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REPORT TO:           AUDIT SUB COMMITTEE

AGENDA ITEM: 12

DATE OF MEETING:       17<sup>th</sup> June 2009

CATEGORY:  
RECOMMENDED

REPORT FROM:       DIRECTOR OF CORPORATE SERVICES

OPEN

MEMBERS' CONTACT POINT: TONY STAMPER (595706)

DOC:

SUBJECT:           Section 106 Developer Contributions – Assessment of Internal Control

REF:

WARD(S) AFFECTED:    ALL

TERMS OF REFERENCE:

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## 1.0 Recommendations

1.1 The Committee are asked to consider the Section 106 report and to make recommendations to Finance and Management Committee.

## 2.0 Purpose of Report

2.1 The Committee requested Internal Audit to examine the management of Section 106 Agreements, as part of their annual work plan, and report the outcome.

## 3.0 Detail

3.1 A system audit has been undertaken to determine the level of internal control operating within the function.

3.2 An audit report has been produced and has been discussed with management

3.3 The report is a standard audit report as used for system and probity audits. A copy is attached at Appendix 1.

## 4.0 Financial Implications

4.1 None stemming directly from this report.

## 5.0 Corporate Implications

5.1 Communicating the work of Internal Audit supports the Council's governance and control environment.

## **6.0 Community Implications**

- 6.1 Developers' Contributions are used to provide community and other facilities arising from developments. Ensuring that the management of those contributions is undertaken in a controlled manner maximises the potential benefits.

## **7.0 Conclusions**

- 7.1 Internal Audit reporting is a key process in ensuring the Council's internal control framework has effective systems to safeguard both the services and finances of the Council.

## **8.0 Background Papers**

- 8.1 None

**AUDIT REPORT**

Type: System

Date: June 2009

Ref: IA-Planning Section 106

Auditor: AJS

**SUBJECT:** Planning Obligations – Section 106 Agreements 2009/10**Introduction**

A system audit has been undertaken on the administration of Section 106 Agreements. The audit concentrated on the negotiation and monitoring processes used to administer and control the management of such agreements.

**Scope of Audit**

The audit has examined the system and procedures for the administration of Section 106 agreements. The areas examined are:

1. Policy and procedure
2. Negotiating the agreement
3. Monitoring – database
4. Monitoring – compliance by the developer
5. Monitoring - compliance by the Council

**Background**

Planning Obligations are obligations relating to a person's land which bind the land and the owner. They are made by deed under Section 106 of the Town and Country Planning Act 1990 (as amended).

Planning obligations may be used to:-

- a) Restrict the development or use of the land in a specified way
- b) Require specified operations to activities to be carried out on the land
- c) Require the land to be used in any specified way
- d) Require a sum or sums to be paid to the authority on a specified date or dates or periodically.

Planning obligations provide a means of ensuring that developers contribute towards the infrastructure and the services that South Derbyshire believes necessary to facilitate proposed developments. Contributions may be either in cash or kind.

For example planning obligations are used for:

- Affordable housing
- Education provision
- Recreation and Leisure (Open space)
- Healthcare
- Community facilities
- Infrastructure (roads, drains)

A development should never be refused because an applicant may be unable or unwilling to offer any benefits. Similarly developments that would be refused under planning grounds should not be granted because a developer offers benefits.

There are two types of agreement within the legislation, a Section 106 Agreement in which the Council and the Developer both are obligated and a Unilateral Undertaking Agreement in which only the developer is obligated

A Section 106 Agreement or Unilateral Undertaking will contain covenants binding the application to a specific area of land, and it will set out what the applicant agrees to do or not to do and the circumstances and timescales within which they will occur.

Planning Obligations are secured as a charge on the property and so can be recovered from successors in title. Planning Obligations can require the payment of periodic sums, or require them to be paid indefinitely or for a specified period.

The obligations contain specific undertakings in the form of covenants which may be financial, operational or in kind. These become due dependent on the terms of the agreement and this involves commencement criteria relevant to the particular development. They often involve stages with each stage being triggered by a date or a set of circumstances. There are also guidelines that determine the length of time an agreement has to be completed.

The undertakings involve different projects and schemes. These might be the building of a community centre, local clinic, improvements at schools, new roads etc. Sometimes they are used as a contribution in money or kind to a much larger project in which other funding is necessary. All have to be directly or indirectly beneficial to the particular development and there are guidelines relating to this.

