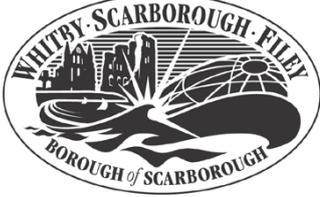


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|  | REPORT TO PLANNING & DEVELOPMENT COMMITTEE TO BE HELD ON 10 DECEMBER 2015 & CABINET ON 15 DECEMBER 2015 |
| | Key Decision NO Forward Plan Ref No N/A |
| Corporate Priorities Quality Environments Prosperous Safe and Healthy | Cabinet Portfolio Cllr J Plant Holder |

REPORT OF PLANNING SERVICES MANAGER – 15/329

WARDS AFFECTED: ALL

SUBJECT: UPDATE ON SECTION 106 PLANNING OBLIGATIONS

RECOMMENDATION (S):

The updated information on Section 106 (S106) planning obligations be received and noted.

REASON FOR RECOMMENDATION (S):

The monitoring of S106 planning obligations and the reporting of that information to Members is required to ensure that the process is transparent. Continued reporting of this information and the availability of reports on the Council’s website enables the process of collecting, allocating and spending of commuted sums to be transparent and the Council more accountable to the electorate.

HIGHLIGHTED RISKS:

The risk associated with not monitoring legal obligations relating to planning applications is that the Council could be criticised for not operating a transparent and comprehensive framework for monitoring such obligations.

Without adequate co-ordination commuted sums could be spent on inappropriate schemes and not on priorities identified within the Council’s various plans and strategies. It is also possible that sums could go uncollected or should deadlines expire, commuted sums would have to be returned (plus interest) to the developers and required community facilities / affordable housing would not be provided.

1. INTRODUCTION

Section 106 Planning Obligations

- 1.1 In 2002 the Development & Regulation Committee approved a protocol for monitoring planning obligations negotiated under Section 106 of the Town & Country Planning Act 1990. It was intended to meet the concerns of District Audit that a more transparent and comprehensive framework for monitoring financial and non-financial obligations was required. It would also ensure that the process is accountable and would allow ready access to information by the public and members.
- 1.2 It was also agreed that as part of the process an annual report on progress with the implementation of planning obligations would be prepared for consideration by members. The report is intended as an up to date statement of the current position as of late November 2015. The detailed position, especially for financial contributions is set out in the tables in Appendices 1-3, while the Assessment section of this report provides a commentary.
- 1.3 Table 1 in Appendix 1 provides an overall picture for financial contributions, according to their current status and broken down in terms of the type of infrastructure provided. Tables 2a - 7 then break this down for the main types of infrastructure within the context of the last 5 years. Finally, Tables 6a – 13 in Appendix 3 summarise the current position on individual S106 planning obligations according to category. These tables do not normally include obligations which have been fully executed by the developer, Council or other party – for example where a commuted sum has been received in full by the Council and the monies have been subsequently spent on a project in accordance with the terms of the agreement. The report concentrates on those obligations which relate to commuted sums and/or affordable housing provision. It does not normally list other non-financial obligations which contain ongoing restrictions or specific requirements imposed on developers.
- 1.4 The last monitoring report considered the merits of introducing the Community Infrastructure Levy (CIL) as a partial replacement for S106 Obligations. CIL was brought in a number of years ago to simplify the funding of infrastructure and try and improve the transparency of development charges for developers. It is a process whereby different forms of development are charged on a square metre basis for new floorspace. These levies are set by undertaking viability assessments of different types of development (housing, industrial, retail, etc) within different areas of the Borough. Where certain development is not shown to be viable a £0 charge can be set or a Local Authority may opt to not take forward a CIL Schedule at that time. At the time of the previous report it was concluded that despite certain benefits in terms of flexibility on how monies are spent, that CIL would not be viable across much of the Borough. This is clearly dependent on market conditions in the construction sector which prevail in the area.

Officers intend to review the feasibility of introducing CIL as a partial replacement for S106 obligations on an ongoing process and members can expect a report on this matter in 2016.

2. CORPORATE AIMS/PRIORITIES AND THE COMMUNITY STRATEGY

2.1 Planning obligations help the Council to achieve 3 of its 4 Key Aims; namely:

- Quality Environments
- Prosperous
- Safe and Healthy

They also contribute to 'Accessible Communities' which is an additional priority referred to in the Community Strategy.

