

# **Title of report: The policy, prioritisation and delivery of section 106 funding**

**Meeting: Connected Communities Scrutiny Committee**

**Meeting date: Tuesday 27 February 2024**

**Report by: Planning obligations manager**

## **Classification**

Open

## **Decision type**

This is not an executive decision

## **Wards affected**

(All Wards)

## **Purpose**

The report sets out the policy that enables the council to secure section 106 funding, the mechanisms for identifying projects to be incorporated into the legal agreements and reports on the delivery of section 106 funded schemes since Cabinet approved the delivery model on 2 March 2023.

## **Recommendation(s)**

**That:**

- a) **The scrutiny committee is asked to note the content of the report and to offer any comments or recommendations to the section 106 process.**

## **Alternative options**

1. Section 106 of the Town and Country Planning Act 1990 (as amended) sets out the legislative framework for the council to secure section 106 contributions towards community infrastructure and affordable housing. Section 106 contributions are required to mitigate the impact of development. If the council were not to secure section 106 contributions would result in unacceptable development.
2. The council could decide to adopt a Community Infrastructure Levy which would be an alternative way of securing developer contributions towards the delivery of strategic and local infrastructure.

## Key considerations

3. 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 planning obligations is to make development acceptable which would otherwise not be acceptable in planning terms.
4. Paragraph 55 of the National Planning Policy Framework states that local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition’.
5. Planning obligations can:
  - a. restrict the development or use of the land in any specified way
  - b. require specified operations or activities to be carried out in, on, under or over the land
  - c. require the land to be used in any specified way; or
  - d. require financial sum or sums to be paid to the authority on a specified date or dates or periodically.
6. Planning obligations should only be sought where they meet all of the following statutory tests as set out in section 122 of the Community Infrastructure Regulations (2010) (as amended):
  - necessary to make the development acceptable in planning terms
  - directly related to the development; and
  - fairly and reasonably related in scale and kind to the development
7. Herefordshire Council’s approach to Section 106 policy is set out in Policy ID1 – Infrastructure Delivery of the Herefordshire Local Plan Core Strategy and in its Planning Obligations Supplementary Planning Document (SPD) and the other relevant strategies to support the significant increase in population and employment. The Council’s approach to planning obligations is based on the key principles set out at Appendix 1. The Council’s process for securing section 106 contributions is set out at Appendix 2.
8. The Herefordshire Council Planning Obligations Supplementary Planning Document (SPD) was adopted in 2008. The SPD provides advice to developers and applicants on the use of planning obligations in the planning application process in Herefordshire. The types of community infrastructure include:
  - Accessibility, Transport and Movement
  - Affordable Housing
  - Biodiversity
  - Community Services
  - Children and Young People
  - Flood Risk Management, Water Services and Pollution Control
  - Heritage and Archaeology
  - Landscape
  - Open Space, Sports and Recreation Facilities

- Town Centres, Community Safety and
  - Public Realm Waste Reduction and Recycling
9. The SPD is based on a formulaic approach to calculating financial contributions based on a financial figure per house type. The figures have not been updated since the adoption of the SPD. If a review of the figures in the SPD were to be undertaken then this would need to be done in accordance with regulations 11 to 16 of the Town and Country Planning (Local Planning) (England) Regulations 2012 which would require resource.
10. The council is in the process of advertising for the position of an Infrastructure Delivery Officer. This role would;
- Co-ordinate the production of the Infrastructure Delivery Plan links policy commitments to delivery on the ground through a variety of mechanisms
  - Progress the delivery of the Community Infrastructure Levy/Infrastructure Levy if the council decides to adopt
  - Revise the Planning Obligations Supplementary Planning Document
11. Members of the Connected Communities Scrutiny Committee received a briefing on section 106 on 31 January 2024. There was particular interest in how education contributions are secured. This is set out at Appendix 3.

