



## Governance and Audit Committee 31 January 2018

### Risk in relation to S106 Agreements

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#### Purpose of report

This report provides members of this committee with information about the background and mitigating actions taken in relation to the risks associated with the council securing justifiable developer contributions through Section 106 planning agreements. It describes the actions that the council takes to ensure that S106 agreements involving this council are being drafted appropriately to optimise their effectiveness.

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#### 1.0 Background

##### 1.1 Regulatory Context

1.1.1 A Section 106 agreement (also known as planning obligations) is a legal mechanisms which makes a development proposal acceptable in planning terms that would not otherwise be acceptable. They are focused on site specific mitigation of the impact of the proposed development. S106 agreements are often referred to as 'developer contributions' or 'planning obligations'. S106 agreements are usually between a developer, landowners and the local planning authority. However, they can also be in the form of a unilateral undertaking that is offered by a developer.

1.1.2 Planning obligations should only be used where it is not possible to address unacceptable impacts through the imposition of planning conditions (paragraph 203 NPPF). Regulation 122 and 123 of the Community Infrastructure Levy Regulations 2010 (as amended) set out that the use of planning obligations should only be sought where they meet all of the following tests:

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

Under current rules, a planning authority can only pool contributions from a maximum of five S106 agreements towards a particular infrastructure project, although it is possible that this may change in the future.

1.1.3 Infrastructure provision is a necessary cost of development and it is expected that the likely cost of infrastructure, including the cost of affordable housing provision, will need to be factored into the development from an early stage. The council will take this into account if the applicant produces evidence as to why the site is not viable. In cases where the applicant considers that the proposed development cannot viably support the council's policy requirements and other identified needs, the council will require the applicant to submit a financial appraisal and supporting evidence. This will be subject to independent review commissioned by the council Ideally this should be at an early stage in the application process.

##### 1.2 Typical infrastructure secured by S106

1.2.1 The following table gives an indication of the most common types of planning obligation secured by S106 and how/by whom the level of obligation being sought is determined

<i>Type of infrastructure provision</i>	<i>Council</i>	<i>Comments</i>
Affordable housing	ENC	The Joint Core Strategy specifies the starting points for negotiations.
Education provision	NCC	Current arrangements need to be revised to reflect the coverage of Academies in this District
Community facilities	Town & Parish Councils	A planned list of costed schemes would aid negotiations with developers and ensure their effective delivery
Highway improvements – strategic and site specific	NCC/Highways Agency	These are usually covered in a complementary S274 agreement
Library contributions	Currently NCC	On a per bedroom formula – if the proposed creation of community-run libraries does take place then a new process/formula will be required to take these into account
Healthcare contributions	NHS England	On a per bedroom formula. Currently the subject of wider planning for health discussions
Open space and its maintenance	Town & Parish Councils	Only where they choose to accept at S106 stage – increasingly Management Companies are being used.
Habitat creation/mitigation	ENC	A specific Supplementary Planning Document (SPD) covers these contributions and they are non-negotiable within the overall S106 package
Fire and rescue	NCC	Requests are not always received and often require better evidence/justification before they will be accepted by developers
Town Centre Improvements	Town & Parish Councils	This is an increasing area of interest but again requires a sound evidence base and costed proposals
Construction Futures	ENC	The provision of apprenticeships during the construction phase. ENC has a good record of getting agreement to these on major schemes.

1.2.2 The current Developer Contribution SPD was agreed in 2006. A Developer Contribution Working Party has been established to review this SPD to reflect the changed planning and local contexts.

### 1.3 Negotiation of S106 agreements

1.3.1 ENC encourages applicants to discuss their proposals with officers before they submit a formal application. These discussions will include ward councillors for larger developments. Until a formal application is received the discussions are confidential but we also encourage developers to discuss their proposals with the County Council, local community and Town/Parish Council at this stage as this provides an early opportunity to highlight any possible requirements for S106 contributions.

1.3.2 The heads of terms for a S106 (a high level summary of developer contributions) is usually submitted with the planning application, particularly where pre-application discussions have been held as noted above. The S106 agreement will be drafted and

refined following the consultation with statutory consultees during the application process. It maybe reviewed after application has been determined and even after the development is started if new factors come to light (such as changes in housing market or significant unforeseen costs).

