

**Agenda Item No:** 4



Report to Overview and Scrutiny Committee

**[Report on the Section 106 Process]**

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**The Overview and Scrutiny Committee is asked:**

1. To note and support the contents of the report and raise any points for further discussion.
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**Date of O&S meeting:** 9 March 2021

**Chair of O&S Committee:** Cllr Ovenden

**Relevant Portfolio(s):** Planning & Development

**Summary:** The Overview and Scrutiny Committee has asked for a paper to be shared on the S106 process, for discussion. In response, officers from the planning and the corporate policy departments have produced this paper. It seeks to:

- explain the broad S106 process,
- establish how the Council request and collect money from development,
- set out how the Council then administer the process,
- establish the role of members and the Parish Council in the process,
- identify the actions that relate to S106 from the Council's perspective.

**Exempt from Publication:** NO

**Background Papers:** N/A

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## Report Title: The Section 106 Process

### Introduction and Background

1. The Overview and Scrutiny Committee has asked for a paper to be shared on the S106 process, for discussion. In response, officers from the planning and the corporate policy departments have produced this paper.
2. It follows on from recent training conducted by the interim Head of Service for Planning. This training was recorded and can be shared with members, if requested.
3. This paper seeks to:
  - Explain the broad S106 process (part a)
  - Establish how the Council request and collect money from development (part b and c)
  - Set out how the Council then administer the process (part d)
  - Establish the role of members and the Parish Council in the process, (part e) and,
  - Identify the actions that relate to S106 from the Council's perspective (part f).

### a) Overview of the S106 Process

4. Section 106 or S106, is a legal agreement (or obligation) between an applicant seeking planning permission and the Local Planning Authority which may also involve other parties (e.g. KCC). It provides the legal framework to secure both financial and non-financial contributions from a development.
5. In the case of financial contributions, these are often used to help pay for additional (or improved) infrastructure that is needed to mitigate the impact from a development. The overall S106 process has four main stages, as follows:
6. **Stage 1 - Identifying the need:** The Council, alongside our public-sector partners, assess the capacity of services and facilities to understand where the stresses are, and what additional infrastructure is required to support new housing growth (this work is ongoing). This identifies specific projects (e.g. buildings, spaces, improvements to services) and establishes what role developer finance plays in delivering them.
7. **Stage 2 - Requesting the money:** When the Council receive a qualifying planning application (for the purpose of S106), various stakeholders will request money (based on evidence) to fund, completely or in part, the projects for which a need has been identified (see above). This is often broken down into a 'per dwelling' figure.

8. **Stage 3 - collecting the money:** Once the Council are satisfied that the requests for developer funding is justified, the Council will enter into a S106 agreement with the developer as part of the planning permission process. This will set out the amount of money to be paid and when, and on what project or type of project.
9. **Stage 4 - Spending the money:** Once developer contributions are paid to the Council (in most cases ABC are the collecting authority), the money can be spent on delivering, completely or in part, the projects identified in line with what the S106 Agreement sets out. This includes paying money to partners to deliver their agreed projects. Once collected (in most circumstances), if the monies are not spent within ten years of receipt they are liable to be paid back to the developer.

### The Basic Principles

10. The following basic principles underpin the S106 process. A S106 agreement:
  - Is part of a long established mechanism and is an integral part of the system. See link: <https://www.gov.uk/guidance/planning-obligations>
  - Is governed by regulations and as such operates within strict legal parameters.
  - Can only be pursued if it is:
    - i. necessary to make the development acceptable in planning terms,
    - ii. directly related to the development in question,
    - iii. fairly and reasonably related in scale and kind to that development.
  - Can only be spent, once the money is collected, as per the legal agreement - i.e. what the money was originally collected for. For example, a S106 payment for the delivery of allotments can't be subsequently spent on the delivery of new sports pitches.
11. These basic principles are enshrined by law and repeated in the National Planning Policy Framework (NPPF 2019) which sets out the Government's national planning policy agenda.
12. Conversely, a S106 Agreement is **not**:
  - About 'planning gain', which is often the perception i.e. many people view S106 monies as a pot of finance that can be flexibly spent by the community on any project. This view is sometimes held, as communities tend to feel that they are the ones facing the 'burden' of new development, and as such should be 'compensated',
  - A means by which existing deficiencies in provision or infrastructure can be 'topped up'. For example, if an area is deficient in play facilities, a development of 100 homes can only be required to mitigate the impact from these 100 homes, it cannot be required to 'top up' any existing deficit in the area,

