



SOUTH
KESTEVEN
DISTRICT
COUNCIL



Finance and Economic Overview and Scrutiny Committee

20 February 2024

Report of Councillor Phil Dilks,
Portfolio Holder for Housing and
Planning

Section 106 Update and proposed administration and monitoring fees for Section 106 planning obligations

Report Author

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Purpose of Report

The purpose of this report is to provide an update regarding the Council's monitoring and administration of Section 106 planning obligations. The Committee is asked to review the proposed amendments to the adopted Supplementary Planning Document in relation to administration and monitoring fees for Section 106 (S106) planning obligations.

Recommendations

That the Committee:

1. Notes the update regarding Section 106 Monitoring, including the publication of the Infrastructure Funding Statement.
2. Recommends that Cabinet review and recommends to Full Council that the charging mechanism for the administration and monitoring of Section 106 agreements currently set out in the "Planning Obligations Supplementary Planning Document (2012)" is updated.

Decision Information

Does the report contain any exempt or confidential information not for publication?

No

What are the relevant corporate priorities?

- Enabling Economic Opportunity
- Housing
- Effective Council

Which wards are impacted?

All Wards

1. Implications

Taking into consideration implications relating to finance and procurement, legal and governance, risk and mitigation, health and safety, diversity and inclusion, safeguarding, staffing, community safety, mental health and wellbeing and the impact on the Council's declaration of a climate change emergency, the following implications have been identified:

Finance and Procurement

- 1.1 The introduction of a monitoring fee will enable the Council to recover the staffing and other associated costs involved in the monitoring of S106 obligations. The work involved in properly monitoring S106 agreements is complex, and it is essential that a robust process is in place to ensure that obligations are complied with. Having a robust system will also support spending any financial contributions that are secured.
- 1.2 Whilst the post of Infrastructure Delivery Officer has been created to carry out this role, any income generated will be linked to development rates and there will be a lag between income being received and the introduction of this monitoring fee. Therefore, the income should not be budgeted as a guaranteed income stream.
- 1.3 Fees will need to be monitored to ensure they are reflective of the true costs of administration and monitoring of S106 agreements.

Completed by: Richard Wyles (Deputy Chief Executive and S151 Officer)

Legal and Governance

- 1.4 Section 93 of the Local Government Act Council and the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019 provide the legislative basis upon which the Council can charge for the monitoring and administration of S106 agreements.

Completed by: Graham Watts, Assistant Director (Governance and Public Protection) and Monitoring Officer

2. Background to the Report

- 2.1 The planning process supports the delivery of the Council's economic growth and sustainable neighbourhood ambitions, as identified in the Corporate Plan (2024-2027). This includes housing and economic development objectives identified in the Local Plan. The purpose of the planning system is to contribute to the achievement of sustainable development which means balancing economic, social and environmental objectives.
- 2.2 A Section 106 (S106) agreement is a legally binding agreement or 'planning obligation' between a local planning authority, like South Kesteven District Council and a property owner or developer. The purpose of a S106 agreement is to mitigate the impact of the development on the local community and infrastructure. Typically, these agreements address issues such as:
- Affordable housing
 - Highways
 - Education
 - Public open space and leisure
 - Town centre improvements
- 2.3 When planning obligations are negotiated, it is necessary to ensure the Planning Authority consider the requirements of the Community Infrastructure Levy Regulations (2010) (CIL Regulations), the National Planning Policy Framework (NPPF) and the Local Plan. The NPPF applies only to England and was first published in 2012. It provides the framework for producing Local Plans for housing and other development, which in turn provide the background against which applications for planning permission are decided.
- 2.4 The CIL is the Government's chosen approach to set a mandatory tariff on development. Regulation 122 of the CIL Regulations sets out the three legal tests that must be complied with when entering into a planning obligation. Essentially, any obligation must be;
- (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.
- 2.5 The Council can recover costs associated with the monitoring and administration of S106 agreements. This report provides a service staffing update and sets out the current arrangements for monitoring S106 agreements, the rationale for a monitoring fee and why it should be updated.

