



Report of the Chief Planning Officer

Corporate Governance & Audit Committee

Date: 29th July 2010

Subject: Principles governing the management of S106 Planning Agreements & S278 Highways Agreements

Electoral Wards Affected:

Ward Members consulted
(referred to in report)

Specific Implications For:

Equality and Diversity

Community Cohesion

Narrowing the Gap

1.0 Purpose Of This Report

- 1.1 The purpose of this report is to provide the Corporate Governance & Audit Committee with;
- i) An overview of the current system for managing S106 Agreements in Leeds.
 - ii) An overview of the S278 Agreement process.

2.0 Background Information

- 2.1 Planning Obligations, also known as S106 agreements, are typically agreements negotiated between local authorities and developers in the context of granting planning consent in order to mitigate their impacts and make them acceptable in planning terms. Direct provision, through on-site benefits, and/or commuted financial contributions may relate to transport provision, affordable housing, greenspace, education or other community benefit. The wording of each S106 agreement will vary depending upon the benefit being sought.
- 2.2 Circular 05/2005 sets out Government policy for the use of S106 agreements. A document entitled Planning Obligations: Practice Guidance published July 2006 by the Department for Communities and Local Government provides further guidance to all parties involved in the planning obligations process. Leeds Unitary Development Plan (UDP) policies carried forward as part of the emerging Local Development Framework (LDF) provide the local policy context in which the authority can seek planning obligations from developers. These policies are translated further within published Supplementary Planning Guidance (SPG) retained as part of the LDF or more recently through the draft Supplementary Planning Documents (SPDs) which are being produced as part of the LDF process.

2.3 The SPG/SPD documents provide information on the level of contribution, the method of payment and the monitoring of agreements. The level of contribution may be, for example, the provision of land laid out as Greenspace (on the development site) or a commuted sum in lieu of this but which has to be spent on the provision or enhancement of Greenspace in the same community area. The SPG/SPD documents primarily ensure a district wide approach to securing contributions, however, additional area specific guidance is also provided by a number of approved SPG and SPD documents (e.g. Eastgate) & Holbeck Urban Village.

3.0 PRINCIPLES GOVERNING THE MANAGEMENT OF PLANNING OBLIGATIONS

3.1 The responsibility for monitoring S106 Agreements lies with the Chief Planning Officer although a number of different service areas are involved at several stages. The Planning Agreement Manager is responsible for co-ordinating the different stages of this process and manages a database detailing information on all planning obligations. This information includes;

- monies received,
- monies due,
- monies spent,
- monies available to spend,
- restrictions on spend,
- any onsite works due/carried out.

Previously, this information has been reported to Ward Members and Lead officers (from across the council) on a quarterly basis. The database is updated on a daily basis and in order that accurate information can be continuously available to Members, Officers, developers and the public. However, in future, it is proposed to provide comprehensive updated reports to ward members & Lead Officers electronically every six months as the extent of change every quarter is not that great.

3.2 The process for tracking sums received, or works carried out and the allocation of monies varies according to the type of obligation (e.g. direct provision by developers on site or commuted sum benefits). In the case of Greenspace, the process for reaching agreement with Ward Members and local communities about how the money received should be spent and then securing the necessary formal approvals for schemes to progress is the responsibility of officers within Strategy & Policy but close working with colleagues in Parks & Countryside is essential. Other parts of the Council are responsible for delivering other benefits but a key element in all of this activity is the role of the Planning Agreement Manager who ensures that this range of work is properly co-ordinated. This includes;

- Education contributions,
- Affordable Housing
- New Generation Transport
- Greenspace/other improvements to the public realm
- Other Community Benefits.

4.0 ALLOCATION OF MONIES RECEIVED FROM S106 PLANNING OBLIGATIONS

4.1 Although the system for managing planning obligations, is led by the Chief Planning Officer, numerous parties and departments of the Council are involved in the process, typically Planning & Development Services, Strategy and Policy, Finance and Legal Services, Parks & Countryside and other external bodies such as Metro.

