

	REPORT TO CABINET TO BE HELD ON 14 FEBRUARY 2017
	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 DIRECTOR (TW) – 17/33

WARDS AFFECTED: ALL

SUBJECT: UPDATE ON SECTION 106 PLANNING OBLIGATIONS

RECOMMENDATION (S):

1. The updated information on Section 106 (S106) planning obligations be received and noted.
2. That in future this update report shall be incorporated into financial monitoring reports rather than being a separate Cabinet agenda item,

REASON FOR RECOMMENDATION (S):

1. 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.
2. To improve the efficiency of the Cabinet decision-making process, whilst maintaining transparency.

HIGHLIGHTED RISKS:

1. 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.
2. 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 January 2017. 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 A report providing all the information in this report, except in respect of Recommendation 2, is to be considered by Planning & Development Committee on 9 February 2017.

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 Council has at the current time decided not to introduce CIL, since across much of the Borough it would not be viable. 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, so it is best practice now (except for affordable housing) 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 £5.9 million. In addition to approximately £2.1 million, which has been received or has been invoiced, this could result in total potential funds of approximately £8 million. These figures should be treated with caution since payments will not be triggered if a developer decides not to proceed with a scheme. The government has also in recent years 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 amount of off-site contribution required. On larger residential schemes of 11+ units on-site, provision of between 10% and 30% provision is normally 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 few years. In 2012, the revised SPD introduced the payment of a sum towards off-site affordable provision on residential schemes of less than 10 units. It also introduced the 'vacant building credit' which discounts existing floorspace when calculating commuted sums. In November 2014, the government issued planning policy which in effect prevented such sums being levied and the Council amended the SPD accordingly. In 2015, a High Court judgement quashed the national planning policy changes introduced by the Ministerial Statement and the SPD was once again revised so that smaller residential schemes were subject to affordable housing contributions. In 2016, the earlier court judgment was over-ruled, allowing the government to reintroduce its earlier policy restrictions and the Council once again follows this approach when making planning decisions. The eventual result is that affordable contributions will not normally be sought on schemes of less than 11 units or where there is no net gain in floorspace.
- 5.5 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.
- 5.6 Between 2010 and 2015 there was a consistent upward trend in delivery provision of affordable housing units. There has been a reduction in the rate of delivery since the last report in late 2015. A total of 55 affordable units have been completed, although there are quite a substantial number nearing completion, most notably at Middle Deepdale and Helredale Gardens, Whitby. It has been this latter site, together with nearby Eskdale Park, High Mill Farm, Scalby and the final two units at West Garth, Cayton which account for the affordable housing provided in the period covered by this report.
- 5.7 The number of affordable units granted permission and secured by s106 obligations in the last 14 months since December 2015 was 120. Whilst construction of these units cannot be guaranteed, this nevertheless represents a pro rata increase compared to the 130 secured in the period covered by last report which was considerably longer lasting 22 months. The most significant contributions to possible future supply are the extra care facility at the former Scarborough RUFC site and Farside Road, West Ayton, although on the latter the applicants may seek to reduce the total agreed.
- 5.8 The number of sites where affordable housing financial contributions are has declined following confirmation from the courts that the government's policy restrictions are valid. Hence, there was a substantial reduction in the amount collected over the last 14 months compared to the previous period. Pro rata, the £19,000 collected was less than 10% of the comparable figure for the previous period reported. Nonetheless, on occasions there will still be larger sites where on site provision is substituted by payments towards affordable provision. Thus, in 2016 two sites granted planning permission (for McCarthy & Stone at Newby Farm Road and 7-11 Esplanade Gardens, Scarborough)

will together generate over £260,000. Therefore in terms of monies secured through planning permissions, this total in effect makes up on this occasion for the reduction in sums resulting from the loss of the ability to raise monies from smaller housing schemes.

- 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. There is greater flexibility on the expenditure affordable housing contributions than other s106 monies. Firstly, there are no restrictions limiting the pooling of sums. Secondly, the fact that obligations must reasonably relate to development means that a play area, for example, could only normally be funded by an S106 sum if it is in walking distance of the scheme from which the money is raised. By contrast, housing market areas cover a much wider geographical area – hence the only locational restriction contained within most affordable housing obligations is to the effect that spending should take place in the Borough. Recent Cabinet decisions on future expenditure include the Young Person’s Pathway Project on Victoria Road, housing at Sneaton Castle and additional contributions to cover staff costs for securing affordable provision. Current allocated spending commitments total £221,200.

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, notably Middle Deepdale, which will secure on-site open space, play provision and maintenance sums of circa £486,000. 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. Within the last year on site provision of facilities by s106 has included public tennis courts at Southdene, Filey.