#### **How are draft heads of terms formulated?**

12. Draft Heads of Terms set out clearly the obligations that the developer is willing to be bound by, in order to meet the needs generated by the development which are not going to be met as part of the development scheme itself. The draft heads of terms also include the agreed timing/triggers for satisfying the obligations. An example is set out at Appendix 4.
13. The draft heads of terms are produced using a number of evidence bases;

Ward members are key to identifying the infrastructure needs of their community. Part 4, section 8, paragraph 4.8.5 of the council constitution states;

- a. In the case of a major planning application the case officer will identify to the ward member whether an application triggers the need for a Section 106 agreement in accordance with the council's adopted Planning Obligations Supplementary Planning Document
- b. in the case of major applications requiring a Section 106 agreement the case officer will have a subsequent conversation/meeting with the ward member to ensure that local mitigation measures are appropriately incorporated. As part of this process officers and members will be guided by the council's adopted Supplementary Planning Guidance and the evolving schedule of local needs co-ordinated by the planning obligations manager.

There is a statutory requirement to consult the Town/Parish Council and service areas, both internally and externally, on the submission of a planning application. There is a 21 day period to respond to a planning application consultation whereby those consultees can identify the infrastructure required to mitigate the impact of the development. The consultation template provides the opportunity for anyone, including members of the public who may be commenting on an application, to suggest infrastructure requirements. Even if the consultee is minded to object to an application the council encourages the identification of those infrastructure items for consideration and application in respect of the legal tests should the LPA be minded to approve an application.

Neighbourhood planning is a key part of the Localism Act. It gives local communities greater power to shape development by having a direct role in the development of planning policies at a local level.

Producing a Neighbourhood Development Plan provides an opportunity for local communities to become directly involved in planning policy. A plan allows the local community to create a vision and planning policies for the use and development of land in a neighbourhood. For example, where new homes and businesses can be built and what they should look like. It can also identify infrastructure requirements.

To date there are 113 designated neighbourhood areas and 92 made/adopted Neighbourhood Development Plans in Herefordshire. Many Neighbourhood Development Plans contain policies in relation to community infrastructure requirements. These can be used to inform the Council's position regarding developer contributions associated with development proposals within the area and inform the heads of terms.

While identifying 'need' and discharging the spend within schemes remains the responsibility of the council, in practice, it is not unreasonable for communities to identify those areas where there are weaknesses in social and physical infrastructure to which contributions could be sought from new development. As part of this process, we maintain a community ideas database. This contains 'needs' or 'wishes' that have been formally identified by councillors, parish councils, residents' associations and other interested groups. This information is published to the council website and updated on an annual basis [Section 106 planning obligations – Herefordshire Council](#)

#### **How do communities find information on planning obligations in Herefordshire?**

14. The council website has a Planning Obligations search facility;

[Section 106 planning obligations – Herefordshire Council](#)

The search facility enables the community to see;

- The section 106 income available from a development site;
- The section 106 income due to be paid on sites that have commenced;
- The sites that are being monitored to ensure that section 106 income is received when the trigger point for payment is met.

Anyone can search for monies by ward, parish, improvement towards, improvements description, planning reference, development site details, status (monies available, monies pending, site being monitored). The information can be exported to an excel file.

15. In addition, the council has a statutory requirement for the council to publish an Annual Infrastructure Funding Statement by 31 December each year.

[Section 106 planning obligations – Herefordshire Council](#)

In summary, the report provides:

- An overview of what section 106 and section 278 highway agreements are
- Contributions that have been agreed within a signed section 106 agreement
- Contributions that have been received and allocated to specific projects, either monetary or non-monetary

- Projects that have been delivered via section 106 income
- Projects that have been delivered by section 278 highway agreements
- The delivery of affordable housing

### **S106 Delivery**

16. 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. The 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 not consistently applied to approve contribution expenditure.
  - c. Inconsistencies were identified between the spreadsheets recording the Section 106 information.
17. In November 2021, Cabinet approved the procurement route and implementation of new delivery proposals, processes and expenditure of up to £9.3m of S106 monies. The [report](#) sought approval of recommendations and obtained approval of a new 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.
18. The PMO then established interim delivery capacity for the implementation of the new delivery proposals, processes and expenditure of up to £9.3m of Section 106 monies under a Portfolio Manager with the Project Management Office (PMO).
19. In March 2022, a further more detailed report was commissioned to Inner Circle Consulting (ICC) which highlighted systematic issues impacting S106 delivery:
  - History of poor performance on delivery by partner services
  - Lack of corporate or member visibility and so inability to provide oversight
  - Lack of visibility of how much money is available to fund infrastructure, when, with what restrictions
  - Inefficient processes for securing and allocating contributions
  - Systems for managing and monitoring developer contributions data are not fit for purpose
  - No coherent pipeline of projects to meet requirements but lots of need
  - Lack of capacity to deliver the projects to the pace and standard you need
  - No long-term strategy to plan for infrastructure linked to planned growth