Infrastructure Delivery Officer

- 2.6 During a restructure of the Planning Department (Winter 2022-2023), the role of Infrastructure Delivery Officer was created, replacing a more administrative monitoring role. Following a competitive recruitment process, the role was successfully recruited to in September 2023. The role involves monitoring and recording obligations, as well as liaising with stakeholders to ensure any financial contributions are appropriately spent. This is a positive and important role for the Council, highlighting the contribution both planning and planning obligations play in shaping our communities and delivering the Council's growth aspirations.
- 2.7 Currently the Infrastructure Delivery Officer (IDO) is working with the Assistant Director of Planning & Growth, Development Management and Enforcement Officers to review the current processes and practices to identify opportunities for improvement. At its meeting of 7 December 2023, the Planning Committee was provided with an update regarding this work and resolved to receive an update in six months (see **Background papers**).
- 2.8 The work currently being undertaken to review the current processes and practices is taking place in parallel with a scheduled audit.

Infrastructure Funding Statement

- 2.9 Local authorities are required to produce an Infrastructure Funding Statement (IFS) on an annual basis. The Community Infrastructure Levy Regulations 2010 (CIL Regulations) require that from the financial year 2019/2020 onwards, any local authority that has received developer obligation (either through Section 106 planning obligations or the Community Infrastructure Levy (CIL)) must publish an IFS by 31 December each year.
- 2.10 The Planning Committee (7 December 2023) received an update and reviewed the IFS for the financial year 2022-23 prior to its publication on the website. The IFS sets out what has happened in the reporting year across the following four main categories of data:
- Obligations which have been entered into;
 - Money received in any year and not spent;
 - Monies allocated yet not spent during the reported year;
 - Money spent during the reported year.
- 2.11 The 2022-2023 IFS has been published on the Council's website (see **Background papers**).

S106 Monitoring and Administration Fees

- 2.12 The Council is able to set charges to the recover cost of delivering discretionary services. For the Planning Service, this means the Council can recover costs associated with monitoring Section 106 agreements. The legal basis for this charge can be found in the Local Government Act 2003 (Section 93) and clarified in an amendment to the Community Infrastructure Levy Regulations (CIL) (2010 as amended) in 2019.
- 2.13 The CIL Regulations set out that any monitoring or administration fee should be fairly and reasonably related in scale and kind to the development and does not exceed the authority's estimate of its costs of monitoring the development over the lifetime of the planning obligations relating to that development.
- 2.14 The Council has an adopted Supplementary Planning Document (SPD) relating to planning obligations (see **Background Papers**). Whilst the document sets administrative costs, these have not been reviewed since 2012, despite costs of monitoring (principally staffing costs) increasing.
- 2.15 The SPD suggests a monitoring or administration charge should be applied for proposals of more than five dwellings and 1,000 Square Metre (sqm) for commercial developments. Whilst an administrative charge is included in the SPD, a court case in 2015 cast doubt on the ability of a Planning Authority to apply a monitoring fee. This has since been superseded by the amendment to the CIL Regulations (2019) as referenced above (paragraph 2.2).
- 2.16 At the February 2023 (the then) Finance, Economic Development and Corporate Services Overview and Scrutiny Committee agreed a new charging framework for the monitoring of S106 agreements would be presented at a future meeting.
- 2.17 Proper administration of the S106 monitoring regime is resource intensive and it is considered appropriate to ensure monitoring is cost neutral to the Council.

Why a monitoring fee is necessary

- 2.18 By updating and consistently applying a monitoring fee, the Council will be able to provide a more efficient service for all matters related to the monitoring of S106 planning obligations. This will be of benefit to all parties involved in the process.
- 2.20 It is acknowledged developments need to be viable to be delivered and any monitoring fees will be added to the cost of the development. The legislation requires monitoring fees to be proportionate and cover the costs associated with the delivery of the service i.e. aiming for a cost neutral position.
- 2.21 There are two distinct forms of monitoring within S106 agreements:

