CABINET **AGENDA ITEM:**
9TH JUNE 2016

S106 AGREEMENT MONITORING FEE SCHEDULE

Cabinet Member Cllr Richard Chesterton
Responsible Officer Stephen Walford, Chief Executive

Reason for Report:
To consider the introduction of a monitoring fee within future legal agreements made pursuant to S106 of the Town and Country Planning Act 1990.

RECOMMENDATIONS:
That the Cabinet agrees to introduce a planning obligation monitoring fee and delegates the setting of these fees and the future review of these fees to the Head of Planning and Regeneration in conjunction with the Cabinet Member for Planning and Economic Regeneration.

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. The effective monitoring of planning obligations (also known as S106 agreements) will ensure that legally binding requirements are adhered to.

Financial Implications:
If introduced, this decision will generate additional revenue to recover the cost of the council's monitoring activity. At present the full cost of the monitoring activity carried out is not recovered from the developer and hence development is being subsidised by the taxpayer.

Legal Implications:
Limitations exist on charging standard, non-differentiated, fees for monitoring activity (see report). However, the introduction of a fee will ensure the Planning Service is able to monitor the various obligations, trigger points and complexities within an increasing number of Planning Agreements entered into under s106 of the Town and Country Planning Act 1990.

Risk Assessment:
The fee must relate to the cost of undertaking the monitoring activity rather than being a standard charge such as a percentage of the overall cost of financial contributions secured through the Agreement.

1.0 INTRODUCTION

1.1 Planning obligations or agreements are entered into by developers under s106 of the Town and Country Planning Act 1990 in order to mitigate the impacts of a development proposal, and are legally enforceable. They must be necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related to the development in scale and kind. These tests are set out in the Community Infrastructure Levy Regulations 2010 and as policy tests in the National Planning Policy Framework.

2.0 CONTEXT

2.1 It has long been the practice of this Authority to charge applicants entering into a planning obligation a fee to cover the council's legal costs in preparing the obligation. The Local Government Act 2003 gave councils the ability to charge for discretionary, non-obligatory services, which in the planning context include services such as the provision of pre-application advice. It is a requirement that the income from the charges should not exceed the cost of providing the service. In this context it is considered appropriate to seek to recover the cost of monitoring the provisions of planning agreements from applicants so that this service is not subsidised.

3.0 BACKGROUND

3.1 The charging of monitoring/admin fees by Local Planning Authorities has been widespread due to the extra costs that such monitoring activity generates. However, a High Court case in 2015[1] has tested this concept and, as a result of this judgment, has meant that block fees or tariffs being applied in a standard manner are more likely to be challengeable as they don't relate to an accurate assessment of the true cost.

3.2 It is important that the fees charged reflect the actual cost (or as close as can be reasonably calculated) in order to justify the fee as a legitimate cost as opposed to 'universal charge' irrespective of the monitoring and administrative burden. In the Oxfordshire County Council case the monitoring sum was calculated as a percentage of the total contributions payable under the agreement and did not, in the view of the Inspector, reflect an accurate assessment of the true costs involved in the monitoring of the obligations in the section 106 agreement.

3.3 Prevailing advice in light of this judgment stresses the need to avoid standardised fees and establish what level of monitoring will be required for each agreement i.e. are there multiple trigger points, is there an ongoing need for monitoring, how complex/large is the development site.

4.0 MONITORING ACTIVITY

4.1 At Mid Devon the monitoring activity is principally undertaken in the Planning Service by the Planning Obligations Monitoring Officer. This post was introduced in November 2013 to develop and manage effective and efficient administration of S106 agreements especially financial contributions and for the monitoring, collection and spending of the Community Infrastructure Levy. The latter has not been introduced, hence the officer has to date concentrated on upon administration of s106 agreements including a fundamental review of the s106 agreement database and software, processes and monitoring arrangements. The officer also deals with the administration of funding from

[1] OCC vs SoS judgement: http://www.bailii.org/ew/cases/EWHC/Admin/2015/186.html

s106 agreements towards specific public open space projects and enquiries over whether planning obligations on existing development have been discharged. This involves liaison with other services in the council.

4.2 Significant progress has been made in reviewing and compiling records of existing s106 agreements, clauses and financial contributions arising from them as part of wider monitoring arrangements. A new integrated software package has been purchased which records S106 agreements and community infrastructure levy payments (once charging starts under the latter). This system is in the process of being populated with the S106 agreement data and will be updated with new agreements as they arise.