ICC presented the report at Cabinet Briefing on 24 March 2022.
20. From 2019, Herefordshire Council has received £15m in S106 contributions. Drawdown over the same period is £5.61m. Highways & Transport, Education, Off-Site Play & Open Space and Sports are the largest contributors accounting for £10.56m of all monies received. Since 2019 the receipt of S106 contributions has been generally consistent however 2023 saw a significant upturn with £5.65m received. A full overview has been provided in Appendix 5 including an individual break down by contribution type.

21. During 2019-2024, the receipt of S106 contributions has significantly outweighed drawdown. However, with the adoption of new processes and delivery mechanisms, delivery has increased with a current drawdown of £1.39m in 2022/23. Spend to date is 2023/24 is £1.362m with a forecast of £2.1m at Q3 by the end of the financial year.
  22. In January 2023, the PMO appointed a new interim Programme Manager to lead on the delivery challenges faced by Herefordshire Council and implement new procedures and processes to ensure robust delivery.
  23. On Thursday 2 February 2023 all internal officers participated in a facilitated workshop run by the PMO Programme Manager to discuss relevant end-to-end processes and delivery mechanisms for S106 and make recommendations for agreement. The workshop aimed to:
    - Discuss past challenges, anticipated future challenges and provide mitigation.
    - To identify clear lines of responsibility between commissioning and delivery.
    - Define clear roles and responsibilities.
    - To provide a forum to discuss communication and governance strategies
  24. The delivery of the workshop allowed for new processes and procedures to be agreed which culminated in a formal [Cabinet Report](#) dated 2 March 2023 which sought to approval of recommendations to;
    - a. Approve the implementation of the new delivery proposals, as set out in Section 106 Delivery Proposals, including the resources required, to spend all Section 106 developer income.
    - b. The council scheme of delegation is updated to authorise the spend of Section 106 monies and to delegate all operational decisions relating to the above recommendation.
- The improvements in the process were welcomed and the need to progress spend of contributions promptly and in consultation with communities was emphasised.
25. Upon approval of the cabinet report, PMO delivery responsibility was increased to £12.8m to take into account additional S106 contributions received in the intervening period.
  26. PMO S106 delivery administers the construction / infrastructure related gain types only which includes Highways & Transport, Education, Off-Site Play & Open Space and Sports. The remaining gain types are delivered directly via the core service area or external bodies (Appendix 6).
  27. The PMO S106 delivery function implemented new commissioning and delivery processes over 2023, which established clear roles and responsibilities between the Planning Obligations Team, Service Areas and PMO S106 delivery. An example has been contained within Appendix 7. The new delivery process aims to standardise the delivery approach and ensure all objectives and statutory obligations are met.

28. A five stage delivery process has been introduced to ensure a consistent project management approach:



**Figure 1: PMO S106 standardised delivery process**

29. PMO S106 Project Managers have a systematic checklist of work elements that need to be completed as part of every project, regardless of size or scale. A copy has been contained within Appendix 8.

30. The PMO S106 delivery function has also implemented robust procedures in regards to governance, escalation and reporting. The process charts have been contained in Appendix 9.

31. Stakeholder engagement improvements have been made including:

- Introduction of Herefordshire Council S106 search facility
- Improved project delivery communication
- Members and Parish Briefings held (quarterly) - We hold 2 sessions each, one in the day and one in evening to ensure the widest possible availability for stakeholders.
- New Delivery focused email address for regular communication

32. The PMO has ensured that specialised resource is in place to expedite the historic backlog. The PMO S106 delivery team now consists of a Programme Manager, two Senior Project Managers and a Programme Co-ordinator.

