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Report of Chief Planning Officer

Scrutiny Board: City Development

Date: 18th December 2007

Subject: THE CURRENT POSITION WITH 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. PURPOSE

- 1.1 The purpose of this report is to provide the Scrutiny Board with;
- i) An overview of the current system for negotiating, reporting and managing S106 Agreements in Leeds, including audit trails.
 - ii) A breakdown of funds generated from S106 Agreements in Leeds and protocols for spending sums.
 - iii) An overview of the use of planning conditions to secure planning obligations, including the process for enforcement.
 - iv) An overview of the S278 Agreement process.

2. BACKGROUND

- 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.

APPENDIX A

- 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). Area specific policy will also be provided through the range of Area Action Plans (e.g. EASEL, Aire Valley, West Leeds Gateway) that are being developed as part of the LDF process. These Area Action Plans are still being prepared and have not yet been adopted.
- 2.4 Section 106 of the Town and Country Planning Act 1990, in summary, says that a Local Planning Authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land. Any such agreement may contain such incidental and consequential provisions (including financial ones) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement.
- 2.5 Circular 05/2005 however, provides further guidance and clarification (supplemented by Planning Obligations: Practice Guidance). It states that 'in dealing with planning applications, Local Planning Authorities consider each on its merits and reach a decision based on whether the application accords with the relevant development plan, unless material considerations indicate otherwise. Where applications do not meet these requirements they may be refused. However in some instances, it may be possible to make acceptable development proposals which might otherwise be unacceptable through the use of planning conditions or, where this is not possible, through planning obligations.' The outcome of any planning obligation therefore, should be that the proposed development concerned is made to accord with published local, regional or national planning policies. Any obligation must therefore, relate back to a published local, regional or national planning policy.

- 2.6 The way planning obligations are managed is founded in national legislation and advice (S106 of the Town & Country Planning Act and Circular 05/2005). The responsibility for local policy development and implementation lies with Strategy & Policy Services and the policy laid down in SPG/SPDs form the basis for negotiations with the developer. Calculations are worked out and are provided to the developer to ensure transparency during this process. Where the full contribution cannot be sought, a financial appraisal is submitted. This is then the subject of independent scrutiny before an appropriate balance is determined. Case officers from Planning Services alongside Planning Policy Officers (as required); carry out negotiations with the developer. Where a planning condition is used to secure planning obligations, the negotiations still take place and the calculations are still provided and retained in the same way.
- 2.7 In addition the Secretary of State's policy contained within Circular 05/2005 requires amongst other factors, that planning obligations are only sought where they meet the following tests:-
- A planning obligation must be:-
- i) relevant to planning;
 - ii) necessary to make the development acceptable in planning terms;
 - iii) directly related to the proposed development;
 - iv) fairly and reasonably related in scale and kind to the proposed development; and
 - v) reasonable in all other respects.
- 2.8 The circular goes further to say that planning obligations:-
- i) must be directly related to the proposal – for example there should be a functional or geographical link between the development and the item being provided as part of the contribution;
 - ii) should not be used solely to resolve existing deficiencies in infrastructure provision or to secure contributions to the achievement of wider objectives that are not necessary to allow consent for any given development.
- 2.9 There is therefore limited scope for flexibility in spending monies negotiated as part of a S106 agreement for anything other than what they were originally identified for in the S106 agreement. Many S106 agreements restrict the allocation of monies to a specific project or a specific geographical area which is reasonably related to the development proposal.
- 2.10 As mentioned previously in this report the local policy context is provided by the UDP (or emerging LDF) and is translated further by various SPG/SPD documents. Sums of money or on site benefits cannot therefore, be negotiated via S106 agreements without clearly being in accordance with national and local policy and guidance.