The majority of undertakings involve payments which have to be collected to fund the particular project or scheme. In turn these are passed on to the organisations that are responsible for administering the facility. Examples are the education authority, primary care trust, highways authority and the local authority, namely ourselves.

South Derbyshire has a dual responsibility in that it is one of the organisations responsible for providing community and leisure facilities as well as being responsible for administering the planning obligations process.

## **Planning Obligations System**

The District Council is the local planning authority for the area and responsible for administering the development control function. The Head of Planning Services is responsible for development control and the Development Control Manager is specifically responsible for the day to day process. A development control manual contains all the relevant guidance and procedures for assessing planning applications. Planning Obligations are a component of that assessment and are inextricably linked to the planning approval procedures.

Planning applications are received and are dealt with on either a delegated or committee decision basis. Any application which has five or more dwellings is assessed against the thresholds for a Section 106 Agreement as detailed in current guidance (circular 05/2005 as updated). Each Area Planning Officer (APO) is responsible for the applications in their designated area of the district.

Developers have access to informal guidance on planning obligations from the website and at pre-application discussions. Meetings with the applicant/developer are conducted without prejudice to discuss calculations; copies of these are available on request.

The Development Control Manual details Section 106, open space and affordable housing procedures and the APO uses this to formulate the appropriate agreement (either S106 or Unilateral Undertakings Agreement). The procedures are formulated from legislation and are clear on what obligations are and what use and form they may take (see above).

There are standard templates for both types of agreement and they have been developed from the model templates by our legal department. The APO informs the legal department of the heads of terms including details of contributions, specific provisions, different projects, payment/transfer dates, time limits, trigger points, defaults, liabilities for continuing revenue costs etc. Our legal department prepares the draft agreement. Section 106 Agreements are finalised before any decision is made.

Planning consent is granted either by officer delegation or by committee decision dependent on the approval procedure.

The Chief Executive is responsible for economic development and inward investment into the district and often looks to enhance any development beyond the limits of the Section 106 calculations. His role is strategic in nature and aligns with the relevant themes in the Corporate Plan for the district. Development grants, increased contributions, community facilities, highway schemes etc are all ways his department looks to integrate any development into the district as a whole. Section 106 contributions are part of that process.

Once the agreements are in place and the planning consent has been granted the enactment of the terms has to be managed. The system then reverts to the monitoring role. Over recent years the Development Control Manager has implemented the requirements of Circular 05/2005 establishing procedures and processes to control planning obligations. A major part of this process is to implement a control mechanism to ensure the undertakings are carried out.

Good practice recommends the use of a database and a comprehensive section 106 database has been implemented using Windows Access database. The records go back

to around 2001 and include details of the agreements. During 2008 a Performance Monitoring and Development Officer (PMO) was recruited and she is responsible for maintaining the database.

Information is gathered from inspections, building control and other sources to determine if commencement of the development and subsequent occupation of the dwellings has taken place. These are often the main trigger points which determine when the actions or payments are due to the Authority under the terms of the agreement.

In monetary terms payments are requested by notification and invoice and are paid as cash income or against a sundry debtor invoice. Payment data is gathered and entered into the database.

Once payments are received and importantly confirmed as such the PMO arranges the transfer of the funds to the appropriate associated organisation to implement the undertakings. These organisations confirm receipt and acknowledge their agreement to the terms of the agreement. This also applies to non-monetary undertakings, commuted sums etc.

The PMO has access to the Agresso system including the accounts payable module and is developing further links and controls to ensure all relevant information is available to maintain the accuracy and completeness of the database. The PMO also liaises with the accountancy section and with the Chief Accountant who has produced spreadsheets that enable the database to be reconciled to the ledgers.

Management reports are produced detailing the various stages of an agreement, from developments not yet commenced, through the varying stages culminating in completion.

Payments go to recipient organisations for education, highways, healthcare, community and leisure. The associated organisations are responsible for using the Section 106 monies for the purpose(s) intended and within the terms of the agreement.

Derbyshire County Council, NHS Primary Care Trust(s) and the Authority are the main recipients and each uses their own systems to control the expenditure.

South Derbyshire, as a recipient of funds to meet undertakings for community and leisure, expends these funds by integrating expenditure within the service budgets and capital programme. Open space maintenance is one such example where over a period of years amounts are added each year to the amenity budget (say for grass cutting) to meet the additional maintenance (cuts) for the development. Capital projects are often multi-funded and Section 106 monies are one of a number of funding streams. It is the appropriate department's responsibility to ensure the monies are spent on implementing the undertaking in line with the agreement and, in the case of ongoing obligations, to ensure sufficient funds are available to continue the maintenance after the Section 106 funds are exhausted.

