



# **Follow up of the agreed actions from the 2015/16 audit of Section 106 agreements**

**City of York Council  
2016/17**

## **Memorandum**

For: Assistant Director Planning and Public Protection  
Status: Final  
Date Issued: 9 August 2017

Where information resulting from investigation and/or audit work is made public or is provided to a third party by the client or by Veritau then this must be done on the understanding that any third party will rely on the information at its own risk. Veritau will not owe a duty of care or assume any responsibility towards anyone other than the client in relation to the information supplied. Equally, no third party may assert any rights or bring any claims against Veritau in connection with the information. Where information is provided to a named third party, the third party will keep the information confidential.

# **1 INTRODUCTION**

- 1.1 Section 106 of the Town and Country Planning Act 1990 relates to agreements regulating the development or use of land. Planning obligations under the Act are employed as legal mechanisms to make acceptable, in planning terms, a development proposal which otherwise would not be and must be secured by way of a deed. Section 106 obligations are often referred to as 'contributions'.
- 1.2 The agreements should be focused on site specific mitigation of the impact of development and most frequently seek financial contribution towards infrastructure or affordable housing (although they can be used for other reasons, such as to restrict the use of land).
- 1.3 A briefing paper on the administration of Section 106 agreements was presented to members at the 7 November 2016 Corporate and Scrutiny Management Policy and Scrutiny Committee (CSMPSC) by the Assistant Director Planning and Public Protection.
- 1.4 The report was brought to members in response to a request from a public participant during the 5 September 2016 meeting of the CSMPSC for the council to provide more information on Section 106 agreements and to explain how they are administered and controlled following the publication of the 2015/16 audit of Section 106 agreements. This was with the intention of assisting the committee in determining whether or not to proceed with further scrutiny work.

## **Scope and objectives**

- 1.5 The objective of this audit was to determine the progress made towards implementing appropriate actions to improve both the administration and controls that were agreed by management as part of the 2015/16 audit of Section 106 agreements. The report was issued on 3 June 2016 with a Reasonable Assurance opinion.
- 1.6 The 2015/16 Section 106 agreements audit report has been provided in Annex 1 for reference. Full details of identified issues, risks and agreed actions can be found in this report.

## **Key findings**

- 1.7 It was found that reasonable progress has been made towards the improvement of controls through the implementation of agreed actions and/or alternative actions which achieve the same outcome as two of those previously agreed. One of these better addresses the risk that Section 106 agreements are finalised without containing all of the contributions sought by the council.
- 1.8 The detailed findings in each area are set out below and, where action is still required, this is set out in the action plan at Appendix 1.

## 2 FINDINGS

### **Area reviewed: framework for monitoring Section 106 agreement progress**

#### Agreed action 1.1

- 2.1 The 2015/16 audit of Section 106 Agreements found that there was no formal framework in place to facilitate monitoring of each agreement as contributions are sought from departments within the council and then incorporated into the final deed.
- 2.2 It was agreed that:
- The existing Section 106 agreement checklist would be revised to ensure that the obligations sought comply with CIL Regulations and would be used to monitor the progress of the agreement across departments.
  - The Planning Officer would inform the Economic Development Intelligence Hub (EDIH) of the contributions being sought to enable the council to seek, wherever possible, to leverage funding from bodies such as Local Enterprise Partnerships in order to maximise the economic benefit of the development.
  - The new arrangement would make provision for closer monitoring of the delivery of projects funded through Section 106 contributions to ensure that all expenditure is in accordance with the heads of terms (the obligations as set out in the deed) of the agreement.
- 2.3 At the time of this audit the Section 106 agreement checklist was not in place.
- 2.4 When this was discussed with senior planning officers (including the Assistant Director Planning and Public Protection) it was advised that the checklist originates from the old paper-based system and was in place to evidence that all necessary consultations had taken place regarding the contributions required in order to make the development permissible.
- 2.5 This function is now provided by the electronic document management system (IDOX) that holds all of the related correspondence and thus provides an audit trail of discussions. Furthermore, the scope of the Section 106 agreement (including its heads of terms, any representations received and concessions made based on viability) is a matter for the officer's report and should be captured there.
- 2.6 Any heads of terms identified in the officer report may be subject to minor change post-resolution (by Committee or delegated officer) but before the Section 106 is finalised and thus would not be reflected in the report. Any significant changes would be referred back to the decision making body before incorporation into the draft Section 106 agreement. However, where this is not the case, documentary evidence explaining changes is held on IDOX and so is capable of interrogation.

- 2.7 To provide further clarity, a revised action to include on the records a summary document capturing any changes prior to finalisation of the Section 106 agreement has been proposed, and this is detailed in action number 1 of the Action Plan in Appendix 1. In addition, an existing part time enforcement officer post has been assigned to work exclusively on the monitoring of agreements to seek compliance with obligations and to ensure that the records of agreements are maintained and kept up to date
- 2.8 In relation to the second part of this agreed action, regard must be had to the relevant legislative position. Regulation 122 of the Community Infrastructure Levy Regulations 2010/948 states that obligations can only be enforced as part of the planning permission if they are:
- necessary to make the development acceptable in planning terms
  - directly related to the development
  - fairly and reasonably related in scale and kind to the development.
- 2.9 If the council were to seek developer contributions on the grounds that they make the development acceptable and then pursues leverage funding from other sources towards large scale infrastructure schemes, the landowner could argue that the level of contribution that they have been required to commit to is over that which would make the development acceptable. The council could then be open to potential legal challenge.
- 2.10 There are limited opportunities for the council to leverage funding from other bodies since there are rarely any ongoing infrastructure schemes that would justify contributions from developers (recently introduced pooling restrictions further limit the potential for this) and Section 106 agreements require specificity which precludes the use of funding generally or on wider schemes.
- 2.11 Given the abovementioned issues, this part of the agreed action cannot be lawfully implemented by the service. However, the risk identified in the original report is addressed by the revised action for this finding detailed in action number 1 of the Action Plan in Appendix 1.
- 2.12 The third part of the agreed action, relating to the monitoring of project delivery and appropriateness of expenditure, had been completed at the time of this audit.
- 2.13 When a Section 106 agreement is signed, the Development Management team raises an enforcement case on the case management system (Uniform). Within each case an 'obligation enforcement table' is now produced and maintained by the dedicated enforcement post. This is a document which records the obligations under the various schedules of the deed – both those that relate to the landowner and those that relate to the council.
- 2.14 Planning Enforcement Officers are expected to monitor the obligations and update the table to evidence their fulfilment. The tables will also deliver the additional benefit of providing a central record of any post signature changes