3. TYPES OF BENEFITS SECURED VIA 106 AGREEMENTS

3.1 There are six main types of benefits secured by S106 agreements. These are:-

- i) **Greenspace:** Either commuted sums in lieu of works or the provision of an area of greenspace or play area on an area of greenspace. The provision of a commuted sum in lieu of onsite/offsite provision tends to be more common.
- ii) **Affordable Housing:** Can also be delivered via commuted sums in lieu of onsite provision or the provision of a number of affordable dwellings within a particular scheme. The latter being the most common approach.
- iii) **Education:** An example of this would be where a new housing development is likely to increase the school roll of a nearby school beyond its existing capacity. In such cases a commuted sum for the building of a new classroom may be sought.
- iv) **Public Transport Infrastructure:** Major developments (i.e. those which have a significant level of traffic generation) are required to make a contribution towards the cost of providing major public transport infrastructure measures as identified in the West Yorkshire Local Transport Plan. These measures include for example, guided bus schemes, new rail infrastructure, park and ride schemes, bus priority schemes and the bus rapid transit proposals being explored as a replacement to the Supertram. Furthermore, contributions may also have been secured for specific public transport measures within the vicinity of the development (e.g. the provision of a new bus service to serve the site or improvements to nearby bus shelters).
- v) **Highways Works:** Commuted sums may be paid to mitigate the impact of the development on the surrounding highway network, where the full cost of the highway works are not to be borne by the developer.
- vi) **Other Community Benefits:** Sums held here could relate, for example, to such works as the provision of public art, provision of community facilities or sports scholarships.

3.2 All of the areas mentioned above for which on site benefits or monies in lieu of on site benefits are negotiated by way of S106 agreements are supported by UDP policies either contained within the main document or SPG/SPD. These policies are well established and are informed by a sound and robust evidence base.

4. PRINCIPLES GOVERNING THE MANAGEMENT OF PLANNING OBLIGATIONS

4.1 The responsibility for monitoring S106 Agreements lies with the Chief Planning Officer though 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 series of spreadsheets detailing information on all planning obligations. This information includes monies received, monies due, monies spent and available to spend, restrictions on spend and any onsite works due/carried out. This information is reported to all Ward Members and appropriate officers (e.g. from Housing, Education and Highways) on, at least, a quarterly basis to advise Members and appropriate officers where monies are available to be spent and where/when they must be spent by.

A number of officers (who are involved at different stages of the S106 process) input information onto the spreadsheets in order to ensure that they are up-to-date on a daily basis and that accurate information can be continuously available to Members, Officers, developers and the public.

- 4.2 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. For off-site payments received for Greenspace, Affordable Housing, Education, Community Benefits, Highways & Public Transport infrastructure we work closely with other council departments and external partners. For example, we work with Learning and Leisure in regard to off-site payments to provide or enhance Greenspace in the same community area in which the development paying the sum is located.

Audit Requirements

- 4.3 In August 2006, the Audit Commission produced two reports on 'improving performance on S106 Agreements'. The reports highlighted a number of key principles which would be evident in a Council that is working effectively to optimise community benefits through the planning process. These were as follows;
- i) A clear up-to-date policy framework;
 - ii) Sound processes and systems of performance management;
 - iii) Good understanding of local needs for infrastructure through effective engagement with communities and other departments;
 - iv) Corporate Objectives which are adequately communicated to all relevant stakeholders.
- 4.4 In April 2007, Internal Audit reviewed our current methodology against the above principles to form an assessment as to its effectiveness. The review noted that the key principles highlighted by the Audit Commission have already been incorporated into our approach to managing S106 Agreements and Planning Obligations per se.
- 4.5 The Internal Audit concluded that '*Substantial assurance was obtained regarding the control environment and compliance with these controls*'. The substantial assurance was in relation to the following objectives;
- i) The procedures for negotiating S106 Agreements are clear, documented and transparent and the officers involved in the process are suitably skilled and experienced;
 - ii) Adequate systems are in place for recording all S106 Agreements, monitoring the Agreements to ensure that all sums are collected, and to ensure that all receipts are correctly recorded;
 - iii) Procedures are in place to ensure that S106 expenditure is used in line with relevant guidance, agreement and agreed timescales.

5. SECTION 278 AGREEMENTS IN RELATION TO PLANNING APPROVALS

- 5.1 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.
- 5.2 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 document.
 - ii) Once planning permission has been granted the developer requests that a S278 Agreement be entered into.
 - iii) 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.
 - Payment from the developer is required in advance of entering into a contract for the works.
- 5.3 The S278 process has been subjected to financial audit on two occasions in the last five years and the process, and compliance with the process, has been confirmed by the audit.

