

Calderdale MBC

Wards Affected ALL

Cabinet 11 December 2023



Section 106 Agreement Governance and Implementation of Monitoring and Miscellaneous Fees

Report of Director of Regeneration and Strategy

1. Purpose of Report

- 1.1 This report considers the issue of governance around the management of planning obligations entered into via planning agreements made under section 106 of the Town and Country Planning Act 1990 (as amended) (“Section 106 agreements”). It recommends a way forward in relation to the aforementioned issue, including the implementation of a fee system to cover the cost of effective monitoring of Section 106 agreements. **N.B.** for the avoidance of doubt, all references to “Section 106 agreement” in this report should be taken as applying equally to planning obligations contained in:
 - a) a bilateral planning agreement entered into between the Council and a landowner or developer under section 106 of the Town and Country Planning Act 1990
 - b) a unilateral undertaking given by a landowner or developer alone under section 106 of the Town and Country Planning Act 1990.
- 1.2 The scope of this report covers the initial activities carried out at the planning application stage and the subsequent processes of ensuring compliance with the Section 106 agreement by developers in the first instance (i.e., developers paying the money or delivering the infrastructure) and then Council services spending the money or managing the infrastructure secured through a Section 106 agreement.
- 1.3 Section 106 agreements support the delivery of infrastructure, including affordable housing, transportation, open space, education, and blue/green infrastructure. Good governance of Section 106 agreements therefore supports the Council’s priorities to reduce inequality; deliver strong and thriving towns and places; and respond to the climate emergency. It is important that the Council has appropriate oversight and procedures in place for the management, receipt and spending of financial developer contributions to the Council and the monitoring of non-financial developer contributions.
- 1.4 The proposals set out in this report should be seen in the context of the wider programme of improvements to planning related processes at Calderdale, following further revenue investment in the financial years 2022/23 onwards.

2. Need for a decision

- 2.1 A decision is required on the approach that the Council takes to managing Section 106 agreements that are signed in connection with planning permissions, including effective monitoring covered by a proportionate fee charged to developers.
- 2.2 Good governance requires us to adopt a Council wide approach to managing this issue.

3. Recommendation

- 3.1 The approach to monitoring and general governance outlined in this report be implemented for all new Section 106 agreements completed after 1 January 2024.
- 3.2 Cabinet recommends to Full Council that:
 - 3.2.1 All Section 106 agreements completed after 1 January 2024, shall include provision for a monitoring fee in accordance with Appendix 1 of this report.
 - 3.2.2 The Council implements the miscellaneous Section 106 related fees set out in Appendix 1 of this report from 1 January 2024.
 - 3.2.3 The Council delegates responsibility for reviewing the fees on an annual basis to the portfolio holder for Resources and Director of Regeneration and Strategy.

4. Background

- 4.1 Planning obligations are legal obligations entered into via a bilateral planning agreement or unilateral undertaking under Section 106 of the Town and Country Planning Act 1990 (as amended) ("Section 106 agreements"). They are a mechanism which can make a development proposal acceptable in planning terms, that would not otherwise be acceptable. They are focused on site specific mitigation of the impacts of development. Planning obligations run with the land, are legally binding and enforceable.
- 4.2 Planning Obligations may:
1. restrict the development or use of the land in any specified way;
 2. require specified operations or activities to be carried out in, on, under or over the land;
 3. require the land to be used in any specified way; or
 4. require a sum or sums to be paid to the authority on a specified date or dates or periodically.
- 4.3 Planning obligations must only be sought where they meet all of the following statutory tests:
1. necessary to make the development acceptable in planning terms;
 2. directly related to the development; and
 3. fairly and reasonably related in scale and kind to the development.
- 4.4 Common uses of planning obligations include:
- securing affordable housing on site or a financial contribution to provide affordable housing off site;
 - securing financial contributions to provide infrastructure.
- 4.5 Following a change in the law in 2019, Councils are now empowered to pool contributions (for example collecting contributions from a number of residential developments that cumulatively provide the capital required to provide the required number of school places).
- 4.6 If the Section 106 agreement is not complied with, it is enforceable against the person that entered into the planning obligation and subsequent owners by the Council invoking an injunction (although there may be limitations on enforcement against individual homeowners of individual residential dwellings on residential developments written into the Section 106 agreement). A planning obligation is also registrable as a local land charge and entered on the planning register.
- 4.7 If the Section 106 agreement is a bilateral planning agreement, the Council, as well as the developer, is bound by the clauses in a Section 106 agreement. So, this means that money paid to the Council through a Section 106 agreement must be spent for the purposes, and within the timeframes, specified by the Section 106 agreement. Where the Council has agreed in