Off-Site Provision/ Improvement

- 5.12 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.
- 5.13 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, both the sums negotiated and the amount received, have been high compared to previous years. Of the potential £358,505 negotiated, these have been derived from 11 sites across the Borough, including Sneaton Castle and the Highways Depot in Whitby, Southdene in Filey, Farside Road, West Ayton, Vernon Road and Esplanade Gardens in Scarborough. Payments from developments at Olivers Heights, Scarborough and Eskdale Park in Whitby were the largest sums received, contributing to the total of £223,119.
- 5.14 Expenditure for projects is allocated by Cabinet through the Capital Bid Process and approved by Cabinet. Therefore, where projects are 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. There was only £2,293 spent in the period covered by the report, but there are spending commitments for the Eastside project in Whitby and a report will be considered by Cabinet which will identify how some long-held monies relating to South Cliff Gardens will be spent.

Education

- 5.15 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. On sites of 150+ dwellings sums can be negotiated for secondary schools, but all current sums negotiated will contribute towards primary education. 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 currently exceeds £2.5 million, which overall is larger than the total sum for any other type of expenditure.

- 5.16 The most significant contributions negotiated since the last report relate to Sneaton Castle, Whitby and two sites in East and West Ayton. Payments from the development at West Garth, Cayton towards the local primary school have all been collected and transferred to the County Council and spent on facilities at Cayton Primary School. The first instalment (£433,204) of four, relating to High Mill Farm, has recently been invoiced and this will contribute towards Newby & Scalby Primary School.

Transport

- 5.17 Commuted sums for transport are requested in response to specific impacts on local infrastructure, rather than having standard formulae/thresholds applied to all development. Table 5 in the appendices provides a summary of the global picture and full details of individual obligations are shown in Table 11. The County Council are normally responsible for most expenditure and where a case is in italics it is also responsible for collecting monies. Otherwise, the Borough Council collect the sums and provide regular reminders to the County Council when funds are available for expenditure and also when repayment dates are approaching. This has occurred, but ultimately the County Council are responsible for ensuring expenditure occurs. As can be seen from Table 1, transport is the category which generates the largest potential share of s106 financial contributions after education. It should be noted in some cases the constituent sums making up the £1.8m 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.
- 5.18 The amount of monies secured and subsequently received for transport have fluctuated significantly over recent years, so it is difficult to identify clear trends. The £113,870 negotiated since November 2015 is below average, but still higher than the previously reported period. Sites relating to the development at Weaponness Valley and Sneaton Castle, Whitby were the largest schemes negotiated in this category. Of the £209,113 received, the largest contributions relate to Eskdale Park, Whitby.
- 5.19 Of the £290,000 spent since the last report, £72,000 related to road construction carried out by the Borough Council in the opening up the enlarged Whitby Business Park. The remaining £218,000 was transferred to the County Council to pay for the Mayfield Road signalised junction scheme in Whitby, which was carried out in conjunction with Sirius Minerals, where appropriate providing reimbursement for works carried out. This scheme was also included in the Section 106 agreement for the potash mine. (This is not reported here because it was granted permission by the National Park Authority.) There a number of other schemes where the County Council has drawn up detailed projects and a request for the release of monies is awaited.

Health Infrastructure & Miscellaneous Obligations

- 5.20 Health contributions are summarised in Tables 6 and 12. Where sums are collected, the Borough Council will work with the Care Commissioning Group to identify how it shall be spent. The most notable changes in the last year relate to sites in the Newby/Scalby area. Planning permission has been granted for a new surgery at the former Scarborough Rugby Club site, with additional funding secured from the elderly person's accommodation at Newby Farm Road and the first instalment from High Mill Farm has been billed.
- 5.21 Tables 7 and 13 in the appendices show some of the more important obligations which do not fall 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. Apart from some additional expenditure on the latter, there have been no changes in this category.

Proposed Changes to Reporting Arrangements

- 5.22 In 2006, it was a decision of Cabinet that the Section 106 monitoring report be reported on an annual basis to both Cabinet and Planning & Development Committee. The report is for information purposes only and does not normally require a decision to be made. To help streamline the operation of Cabinet so that it concentrates on decision-making items, it is recommended that the information is presented in future as part of one of the quarterly financial monitoring reports.

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.

7. ACTION PLAN

- 7.1 The following actions are identified:

Objective**Target**

- | | | |
|---|---|----------|
| 1 | Continue monitoring of Legal Agreements | Ongoing |
| 2 | Prepare Monitoring Report | Annually |



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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

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