- 1.3.3 It is the role of the case officer to communicate requests for contributions to the applicant and bring parties together at times of dispute or other difficulty, such as having to prioritise which planning obligations are included in the S106 as the overall monies available (as demonstrated by a viability assessment carried out by the council on figures supplied by the developer) is insufficient. In this case ward Cllrs will be involved in the discussions.
- 1.3.4 The case officer will not make a recommendation to the Planning Management Committee until there is agreement on the detail of the S106 from all parties. In the unlikely event that a consensus cannot be reached, the Council can refuse a planning application for this reason where there is a clear need for contributions that meet the tests in planning legislation

## **2.0 Key risks and mitigations**

2.1 Three key risks have been identified which are discussed in more detail below.

2.2 *Reducing the 'lag' factor between delivery of homes and community facilities – particularly for larger developments.*

2.2.1 There are two basic reasons why there is often a time delay or 'lag' between the start of a development and the provision of some of the infrastructure. The first is that it is often not reasonable for provision of, for example, a new school to be made before there are children from the development to fill it. In such cases a trigger for the contribution for the infrastructure to be made will set for the occupation of a certain number of homes.

2.2.2 The other reason for a lag is cash flow considerations from the development. Often there are some elements of infrastructure that have to be provided at a very early stage such as access road infrastructure. As noted above other infrastructure delivery may be reasonable delayed until a later stage in the development. It is often possible to negotiate a trade off in the timescales between the delivery of infrastructure elements in this way with the developer. However, regard will also have to be had on the viability of the development at each stage. Case officers will look to the earliest possible trigger points subject to these considerations and negotiate with the developer on this basis.

2.2.3 Officers are currently reviewing the lead set by Southwark MBC which has mandated the use of open book viability assessments which enable wider scrutiny of viability of a development as they are in the public domain. If appropriate this approach will be proposed to the Developer Contributions Working Party.

2.3 *The timing of works for infrastructure requiring multiple contributions*

The current ENC practice is for a period of five years to be set for the utilisation of S106 contributions (as set out in the agreement). Officers will explore with the Developer Contribution Working Party extending this period to “the completion of the development plus five years” as a starting point for negotiation with developers. This would enable greater flexibility to join up contributions from a number of developments in an area. Other planned areas of activity are the use of a standard template for S106 agreements, the inclusion of affordable housing as well as market housing in the trigger numbers.

- 2.4 *Best reflects community aspirations*  
As noted above, ward councillors are invited to pre-application discussions if these are held. It is proposed to formalise (through changes to Part 5.4 of the Constitution) the current practice of involving ward councillors in discussions after an application is received but before it is determined where pre-application discussions are not held and also where the requests for planning obligations exceeds that available and options are presented to Planning Management Committee

### **3.0 Equality and Diversity Implications**

- 3.1 This report is purely for information and requires no decision from committee. There are no equality and diversity implications arising from this report.

### **4.0 Legal Implications**

- 4.1 All S106 agreements are drafted by a solicitor, usually LGSS, on behalf of the council. There are no known legal implications arising from this report.

### **5.0 Risk Management**

- 5.1 This report outlines some current and proposed actions to mitigate risks associated with the agreement of S106 agreements

### **6.0 Resource and Financial Implications**

- 6.1 The cost of preparing the S106 is met by the developer. There are no known financial implications for this council arising from this report.

### **7.0 Constitutional Implications**

- 7.1 There are no constitutional implications arising from this report other than the proposed change to Part 5.4 noted in paragraph 2.3 which will be brought forward in a future Constitution Review report.

### **8.0 Customer Service Implications**

- 8.1 S106 agreements are an important route for providing new or maintaining existing infrastructure which will benefit both the occupants of the new development and often the existing residents of the area.

### **9.0 Corporate Outcomes**

- 9.1 S106 contributions assist the council in the delivery of its corporate objective of Strong Community Leadership.

### **10.0 Recommendation**

- 10.1 The Committee is recommended to note this report.  
*[Reason: This report is for information only]*

<b>Legal</b>	Power: The statutory framework for planning obligations is set out in Section 106 of the Town and Country Planning Act 1990, (as amended), Regulations 122 and 123 of the Community Infrastructure Levy Regulations 2010 (as amended); and the National Planning Policy Framework (NPPF) in particular paragraphs 203 to 205.				
	Other considerations:				
<b>Background Papers:</b>					
<b>Person Originating Report:</b> Sharn Matthews, Executive Director ☎ 01832 742108 ✉ smatthews@east-northamptonshire.gov.uk					
<b>Date: 10/1/18</b>					
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