

**Name of meeting:** Economy & Neighbourhoods Scrutiny Panel  
**Date:** 20 December 2019  
**Title of report:** Section 106 Process

**Purpose of report:** To clarify the process for the collection/audit and making recommendations for the expenditure of financial contributions collected from developers through the S106 process.

Key Decision - Is it likely to result in spending or saving £250k or more, or to have a significant effect on two or more electoral wards?	Not Applicable
Key Decision - Is it in the <u>Council's Forward Plan (key decisions and private reports)?</u>	Key Decision – No Private Report/Private Appendix – No
The Decision - Is it eligible for call in by Scrutiny?	Yes  If no give the reason why not
Date signed off by <u>Strategic Director</u> & name	Karl Battersby
Is it also signed off by the Service Director for Finance IT and Transactional Services?	Eamonn Croston
Is it also signed off by the Service Director for Legal Governance and Commissioning Support?	Julie Muscroft
Cabinet member <a href="#">portfolio</a>	Cllr Peter McBride

**Electoral wards affected:** All

**Ward councillors consulted:** None

**Public or private:** Public

**Has GDPR been considered?** Yes

## 1. Summary

- 1.1 This report sets out the internal governance procedure to which Kirklees Council follows when monitoring and managing financial contributions received by the council under the provision of legal agreements attached to the development of land. These agreements are referred to as Section 106 agreements (s.106).
- 1.2 It is recommended the process be formally agreed by Cabinet.

## 2. Information required to take a decision

### Background

- 2.1 Planning obligations under Section 106 of the Town and Country Planning Act 1990 (as amended), commonly known as s.106 agreements, are a mechanism which make a development proposal acceptable in planning terms, that would not otherwise be acceptable. They are focused on site specific mitigation of the impact of development and are an important funding stream going towards the costs of infrastructure needs. S.106 agreements can require land to be used in a particular way or for activities to be carried out although they are typically used as a means to obtaining funding from developers for infrastructure matters including highway and public open space improvements and educational and affordable housing needs as a result of new housing.
- 2.2 Funding infrastructure via s.106 agreements is a historical part of the Planning process and in recent years the total average annual receipt of s.106 monies is £2,653,532.03<sup>1</sup> from an average 60 individual payments each year. The scope of the Planning Compliance team is to ensure these payments are monitored, collected, audited and spent on the infrastructure need the s.106 agreement intended to fund. It is recognised that the values are significant and robust procedures need to be in place to ensure open accountability and risks are managed. This is particularly important for local communities to be satisfied their infrastructure needs are being met and the Council is being effective in discharging its' legal and corporate responsibility.
- 2.3 Previous internal audits<sup>2</sup> have concluded that current processes and controls in place in relation to s.106 agreements are "effective" and "the risk management response is accurate and ensures that the risks are managed effectively."
- 2.4 However and as a result of legislative<sup>3</sup> amendments, the Local Planning Authority will be statutorily required to publically issue an annual Infrastructure Funding Statement by the 31 December 2020. The statement, amongst other non-monetary details **must** include the following details of s.106 matters -
- i) total value of s.106 monies agreed;
  - ii) total value of s.106 monies received;
  - iii) total value of s.106 monies not allocated;
  - iv) total value of s.106 monies allocated and not spent;
  - v) total value of s.106 monies spent;
  - vi) the items of infrastructure on which that money was spent; and
  - vii) total value of s.106 monies refunded,

for the financial year prior to the statement being issued. Moreover, central Government planning policy advice<sup>4</sup> places significant importance upon the transparency and accountability of the s.106 process.

- 2.5 Transparency of infrastructure funding is also a key matter for local ward members. Ward members have an important role to play in the delivery of local infrastructure as they are often able to express their knowledge of local community needs. Consequently local ward members

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<sup>1</sup> Source – Section 106 database years 16/17, 17/18 & 18/19

<sup>2</sup> Latest October 2015

<sup>3</sup> Community Infrastructure Levy Regulations 2010 as amended by the Community Infrastructure Levy (Amendment) (England) (no.2) Regulation 2019 (SI 2019/1103)

<sup>4</sup> National Planning Policy Guidance (Planning Obligations) paragraph 29 <https://www.gov.uk/guidance/planning-obligations>

are consulted upon the expenditure of any s.106 monies likely to be derived from a development proposal very early in the planning process<sup>5</sup>.

- 2.6 The Member Communication Protocol approved by Cabinet seeks to engage, inform and consult with local ward members throughout the planning process when development proposals affect their respective ward. This includes consultation at pre-application stage and in particularly discussions around heads of terms of s.106 agreements from which general infrastructure funds via potential s.106 monies are generally agreed. These heads of terms will inform all decision makers throughout the lifetime of the development, in particular the point where funds are allocated to infrastructure needs.
- 2.7 Of fundamental importance, however, is that s.106 monies can only legally be agreed (the three tests) where the infrastructure it will be spent upon is -
- i) necessary to make the development acceptable in planning terms;
  - ii) directly related to the development; and
  - iii) fairly and reasonably related in scale and kind to the development<sup>6</sup>.
- 2.8 It is common for s.106 agreements to specify where the money shall be spent although occasionally refer to infrastructure needs “within the vicinity of the development”. It is therefore important that members understand and continue to be informed of any decisions to expend s.106 monies and are able to easily obtain information how much funding is available or has been allocated for infrastructure improvements within their wards. Decisions to allocate s.106 monies to types of infrastructure are generally taken by relevant service areas or Capital Boards and must be consistent with the three tests and obligations made by the Council within the s.106 agreement.

