

# Scrutiny report

Author: David Burson

Telephone number: 01491 823272

Email: [david.burson@southandvale.gov.uk](mailto:david.burson@southandvale.gov.uk)

Strategic Director: Anna Robinson

Cabinet Portfolio Holder: Roger Cox

Telephone number: 01367 243360

E-mail: [roger.cox@whitehorsedc.gov.uk](mailto:roger.cox@whitehorsedc.gov.uk)

Paper for Vale Scrutiny Committee on: 24 October 2013

## S106 Planning Obligations Monitoring Report 2013

### Recommendation

That scrutiny committee considers and provides comments to the cabinet member for planning (Development Management) on the progress in setting up monitoring of s106 obligations.

### Purpose of Report

1. This report aims to update councillors on;
  - Actions taken following the the S106 Audit review 2010
  - the processes past and future for the management of S106s including developing protocols
  - the review of historic S106 performance
  - summary of financial sums received, spent and current balance
  - our next steps on the wider infrastructure delivery work

## **Background**

2. Planning obligations under Section 106 of the Town and Country Planning Act 1990 are commonly known as S106 agreements. They provide a formal legal mechanism to secure measures that help make development proposals acceptable in planning terms. S106 agreements are our current method for guaranteeing developer contributions for infrastructure to mitigate the development impacts. The legal framework for collecting contributions for infrastructure is set out in Appendix 1.
3. Under S106 agreements developers and landowners are legally obliged to make the required contributions. The agreement sets out the obligations of the developer in terms of what contributions are to be made and at what stage (triggers) of the development they are required. For the council, the agreement sets out what the contribution is to be spent on and the timeframe for it to be delivered.
4. Under S106 agreements developers are normally required to notify the council when they reach key stages of a development and in response, where these stages trigger a financial obligation, we will invoice for the due amount.
5. The signing of an agreement does not guarantee the funds. As S106 agreements are to mitigate impacts of development they are only paid if a development occurs and the triggers have been reached. A significant proportion of planning permissions are never implemented. As a result a proportion of contributions agreed never come to fruition. Where a development does proceed contributions will be paid at key stages such as a certain levels of occupation, e.g. the 50<sup>th</sup> dwelling. On large developments these triggers may not occur for several years, which impact on infrastructure delivery.
6. There are a minority of instances where developers pass trigger points, don't advise the council and delay or fail to pay contributions due. For this reason we require a robust S106 monitoring system.
7. Our S106 audit review in 2010 made a number of recommendations (Appendix 2) to improve the way we work and monitor receipts and expenditure. This report addresses or updates our progress towards meeting the recommendations.

## **Monitoring process – past**

8. Historically we have not had a formal process for the monitoring of S106 payments, or their spending. All agreements (over 800) that date back to 1990 are recorded on our land charges register and a copy was held with the planning application. Planning application case officers oversaw new developments and their contributions. Planning conditions normally require the submission of detailed information ahead of implementation of a scheme. The submission of details was an indicator that a development was likely to commence and provided an alert for officers to expect contributions, where required, to be paid.

9. Our enforcement team collected records for some large developments, where payments were received, but this was not proactive monitoring. There was no formal process for regular review of new developments where agreements were in place, nor was there any performance reporting. Where payments were made they are documented and can be tracked through to their eventual spending, including who was responsible. These records (spreadsheets), have been the only tool in managing S106 finances. However, they were not directly linked to the development undertaken and did not identify where a developer failed to make a payment.

