

REPORT OF THE HEAD OF PLANNING, ECONOMY AND REGENERATION

SECTION 106 AGREEMENTS AND FINANCIAL CONTRIBUTIONS – PROPOSED GOVERNANCE

Cabinet Member(s): Cllr Richard Chesterton
Responsible Officer: Mrs Jenny Clifford, Head of Planning, Economy and Regeneration

Reason for Report:

In order to agree governance arrangements for S106 agreements. A previous audit report flagged up the need to review and formalise governance arrangements. Draft proposals were subsequently drawn up and sent out for consultation with Parish and Town Councils. This report bring together the output from that consultation and subsequent amendment to draft governance proposals.

Mid Devon District Council currently collects financial contributions from new development through legal agreements signed under Section 106 of the Town and Country Planning Act 1990 (as amended), sometimes also referred to as planning obligations.

RECOMMENDATION:

- 1. That Cabinet recommend to Council that the governance arrangements at Appendix 1 be adopted.**

Financial Implications:

S106 agreements will normally include clauses stating when the funds will be paid (by reference to some trigger in the development phase) and for what purpose they will be used, often project or location specific. There is also provision for the return of contributions if they remain unspent or uncommitted after an agreed period of time, typically 10 or 15 years depending on the nature of the contribution. All monies collected on applications submitted since April 2015 must be spent on the specific project that it was allocated to at the time the planning application was submitted and that should be set out clearly in the S106 agreement. It cannot be spent on any other project and will only become available for spending once a development has commenced on site. Therefore if a site is never developed the monies won't become available and equally if development of the site is delayed, some monies may not become available for some time. It is therefore important to track payments to ensure any funds secured are used before they have to be returned.

Budget and Policy Framework:

None directly.

Legal Implications:

Planning obligations, also known as Section 106 agreements and procedures must comply with the following legislation and Government guidance:

1. The 1990 Town & Country Planning Act

2. Community Infrastructure Levy Regulations 2010 (“CIL Regulations”)
3. National Planning Policy Framework 2018
4. Ministry of Housing, Communities & Local Government Planning Practice Guidance.

More information on the legal framework within which planning obligation operate are set out in **Appendix 2** to this report.

Risk Assessment:

Clearer governance and the opportunity for Town and Parish Councils to engage with the process results in greater transparency and understanding of the processes that need to be followed in order to comply with the aforementioned legislation and guidance.

Equalities Impact:

There are no equality issues identified directly arising from this report.

Relationship to Corporate Plan:

The Planning Service is a statutory service, the effective operation of which is central to the delivery of Corporate Plan priorities of community, housing, economy and environment.

Climate change impact:

None directly arising as a result of this report save that developer contributions are a mechanism by which the impacts of a development can be mitigated in order to make it acceptable in planning terms. The climate change impacts of a development form part of the planning application assessment in accordance with policy.

1.0 BACKGROUND.

- 1.1 Draft governance arrangements were sent out for consultation purposes with Parish and Town Councils, with the 5 week consultation period finished on the 4th January 2019. Section 3 of this report summarises the responses from the consultation process, provides an officer response where required and advises of any revisions to the governance arrangements as a result. A copy of the governance arrangements is attached at **Appendix 1**.
- 1.2 Mid Devon District Council currently collects financial contributions from new development through legal agreements signed under Section 106 of the Town and Country Planning Act 1990 (as amended), sometimes also referred to as planning obligations.
- 1.3 The need for planning obligations are considered on a case by case basis and may only constitute a reason for granting planning permission if they meet the following statutory tests from the Community Infrastructure Levy (CIL) Regulations, namely that they are:
 - necessary to make the development acceptable in planning terms;
 - directly related to the development; and
 - fairly and reasonably related in scale and kind.

