

WELWYN HATFIELD BOROUGH COUNCIL
DEVELOPMENT MANAGEMENT COMMITTEE – 21 JULY 2016
REPORT OF THE DIRECTOR (GOVERNANCE)

SECTION 106 REPORT

1 INTRODUCTION

- 1.1 Section 106 (s106) of the Town and Planning Country Act 1990 (as amended) allows landowners to enter into planning obligations, the purpose of which is to make development acceptable that would otherwise be unacceptable in planning terms. Planning obligations are legally binding covenants and compromise both planning agreements and unilateral undertakings. A s106 agreement is an agreement between a local planning authority and a landowner, whereas a unilateral undertaking is an obligation offered by an applicant in support of a planning application or planning appeal.
- 1.2 Planning obligations are an effective tool to secure the necessary infrastructure and services required as a result of development and to also ensure that the negative impacts of a development can be adequately mitigated, for example increasing/improving public transport provision, increasing school capacity, enhancing open spaces, requiring that a given portion of housing is affordable, etc. It is important to note that they cannot be used to mitigate the impact of any shortfall in existing infrastructure however.
- 1.3 Central government introduced the Community Infrastructure Levy (CIL) Regulations 2010 (as amended) which came into force in April 2010 as a more transparent way of securing contributions from developers via a tariff for each square metre of new residential, industrial, commercial, etc. development. This Council is working towards the introduction of a CIL charging schedule. The first stage of this process will be to publish a Preliminary Draft Charging Schedule for consultation; this is currently intended to take place towards the end of 2016 following consultation on the Local Plan. After this a Draft Charging Schedule will be prepared and submitted for examination later in 2017 with a view to adopting CIL at the end of 2017 or early 2018.

2 RECOMMENDATION

- 2.1 That Members note the explanation of the Section 106 and Community Infrastructure Levy process set out in this report and the monies currently held by the Borough Council.

- 2.2 That Members offer comments on how they would like the Council to secure (as elaborated on in paragraph 3.3) and spend Section 106 and Community Infrastructure Levy contributions in the future.

3. **PURPOSE OF THE REPORT**

- 3.1 The purpose of this report is to provide members with a broad understanding of both how the planning obligations system works, and to provide information on how the Borough Council has collected and spent monies in the past, as well as monies which are still to be spent. The Borough Council collects and spends contributions towards community facilities, public art, green spaces, indoor and outdoor sports facilities, play areas and equipment, and on site waste and recycling storage. These funds are detailed in Appendix 1 by Ward (which shows a breakdown of potential s106 monies, the sums collected so far, spent so far and remaining funds yet to be spent). Hertfordshire County Council as the local highway and education authority spends contributions towards education, highways, transport, parking and rights of way. Monies currently held and recently spent funds by County are detailed in Appendices 2 and 3.
- 3.2 To report s106 matters to this committee on a yearly basis.
- 3.3 To advise Ward Members that s106 contributions can be sought from future developments above 10 residential units and for Members to consider this in identifying related potential infrastructure requirements in their wards. Contributions can also be sought from developments including employment or retail uses.

4 **BACKGROUND**

Guidance on Planning Obligations

- 4.1 Both the Borough and County Councils have produced guidance fully detailing the planning obligations which can be sought. This is also useful in assisting applicants/developers to calculate their potential s106 costs. These documents titled *Planning Obligations Supplementary Planning Document (SPD) in 2012* and *HCC Planning Obligations Guidance - Toolkit for Hertfordshire* can be viewed at: <http://www.welhat.gov.uk/planningguidance>

Necessary Tests to make Planning Acceptable

- 4.2 As mentioned above the purpose of Planning Obligations is to make development acceptable that would otherwise be unacceptable in planning terms. The National Planning Policy Framework (NPPF) sets out in paragraph 204 that planning obligations only be sought where they meet 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.

- 4.3 Furthermore, with the Community Infrastructure Levy (CIL) coming into force, planning obligations can also only be sought where they meet the tests set out in Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended). This places new statutory restrictions upon the use of planning obligations to clarify their purpose. For local planning authorities without an adopted CIL Charging Schedule, CIL Regulation 123 (3) limits the pooling of a maximum of five obligations towards a specific infrastructure project or type including education and transport. This affects all s106s entered into since 6 April 2010.