## **Current processes**

10. Our S106 agreements contain numerous obligations (approx. 5,000 plus), which can be split across several triggers. The historical style of S106 agreements has meant some of the triggers are difficult to find. The style of agreements has changed in the last few years, but there is still room for improvement.
11. Recognising in 2010 that we did not have a robust monitoring system for S106 agreements in place, part of the new planning database specification, agreed in 2011, provided the opportunity to appropriately monitoring agreements. The database (Ocella) became live in April 2012 and we have captured each obligation, where contributions are due, the triggers and what has been spent. This now means we can properly monitor S106 agreements. It enables officers to advised developers and customers including town and parish councils what funds exist, when the triggers are and more accurately, whether funds are due. The latter is partly linked to other processes using the Ocella database.
12. Although developers are still required to notify us when they reach key stages in a development, we now use other mechanisms to proactively monitor development. In addition to the day to day monitoring of sites by case officers dealing with planning condition discharge or amendments that often give an indication of a development commencing; we link to Building Control commencements. As a backup, when we undertake our annual survey of housing completions, in preparation for our annual Housing Statement, this will capture any developments commenced, the number of houses built and so the triggers reached to ensure no contributions due are missed. Similarly, our work with the registered providers on affordable housing helps monitor development progress.
13. As part of the planning staff restructure we have a dedicated Community Infrastructure Officer to co-ordinate monitoring, advise officers, developers and the public, and take action should contributions not be forthcoming. The officer maintains the live database of agreements, receipts and spending, will undertake monthly monitoring and responds to public enquiries, including Freedom of Information requests. We are also working towards providing the details of agreements and monies due/spent on our web site to allow access for all our customers.
14. Alongside our new robust monitoring system to ensure we collect all payments due we are also improving the management of our S106 receipts and expenditure. We have started to use our financial monitoring system (Agresso)

to itemise S106 receipts and outgoings. Each category of infrastructure is given a unique identity to enable auditing.

15. As part of improving our systems we are developing protocols to ensure receipts collected are spent in accordance with agreements in a timely manner (within 10 years), by council services, town and parish councils or other bodies. The processes being developed are set out at Appendix 3.
16. Our improved monitoring of developments will allow regular reporting of S106 performance and an annual review of spending and receipts to make sure new development mitigates its impact on the local community.

## Historic S106

17. We have reviewed our historic S106 agreements to show contributions agreed to date. A summary of the contributions we have secured in S106 agreements between 2002-2013 is set out below in table 1.

Table 1. S106 Contributions agreed 2002-2013

	Infrastructure category	Total 2002-2013 (£)
VOWH	Affordable Housing	14,003
	Community Buildings	70,300
	Combined Infrastructure	62,653
	Countryside	66,500
	Car Parks	43,000
	Cycle Paths	55,000
	Facilities	46,216
	Indoor Sport	473,747
	Miscellaneous	132,338
	Open Space	916,016
	Outdoor Sport	903,829
	Public Art	636,352
	Play Areas	554,953
	Public Transport	83,416
	Community Safety	320,482
	Social Care	293,385
	Waste and Recycling	151,911
	<b>Subtotal</b>	<b>4,824,101</b>
OCC	Combined Infrastructure	7,775,639
	Drainage	8,000
	Education	3,914,556
	Libraries	390,009
	Museums	10,222
	Miscellaneous	553,715
	Primary Education	1,823,091
	Public Transport	1,928,703
	Rights of Way	21,500
	Road Infrastructure	8,444,239
	Secondary Education	1,788,832

	<b>Special Educational Needs</b>	63,878
	<b>Social and Healthcare</b>	218,545
	<b>Waste Facilities</b>	68,828
	<b>Subtotal</b>	<b>27,009,459</b>
	<b>Total</b>	<b>31,833,860</b>

18. Sums secured for infrastructure provided direct to Oxfordshire County Council within our district are provided for context. Although these sums were negotiated by our planning officers and supported by County Council staff, they are secured, monitored and administered by the County Council.
19. As noted earlier the securing of a sum in a S106 does not normally mean it is immediately due. The sums agreed (Table 1) for the period, 2002 - 2013 are not guaranteed payments as they may only be due if the development has commenced or a trigger has been reached. For this reason the comparison between the 'S106 Contributions agreed' and the 'S106 receipts' (Table 2) is not relevant. Sums secured in S106 are also normally index linked, which takes account of any fluctuation in costs over time between when the agreement was signed and actual payment; consequently sums paid, rarely match the sum requested.
20. In order to assess the performance of historic S106 agreements we have reviewed how many developments commenced, that made S106 payments. As there can be a significant delay between the signing of a S106 and contributions becoming due, we have selected a sample three years, 2008 – 2010 (86 agreements), where it is likely that development has started and would have reached trigger points. In this period we have undertaken some spot checks on agreements. Eight agreements were selected, six of which have commenced and have been fully reviewed. Our analysis shows that all but one financial obligation due have been correctly paid. One example of this analysis, showing where there is an obligation outstanding, is set out at Appendix 4. We are pursuing this outstanding sum due.
21. We intend to undertake a more fine grain review, particularly on larger schemes to confirm whether specific triggers have been passed and ensure all contributions due have been paid. Initially however, our high level review indicates that developers generally have paid contributions where required.