3. BACKGROUND AND ISSUES

Section 106 Planning Obligations

3.1 Section 106 of the Town and Country Planning Act 1990 allows Local Planning Authorities to impose restrictions or requirements on land, including the payment of monies towards infrastructure. Collectively, these are known as planning obligations and may take the form of a Section 106 agreement between a developer/landowner, the Council and possibly other parties, or alternatively, a unilateral undertaking provided by the developer alone. Obligations form part of a planning permission, but are only used when planning conditions are unsuitable, in part because of their complexity and the delay they can add to the planning process. Since 2010 it has been a legal requirement that that planning obligations 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

3.2 The two most commonplace scenarios where planning obligations are: (i) to secure monies for infrastructure required in connection with new development; or (ii) to provide affordable housing. The Planning Act 2008 made provision that most financial contributions can be secured by the Community Infrastructure Levy (CIL) and it was the clear intention that in due course this would become the usual means of securing funding for off-site infrastructure (excluding affordable housing). The Act stipulated that from 1 April 2014 that any pooled contribution arising from the Section 106 route could only be applied up to a maximum of 5 obligations. This now limits the flexibility in spending these funds since it is best practice now to identify a particular project in the obligation, rather than expenditure merely being ring-fenced to a more generic and pooled type of expenditure.

- 3.3 The Council has adopted Supplementary Planning Documents setting out the detailed guidance on thresholds, financial formulae and means of securing: (i) affordable housing, (ii) education, and; (iii) green space (including play and sports facilities); all in connection with residential development. Other areas, such as transport and health are not currently subject to formulae for calculating commuted sums. Transport accounts for the majority of commuted sums which are not directly calculated with reference to supplementary guidance, but these amounts are normally determined in respect to the cost of providing specific highway infrastructure in the vicinity of the development site, relative to its scale.
- 3.4 The Borough Council is most often responsible for the expenditure of monies relating to affordable housing, public open space, play, sport and occasionally transport. The County Council normally spends or has a key determining role in the expenditure of transport and education funds. Subject to suitable safeguards, monies may also be spent by other organisations, such as Parish Councils, statutory infrastructure providers or community groups. This monitoring report does not determine how monies should be spent.

4. CONSULTATION

- 4.1 Consultation has not been necessary with respect to the ongoing monitoring process. It has, however, been prepared with input from other service areas, including Environment and Countryside, Housing and Finance.

5. ASSESSMENT

- 5.1 Section 106 obligations completed since January 2014 have continued to result in a range of contributions towards infrastructure or community facilities required as a direct result of the proposed development. Most frequently, these obligations require payment of a commuted sum to be spent off-site. Table 1 in Appendix 1 shows the value of these funds. If all developments with planning permission, and subject to s106 obligations, were to be implemented, this would raise more than £5.5 million. In addition to approximately £2.3 million, which has been received or is owing, this could result in total potential funds of up to £7,882,213. These figures should be treated with some caution since payments will not be triggered if a developer decides not to proceed with a scheme. The government has also made it easier for developers to reduce contributions after planning permission has been granted if it can be demonstrated that they affect the overall viability of a scheme.

Affordable Housing

- 5.2 Planning obligations are an important mechanism for securing and retaining affordable housing. They are normally used to provide either a proportion of on-site provision on new residential developments or a commuted sum towards off-site provision. Not all affordable units are secured by this route. Where the planning applicant is a Registered Provider of social housing, then

a planning obligation may not always be necessary since they are governed by other regulatory safeguards to ensure retention of affordable stock. Where existing housing is acquired by a Registered Provider this normally falls outside the planning process

- 5.3 The Affordable Housing SPD sets out the Council's policy for considering the level of provision within new residential schemes, and where applicable, the level of off-site contribution required. It was revised in 2012 to take account of the impact of current economic conditions on the viability of schemes. On larger residential schemes, (10+ or 5+ depending on the area) on-site provision of between 20% and 40% provision is expected - the higher requirements applying to more buoyant housing market areas, such as Whitby.
- 5.4 The planning policy position on affordable housing contributions has been quite complex during the last year and is part of the reason why the presentation of this report to members has been delayed. In 2012, the revised SPD introduced the payment of a sum towards off-site affordable provision on residential schemes of less than 10 units. In November 2014, the government issued planning policy which in effect prevented such sums forming a S106 obligation and the Council amended the SPD accordingly. More recently, a recent High Court judgement has quashed the national planning policy changes introduced by the Ministerial Statement and the SPD has once again been revised so that smaller residential schemes will once again be subject to affordable housing contributions. Where payments had not been triggered in November 2014, many developers unsurprisingly requested that the requirement for the payment be lifted, which under the more lenient policy conditions which existed, was difficult to resist. Consequently, 27 obligations have been released or superseded, which in total would have potentially collected in the region of £230,000. This excludes the impact of the 'vacant building credit' another element of the now quashed government policy which discounted any existing floorspace when calculating the commuted sum.
- 5.5 In terms of on-site affordable housing provision, delivery has continued to increase each year since 2010-11 when only 6 units were constructed through s106 agreements. In 2013, the figure had increased to 51. Even taking account of the fact that it relates to a longer period, the 194 dwellings provided subsequently still represents a rate of delivery which is over 100% greater. The most important sites securing the increased delivery have been Muston Road, Filey (73 affordable dwellings completed in period, although 24 of these cannot easily be occupied as they are still in an area where construction is still taking place), West Garth, Cayton (30), Middle Deepdale (30), Eskdale Park, Whitby (23) and Milestone Farm, Seamer (20). Those affordable dwellings secured through s106 are most often part of a larger private sector led development. The increase to an extent reflects a more buoyant market in this sector, since provision both open market and affordable housing has been viable. However, this will need in future to be balanced against the reduced monies available to Registered Providers to develop their own schemes.

