

14 March 2023

Report of	Karen Syrett, Lead Officer for Planning & Place Strategy	☎ 506477
Title	Review of S106 Developer Contributions	
Wards affected	All	

1. Executive Summary

- 1.1 This report covers a range of topics associated with developer contributions, namely;
- Background and procedures for setting section 106 contributions/policies
 - Permitted Development
 - Essex County Council guidance
 - Issues and problems
 - Collection rates and procedures for collecting Section 106 contributions
 - Comparison of planning applications.
- 1.2 A number of changes to procedures have already been implemented and others are proposed.

2. Action Required

- 2.1 Scrutiny Panel is asked to discuss existing procedures and guidance, the recent review of s106 processes and to recommend any further changes considered appropriate.

3. Reason for Scrutiny

- 3.1 Scrutiny Panel requested that a report be prepared and brought to the Panel for consideration, to examine any issues, problems, collection rates and procedures relating to setting and collection of section 106 contributions from developers, and that this includes examination of the relevant guidance from Essex County Council and comparison of a range of planning applications received by Colchester City Council.
- 3.2 Langham Parish Council requested a review of infrastructure provision when considering planning applications.

4 Background Information

- 4.1 Planning obligations are legal obligations entered into to mitigate the impacts of a development proposal. They are also commonly referred to as 'section 106', 's106', as well as developer contributions. It is important to note that they cannot be used to address existing shortfalls in infrastructure provision.
- 4.2 This can be via a planning agreement entered into 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.
- 4.3 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.
- 4.4 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:
 - 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.
- 4.5 These tests are set out as statutory tests in regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended by the 2011 and 2019 Regulations) and as policy tests in the National Planning Policy Framework.
- 4.6 Planning obligations are not the only way developers may be asked to contribute to infrastructure. Unacceptable development may be made acceptable by the use of conditions. These should be kept to a minimum and only imposed where they are necessary, relevant, enforceable, precise and reasonable.
- 4.7 Planning obligations in the form of section 106 or section 278 (highway works) agreements should only be used where it is not possible to address unacceptable impacts through the use of conditions.
- 4.8 Policies for planning obligations should be set out in local plans Development Plan Documents and examined in public. Policy requirements should be clear so that they can be accurately accounted for in the price paid for land.
- 4.9 Such policies should be informed by evidence of infrastructure and affordable housing need, and a proportionate assessment of viability.
- 4.10 It is not appropriate to set out formulaic approaches to planning obligations in supplementary planning documents or supporting evidence base documents, as these are not subject to examination. Whilst standardised or formulaic evidence may have informed the identification of needs and costs and the setting of plan policies, the decision maker must still ensure that each planning obligation sought meets the statutory tests set out above. This means that planning obligations will only be appropriate for funding a project that is directly related to that specific development. A financial contribution should not be sought just because of the existence of a formula.

- 4.11 Plans should be informed by evidence of infrastructure and affordable housing need, and a proportionate assessment of viability that takes into account all relevant policies, and local and national standards including the cost implications of planning obligations. Viability assessment should not compromise sustainable development but should be used to ensure that policies are realistic, and the total cumulative cost of all relevant policies will not undermine deliverability of the plan.
- 4.12 Plans should set out the contributions expected from development towards infrastructure and affordable housing. Where up to date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. Planning obligations can provide flexibility in ensuring planning permission responds to site and scheme specific circumstances. Where planning obligations are negotiated on the grounds of viability it is up to the applicant to demonstrate whether particular circumstances justify the need for viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker.
- 4.13 Applicants do not have to agree to a proposed planning obligation. However, this may lead to a refusal of planning permission or non-determination of the application. An appeal may be made against the non-determination or refusal of planning permission. The Council has used the failure of developers to make adequate provision for S106 as a reason for refusal in many cases but if they go to appeal Inspectors are very strict in their implementation of the tests.
- 4.14 Planning obligations can be renegotiated at any point, as long as both the local planning authority and developer wish to do so. Where there is no agreement to voluntarily renegotiate, and the planning obligation predates April 2010 or is over 5 years old, an application may be made by the developer to the local planning authority to change the obligation where it “no longer serves a useful purpose” or would continue to serve a useful purpose in a modified way. Although this is not common it does have to be noted as a possibility if spend does not occur as agreed.
- 4.15 Local planning authorities are expected to use all of the funding received by way of planning obligations, as set out in individual agreements, in order to make development acceptable in planning terms. Agreements should normally include clauses stating when and how the funds will be used by and allow for their return, after an agreed period of time, where they are not.
- 4.16 Since the financial year 2019/2020 onwards, any local authority that has received developer contributions must publish online an infrastructure funding statement by 31 December each year thereafter. Infrastructure funding statements must cover the previous financial year from 1 April to 31 March. The infrastructure funding statement must set out the amount of planning obligation expenditure where funds have been allocated. Allocated means a decision has been made by the local authority to commit funds to a particular item of infrastructure or project.
- 4.17 National guidance contained in the Planning Practice Guidance (PPG) suggests that the infrastructure funding statement (IFS) should set out future spending priorities on infrastructure and affordable housing in line with up-to-date or emerging plan policies. This should provide clarity and transparency for communities and developers on the infrastructure and affordable housing that