- 4.2 The process for the allocation of monies varies and can depend on the type of benefit the commuted sum is in lieu of or in contribution to (e.g. Greenspace, Affordable Housing, Education, Community Benefits, Highways and Public Transport Infrastructure).
- i) In the case of **Greenspace**, Ward Members, officers or the local community may first identify potential Greenspace projects. A corporate officer working group, the Greenspace Implementation Group (GIG), has been established to bring these schemes forward in accordance with agreed priorities and to ensure that there is Ward Member and community consultation for proposed schemes. Irrespective of where a particular scheme originates, consultation with Ward Members must take place before a scheme can progress.
 - ii) Financial contributions received for **Education & Highways** are passed on directly to Education Leeds & Highways, respectively, as they are related to specific schemes or provision of facilities in the vicinity of the development.
 - iii) Where financial contributions are secured for **Affordable Housing**, they are in effect, 'banked' until sufficient funds are in place to implement schemes. However, the key aim of the policy to secure affordable housing is to ensure that provision is made on the application site.
 - iv) **New Generation Transport** contributions are ring fenced for those schemes identified within the West Yorkshire Local Transport Plan and/or for specific measures in the vicinity of the application site.
 - v) Other **Community Benefits** are developer contributions which are not specifically for a named project but must be spent in locations, which as closely as possible, meet the needs of the residents of the generating development, within the same or adjoining Community Area. An example might be a Community centre.

5.0 SPENDING OF MONIES RECEIVED FROM S106 PLANNING OBLIGATIONS

- 5.1 Each S106 agreement is closely monitored to ensure that the money is spent within the specified timescale (where this is stated). The systems and procedures relating to s.106 and S278 agreements was presented to Scrutiny Board on 18th December 2007 & 10th November 2009 and that the conclusions of the Board were complementary about the procedures that are in place.
- 5.2 There is an active programme in place to ensure that all S106 commuted sums are spent in accordance with the legal agreements concerned. The amount of sums held by the Council changes every day, as monies are received, committed and spent.
- 5.3 Commuted Sums are only identified as 'committed' once official approval has been achieved. The sums are then only identified as 'spent' when they are actually allocated. This is to ensure the transparency of our accounts and meet the requirement of auditors. So significant sums which are described as 'uncommitted' are in fact currently going through the approval for spend process or are at the early stages of consultation.
- 5.4 When identifying how sums should be spent, the aim is to create viable and sustainable schemes in response to local need and priorities and in line with the intended purpose of the contributions. This approach values consultation with ward members as a means to ensure that local communities are involved in these decisions. This whole process can take a considerable length of time. Listed below are some of the key reasons why monies may remain unspent for a period of time;

- i) Some monies have specific restrictions on where/how they must be spent. (*Obligations must also be directly related to proposed developments, for example, there should be a functional or geographical link between the development and the item being provided as part of the developer's contribution* - ODPM Circular 05/2005 Planning Obligations) These monies will then form part of a series of phased payments required to fund a particular scheme which is in line with the restrictions on how/where the money must be spent. Also, it is often the case that there is a need to fund priority schemes, or a more comprehensive project, from a number of different sources in the same locality. Consequently, some funds have to remain untouched until **all** the funding is in place. The effects of the economic downturn have compounded this issue owing to developments not proceeding or coming forward at a slower rate.
- ii) Some monies are earmarked for specific schemes which are programmed but which cannot be implemented immediately.
- iii) Some of these monies have only been received recently, even though the planning approval was some years ago. This is because payment of the sums is tied to 'trigger points' within the development process, e.g. commencement of works, first occupation, 50% occupation, amount of floorspace constructed etc. Again, payments may have been delayed.
- iv) Some of these monies are ringfenced for Public Transport Infrastructure, specific works at Holbeck Urban Village, specific Highways & Education works, and sums currently going through an approval process for spending on Affordable Housing. Many of these funds are therefore restricted geographically or tied to specific works or are currently undergoing the 'approval for spend' process.
- v) The process for agreeing the implementation of the monies differs depending on what the money is to be spent on. The system for spending monies for Greenspace & Play Areas involves extensive consultation with the relevant Ward Councillors, communities and other council departments). Then, procure the works via the tender process or competitive quotations, followed by a construction period which is often reasonable by its very nature.

5.5 As all sums are restricted in some way by the wording in the various S106 agreements, either to a specific project or area as illustrated above, it is clearly important for officers to ensure that spending the sums received are entirely consistent with each legal agreement. It is also important to note that funds provided under s.106 Agreements are often subject to clawback clauses if the monies are not spent within a specified time period, typically 10 years. This gives added importance to the need for officers to monitor all s.106 Agreements in order to ensure that monies received are spent in a timely manner and for the intended purpose.

6.0 SUMS NOT YET RECEIVED FROM SIGNED S106 LEGAL AGREEMENTS

- 6.1 There are a number of reasons why sums have not yet been received by the Council, after being pledged within S106 Agreements.
- i) A considerable amount has been recently pledged from several major developments which have not hit appropriate trigger points yet due to slow progress, have been mothballed due to the current economic climate or because they may not be implemented for some time, e.g. Sovereign Street and sites within Holbeck Urban Village.
 - ii) On bigger schemes, S106 monies may be paid at different stages of development. For example, a planning application may have been approved in 2008 and the Legal Agreement drawn up in 2008 when the planning permission was granted.

