

**Community infrastructure levy and S106**

**Ward(s)** All

**Portfolios:** Councillor Lee Jeavons, Portfolio Holder Economy, Infrastructure and Development

**Executive Summary:**

To offset the impacts development may have on the surrounding environment, the Local Planning Authority may consider the use of a Section 106 agreement under the Town and Country Planning Act 1990 to secure contributions from developers. The obligations may be in the form of community provision including affordable housing and open space or they obligations may seek to ensure works are undertaken at a certain time or particular activities are precluded for example restriction on use of a building.

The Council is also consulting on new measures to secure community infrastructure necessary to support new development through the Community Infrastructure Levy (CIL) Regulations. These new arrangement are intended to secure financial contributions that the Council can utilise in accordance with an agreed spending list under Section 123 of the regulations. The CIL regime nationally has been the subject of a Government review, and the results of this are due to be published with or as part of the Housing White Paper proposed for January 2017.

This paper seeks to clarify the circumstances where obligations under Section 106 of the Planning Act can be secured, the overlap between obligations and the emerging CIL regime and the process for deciding on the need for and spending of resources received..

**Reason for scrutiny:**

The contributions received from developers are used to provide funding for a number of projects within the Borough in particular the delivery of affordable housing and open space. Accordingly decisions on how the money raised is spent can be of considerable importance to communities in the surrounding area and a degree of transparency about this process is required.

**Background papers:**

Cabinet – 3rd February 2016: Walsall's Local Plan – Consultation  
Cabinet – 27th July 2016: Walsall's Local Plan – Pre-Submission Modifications  
Consultation on Proposed Modifications to Walsall's CIL Charging Schedule  
and Section 123 List:  
[http://cms.walsall.gov.uk/index/environment/planning/planning\\_policy/community\\_infrastructure\\_levy.htm](http://cms.walsall.gov.uk/index/environment/planning/planning_policy/community_infrastructure_levy.htm)

### **Resource and legal considerations:**

The management of these agreements / obligations is provided for under Section 106 of the Town And Country Planning Act 1990. Such Section 106 obligations are subject to strict tests that are set out in Section 122 (2) of the Community Infrastructure Levy Regulations 2010 (as Amended):

*A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—*

- (a) necessary to make the development acceptable in planning terms;*
- (b) directly related to the development; and*
- (c) fairly and reasonably related in scale and kind to the development.*

The CIL Regulations also govern the establishment and implementation of the CIL regime.

In terms of the resources that might be generated to be spent on infrastructure, the report to the Council's Cabinet on 27<sup>th</sup> July 2016 included the following.

*The introduction of a CIL regime has been estimated by the Council's consultants (DTZ, now Cushman & Wakefield) as potentially generating £4.5-£5.6 million up to 2026 for spending on the provision and maintenance of infrastructure. It is difficult to make a direct comparison with what might otherwise be collected through s106 obligations, because Government expects that resources for infrastructure will be gathered through CIL and it has tightened the rules on the collection and use of s106s (including, as of April 2015 with restrictions on the pooling of s106 contributions). For comparison, £309,000 was secured from s106 obligations in 2014-15. Some provision (on and off-site affordable housing, and site-specific infrastructure) will still be most appropriate for funding solely through s106s, but infrastructure funded through CIL cannot also benefit from contributions through s106.*

The sums involved might seem large when considered in isolation, but they are relatively modest compared to the infrastructure needs of the borough.

Both Section 106 obligations and a future CIL regime will require resources, principally staff, to implement them. Previously this was done through an arrangement whereby an officer in the directorate specialised in these matters (whilst also undertaking other work). However, pressure in the Development Management service has meant that this officer is now fully employed in the

determination of planning applications. Responsibility for Section 106 obligations is now spread between officers in Development Management. There is currently no staff resource for the implementation of CIL.

#### **Citizen impact:**

The impact of any contributions received can affect residents across the Borough. In respect of monies received for public open space; this may enable the provision of new facilities, expansion of existing facilities or maintenance of equipment. Major investment into new and existing facilities may necessitate the submission of a planning application to secure consent for the works which in turn provides an opportunity for public consultation on the merits of the scheme. Affordable housing is normally provided on site as part of any new development proposal and again, is subject to the consideration of a planning application.