### S.106 Process

- 2.9 In light of recent legislative changes the s.106 process is being evaluated and refined to enable the Local Planning Authority to record and report the annual Infrastructure Funding Statement. In the interest of transparency and accountability it is also considered this is an appropriate and opportune time to ensure this process is formally scrutinised for its robustness and that members of the Council can be satisfied the process and management of s.106 infrastructure funding is open and transparent.
- 2.10 The s.106 process has a number of elements from the initial recording of the signed s.106 agreement through to the final delivery of the relevant infrastructure. In brief these steps would include the recording of the signed agreement, monitoring, invoicing, recovery, accounting and review of unspent funds leading to the allocation, expenditure and delivery of infrastructure. The table below sets out the governance arrangements for each of these steps.

Table 1 – s.106 Process

Step	Description	Responsibility	Governance	Consulted	Accountability	Informed
<b>S.106</b>	Legal agreement signed	Planning / Legal Officers	Governed via the established Planning process and legal requirements. Infrastructure needs identified in Planning process	Ward Members, Planning Committee and relevant Service Areas e.g. Parks/Highways	Decisions made under the Scheme of Delegation	Public document available on the Council website
<b>Monitoring</b>	Checking development for commencement and s.106 trigger points	Compliance officer	All s.106 agreements recorded on specific database and monitored/prioritised under Compliance Management Strategy	Not applicable	Compliance Officer	Ward Members via Councillor website

<sup>5</sup> [Development Management Charter](#) / Member Communication Protocol

<sup>6</sup> Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended)

<b>Invoicing</b>	Where due monies are identified, invoice raised	Compliance officer / Business Support	Invoice is raised and recorded via the corporate system (SAP)	Not applicable	Finance officers	None
<b>Recovery</b>	Monies received monitored via SAP system	Finance officers	SAP system identifies all outstanding payments. Payment is receipted to s.106 holding account	Not applicable	Finance / Debt recovery officers	Compliance officer
<b>Accounting / Review</b>	All monies invoiced/received recorded and monitored for expenditure	Compliance officer	s.106 database reports monies sitting in specific s.106 holding account	All relevant service areas notified of available monies on quarterly basis	Finance / Compliance Officer	Ward Members via Councillor website  Public via Infrastructure Funding Statement
<b>Allocation</b>	Infrastructure needs identified	Service Areas/Capital Boards	Relevant Service areas identify allocation in accordance with s.106 agreement	Compliance Officer / Ward Members	Service Areas / Decisions under Scheme of Delegation	Publicly reported via Infrastructure Funding Statement.
<b>Expenditure</b>	Monies spent and infrastructure delivered	Service Areas / Compliance Officer	Service area request monies via pro-forma. Must include Capital Outlay Report reference as agreed under Constitutional finance rules	Finance	Service Area / Compliance officer / Finance	Publicly reported via Infrastructure Funding Statement.

### Community Infrastructure Levy (CIL)

- 2.11 The Council is currently awaiting decision from the Planning Inspectorate following examination of the Council's proposed CIL charging schedule. The benefit of CIL includes an alternative means of obtaining developer contributions proposed to go towards wider strategic infrastructure needs as opposed to s.106 contributions which, as stated in paragraph 2.7 above, are legally bound to only fund local needs as a result of development harm. It is anticipated the Council will be in a position to decide whether or not and when the CIL charging schedule will be adopted and chargeable early 2020.
- 2.12 Both CIL and s.106 contribution can be derived from the same development subject to viability although liability for CIL contributions on chargeable developments are mandatory upon the grant of planning permission. This may impact upon the ability of the Council to seek further funding for local infrastructure needs via s.106 if viability of the development does not allow for additional contributions. In turn local infrastructure needs funded by a reduced s.106 contribution may need to be "topped up" by CIL or via other funding streams.
- 2.13 Detailed options for the adoption and governance of CIL will be provided in future papers for Council to consider although it is anticipated governance of CIL will be closely aligned to the s.106 process as detailed in table 1 above. The Council will also be obligated to publish clear details of where CIL contributions will be expended (the Infrastructure List)<sup>7</sup>.

### Discussion

- 2.14 As set out in the table 1 above the current governance process around the expenditure of s.106 monies with the added transparency provided by the future Infrastructure Funding Statement, provides a clear, open, accountable process around the steps involved throughout the process. Each step of the process builds in clear areas of responsibility, accountability, consultation and transparency to ensure the process is managed effectively.

