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# INTRODUCTION

We decided to carry out a review of Section 106 planning agreements because Members of the Council were aware that the Section 106 “pot” had grown to many millions of pounds and we were concerned that this was a sign of lack of management controls in place. In addition, there also seemed to be confusion by Members about the process for negotiating Section 106 Agreements, who undertook it, and whether the process was being utilised to its greatest effect.

The review had three main objectives:

- To evaluate how effectively the resources secured through Section 106 Agreements are managed and utilised.
- To evaluate the impact of changes to Government policy on Section 106 Agreements.
- To make recommendations to the Cabinet to improve effectiveness of the Section 106 Agreement process in the future.

We have gathered information for this review from a number of sources, including:

Meetings with planning officers, finance officers in Environment & Regeneration, officers from Children & Young People, Highways, Housing Strategy, Legal Services and Sport & Recreation.

Throughout this report we have used the term “Section 106 Agreements” to describe the document that contains the Planning Obligations which the Local Planning Authority considers should be imposed on an owner/developer before permission can be granted. An owner can also sign up to a unilateral undertaking to effectively volunteer to have Planning Obligations imposed on their land. However, in this report, the term S106 Agreement will be used to cover both undertakings and agreements.

Section 2 of this report summarises the information that we have gathered as part of our review. We would like to thank all those people who have taken the time to meet with us. We have made a number of recommendations in Section 3 of the report which we believe will improve the way the Council negotiates Section 106 Agreements across the borough. These recommendations will be presented to the Council’s Cabinet and for those recommendations that are accepted, we will monitor the progress to implement them.

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# BACKGROUND INFORMATION

## What are Section 106 Agreements?

The principle objective of the planning system is to deliver sustainable development, through which Government social, environmental and economic objectives can be achieved. This is done through:

- a) the Council's Local Development Plan, which gives an overall vision of development requirements for the Telford and Wrekin area over the next 20 years;
- b) a transparent decision making process for individual planning applications.

A planning application, which would otherwise be unacceptable, may become acceptable, through the use of conditions or Section 106 Planning Agreements.

Planning Circular 100/95 sets out how each of these mechanisms may be used. It makes it clear that, where possible, the use of conditions is preferable to the use of Section 106 Agreements as the developer loses the right to appeal if a Section 106 Agreement is used. Generally, conditions are used to govern the implementation of the permission within the development and obligations on the site or adjacent land owned by the applicant, outside these areas Section 106 Agreements would be used.

Section 106 Agreements are generally negotiated between the Local Planning Authority and persons with an interest in a piece of land. They might be used to:

- prescribe the nature of a development e.g. the mechanism for ensuring that an appropriate proportion of affordable housing is maintained on site for as long as possible. There may be some circumstances where the inclusion of affordable housing is not possible on site so alternatively the obligation could require that a financial contribution be made.
- compensate for loss of damage created by a development e.g. obligations could be used to offset the loss of or damage to a feature or resource (like the loss of open space) that is present on the development site or nearby through substitution, replacement or regeneration.
- mitigate a developer's impact e.g. where a proposed development is not acceptable in planning terms because of inadequate access or public transport provision, obligations could for example, be used to secure contributions towards a pedestrian crossing facility, a new access road or a bus service.

One fundamental principle that applies to the use of Section 106 Agreements is that planning permission may not be bought or sold; it would therefore not be acceptable for a developer to offer an inducement that does not relate to the development. Likewise Section 106 Agreements cannot be used to secure

a share in the profits of a development for the community. Section 106 Agreements are not required for all developments and government guidance requires that Section 106 Agreements should only be sought where the following five tests can be satisfied:

A Section 106 Agreement must be:

- relevant to planning;
- necessary to make the proposed development acceptable in planning terms;
- directly related to the proposed development - either there should be a functional or geographical link between the development and the item being provided as part of the developer's contribution;
- fairly and reasonably related in scale and kind to the proposed development – developers may reasonably be expected to contribute to the cost of all or part of additional infrastructure provision which would not be necessary but for the development. Section 106 Agreements should not be used to resolve existing deficiencies. The agreement should be directly related in scale to the impact which the proposed development will make;
- and reasonable in all other aspects.

Contributions under a planning obligation can be either in kind or a financial contribution:

- financial – payments can be made in a lump sum or an endowment or if beneficial to all parties and not unduly complicated as phased payments over a period of time;
- in-kind – where the developer builds or provides directly the matters necessary to fulfil the agreement;
- maintenance payments – where agreements are for the provision of facilities which are for the benefit of the users of a development the developer could be required to pay for subsequent maintenance. This could be required for perpetuity;
- pooled contributions – where the combined impact of a number of developments creates a need for infrastructure it may be reasonable for the associated developers' contributions under a Section 106 Agreement to be pooled. In the event that contributions are made towards specific infrastructure provision but the infrastructure is not provided by the Council within the agreed timeframe, arrangements should be made for contributions to be returned to developers.

## **Determining what is included in a S106**

### Identification and prioritisation of requirements

The starting point will be policies contained in the Council's Wrekin Local Plan and the new Local Development Framework that the Council takes a lead on producing, but in consultation with stakeholders and the community. The Wrekin Local Plan was adopted in 2000 but to a large extent has been

superseded by the new Government requirement for a Local Development Framework which is a folder of planning documents which outlines the special strategy for the local area. As part of the transition to the new Local Development Framework (LDF) planning system, not all Wrekin Local Plan policies remain part of the Development Plan. After 27th September 2007, only those Wrekin Local Plan policies that have been approved by the Secretary of State as "saved policies" can remain part of the Development Plan. In the current Wrekin Local Plan the following parts pertaining to Section 106 Agreements remain as "saved policies":

D5	<p>Public Art – The Council will seek to negotiate the provision of works of public art as part of major development schemes, defined as:</p> <ul style="list-style-type: none"> <li>a) development sites of more than one hectare</li> <li>b) all non-residential developments of more than 1000 s.q.m.</li> </ul>
H22	<p>Community Facilities – contributions will be sought from major new residential development towards the provision of the following in appropriate circumstances:</p> <ul style="list-style-type: none"> <li>a) primary education facilities;</li> <li>b) community facilities;</li> <li>c) local health care facilities.</li> </ul>
H23	<p>Affordable Housing – on new housing land allocations in Telford of 0.5ha or above or 15 dwellings or above, throughout the plan period, the Council will pursue, through negotiation, an overall target of 38% of dwellings for affordable housing, both social housing and low cost market housing, via registered social landlords or through the use of planning conditions or obligations.</p>
T22	<p>Section 106 Agreements – In all new developments, necessary improvements to meet the transport needs of the development in accordance with all policies of this Plan, will be provided and funded by the development. Such improvements will include in appropriate cases:</p> <ul style="list-style-type: none"> <li>a) improvements to existing highways and provision of new roads,</li> <li>b) provision for public transport improvements</li> <li>c) traffic calming measures</li> <li>d) infrastructure to meet the needs of the pedestrians, cyclists and horse riders.</li> <li>e) access for people with disabilities</li> </ul>
OL12	<p>Open Land and Landscape - Contributions From New Development</p> <p>In considering development proposals, the Council will seek the following in relation to landscaping and the provision of open land:</p> <ul style="list-style-type: none"> <li>a) an appropriate landscape setting in accordance with the location, nature and scale of the development;</li> <li>b) protection and appropriate enhancement works to areas of green network which are clearly related to the</li> </ul>

	<p>development site in physical or visual terms;</p> <p>c) footpath, bridleway and cycleway links, to replace those lost as a result of the development, or considered necessary as a result of the development;</p> <p>d) on development sites within the defined community forest area of search, tree planting and other reasonable and appropriate measures towards the establishment of the community forest, where they are clearly and directly related to the proposed development;</p> <p>e) protection and appropriate enhancement of important ecological or archaeological sites and wildlife habitats that may be adversely affected by the development;</p> <p>f) protection of all legally protected species affected by the development;</p> <p>g) where a recreation or sports facility or other feature is lost through development a suitable replacement facility or feature of equal or enhanced quality and accessibility is provided.</p>
OL13	<p>Maintenance of Open Space – The Council will seek a legal agreement to ensure that provision is made for the long term maintenance of open space or landscaping that is provided principally for the benefit of the new development.</p>
LR6	<p>Developers Contributions to Outdoor Recreational Open Space Within New Residential Developments - In accordance with policy LR4 when granting planning permission for new residential development, The Council will require the provision of outdoor recreational open space within new housing development to meet the standards set out by the National Playing Fields Association of 2.34 hectares per 1,000 people. On larger sites as part of this requirement, the following equipped play provision will be sought:</p> <p>a) on sites providing more than 75 and less than 200 new child bed spaces (or where two or more adjacent sites are combining to provide this level of new bed spaces) a “local” equipped area for play;</p> <p>b) On sites of 200 new child bed spaces or more (or where two or more adjacent sites are combining to provide this level of new bed spaces) a “neighbourhood” equipped area for play.</p> <p>The Council will seek legal agreement to ensure the provision of outdoor recreational open space or equipped areas for play in accordance with the above.</p>
LR7	<p>Recreational Open Space on Employment Developments – On new employment development, the Council, through legal agreement with a developer, may require the provision of 1.5 hectares of open space or a contribution of equivalent value per 1,000 employees.</p>

### Involvement of Members

Ideally the developer will contact Planning before they submit a planning application, so Members should be involved at this stage. However, not every developer does this. There can also be a misconception by Members that they can influence what could be included in a planning obligation agreement, when in fact this is determined by officers or Plans Board with reference to the Local Development Plan policies and the five tests set out above. Members can make representations at the formulation of policy stage and, if they are the relevant Ward Member for an application, can require that the application is determined at Plans Board where they have the right to speak at the Board meeting.

All Members get decision notices (when Section 106 Agreements are signed) and the fact that a Section 106 Agreement applies in this application is included in the notice. However, it does not include a detailed breakdown of the agreement itself. At the moment this information would need to be requested on an individual basis.

### Involvement of other Council departments

There are a number of Council services that planning consult with on a regular basis and are involved in negotiations with developers on Section 106 Agreements, these are: Children & Young People, Highways, Sport and Recreation, Housing Strategy and Development together with technical legal support from officers in Legal Services. There is a strong relationship between these services and planning; planning officers fully involve the service areas once they are aware of a potential development site. In many cases these services undertake the Section 106 Agreement negotiation with the developer directly, facilitated by planning officers. It is the task of these officers to identify what is required to make the development acceptable under planning guidance, but it is the responsibility of the planning officer and Plans Board to finally determine, bearing in mind relevant planning considerations, what Section 106 Agreement should be imposed on any development.

### Sport facilities and play equipment

Officers would look to negotiate for provision under LR6 and LR7 in the above table from the Wrekin Local Plan. In the past it has been difficult to sufficiently evidence the need for the commuted sum, however the development of new Council strategies: Sports Facilities Strategy now provides good evidence of the needs of the local community in enough detail to make requests on the developer harder to disagree with.

There have been particular challenges with negotiating successful play equipment provision over the last few years, as the standards have radically changed since some Section 106 Agreements were entered into with the developer. So much so, that agreed provision in a Section 106 Agreement

have had to be redesigned to reflect the raising of play equipment standards, which has required compromise from both the Council and developer. Now, play equipment provision is inspected by ROSPA before adoption by the Council to ensure that it meets the stringent requirements on design and maintenance.

Time limits on when financial contributions under Section 106 Agreements have to be spent by the Council in relation to play and sport facilities are kept deliberately general because it is difficult to predict when a build will hit its trigger point in the Section 106 Agreement. There is also a need sometimes to negotiate several obligations within the Section 106 Agreement where the site is large and there is a need to provide one or two large facilities or play schemes. On smaller developments officers would look to maximise a Section 106 Agreement by refurbishing existing play equipment or sport facilities or alternatively bid for other streams of funding to supplement the contribution from the Section 106 Agreement to provide something larger for the whole development.

Very often the sum negotiated as a Section 106 Agreement will not only cover the cost of building a new play scheme but will also include a part that is income generating to cover the cost of maintenance. This is particularly important for play equipment as it is subject to regular ROSPA inspections and risk assessments, so the maintenance sum will ensure that the equipment is sustainable in the long term.

Officers in Sport & Recreation will keep a record of Section 106 Agreements relating to their area via a database held in their service area.

### Children & Young People – school places

Officers would look to negotiate for provision under H22 in the above table from the Wrekin Local Plan. Officers in Children & Young people did initiate a review by external consultants to see whether they were negotiating effectively for Section 106 Agreements contributions to school places, based on the number of children generated by new developments. The conclusion of the review was that the Council was in some cases receiving lower than average contributions. The reasons for this were; although the original policy pre-2001 used a guideline figure it wasn't broken down into more detailed information and therefore was more easily challenged by developers. The other reasons were that the Council has never negotiated for school places contribution to developments consisting of less than 10 dwellings. Recent recommendations made as part of the Local Development Framework process suggest that when the new process is adopted, developments of any size are included in a S106 Agreement. The Council does not include in its policy at the moment a requirement for contributions to early years and secondary education, which could treble the contributions.

Some local authorities across the country have adopted a formula for estimating the capacity needed and the contribution required to meet it;

Peterborough is a local authority which has adopted a formula based upon the number of dwellings and beds per dwelling, and this is the formula the Council currently uses (since 2001). However convenient this may appear, it should be noted that if this formula had been used for contributions linked to the Lightmoor development, the Council would only have secured 1/3 of what officers in Children & Young people actually negotiated under a Section 106 Agreement.

Monitoring of Section 106 Agreement contributions for school places is done via a database linked to the Children & Young People's Capital Programme.

### Highways

Officers would look to negotiate for provision under T22 in the above table from the Wrekin Local Plan. As in other areas, highways officers also have to show evidence of need to successfully negotiate with developers, although this is via the broad policy statement contained in the 05/05 planning circular and Wrekin Local Plan with no use of formula, so it can be challenged by developers.

Section 106 Agreements do not provide the Council with an opportunity to seek large scale road building or resurfacing projects as the Section 106 Agreement has to be in relation to the scale of the development, which in most cases is small. highways officers will evaluate what the impact of the development will be on the road network and then look at how this impact could be mitigated and the cost of doing this.

Under the new Community Infrastructure Levy, introduced in the Planning Act 2008, major infrastructure projects will need to be identified and costed, and then a formula will need to be applied to work out what that means in terms of cost per trip and number of trips made. This will make it easier for highways officers to ensure that developers contribute adequately to large scale infrastructure changes, although there will still be a need to negotiate on a site by site basis.

Highways are a statutory consultee for planning applications and Planning ensures that highways officers are consulted on every development as early on as possible. The time frames they work to are very tight; usually 8 weeks for simple developments and 13 weeks for more complicated applications, although highways officers will be involved in pre-application discussion with the developer for these as well. As well as highways officers, officers involved in safe routes to schools and public transport will also be involved and from these discussions a list of priority needs can be drawn up to form the basis of negotiation.

Highways officers keep their own database of all Section 106 Agreements that will affect their area; this lists the trigger points, how much has been agreed and on what.

## Housing Strategy and Development

Officers would look to negotiate for provision under H23 in the above table from the Wrekin Local Plan. The provision of affordable housing is usually the most contentious part of a Section 106 Agreement to negotiate, because it often represents the biggest cost for the developer. However, it is very important that Section 106 Agreements impose affordable housing obligations as there continues to be an ever increasing need. Every two years the area is subject to a Strategic Housing Market Assessment and in 2007 the assessment identified a shortfall of 750 houses per year. Therefore, it is very important that Section 106 Agreements are used to try and redress this deficit.

When negotiating Section 106 Agreement officers in Housing Strategy & Development follow Government guidance to get a mix of types of housing that provides a balance between rented, shared ownership and owner occupier. This has resulted in many successes; most notable in Donnington, where 40% of affordable housing was secured and was appropriately “pepper-potted” around the development.

There are a number of particular challenges in negotiating Section 106 Agreements for affordable housing. The majority of developers do not enter into pre-application discussions with the Planning Authority prior to submitting a planning application and this often means that negotiations are pressured because the application has to be determined within strict planning deadlines. Sometimes the developer will argue that the proposed development will not be economically viable when factoring in a Section 106 Agreement for affordable housing. In these situations, viability is a relevant planning consideration but it can be difficult to understand what the real economic cost to developer will be. Housing officers will then have to seek expert assistance externally to assess this and help counter any arguments on the grounds of less economic viability in the current economic climate.

### **Negotiation of Section 106 Agreements**

In the Council’s Local Development Plan that is being developed in a staged process, planning officers intend to include a supplementary planning document on Section 106 Agreements to expand the list of amenities that developers will be expected to contribute to e.g. including secondary school and early years provision as well as primary. The development of this supplementary planning document is continuing, with planned adoption in 2009.

Planning officers will always negotiate contributions to basic services first, but then look at how contributions could support the Council’s strategy in other areas. They will then liaise with other departments to prioritise their needs. However this can sometimes be difficult or hold up the process as some areas of the Council do not have clearly defined service needs. This has had an impact when large developers like English Partnerships (now Homes & Communities Agency) wish to see the evidence for a particular requirement which is not always available.

Negotiation is always about testing the water, and this is why negotiation of these types of agreements can be lengthy; the Council will always try to maximise the Section 106 Agreement, whilst the developer will try to minimise it. In some instances developers try to assert that profit margins are small but the Council will always ask to proceed on an open book basis to establish whether this is really the case.

Negotiation is usually done via planning officers involving particular officers from other departments as required. If however, it is done via open book process, the negotiations will also involve finance officers and a quantity surveyor.

### **Recording and managing Section 106 Agreements**

The current system for recording and managing payments culminated from a project between Finance and Legal Services about 9 years ago, to review the monitoring of Section 106 Agreements. The previous system was not very robust, and was not finance led. Although Legal Services ensured that the agreements were legally sound, it was not their role to monitor or chase payment of agreed money by developers, or the spending of that money by Council departments.

As well as setting out the “in-kind” obligations, each Section 106 Agreement details how much money is due, what it should be spent on and where. This can include revenue to pay for site maintenance and/or capital to install play areas, highway improvements, schools etc. Finance officers in Environment and Regeneration maintain the monitoring system which contains all of the information for every Section 106 Agreement the Council enters into. When this system was first set up, there was a substantial amount of money owed from developers for agreements made in the past, but the monitoring system now enables finance officers to identify where developers have not paid and pursue them. Section 106 Agreements can include staged payments and certain triggers, for example, on commencement, £x after the 100<sup>th</sup> house is built or payment on first occupation etc. The risk with having payment predicated on trigger points is that payments may not be received in a timely way and scrutiny were concerned that sufficient checks were not carried out to ensure that developers did not miss these payments. However, Members were reassured that finance officers liaise with enforcement officers in Planning who provide information on the progress of the build which enables finance officers to pursue payment when it is due. This will be further strengthened by planned regular monthly checks being carried out by finance officers in the future.

Under a Section 106 Agreement and money not spent within the agreed time period should be returned to the developer. No money has been returned to developers in the last 9 years since the new recording/management system has been used. Older agreements generally don't have a time limit, but in recent years, developers have started to put a time limit on payments so that if

the Council has not spent the money in the agreed way within the identified number of years, usually 3 or 5, it must be returned to the developer. This information is logged on the spreadsheet and finance officers monitor this with individual managers to ensure that it is being spent within the timeframe agreed.

Finance officers meet regularly with the Development & Design Manager and with client officers from across Council departments to look at their accounts and identify what has been spent and any left to spend. If the major work has been completed, for example a play area and a small amount of money remains, additional small items such as litter bins might be purchased for the site to utilise the full amount. Some developers, usually smaller developers, will contact the Council to check that the money has been spent and spent in the right place.

The current Section 106 Agreement balance stands at £6.5m. This includes a substantial amount for the Lawley and Ketley developments. The money does not have to be spent immediately on receipt, as long as it is spent within any time limit stated in the agreement. It is held in the account until the departments responsible for the work have completed it. For example, sport & recreation officers may choose to wait for money to come in from a number of developments in the same area, so that they can install one large play area for the whole development. However, even if it is not spent immediately, all of the money held in the account remains allocated to particular work and cannot be spent on other work without the agreement of the owner/developer.

All of the money is held in this account until there is proof that the work has been carried out. In some instances, contractor invoices are submitted via the business unit responsible for the work, these invoices are signed by the Development & Design Manager as the authorising signatory for Section 106 monies and are paid in the usual way through the payments section. In other cases the payments are made to client units after the Development & Design Manager has authorised the transfer of funds.

There are some instances where money cannot be spent in the way originally agreed, perhaps because of a change of policy on the use of the land. In these situations, planning officers would go back to the developer to ask for their agreement to move or change the agreed work. This has happened on a number of occasions, and all of the developers involved have agreed to changes, and none have asked for the money to be returned to them.

Some Section 106 Agreements include provision for indexation, i.e. if the development does not commence for a number of years, when the sum eventually becomes due, indexation is added from the date of signing to the date of payment, usually using the Retail Prices Index. This ensures the original sum represents the same amount in real terms. This is recorded in the monitoring information and identified separately to ensure transparency.

Around £1m of the current £6.5m in the account is money which is not due under a formal S106 Agreement but is held under the same arrangements.

Some is from developer contribution agreements made with developers by individual Council business units. An example of this would be Environmental Maintenance agreeing to take on maintenance of an area of open land from the developer, if the developer contributes an amount of money. Unlike Section 106 Agreements, these are not legally binding, but developers expect the money to be used in the way agreed. It is transferred to the Section 106 account so that use of the money can be monitored in the same way. The account also holds some money received through agreements made between Council business units. For example, Property & Design might make a contribution from sale of land to fund a play area near that site once built on via a memorandum of agreement which is explained in greater detail in the next section. Further money could still be agreed from that site through Section 106 Agreement with the developer.

Money paid for the maintenance of some sites is held in the Section 106 account balances and the interest earned is used to fund the maintenance of these sites on an annual basis, some of this is through the TWS contract. Maintenance monies were originally expected to last 15 years; this is an internal timeframe and is not contractual. Because only the interest is spent, when the 15 years has expired the original sum becomes expendable. However, even though it would be possible to commute some or all of this revenue to help reduce the base budget, this can only happen once and is a very short term solution. In the long term once this money is spent, there can be no further benefit from the capital or interest earned. If the commuted sum is used for other purposes the client portfolio would become liable for the maintenance costs in perpetuity.

### **Memorandum of agreement**

These types of agreement are entered into by the Planning Authority and the Property & Design function of the Council when planning permission is being sought on a piece of land owned by the Council. It is not possible for the Planning Authority to enter into a Section 106 Agreement with another part of the Council, so instead a memorandum of agreement is drawn up, whereby the same undertakings that would normally be agreed in a Section 106 Agreement are set out and agreed by both parts of the Council. The memorandum is attached to the planning application just as a Section 106 Agreement would be and also copied to Legal Services. It is recorded, tracked and monitored in exactly the same way by Finance as the Section 106 Agreements.

If the land is bought by someone else from the Council before the development has taken place the memorandum of agreement is transferred into a Section 106 Agreement and moves with the land as part of the new conveyance to the new purchaser who inherits the liability agreed under the memorandum as a Section 106 Agreement. If the land stays in the Council's possession and development is completed any monies agreed under the memorandum of agreement would be transferred from Property & Design

function to the Section 106 database and Finance for onward transfer to the Council departments who will use the money as agreed in the memorandum.

## **Different approaches to Section 106 Agreements**

The Barker review on Housing Supply 2004 concluded that housing development was being held back by infrastructure issues and that a tariff system for raising funds to finance infrastructure development would help to support communities' needs. This review resulted in the enactment of the Planning Act 2008 which included in Section 11 the legislative framework for the introduction of the Community Infrastructure Levy.

## **Community Infrastructure Levy (CIL)**

CIL is intended to be a mechanism for securing contributions from developers to fund infrastructure and other facilities. However, the regulations for CIL will empower rather than require planning authorities to levy CIL and will be able to work in parallel with the current system of Section 106 Agreements. In order for CIL to work, local authorities are encouraged to use standard charges through CIL and to start preparing evidence on infrastructure needs and local land values. The Planning Act 2008 allows the creation of regulations which will set out the detail of the new Section 106 Agreements regime and how the proposed CIL will work in practice. The Government is now seeking views from consultees on detailed proposals for the introduction of CIL, including regulations with an expectation that final regulations will be made in April 2010.

The benefits of the system are that CIL is thought to unlock additional funds for infrastructure development, decrease delays and be more transparent than the current system. In the 2007 Comprehensive Spending Review it was argued that the existing system of negotiated Section 106 Agreements struggles to sustain large infrastructure requirements, often because of problems where either the first or last developer contributes disproportionately while others make a low contribution or none at all. Also, Local Authorities tend to only negotiate Section 106 Agreements alongside consents for larger developments because of the cost and inefficiency of negotiating agreements from small developments. A simplified system of standard charges will allow the collection of contributions from a wider range of development sources.

## **Setting the CIL**

For those authorities wanting to set a CIL they will first need to identify what infrastructure is needed and its cost. It will then need to work out what contribution each development should make to the cost. However, CIL proposals will need to be tested independently through consultation with developers, infrastructure providers and the public. The types of infrastructure that could be included are:

- roads and other transport facilities;
- flood defences;
- schools and other educational facilities;
- medical facilities;
- sporting and recreational facilities;
- open spaces;
- and affordable housing.

As part of the development plan process authorities should:

- a) have regard to the infrastructure plans and the Regional Economic Strategy (RES) for their area;
- b) only include items of infrastructure that are likely to enable, facilitate or mitigate the impact of development
- c) have regard to the likely yield from the CIL
- d) only include items that have a reasonable prospect of happening within the period covered by the development plan
- e) have regard to other sources of funding
- f) prioritise infrastructure likely to make the biggest contribution to sustainable development.

The authority should also produce a draft charging schedule setting out the rate and/or formula determining how the levy might be calculated in their area. Ideally, the process of setting charges should be embedded within the development plan process. Developers applying for planning permission will be able to consult the published schedule to determine how much they will have to pay.

The CIL should not be used for general local authority expenditure or to remedy pre-existing deficiencies in infrastructure unless these are likely to be aggravated by new development. However, the CIL could be used to facilitate better use of existing infrastructure or facilities where the development circumstances of an area justifies it.

The regulations could provide charging authorities with more flexibility, including options for attributing CIL to expenditures already incurred, for reserving CIL receipts for expenditure that might be incurred in the future, or for loans, guarantees, or indemnities. Planning authorities could use anticipated CIL funds to pump prime or forward fund, infrastructure projects. Some local authorities and regional agencies are already forward-funding infrastructure projects in this way under the existing Section 106 Agreements regime to relieve infrastructure supply bottlenecks.

The Planning Act 2008 requires all bodies that receive CIL to report on how the funds are spent. It will also allow for the regulations to provide a reserve power of direction for the Secretary of State.

Some of the infrastructure needed to support the development of an area is likely to span more than one local authority area, towards which a number of

authorities and developers need to make a contribution if it is to be affordable. Under the current regime, it can be difficult to secure contributions for infrastructure that benefits a wide area because the benefit that any one development derives from the infrastructure may be small. The regulations will contain powers ensuring that the CIL contributes towards sub-regional infrastructure.

### **The Future of Section 106 Agreements**

Section 106 Agreements will be retained as the legal underpinning for negotiated agreements between developers and planning authorities, and will continue to provide a means of securing developer contributions for those authorities who choose not to introduce a CIL.

However, where a CIL is implemented, it will be complemented by Section 106 Agreement. But it is proposed that Section 106 Agreements should focus on three areas.

- non-financial, technical, or operational matters
- site-specific impacts that must be mitigated before permission can be granted (such as access roads or the preservation of an endangered species)
- for sufficient affordable housing to be provided, where possible on-site, to achieve genuinely mixed communities.

The Government will consult on whether what should be covered by CIL and what should be covered by negotiation should be given a statutory definition.

### **Paying CIL**

It is envisaged that CIL will be payable at the point of commencement of development. The Planning Act states that regulations must ensure that liability for CIL is attached to the landowner, but there are difficulties attached to this, ensuing from unregistered land, enforcing against off-shore landowners, and the fact that developers might not own the land at the time permission becomes effective. The Government is therefore proposing that developers should also be liable.

The Act allows for regulations to set enforcement actions for the payment of CIL. Failure to pay CIL could result in an order to halt development. The Act also includes a power to create a criminal offence.

The Government wants CIL to be levied on most types of development, including residential and commercial. There will be a minimum threshold for CIL. Liability for CIL will not arise in relation to householder development by homeowners. Subject to further consultation, development granted permission by a General Permitted Development Order might also not be liable to CIL.

### **CIL in Telford and Wrekin**

Currently Telford & Wrekin Council has two pieces of work being carried out:

- a) looking at the approach to CIL in the Borough as a whole – being undertaken by consultants appointed by the Council;
- b) looking at the approach to CIL in the central area of the Town Centre development (predominately the Shopping centre) – being undertaken by a consultant via Transforming Telford. This will be a key regeneration site over the next few years so the Council wants to make sure we maximise contributions to infrastructure and this is easier to negotiate through a tariff system.

Both pieces of work are testing whether it will help the Council negotiate more effectively and whether it will minimise barriers to development. The aim of planning officers is to have a Local Development Plan that sets out the Borough's needs and a tariff document for the prescribed infrastructure needs.

### **Other approaches to CIL**

Prior to CIL Milton Keynes ran a pilot “roof tax”. The basis was to work out the cost of all public services requirements over time to give an overall cost which included future investment commitments. This required that public services like the Police and NHS had to sign up to investment plans. The tariff required a contribution of £18,500 per dwelling on 15,000 homes to be built by 2016 and a further £33.46m contribution from employment developments to support the requisite infrastructure. The total contribution from the private sector amounted to £300m.

The tariff was applied without reduction, no matter what the size or value of the development. The levy was spent on infrastructure such as: road improvements, public transport improvements and subsidy and patronage schemes, hospital infrastructure, universities, voluntary sector capacity building and voluntary sector small grants funding.

A potential flaw in the scheme was the inevitable time lag between expenditure on new infrastructure to enable new development to take place and actual payment of the roof tax. To address this, English Partnerships forward funded some of the infrastructure and later recovered those costs from the subsequent tariff payments. The tariff had to be paid by a specified date – whether or not development has commenced. This meant that new infrastructure could be delivered ahead of development in the knowledge that payment to meet the costs incurred would be received. In addition, this guaranteed payment mechanism also tackled the perceived problem of “land-banking” – the practice of purchasing land for the future use by a private or public entity. The levy, between 5% and 10% on the cost of an average house, which could bring Milton Keynes more than £60m a year, could be used to build schools, health centres, roads and other community facilities.

## CONCLUSIONS AND RECOMMENDATIONS

Section 106 Agreements are often criticised for, at best being opaque, and at worst evidence that planning permission can be “sold”, and that is why it is crucial that this part of planning procedure is dealt with in a transparent way to provide confidence to the public that the Planning Authority is acting legally and for the benefit of the community at large. Members have been reassured that the Council has robust processes for negotiating, recording and managing the money received through Section 106 Agreements. However, there are some recommendations that Members wish to make which are listed below, but it should be emphasised, that these are recommendations for relatively small adjustments to existing operational processes rather than recommendations for wholesale change.

Members felt that to add further transparency to the Section 106 Agreement process, there is a need for planning permissions to be more specific about the detail of the corresponding Section 106 Agreement. At the moment the planning permission acknowledges that a Section 106 Agreement has been reached but is not specific on the detail of the agreement. This is due to the fact that at this stage the final detail of the Section 106 Agreement could still change. Although this information can be requested, by providing more detail on the sum of the Section 106 Agreement and the % split between areas of expenditure on the permission this would help to clarify what has been agreed for the benefit of members of the public, Ward Members and Parish Councillors.

### **Recommendation 1**

**Members recommend that Planning Officers consider including more detail of specific S106 agreement on the planning permission to provide more clarity to members of the public, Ward Members and Parish Councillors.**

Members found some very positive aspects to the negotiation process like the Planning department acting as the gatekeeper to ensure one point of contact for the developer. It was also very clear from feedback received from other officers that planning officers actively involved other Council departments in the negotiation of the S106 Agreement to ensure that the developments are as sustainable over the long term as possible. And where developments are very large, planning officers convened general meetings at the very beginning of the process between planners and Council departments to ensure that the Council has a co-ordinated approach to negotiation. Members felt based upon the positive feedback from other departments and their expressed desire to see more of these more general meetings for medium sized developments, that Planning should consider more frequent use of co-ordination meetings. The benefits of doing this would be to clarify the priorities for the Section 106 Agreement within the larger context. Members also felt that Ward Members could also be included in these meetings which would provide them with information early in the process and an opportunity to offer their own views.

### **Recommendation 2**

**Members recommend that planning officers convene more multi department team discussions for medium and larger developments, on priorities for inclusion in a Section 106 agreement at the very beginning of the process and to include Ward Members as is appropriate.**

The success of negotiating a Section 106 Agreement has been largely predicated on the strength of evidence of additional need and “harm” that the development would create. The contributions gained through Section 106 Agreements have been lessened in the past because of the lack of Council policy or strategy to demonstrate the extra local needs for services. This has now been resolved by officers across the Council ensuring that they have robust evidence in the form of strategies and public consultation to rely on as evidence. Council departments have also employed formula for calculating Section 106 Agreement contribution where it is pertinent to do so, but have also kept the flexibility of open negotiation based upon identified need for other areas to maximise the S106 contribution.

Members were aware of a gap, in terms of the absence of a requirement to contribute to secondary and early year’s places in schools. In conversation with planning officers, it was made clear that they planned to address this gap by including this provision in the Local Development Plan which Members strongly support.

### **Recommendation 3**

**Support the inclusion of contributions under section 106 for both early years and secondary school places in the Local Development Plan.**

Members were assured that there was a process in place for managing Section 106 Agreements where the land is owned by the Council’s Property & Design function. The process recorded and dealt with Section 106 Agreements in these circumstances as a memorandum of agreement and that on subsequent sale of the land to a private owner, this is then converted into a Section 106 Agreement that is transferred with the land. Although officers from Planning, Legal Services and Property & Design demonstrated they were conversant with the process in our meetings with them, there was no evidence to suggest that this process had been recorded as a formal written procedure.

### **Recommendation 4**

**Members recommend that Property & Design function have a written procedure for the creation and management of memorandum of agreement.**

Members note the effect the current economic climate is having on the viability of developers to build new homes and to also honour existing Section 106 Agreements or negotiate new ones. They also note the effect this is

having on officers in Housing Strategy and Development in trying to negotiate fair Section 106 Agreements with them but not having the specialist support to assess the merits of developers arguments to lessen the Section 106 burden because of the declining profit margins. Given that this type of negotiation is likely to continue for a considerable time, and the Council does not have this type of specialist support in house, Members would like officers to investigate whether this external expertise can be procured in such a way as to provide more responsive assistance, but that will also offer better value for money.

#### **Recommendation 5**

**Members recommend that the Council investigate how specialist expertise can be procured to provide more responsive assistance but that offers better value for money, to Housing Strategy and Development in negotiation with developers where there are viability arguments for lessening the Section 106 agreement burden because the developers can no longer afford the required planning obligations.**

From their meetings with officers, Members were reassured that the money received as Section 106 contributions from developers was recorded and managed in a robust way via finance and planning officers and transferred to colleagues in other parts of the Council to dispose of as required by the Section 106 Agreement in a timely manner. The financial processes for managing the money received appear to be sophisticated enough to enable indexation to allow for inflation and to include payments received through other slightly different means e.g. memorandum of agreement and individual agreements with developers for Council adoption of areas. The process was also robust; no Section 106 Agreement monies have ever had to be returned to a developer because the monies had not been spent within the time frame agreed.

However, an area where Members felt changes should be made was the duplication of records in those Council departments that frequently benefit from Section 106 Agreements monies, with the Finance/Planning database of Section 106 Agreements. Members found that all officers who are in receipt of Section 106 Agreements kept a record of those that were specific to their area of service delivery. Members felt that although officers record information accurately, there is a risk that several sets of information can lead to confusion, inaccuracy as well as to duplication in effort. Consequently, Members believe that only one database should exist and be maintained primarily by Planning and Finance as it is now, but have the ability to allow other designated officers from across the Council to read and record their own information on it, via pre-determined access rights.

#### **Recommendation 6**

**Members recommend that the Section 106 Agreement database held currently by finance officers becomes a shared resource so all information pertaining to Section 106 Agreements held by other Council departments is recorded in one place.**

## SUMMARY OF RECOMMENDATIONS

The recommendations are summarised in the table below. We have assigned a priority level to each of the recommendations, and given an indication of the cost.

It is not possible to provide detailed costings for the recommendations within this report without a considerable amount of additional work being undertaken by both scrutiny and finance officers. However, the recommendations have been placed into one of three categories as follows:-

- Low cost indicates that the recommendation could be funded from within existing resources, although not necessarily in the current year.
- Medium cost indicates that the recommendation is anticipated to cost up to £10,000 which is not currently budgeted.
- High cost indicates that the recommendation is expected to cost more than £10,000 which is not currently budgeted.

Recommendation	Indication of cost	Priority level
<p><b><u>Recommendation 1</u></b>  <b>Members recommend that planning officers consider including more detail of specific S106 agreement on the planning permission to provide more clarity to members of the public, Ward Members and Parish Councillors.</b></p>	LOW	2
<p><b><u>Recommendation 2</u></b>  <b>Members recommend that planning officers convene more multi department team discussions for medium and larger developments, on priorities for inclusion in a Section 106 agreement at the very beginning of the process and to include Ward Members as is appropriate.</b></p>	LOW	3
<p><b><u>Recommendation 3</u></b>  <b>Support the inclusion of contributions under section 106 for both early years and secondary school places in the Local Development Plan.</b></p>	LOW	1
<p><b><u>Recommendation 4</u></b>  <b>Members recommend that Property &amp; Design function have a written procedure for the creation and management of memorandum</b></p>	LOW	4

of agreement.		
<p><b><u>Recommendation 5</u></b>  <b>Members recommend that the Council investigate how specialist expertise can be procured to provide more responsive assistance but that offers better value for money, to Housing Strategy and Development in negotiation with developers where there are viability arguments for lessening the Section 106 agreement burden because the developers can no longer afford the required planning obligations.</b></p>	LOW	5
<p><b><u>Recommendation 6</u></b>  <b>Members recommend that the Section 106 Agreement database held currently by finance officers becomes a shared resource so all information pertaining to Section 106 Agreements held by other Council departments is recorded in one place.</b></p>	LOW	6

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Dave Fletcher	Development & Design Manager
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Derek Owen	Outdoor Recreation Officer
Richard Peach	Finance Manager
Ian Ross	Group Solicitor
Steve Swain	Capital Planning Officer
Chris Winter	Housing Strategy & Development Manager
Mal Yale	Capital & Facilities Manager