- 5.6 The number of affordable units granted permission since January 2014 through the s106 route was 130. This is a reduction on the previous period, but this was unusually high due to Middle Deepdale. The most significant schemes where S106 obligations were completed were Helredale Gardens/St Peters Road, Whitby (91 units) and Pasture Lane, Seamer (30).
- 5.7 Overall since January 2014, there have been just over 300 new affordable housing completions across the Borough, which includes both the aforementioned S106 units and direct development by Registered Providers. These include schemes developed by Yorkshire coast Homes at Manham Hall and Ridgeway in Eastfield and Wreyfield Drive in Barrowcliff, plus the new Extra Care development, Jazz Court, developed by Sanctuary Housing in Middle Deepdale. In addition, 18 affordable homes have been provided on rural exception sites in the National Park, which is outside the Borough Council Planning Authority responsibility.
- 5.8 Returning to commuted sums, between 2012 and 2014 there were a reasonable number of developments where a commuted sum was liable and was collected. This was mainly before the temporary prohibition on payments on smaller residential schemes was imposed. Excluding those cases where obligations were released, sums totalling £331,331 were included in s106 obligations completed since January 2014 and more than £250,000 has been paid during the same period. Table 2B in the appendices summarises those cases where payment of a commuted sum for off-site affordable housing has been agreed and Table 6B provides individual details.
- 5.9 It is not a function of this report to determine how commuted sums are spent. The normal procedure for this is the relevant Service Unit to make a request through the Capital Bid Process as part of the Financial Strategy. A total of £611,007 is waiting expenditure - Cabinet has agreed spending on housing at Sleights and Aislaby. The intention is, subject to Member agreement, to spend the remaining money to stretch an existing programme that uses Homes & Community Agency grant (if available) and Registered Provider funds to meet affordable housing priorities in the current Housing Strategy (e.g. temporary accommodation for homeless, supported housing schemes, bringing empty homes back into use etc. Since the last report £210,000 of Section 106 funds were spent to develop temporary accommodation for the homeless at Alma Square, Scarborough.

Public Open Space/Play Equipment/Sports Facilities

- 5.10 The Green Spaces SPD gives guidance as to whether such facilities should be provided on or off site. This only occurs if there is a recognised need, taking account of the Green Space Audit and Playing Pitch Strategy. While on-site provision would usually be expected on larger residential schemes, there is not an overriding presumption that this is in preference to an off-site commuted sum. For smaller developments on-site provision may not be practical and even on larger developments greater community benefit may

be gained by improving existing or creating new facilities, possibly in the form of pooled contributions, which may also attract matching funding.

On-Site Provision/ Improvement and Maintenance

- 5.11 The process of ensuring provision of open space/play areas to an adequate standard, its adoption by the Council and procuring payment of commuted sums can be a drawn out process involving several Service Areas. Consequently, Section 106 obligations have tended not to be used in recent years and the cases summarised in Tables 3A and 7A in the appendix were mainly agreed some time ago. However, there are exceptions – for example, the agreements completed for Middle Deepdale will secure on-site open space, play provision and maintenance sums of circa £486,000.
- 5.12 Where monies in Table 9A have only been partially spent this reflects the fact that payments cover maintenance, which is phased over a number of years (normally 10). This explains why not all the sums collected have been spent yet.