## Summary of S106 receipts

22. Table 2 below sets out the S106 sums received by the council between 2005/06 and 2012/13. This covers the period available from our present financial records. Also provided for context are the S106 receipts by Oxfordshire County Council in our district for the same period.

Table 2, S106 Receipts 2005/06 to 2012/13

	Infrastructure Category	Receipt 2005/06 to 20012/13 (£)
VOWH	Affordable housing	455,000
	Air quality	0
	Community Buildings	532,638
	Combined Infrastructure	0
	Countryside	2,744
	Car Parks	40,000
	Drainage	0
	Facilities	0
	Indoor Sport	48,932
	Miscellaneous	0
	Open Space	57,974
	Outdoor Sport	314,386
	Public Art	310,149
	Play Areas	127,794
	Public Transport	5,000
	Community Safety	0
	Social Care	0
Waste and Recycling	6,981	
	<b>Subtotal</b>	<b>1,905,016</b>
OCC	Transport	3,853,033
	Education	4,541,417
	Library	454,642
	Museum	14,641
	Adult Education	0
	Countryside	495
	Social & Health Care	172,062
	Waste	434,594
	<b>Subtotal</b>	<b>9,471,084</b>
	<b>Total</b>	<b>11,376,100</b>

23. The most significant items of infrastructure are education and transport both collected by the County Council. The greatest contributions for us were community buildings, affordable housing and outdoor sport. An annual breakdown of S106 receipts during this period is attached to this report at Appendix 5.

24. In addition to financial contributions, we have also collected infrastructure contributions in kind. The most common element delivered in this way is affordable housing, with our policies favouring on site provision wherever possible. On larger sites other important infrastructure has also been secured in kind, in place of a financial payment. Examples of this are the open space and sports facilities, e.g. Faringdon (Appendix 4). The provision of infrastructure in kind has benefits in terms of timing and ease of delivery by the developer. The quality of the infrastructure is usually agreed by a specification, which forms part of the agreement.

## Summary of S106 spending

25. Table 3 below sets out the S106 sums spent by the council or bodies (e.g. town and parish councils) between 2005/06 and 2012/13. This covers the entire period available from our present financial records. Also provided for context are the S106 receipts for Oxfordshire County Council in our district for the same period.

Table 3. S106 Receipts 2005/06 to 2012/13

	Infrastructure Category	Spending 2005/06 to 2012/13 (£)
VOWH	Affordable housing	0
	Air quality	118,600
	Community Buildings	160,000
	Combined Infrastructure	0
	Countryside	6,485
	Car Parks	19,688
	Drainage	0
	Facilities	0
	Indoor Sport	37,988
	Miscellaneous	2,181
	Open Space	72,626
	Outdoor Sport	327,780
	Public Art	206,107
	Play Areas	59,470
	Public Transport	0
	Community Safety	91,000
	Social Care	0
	Waste and Recycling	0
	<b>Subtotal</b>	<b>1,101,925</b>
OCC	Transport	2,107,094
	Education	1,149,295
	Library	281,271
	Museum	15,050
	Adult Education	0
	Countryside	0
	Social & Health Care	0
	Waste	0
	<b>Subtotal</b>	<b>3,552,711</b>
	<b>Total</b>	<b>4,654,636</b>

26. The spending record covers a finite period in time (2005/06 to 2012/13); some sums received prior to this period will have been spent within it. We have not had to return any funds due to non-expenditure. The expenditure within this period has been in accordance with the S106 agreement obligations. An annual breakdown of spending is attached as Appendix 5.

