

Report of the Director of Environment, Transport and Planning

Securing, Monitoring and Delivering Planning Obligations (Section 106 agreements)

Summary

1. The Chair of the Scrutiny Management Committee has requested information on.
 - a. CYC's approach to creating Section 106 agreements (S106) before they are signed off.
 - b. Implementation of new tracking system and arrangements between Finance and Planning.

Background

What Are Planning Obligations?

2. Planning obligations are legal obligations entered into to mitigate the impacts of a development proposal. This can be via planning agreement secured under Section 106 of the Town and Country Planning Act 1990 by a person with an interest in the land and the local planning authority; or via a unilateral undertaking entered into by a person with an interest in the land without the local planning authority. Planning obligations run with the land, are legally binding and enforceable. A unilateral undertaking cannot bind the local planning authority because they are not party to it. (Planning Obligations, Paragraph 001, National Planning Practice Guidance).
3. As set out within Paragraph 002 Planning obligations of the National Planning Practice Guidance. Planning obligations assist in mitigating the impact of unacceptable development to make it acceptable in planning terms. Planning obligations may only constitute a reason for granting planning permission if they meet the tests that they are necessary to make the development acceptable in planning terms. They must be:

- A) Necessary to make a development acceptable in planning terms;
 - B) Directly related to the development; and
 - C) Fairly and reasonably related in scale and kind to the development.
4. Planning obligations typically comprise of two forms. Financial and non-financial obligations. A financial obligation typically secures the payment of a financial sum payable to the Council which will then in turn be used to fund the delivery of specific item of infrastructure. These include contributions toward the provision of school places or for items such as highway or transportation improvements or public realm improvements to play areas or community sports facilities. A non-financial obligation is where the developer will, as part of the development, provide the physical infrastructure that is required. An example of this would be the provision of on-site affordable housing.
 5. In all cases the completed Section 106 Agreement will set out what obligations are to be provided and when by the developer. In cases where the Council is a signatory to the agreement there will be covenants upon the Council. These typically, in the case of financial obligations, define how the obligation will be spent and what it must be used for. There will also usually be a time period within which the obligation has to be spent.

When are Planning Obligations Secured?

6. The negotiation and securing of planning obligations is undertaken as part of the planning process and the consideration and determination of a planning application. Where it is considered necessary to secure planning obligations the granting of planning permission will not occur until such time a Section 106 Agreement is completed. This ensures that the obligations required to make a proposal acceptable in planning terms are legally secured before the grant of planning permission.
7. During the planning application process key technical consultees, as part of their consultation responses set out their 'asks' which they wish to see secured as part of the development proceeding. Any 'asks' need to be justified in planning terms. This will typically be via policies contained within the Local Plan and informed by national guidelines or standards. These are often then reinforced by area specific frameworks, for example for calculating commuted sums for off-site public open space. In each case as part of the planning process these 'asks' are reviewed by the Local Planning Authority and if they are considered necessary, they form part of the Section 106 negotiations with the applicant. Inclusion of any 'asks' from technical consultees is incorporated into the planning balance of assessing the application. In the majority of cases 'asks' are usually justified.
8. In a scenario whereby the applicant is not willing to sign up to the Section 106 agreement a grant of planning permission would not be forthcoming. If obligations are required to make a development acceptable in planning terms the absence of

those obligations would mean that development is unacceptable in planning terms and would mean planning permission should be refused.

