

Title of report: Section 106 Portfolio of Works - delivery proposals

Meeting: Cabinet

Meeting date: Thursday 25 November 2021

Report by: Cabinet member finance, corporate services and planning;

Classification

Open

Decision type

Key

This is a key decision because it is likely to result in the council incurring expenditure which is, or the making of savings which are, significant having regard to the council's budget for the service or function concerned. A threshold of £500,000 is regarded as significant.

This is a key decision because it is likely to be significant having regard to: the strategic nature of the decision; and / or whether the outcome will have an impact, for better or worse, on the amenity of the community or quality of service provided by the authority to a significant number of people living or working in the locality (two or more wards) affected.

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Notice has been served in accordance with Part 3, Section 9 (Publicity in Connection with Key Decisions) of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.

Wards affected

(All Wards);

Purpose

To obtain approval of the procurement route, new delivery proposals and processes and to put in place appropriate delegation to approve the spend and resources required in connection with the delivery of the Section 106 schemes identified.

Recommendation(s)

That:

- a) Cabinet approves the procurement route and implementation of the new delivery proposals and processes and expenditure of up to £9.3m of Section 106 monies, including resources required, to deliver Section 106 schemes;**
- b) Cabinet delegates to the Section 151 Officer to take all operational decisions relating to the above recommendations following consultation with the Cabinet Member for Finance, Corporate Service and Planning, the Cabinet Member for Infrastructure and Transport and the Cabinet Member for Children's and Family Services.**

Alternative options

1. Not approve the procurement route and implementation of the new delivery proposals and processes and expenditure of up to £9.3m of Section 106 monies, including resources required, to deliver Section 106 schemes. This is not recommended. As of June 2020 there was £7.6m of unspent Section 106 agreement contribution available to mitigate the impact of building developments on residents affected, this figure increased to £9.3m in July 2021. There is also unspent, received monies of £122k which exceeded the repayment date for the Section 106 agreement. There is now an urgency to deliver schemes for communities.

Key considerations

Background

2. Section 106 agreements are legally binding obligations between Herefordshire Council as the local planning authority and developers under Section 106 of Town and Country Planning Act 1990. The purpose of Section 106 Agreements is to make acceptable development which would otherwise be unacceptable in planning terms. The planning obligation within the Section 106 agreement may comprise of a financial contribution, for example, contributions towards infrastructure or schools.
3. The Section 106 legal agreement is ancillary to planning permission granted for a development and where applicable specifies the amount of the financial contribution secured to be secured by the local planning authority in accordance with planning policy and specify the purpose of the financial contribution. In many cases the Section 106 monies must be spent in close proximity to the development site to mitigate the impact of development. The Section 106 agreement may also specify the time period within which the Section 106 monies must be spent by the Local Authority. If this time period expires the Local Authority may be required to return any unspent or uncommitted parts of the Section 106 monies in whole or part to the developer.
4. Herefordshire Council's approach to Section 106 is set out in its Planning Obligations Supplementary Planning Document (SPD) and is designed to meet the relevant

objectives of the Core Strategy and the other relevant strategies to support the significant increase in population and employment.

5. The Economy and Place Directorate has Section 106 delivery processes mapped out for Sports, Play, Public Realm and Flood. The Directorate has £6.2m of unspent Section 106 contributions, £4.2m of which is in Highways and Transport.
6. The Children and Families Directorate has a policy in place for the “use of and determination of projects for Section 106 funding”, but has £2.9m of unspent Section 106 contributions.
7. In February 2021, SWAP Internal Audit Services issued a report on Section 106 Agreements. The purpose of the audit was to verify there was adequate Council oversight of funding received from developers and that Section 106 agreements were discharged as agreed. This key issues identified were:
 - a. Management Board require more comprehensive reporting to enable informed decisions to promote the expenditure and maximise the benefits to residents.
 - b. Governance is not consistently applied to approve contribution expenditure.
 - c. Inconsistencies were identified between the spreadsheets recording the Section 106 information.

Section 106 Procurement route and new delivery proposals

8. For Highways and Transportation Section 106 agreements, some professional services where necessary may be procured via the Public Realm contract.
9. For any other Section 106 agreements, where necessary these will be procured externally via the Midlands Highways Alliance Professional Services Partnership 3 (PSP3) Framework or the North West Construction Hub Professional Services Framework as appropriate for professional services to manage the programmes of works and meet the tight timescales to commence development and delivery of the Section 106 schemes.
10. The Midlands Highways Alliance PSP3 Framework aims ‘to help highway authorities improve highway services in the Midlands area and help them deliver efficiency savings’ and includes all services required for the execution of the design and supervision of highway, civil and municipal engineering works.
11. The Frameworks objectives are:
 - a. To establish and develop collaborative procurement frameworks to secure the delivery of highway schemes;
 - b. To establish, implement and develop a continuous improvement model for highway term contracts to achieve convergence to best practices;