#### **Environmental impact:**

The collection of s106 monies does not impinge on the environment. Significant expenditure of raised funds will be subject to consideration of a planning application which will assess the environmental impact of the development. Smaller proposals which are not deemed to be development in the context of the Town and Country Planning Act, maintenance of existing equipment for example, will need to comply with relevant environmental legislation.

#### **Performance management:**

The collection and expenditure of s106 monies is monitored through quarterly reports to the Planning Committee. Because of the significant variance in the character of each agreement, there are few examples where direct comparison can be made between in terms of their performance. The large majority of s106 agreements is associated with the determination of the host planning application and the performance of these is monitored through quarterly reports to the DCLG and Planning Committee.

#### **Equality Implications:**

Equality Impact Assessments are not undertaken on the legal agreements themselves. Where significant expenditure of obligation monies requires a planning application, the process of determining each planning submission is undertaken with regard to The Equality Act 2010 as well as in the context of Walsall's Local Plans, which are themselves the subject of equality impact assessments.

#### **Consultation:**

Consultation on each planning application is undertaken with both Statutory and local consultees and also neighbours who may be affected by the development. Expenditure of s106 monies is undertaken in accordance with strategies adopted by the relevant service areas which are subject to their

relevant consultation exercises.

The CIL regulations which are currently at the draft stage have been subject to presentation to Cabinet to approve a period of public consultation and again for subsequent modifications and further consultation in Spring and Autumn 2016.

**Recommendations:**

**That:**

That the committee note the contents of the report.

That the committee should receive a report to a future meeting should the Housing White Paper make or propose significant changes to the CIL regime.

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## **1. Report**

### **1.0 Purpose of the Report**

- 1.1 This report is to update Members on the collection and expenditure of monies collected through the Section 106 process. It also looks at the role of the forthcoming Community Infrastructure Levy (CIL) regulations.
- 1.2 There have been a number of planning applications made over the last few years where the proposed development triggers a financial contribution but the development has been shown to be unviable following assessment by the District Valuer.
- 1.3 For other schemes, contributions have been made, some of which are linked to specific projects and others are more general. As a consequence of Councillor enquiry, this note has been prepared to give an overview of this topic, including an explanation of both section 106 and the Community Infrastructure Levy.

### **2.0 Triggers for Financial Contributions.**

- 2.1 When a planning application is assessed by the planning officer, the proposal is considered against adopted planning policy both local and national. Where a policy requires affordable housing, public open space or other contribution to mitigate the impact of the development, the first option is to meet that requirement on site. If this cannot be done, a financial contribution can be provided in lieu of onsite provision, so that that offsite provision can be secured.
- 2.2 Affordable housing provision is sought under Black Country Core Strategy Policies DEL1: Infrastructure Provision and HOU3: Delivering Affordable Housing and the Council's own Affordable Housing SPD. These policies require 25% of the dwellings on sites of over 15 houses or more to be provided for affordable housing. The tenure and type of affordable units sought will be determined on a site by site basis, based on best available information regarding housing need, site surroundings and viability considerations.
- 2.3 Open Space is secured under Black Country Core Strategy Policies DEL1: Infrastructure Provision and ENV6: Open Space, Sport and Recreation and the Councils UDP Policies GP3: Planning Obligations and LC1 Urban Open Space and the SPD for Urban Open Space. The calculation for the contribution is made on the number of bed spaces provided on schemes of 10 or more dwellings.
- 2.4 **Viability Assessments:** Where a developer considers it to be unviable to provide one or both contributions, they may undertake an independent assessment into the viability of the development. This should be undertaken in line with the HCA guidance in their development appraisal toolkit, details of which are freely available on the internet. This assessment is in turn assessed by the District Valuer at the applicant's expense and they will consider the methodology and assumptions made about the development costs.