is expected to be delivered. Infrastructure funding statements should set out the infrastructure projects or types of infrastructure that the authority intends to fund, either wholly or partly, by planning obligations. This will not dictate how funds must be spent but will set out the local authority's intentions. This should be in the form of a written narrative that demonstrates how developer contributions will be used to deliver relevant strategic policies in the plan, including any infrastructure projects or types of infrastructure that will be delivered, when, and where. The Council has not previously included this information but it is proposed that going forward the Local Infrastructure Delivery Plan is included (see below)

4.18 Permitted Development

There are many forms of permitted development these days. The Government have introduced these because they consider that they should already be generally acceptable in planning terms and therefore planning obligations would ordinarily not be necessary. Any planning obligations entered into should be limited only to matters requiring prior approval and should not, for instance, seek contributions for affordable housing.

4.19 Essex County Council

4.20 The County Council are responsible for S106 contributions related to many areas including education and transportation. Their guidance is contained in [Developers' Guide for Infrastructure Contributions \(ctfassets.net\)](http://ctfassets.net) and a revised version is currently out for consultation.

4.21 Government provides funding to local authorities for the provision of new school places, based on forecast shortfalls in school capacity. There is also a central programme for the delivery of new free schools. Funding is reduced however to take account of developer contributions, to avoid double funding of new school places. Government funding and delivery programmes do not replace the requirement for developer contributions in principle.

4.22 Plan makers and local authorities for education should therefore agree the most appropriate developer funding mechanisms for education, assessing the extent to which developments should be required to mitigate their direct impacts. When local authorities forward-fund school places in advance of developer contributions being received, those contributions remain necessary as mitigation for the development.

4.23 In addition to schools and highways, the County Council also seek contributions towards;

- Early Years and Childcare from sites of 20+ units (same for schools)
- Special Educational Needs from sites of 2000 (intended to reduce to 1000 units)
- Post 16 provision from 20+ dwellings
- Employment and Skills
- Travel Planning from sites of 80+ dwellings and commercial sites
- Waste and Recycling from Garden Communities
- Libraries from sites of 20+ dwellings

- Highways – the consultation is seeking to make changes to the commuted sums for maintenance and the addition of need for provision of Active and Sustainable Travel, and compliance with Cycling Infrastructure LTN 1/20 and Manual for Streets.
- SuDS
- Public Rights of Way
- Passenger Transport

4.24 **Issues and Procedures**

There are a number of issues that arisen over the past year and an internal review of procedures was carried out. Some of the findings have already been addressed and others are in the process of being implemented.