- Monitoring of commencement and phasing triggers to ensure financial contributions are collected; and
 - Physical monitoring of compliance with the terms of the agreement e.g. monitoring the physical delivery of infrastructure on site or delivery of affordable housing.
- 2.22 Obligations relating to highways and education are usually a County Council matter. Where Lincolnshire County Council (LCC) is a party to the agreement and responsible for collecting and monitoring obligations, it will be a matter for this authority to set its own monitoring fees. South Kesteven District Council will only charge monitoring fees for those elements that it is responsible for monitoring, collecting and using and not for those elements which LCC will be responsible for.
- 2.23 The Planning Practice Guidance (PPG) sets out Local Planning Authorities (LPAs) are required to keep a copy of any planning obligation, along with details of any modifications or discharge of the obligation. Every LPA in receipt of developer contributions is required to publish an Infrastructure Funding Statement (IFS) at least annually (**referred to above**).
- 2.24 To ensure a development is delivered in line with its planning permission, it is important the Council effectively monitors planning obligations. This includes ensuring in circumstances where contributions have been secured in lieu of on-site infrastructure provision, this is spent appropriately. Unspent contributions should be repaid back to the developer in accordance with any agreed clawback clauses.
- 2.25 The PPG states that *“monitoring fees can be a fixed percentage of the total value of the s106 agreement or individual obligation; or they could be a fixed monetary amount per agreement obligation (for example, for in-kind contributions”*, and confirms that Authorities should consider setting a cap to ensure any fees are not excessive.
- 2.26 Work involved in monitoring S106 planning obligations includes:
- Recording the details of the S106 planning obligation on an IT system,
 - Recording triggers for the obligation contained within the agreement,
 - Monitoring the progress of the development to identify when obligations are due to be paid, this includes site visits to monitor development progress,
 - Writing to developers to request financial contributions and ensuring that they are paid by the relevant deadline, this also includes calculating any indexation and late payment amounts,
 - Working with the enforcement team where there are breaches of any obligation,
 - Liaising with third parties to ensure that they are aware of any contributions that have been secured,

- Manage the process through which third parties can request financial contributions are released to them, ensuring this complies with requirements of the planning obligation,
- Recording how financial contributions are spent,
- Working with the planning policy team to prepare the Infrastructure Funding Statement and report as appropriate on delivery of infrastructure.

Setting a proportionate fee

- 2.27 In setting any fees, the Council is required to be proportionate and should not exceed the overall estimated costs of delivering the service. Officers have reviewed the approach taken by other Local Authorities to ensure the proposed fees is similar.
- 2.28 Many Authorities apply a 5% fee for financial contributions to cover the costs of monitoring. The Government also allows 5% of CIL receipts to be used for administration of the Community Infrastructure Levy, as it considers this a proportionate fee for CIL given requirements to effectively monitor collection and spending.
- 2.29 Given Government considers 5% is a reasonable monitoring fee, Officers consider this would be a reasonable fee for the monitoring of Section 106 agreements.
- 2.30 Not all obligations relate to financial contributions yet there are still requirements to monitor those agreements. For example, in relation to affordable housing, the Council will need to ensure the agreed mix is provided at the relevant triggers and a suitable registered provider is on board to manage the affordable housing.
- 2.31 As illustrated in **Table 1**, it is proposed the total monitoring fee per agreement is capped at £15,000. This is an uplift from the £10,000 cap set out in the 2012 SPD and has been calculated by applying indexation to the 2012 cap. The use of a cap will ensure the monitoring fee is reasonable and does not exceed the actual cost of monitoring.
- 2.32 Larger developments (over 1,000 dwellings or 5,000 sqm floorspace) are ordinarily complex, with multiple obligations payable at several trigger points spanning many years. Recent and current examples include the urban extensions to Grantham and Stamford, as well as the Designer Outlet schemes. In these cases, to ensure any administration and monitoring fee covers the costs of monitoring, all fees will be calculated on a case-by-case basis.
- 2.33 There are some initial administration costs associated with monitoring S106 agreements which are similar, regardless of the number of dwellings or the amount of floor space proposed. For this reason, a one-off charge of £1,500 to monitor agreements is proposed where there are no financial obligations secured. This amount will also be the minimum monitoring fee in all other cases.