33. The PMO S106 delivery team has historically been funded by available S106 monies remaining once works / projects have been delivered. Any remaining delivery costs are funded by PMO revenue budgets. Future S106 agreements will request additional monies to allow Herefordshire Council to cover future delivery costs, but due to the time until income is received after the houses are sold this will be a while off.

34. So far in 23/24, PMO S106 has delivered spend of £1.362m. The delivery programme is on target to exceed its projected revised forecast of £1.52m. An overview of delivered projects in 23/24 has been contained in Appendix 10 and 10a.

35. The backlog is forecast to be delivered over financial years 2024/25 and 2025/26:

Gain Type	Balance (within PMO remit)	Forecast Delivery 24/25	Forecast Delivery 25/26
Highways & Transport	£5.73m	£2.00m	£3.73m
Education	£4.44m	£2.44m	£2.00m

Off-Site Play & Open Space	£0.81m	£0.45m	£0.36m
Sports	0.59m	£0.31m	£0.28m
<b>Total</b>	<b>£11.57m</b>	<b>£5.20m</b>	<b>£6.37m</b>

N.B. Forecasts set out within this report are contingent on design and construction risks. Changes to scope or delivery parameters will ultimately have an impact on the delivery programme.

37. Across all gain types PMO S106 has £7.11m within the delivery process however, forecasts have been considered against the seasonal impacts of construction delivery. In addition, Education Projects have been forecasted taking into consideration site availability during school holidays.
38. If the council required to further expedite delivery in advance of that set out above then the following may be required;
- Additional support to service area commissioners within Education and Built & Natural Environment Service. The additional support would help to increase the rate of commissioning by service areas into formal delivery.
  - Additional support to Highways & Transport service to better scope and agree design /construction parameters.
  - Additional project management resource within PMO S106 and funding.
39. Additional programme delivery constraints include budgets. Working within a historic backlog the available funds are not always enough to deliver the set requirements. The PMO S106 delivery is mitigating this by seeking additional funds from internal & external stakeholders. However in most cases, projects are value engineered within the set budget parameters.
40. Further improvements to stakeholder engagement are planned to be introduced including:
1. Release of delivery focused newsletter – to better update internal and external stakeholders
  2. Herefordshire Council website updates – New delivery focused webpage
  3. Updates to Parish Wish Lists – Working in conjunction with the planning obligations manager letters will be issued asking for wish lists updates to better anticipate local needs.

### **Benchmarking section 106 matters with other Local Authorities**

41. The council are in the process of implementing a Planning Improvement Plan within the planning service. The Plan includes considering revisions to the council pre-application processes and the implementation of a range of discretionary charges. As part of this process, the council is benchmarking section 106 processes with 17 benchmarked local authorities including its neighbouring counties. This work will assist in informing future decisions on section 106 processes and charges.

### **The Community Infrastructure Levy**

42. The Community Infrastructure Levy (CIL) came into force in April 2010 and allows local authorities to raise funds from owners or developers of land undertaking new building projects in their area, to help fund infrastructure.



43. The council commenced the process of adopting the Community Infrastructure Levy. In November 2015 the government commissioned an independent review of the Community Infrastructure Levy to assess the extent to which CIL does or can provide an effective mechanism for funding infrastructure, and to recommend changes that would improve its operation in support of the government's wider housing and growth objectives.
44. The independent review group submitted their report to ministers in October 2016.  
[View the report and supporting papers on the government website](#)
45. The government responded to the publication of the review as part of its Housing White paper published in February 2017, specifically at paragraph 2.29 on page 40 the government said;  
"...The Government will examine the options for reforming the system of developer contributions including ensuring direct benefit for communities, and will respond to the independent review and make an announcement at Autumn Budget 2017."  
[View the White Paper on the government website \(PDF\)](#)
46. Having regard to the above, the council paused work on the Community Infrastructure Levy in October 2018.
47. The Government set out its initial proposals for the new planning levy to replace CIL to be called the Infrastructure Levy (IL) in its 2020 Housing White Paper. The Government published a technical consultation intended to inform secondary legislation to regulate IL in June 2023.
48. The framework legislation for the new IL is now contained in the Levelling Up and Regeneration Act 2024 but given the response to the 2023 consultation, the Government has confirmed its intention to undertake a further consultation in 2024 to further inform the secondary legislation for IL.
49. The council is in the process of preparing a new Local Plan with consultation on the draft regulation (18) Plan due to commence in March 2024. The Plan will be accompanied by a Viability Assessment which will include a section on future CIL charges in the county. Having regard to the current legislative position the council will need to decide in due course its approach to developer contributions.