- A tax on development. There is no default requirement for development to pay S106 contributions. If no need is generated from a new development, or in situations where the need generated can be met via existing provision, no money should be requested. It would not be lawful to do so.
13. It is also important to note that in most cases the Council is both the decision-making authority (in terms of what to collect for) and the spending authority (once money is received). As such, the Council carries the highest risk of legal challenge if any agreement is not adhered to.

## **b) The role of the Local Plan 2030**

14. In terms of the broad four stages of the S106 process identified above, the Local Plan's main role relates to Stage 1 – 'Identifying the need'.
15. The NPPF (2019) is very clear that the Local Plan should provide clarity to the market and stakeholders as to what infrastructure is required to meet the housing need identified in the plan. This should include a list of projects (i.e. facilities, buildings, space) and also where and when these projects are to be delivered. More detail is required at the early stage of the plan, given that providers should be clearer on their needs in the short term.
16. Furthermore, the NPPF 2019 also requires that the level of money being asked for from developers, to deliver the projects identified, must be viability tested. This is to ensure that new development is not unduly burdened by contributions in a manner that would render new housing unviable.
17. Like much of planning, a balanced approach is therefore needed. On the one hand, there is pressure on infrastructure coming from new housing growth. On the other hand, there is a limit on what role developer finance can play to help deliver that infrastructure. Failing to achieve the balance would essentially result in no new housing coming forward, as it would be unviable.
18. Much of this debate should be progressed through Local Plans as a way of ensuring that the process remains a plan-led one (which is enshrined in law). The Council is fortunate in that it has a recently adopted Local Plan in place (February 2019). In the context of infrastructure delivery, the most relevant policies are summarised below.
19. Policy IMP1 'Infrastructure Provision' – sets out that the Council's starting point is that all qualifying proposals will contribute and help deliver for the needs generated by the development.
20. Policy IMP2 'Deferred Contributions' – sets out that in the rare circumstances where policy IMP1 cannot be complied with, the Council may seek to utilise a deferred contributions approach (to be secured through a S106 agreement). E.g. development contributions that are normally paid could be deferred until later in the build out, in the hope that viability improves. There is a risk that no

contributions are paid (if the market does not improve). Accordingly, this policy tends to only apply for schemes that – in themselves - provide wider planning benefits.

21. Policy COM1 'Meeting the communities needs' – this policy sets out a list (not exhaustive) of what infrastructure and facilities need to be provided to mitigate new developments. The uses covered include education, sports, community, art and health. This is the main policy hook on which to base future S106 agreements.
22. Policy COM2 'Recreation, Sport, Play and Open Spaces' – sets out how the facilities and infrastructure, mainly within the control of the Council, will be delivered. This includes the identification of a number of strategic sports hubs that will be the focus of most new investment.
23. The Local Plan 2030 policy framework was (and remains) supported by a range of relevant evidence that needs to be kept up to date, as resources allow. This includes:
24. The Infrastructure Delivery Plan (IDP) and Schedule: An iterative Plan which sets out (in the Schedule) a rolling five year of projects to be delivered within certain identified categories (those listed in Policy COM1). It also provides information about how some of these projects might be funded, i.e. the role development finance will play. The last update of the Plan was early 2017. The IDP is also informed by evidence produced by our public partners, such as evidence from KCC about future school placings.
25. Supplementary planning documents: A number of existing supplementary planning documents exist which also help to identify projects for S106 to spend money on. For example the 'Green Spaces and Water Environment SPD' (2012) sets out the scale of contributions for open space and strategic parks and identifies where this money should be spent.
26. A range of other studies and documentation. For example, the Council produced a Sport's England endorsed 'Sports and Indoor Sports Building Strategy' in 2017. This allows us to use the national Sport's England calculator to calculate development monies to deliver the projects identified in the 2017 strategy. Similarly, Cultural Services produce a variety of Council endorsed strategies relating to projects and the role development finance might play.
27. The above means that, in practice, much of the contributions we ask for from developers is in the public domain and is transparent. Developers are broadly aware of many of the projects we want to deliver and the Local Plan policies have been viability tested (in 2018).
28. However, much of the Council's evidence base needs reviewing and updating. There also needs to be a better focus on actual project delivery, (i.e. what buildings, space or areas are needed in the next five years). Many of our