6. ALLOCATION OF MONIES RECEIVED FROM S106 PLANNING OBLIGATIONS

- 6.1 As mentioned previously, in Leeds the system for managing planning obligations, is led by the Chief Planning Officer although the process involves numerous parties and departments of the council, typically Planning & Development Services, Strategy and Policy, Finance and Legal Services and other external bodies such as Metro.
- 6.2 The process for allocation of monies will vary 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

support for suggested schemes. Irrespective of where a particular scheme originates, the support of Ward Members is a pre requisite for it to 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) **Affordable Housing** Where sums are secured, they are in effect, 'banked' until sufficient funds are in place to implement schemes but because of the policy framework they tend to relate to specific schemes or provision is made on the application site.
- iv) **Public Transport Infrastructure** 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**, developer contributions which are not specifically for a named project are 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.

6.3 On bigger schemes, S106 monies may be paid at different stages of development and this phasing may affect the speed at which payments are made. For example, the planning application may have been approved in 2003 and the S106 agreement drawn up in 2003. Development on site, which is outside Leeds City Council control, may not have commenced until 2006, and monies may not be due to be paid to the Council until the development is fully occupied which may be 2007/2008 or some other future date.

6.4 Some S106 agreements may be drawn up and monies agreed but developments are never implemented so these monies would then not be payable.

6.5 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. For example, greenspace may be provided onsite instead.

6.6 Some monies may only have been agreed recently and so are not due to be paid to the Council for some considerable time. Trigger points may fall at different stages of the development. For example, some trigger points may require payment to be made on commencement of development. Some may require payment on occupation of the development or even on completion of the development.

6.7 It should be noted that many S106 agreements include a claw back clause if the money is not spent within a specified time. This money must then be repaid with interest accrued (where applicable).

7. **SCOPE FOR FLEXIBILITY WHEN SPENDING COMMUTED SUMS RECEIVED UNDER S106 AGREEMENTS**

7.1 Appendix 1 of this report demonstrates;

- i) A breakdown of funds generated from developers under S106 agreements.

- ii) Indication of amounts available to spend.
- iii) Indication of amounts due when relevant payment trigger points are reached.

The information within Appendix A is an accurate account, at the time of writing, and subject to change as new agreements are signed each week, some are subsequently superseded and some of the planning applications actually lapse.

- 7.2 At the time of writing this report the total sum of greenspace monies stands at £7,765,243. Of this, £4,134,018 is committed or spent with £3,632,896 available to spend which is termed uncommitted. All of this, however, is restricted in some way by the wording in the various section 106 agreements either to a specific project or area as illustrated above. If the sums of money or onsite benefits were not restricted in this way then they would not be in accordance with national and local policy and guidance. Thus, any attempt at negotiating such unfettered benefits would be open to challenge from developers and the legality of such agreements would be questioned by the Auditors.

8. THE ENFORCEMENT OF PLANNING CONDITIONS USED TO SECURE PLANNING OBLIGATIONS

- 8.1 Section 72 of the Town and Country Planning Act 1990 contains a general power to impose conditions on a planning permission but judicial decisions have limited this, and to be lawful a planning condition must be reasonable and relate to the development permitted by the planning permission.
- 8.2 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 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. S106 obligation has been put in place. The Planning Officers Society has issued guidance on this approach which has been supported and agreed by the CLG.
- 8.3 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.
- 8.4 The guidance note from the Planning Officers Society listed the main advantages and disadvantages of the use of a planning condition to secure planning obligations and these are reproduced below;

Main advantages

- i) it enables the administrative side of the processing of a planning application to be completed when the planning issues have been resolved;
- ii) it assists local planning authorities to comply with the Government's Best Value indicator relating to the timeliness of the processing of planning applications;
- iii) the conclusion of the planning issues by the grant of major planning permission sooner than would otherwise be the case if it had to await the

- completion of a legal agreement sets the time from when a judicial review can be brought at an earlier date;
- iv) granting the planning permission immediately with a Grampian condition precludes any later discussion as to whether or not the planning application should be formally reconsidered by the local planning authority if there is a long delay between the resolution to grant planning permission and its actual grant, whether by reason of the legal process or otherwise;
 - v) the third and fourth bullet points above are equally of benefit to planning applicants, in particular developers. An advantage to developers alone is that it may allow them to exercise an option to purchase at an earlier date, certain in the knowledge that planning permission has been granted and that the development will be able to proceed on the completion of the planning obligation;
 - vi) it avoids the need for the planning obligation to be entered into by the existing owners where land is to be sold for development. This can sometimes be inconvenient and expensive as there may well be no contractual provision requiring an existing landowner to enter into a s106 agreement and sometimes a misunderstanding as to exactly what it entails.