- 1.4 Planning obligations must be fully justified (usually by reference to development plan policy requirements) and evidenced. More information on the legal basis upon which S106 agreements operate, relevant Government guidance and advice is set out in **Appendix 2**.
- 1.5 Between April 2015 and October 2019, Regulation 123 of the CIL Regulations has placed a national restriction on the traditional approach of ‘pooling’ Section 106 contributions from numerous developments towards the provision of infrastructure, such as public open space, schools or roads. Such pooling only being permissible for up to five separate planning obligations, for any given infrastructure by project or type. This pooling restriction was removed by the Government in October 2019.
- 1.6 Local planning authorities are expected to use all of the funding they receive through planning obligations in accordance with the terms of the individual planning obligation agreement with the emphasis being to mitigate the impact of development in order to make it acceptable in planning terms. This can result in the delivery of benefits for local communities and support for the provision of local infrastructure. 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. Equally, if monies are not spent in accordance with the terms of the S106 agreement, developers can request that their contribution is returned to them.
- 1.6 With the introduction of the CIL legislation, the Government has ‘scaled back’ the use of planning obligations, as CIL has been viewed as a replacement for the use of planning obligations in some circumstances. However the publication of the Government’s White Paper on ‘Planning for the Future’ in August 2020, indicates an intention to consolidate the existing separate systems of S106 agreements and CIL payments into a new infrastructure levy. This is likely to replace existing arrangements meaning that the S106 governance contained in **Appendix 1** is likely to be time limited, pending that change. Should new legislation be introduced, governance will need to be revisited.

2.0 CONSULTATION RESPONSES.

- 2.1 The consultation exercise over the proposed governance arrangements produced 8 responses. The consultation sought views on the governance arrangements, guidance notes and a flow chart. This report deals with the former. Guidance notes and a flow chart to help explain procedures will be updated before being rolled out. The responses are set out below:

2.2 Town and Parish Council responses

- 2.2.1 **Bradninch Parish Council** – Our main concerns are that the balance between the District and the local community affected is too much in favour of the District and that, within MDDC, the balance between the primacy of officials and elected councillors on the Planning Committee/S106 Board is too much in favour of the officials, in particular the Head of Planning. We’ve heard in the past that the Committee is led by the recommendations of the Planning

Officers and this governance policy will only serve to reinforce that position. We understand that this makes things easier for District Councillors but are not convinced that it is necessarily right. We have seen numerous instances in previous planning matters where dubious decisions have been the result.

The document also needs a good proof read for both grammar and the inclusion of jargon, such as 'SPD'.

The project areas for spend are limited to Public Open Space, Air Quality and 'Other'. Should these be more comprehensively defined and does it mean that projects will only have a reasonable chance of success if they fall into one of the first two categories?

2.2.2 Clayhidon Parish Council – The response was limited to a project specific request for funding.

2.2.3 Cullompton Town Council – Cullompton Town Council is pleased to note that MDDC intends to consult with Town and Parish Councils and hopes that MDDC will not only consult but also take on board the comments made and act on those comments. Request that Town and Parish Councils receive regular update reports on what S106 funding is available and when it needs to be spent by.

2.2.4 Stoodleigh Parish Council – Comments in relation to the guidance note rather than proposed governance.

2.2.5 Halberton Parish Council

1. Pre 2015 contributions – not scheme specific

- spending under £10k is delegated to officers
- spending over £10k is delegated to S106 Board consisting of members and officers. Towns/parishes within catchment area to be consulted 14 days before Board meeting.

Comment: Town/Parishes should be consulted on all proposed spending including up to £10k. It would be useful to have more than 14 days notice where possible as referrals are likely to need to fit in with formal council meeting cycles.

2. Post 2015 contributions – scheme specific

- nominations for specific projects and amount made at planning application stage
- nominations to come from MDDC departments, Ward members within the catchment area, Town/Parishes within the catchment area, sports/community groups
- assessment of nominations delegated to officers, or S106 Board if competing projects.
- Note that a project in a neighbouring area may be prioritised over local project if officers feel it is closer/more accessible. Town/Parishes in both areas to be consulted.

