

Report of the Assistant Director Planning and Public Protection

## **Section 106 Planning Obligations**

### **Summary**

1. This report presents Members with information around Section 106 arrangements and how they are administered.

### **Background**

2. At a meeting of the Corporate and Scrutiny Management Policy & Scrutiny Committee (CSMPSC) in September 2016, a public participant made comments, during the public participation section asking Members of this Committee to look in detail at the enforcement of S106 agreements following a recent internal audit by Veritau.
3. Members resolved that a “scoping” report be brought before the CSMPSC to provide more information about S106 Obligations generally, how they are administered and controlled and how information about them is made available to the public.
4. To assist the Committee in considering whether it wishes to proceed with further scrutiny work in this area and if so in relation to which specific aspects, this report provides an overview of the legal context to S106 Planning obligations. Specifically, it sets out the procedures in place to prepare, register and monitor compliance in York, together with a summary of the recommendations already made by Veritau following their internal audit of the S106 processes, which are presently being implemented so that information is more easily accessible to the public via the Council website. Attached at Annex A is a copy of the Internal Audit Report.

## **What is a S106 contribution?**

5. Planning obligations under Section 106 of the Town and Country Planning Act 1990 (as amended), are a legal mechanism which can make a development proposal acceptable in planning terms, that would not otherwise be acceptable. They are focused on site specific mitigation of the impact of development. S106 obligations are often referred to as 'developer contributions'.
6. The planning obligation is a formal legal document, a deed, which states that it is an obligation for planning purposes, identifies the relevant land, the person entering the obligation and their interest and the relevant local authority that would enforce the obligation. The obligation must be secured by way of a deed, and can be either a unilateral undertaking or a multi party agreement. The obligation is registered as a local land charge.

## **What are they used for?**

7. The common uses of planning obligations are to secure financial contributions to provide infrastructure or affordable housing. However these are not the only uses for a S106 obligation.  
A s106 obligation can:
  - restrict the development or use of the land in any specified way
  - require specified operations or activities to be carried out in, on, under or over the land
  - require the land to be used in any specified way; or
  - require a sum or sums to be paid to the authority on a specified date or dates or periodically.
8. In York S106 contributions are mainly used to:
  - Mitigate the impact of the development on the highway network
  - Contribute to public transport
  - Mitigate the impact of the development on schools
  - Contribute to existing or new open spaces
  - Contribute to sports facilities
  - Provide affordable housing

## **Restrictions on the use of S106 planning obligations**

9. The legal tests as to when a S106 obligation is appropriate are set out in government guidance and regulation:

*Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.*

*Planning obligations should only be sought where they meet all of the following tests:*

- *necessary to make the development acceptable in planning terms*
- *directly related to the development; and*
- *fairly and reasonably related in scale and kind to the development."*

10. From April 2015 there are also restrictions on the “pooling “of planning obligations. Where there is no Community Infrastructure Levy (CIL) Charging Schedule in place, when determining planning applications, local authorities can no longer use a planning obligation as a reason to grant planning permission if there has been more than five s106 obligations entered into since March 2010 to pay for the single infrastructure project or type of infrastructure sought to make the development acceptable. The recent regulations are designed to urge local authorities to adopt the Community Infrastructure Levy (CIL).

## **Community Infrastructure Levy (CIL) and s106 planning obligations**

11. A CIL Charging Schedule would provide for a fixed amount to be paid by Developers based upon a charge per m<sup>2</sup>, to be used towards infrastructure identified in the Infrastructure Delivery Plan and aligned with the Local Plan. This would be instead of section 106 contributions from developers being pooled towards infrastructure. To be able to adopt this in York, the Local Plan needs to be in place so that the required infrastructure projects are identified within the associated Infrastructure Delivery Plan. There is

a requirement to consult on any proposed CIL Charging Schedule and have an independent public examination to demonstrate, inter alia, viability before adoption.

12. The reason that CIL is charged per square metre of floorspace, according to rates set by councils is that the government considers that raising money in this way is fairer and more transparent than through Section 106, which is often negotiated on a case-by-case basis.
13. Once a CIL is in place, that Local Authority would no longer be able to collect generic contributions through S106 under terms such as "open space", "education" or "transport", where these are identified as Infrastructure that is covered by CIL, as this would constitute double counting.
14. Instead, where CIL is in place, any S106 Obligations would only be in addition to the CIL payment where the Infrastructure required is not included in the CIL Schedule and the Obligations are "necessary to make a development acceptable in planning terms; directly related to the development; and fairly and reasonably related in scale and kind to the development." (An example would be affordable housing provision, which is not covered by CIL).