Off-Site Provision/ Improvement

- 5.13 Table 3B shows global figures for off-site open space, play and sports facilities, while Table 9B provides details of individual cases. Since the last report, a potential sum of £90,889 has been secured. This is lower than some previous years, but figures can sometimes be dominated by one or two large sums. In addition, the revised SPD no longer requires sums on schemes of 5-9 dwellings. The most significant sum secured recently is £50,000 towards the upgrading of open space and play facilities was at Oliver's Heights. The sum in the 'invoiced/owing' column is unusually high at £193,389. This due to the monies for Oliver's Heights, and large instalments for Eskdale Park, Whitby, having been billed recently. The £75,431 received since the last monitoring report came from a number of sites, the largest being £24,290 relating to development at Manham Hill, Eastfield.
- 5.14 Individual sums received in this category may often not be sufficient to fund a meaningful project alone. The pooling of contributions has historically been the approach adopted for the spending of these funds, subject to the legal requirement that expenditure directly relates to the development. Where there are several smaller developments within the same geographical area it allowed the sums to be accumulated and reach a critical mass for a particular project, as well as being used to attract matching funding. Since April 2015 the scope for pooling has been curtailed so that a maximum of 5 obligations (completed since 2010) can be used towards a project or type of project. As a consequence, s106 obligations normally now identify a particular project on which the monies will be spent.
- 5.15 Historically, monies were allocated by Cabinet to projects emerging from the Play and Open Space Strategies as agreed by Cabinet. However, now they would normally come forward through the Capital Bid Process, again approved by Cabinet. Therefore, where a project is identified in the fifth

column of Table 9B those in italics are provisionally agreed, whereas those underlined are confirmed projects as part of the Capital Bid Process or the planning obligation specifically identifies a project for expenditure. Among the projects on which £82,000 of s106 monies have been spent since the last report are the Italian Gardens at South Cliff, maritime themed flowerbeds at West Cliff, Whitby, as well as play facilities at Seamer and St Peter's Play Area, Whitby.

Education

- 5.16 The threshold for securing an education contribution in the relevant SPD is normally 25 dwellings and then the County Council only requests a sum where insufficient school capacity exists. Consequently, there are fewer schemes where such a sum is sought than for some other types of infrastructure. Table 4 in the appendix provides an overview on these funds, while Table 10 shows details of individual obligations. Although they are derived from only a small number of sites, the sums can be quite substantial, so the total potential funding is currently £2.28m.
- 5.17 Since the last monitoring report, the S106 obligation for Pasture Lane, Seamer has been completed, which required payment of £67,980 towards the local primary school. The development at TT Electronics, Gristhorpe would yield £152,955 towards Cayton Primary School. This sum is in addition to the £486,849 previously secured by development at West Garth, the final instalment for which will become payable in 2016. Although the s106 obligation is not yet complete, development at Sneaton Castle Farm, Whitby should secure in excess of £500,000.

Transport

- 5.18 Commuted sums for transport are normally requested in response to specific impacts on local infrastructure, rather than having standard formulae/ thresholds applied to all development. The County Council are normally responsible for most expenditure. However, there are exceptions – for example the Borough Council is carrying out road improvements at Whitby Business Park. Table 5 in the appendices provides a summary of the global picture and full details of individual obligations are shown in Table 11. As can be seen from Table 1, transport is the category which generates the largest potential share of s106 financial contributions. It should be noted in some cases the constituent sums making up the £2,028,874 of untriggered contributions, is dependent on the County Council deeming specific highway works necessary, while in other cases (e.g. new bus services) a reconciliation process exists which may allow the developer to be partially refunded.
- 5.19 In comparison to previous monitoring reports the amount of monies secured for transport infrastructure is relatively low at £30,000. However, the previous period was especially high due to the £560,000 to be derived from Middle Deepdale. However, there are a number of schemes which have been agreed in principle by Planning Committee, but the S106 obligations

for which have not been completed yet (e.g. development at Weaponness Coach & Car Park and Sneaton Castle Farm, Whitby). The potash development also secured significant transport contributions for Whitby – this is not covered by this report since this planning permission was granted by the National Park Authority.

- 5.20 Transport payments totalling £86,687 have been received since the last report, and a further £135,943 should be forthcoming shortly. This sum, derived from Eskdale Park, is one of a number contributing towards improvements at the Prospect Hill/Mayfield Road Junction in Whitby, as well as the Cinder Track cycle/pedestrian route. The most important item of expenditure has been the construction of roads at Whitby Business Park by the Borough Council.