Comment: The council welcomes the opportunity to nominate projects, but does not find it helpful to nominate projects now which may not be delivered

for many years hence when priorities may have changed. The council does recognise this is a legislative issue and not within MDDC control.

Similar to the comment on 1 above, the council would like as much notice as possible to consider where a neighbouring project is likely to be prioritised over a local project, including MDDC reasons for preferring the neighbouring project, so that a considered response can be made.

3. Requests to vary S106

- delegated to officers, unless members require it be considered by MDDC committee
- must have clear planning reasons

Comment: Given the current process of nominating projects potentially many years hence, MDDC should make the process of varying the project as straight forward as possible as priorities do change over time.

2.2.6 **Stockleigh English Parish Council** – As Stockleigh English is a tiny parish with no arrangements to handle money we do not wish to participate.

2.2.7 **Tiverton Town Council** – The 14 days proposed for comments from Parish and Town Councils is not a long enough period for a democratic view to be provided. One would also question why such a short period would be necessary. We would suggest 28 days is far more realistic. Many Parish Councils meet on a monthly basis; therefore 28 days is far more realistic a period

In the flow chart it would seem that a Parish Council could be by-passed by a S106 Board. This is not acceptable. We would wish to always be consulted.

2.2.8 **Willand Parish Council** – In the proposed Section 106 governance document under paragraph 2 Willand Parish Council are concerned that the suggested makeup of the Board would mean that the decision making is officer controlled and have asked why this is felt to be necessary. It is suggested that there should be an uneven number on the Board, maybe 7 and that the majority should be elected members. The Councillors feel strongly that the officers are there to advise and not to decide, this should be decided by elected members.

Paragraph 2 also states that 'views will be sought from Parish or Town Councils and Ward Members (14 days allowed)'. Although it is recognised that these things need to be moved quite quickly Willand Parish Council also think that this period of time should be longer given that some Councils only meet bi-monthly, even Willand with its more frequent meetings can have a gap of 3 weeks between meetings

It would be helpful if the note to paragraph 3 Project Selection for Spend could emphasise that this would be discussed during the setting up of new projects from new developments and there would not be any possibility of agreed projects having funding removed to another parish.

2.3 Since the consultation draft, revisions have been made to the proposed governance arrangements. These include giving more time for receipt of

Parish and Council responses and increasing opportunity for Member input into the process.

3.0 PLANNING POLICY ADVISORY GROUP.

3.1 Planning Policy Advisory Group (PPAG) has previously considered draft governance arrangements for S106 agreements and requested the meeting of a working group so that this could be considered further before reporting back to a further meeting of PPAG. The working group consisted of Councillors Barnell, Chesterton and Woollatt. The group met on 8th June 2020 and was attended by Cllrs Woollatt and Barnell with apologies from Cllr Chesterton.

3.2 The views of the working group in relation to the draft governance were as follows:

1. The **S106 Board** should also include the relevant Ward Member(s). At present it is too officer led.
2. **Public open space – project nominations.** There should be more regular contact with Ward Members and Parish/Town Councils over the proposed project list.
3. **Reporting: public open space.** Ward Members and Parish/Town Councils should be advised regularly on the amount of public open space money available to spend and when it needs to be spent by. The working group suggested quarterly reporting in Tiverton, Cullompton and Crediton, with 6 monthly reporting elsewhere.
4. **Nominations for all S106 projects.** The working group also sought to replicate the public open space project nomination procedure for other S106 contributions.

However there is a marked difference here between legacy contributions sought for public open space where the project was not specified in the original S106 agreement as compared with other contributions that are now being negotiated at planning application stage. The current negotiations must be in accordance with local plan policies and take into account responses by statutory consultees. Whilst views of Ward Members, Parish and Town Councils may be taken into account, the starting point and main consideration for the determination of planning applications must legally be the policies in the development plan. To adopt the same procedure as at item 4 would move away from that approach and be likely to also introduce delay that would impact upon determination timescales.