The Pooling Restriction

- 4.4 Prior to April 2015, local planning authorities were able to pool together a number of planning obligations in order to pay for infrastructure projects. This meant, for example, that generic planning obligations could be sought on a tariff based approach towards generic infrastructure types such as “education” or “transport”. The opportunity to pool planning obligations contributions was helpful for both the borough and county council as it enabled larger pots of money to be assembled and then spent on more costly projects. However, the introduction of the pooling restriction, which as mentioned is backdated to March 2010, means that no more than five planning obligations may be entered into towards any specific project or type of infrastructure. The overriding purpose of the pooling restriction has been to encourage councils to adopt a CIL charging schedule and, for the majority of applications, to move away from the use of s106 agreements. The aim of this was to be able to provide developers with more certainty over the infrastructure costs that would be associated with their development.
- 4.5 What the pooling restriction has meant is that this Council can no longer rely on the tariff based approach of the past. This means that, when an impact on infrastructure is likely as a result of a planning application, the nature of that potential impact has to be identified and quantified. A specific project then has to be identified to demonstrate where any s106 money from that development would be spent. The Council has to demonstrate that the project is deliverable, costed, whether any other sources of funding are contributing to it as well and, in particular, be sure that five obligations have not already been spent on that project. In order to do this, the planning team is reliant on timely advice from the providers of these services, be that Hertfordshire County Council, NHS England, internal departments or one of our Town or Parish Councils.
- 4.6 In practice, this has meant that planning obligations will not always be sought, particularly if the relevant service provider is not able to demonstrate that they have an identified scheme on which the money could be spent, or that the proposed development is not of significant enough size, and would not generate a large enough sum of money, for it to be worthwhile including it as one of the five obligations which can contribute towards the identified project in that area. This has meant that service providers of major infrastructure such as education, transport and healthcare, have had to try and predict and plan for new development over a longer timeframe in order that they seek planning obligations from the right developments. This in turn serves to re-enforce the importance of

the new Local Plan in supporting this infrastructure planning.

5 Going Forward

Viability

- 5.1 During the course of determining planning applications which would be likely to generate some impact on infrastructure, it is increasingly important to consider the overall viability of a development. This is particularly important when it comes to the consideration of potential planning obligations that a developer may be asked to pay for their development as these can have a significant impact on development viability.
- 5.2 The National Planning Policy Framework advises at paragraph 205 that “*where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled*”. It is clear from this that where a developer identifies to the Council that there are viability difficulties for the development being considered, the Council has to take this into account and consider whether it would be appropriate to reduce the amount of planning obligations and/or affordable housing being sought.
- 5.3 In scenarios where a developer does identify a viability challenge for a proposal, the Council can request the submission of a viability assessment in order to test the assertion being made. This assessment will then be considered by the Council, or consultants acting on the Council’s behalf, with the costs of this work being covered by the developer. This process is set out in detail in the Council’s Planning Obligations Supplementary Planning Document (SPD).
- 5.4 The outcomes of a viability appraisal can be varied and may include a negotiated reduction in planning obligations contributions or affordable housing, or the Council and developer may not agree, in which case applications can still be refused and viability arguments tested further at an appeal.

Reasons why planning obligations may not be sought

- 5.5 There are circumstances where planning obligations may not be sought, even though it would initially appear that some impact on existing infrastructure provision would be likely to occur. There can be a number of different reasons for this such as a lack of resources, a lack of evidence to demonstrate need or indeed the pooling restriction which has been discussed above. It is important to understand that if the Council, as Local Planning Authority, is not able to demonstrate a robust case for seeking planning obligations payments, then it should not do so. In this regard, the Council is reliant on the quality of information and justification that emerges from the various service providers.

A case example where NHS money has not been sought:

It is understood that Members have expressed concerns for some time regarding the perceived lack of response to planning applications from healthcare service providers, NHS England and the East and North Herts Clinical Commissioning Group (CCG). Firstly it is useful to understand the differences between these two organisations. NHS England is the part of the NHS which is responsible for commissioning General Practice (GP) services and facilities. The CCG is responsible for commissioning primary care such as specialist hospital based services. Since the reorganisation of the NHS it had been the case that these two bodies were trying to respond to planning application consultations separately, with a varied quality of outcome. More recently, they have sought to give a more rounded response to the local planning authority in order to better target their responses and have a better chance of collecting planning obligations monies.

The challenge with healthcare however is the implication of the pooling restriction. It is undeniably the case that, with very few exceptions, every new dwelling that is created in the Borough is likely to have some impact on the availability of healthcare services by increasing demand. However, having regard to the pooling restriction, the healthcare organisations have to be careful in making sure that they only target the proposals that are likely to deliver the most significant funding streams. For example, if NHS England is looking to deliver a new doctor's surgery in a settlement in the Borough, they will need to consider carefully which development proposals are likely to come forward within the timeframe for the delivery of that facility. They will need to target the largest schemes which can deliver the most funding, and the other developments in the area will be likely to pass by without paying a contribution towards healthcare. Whilst this is not entirely satisfying, this is the nature of the system that has been created, and indeed presents a persuasive justification for implementing a Community Infrastructure Levy (CIL) charge within the Borough. A meeting between representatives of NHS England and CCG has taken place with the Council including the Executive Member for Planning, Housing and Community. Notes of that meeting can be seen at Appendix 2.