4.3 The time and hence cost to the council taken to monitor planning obligations by this officer is not currently covered by a charge.

4.4 Planning obligations may take several forms – from simple, paid up front unilateral undertakings to complex s106 agreements between several parties with multiple clauses and triggers. It is estimated that there are approximately 700 s106 agreements and nearly 800 simple unilateral undertakings relating to developments in Mid Devon. These are added to by approximately 20 – 30 new s106s and 40 - 50 unilateral undertakings per year, although this varies according to application activity and type. Clearly there are significant monitoring costs and demands that the council incurs in order to successfully manage and ensure compliance with these legal agreements.

4.5 Monitoring activity includes reviewing and recording the s106 agreement and its obligations onto the software system. Site progress may need to be checked to assess whether triggers have been reached, records cross referenced with other data held by the council over commencement of development, invoicing for payment, chasing and enforcing payments (if required), distributing payments to services, auditing expenditure and compiling reports. Liaison also takes place over monitoring activities with other bodies such as the County Council – for example in respect of education and highway related obligations.

5.0 BENCHMARKING AND LOCAL COMPARISONS

5.1 As set out above, any fees need to be linked intrinsically to the costs arising specifically within MDDC. However, there is also a case for benchmarking across neighbouring councils since, if fees were markedly different, there would be a case for taking this into account.

5.2 In determining the appropriate level for the monitoring fee it is appropriate to understand current schemes in place with other councils. In January 2015 Sedgemoor District Council undertook a similar review and identified four approaches to s106 monitoring fees:

i. Charging a % of financial contributions due from each development (Coventry, Rutland, Wiltshire, South Gloucestershire).
ii. Charging a % of planning application fee (15% used at Bristol and North Somerset).

iii. Standard charge based on the resource required for each financial, physical or compliance obligation (Colchester, Mendip, Newcastle, Mid Suffolk, Rushcliffe); or

iv. Standard charges, sometimes varying between minor /major and amount of the contribution sought (Bath and North East Somerset, Three Rivers, Cornwall, Leeds, Guilford).

5.3 In preparing this report more up to date benchmarking information has been sought from other south west councils. Where known, charging is as follows:

North Devon – 2 hr equivalent charge for data entry, monitoring and report production with additional charges for pre-application meeting attendance, checking of non-standard customised agreements, the number of topics / obligations covered by the s106 and multiplication by the number of phases of the development. A cap of 50 hours equivalent time is applied.

Sedgemoor – Standard charge based upon the resource required for each financial, physical or compliance obligation. For schemes under 10 houses or less than 1,000m2 of non-residential development a standard rate of £250 is charged per agreement in order to promote growth and avoid burden on minor developments.

East Devon – Monitoring fee charges are under review.

Plymouth City – A standard rate of £667 x number of financial obligations x number of trigger points PLUS £667 x number of non-financial obligations. The first £1,000 is paid on completion of the agreement, remainder due on works commencement or as agreed.

Torbay – Monitoring fee charged to reflect cost of officer time to monitor / manage.

South Somerset – Monitoring fee previously charged, based on £250 minimum with a formula based on the planning fee. Now ceased, due to reduced s106 financial contributions due to viability issues.

North Somerset – Monitoring fee charged for s106 with more than 5 different triggers. Based on the cost of officer time in monitoring the obligation.

Taunton Deane – None charged either now or historically. (Now a Community Infrastructure Levy charging authority).

Somerset County Council – None charged (except mineral sites).

Cornwall County Council – Set charge by type and scale of application up to approximately £3,925 for schemes of over 100 houses / holiday units.

5.4 It is clear that most local councils that are non CIL charging require a s106 monitoring fee and that this fee is based upon the time taken rather than a flat fee.

6.0 THE PROPOSED CHARGING SCHEDULE

6.1 The proposed monitoring charges will be formulated to recover the cost to the council of monitoring each agreement based upon an estimation of officer time and overhead. The charges will respond to the type and number of obligations such as financial, commencement trigger, in-definite / compliance triggers, phasing and the number of distinct topic areas covered by the obligation such as highways, public open space, affordable housing. An 'all in' hourly rate is applied that seeks to cover monitoring input from all relevant officers. Whilst this will be a function mainly undertaken by the Planning Obligations Monitoring Officer, it is expected that officer input will also be needed from other officers in the areas of enforcement, planning and other services as required. Allowance will be made for this.

Contact for more Information:

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Circulation of the Report:

All Cabinet Members

List of Background Papers:

None