However, development on site may not commence until 2011 (especially due to the economic downturn), and monies may not be due to be paid to the Council until the development is fully occupied which may be 2013/2014 or some other future date. It's important to note that due to the current climate some sites are not progressing with speed.

- iii) Some Legal Agreements may be drawn up and monies agreed but developments are never implemented so these monies would then not be payable. Once again the economic climate has led to an increase in mothballed sites.
- iv) Some monies may be held as a bond and therefore may not be due unless onsite works are not carried out as agreed. If the onsite works are carried out these sums would then not be payable, eg, Greenspace may be provided onsite instead.
- v) Some monies may only have been agreed recently and so are not due to be paid to the Council for some considerable time. The Council carries out regular monitoring checks to ensure that triggers for payment are adhered to and any problems are identified and addressed.
- vi) The developer who signed the agreement may have gone into liquidation and although the s.106 Agreement will remain as a land charge on any subsequent disposal, the funds arising from the development may not be achieved for some time.

6.2 When appropriate trigger points are reached, the Planning Agreement Manager raises an Invoice to the Developer for the agreed sums. Usually the developer pays the invoice on receipt. However, if the Invoice is not paid, Sundry Debtors proceed with their recovery protocols.

7.0 THE ENFORCEMENT OF PLANNING CONDITIONS USED TO SECURE PLANNING OBLIGATIONS

- 7.1 Section 72 of the Town and Country Planning Act 1990 contains a general power to impose conditions on a planning permission. However, judicial decisions have clarified that to be lawful, a planning condition must be reasonable and relate to the development permitted by the planning permission.
- 7.2 The determination of major planning applications can be delayed by the requirement for the applicant to enter into a S106 obligation. In appropriate circumstances, particularly in the case of straightforward major applications, it is possible to use Grampian Conditions⁽¹⁾ as a prelude to obligations being entered into, so as to enable the application to be determined, but preventing implementation of the permission until such time that alternative arrangements i.e. a S106 obligation has been put in place. Following further guidance from the Planning Inspectorate, Grampian Conditions are now rarely used.
- 7.3 Detailed advice on the use of conditions is given in Circular 11/95 which stipulates that conditions should be necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.
- 7.4 The enforcement of planning conditions allows a local planning authority to take enforcement action if appropriate where the condition has been breached. The Enforcement Team and the Planning Agreement Manager both monitor progress with individual cases to ensure that non-compliances are identified and dealt with at the earliest stage possible. A summary of the current position for planning conditions used to secure planning obligations is provided in Appendix 2.

(1). A "Grampian Condition" is a planning condition attached to a decision notice that prevents the start of a development until off-site works have been completed on land not controlled by the applicant.

- 7.5 In Leeds, the Planning Agreement Manager is responsible for tracking & monitoring planning conditions used to secure planning obligations. Onsite monitoring visits are carried out, as they are with S106 agreements. If the development has commenced and the developer has not complied with the planning condition used to secure planning obligations, the Planning Agreement Manager will communicate this non-compliance to the Enforcement Team, who then instigates enforcement action. This will begin with a letter to the developer detailing the seriousness of the non-compliance and the requirement for immediate action by the developer and ultimately could result in works being stopped onsite if the developer disputes payment.
- 7.6 The planning condition is also logged as a local land charge which means that a developer would not be able to sell any properties without this non-compliance showing up on a local land search performed by buyers.