Health Infrastructure & Miscellaneous Obligations

- 5.21 Health contributions are summarised in Tables 6 and 12. No new contributions have been secured since the last monitoring report towards health infrastructure. The total of £400,000 has not yet been triggered, but would pay towards local surgeries at Eastfield, Newby and Filey.
- 5.22 Tables 7 and 13 in the appendices show some of the more important obligations not falling into other categories. These mainly relate to Middle Deepdale and provision for community facilities, £140,000 towards a foul drainage feasibility study and £100,000 for a Regeneration Study/ Development Brief for Eastfield High Street. The Regeneration Study has now been completed and was reported to Cabinet.

6. IMPLICATIONS

(a) Policy

- 6.1 The issues in this report are within the Council's planning policies.

(b) Financial

- 6.2 Without monitoring Section 106 sums may remain uncollected or returned to developers if not spent. Monitoring charges were introduced in 2011 to cover the costs of providing this service.

(c) Legal

- 6.3 If the system of planning obligations is not dealt with properly, there is a risk that developers and/or the community could mount a legal challenge to the Council's actions. District Audit would also criticise the Council if the process of negotiating for commuted sums were not transparent.

(d) Environmental

- 6.4 Planning obligations have positive environmental impact; for example by providing and maintaining Public Open Space and Play Areas and access to decent homes through the negotiation of affordable housing.

(e) Staffing

- 6.5 Monitoring is carried out by Planning Services in consultation with other service areas such as Finance, Parks & Countryside and Housing.

(f) Crime and Disorder Act 1998

- 6.6 The implications for crime and disorder will be considered when the allocation of funds is determined and officers making recommendations will ensure that any proposed schemes have due regard to this issue.

(g) Health and Safety Issues

- 6.7 The Health and Safety implications are positive in that the allocation of funds towards health facilities, open space, recreation and play and affordable decent housing should have a beneficial impact on the health of the community.

(h) Co-operation with Health Authorities

- 6.8 The improvement of open space/recreation facilities and affordable housing has the potential to improve the health of the community. Where a commuted sum is negotiated for improvements to local health or medical facilities, this will be carried out with the full involvement of the relevant health body.

(i) Equality Implications

- 6.9 There are no implications for equality issues. Benefits from the allocation of Section 106 sums are generally community wide and not directed towards a specific group.

(j) Human Rights Act 1998

- 6.10 Benefits through the Section 106 process will improve the general well-being of the community and provide greater options, for example, towards recreation, play and access to affordable housing.



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Background Papers:

Appendix 1 - Overall Summary Table for Current Section 106 Funds

Appendix 2 - Summary Tables for Individual Types of Infrastructure

Appendix 3 - Current Status of Individual Section 106 Planning Obligations

Risk Matrix

| Risk Ref | Date | Risk | Consequences | Mitigation | Current Risk Score | Target Score | Service Unit Manager/ Responsible Officer | Action Plan |
|-----------------|-------------|--|---|--|---------------------------|---------------------|--|--------------------|
| 1 | | Section 106 Agreements are not monitored adequately. | The risks associated with not monitoring legal agreements associated with planning applications is that the Council could be criticised for not operating a transparent and comprehensive framework for monitoring such financial and non-financial obligations | The continued monitoring of information and the operating of a Section 106 Protocol ensures that the process is openly accountable and allows ready access to information by the public and members. | C3 | A1 | David Walker | None |
| 2 | | Section 106 Sums are not spent. | Commuted sums would be returned (plus interest) to developers and required community facilities would not be provided. | Regular monitoring and action in accordance with the agreed protocols/ procedures ensures that the sums are properly allocated. | C3 | A1 | David Walker | None |

Glossary of Terms

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| Risk | An event which may prevent the Council achieving its objectives |
| Consequences | The outcome if the risk materialised |
| Mitigation | The processes and procedures that are in place to reduce the risk |
| Current Risk Score | The likelihood and impact score with the current mitigation measures in place |
| Corporate Objectives | An assessment of the Corporate Objectives that are affected by the risk identified. |
| Target Risk Score | The likelihood and impact score that the Council is aiming to achieve |
| Service Unit Manager | The Service Unit or Officer responsible for managing the risk |
| Action Plan | The proposed actions to be implemented in order to reduce the risk to the target score |

Risk Scoring

| | | | | | | |
|--------|------------|---|---|---|---|---|
| Impact | 5 | | | | | |
| | 4 | | | | | |
| | 3 | | | | | |
| | 2 | | | | | |
| | 1 | | | | | |
| | | A | B | C | D | E |
| | Likelihood | | | | | |

Likelihood:

A = Very Low
 B = Not Likely
 C = Likely
 D = Very Likely
 E = Almost Certain

Impact

1 = Low
 2 = Minor
 3 = Medium
 4 = Major
 5 = Disaster