9. When securing obligations via a Section 106 Agreement it is also common to specify when an obligation either in whole or part will become due. For financial obligations the agreement will specify when the obligation is to be paid to the Council. This could be tied to development commencing; development being first occupied or a specified point in the development, such as a certain number of dwellings being occupied. For physical on-site infrastructure the provision would be linked to a milestone within the development cycle, such as prior to first occupation or a specified number of units being occupied.
10. In negotiating these aspects there are several factors which are considered. Some obligations, such as securing a Traffic Regulation Order may be required early in the development phase. Therefore, this could be justified as being a payable upon commencement obligation. Others such as Education contributions could be tied to first occupation because the impact upon the nearby schools would not happen until the development is beginning to be occupied. Equally in larger scale developments phased payments could be justified as the full impacts of a development do not occur until a development is nearing completion. An agreement can have multiple trigger points across multiple obligations. Whilst agreements do have a degree of commonality in how they are structured, or common functions and purposes each agreement is ultimately entirely unique. There is no one size fits all solution.
11. Structuring obligations in this manner, particularly financial obligations, presents advantages to both the Council and the developer. For the Council many financial obligations will be repayable if not used within a specified time period. That time period will not normally begin until all of the monies due have been paid. Phased payments allow for larger projects to be planned and delivered. For the developer phased payments can provide a degree of certainty in respect of cash flow. They can plan the upfront costs of the development whilst having confidence that other obligations will not become due until later in the development once, for example when they have sold elements of the development.
12. Another tool that is often negotiated into an agreement is index linking financial obligations. There can often be a lag time between a s.106 agreement being completed and a development commencing, with potential further lag time between development commencing and the agreed trigger point being reached. During this lag time economic inflation occurs which can act to diminish the purchasing power of that particular obligation. For example, a Section 106 Agreement is entered into in 2020 securing a contribution of £10,000. The obligation is index linked and becomes due for payment in January 2025. Applying indexation to this obligation the actual amount required to be paid to the Council is £12,452.43.
13. Once a financial obligation is paid to the Council it is not uncommon for the Council to be obliged, by the Section 106 Agreement, to then hold the monies in an interest-bearing account. This allows the monies to continue to make modest gains on the overall amount. This serves two purposes. Firstly, in the event of the monies being spent it can further increase the purchasing power of that contribution to the spending service, allowing it to be maximised as far as possible. Secondly, in the

event of the monies not being spent and the obligation to repay the monies to the developer it provides a slight return on the obligation to the developer.

14. In basic terms a Section 106 agreement is contract between a developer and the Council which secures and delivers the infrastructure needed to offset the impacts of a development proposal. The agreement will specify the obligations upon the developer such as what is to be provided and by when. Similarly, it will specify what, how and when the Council will deliver or maintain that infrastructure. Particularly in the case of financial obligations the covenant on the Council will be specific in what the monies can be spent on and the deadline by which they need to be spent. As such all financial planning obligations are to a great extent already allocated toward funding something. The collective pot of monies secured via Section 106 Agreements is not an open pool which can be used to fund the latest corporate priorities or projects.
15. Once a Section 106 Agreement is completed it is not impossible for it to be varied. If the signatory parties are in agreement then a Deed of Variation can be secured to vary the provisions of the agreement. These are not uncommon, and it the majority of cases occur when amendments are made to the original planning permission. In this situation the variation would simply ensure that the agreement keeps pace with the consented planning permission.
16. Other scenarios where variations may be sought could be in a scenario where economic factors change the viability of a scheme and the developer may wish to seek a renegotiation. In this scenario the Local Planning Authority is under no obligation to agree these amendments. Any decision would be a balance between potentially still securing the development versus the impacts of renegotiated obligations.

Written Example of an Obligation

17. As part of the Development Management process, it is considered necessary to secure funding toward the provision of Play Space Improvements. At the time of negotiating the Section 106 Agreement it was determined that £10,000 was the contribution required.
18. Upon completing the Section 106 Agreement the developer agreed to 'not to allow the occupation of any of the dwellings until it has paid the Play Space Improvement Contribution. It was also agreed that the Contribution would be indexed linked.
19. As part of completing the Section 106 Agreement the Council agreed to a series of covenants. Firstly, the Council agreed, upon written request, to provide a receipt for the Play Space Contribution. The Council also agreed to hold the contribution in an interest-bearing account.
20. Critically the agreement also stipulates what the contribution is to be spent on by stating. *'To only apply the Play Space Improvement contribution towards procuring the provision of improvements to play space within the vicinity of the land, the need for which directly arises from the development and the Council shall (on reasonable request of the payee or the payees nominee) provide evidence that the monies have been so applied.'*

21. The final covenant then requires the Council to 'repay to the person or persons making the play space contribution and part of that sum (with interest accrued) which has not been spent for the purpose specified (Play Space Improvements) within five years of receipt.
22. As can be seen through the above written example any planning obligation that is secured will already be earmarked for a particular use by the provisions of the completed Section 106 Agreement. The spending of the obligation is not for determining once it is received by the Council. It is paid to the Council on the basis of being used for the purposes as set out in the Section 106 Agreement.