- 2.34 To ensure the fee continues to cover the costs of monitoring Section 106 planning obligations, it is recommended the proposed monitoring fees are reviewed on an annual basis and increased in line with the indexation factor set by the Building Cost Information Service All-in Tender Price Index (BCIS TPI). This will ensure monitoring fees are kept up to date, in-line with other financial obligations required by S106 Agreements.
- 2.35 The proposed monitoring fees are set out in **Table 1**, as follows:

Table 1: Proposed monitoring fees		
	Fee 2023/2024	Comment
Section 106 – Non-Financial Up to 1,000 dwellings or 5,000 sqm floorspace	£1,500	One-off fee for any Section 106 agreements with non-financial clauses. This will be reviewed on an annual basis and subject to indexation
Section 106 – Financial Up to 1,000 dwellings or 5,000 sqm floorspace	£1,500 minimum monitoring fee plus 5% of financial obligations	Monitoring fee capped at a maximum of £15,000 per agreement. This will be reviewed on an annual basis and subject to indexation
Section 106 agreements with over 1,000 dwellings or 5,000 sqm of non-residential floorspace	Variable, to be agreed on a case-by-case basis.	Each development over 1,000 dwellings or more than 5,000 sqm floorspace will be worked out on an individual basis based on the amount of monitoring work involved. Any agreed monitoring fee will be subject to indexation

3. Key Considerations

- 3.1 The updates regarding the appointment of the Infrastructure Delivery Officer, the review of processes and practice including the audit and publication of the Infrastructure Funding Statement are included for noting. Further actions associated with the outcomes will be reported to the Governance and Audit and Planning Committees accordingly.
- 3.2 The Committee is requested to review the proposed updated monitoring and administration fees proposal and recommend to Cabinet that the adopted SPD for planning obligations is updated accordingly. There are no budget setting implications for this in the next financial year because there will be a lag between the amended fees and their collection meaning that the budget does not require amendment.

4. Other Options Considered

- 4.1 In relation to the monitoring and administration fees, the alternative is to retain, as set out in the adopted Planning Obligations SPD, the existing fees. However, this has not been reviewed in the last 12 years, despite costs of monitoring (principally staffing costs) increasing since the previous charge was agreed in 2012. Therefore the 'do nothing' option has been discounted.

5. Reasons for the Recommendation

- 5.1 The reason for the recommendation is to ensure the Council can recover the costs associated with the monitoring of S106 planning obligations. This will ensure the Council can robustly provide this service. The amended monitoring charge would update the overall cap applied and provide clarity about when to apply the charge.
- 5.2 As the Council's adopted SPD relating to S106 agreements requires updating to reflect the proposed administration and monitoring charges, Cabinet followed by Full Council will be required to review and subsequently amend the adopted policy.
- 5.3 Whilst the fees and charges for 2024/2025 will be agreed by Full Council on 29 February 2024 when the budget is agreed, any income received from these amended charges is linked to development rates which are not controlled by the Council. As a result it is not proposed to budget for any income in 2024/2025; this will be monitored and may change in future years. This means that the SPD can be reviewed and amended outside of the normal budget setting process.

6. Background Papers

- 6.1 *Planning Obligations Supplementary Planning Document: June 2012*, available online at:
https://www.southkesteven.gov.uk/sites/default/files/2023-08/INF8_Planning_Obligations_SPD_2012.pdf
- 6.2 *Section 106 (Planning Obligations) Agreement Monitoring Update Report - Report to Finance, Economic Development and Corporate Services Overview and Scrutiny Committee*, published 21 February 2023, available online at:
<https://moderngov.southkesteven.gov.uk/documents/s36955/S106%20Report.pdf>
- 6.3 *Annual Infrastructure Funding Statement (2022-2023) and Section 106 Update (as of November 2023)* – Report to Planning Committee, published 7 December 2023, available online at:
<https://moderngov.southkesteven.gov.uk/documents/s39842/6%20S106%20and%20IFS%20Committee%20Report.pdf>
- 6.4 *South Kesteven District Council Infrastructure Funding Statement 2022/2023*, published December 2023, available online at:

<https://www.southkesteven.gov.uk/sites/default/files/2023-12/Infrastructure%20funding%20statement%202022-2023.pdf>