- 4.25 Delay between agreement and receipt of money – this was an issue raised by Langham Parish Council but is also an issue faced by officers, especially in relation to larger infrastructure projects. It can be many years between a planning application being determined, the s106 signed and the money actually being received. In rare instances the approved development is not implemented so the money is never received. This means it is difficult to plan and sometimes alternative funding has been found by the time the S106 is paid. If the legal agreement is specific to a project, the money cannot be spent elsewhere unless the developer agrees a deed of variation, which they are not under any obligation to do. Officers try to build in flexibility within agreements wherever possible.
- 4.26 Developer expectations – increasingly developers are challenging requests for s106 agreements and unilateral undertakings. In most instances their argument is that the request does not satisfy the statutory tests because the ask is not specific enough. To address this the Council needs to maintain a live list of projects for all areas so there is evidence to substantiate each request. It does however make it difficult to incorporate much flexibility.
- 4.27 Identifying projects – everyone wants the same pot of money and it can only go so far. It has become standard practice to split S106 funding so 65% is spent in the ward and 35% on strategic projects which may include the Councils own corporate projects. There are two separate Supplementary Planning Documents (SPD's) on Community Facilities and Sport, Recreation and Open Space and in accordance with these individual requests are made. However, S106 is ward blind and the spend should occur so it mitigates the development. There are also instances where a project can serve multiple benefits ie an area of open space might provide community facilities as well as recreational opportunities. A flexible approach needs to be taken with the priority given to mitigating the new development which will often mean spend in the vicinity of the site (but not necessarily the ward). Some officers believe that contributions should move away from the 65%/35% split and that the rates should be more balanced. Whilst it is acknowledged that some areas do not generate enough S106 to be spent in the Ward and therefore it is difficult to implement change in areas where the priority lies, it is not possible to spend money on a playground upgrade in one area when the growth it is mitigating is in another as it would be contrary to the statutory tests.
- 4.28 Councillors involved too late in the process – there have been occasions when Councillors and Parish Councils have not known about a project for which funding is requested. For this reason it is proposed to change the existing system so Councillors and Parish/Town Councils are involved at the start of the

process by identifying projects within their locality. There should then be no surprises.

- 4.29 Spend release process – is currently slow and cumbersome and has evolved over time without any oversight. Appendix 1 shows the existing spend release process which often requires 9 people to sign each agreement. In the past few years this has included ward councillors but there is no explanation of why this is the case. In many cases projects are identified in the legal agreement and it should be a very straightforward process to release the money for spend. However, in theory any one of those nine signatories could object to the project or spend and there is no process for resolving this. The introduction of Councillor involvement early in the process should avoid this happening and remove the need for so many signatures. The spend release form is now saved in Sharepoint which means everyone can be sent the spend release form at the same time. Appendix 2 shows the revised spend release process.
- 4.30 Viability – national policy and guidance (NPPF and PPG) requires local planning authorities to take account of viability. Where planning obligations are negotiated on the grounds of viability it is up to the applicant to demonstrate whether particular circumstances justify the need for viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker. Where a viability assessment is submitted to accompany a planning application this should be based upon and refer back to the viability assessment that informed the plan; and the applicant should provide evidence of what has changed since then. Viability assessments are used less frequently at the moment because of the recent adoption of the Local Plan. Each of the sites allocated had to be deliverable and developable which includes being viable. Accordingly most applications are now policy compliant with regard to S106. There are some instances where officers do require a viability assessment and these are then assessed independently.
- 4.31 S106 v CIL – the Community Infrastructure Levy (CIL) was introduced in 2010 and is a charge that local authorities can set on new development in order to raise funds to help fund infrastructure. The system runs alongside S106 agreements which are still needed in order to deliver affordable housing and other infrastructure. Colchester initially proceeded with a CIL charging schedule but paused work when it became apparent that adoption would undermine delivery of affordable housing. An up-to-date local plan must be in place in order to proceed with CIL so whilst the situation was kept under review the circumstances in Colchester were not right to proceed. The Government have also announced, several times, that they would be reviewing CIL and the latest consultation (NPPF Feb. 2023) also suggests that a new Infrastructure Levy will be introduced and consultation on this is expected in the next few weeks. It would not be wise for the Council to proceed with CIL now when it could be about to be replaced. There are pros and cons to adopting CIL so the situation should remain under review.
- 4.32 If introduced, the levy, which is being brought forward via the Levelling Up and Regeneration Bill, would largely replace the community infrastructure levy and section 106 payments. Rates would be set locally and based on the gross development value (GDV) of the finished development, rather than - like CIL - the value at the point permission is granted. A report for the think tank Centre for Social Justice suggests that the proposal to “level up” affordable housing through the new levy is “liable to make a bad situation worse” and calls on the government to make a number of changes to the legislation to “remedy these

issues". The report also argues that the infrastructure levy should be ring fenced for the delivery of affordable housing and community infrastructure "rather than opening the door to diverting funds away from these much-needed homes and facilities".