- 2.5 The audited report is then provided as evidence of viability to the planning department when the applicant is seeking to provide reduced or nil contributions. Where a development is shown following appraisal not to be viable, the decision maker must consider the acceptability of the development without the contribution and weigh this against any positive impact the development may have.
- 2.6 **Section 106 Obligations.** Developers making financial contributions in lieu of onsite provision will usually want their development to benefit from the payment made. In other words, they will usually want to see the monies spent in the vicinity of the development and within a short period of time. Many will also want to see provision for the repayment of any sums which are unspent or uncommitted after a given period of time, usually 5 or 7 years.
- 2.7 The method of securing financial contributions is by way of Agreement between the Council and the applicant or a Unilateral Undertaking provided by the applicant under section 106 of the Town and Country Planning Act 1990. As this involves the transfer of money, this cannot be done by condition. A section 106 obligation also enables the owner/developer to enter into binding covenants with the Council to restrict the development or use of the land in a specified way; to require specified operations or activities to be carried out or require the land to be used in a specified way as well as require a financial contribution to be paid. A s106 obligation binds those with an interest in the land and the land itself and appears as part of a legal search on a property.
- 2.8 Where an applicant fails to comply with the requirements of a S 106 Agreement this is a breach of contract and the Council may pursue the applicants for costs or damages through the Courts.
- 2.9 **Expenditure of S106 Monies:** With regard to affordable housing contributions these are often sought on site. The Housing Strategy Officer is central to the decisions on the form of tenure needed ranging from social rented housing, discounted and Right-to-Buy. Not all tenure types are suitable for each site and part of the borough and the specific requirements to ensure the development is compliant with policy will depend on the characteristics of the proposal. Where off site contributions are sought, the Housing Strategy Officer will work with Registered Providers who work within Walsall. The most notable of these for this authority is Walsall Housing Group, WHG. Together, the Housing Strategy Officer and the Registered Provider will look at the needs of local communities for new housing or improvements to existing stock and bring forward planning applications as appropriate. The merits of these schemes will be assessed through the planning process if appropriate.
- 2.10 For open space contributions, these are managed by the Environmental Improvement Manager who is based in the Council's Clean and Green service area. The identification and prioritisation of projects is managed through the Council's adopted Green Space Strategy. This document is central to determining where monies should be spent to ensure that the obligations arising from each development meet the known requirements of each community.
- 2.11 The Strategy includes details of children's outdoor play areas in the borough, youth and adult facilities, the amount of equipment available, proposed play hubs some of which have been built out, natural open space and allotments. In addition

to assessing quantity, the strategy also looks at the quality of provision across the Borough.

- 2.12 In addition to identifying existing facilities, the Strategy has also undertaken an assessment of existing demand and this will be taken into account along with any new pressures generated by new development proposals. As with affordable housing, the Clean and Green Service work in conjunction with partner organisations where appropriate to ensure S106 monies are expended as efficiently as possible.
- 2.13 **Member Involvement in assessing Expenditure:** As noted in paragraph 2.9, the delivery of affordable housing is overseen by the Council's Housing Strategy Officer. The officer has early engagement with any planning applications submitted and will work with applicants to ensure the tenure, location and form of any affordable housing meets identified needs. They will also be able to take into account representations made during the determination of any planning application to ensure the final scheme best integrates with the surrounding pattern of development.
- 2.14 Members are informed of all planning applications received in the Borough through the weekly list which is emailed to Members every Friday. In addition ward members are notified of larger schemes directly by email. From this information, Members can express their views on the form of any development during the planning consultation stage and these comments will be given due consideration. At a strategic level, Housing Services have also published its Housing Strategy which has been produced in conjunction with Registered Providers, WHG, Homes and Communities Agency, private landlords and neighbouring Authorities. In addition, the Council has a Housing Allocation Scheme which is administered by WHG. The Council is represented on the relevant area Housing Groups operated by WHG by local ward Members.
- 2.15 With regards to open space provision, Member input was provided through the Green Spaces Working Group which helped direct the Green Space Strategy which in turn is used to prioritise the provision of new facilities or improvements to existing areas. As with the consideration of affordable housing proposals, Members are informed of applications through the weekly list or via direct notification of larger proposals in their Ward. Members can contact officers with their thoughts on a proposal and where appropriate, suggestions for expenditure of any S106 monies generated by a development can be made to officers for considerations.
- 2.16 Where proposals for the expenditure of S106 monies is made to officers, it is beneficial if this can be made as soon as possible to enable officers to assess the viability of delivering the scheme within the 5 years normally allowed in the S106 process. If the scheme requires its own planning permission or there may be a risk of delivery not being achieved within the 5 years, officers will highlight this and possibly suggest other mechanisms through which any S106 monies can be utilised effectively for the benefit of the community affected by the proposed development.
- 2.17 To avoid the risk of S106 monies being lost after the 5 year period if they remain unspent, officers will caution against schemes where the viability has not been

fully explored or the risks remain un-quantified. It can therefore be difficult to agree to a specific spending proposal for example at Planning Committee where there is limited scope to confirm whether a scheme can be delivered in the necessary time scales.