8.5 Main Disadvantages:

- i) Use of such conditions has not yet been tested in the courts.
- ii) Planning Conditions must clearly and consistently be justified against policies and any financial appraisal to enable transparency and accountability.

8.6 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.

8.7 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.

8.8 The 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.

9. CONCLUSION

9.1 The recent internal audit of our systems for managing planning obligations in Leeds, concluded that '*Substantial assurance was obtained regarding the control environment and compliance with these controls*'. However, there are areas for improvement which we will address in order to improve the transparency of our processes in the future.

- 9.2 In line with policy guidance, we will continue to use planning Conditions to secure planning obligations where appropriate so that *'the negotiation of planning obligations does not unnecessarily delay the planning process, thereby holding up the development'* (Circular 05/2005: B31). For this reason, the Circular also advises that *'Where there is a choice between imposing conditions and entering into a planning obligation, the imposition of a condition is preferable'* (Circular 05/2005: B2 & B51). However, we will ensure that our Heads of Terms are made more explicit.
- 9.3 We will continue to maintain our series of spreadsheets and calculations of contributions to ensure accountability and maintain transparency. However, we will adopt a database to ensure that this information is more easily managed and that reporting can be provided in a more efficient way.
- 9.4 We will continue to report unspent balances to 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. We 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.

10. RECOMMENDATION

- 10.1 Scrutiny Board is asked to note the contents of this report and is reported to make comments and recommendations as appropriate.

APPENDICES**APPENDIX 1: A BREAKDOWN OF FUNDS GENERATED FROM DEVELOPERS UNDER S106 AGREEMENTS**

This breakdown does not include works which are provided onsite as agreed under S106 of the Town & Country Planning Act. It only includes commuted sums paid in lieu of works being carried out.

Type Of Obligation	Sums Received	Sums Committed* Or Spent	Sums Available To Spend	Sums Still Due**
Affordable Housing	£4,449,681	£2,664,514	£1,851,453	£275,000
Highways	£1,012,635	£527,639	£489,694	£2,310,500
Public Transport Infrastructure <i>(These Sums Are Ringfenced)</i>	£4,203,980	£4,203,980	£0	£3,313,897
Community Benefits & Education	£2,429,082	£2,153,924	£313,884	£1,727,380
Major Developments <i>(E.g. Holbeck Urban Village & Sharp Lane)</i>	£7,207,786	£7,207,786	£0	£2,014,514
Greenspace	£7,765,243	£4,134,018	£3,632,896	£4,157,053
TOTALS	£27,068,407	£20,891,861	£6,287,927***	£13,798,344

*The term 'committed' only applies to monies which have been matched to specific schemes and approved by Panel. This does not include ideas in the pipeline. Therefore, some of the sums marked 'available to spend' may be in the early stages of being matched to specific schemes.

**This column includes S106 Agreements which have not yet reached trigger point (i.e. not yet due for payment) and also S106 Agreements which have reached trigger point and which have been invoiced for. Currently there is £410,743 that has been recently invoiced for and is awaiting payment.

*** The unspent balance is brought to the attention of Members and council officers on, at least, a quarterly basis with the aim of stimulating debate on how any available monies can be spent.

APPENDIX 2: CURRENT POSITION FOR PLANNING CONDITIONS USED TO SECURE PLANNING OBLIGATIONS

Current Stage	Value of Contribution (where Agreed)	Number of Developments	Comments
Contributions received	£865,189	30	This includes commuted sums received, invoices raised and awaiting payment, onsite provision in lieu of commuted sums .
Under Negotiation	£7,057,524	110	This includes Planning Conditions on outline applications, developments where work has not yet commenced onsite, S106 Agreements currently being drafted and new applications being submitted.
Outstanding Contributions	£830,092	53	These outstanding contributions are being chased on an individual basis. Where there are undue delays, enforcement action is being taken.
TOTAL	£8,752,805	193	