- c. To establish and develop other collaborations for highway activities, such as the procurement of commodities and professional services, as agreed by the MHA members; and
 - d. To embed partnering principles and construction best practise in all its work and throughout the supply chains.
12. The North West Construction Hub Professional Services Framework is a fully compliant framework established by public sector partners providing a comprehensive consultancy service offer.
13. The Framework provides:
- a. Rapid access to market leading multi-disciplinary consultants through OJEU compliant procurement;
 - b. Challenging social value targets that can be tailored;
 - c. No direct fee to use the framework;
 - d. End to end support with a fully managed and quality assured process;
 - e. Unrestricted limit on value of works that can be appointed;
 - f. Collaborative approach from consultant partners.
14. These procurement routes are in line with Herefordshire Council's Contract Procurement Rules and will enable an award to be made for the commencement of the contract in December 2021.
15. The specification for the new delivery proposals and processes will cover:
- developing the programme, including acceptance of the Section 106 programme including, projects not yet commenced and projects that have been designed in preparation for tender and construction;
 - revenue implications for each individual scheme;
 - consultation/liaison with local members/parish councils/schools ;
 - preparing programme for tender;
 - leading on relevant scheme consultation;
 - recommending suitable procurement routes;
 - drafting and managing ITT's, including tender development, contract development (Legal Services), tender evaluation and award;
 - managing the subsequent contract/s, through to completion of the works, (including clerk of works/quantity surveyor etc).
16. A further decision will be presented to Cabinet at a future date which will outline the Council's new policy and procedure to spend Section 106 monies in the future to ensure that it is spent in an efficient and timely manner.

Community impact

17. Section 106 monies assist in mitigating the impact of new developments on existing facilities and infrastructure. The approval of the procurement route and new delivery proposals and processes will ensure the monies are spent efficiently and effectively and will also have a positive impact on contributing towards local and regional strategy priorities, targets and legislation.
18. The County Plan (2020-24) priorities are:
 - a - Protect and enhance our environment and keep Herefordshire a great place to live
 - b - Minimise waste and increase reuse, repair and recycling
 - c - Build understanding and support for sustainable living
 - d - Invest in low carbon projects
 - f - Support the an economy which builds on the county's strengths and resources;
 - h - Develop environmentally sound infrastructure that attracts investment
 - i - Support an economy which builds on the county's strengths and resources and spend public money in the local economy wherever possible.

Environmental Impact

19. Herefordshire Council provides and purchases a wide range of services for the people of Herefordshire. Together with partner organisations in the private, public and voluntary sectors we share a strong commitment to improving our environmental sustainability, achieving carbon neutrality and to protect and enhance Herefordshire's outstanding natural environment.
20. The planning obligations sought through Section 106 are an important mechanism to mitigate the impact of new developments, this includes environmental impact and sustainability.
21. Contributions for example, can assist in allowing for the needs of walking and cycling, as well as enhancements to public transport all of which can contribute to a reduction in carbon emissions and improvement in air quality.

Equality duty

22. Under section 149 of the Equality Act 2010, the 'general duty' on public authorities is set out as follows

A public authority must, in the exercise of its functions, have due regard to the need to

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 - a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

- c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
23. The public sector equality duty (specific duty) requires us to consider how we can positively contribute to the advancement of equality and good relations, and demonstrate that we are paying 'due regard' in our decision making in the design of policies and in the delivery of services. Our providers will be made aware of their contractual requirements in regards to equality legislation.

Resource implications

24. Two temporary Senior Project Managers (for up to 12 months) will be recruited to assist in developing and delivering the Section 106 Works Programmes. These will be funded from Section 106 monies and it is anticipated they will commence November/December 2021.
25. Tasks will include:
- Reviewing and allocating Section 106 monies in line with current strategies/policies;
 - Undertaking initial consultation/liaison with local members/parish councils/schools, etc;
 - Contract managing, liaising and coordinating with the successful bidder for professional services to manage the Section 106 programmes of works, including, leading on the tender development, contract development, evaluation, award, management of contracts (consultants, designers, contractors), etc for Highways, Education and Off Site Play.
 - Project management of the Flood, Sports, Public Realm and all other schemes categories from development to delivery.
 - Ensuring **all** Section 106 projects (revenue and capital) are managed in line with Herefordshire Council processes, e.g. Verto, Governance, Contract Procedure Rules, Financial Procedure Rules, etc.
26. Further resources will be identified as required through the programme lifecycle to support delivery.
27. There may be additional resource implications required for Herefordshire Council to discharge its statutory functions as the Highway Authority. These will be quantified and reported upon receipt /identification of the detailed works programmes from the Project Managers.
28. There are no direct financial implications on the council's budget arising from the recommendations. However, schemes may be identified where there is not sufficient Section 106 funds available.
29. There is currently £9.3m to spend in the Section 106 Portfolio. It is proposed to programme this spend over a 3 year programme, but is dependent on the outcome of the work undertaken by the Senior Project Managers and Professional Services Consultants.