**2.18 CIL Payments:** The Community Infrastructure Levy (CIL) Regulations introduced a CIL charging provision for the collection of financial contributions for “infrastructure”. Each Local Planning Authority will need to adopt a CIL Charging Schedule if it intends to collect CIL payments. In Walsall, the CIL policy is being progressed alongside the Site Allocations Document (SAD). It is intended to go before an Inspector for Examination in Public in the Spring of 2017 and, hopefully, adopted thereafter. In the interim, Walsall cannot charge CIL. Once the CIL Charging Schedule comes into force it is intended that it will collect financial contributions in respect of developments that can afford to pay it: Essentially these are all residential developments that create new dwellings and certain types of retailing (retail warehouses and foodstores) -(other kinds of development cannot be shown to be able to afford to pay CIL<sup>1</sup>. The Council’s Draft Charging Schedule, setting out all details of the rates of charges, the type of development for which CIL will be triggered and the 5 zones set across the borough for which different charges will apply is available on the Council’s website and the latest consultation closed on 19<sup>th</sup> December 2016..

The infrastructure to be provided by CIL funds includes:

- strategic transport and highways infrastructure;
- strategic utilities infrastructure for employment sites outside the enterprise zone;
- education facilities;
- open space and outdoor leisure;
- community hubs, heritage centre and other social / community related infrastructure;
- strategic flood resilience and mitigation infrastructure;
- strategic nature conservation and environmental infrastructure; and
- strategic public realm including the historic environment and heritage assets.

**2.19** Any other policy requirements which necessitate specific obligations and payments of financial contributions for purposes outside of the Regulation 123 List will continue to be dealt with by s106 agreement. These are likely to include:

- site specific highway improvements such as vehicle access, junction improvements and public transport improvements necessary to make the development acceptable;
- site specific air quality mitigation measures;
- site specific public art;
- affordable housing;

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<sup>1</sup> The CIL regulations also apply certain restrictions and exemptions for example that to be liable developments should comprise 100 sq.m. or more of net additional floorspace, and the conversion of existing buildings, social housing a developments and self-build housing are the subject of exemptions from CIL.

- site specific education facilities where required on-site such as to meet demand for a new school as part of a large development;
- site specific improvements to, and the mitigation of adverse impacts on, the historic environment; and
- site specific flood mitigation / resilience measures; and
- mitigation measures required under the Habitats Regulations 2010 in respect of impacts on European Sites within or outside of the borough.

2.20 **S106 and CIL Together.** From April 2015, changes to the CIL Regulations limited the ability of Councils to pool more than 5 (five) s106 contributions towards a single item, project or pot, except for affordable housing provisions. In other words, once 5 contributions have been made for a particular item, project or pot, no more can be collected. The purpose of this is to place greater reliance on CIL but where no CIL Charging Schedule is yet in force, it means that greater care needs to be taken in relation to the purpose for which financial contributions are collected

2.21 Consequently, where a financial contribution is made for “Urban Open Space” with the intention that it is placed in a general pot to provide Urban Open Space in the Borough, a Council is limited to collecting only 5 contributions. After those 5 have been collected, no further collection may be made. In some instances, councils feel compelled to refuse planning permission because there is no mechanism available to address the adverse effects of the development proposal.

2.22 Many Councils, including Walsall, are therefore collecting financial contributions in a more focused way, specifying particular developments, projects or pots for which the contribution is to be used. This should however be done carefully. Infrastructure projects could be separated into regions, or phases of projects. For Urban Open Space and similar contributions, collections may be specified for particular projects or areas. However, mindful of the common requirement under s106 to repay any “unspent or uncommitted” monies after a period of years, it is key to attribute contributions to a particular project for which there is a clear plan to ensure deliverability within the period.

2.23 The Council has continued to seek to progress CIL because of the potential it might offer for increased resources and increased flexibility as to how such resources might be spent. However, the likely resources are still relatively limited and the CIL regime is complex. Concerns at a national level have led to a Government commissioned review of the operation of CIL. This was due to be published as part of or alongside the Housing White Paper in November 2016, but this has been delayed until January 2017. It remains to be seen whether significant changes to CIL might be made or proposed.