the section 106 agreement to return monies to the developer which are not spent (or committed for expenditure) within the agreed timeframe stated in the Section 106 agreement and the Council then fails to spend the money on the purpose agreed within that timeframe, they have to repay the unspent money to the developer. A unilateral undertaking cannot bind the Council because they are not party to it.

- 4.8 There are planning policies within the Calderdale Local Plan that require a Section 106 agreement to be signed before planning permission is granted for certain developments. This is expected to include the roof tariff, that is proposed to be used to fund the delivery of specific infrastructure required in connection with the Woodhouse and Thornhills Garden Communities. Detailed guidance on the use of Section 106 agreements will be set out in the Supplementary Planning Documents that the Council is currently preparing to cover a range of topics, including Affordable Housing, Biodiversity Net Gain, and Public Open Space.
- 4.9 In the years leading up to the adoption of the Calderdale Local Plan, the Council was typically signing about six Section 106 agreements per year. In 2020/21 receipts were £5,000; £80,738 in 2021/22; and £556,500 in 2022/23. According to our records, £705,230 is held in connection with affordable housing; £192,802 for education; and £439,547 for other purposes.
- 4.10 Following adoption of the Calderdale Local Plan it is expected that considerably more Section 106 agreements will be entered. A further factor that will result in more Section 106 agreements is the introduction of mandatory Biodiversity Net Gain from January 2024. The management of Section 106 agreements is therefore expected to become a lot more complex and present more risks as the flows of money and other contributions increase.
- 4.11 There is scope to improve our approach to managing Section 106 agreements. In broad terms our approach across the Council is fragmented, and we are reliant on individual/ad-hoc record keeping. In order to progress our practices around agreements, we have started the process of implementing a new software system – Exacom. This software stores information relevant to the administration of permissions which have been granted subject to a Section 106 agreement. The information captured is used to manage the Section 106 agreement throughout its life.
- 4.12 The Exacom system is also designed to monitor projects funded by the Community Infrastructure Levy (“CIL”) grants, and any other funding types. The information captured is used to supply reporting and accounting capability on various projects running against monies raised from CIL, Section 106 agreements, and other sources.
- 4.13 Further to the above, Members will be aware that the Council has not yet adopted a CIL charging schedule. However, work is continuing in this regard, and it remains the Council’s intention to adopt CIL (or its successor regime) in the future. Managing CIL receipts would obviously create further complexity.

- 4.14 There is no limit to the number of Exacom users within an organisation (i.e., we are not restricted to a specific number of user licences) and as such it will enable the Council to implement an appropriately robust, cross-Council approach.
- 4.15 There are a number of Section 106 agreements which have historically been completed, attached to planning permissions that either have not been implemented yet, or the trigger points have not yet been reached. There is also money held and managed by individual Services. At the current time, once money has been paid to the Council, it is the responsibility of Services to ensure that it is spent correctly. The Section 106 agreements alluded to in this paragraph are therefore referred to as “legacy agreements”.
- 4.16 The Council needs to transition to a system where there is a single point of oversight and record keeping. It is considered that each Section 106 spending Service in the Council should have a nominated senior officer responsible for Section 106 liaison. This individual will ensure that; money is only released in accordance with the clauses in the Section 106 agreement; and central records are updated. They will be the first point of contact for the S106 monitoring officer within the Planning Service and be expected to participate in training and general liaison meetings.
- 4.17 It is acknowledged that a new system cannot be introduced instantaneously for new and legacy agreements. As such the recommendation above sets an implementation date for new agreements. There will need to be further discussions between service managers over how legacy agreements are managed. Monitoring fees cannot be sought by the Council retrospectively for legacy agreements.