or variations to the agreement. The intention is for this document to be made available to the public through the council's website. A dedicated resource to manage Planning Enforcement has been agreed by members which will include overseeing and monitoring compliance with Section 106 agreements. The post is currently under recruitment.

2.15 Council departments in receipt of developer contributions are still expected to update Finance and Planning Enforcement on when and how the monies have been spent. As of January 2017, data regarding details of Section 106 contributions has been published on the York Open Data Platform, with arrangements also being made to include details of expenditure of those contributions.

2.16 With the introduction of the obligation enforcement table the issue previously identified has been satisfactorily addressed and there is now an improved management of risk. Therefore, this part of the agreed action has been completed.

#### Agreed action 1.2

2.17 It was initially agreed that the EDIH would assess the viability of a development where viability is an issue in obtaining agreement over the heads of terms. However, an alternative option, considered by the service to provide a more robust approach and involving the independent assessment of viability, has been implemented.

2.18 Paragraph 176 of the National Planning Policy Framework (which underpins development management in the UK) says that planning permission should not be granted if the safeguards necessary to prevent inappropriate development cannot be secured but also that the options for keeping costs associated with obligations to a minimum should be fully explored so that development is not inhibited unnecessarily.

2.19 Assessment of viability is a specialist discipline, involving determination of such factors as Gross Development Value, costs, land value and competitive return to developers and land owners.

2.20 Planning Officers are not expected to be proficient in viability assessment. However, where viability is an issue, the council has the option of commissioning a District Valuer to carry out an independent assessment at the applicant's cost. Furthermore, the council has internal resource (through the Housing Development Manager) which it can call upon should there be a dispute with the developer over the contributions sought.

2.21 The specific risk that this agreed action sought to address has therefore been mitigated.

#### Agreed action 1.3

2.22 It was agreed that a full review of the implementation of the new process in the negotiation and monitoring of Section 106 agreements would be undertaken to establish progress made and lessons to be learned.

- 2.23 Alternative and more robust proposals (see 2.21) to those included in the action agreed at the time of the audit have been formulated and so there is no longer a requirement for it to be implemented as stated in the original report.

**Area reviewed: register of Section 106 agreements**

- 2.24 Beyond the Finance monitoring spreadsheet, the 2015/16 audit found that the council does not maintain a definitive list of all Section 106 agreements entered into.
- 2.25 It was originally agreed that a central register of all Section 106 agreements would be maintained and that this would also include those agreements that contain only non-financial obligations.
- 2.26 However, the planning register and the monitoring records held on the IDOX system effectively form this additional register, which is not considered necessary for operational purposes.
- 2.27 Should information need to be retrieved for any reason, the enforcement module on Uniform could be used. Entering the search term 'S106' would return all Section 106 agreements that the council has entered into since 2006 when the system was originally launched.
- 2.28 It would then be possible to compare this list (which should contain all agreements) to the list of agreements recorded on the Finance monitoring spreadsheet in order to separate those which contain financial obligations or a mixture of financial and non-financial from those purely non-financial agreements.
- 2.29 The agreed action has been completed as sufficient assurance can be derived from the fact that the planning system has the capacity to produce a register of all Section 106 agreements should this information be required.

### **3 CONCLUSION**

- 3.1 The service has successfully addressed issues of risk which were highlighted by the 2015/16 audit of Section 106 agreements, either through the actions originally agreed or, alternatively, through new actions which are considered to be both appropriate and more robust. Monitoring of the new agreed action will be undertaken, with any follow up work being carried out during 2017/18.

## APPENDIX 1 – ACTIONS AGREED TO ADDRESS CONTROL WEAKNESSES

Action Number	Report Reference	Issue	Risk	Agreed Action	Priority*	Responsible Officer	Timescale
1	2.3 – 2.6	The framework in place to ensure the final deed reflects the full contributions sought by the council has not been formalised.	Section 106 agreements may be finalised without containing all contributions required by departments.	A new pro-forma will be introduced, to be completed by the Development Officer, which captures the audit trail of any changes in heads of terms post reporting and up to the point at which the deed receives the council's seal. Once completed, this will be held on IDOX.	2	Assistant Director Planning and Public Protection	31 Oct 17

\*The priorities for actions are:

- Priority 1: A fundamental system weakness, which presents unacceptable risk to the system objectives and requires urgent attention by management.
- Priority 2: A significant system weakness, whose impact or frequency presents risks to the system objectives, which needs to be addressed by management.
- Priority 3: The system objectives are not exposed to significant risk, but the issue merits attention by management.