5. **Project selection for spend: other contributions.** Consultation should also take place with Ward Member(s) as well as the relevant departments
6. **Variation or renegotiation of S106 agreements.** The working group wished for procedures to be consistently followed. These procedures derive from the scheme of delegation, procedures agreed by Planning Committee in 2016 and the agreement by Council of Motion 553 (Councillor Evans). The need to fully align these and ensure it was followed was highlighted. Further text has been added to clarify consistency with Motion 553 and the scheme of delegation and procedures will require updating accordingly

In addition to more detailed comments on the proposed governance arrangements, the members of the working group considered that:

1. Greater accountability and transparency is required over S106 agreements, the collection and spend of financial contributions.
2. Greater Member oversight and awareness is needed given the critical role of developer contributions in implementing the local plan as a whole, specific policies and strategic development allocations. Greater oversight is also required due to the significance to the Corporate Plan.
3. There was an overarching wish for greater Member involvement at an earlier stage in the planning process.
4. There is currently insufficient engagement over local priorities.
5. A process is needed to address the impact of traffic upon local communities.
6. The need was identified for a process to address these comments. It was suggested that the role of the Development Delivery Advisory Group (DDAG) could be widened to take this on.

3.3 The draft governance arrangements were updated following the meeting of the working group, to incorporate the sought additions/deletions. This was referred back to the meeting of PPAG on 27th July 2020 where the proposals were agreed for Cabinet consideration.

4.0 CONCLUSIONS.

4.1 There remains a need to agree governance arrangement for S106 agreements even in light of likely legislative change which would require a further review. The arrangements set out in **Appendix 1** have been updated following consultation with Parish and Town Councils and input by the Planning Policy Advisory Group.

Contact for more Information: Jenny Clifford, Head of Planning, Economy Regeneration
jclifford@middevon.gov.uk

Eileen Paterson, Group Manager for Development
epaterson@middevon.gov.uk

Circulation of the Report: Cabinet Members

List of Background Papers: Cabinet 25th Oct 2018
 Ministry of Housing, Communities and Local Government 'Planning for the Future' August 2020

APPENDIX 1 - SECTION 106 GOVERNANCE

1. All payments received by Mid Devon District Council (MDDC) for legal agreements signed under Section 106 of the Town and Country Planning Act 1990 (as amended) which are referred to as Section 106 agreements (S106) must be given the relevant planning application reference upon receipt.
2. **Arrangements for the spending of financial contributions for S106 agreements where financial contributions are not project specific** (generally pre 2015 and by infrastructure type).

- a. Spend <£10,000 delegated to Head of Planning, Economy and Regeneration in consultation with Estates and Operations (if relevant to operational area).

Views will be sought from Parish or Town Council and Ward Members within the catchment area in advance (28 days allowed).

- b. Spend >£10,000 shall be referred to a S106 Board comprising of the following:

1. Cabinet Member of Planning and Regeneration (Chair)
2. Cabinet Member for Community Well being
3. Senior officer from Planning (Head of Planning or Group Manager for Development)
4. Senior officer from Operations
5. Senior officer from Estates
6. Admin support – Planning Obligations Officer
7. Relevant Ward Member(s)

Views will be sought from Parish or Town Council and Ward Members within the catchment area in advance of Board Meeting (28 days allowed).

4. **Project Selection for spend: PUBLIC OPEN SPACE**

For S106 financial contributions post 2015, these are required to be project specific. Accordingly prior to the signing of a S106 agreement at the planning application stage the project upon which the financial contribution should be spent needs to be specified.

Project nominations will be sought from:

- a. Internal to MDDC – Relevant departments and Ward Members within the catchment area.
- b. External to MDDC – Parish or Town Council within the catchment area, sports and community groups (with 28 days allowed and sports/community group consultation depending on relevance to S106 contribution).

c. Assessment of the eligibility of a project (assessed against statutory requirements, guidance and its relation to the planning application from which contribution sought) – Delegated to Head of Planning, Economy and Regeneration via case officers.

d. In the case where project prioritisation is required between two or more eligible projects – Referred to S106 Board.