The PMO ensures that the spending department accepts the funds and confirms their use will be in accordance with the agreement. In addition the finance department is made aware of the Section 106 monies so that they may be included in the budgeting process.

## Observations

### **Policies and Procedures**

The arrangements for negotiating and entering into S.106 agreements are generally sound. Pre-application discussions are encouraged and consultation with outside bodies is carried out. Planning obligations are clearly defined in the Council's guidance, which provide certainty for developers, and a good basis for negotiation.

Policy is updated from the Department of Communities and Local Government guidance. The Policy statement is presently being updated for the East Midland Regional plan.

- 1. Guidance** – Procedures for the undertaking agreements along with a raft of documentation including a Members Protocol, guidance on affordable housing, open space information etc, are all found in the Development Control Manual. The Section 106 passage is reviewed and updated on a regular basis and is seen as a fluid document. The document is amended relevant to necessary changes in legislation and guidance but also takes into account economic and local considerations where allowable and possible.

#### **Audit Comment:**

**All the relevant parts of the manual have been examined and found to be explicit and comprehensive. A few minor updates to some of the procedures, relevant to Circular 05/2005, were needed and these were dealt with during the course of the audit.**

- 2. Website** - informal guidance is available to developers on the website and this is supported by internal procedures to administer the process. The "Developer's Guidance" is found in "Supplementary Guidance" which is part of the planning policy section on the website.

#### **Audit Comment:**

**Although the guidance is very comprehensive, difficulty was found in locating this on the website. The guidance needs to be easily accessible and would benefit from a more prominent position on the site rather than as another planning document.**

#### **Recommendation:**

**Planning Obligations (Section 106) should be a section in its own right on our website (Category - low).**

#### **Management Response:**

***A number of issues have arisen related to the website of which we would wish to improve on. Planning Obligations will be included with these for action.***

- 3. Information for Members** - Planning Committee members are made aware of all agreements which form part of a planning application which is subject to committee decision and these appear as an open agenda item. In addition the relevant Ward Member is informed by letter. However many of the approvals are made under delegated powers.

**Audit Comment:**

**Members may not be aware of all Section 106 agreements in particular those approved by delegation. A mechanism should exist to inform them of such agreements. The Development Control Manager is considering the introduction of a bulletin to advise Members of these agreements.**

**Recommendation:**

**A report or bulletin should be produced to advise Members of all Section 106 agreements (Category - low).**

**Management Response:**

***In future information on agreements will be given in the current Members Bulletin.***

## **The Agreement**

The development control process for assessing planning applications identifies the need for a Section 106 agreement. Developers are informed at the earliest opportunity, usually during pre-application discussions, that a S106 Agreement will be required for the proposed development. Developers are provided with a detailed calculation of their expected S106 contribution which accords with the published guidance.

A standard template for the Deed of Agreement (Section 106 or Unilateral Undertaking as appropriate) is used and then customised for the appropriate heads of terms. The contribution, projects, trigger point relevant details are included and agreements are completed. Section 106 Agreements are sealed and retained by the legal department. Unilateral Undertakings are completed and then sent to the developer for signature before being returned to the Planning Department. These are dated and retained in Development Control although copies are now sent to the legal department. Copies of all agreements are scanned and retained on the network.

- 1. Defaults** – each type of agreement should contain a clear statement as to what will happen to the money if it is not spent on the stated project(s) within the stipulated time limit. Normally the contribution reverts back to developer for all elements whether cash or otherwise

**Audit Comment:**

**Examining a number of both types of agreement, it was apparent that, in general Section 106 Agreements contained such statements but Unilateral Undertakings were more open-ended.**

**Recommendation:**

**Clarification is required for the terms of Unilateral Undertakings agreement in this respect (Category - Low)**

**Management Response:**

***This will be ascertained.***

**Monitoring – Database.**

The Council has established a single database of S106 Agreements which is used for monitoring purposes and to which appropriate staff have access. The database contains sufficient relevant information to enable effective monitoring which is regularly updated. In addition, effective control over access and update to the database has been implemented and each stage of the process is defined in the database structure derived from the guidance in the Development Control Manual. There are no issues in this area.

**Monitoring – Compliance by the developer.**

The Database ensures that the risk of Section 106 monies and other provisions not being provided by the developer is identified. The database provides information on trigger points; these initiate each stage of the payment cycle. Developers are written to requesting payment and a sundry debtor invoice is raised for all/subsequent payments.