4.33 No single point of contact for S106 – many of the problems referred to above stem from the fact that there is no one with overarching responsibility for S106. Part of the review undertaken in the past year has identified the need for a senior position which will have responsibility for compiling an evidence base (including an audit of infrastructure needs) as well as establishing and maintaining the LIDP which will be used to inform the review of the local plan and planning application decisions. The postholder will be the single point of contact for establishing what money is available and will ensure that no wasted work is undertaken. They will liaise with ward councillors and parish/town councils as well as developers and can help manage expectations.

4.34 Collection Rates - there is no data held for collection rates but generally most people pay when invoiced, occasionally they will pay early to avoid indexation. Payment terms are 30 days. It is not considered necessary to implement any changes to this part of the process.

4.35 **Comparison of Applications**

It is very difficult to compare planning applications because no two applications are the same and in accordance with the regulations S106 is a bespoke process and contributions will vary from site to site. Even where the development comprises a single dwelling and standard formulaic contributions are sought these may vary dependent on the size of dwelling proposed and infrastructure needs are being addressed. Four examples are summarised below and appended in full to this report as Appendix C.

4.36 211392 – 55 dwellings in Layer de la Haye (outline application). The contributions for this comprise the following;

- Community facilities - £148,711.75
- Parks & Recreation - £314,917.40
- Provision of and maintenance/management (£91,997.34) of open space within the site
- 30% affordable housing
- RAMS contribution - £137.71 per dwelling
- Highways works (by condition) – priority junction works; upgrade 2 bus stops; footpath improvements; travel information works.
- Total financial contribution per dwelling - £10,240.

4.37 220747 – 48 apartments and 10 dwellings in Military Road. The contributions consist of the following;

- Community facilities – £69,768.85
- Affordable Housing – 30% (16 units)
- Parks and recreation – £159,333.35
- CCTV - £20,000.00
- Transportation - £30,000.00
- Archaeology - £15,153.00
- RAMS - £7574.05
- Healthcare - £35,300.00
- Crossing point on Military Road and Travel Information Packs (by condition)

- Total financial contribution per dwelling unit = £6,129.

4.38 221786 – 1 x 3 bedroom house, Ambrose Avenue;

- Community facilities - £2872.83
- RAMS - £137.71
- Open Space, Sport and Recreation - £6560.79
- Total financial contribution = £9571.33

4.39 222460 – 4 x 3 bed houses and 5 apartments - Albert Street, Colchester;

- Community facilities - £18,878.61
- RAMS - £1239.39
- Open space, Sport and Recreation - £43,113.75
- Total financial contribution per dwelling = £7,025.75

4.40 The Review and Further Proposed Actions

A review of the S106 process was authorised to be conducted as a project as part of the Transformation Programme. The purpose of the review was to maximise the use of S106 contributions. A number of findings and recommendations were made as a result of the review which was informed by the Planning Advisory Service best practice guidance. These are detailed below.

- 4.41 Ensure infrastructure planning and delivery function is sufficiently skilled and resourced. This should cover not just collection and monitoring of funding and works but should link infrastructure planning into the wider corporate capital delivery process. It is important officers and Councillors have a good understanding of S106. Training has been rolled out and will be offered on a regular basis.
- 4.42 Secure and maintain support and buy in from Senior Board. The absence of leadership is the biggest predictor of an absence of effective spend. Infrastructure planning and delivery is of relevance across many council services and therefore requires corporate-level support. Regular reports will be made available to Senior Board.
- 4.43 Establish an officer level steering group. This group can take ownership and accountability for day-to-day infrastructure planning and delivery matters. Ensuring representation from all services who depend on developer contributions can help play an active role in the process. Development Team Membership has been reviewed and Protocol reviewed updated.
- 4.44 Ensure evidence for infrastructure planning is robust and up to date. A schedule of infrastructure needs set out in the Local Infrastructure Delivery Plan (LIDP) should be regularly updated. It should be able to provide a credible pipeline of projects which can be assessed through your prioritisation governance framework to make well informed spending decisions. This has been initiated and will be regularly updated.
- 4.45 Agree a clear set of priorities. This will ensure that there is a clear, transparent and robust way to identify projects for spend. These should be based on an understanding of infrastructure requirements and objectives related to the Strategic Plan, the Local Plan, IDP or other corporate documents.