Funding of Section 106 Monitoring

- 4.18 Regulation 122(2A) of the Community Infrastructure Levy Regulations 2010, provides that a planning obligation can be sought in respect of the cost of monitoring (including reporting under the said Regulations) in relation to the delivery of planning obligations provided:
1. The sum to be paid fairly and reasonably relates in scale and kind to the development; and
 2. The sum to be paid to the Council does not exceed the Council's estimate of its cost of monitoring the development over the lifetime of the planning obligations which relate to that development.
- 4.19 Effective monitoring includes the following tasks:
1. Updating and maintaining a planning obligations database;
 2. Monitoring that all the financial and non-financial planning obligations in Section 106 agreements are met;
 3. Keeping track of site/application progress and trigger points in the Section 106 agreement (it is common for financial instalments to be required to be paid at particular milestones in a development,

- for example the commencement of development and/or occupation of a given percentage of the total number of houses);
- 4. Providing calculations of financial contributions, sending invoices and receiving payments;
- 5. Ensuring financial contributions are used by the Council for the specific purpose specified in the planning obligation, and within any agreed timeframe;
- 6. Keeping and maintaining transparent accounting procedures;
- 7. Providing regular updates for Councillors, Cabinet, Scrutiny Boards and the wider community;
- 8. On-site quality inspections;
- 9. Maintaining an appropriate IT system to manage all of the above tasks;
- 10. Publishing the Infrastructure Funding Statement.

4.20 The Section 106 monitoring fees charged by the Council through planning obligations in a Section 106 agreement must be proportionate and reasonable to the respective agreement and reflect the actual time required to monitor individual agreements and their various planning obligations. It is proposed therefore to introduce a fee based on an amount per obligation contribution that is adjusted depending on the size of the development. The fee requested in the agreement therefore will reflect the average hours spent, the number of planning obligations in the Section 106 agreement and the size of the development.

4.21 Officers have considered the approach to Section 106 monitoring used elsewhere. It is estimated that a total time of eight hours work is required for the duration of an obligation for a Section 106 agreement with up to five dwellings or an area of up to 1ha.

4.22 Considering the hourly rates for staff and the relevant overheads, the proposal to Cabinet is that the hourly rate for agreement monitoring should be £35.00. This equates to £280.00 per obligation for small developments. An appropriate adjustment for the size of development results in the following (to be reviewed annually):

- 1. Band 1: 1-5 dwellings or up to 1ha of land - Percentage increase 0%
Fee = **£280.00** per obligation – 8 hours @ £35.00 per hour
- 2. Band 2: 6-10 dwellings or up to 3ha of land - Percentage increase 20%
Fee = **£336.00** per obligation
- 3. Band 3: 11 – 49 dwellings or up to 10ha of land - Percentage increase 40%
Fee = **£392.00** per obligation
- 4. Band 4: 50+ dwellings or more than 10 ha of land – Percentage increase 80%