NOTE – Whilst the Provision and Funding of Open Space through Development Supplementary Planning Document (SPD) identifies the use of a catchment area approach for the collection and spend of financial contributions towards public open space, in order to ensure that the tests of the CIL Regulations are met, there may be instances where a project or facility in an adjacent catchment area is more likely to be used/accessed due to it being closer/more accessible to the development in question. In such cases the Parish or Town Council and Ward Members of both catchment areas will be consulted during the setting up of new projects.

5. Project selection for spend: AIR QUALITY

a. For S106 contributions post 2015 towards air quality, these are project specific therefore project nominations will be sought from:

b. Internal to MDDC – Relevant departments and Ward Members (both Ward within which the development is located and Ward of the relevant Air Quality Management Area if different).

NOTE 1 – Air quality projects are generally those which will assist in the management of air quality within an Air Quality Management Area (AQMA) (Cullompton or Crediton). Contributions may be sought from outside the AQMA where it is identified that new development would have a negative impact upon the AQMA. Actions to address air quality are included within the Air Quality Action Plan. Air quality projects to receive S106 funding will normally be based upon the actions identified within the Mid Devon District Council Air Quality Action Plan.

NOTE 2 – Suggestions for air quality projects from the community to be considered for inclusion in the Air Quality Action Plan (when next reviewed) may be made via the Ward Member.

6. Project selection for spend: OTHER CONTRIBUTIONS

a. Delegated to the Head of Planning, Economy and Regeneration in consultation with relevant departments and Ward Member(s).

NOTE – These are normally identified through adopted planning policies relevant to the development and responses from statutory consultees during the planning application assessment process.

7. Selection of S106 heads of terms and prioritisation between S106 asks where viability an issue.

- a. Delegated to the Head of Planning, Economy and Regeneration in consultation with the Ward Members and relevant services (e.g. Housing, Environmental Health etc.).

NOTE – These are normally identified through adopted planning policies relevant to the development and responses from statutory consultees during the planning application assessment process.

8. Requests to vary or renegotiate S106 agreements

- a. Delegated to the Head of Planning, Economy and Regeneration in consultation with the relevant services unless the Ward Member, Chairman and Vice-Chairman of Planning Committee and Cabinet Member for Housing (the latter in the case of amendments to affordable housing only) having been consulted, require that the Planning Committee consider the proposed changes having given clear planning reasons.
- b. Procedure a. above allows for officers and members to come to agreement over proposed changes without reference to Planning Committee. Should the officers and members fail to agree on the proposed changes or cannot negotiate agreeable alternatives, the members may require that the Planning Committee consider the proposed changes having given clear planning reasons.

NOTE – Existing process in place, agreed by Planning Committee 6th July 2016. The procedure includes consultation with relevant consultees, Ward Members and the Parish or Town Council (14 days allowed).

NOTE – The procedure at a. above includes wider Member consultation than Motion 553 (Cllr Evans) agreed at the meeting of Council on 24th April 2019 and is not inconsistent with it in other respects. Point b. above has been added to clarify the approach and consistency with Motion 553:

'Motion 553:

Any planning application that is approved by Committee giving specific affordable housing provision and or a detailed section 106 agreement as part of the information for members to consider that subsequently receives any application to alter all or part of these agreements must be referred to the relevant ward member/s and the Cabinet Member for Housing for their consideration and input.

Should both the officer dealing and the ward member/s agree to the changes these can be allowed to form the new affordable housing agreement and or section 106 agreements.

Should the ward member/s and officer dealing fail to agree on the proposed changes or cannot negotiate agreeable alternatives then the application to change the affordable housing and or section 106 agreement should be referred back to the committee for their consideration and agreement / disagreement.'