How are Obligations Monitored?

23. It is important to stress that the granting of planning permission and the securing of a Section 106 Agreement does not categorically guarantee that the obligations secured would come to fruition. Planning obligations are contingent upon the planning permission being implemented and the specified trigger point within that agreement being reached.
24. When planning permission is granted that is subject to a Section 106 Agreement securing obligations the case is automatically flagged up to the Development Monitoring team within Planning and Development Services. The Section 106 agreement is recorded into the monitoring system Exacom. In tandem with this a copy of the Section 106 agreement is published to online Planning Register; this provides a public copy of the agreement that has been secured.
25. At the point of first recording the legal agreement contact is made with the developer or their representatives to introduce the monitoring team and seek confirmation of a liable party. This liable party then become our first point of contact for the purposes of monitoring the development. At this stage we will also take the opportunity to remind the liable party of their most immediate obligations. Often this can be their obligation, as secured by the s.106 agreement to notify the Council that that then intend to commence development.
26. There are a number of methods utilised for the physical monitoring of the site. These include physical visits to the site, having dialogue with the developer and monitoring other planning applications for the same site, for example it is common for a development to need to discharge numerous planning conditions before being able to commence on site. Those applications are dealt with by Development Management. These can be an indication that a developer is preparing to commence on site. Throughout the monitoring process dialogue with the developer is important.
27. In the case of financial obligations. When the specified trigger point is reached or the developer has advised that it is imminent the obligation is reviewed and a demand notice prepared. This demand notice specifies the obligation that is due and the amount that is due. It is common practice when dealing with financial obligations to index link them. In practice this means when an obligation is due and prior to issuing the demand notice we will seek assistance from finance to calculate the indexation to be applied to the obligation. Once confirmed the demand notice is issued to the liable party along with details of how to make payment.

28. Payments are received by colleagues in finance who will confirm receipt of the payment to the Council. The Compliance and Monitoring team will then record the payment on Exacom, to record that the issued demand notice has been satisfied. The monies once received are held within a Section 106 holding account.
29. Once the Council is in receipt of the monies. The Compliance and Monitoring Team will advise the 'spending' service area of the monies being available and issue them with Request to Release forms to draw the monies into their local accounts. A spending service is typically the service area within the Council who first requested the obligation and will be the service responsible with spending the monies secured to deliver the obligation. For example an obligation securing a contribution for Sports provision or enhancements will ultimately be released to the Community Sports Service for them to liaise and support sports clubs or community groups in spending the secured obligation.
30. One of the limitations of Section 106 Agreements is that the obligations it places upon the developer and the Council are set at the very start of the development process, prior to the granting of planning permission. In cases where the associated development takes a number of years to build out local priorities may change.

Governance of Section 106 Agreements

31. The obligations secured via a Section 106 Agreement whether they be financial or non-financial obligations are secured by the Local Planning Authority and then distributed to the delivering service area. A Section 106 Agreement will place obligations upon the developer and the Council in respect of how, when and where obligations will be delivered. It is acknowledged that particularly in the case of financial obligations Section 106 agreements do and have generated a significant amount of money into the Council. However, it must be clear that these are not funds that can be used at will by the Council. Each individual agreement will precisely specify what it is to be used for and when it is to be used by.
32. To this end in the last 24 months the Compliance and Monitoring Team have started to use release and spend forms with spending service areas. The purpose of these is enhance traceability of s.106 obligations and impress upon the spending service areas the conditions attached to the associated obligation, for example what it is for, where it is to be spent and the time in which it must be spent by. In practice this process begins when receipt of the monies is confirmed as being paid to the Council. As part of advising the spending service area the monies are available, they are also invited to request release of the funds to their own service budgets.
33. When the monies are then spent the spending service are required to notify the Compliance and Monitoring team that the monies have been spent and what they have been spent on. Allowing full traceability of spend to ensure compliance with the relevant s.106 agreement. One of the challenges particularly around the recording of spending obligations is ensuring spending services notify the Compliance and Monitoring team of spend. This can be due a planning obligation only making a small proportion of a larger spend, for example in projects where other funding is also used such as grants or capital budgets. Experience has also demonstrated that the reconciliation of budgets toward the financial year end can also delay spending notification. It is imperative that spending service areas