Fee = **£504.00** per obligation

- 4.23 To reflect the fact that planning permissions need to be monitored before they are implemented (i.e., ongoing monitoring to establish whether development has commenced), 50% of the monitoring fee would be required to be paid by the developer to the Council before or on completion of the Section 106 agreement, and 50% on the commencement of development. If this approach is implemented there would be no need to include a clause in the agreement requiring the fee to be returned in the event of the development not commencing before the planning permission expires.
- 4.24 There may be individual cases where it is not appropriate to charge a monitoring fee – for example clauses that do not require the developer to take any positive action (for instance a developer agreeing not to implement an earlier planning permission); or agreements discharged within a few days of completion by a one-off act (for instance a single payment of money). In these cases, there should be discretion for an officer with the appropriate delegation to waive the fee. There will also be circumstances where bespoke provision is made for monitoring of certain planning obligations and as such it could be necessary to reduce the fee (for example in the case of Biodiversity Net Gain, long term monitoring is covered within the standard financial payments, so one would only charge the initial 50% of the fee payable on completion of the agreement).
- 4.25 For the avoidance of any doubt, the monitoring fees detailed in paragraph 4.22 above does not include the Council's legal costs for the drafting, preparation and negotiation of a Section 106 agreement, they will continue to be payable for new Section 106 agreements as they were for the legacy agreements. The Council's legal costs are payable before or on completion of the Section 106 agreement.

Miscellaneous Section 106 Related Fees

- 4.26 The Council does not currently charge for negotiating and progressing changes to Section 106 agreements through deeds of variation under section 106A of the Town and Country Planning Act 1990. There is also no charge for dealing with enquiries about compliance with Section 106 agreements.
- 4.27 Progressing requests to vary Section 106 through deeds of variation agreements can be very complex (for example consideration of viability appraisals and preparation of planning officer reports for a delegated decision or referral to Planning Committee). It is therefore considered that the same per obligation charge as set out above should apply. Any monitoring fees already paid to the Council pursuant to the original Section 106 agreement will be accounted for in the deed of variation (so as not to double charge).
- 4.28 Responding to enquiries from third parties about compliance with new Section 106 agreements will become much easier should the new system be implemented, so it is considered that these should be charged on the basis that they will take no more than an hour to deal with – i.e., a flat rate of £35 per Section 106 agreement.

5. Consultation

- 5.1 Consultation has been carried out with the main Council Services who have responsibility for Section 106 agreements and adjustments made to the draft process to reflect the feedback received.

6. Options considered

- 6.1 The following options are considered:
 - 6.1.1 Option 1 – Introduce the approach to managing Section 106 agreements outlined above.
 - 6.1.2 Option 2 – Do not change the Council's approach to managing Section 106 agreements.
- 6.2 The first option represents good governance and the best use of resources, and it is therefore recommended to Cabinet.

7. Financial implications

- 7.1 Effective management of Section 106 agreements supports the financial position of the Council. Charging proportionate and reasonable fees will ensure that our costs delivering this are met without placing a burden on existing budgets.
- 7.2 Approval is sought to introduce the fee structure detailed in paragraph 4.22 of the report to recover the Council's costs in relation to Section 106 agreement monitoring.

8. Legal Implications

- 8.1 Regulation 122(2A) of the Community Infrastructure Levy Regulations 2010 (as amended) provides that a planning obligation can require a sum to be paid to a Council in respect of monitoring (including reporting) in relation to the delivery of planning obligations provided:
 - (a) the sum to be paid fairly and reasonably relates in scale and kind to the development; and
 - (b) the sum to be paid to the authority does not exceed the authority's estimate of its cost of monitoring the development over the lifetime of the planning obligations which relate to that development.
- 8.2 The introduction of a monitoring fee regime will enable the Council to recover its costs in monitoring future Section 106 agreements. The monitoring fees have been based on the estimated hours spent on monitoring per planning obligation and thresholds have been created based on dwelling numbers to reflect that larger scale developments tend to have a greater number and complexity of planning obligations within a Section 106 agreement. It is considered that the above legal tests are therefore met as the fee would relate fairly and reasonably in scale and kind to a development and is not expected to exceed the Council's estimate of its costs of monitoring a development over the lifetime of the planning obligation.

- 8.3 The monitoring fees for Section 106 agreements should be secured by way of a planning obligation in the Section 106 agreement itself and in addition to the Council's legal costs for the drafting, preparation and negotiation of the Section 106 agreement.