Financial obligation/gain type category	Capital (amount £)	Revenue (amount £)
Highways/Transport	4,195,549	49,166
Education	2,890,933	-
Off site play and open space	567,912	221,686
Floods	585,945	-
Sports	248,030	40,490
Public Realm	109,913	-
Recycling and Waste	1,624	92,180
CCTV	28,144	-
Libraries	11,430	15,059
Biodiversity	-	5,000
Public Art		1,020
Monitoring (s.106 Officers)	32,645	5,181
<i>Primary Care/CCG</i>	<i>138,435</i>	-
<i>Wye Valley Trust</i>		<i>5,108</i>
Total	8,810,560	434,890

Legal implications

The Legal Background S106 Agreements

30. Planning obligations under Section 106 of [the Town and Country Planning Act 1990](#) (as amended), commonly known as s106 agreements, are a mechanism which make a development proposal acceptable in planning terms, that would not otherwise be acceptable. They are focused on site specific mitigation of the impact of development. Section 106 agreements may secure financial contributions to provide infrastructure or affordable housing. However these are not the only uses for a Section106 and an obligation may for example, restrict the development or use of the land in any specified way or require specified operations or activities to be carried out in, on, under or over the land require the land to be used in any specified way
31. Where the Section 106 Agreement seeks to secure a financial contribution the amount of the financial contribution secured will be specified together with the purpose for which the monies are to be used in the agreement
32. The Section 106 agreement may also specify the time period within which the Section 106 monies must be either be spent or committed by the Local Authority. If this time period expires the Local Authority may be required to return any unspent or uncommitted parts of the Section106 monies in whole or part to the developer

The Procurement route and implementation of the new delivery proposals and processes, including resources required, to deliver Section 106 schemes:

33. The use of either the Midlands Highways Alliance Professional Services Partnership 3 (PSP3) Framework or the North West Construction Hub Professional Services Framework would be in accordance with the council's Contract Procedure Rules. Any contract awarded will have a maximum duration of five (5) years.
34. The council has the power to enter into the proposed contracts under section 111 of the Local Government Act 1972 which allows the council to do anything which is considered to facilitate the discharge of its functions.

Risk management

35. There is a reputational risk to the council if the Section 106 monies are not spent efficiently and effectively. This will also have a direct impact on communities and their environment as Section 106 monies mitigate the impact of new developments.
36. There is a financial risk as time constraints are written into the Section 106 agreements that if the monetary contributions are not spent within a certain period of time after it has been provided for that particular purpose, then the person/company making the payment is entitled to have it repaid and in some cases with interest. Currently there is £122k of Section 106 monies expired and schemes not commenced and are therefore at risk of return to the developers.

37.

Risk / opportunity	Mitigation
Procurement route and implementation of new delivery proposals and processes not approved.	Complete further work to ensure acceptable delivery proposals and processes are arrived at. Complete further briefing with key stakeholders and hold more workshops.
Schemes may be identified where there are not sufficient Section 106 funds.	Seek to identify additional funds from alternative sources, i.e. grants, capital and revenue budgets.

Consultees

38. Political group consultation has been undertaken to support this decision paper. Comments received are as follows:

39. Cllr. Louis Stark: -

"I have no quarrel with having appropriate systems and procurement processes in place that ensure we spend the S106 monies we receive in an effective and timely

matter. The problem for me is that ward members do not have sufficient oversight and say on what developers should contribute to when it comes to local physical and social infrastructure. So, there is a planning gap between the number of new developments allowed and town and parishes ability to ensure the impact of these developments produce an appropriate range of S106 funding to ensure our physical and social infrastructure can cope. This is not happening in Ross, nor will your planned and necessary improvements deliver that for us”.

Appendices

None

Background papers

None

Report Reviewers Used for appraising this report:

Governance	Kate Charlton, Interim Head of Legal Services	17/11/21
Finance	Karen Morris, Strategic Capital Finance Manager	03/11/21
Legal	Alice McAlpine, Senior Lawyer Sharon Bennett-Matthews, Head of Law and Legal Business Partner	02/11/21 17/11/21
Communications	Luenne Featherstone, Strategic Communications Manager	05/11/21
Equality Duty	Carol Trachonitis, Head of Information Compliance	02/11/21
Risk	Paul Harris, Head of Corporate Performance	02/11/21
Procurement	Mark Cage, Commercial Services Manager	01/11/21
Approved by	Claire Ward, Solicitor to the Council	Date 17/11/2021