27. S106 receipts are often pooled before sufficient funds are available to deliver the infrastructure or pooled with other funds to deliver a larger item of infrastructure that a single development could not support, such as a major leisure facility or community building. This can allow a greater overall benefit for the community, than providing infrastructure in a piecemeal fashion; it does however require that some contributions are held for a time, while others are collected.
28. Regulations in the form of the Community Infrastructure Levy Regulations 2010 (as amended) (CIL) dictate that a maximum of five S106 contributions can be pooled toward a single item of infrastructure since 2010. This limitation is due to come into effect in April 2014, although following a Government consultation earlier this year it may be delayed until April 2015. We are progressing our CIL in parallel with our emerging Local Plan Part 1.
29. We are managing the pooling of contributions so that we do not run foul of the limitation of five contributions. The wording of agreements needs to be carefully drafted to ensure that we can fund infrastructure yet be sufficiently specific to meet the tests required under the Community Infrastructure Levy Regulations 2010 (see Appendix 1). The CIL does allow unlimited pooling of contributions.
30. Some funds collected are on behalf of third parties, such as for town and parish councils to provide community facilities. We hold the funds until the town or parish council is in a position to use them and the district council can ensure they will be spent in accordance with the terms of the s106 agreement. Although some town and parish councils are set up to spend the money, others are not and are content that we hold the funds on their behalf and assist them to spend it.
31. Overall our balance (VOWH) remaining to be spent on infrastructure is set out in the table below;

Table 4, VOWH S106 balance August 2013

<b>Balance @ 31 March 2013 (£)</b>		
<b>VOWH</b>	<b>Balance B/F 31/03/05</b>	<b>759,172</b>
	<b>Total receipts 2005/06 – 2012/13</b>	<b>1,905,016</b>
	<b>Total spend 2005/06 – 2012/13</b>	<b>1,101,925</b>
	<b>Total balance</b>	<b>1,562,263</b>

32. In terms of our (VOWH) overall historic S106 performance from the data analysed to date (spot checks) we have secured the majority of correct funds required to be paid by developers. We have spent some of these funds, which accord with the S106 agreements and have not had to return funds to developers. We now have a system and a resource (currently vacant) to regularly manage and monitor agreements and will be reviewing these on a monthly basis with annual reports to Cabinet. There is further refined scrutiny of agreements to be undertaken, but new agreements and details are being logged and monitored.

## **Response to Audit Review 2010**

33. In response to the Audit review the actions undertaken, as set out in this report, have addressed the recommendations made, albeit some are work in progress to implement new processes.

### **Next Steps**

34. There is a variety of policy work on S106 and infrastructure delivery that officers are developing for cabinet consideration. Such work does not form part of this monitoring report. However, the work includes developing a Supplementary Planning Document for S106s, setting out requirements, justification and policy background (CIL compliant), which could sit along side our Community Infrastructure Levy. This will follow our emerging Local Plan Part 1. In addition, recognising scheme viability is fundamental, we are developing some guidelines to help prioritise officer negotiations on infrastructure.

### **Conclusion**

35. Following a review of our previous S106 performance monitoring system we now have in place a robust system to record and monitor existing agreements, ensure appropriate spend and respond to customer enquiries.

36. In summary we can conclude the following;

- All S106 legal agreements dating back to 1990 are recorded on our central database, Ocella.
- We have a comprehensive record of monies due, triggers and monies received. Using our historic records we are able to establish on commenced developments whether payments due have been secured or we need to chase.
- With the increased use of Ocella and Agresso proactive monitoring of development, receipts and spending is in place.
- We are now able to respond efficiently to customer enquiries and Freedom of Information Requests. We are preparing internet access of the data for the public to view.
- We have and are developing protocols to ensure third parties can be paid in a timely manner and appropriate community infrastructure can be delivered.
- An annual report to Strategic Management Board and Cabinet will be prepared at the end of the financial year, regarding receipt, expenditure, our balance along with details of outstanding amounts being pursued.
- As part of the next steps we are developing our policy to sit alongside our community infrastructure levy and Local Plan Part 1.

## Appendices

1. Legal Framework of S106 agreements
2. S106 Audit 2010 recommendations
3. Developing protocols for third parties
4. Example details of an agreement
5. Receipt and spending annual amounts

### **Legal framework for collecting developer contributions through S106 agreements**

Planning obligations under Section 106 of the Town and Country Planning Act 1990, commonly known as S106 agreements, are a mechanism to secure measures to help make development proposals acceptable in planning terms. S106 agreements are our current method for securing developer contributions for infrastructure to mitigate the development impacts. They can also be used to secure affordable housing, restrict development or uses of land.