understand the conditions attached to financial planning obligations and the need for their spending to be recorded accurately and in a timely manner.

34. One of the advantages of the Exacom monitoring platform is that it provides better visibility of planning obligations and their requirements to Officers, along with providing alerts to check the progress of development and the spending of obligations. Enhanced tracking of Planning obligations allows for a more timely response to enquiries by the public and Councillors as to the status of planning obligations for a particular development. Importantly it facilitates production of the Annual Infrastructure Statement (IFS) which is a statutory annual report covering planning obligation activity.
35. The obligations secured via Section 106 Agreement are secured solely on the basis that they are considered necessary to make a development proposal acceptable in planning terms. It is therefore the role of Planning and Development Services as part of their remit to monitor development and to operate the wider Development Management process of the Local Planning Authority.

Challenges of Section 106 Agreements

36. Planning Obligations are not without their challenges. The initial securing of the obligations doesn't normally present too many issues. Developers generally already have an expectation that obligations would be necessary and subject to the Council being able to justify them, in most cases, developers are agreeable to them. Developers are also fully aware that in the absence of reaching agreement in respect of Planning Obligations they are unlikely to receive a grant of planning permission.
37. Once an agreement moves into its monitoring phase the challenges faced can vary from site to site. As a starting point the Local Planning Authority will also seek to engage with a developer to ensure that the obligations secured are delivered in a timely manner in accordance with the provisions of the secured agreement. In many cases this collaborative approach works. In instances where a developer fails to meet their obligations there are normally mechanisms within the secured agreement to deal with this such as penalty charges in the case of financial obligations.
38. Often, however, the largest challenges of Section 106 Agreements occur at the delivery phase. This can be a particular issue in respect of financial obligations which the Council are obliged to use for the delivery of items of infrastructure. The challenges faced in this regard can vary depending upon the spending service and the nature of the obligation. For example, spending in areas such as Sport are not usually problematic as the monies are typically transferred to a local provider such as sports club for spending. With the assistance of the Community Sports Team the obligation is either spent in isolation or it is topped up by the club from other funds to meet any shortfall. Typically, in the context of Section 106 Agreements these are smaller amounts of money.
39. Challenges around the delivery of secured obligations tend to occur in instances where the infrastructure to be provided is larger and more complex. A secured obligation may provide a defined sum of monies to be used for the delivery of particular infrastructure. However the process of delivering this can also incur costs

which are not recoverable. For example, staffing costs incurred by the spending service to deliver a piece of infrastructure.

- 40. The delivering service therefore have to juggle priorities of other projects and Council funded projects in terms of the allocation of project manager resource to deliver projects. This is a real challenge for services where no project staff budget exists and the delivery is funded by charging capital fees.
- 41. There are instances for some obligations staffing costs can be built into the agreement, with a portion of the monies secured being eligible to cover staffing costs. This can occur with Affordable Housing provision where the definitions for commuted sums include staffing costs.
- 42. In many cases no such associated costs provision can be made so the challenge becomes one of Council resource in respect of delivering secured obligations. Delivering obligations secured can be challenging in circumstances where the associated Council resource is finite and has to be spread across numerous different priorities.

Distributing Section 106 Information

- 43. Planning Infrastructure Statement (IFS) is published on the Council's web site on a yearly basis by the end of December for the previous financial year. This is publicly available for years from 2019 onwards.
- 44. The IFS has been made available to members of CMT to ensure that existing contributions that have been collected and available have been circulated.
- 45. Finance circulates a Section 106 Management Report quarterly to each of the receiving departments, which outlines the contributions received, when and what development they are tied to.
- 46. It has been agreed that a spread sheet of contributions will be presented at the City Development Board who will be looking at specific projects and how to ensure the contributions are spent.
- 47. The Planning compliance team are working with colleagues in other departments to work through contributions that have been with us the longest time and are at risk of being paid back.