### **The administration of S106 planning obligations**

15. Anticipated S106 obligation requirements are identified (where appropriate) in formal pre-application advice provided to individuals and developers.
16. S106 planning obligations are the subject of discussion with applicants/ agents during the assessment of a significant number of planning applications. Service departments will at this stage identify or confirm s106 requirements as appropriate. Assessment of viability and deliverability may be undertaken if relevant at this time.
17. The Development Management case officer identifies s106 requirements in the planning report on an application, so that the heads of terms required are clear at the decision making stage. If an application is approved, subject to a S106 agreement, CYC Planning solicitors will be instructed to draft and agree the detailed wording of the Deed with the Applicant's solicitors to secure the necessary planning obligations that were identified in the Committee resolution. On completion of the S106, the Deed is registered as a land charge and scanned onto the public

access system that forms the Planning Register. This is available through the Council's website.

18. The terms of S106 Agreements/Undertakings will usually contain “trigger points” requiring either payment or another action by the developer (e.g. provide a children's play area on a site after “x” number of house have been built). The Planning Enforcement officers monitor the implementation of planning permissions to check that where trigger points are reached, payments are being made. Upon receipt of the agreed payment to the council Finance team the relevant / directorate/ service is notified of the income and is obligated to spend this as detailed in the S106 agreement.
19. Both the Finance team and Planning Enforcement officers record the S106 requirements, triggers for .payments or other actions. Directorates / services receiving payments are required to confirm both when and how the money is spent.

### **Enforcement of S106 Obligations**

20. In the rare event that a payment is not made, or an Obligation is otherwise breached, the Council will in the first instance write to the Developer and request payment. It is very rare that payments are not made, as the S106 creates a contractual obligation to make the payment, and any breach gives rise to reputational damage for the developer.
21. However, continued failure to make the payment could result in the Council having to take formal Court action to obtain an injunction. It is also open to the Council to take direct action and enter the land to carry out any required obligation and recover any expenses reasonably incurred in doing so from the person against whom the obligation is enforceable. Such matters will be assessed on a case by case basis, taking specialist legal advice in determining the appropriate and proportionate action.

### **Veritau Recommendations and Work Programme**

22. The recent Veritau Audit of S106 Obligations recommended a number of changes in relation to their administration. These were reported to Audit & Governance Committee on 22 June 2016. The Section 106 checklist, which will be used to monitor progress with Section 106 agreements, is being revised to ensure obligations are compliant with the CIL Regulations. A work programme is being

developed in liaison with the Economic Development Intelligence Hub to implement the recommendations. Information referred to at 18 and 19 above is also being published on the CYC website in an 'Excel' spreadsheet, which can be sorted by Ward. This will publicly demonstrate where S106 obligations have been met by the developer/ landowner and where the required infrastructure and/ or community facilities have subsequently been delivered.

### **Council Plan**

23. This Report relates to A Prosperous City for All and A Council That Listens to Residents elements of the Council Plan

### **Options**

24. Members can choose to:
- (i) Note the information received in this report, including the recommended actions of the Internal Audit Report and proceed no further;
  - (ii) Consider whether they wish to undertake any further scrutiny work around this area and specifically in relation to what.

### **Implications**

25. There are no direct implications associated with the recommendations of this report in relation to any of the following implications:
- Financial (other than potential staff resource costs to undertake any review)
  - Equalities
  - Legal
  - Crime and Disorder
  - Information Technology (IT)
  - Property

### **Risk Management**

26. There are no known direct risk management implications associated with the recommendations in this report.

## Recommendations

27. Members are asked to

- (i) note the information contained in this report, together with the Internal Audit Report and the actions to be implemented by officers in response;
- (ii) agree whether the issues identified in this report warrant any further scrutiny involvement and if so specify which issues require further scoping;

Reason: To determine whether further scrutiny is required in relation to Section 106 Agreements

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**Wards Affected:**

All

**For further information please contact the author of the report**

### Annexes

Annex 1 – Veritau Internal Audit Report 2015/16 – Section 106 Agreements

### Abbreviations

CIL – Community Infrastructure Levy

CSMPSC – Corporate & Scrutiny Management Policy & Scrutiny Committee

CYC – City of York Council