requests stem from a variety of sources and this can often lead to confusion and uncertainty. In addition, the Infrastructure Delivery Plan has not been updated since 2018.

29. Updating our approach is now required to ensure that the limited amount of development funding collected is targeted towards the right projects – projects which the Council (as a whole) consider will best meet additional community needs as the population grows and want to see delivered. This may well involve prioritising some projects over others.
30. One of the central reasons for the recent restructure of the Planning & Development service was to prioritise infrastructure delivery by moving it into the Spatial Planning Team, with officers' revised job descriptions reflecting this change in focus. Part d of this paper (below) identifies some work areas to ensure a more centralised process is progressed from this point forward.
31. The role of **Neighbourhood Plans** (NP) also needs to be highlighted. These Plans provide the opportunity for communities (and the Parish Council) to identify specific projects related to meeting the needs of the development planned in their areas and they are subject to less stringent tests than a Local Plan (in terms of what it can cover and progressing through an Examination). NPs can also provide the platform to prioritise projects, so any contributions can be targeted accordingly.
32. However, NPs do still need to be broadly consistent with the policies in the Local Plan 2030 (see above) – unless specific evidence is produced to show any 'departures' are justified. Any requests for money from development or projects identified are also required to be in line with the NPPF (2019) and the established legal tests (see part A). These apply to all plan makers.

### **C) The Development Management Process**

33. In terms of the four stages of the S106 process identified above, the Development Management process relates mainly to Stages 2 and 3 – 'requesting the money' and 'collecting the money'.
34. A planning permission is not issued until any associated S106 Agreement is signed and thus is part of any such permission.
35. With regards to the process, (in most circumstances) before any application is submitted, applicants will have already familiarised themselves with both the Council's and the County Council's requirements as contained in the documents listed above. For complex applications, most developers will usually have had preliminary discussions with Council officers so that by the date the application is submitted, broadly speaking, the contributions that are likely to be required will be known.
36. Notwithstanding any preliminary discussions, when the Council receives a qualifying application (for S106 purposes) it will then formally consult the relevant bodies who may then respond identifying the scale of need generated

by the proposed development and requesting money towards a project(s) they want to deliver in order to mitigate that need. This includes internal consultation with departments such as Cultural Services, and consultation with public-sector partners (such as KCC, the Clinical Commissioning Group (CCG) or a Parish Council).