Alternatives to Section 106 Agreements

- 48. The primary alternative to securing planning obligations via Section 106 Agreement is to implement the Community Infrastructure Levy (CIL) as a means of funding infrastructure. To do this a Local Authority must adopt a CIL Charging Schedule. An adopted CIL Charging Schedule would set the rate at which the Levy will be charged and defines the type of development it would be charged upon. These rates would track annual inflation.
- 49. CIL acts as a levy upon new development. In terms of the amount payable this is calculated on the basis of Gross Internal Area X CIL Rate with the Levy becoming payable at the point at which development is implemented. Exemptions for things

such as Self Build are available as are credits for vacant buildings. In larger developments phased payment structures are usually available.

50. The implementation of CIL will not entirely negate the need for Section 106 Agreements. They will still be required in some circumstances, for example to secure on-site affordable housing provision and on sites such as Strategic allocations within the Local Plan where it has been determined CIL would not be levied. However, the bulk of financial obligations would fall away having been superseded by CIL.
51. The adoption of a CIL charging schedule would have two notable changes. It would broaden the amount of development from which a levy or obligation would be generated. For example, at present obligations are only typically sought on Major applications (applications of 10+ residential units). Whereas under CIL, assuming a qualifying exemption was not secured, a development of 1.no residential unit would be liable for CIL.
52. Another opportunity CIL provides is that in terms of spending, it operates at a strategic city-wide level and has greater flexibility. Whereas obligations secured by Section 106 agreement are typically tied to a specific item of infrastructure or named locations, collected CIL monies would go into a central collective pot. The levy can be used to fund a wide range of infrastructure including transport, flood defences, schools, hospitals and other health and social care facilities, sport and recreation facilities and open spaces. It can also be used to increase capacity of existing infrastructure or to repair existing failing infrastructure. Whilst CIL receipts would not create a totally un-conditional funding source it would be significantly more flexible than the obligations secured via a Section 106 Agreement. The Council would also have the ability to review its infrastructure funding priorities at its own discretion. The spending of CIL monies would also not be time limited or be liable for repayment in the event of not being spent within a specified time.
53. The greater degree of spending flexibility that CIL allows for would also assist with covering gaps in funding. CIL effectively allows for monies to be pooled as required to deliver a particular item of infrastructure. This would address issues that have been seen in the past with Section 106 financial obligations where, for example, an amount of £15,000 is secured toward the provision of a new bus stop. However upon further work the true cost of providing the bus stop totals £20,000. It then falls to the Council to find and fund that £5,000 shortfall from other sources.
54. The only obligation of CIL funding is that the Council must spend the levy on infrastructure needed to support the development of their area and it is for the Council to decide what infrastructure is needed. In addition, where chargeable development within the area of a Parish Council occurs the charging authority (CYC) must pass a proportion of the CIL receipts from the development to the Parish Council.

Consultation

55. No consultation has taken place as this report is provided for information only

Risk Management

56. This report is prepared for information purposes. As such it is not considered that there are any notable risks arising from the content of the report or the recommendations that are being made. The purpose of planning obligations is to offset and mitigate the impacts of a particular development and make a development acceptable in planning terms. Failure to do this could place an additional burden upon the public bodies who it would then fall to provide such infrastructure, such as the Council. Such impacts could be felt in multiple areas such as within the Council's roles of Local Highway Authority, Local Education Authority and as a provider of public spaces and community sports and recreation facilities.

Recommendations

57. Members are asked to

- 1) note the information.

Reason: Provide reassurance to scrutiny committee members

Contact Details

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**Report
Approved**



Date 12/05/2025

Wards Affected: *List wards or tick box to indicate all*

All

☐ *tick*

For further information please contact the author of the report

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Abbreviations