The Role of Town and Parish Councils

- 5.6 Town and Parish Councils have an important role to play in this process, in particular by being able to identify local deliverable schemes. It is important that the Borough Council works with the Town and Parish Councils to help them to provide robust information about projects in their localities. Information will be required on the nature of the project, what the estimated overall cost will be, whether any other funding streams will also be used and the timeframe for the delivery of that project. It is anticipated that this will predominantly relate to projects dealing with play space, green space and sports and recreation facilities. The Development Management Team will seek to engage with Town and Parish Councils on planning applications with potential s106 agreements.
- 5.7 Town and Parish Councils should also recognise that providing this information is important even in circumstances where they do not support a particular

application which is being considered by the local planning authority. Whilst an application may not be supported at the local level, it may still be granted by the Borough Council or allowed on appeal. In these circumstances, it is important that the local community is still able to realise some benefit from a development, even if it was not initially supported. It is also worth noting that funding for projects would only come forward if and when development is implemented, it could also be years before this occurs for example if they are developments which have been identified in the Local Plan.

- 5.8 Officers intend to organise training with Town and Parish Councils to improve awareness of the development management and section 106 process.

6 INCOME AND EXPENDITURE

- 6.1 Here is a breakdown of the Borough Council's s106 monies received and spent since 2006

Year	Receipts	Expenditure	Remaining sum for spending
Pre 2006	£1,463,868	unknown	
2006/07	£101,804	£231,540	
2007/08	£212,339	£128,875	
2008/09	£0	£128,128	
2009/10	£17,654	£290,907	
2010/11	£0	£20,914	
2011/12	£3,252	£433,584	
2012/13	£16,149	£40,315	
2013/14	£474,939	£49,530	
2014/15	£136,206	£130,410	
2015/16	£174,491	£26,331	
2016/17 to date	£3,114	£20,242	
Total	£2,603,817	£1,482,426	£1,121,390

Source: Finance records

2016/17 to date - Demand Notices have been issued to the value of £15,686.

6.2 Projects S106 funds spent on

Here are a few examples of the projects larger s106 sums have been spent on over the years:

Site/Project	Amount spent
Provision of a Community Centre within the Primary School site of the Hatfield Aerodrome development (1999/1064)	£259,993
Provision of a Sports Ground at the North of Manor Road and west of Hatfield Garden Village, Hatfield development (2001/0577)	£ 73,268
Controlled Parking Zone Design, Consultation & Implementation at the Park & Ride development at Land at Angerland Common, South Way, Hatfield (2003/0150)	£492,327

Source: Exacom Dashboard and Projects

7 IMPLICATIONS

- 7.1 There are no financial, security/terrorism, or climate change implications associated with this report other than those that fall under the Town and Country Planning Act 1990 and the CIL Regulations 2010. There are policy implications in that the Council's planning and housing policies may need to be amended to reflect any future Starter Homes regulations, these will become apparent as we progress through this process.
- 7.2 Legal and procurement implications – The Council is in process of commissioning legal practitioners to help prepare Section 106 agreements. The costs of such agreements are paid by the developer/applicant. A report shall be presented to the Cabinet on 2nd August which will recommend the award of a framework contract to three companies.
- 7.3 Risk management implications – The Council should be aware of how much unspent Section 106 funds it holds, as Hertfordshire County Council was recently criticised in the national press for holding £56 million. This Council should work closely with the County Council to identify and progress highway, education, etc. projects for which they are responsible. Funds also need to be spent within certain deadlines stipulated by each agreement (most commonly 10 years). Any unspent funds would need to be returned to the Developers. No such obligations have been identified to date. The Council also needs to closely monitor proposed financial obligations in adherence with the Pooling Restriction (as explained from paragraph 4.4).

8 EQUALITIES AND DIVERSITY

- 8.1 An Equality Impact Assessment (EIA) has not been carried out in connection with the recommendations in this report.

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Appendices:

Appendix 1 – S106 Funds by Ward

Appendix 2 – Herts County Council Traffic Light Report (Property) as at 29 Dec 15

Appendix 3 – Herts County Council Traffic Light Report (Environment) as at 29 Dec 15

Appendix 4 - Notes of Healthcare Meeting