<sup>7</sup> Regulation 121A of the Community Infrastructure List 2010 (as amended)

- 2.15 It is considered the monitoring of s.106 agreements to secure the payments from developer's works well and can be openly scrutinised as set out in the table above. However it is accepted some members have raised comments around accessibility to the information, particularly where decisions need to be made where the s.106 monies are spent. Currently it is open to members to request information from the S.106 database and previously information of s.106 contributions were available on the Council's intranet. This online facility was lost due to a number of changes to the Council's intranet and it remains unclear how useful this facility was to ward members. Options to re-instate the facility are currently being looked at with officers from I.T.
- 2.16 Notwithstanding this, the introduction of the Infrastructure Funding Statement in 2020 will provide added transparency into where s.106 monies are spent and may equally deal with members concern over where monies are available. However, ease of access to this information may well assist members to make informed request for infrastructure spending for "new" s.106 contributions when consulted at the planning stage.
- 2.17 Overall it is considered the s.106 process is generally effective although to add additional trust into the process further openness to information and decisions within relevant service areas around expenditure on public open spaces, education needs, highway infrastructure and housing needs could benefit local ward members.
- 2.18 Once the S106 money is collected by the Planning Service, through the Compliance Team the next steps of the process of S106 spending which requires further improvements to ensure money is collected is spent in a timely manner and on the infrastructure it was secured to provide in the first place and Members have involvement through the Service area responsible for its expenditure.
- 2.19 Going forward it is suggested that the spending of S106 monies received from developments should be made clearer with Service areas who are responsible for the delivery of the s106 obligations acting in a coordinated way. This could happen through Capital Programme Boards, over seen by Service and Strategic Directors. The spending of the monies received from s106 should align with capital delivery programmes so that unspent and future s106 monies can be used effectively to support the delivery of local infrastructure to help meet the needs of communities and ensure that new developments mitigate their impacts fairly.

### **3. Implications for the Council**

- **Working with People**

The s.106 process has historically a process solely administered by the Council with little information available to communities and members of the public. As a result of a number of audit recommendations, improvements to governance and recent Government advise and legislative changes the process is open to scrutiny and more transparent. These latest review of the s.106 further re-assures the process continues to be transparent to all communities.

- **Working with Partners**

The review of the s.106 process not only adds value to the transparency of the system to local communities but also to businesses and working partners, in particular the West Yorkshire Combined Authority who often benefit from payments towards sustainable transport schemes.

- **Place Based Working**

Local communities are represented by their local ward members who are often best placed to provide knowledge of needs local to the area. The s.106 process aims to be collaborative and embeds the views of local ward members with all key decisions.

- **Improving outcomes for children**

There will be no impact

- **Other (eg Legal/Financial or Human Resources)**

The s.106 process inherently involves the accounting of substantial amounts of financial contributions. Mismanagement of these finances not only carries a financial risk to the Council but also reputational and legal implications if it cannot be demonstrated the funds are expended upon legally agreed infrastructure needs. The s.106 process is designed to eliminate these risks.

#### **4. Consultees and their opinions**

4.1 The s.106 process has evolved over a period in time excess of 10 years and during this period relevant partners have been consulted as the system has been refined. Finance officers have been closely involved in designing the process and have previously made a number of recommendations around the collection, holding and expenditure of s.106 monies.

#### **5. Next steps and timelines**

5.1 The purpose of this report is to clarify the current s.106 processes and provide satisfaction robust procedures are currently in place. However, the Service will ensure the Infrastructure Funding Statement is in place by December 2020 as required by legislation. Officers will also continue to work with I.T. officers to ensure information is freely available to all ward members.

5.2 Any other recommendations from Scrutiny panel will be implemented within agreed timescales.

#### **6. Officer recommendations and reasons**

6.1 As set out in paragraph 2.9 above it is officers opinion that the governance around the s.106 process is effective to minimise risks to the Council and Scrutiny Panel is requested to invite discussion and comment for Executive to endorse the governance process to enable the Council to demonstrate it is collecting and holding section 106 payments in an open and proper manner.

6.2 To add further transparency to the process it is recommended that officers continue to liaise with I.T. colleagues to ensure s.106 information proposed to form part of the Infrastructure Funding Statement (see paragraph 2.4) is available to local ward members via an intranet link.

6.3 It is recognised that openness of decisions where monies will be expended is a matter where members may wish clarity. While currently the process of expenditure is auditable as set out in table 1 above, the recording of decision making within other Service areas does not form part of the s.106 collection process administered by the Planning Compliance team. It is recommended further consultation with relevant Service areas over decision making governance is carried out and future paper is taken to Cabinet. This would further explore the suggestions set out in paragraphs 2.18 and 2.19 of this report.

#### **7. Cabinet Portfolio Holder's recommendations**

7.1 Agreed - with clarification around links to the Community Infrastructure Levy (included above) and sight by Cabinet.

#### **8. Contact officer**

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#### **9. Background Papers and History of Decisions**

None

**10. Service Director responsible**

Karl Battersby – Strategic Director - Economy & Infrastructure