8.0 SECTION 278 AGREEMENTS IN RELATION TO PLANNING APPROVALS

- 8.1 The assessment of a planning application sometimes results in a requirement for off site highway works to be funded by the developer. If the works are to be totally funded by the developer then the appropriate means of achieving this is through a S278 Agreement of the Highways Act 1980. As stated previously in para 3.1(v), if the developer is contributing a fixed amount towards highway works, for example a contribution to a larger scheme than necessary for the development itself, then a Section 106 agreement under the T & CPA 1990 is the appropriate method.
- 8.2 S278 is a mechanism by which a highway authority can take payment from a third party for the execution of highway works where that party will derive special benefit from such works. The methodology of the Leeds City Council's standard agreement is:-
- i) The highway works are agreed prior to the granting of planning permission and conditioned on the approval development.
 - ii) Once planning permission has been granted the developer requests that a S278 Agreement be entered into.
 - iii) A Design & Cost report is present to the Highways Board which seeks permission to negotiate and enter into a S278 Agreement. Formal approval for injection into the capital programme, by the Director of Resources, is also obtained. The report states that the highway works have previously been through a formal consultation process when the planning application was determined.
 - iv) The agreement is negotiated on the principles of the standard agreement whereby:-
 - Leeds City Council will inform the developer of the staff costs for carrying out the detail design of the scheme.
 - On receipt of a portion of the design fee the Council carries out the design, and with the developer's approval seeks tenders.
 - Full payment for all costs is required from the developer in advance of entering into a contract for the works.
 - A final account is prepared on completion of the works and financial closure of the scheme completed
- 8.3 The S278 process has been subjected to an internal financial audit on two occasions in the last five years and the process, and compliance with the process, has been confirmed by the audit.

9.0 AREAS FOR IMPROVEMENT

- 9.1 Although the process for managing s.106 and s.278 Agreements are considered to be robust and up to date, the arrangements are the subject of regular review between the Chief

Planning Officer, the Planning Agreement Manager and relevant team leaders. These reviews have highlighted two areas where procedures could be improved. These are:

a) Communication with Ward Members: As described in this report, Ward Members are always consulted on proposals to spend monies received through s.106 Agreements before a commitment is made. Ward Members are also informed of the overall picture of what monies have been received, monies due, and monies spent and currently available to spend on greenspace improvements, not just in their ward but also district wide. Whilst this report is useful to elected members, it is essentially an extract from a database and a little 'dry.' Consequently, it is intended to make this a more interesting and readable document by providing a very short covering report, supported by photographs, highlighting schemes which have been implemented through s.106 funding. These 'headlines' will help ward members and lead members to appreciate the tangible results of the s.106 programme and the community benefits that have resulted. The covering report can also give some guidance on forthcoming projects.

b) Ward Member input in drawing up s.106 Agreements: Whilst ward members are consulted on the spending of s.106 monies received, it is acknowledged that they need to be given more opportunity to comment and influence the Heads of Terms of s.106 Agreements before they are finalised. This is to enable Members, from their knowledge of their area, to suggest priorities that contributions should be used for and any other non-standard community benefit which can be justified and delivered through the planning application process. Case officers handling planning applications will therefore be asked to raise this with Ward Members in appropriate situations on major applications where planning benefits are normally requested. However, it should be noted that any benefit negotiated through a s.106 Agreement must be consistent with the statutory regulations (s.122 of the Community Infrastructure Levy Regulations 2010), which states that a planning obligation must be:

- (a) necessary to make the development acceptable in planning terms;
- (b) directly related to the development; and
- (c) fairly and reasonably related in scale and kind to the development.

The final decision on the form and extent of the contribution is the responsibility of the Local Planning Authority.

10.0 CONCLUSION

- 10.1 The Council will continue to use the existing measures in place to monitor and track S106 & S278 Agreements. Current procedures are fit for purpose and are subject to regular monitoring and review.
- 10.2 Officers will continue to maintain a database and calculations of contributions to ensure accountability and maintain transparency.
- 10.3 Officers will continue to report unspent balances to members, appropriate officers and departments, to ensure that monies continue to be utilized at the earliest opportunity in a way which reflects choice for the developer yet meets local priorities, within the national policy framework. The regular, bi-annual reports which are circulated will be improved to provide a brief commentary on key projects which have been implemented together with a summary of emerging schemes.
- 10.4 Officers will continue to involve members and community groups in the allocation of greenspace monies to ensure that we are fully aware of local community needs and priorities when allocating available monies. Within the context of the statutory regulations,

action will be taken to give Ward Members an opportunity to influence the contents of s.106 Agreements at an earlier stage to enable local priorities for community benefits to be considered as part of the planning application process.

11.0 RECOMMENDATION

- 11.1 Corporate Governance & Audit Committee is asked to note the arrangements that are in place to manage the s.106 and s.278 programmes and the reassurances given that the system is robust, up to date and in line with statutory regulations. The Committee is also asked to note that such arrangements are subject to regular review and monitoring and that continual improvements to the systems in place are sought. The Committee is invited to make comments on the report and recommendations as appropriate.

List of Background Papers

Town & Country Planning Act (1990)

Circular 05/2005

Planning Obligations: Practice Guidance (2006)

Leeds Unitary Development Plan (UDP)

Local Development Framework (LDF)

Internal Audit Report (2007)

Supplementary Planning Guidance

S106 Planning Agreements: Quarterly Schedule of Funds