The S106 database produces the information required to monitor the spending and ensures that the potential for the loss of developer contributions does not occur. Other recipients of funds (County Council etc) are written to and asked to respond with their confirmation to spend the monies in line with the agreement. Their written confirmation forms the basis of the cheque /BACS payment authorisation.

Where money payment or other provision is not completed in accordance with the Section 106 Agreement, measures are implemented to enforce developers' compliance. Developers are chased for the debt and enforcement is used for other obligations. Money received from developers is banked and recorded in the main financial systems as any other payment.

- 1. Sundry Debtor System** – invoices are raised on the debtors system to collect payments for Section 106 Agreements from developers. Once invoiced this system places a credit for the income on the ledger. However the invoice may not have been paid until sometime later. Like most income systems it relies on effective recovery to monitor late or non-payment. Outstanding payments on three agreements were successfully pursued by the recovery unit.

**Audit Comment:**

**A routine has been written which informs the Performance Monitoring Officer when an invoice has been paid on the debtors system. Other payments are received in cash and it would be beneficial if these could also be ascertained. The Performance Monitoring Officer has access to some standard enquiries**

on the Agresso Accounting System, however general access to the ledger system would be of use.

**Recommendation:**

Consider using general access to the ledger enquiry facilities.

**Management Response:**

*Open use of the ledger system will be requested.*

## **Monitoring - Compliance by the Council**

The database shows all undertakings that form part of each agreement. These undertakings may be financial, operational or in kind. The database illustrates how much money has been spent and is still to be spent; it also highlights where the Council has failed to spend the monies within the time limits of a number of its agreements, but still retains the funds.

The database also takes account of transfers of assets and property as well as controlling the funds transferred to associated organisations such as the County Council and the Primary Care trusts.

- 1. Associated Organisations** – Large amounts of Section 106 monies are transferred to the County Council and the Primary Care Trusts. When payment is made the associated organisations agree the terms of the undertaking and confirm receipt. This also applies in the case of undertakings in kind. However no later check is undertaken to ensure it is spent in line with the terms of the agreement.

**Audit Comment:**

There is a risk that monies or assets that have been transferred will not be used as per the terms of the agreement and as such could become repayable leading to a loss of infrastructure benefits.

**Recommendation:**

Continuous monitoring of such payments should be introduced and consideration be given to introducing indemnities (Category – High).

**Management Response:**

*A procedure will be introduced to monitor payments to associated organisations and the feasibility of using indemnities will be explored.*

- 2. Community and Leisure** – large payments are also made to the Council itself for leisure facilities. The above should also apply to internal transfers thus reminding the spending department of the conditions of the agreement.

## Conclusion

Prior to 2005 there was no specific control over Section 106 Agreements as it was part of the planning approval process. In this respect negotiating an agreement was seen as the main responsibility. Increases in the scale and size of developments over recent years have seen the value of developer contributions increase and this has been the case in South Derbyshire.

The requirements of circular 05/2005 were implemented from 2006 and it had been acknowledged, prior to this, that the Authority needed to manage planning obligations (developer contributions) as a specific function. Developers' guidance and the procedures for administering Section 106 Agreements have been enhanced over recent years. The guidance and procedures are thorough and easily read in dealing with a complex set of regulations. A system for monitoring all aspects of these agreements has been established, including how, when and where the contributions are spent. This includes a comprehensive database in which all agreements have been included from 2001. In addition an officer has been appointed to administer and monitor the function.

The system evaluation has confirmed that, overall, sufficient controls exist within the system. There is a need to ensure that all data necessary to determine compliance with trigger points, default and liability criteria is gathered to maintain completeness and integrity of the database. A further audit is planned to examine the use of developer contributions on a multi-funded capital scheme and to assess the planning obligations function against the Audit Commission's awareness and value for money checklists

A significant improvement is the acceptance that it is necessary to devote resources to monitor and manage the spending of the contributions that realise the infrastructure improvements. The Planning Department should be commended for developing a co-ordinated approach to an important function that was previously administered in a fragmented manner. In addition the internal controls introduced into the process demonstrate a high degree of understanding of managerial and governance responsibilities.

The Council is further advanced than many local authorities in controlling and administering developer contribution as determined under Section 106 the Town & Country Planning Act 1990.

### **Governance Statement Comment:**

The audit has confirmed that the system for managing Section 106 Agreements operates with a high degree of internal control. One high risk weakness was identified and this is being addressed by management.

## **Audit Manager**