### **Community impact**

50. Planning obligations are the means by which a local planning authority can secure contributions, improvements or mitigation works to offset any adverse impact of new development. Whilst most new development is necessary and provides direct benefits for the communities to which they relate i.e. new and improved housing, shops or employment provision, it can sometimes place additional burdens on existing services and infrastructure as well as have adverse impacts on the local natural environment. For example, residential development can increase demand for new school places and community facilities and add to the number of people using open space and recreation facilities. New residential and commercial development will increase the number of people travelling in and around an area such as Hereford and will therefore add to congestion and pressure on public transport, car parking, air quality and public safety.
51. Section 106 monies assist in mitigating the impact of new developments on existing facilities and infrastructure and secure affordable housing which is a known need in the county.

52. The County Plan (2020-24) priorities are:

- Protect and enhance our environment and keep Herefordshire a great place to live
- Minimise waste and increase reuse, repair and recycling
- Build understanding and support for sustainable living
- Invest in low carbon projects
- Support the an economy which builds on the county's strengths and resources
- Develop environmentally sound infrastructure that attracts investment
- Support an economy which builds on the county's strengths and resources and spend public money in the local economy wherever possible.

### **Environmental Impact**

53. 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.
54. Planning obligations sought through Section 106 are an important mechanism to mitigate the impact of new developments, this includes environmental impact and sustainability.
55. 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. Securing phosphate credit contributions assists in mitigating the impact of development on the county's environmental river quality.

### **Equality duty**

56. 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 –

- 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.

57. 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**

58. There are resources within Planning Services which comprises the Planning Obligations Manager and Planning Obligations Support Officer to secure section 106 contributions within the

Development Service area and Infrastructure Delivery Officer post in the Strategic Planning Service area. Senior Development Management and Strategic Planning and Neighbourhood officers are also well versed in the legal requirements around Section 106 and CIL and, there is resource within the service areas and the Project Management Office (PMO) to support the programme of delivery.

59. Further resources and funding will need to be identified as required to support delivery if the council decides to accelerate the delivery of projects.
60. There are no direct financial implications on the council's budget arising from the recommendations.

### **Legal implications**

61. 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 Section 106 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.
62. 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.
63. 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 Section 106 monies in whole or part to the developer.
64. The role of the S106 delivery programme is to expedite delivery whilst safeguarding the use of S106 monies. In some cases, S106 monies act as a contribution to a larger project which can delivered by a third party.

### **Risk management**

65. 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.
66. 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, then the person/company making the payment is entitled to have it repaid and in some cases with interest.

Risk / opportunity	Mitigation
Insufficient section 106 funding to deliver project – Infrastructure may not be delivered	Ensure that all other funding mechanisms both internal and external are explored and secured.
Community resource – if there is insufficient resource to manage the requirements of a community led project, then the development scheme might not meet its potential.	Consider the support given from the local authority to the project.
Costs of works to deliver a project exceeds section 106 contribution available.	Ensure a contingency is planned in the delivery programme

### **Consultees**

None

### **Appendices**

Appendix 1 – Herefordshire Council Key Principles to Section 106

Appendix 2 – Herefordshire Council Section 106 Planning Process

Appendix 3 – Explanation of Section 106 Education Contributions

Appendix 4 – Example of Draft Heads of Terms

Appendix 5 – Overview of Section 106 Income and Spend since 2019

Appendix 6 – Breakdown of Section 106 Balances and Delivery Mechanism

Appendix 7 – Example of Project Delivery Process

Appendix 8 – Project Management Office Delivery Checklist

Appendix 9 – Governance and Communication on Delivery

Appendix 10 – Overview of Delivered Projects

Appendix 10a – Overview of Delivered Projects

### **Background papers**

None