

REPORT OF Planning Manager

To: Community and Resources Committee

Subject: S106 Monitoring Fees

Date: 30th January 2023

Reference:

PURPOSE OF REPORT: To consider a proposal for the introduction of Section 106 Monitoring Fees.

1. INTRODUCTION

Section 106 (S106) Agreements are formal Deeds made pursuant to Section 106 of the Town and Country Planning Act 1990 (“the Act”) to secure planning obligations which are required in order to make a proposed development acceptable in planning terms. The idea is that the planning obligations mitigate the impact of a proposed development.

Section 106 of the Act states that a planning obligation can:

- Restrict development and/or use of land;
- Require specified activities or operations to be carried out on or over land;
- Require land to be used in a specific way; or
- Require a sum(s) to be paid to the local authority.

Mostly, S106 agreements are used to secure funding for, or the direct provision of, new or improved infrastructure made necessary by new development. This can include affordable housing, public open space, built facilities and biodiversity net gain.

Tests on the use of S106 planning obligations are set out in the Community Infrastructure Levy (CIL) Regulations 2010 (as amended).

The introduction of the new regulations in September 2019 confirmed that a local planning authority may lawfully include a monitoring fee as a planning obligation if it is fairly and reasonably related in scale and kind to the development and does not exceed the local authority's estimate of its cost of monitoring the development over the lifetime of the related planning obligations.

2. REPORT

In 2019 there was an amendment to the Community Infrastructure Levy (CIL) Regulations 2010, which included a provision entitling local planning authorities to charge a monitoring fee for the oversight of (monitoring and reporting on) compliance of s106 obligations. The regulations state such a fee has to be fair and reasonable based on the local planning authority's estimates of the actual costs of monitoring. To date, Torridge District Council has never introduced such a monitoring fee.

The regulations also introduced a requirement for councils to publish "infrastructure funding statements". These statements will replace Regulation 123 lists and should include details of how much money has been raised through developer contributions and how it has been spent. Statements must be published on local authority websites at least once a year.

Given the above permissive legislative framework, and the importance of effective securing of obligations to mitigate the impacts of development, it is considered reasonable to introduce a monitoring fee to cover the cost of officer time to monitor compliance and delivery of S106 obligations together with their reporting.

It is prudent for the setting of any monitoring fees to incorporate a benchmarking exercise in order to align any future fee schedule with other neighbouring authorities within Devon. The following table shows the results of an online investigation:

Table 1: S106 Monitoring Fees charged by local authorities across Devon

Local Authority	S106 monitoring fees charged
East Devon Council	No information published
Exeter City Council	No information published
Mid Devon Council	Charges are based on the full cost recovery rate for officers involved in the S106 process. The charges reflect the officer time involved in the recording, monitoring and reporting on planning obligations. The fee bands are based on the number and type of obligations necessary to make a development acceptable, in accordance with the Mid Devon Local Plan 2013 – 2033, dependant on the type and scale of the development proposed.
North Devon Council	During the financial year 2020/21, the Council received £6,420 and during the financial year 2019/20, the Council received £4,440 through planning obligations, which has been spent during the year on monitoring the delivery of requirements set out within all planning obligations
South Hams District Council	£667 per trigger point within the agreement/undertaking for a payment to be made or other action to be taken by the developer
Teignbridge District Council	No information published

West Devon Borough Council	The Council generally exercises the right to charge S106 monitoring fees. These have historically been levied at a rate of 5% of the total value of the financial contribution that the Council receives. More recent S106 agreements have fixed monitoring fees that are in addition to the financial contributions received by the Council
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The findings of this exercise were inconclusive, and it is therefore not possible to consider benchmarking findings within any proposed new fee structure. However, the model used by Mid Devon Council is considered the most robust and in line with the requirement for any such fee to be fair and reasonable and based on the actual costs of monitoring.

It is therefore proposed that the fee basis for the proposed new S106 monitoring charges be based on the full cost recovery rate for officers involved in the S106 process. The proposed charges, set out at Appendix 1, reflect the officer time involved in the recording, monitoring and reporting on planning obligations. Such tasks include, but not exclusively:

- