

**TELFORD & WREKIN COUNCIL**

**CABINET – 26 JANUARY 2010**

**RESPONSE TO SCRUTINY REPORT S106 PLANNING AGREEMENTS**

**REPORT OF CABINET MEMBER FOR ENVIRONMENT**

**1.0 PURPOSE**

- 1.1 To inform Members of the proposed response to the recommendations made by the Scrutiny Review of Section 106 Planning Agreements.

**2.0 RECOMMENDATION**

- 2.1 **That the response to the Scrutiny Commission's recommendations set out in Appendix 1 is approved.**

**3.0 SUMMARY**

- 3.1 This report summarises the response to the recommendations made **by the Scrutiny Commission for Environment and Regeneration.** The responses are detailed in Appendix 1. The Commission's review has been thorough in its coverage and has been assisted by the involvement of a number of internal officers across the Council who have participated in the review by sharing their information and views on the S106 Planning Agreements process.

**4.0 PREVIOUS MINUTES**

- 4.1 None.

**5.0 INFORMATION**

- 5.1 The Scrutiny Commission 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 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. 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.

5.2 The review had three main objectives:

- To evaluate how effectively the resources secured through Section 106 Agreements are secured, 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

5.3 Members examined the legal background to S106 Agreements set out in Circular 10/95 and looked at the different ways that they could be used to either prescribe the nature of a development, compensate for loss of damage created by a development or to mitigate a development's impact. They then examined the five tests in Circular 10/95 that need to be satisfied before a Section 106 Agreement can be sought, namely that it 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.

These contributions can be either in kind or a financial contribution.

5.4 Members then examined the “saved policies” contained in the current Wrekin Local Plan pertaining to Section 106 Agreements as well as the Local Development Framework Core Strategy policies which are used by Officers to negotiate S106 Agreements.

5.5 The involvement of Members in the process of negotiating S106 Agreements was reviewed as there appeared to be a misconception by Members that they could influence what is included in a planning obligation agreement. However, this is determined by officers and approved by 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, they can require that the

application is determined at Plans Board where they have the opportunity to speak at the meeting.

- 5.6 The involvement of other Council Business Units was examined by interviewing officers from Children & Young People, Highways, Sport and Recreation, Housing Strategy and Development as well as the legal officers who draw up the actual agreements. The interviews revealed that there is a strong relationship between these services and planning with planning officers fully involving the service areas once they are aware of a potential development site.
- 5.7 Members recognise that the Council's Local Development Plan is being developed in a staged process, with a supplementary planning document on Section 106 Agreements being prepared which will 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.
- 5.8 The recording and managing of the Section 106 Agreements was reviewed. 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. 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 and reference back to Plans Board.
- 5.9 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. Some Section 106 Agreements include provision for indexation. 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.
- 5.10 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. 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.
- 5.11 Members then investigated potential different approaches to Section 106 Agreements that a tariff based approach known as Community

Infrastructure Levy (CIL) could bring to funding infrastructure and other facilities in conjunction with the existing S106 Agreements. This legislation is expected to be introduced in April 2010. Currently Telford & Wrekin Council has two pieces of work being carried out looking at the approach to CIL in the Borough as a whole – and also looking at the approach to CIL in the central area of the Town Centre development (predominately the Shopping centre) – as 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.

- 5.12 Both pieces of work are testing whether it will help the Council negotiate more effectively and whether it will minimise barriers to development. The adopted Local Development Scheme (LDS) sets out the programme for the production of the Local Development Framework documents. This includes reference to the preparation of a Supplementary Planning Document (SPD) for Developer Contributions. This document will set out the Borough's needs and a tariff for the required infrastructure.
- 5.13 The thorough review has reassured Members 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 in Appendix 1, but it should be emphasised, that these are recommendations for relatively small adjustments to existing operational processes rather than recommendations for wholesale change.

## **6.0 Equality & Diversity**

- 6.1 No equality and diversity considerations have been identified. An aim of the planning legislation is to ensure that all sections of the community have the opportunity to engage in the development of planning policies. The Council has produced a Statement of Community Involvement which sets out the standard for consultation for all planning issues and the Local Development Scheme lists all the documents that will make up the Local Development Framework.

## **7.0 Environmental Impact**

- 7.1 The contributions sought through the S106 Agreements are often sought to secure off site or financial contributions towards measures to mitigate against the environmental impact of proposed developments.

## **8.0 Legal Comment**

- 8.1 Because the legal issues are addressed within this report, there is no further legal comment to make

## **9.0 Links with Corporate Priorities**

- 9.1 The implementation of the recommendations will contribute to maintaining a high quality, attractive and sustainable environment.

## **10.0 Opportunities & Risks**

- 10.1 The report recognised the importance of keeping an up to date monitoring system which contains all the information for every Section 106 Agreement the Council enters into. 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. 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.

## **11.0 Financial implications**

- 11.1 The recommendations proposed will be either met from existing budgets or by introducing charges to applicants to fund the Project Support Officer.

## **12.0 Ward implications**

- 12.1 The report relates to a Borough-wide strategy.

## **13.0 BACKGROUND PAPERS**

- 13.1 None.

Report prepared by David Fletcher, Development Manager (01952 380380)

## Appendix 1

	Scrutiny Commission Recommendations	Benefits of recommendation	Summary of Action Being Taken	Timescale	Officer responsible
1	<p><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>	<p>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. This would help to clarify what has been agreed for the benefit of members of the public, Ward Members and Parish Councillors.</p>	<p><b>Not Agreed</b> – The planning permission is a formal document setting out the conditions that govern the implementation of the proposal. The S106 Agreement is a separate document setting out associated planning obligations. The planning permission is not the appropriate place to repeat the S106 obligations. Current practice is to include a clear written “informative” confirming that the permission is subject to a written S106 Agreement. Any person can request a copy of the S106 Agreement and a copy is held on the public planning file. Planning conditions and planning obligations should not be confused and to set them out on the same document has potential to lead to confusion and the risk that the S106 agreement will be seen to have</p>	<p>Dec 2009</p>	<p>David Fletcher Ian Ross</p>

			<p>had undue influence on the planning decision.</p> <p><b>Amended Proposal</b> – The existing informative will be amended to make it clear that a copy of the S106 Agreement is available to the public.</p>		
2	<p><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>	<p>The Planning department acts as the gatekeeper to ensure one point of contact for the developer in the negotiation of the S106 Agreement. 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 expressed</p>	<p><b>Agreed</b> – To introduce a Development Team approach to look at medium sized developments (ten or more houses).</p> <p>A Development Team approach for medium sized applications will be dependent on effective project management support and consistent and timely contributions to the approach by officers from all of the service areas involved.</p> <p>The leading authorities who have been successful in introducing the Development Team Approach have sought to fund a planning obligations/project support officer through adding an administrative charge to the</p>	April 2010	David Fletcher; Gareth Thomas.

		<p>their desire to see more of these co-ordination meetings for medium sized developments, 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.</p>	<p>planning obligation. This person would be able to play an important role both in project management but also importantly in being a focal contact and conduit for developers, the public and local Members for planning agreement matters.</p> <p>A report setting out the composition of the Development Team and its procedures together with recommendations on how the project support officer could be funded at no cost to the Council will be prepared for consideration by Directors.</p>		
3	<p><b>Support the inclusion of contributions under section 106 for both early years and secondary school places in the Local Development Framework.</b></p>	<p>Members were aware of a gap, in terms of the absence of a requirement to contribute to secondary and early</p>	<p><b>Agreed</b> - Council's Local Development Plan is being developed in a staged process, with a proposed supplementary planning document on Section 106 Agreements.</p>	2011	<p>Matthew Wedderburn</p>

		year's places in schools.			
4	<b>Members recommend that Property &amp; Design function have a written procedure for the creation and management of memorandum of agreement.</b>	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. There was no evidence to suggest that this process	<b>Agreed</b> – A formal written procedure will be prepared and adopted for use.	Dec 2009	David Fletcher Ian Ross and Alan Fox

		had been recorded as a formal written procedure		
<b>5</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>	The current economic climate is having an effect 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 trying to negotiate fair and appropriate Section 106 Agreements without the specialist support to assess the merits of developers arguments to lessen the Section 106 burden because of the declining profit margins. This situation involving negotiations of this	<b>Agreed</b> – The Strategic Housing Business Unit are in the process of strengthening the in house capabilities by appointing a Housing Delivery Officer. The expectation is that this person will have skills in development economics and will be capable of providing advice to other colleagues on the economic viability of schemes. The Council has also commissioned the Three Dragons Consultancy to prepare advice on the viability of affordable housing schemes and this will be incorporated into future LDF documents. It will also set a clearer context for the level of affordable housing that is viable for different parts of the Borough. The Three Dragons have also prepared a model for the Council which can be used by officers so that in the future the Council will have the ability to do the relevant assessments in house.	Katherine Kynaston David Fletcher

		<p>type is likely to continue for some time. As 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 responsive and effective assistance, that also offers better value for money.</p>			
6	<p><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>	<p>All officers who are in receipt of Section 106 Agreements keep records of those that were specific to their area of service delivery. Members felt there is a risk that several sets of information can lead to</p>	<p><b>Agreed</b> – The third phase of the MIS computer upgrade will introduce a new monitoring system. This will allow all information pertaining to Section 106 agreements to be recorded in one place with access to all designated officers via the MIS system.</p>	<p>May/June 2010</p>	<p>David Fletcher, Jovo Radusin and Sue Overton</p>

		<p>confusion, inaccuracy as well as to duplication in effort. One database should exist and be maintained primarily by Planning and Finance as it is now, but with the ability to allow other designated officers from across the Council to read and record their own information on the database, via pre-determined access rights.</p>			
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