The agreements are legally binding on each party and become a charge on the land. The agreement sets out the obligations of the developer in terms of what contributions are to be made and at what stage (triggers) of the development they are required. For the council, the agreement sets out what the contribution is to be spent on and the timeframe for it to be delivered.

There are legal tests as set out in the Community Infrastructure Levy Regulations 2010 and also in the National Planning Policy Framework (NPPF), which need to be satisfied before securing a S106. These tests are:

1. necessary to make the development acceptable in planning terms
2. directly related to the development, and
3. fairly and reasonably related in scale and kind to the development.

In order to secure a financial obligation sufficient evidence to justify the request must be available and supported by an appropriate planning policy (Development Plan). Even if parties are in agreement over planning obligations, if an appeal occurs the planning inspector will review the agreement and its obligations. In addition developers can appeal an obligation after five years, which has recently been reduced to three years (until 2015). In the current economic climate and as set out in the NPPF, development viability is important and we need to be flexible about obligations to prevent planned development being stalled. A recent change to the regulations also means that developers can renegotiate agreements where they include affordable housing and there is a risk of scheme viability.

The Community Infrastructure Levy (CIL) remains the government's preferred vehicle for the collection of developer contributions; however S106 is likely to retain an important role, even subsequent to any adoption of CIL. We need to demonstrate past performance and future use of S106 to deliver infrastructure. This information will also form a vital component of a CIL evidence base when we progress our charging schedule to Examination. We intend to progress our CIL charging schedule parallel to the emerging local plan, as we need an up to date local plan and infrastructure delivery plan to support CIL.

### S106 Audit review 2010

The recommendations of the S106 audit review undertaken in 2010, were:

- Creation of a central database of S106 agreements using Ocella
- Review the balance from historic agreements to ensure funds are spent in accord with terms of agreements
- Regular reviews of S106 records for commitments, receipts and expenditure
- Implement formal processes for securing, monitoring, receiving and spending S106 monies,
- Create a proactive monitoring system to ensure prompt payments by developers
- Implement a formal reporting mechanism for agreements including income, expenditure and future amounts due
- Implement a secure, transparent process for release of S106 funds to third parties

### **New protocols being developed**

It is necessary to ensure receipts are spent in accordance with the S106 agreement and within the time limit specified (usually ten years). Most of the monies received by the district council are spent by the service teams; particularly leisure services.

Upon the receipt of S106 monies the Community Infrastructure Officer alerts the relevant service and clarifies how the monies can be spent. The officer will monitor progress and require evidence of expenditure to meet the requirements of the S106.

Monies that are received towards other infrastructure provided by third parties need to be released. It is important that this process is simple and transparent while maintaining robustness and security for all parties.

Where the S106 identifies funding for a particular project, which has been agreed through a planning application either by the planning committee or by delegated authority the monies must be allocated for that project. The Head of Planning should release funds to a qualifying body if they show the contribution will be used in accord with the S106. Bodies will be required to confirm what the funds will be spent on, land ownership, demonstrate relevant permissions have been secured and provide at least two quotes for the project.

Alternatively, if the S106 agreement identifies funds for a broader purpose, such as 'community facilities' then a process similar to a CIF bid will be required and agreement by Strategic Management Team (< £20,000) or Cabinet member (£20,000 to < £100,000) and Council (£100,000 plus) will be required in accordance with the constitution (proposed amendment). Requests for funds will be reviewed in co-operation with the grants team making use of their expertise. This will also allow the opportunity for match funding and an overview of other funding sources. This process is under development and will clearly detail responsibility for managing bids, details required from applicants and processes for approving the release of funds.

Where we agree to release S106 funds an agreement will be required between ourselves and the body receiving funds. This sets clear conditions to ensure the funds are spent correctly. We currently have a standard third party legal agreement which has been drafted by Legal Services and is in use. We are exploring the use of a simplified form of agreement for the release of smaller sums.

The adoption of new processes will be subject to it satisfying the requirements of legal and audit in being suitably transparent and robust.