9. Human Resources and Organisation Development Implications

- 9.1 The intention is to use an existing staff resource to deliver the approach outlined in this report (Section 106 agreement monitoring is reflected in the role profile of a recently recruited officer in the Planning Service). However, the implementation of new software and systems will generate a requirement for further staff development. In addition, it will be necessary to deliver short training sessions to the nominated S106 liaison officers.

10. Environment, Health and Economic Implications

- 10.1 Infrastructure and affordable homes provided through Section 106 agreements have a significant impact on the environment of Calderdale and the health and economic wellbeing of our communities. This underlines the importance of managing Section 106 agreements effectively.

11. Equality and Diversity

- 11.1 Section 106 agreements support the delivery of the Calderdale Local Plan, which does in turn support equality and diversity – for example through the provision of affordable and accessible homes, and multi-modal transport improvements. The Calderdale Local Plan was subject to Equality Impact Assessment when it was at its draft stage.

12. Summary and Recommendations

- 12.1 This report considers the importance of having effective governance in place for the management of Section 106 agreements, and recommends that we move to a more robust, one Council approach. The report establishes a need to introduce a new monitoring fee regime to support the required governance and sets out the basis for proportionate and reasonable fees to be required by a planning obligation to cover the Council's costs. The recommendations to Cabinet are as follows:
- 12.2 The approach to monitoring and general governance outlined in this report be implemented for all new Section 106 agreements completed after 1 January 2024.
- 12.3 Cabinet recommends to Full Council that:
- 12.3.1 All Section 106 agreements completed after 1 January 2024, shall include provision for a monitoring fee in accordance with Appendix 1 of this report.
- 12.3.2 The Council implements the miscellaneous Section 106 related fees set out in Appendix 1 of this report from 1 January 2024.

12.3.3 The Council delegates responsibility for reviewing the fees on an annual basis to the portfolio holder for Resources and Director of Regeneration and Strategy.

For further information on this report, contact:

Richard Seaman Corporate Lead – Planning

Telephone: 07932 101360

E-mail: Richard.seaman@calderdale.gov.uk

Appendices:

Appendix 1 – Section 106 Monitoring and Miscellaneous Fees

Documents used in the preparation of this report are :

1. Calderdale Local Plan, adopted 22 March 2023
2. Community Infrastructure Levy Regulations 2010
3. Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019

The documents are available for inspection at:

The Town Hall Halifax and online at www.calderdale.gov.uk.

DLUHC documents available at: [Plan-making - GOV.UK \(www.gov.uk\)](http://Plan-making-GOV.UK)

Appendix 1 – Schedule of Fees

Section 106 agreement* Monitoring		Fee
1	Band 1: 1-5 dwellings or up to 1ha of land	£280.00 per obligation
2	Band 2: 6-10 dwellings or up to 3ha of land	£336.00 per obligation
3	Band 3: 11 – 49 dwellings or up to 10ha of land	£392.00 per obligation
4	Band 4: 50+ dwellings or more than 10 ha of land	£504.00 per obligation
Section 106 agreement* Miscellaneous		
5	Planning advice on Deeds of Variation	Charged per obligation at the same rate as above
6	Dealing with requests for Confirmation of compliance with Section 106 Agreement	£35.00 per Section 106 agreement/Deed of Variation
<p>Notes for categories 1-6:</p> <p>I. To be reviewed annually, and index linked.</p> <p>Notes for categories 1-4 only:</p> <p>II. To be paid in two instalments: 50% on or before completion of Section 106 agreement and 50% on or before commencement of development.</p> <p>III. Fees may be waived or reduced where obligations do not require any active monitoring or where a separate monitoring regime has been explicitly provided for.</p> <p>Notes for categories 5-6 only:</p> <p>I. Payment to be made in advance of work being carried out by the Council.</p> <p>*Reference to “Section 106 agreement” in Appendix 1 includes planning obligations entered via a bilateral planning agreement and given via a unilateral undertaking</p>		