37. As part of the application process, planning officers may challenge or query the requests being made to ensure they meet the legal tests of the S106 process (see part a). Given that a legal framework steers what S106 requests can legitimately be made, it is imperative that the Council are able to demonstrate that requests for money are justified and compliant with the legal tests.
38. Developers and agents now utilise significant resource to challenge and debate emerging requests, and it is therefore important to note that the S106 process often requires negotiation with developers and other service providers such as KCC and the CCG. In some cases negotiations can be lengthy and complex.
39. With regard to decision making, the requirement for a Planning Obligation/Agreement and the proposed 'Heads of Terms' will be formally set out and appraised in either the officer's report to Committee or the report for a delegated decision. Once a resolution has been agreed at Planning Committee or by an Authorised Officer under Delegated powers, the detailed S106 Agreement is drafted.
40. This stage can be prolonged as Heads of Terms are converted into a detailed set of legal obligations. Legal teams for the Council and developer (plus any third parties to the Agreement) will need to receive detailed instructions and a period of negotiation will often take place. Delegated authority to conclude the Agreement lies with the Strategic Development & Delivery Manager and the Development Management Manager whose role is to ensure that the detail within the final Agreement remains within the scope of the Heads of Terms agreed by Members. The Agreement is then signed at the point at which all parties are satisfied with its content/wording and only at this stage is the planning permission issued.
41. In cases where a developer or applicant disagrees with the required contributions they may not want to agree to a proposed set of Heads of Terms for a S106 agreement. In these cases, applications may be recommended for refusal because proper provision has not been made for the required infrastructure contributions (subject to viability considerations – see below).
42. A developer or applicant may also appeal to the Planning Inspectorate, to challenge the Council's decision. Doing so means the decision making powers are taken out of the Council's hands. Developers also have the right to apply to vary a S106 at a later date.

#### Viability

43. In some circumstances developers or applicants may allege that development will be rendered unviable if it is required to meet the full range of contributions

required by policy. In circumstances where this applies, developers or applicants are required to satisfy the criteria set out in Policy IMP2 of the Local Plan. Policy IMP2 facilitates a flexible approach (a key requirement of the NPPF).

44. The prescribed approach to dealing with matters of viability in this context is set out on national planning guidance <https://www.gov.uk/guidance/viability>. The Council engages independent consultants to advise on developers' viability reports and their conclusions are routinely reported to the Planning Committee when proposals come forward for a decision.
45. Where site specific viability evidence can robustly demonstrate that the required developer contributions cannot be met, Policy IMP2 allows the Council to secure 'deferred contributions' through a S106 Agreement. Using this approach, the Council may agree that some normal S106 financial contributions can be forgone on the proviso that, should sales values increase beyond an agreed benchmark in future, some or all of the previously under-funded contributions will be made up. Whilst the Plan is based on a whole plan viability approach to show that realistically it is able to be delivered, the approach adopted through Policy IMP2, provides both the Council and developers with important flexibility to allow development to proceed in changing market conditions over the course of the plan period.

#### **D) The Administration of the S106 Process by the Council**

46. In terms of the four stages of the S106 process identified above, the administration of S106 Agreements mainly relates to Stage 4 – 'spending the money'.
47. Once a S106 Agreement has been signed, there will be requirements on the developer to pay money to the Council based on the parameters established through that Agreement. For example, money due on the completion of a certain numbers of houses.
48. The Council employs a S106 Monitoring Officer, who now sits within the Spatial Planning Team. This Officer mainly has responsibility for:
  - Recording when money has been paid and for what project,
  - Liaising with developers about the progress of their schemes (to determine if money is owed),
  - Checking that requests for spend, and the money collected, align with the relevant agreement,
  - Monitoring the process to ensure that the S106 money collected is spent on projects that are consistent with those identified in the relevant S106 agreement.

49. These various tasks are not straightforward and can be very complicated indeed, especially for large schemes with several S106 agreements related to them. This is further complicated as the Council's current IT software is simply not designed in a way that enables the data to be interrogated easily. It currently requires manual examination which can take significant time.
50. Accordingly, the process is not as transparent or straightforward as it needs to be, for officers, members or the public. This is not a criticism of our process alone. The Government has long recognised that the S106 process is not as accessible and transparent as it needs to be. Partly in response to this, they have introduced the requirement for Councils to produce Infrastructure Funding Statements (IFS) each year. These Statements are publicly accessible documents that are required by law to report on S106 spending, including monies received, monies spent, and for what typology of infrastructure (nationally categorised such as education, sports etc.). The Council produced its first IFS in December 2020, please see here:

[https://www.ashford.gov.uk/media/ditjdikc/abc00360\\_section-106-infrastructure-doc\\_for-web.pdf](https://www.ashford.gov.uk/media/ditjdikc/abc00360_section-106-infrastructure-doc_for-web.pdf)

## **E) The Role of Borough Members and Parish Councils**

51. So far, this paper has solely focused on the 'operation' of the S106 process. However, members have questioned their role and that of the Parish Council, in the wider process.
52. In the longer term, it is clear that the greatest influence members, and the Parish Council, can have on the S106 process is early in the plan making process.
53. Accordingly, the Local Plan review will be a primary driver to set out this information and that will frame future S106 requests. Departing from this agreed approach will be difficult afterwards, for the reasons outlined in part (a) of this paper.
54. Members will be required to help shape and evolve both the topic policy approach for a future Local Plan, and what infrastructure projects should be subsequently delivered. This will ensure that a streamlined approach is adopted – one that delivers what the Council actually want to achieve. However, this is a longer-term aspiration, as the Local Plan Review has not yet been triggered.
55. Nevertheless, there are several work areas that can be progressed now, to 'align' the current approach and make sure it is as up to date as possible. In doing so, this work will also help shape a future Local Plan.
56. It is important to note that a Local Plan can only ever be a snapshot in time. As such, the Council are encouraged to keep the list of on-going projects up to date. Accordingly, we should now progress an update to our Infrastructure

Delivery Plan (IDP) and Infrastructure Delivery Schedule (IDS), both produced in 2018.

57. This work will involve discussions with infrastructure providers to review their current project list and what role development finance play in their delivery. This includes internal Council providers such as Cultural Services, and external providers such as the Kent County Council. Discussions will also be needed with the various Parish Councils to understand their requirements.
58. All of these updates will lead to an 'Infrastructure Contributions Supplementary Planning Document' (SPD). This will be led by the planning service and will essentially provide a 'shopping list' of the contributions developers will be expected to make – based on a series of identified projects. Members of the Local Plan and Planning Policy Task Group will play a lead role in the production of the SPD.
59. As per the process, this SPD will need to be subject to public consultation – and this will include the opportunity for the development industry to comment as well.

## **F) Actions**

60. **Continue to review existing S106 Agreements:** Planning officers are already reviewing existing S106 Agreements and some of this work fed into the recent Infrastructure Funding Statement. This work needs to continue and there is a lot of work that remains to be done to ensure we are aware of all the payments to be received, and to ensure that these payments are being collected in accordance with the timeframes set out in the terms of the S106 and that they are targeted on the right projects. Management Team have agreed for extra resource to assist this important work area.
61. **Progress the digital transformation:** Crucial to the successful interrogation of S106 money is to make sure the IT system is fit for purpose. This will benefit everybody and allow us to deal with member and public requests more speedily. It will also help the Council identify priority projects moving forward. Furthermore, it is crucial to enable us to accurately report on all relevant data required within the IFS. This work is ongoing as part of Planning's digital transformation project.
62. **Centralising the S106 process:** As stated in this paper, it is crucial that the Council work in a more collective way to ensure that the limited amount of S106 money available is targeted towards projects that can be delivered. This may require the prioritisation of projects. Discussions to be held at a future management team, led by the Planning Service and the Corporate Policy Service. The S106 working group is to be re-established with a clear terms of reference.

63. **Progress a Developer Contributions Supplementary Planning Document:**  
The planning service are currently working on new SPD, as per the above (see part e). This will flow from a review of the current Infrastructure Delivery Plan (IDP) and the Infrastructure Delivery Schedule (IDS).
64. **The Local Plan Review:** Once the Local Plan review has been commenced, there will be a need to identify specific projects to be delivered that meet the needs generated by the housing number identified. This may require specific sites to be allocated for such infrastructure. Again, members of the Local Plan and Planning Policy Task Group will play a key role.

## **Recommendation**

65. **The members of the Overview and Scrutiny Committee are asked to note the contents of this Paper and support the actions identified.**

## **Contact and Email**

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