- 4.46 Use the Infrastructure Funding Statement (IFS) to promote delivery. The IFS should be seen as an opportunity to demonstrate the collaborative working and successful delivery of projects that support communities and enable good growth, as well as providing transparency over what developer contributions have been collected for and are likely to be spent on in the future. The IFS is published annually but it is proposed that it will include more information in the future (see below)
- 4.47 An integrated system for managing data. Being able to efficiently and accurately collect and monitor developer contributions is fundamental in supporting the wider infrastructure planning and delivery system. A system that allows this data to be managed in an integrated way across relevant parts of the Council can make the whole system be more effective. the current database is available as an access database and confirmation is required that that the Northgate Assure Project is a fit for purpose replacement for the current system.
- 4.48 A sufficiently skilled and resourced delivery function. The whole system only operates effectively, and the outcomes for which developer contributions are collected can only be realised, if projects are delivered in a timely fashion. The introduction of a S106 Manager will improve the understanding of the S106 process. There needs to be a review of the Spending Officer Role and Responsibilities who are often tasked with project managing delivery alongside their day job.
- 4.49 Legal Process Timescales. The current legal process in support of S106 activity is a lengthy process. There is currently a backlog of Land Transfers. The Council currently uses in house legal expertise which can have time constraints due to available resources. It is intended to introduce a Memorandum of Understanding (MOU). This is currently in draft; and needs ratifying. External legal processes also cause delay.
- 4.50 Spend Release Process. It has been established that this is complicated and needs simplifying (see para. 4.29 above). This is work in progress.
- 4.51 In addition to the actions already implemented above it is proposed that the following actions are implemented and amended if necessary in accordance with any recommendations following the planned audit of S106 spend.
- Update and circulate the Local Infrastructure Delivery Plan
 - Update the spend release process
 - Include the LIDP as an appendix to future Infrastructure Funding Statements to provide clarity and transparency for communities and developers
 - Appoint a s106 Manager to have oversight of S106 procedures and spend.
 - Ensure the Council has a fit for purpose system for managing data.
 - Review the role and responsibilities of spending officers
 - Update the Community Facilities and Sport, Leisure and Recreation SPD(s).

5 Equality, Diversity and Human Rights implications

- 5.1 An Equality Impact Assessment has been prepared for the Local Plan, and is available to view by clicking on this link:
[Equality Impact Assessment June 2017.pdf \(windows.net\)](#)

6 Strategic Plan References

- 6.1 The Council's Strategic Plan includes the objective to deliver homes for those most in need and to improve health and wellbeing. Effective use of S106 agreements can help deliver affordable housing and infrastructure to support our communities.

7 Consultation

- 7.1 N/A

8 Publicity Considerations

- 8.1 Planning contributions can be controversial so the report could generate publicity for the Council.

9 Financial implications

- 9.1 An effective system will ensure financial contributions are collected to mitigate the impact of new development.

10 Health, Wellbeing and Community Safety Implications

- 10.1 An effective system will ensure financial contributions are collected to mitigate the impact of new development and ensure health and wellbeing are planned for.

11 Health and Safety Implications

- 11.1 N/A

12 Risk Management Implications

- 12.1 An effective system for collecting S106 contributions should manage the risk of inappropriate development that can place a burden on existing infrastructure.

14. Environmental and Sustainability Implications

- 14.1 The Council has declared a Climate Emergency and has committed to being carbon neutral by 2030. The purpose of the planning system is to contribute to the achievement of sustainable development as defined in the National Planning Policy Framework. Achieving sustainable development means that the planning system has three overarching objectives, which are interdependent and need to be pursued in mutually supportive ways. These are economic, social and environmental objectives. Sustainable Development is the golden thread running through planning.

15. Appendices

Appendix A – Existing spend release process

Appendix B – Proposed spend release process

Appendix C – Four examples of Section 106 agreements [see 4.35 above]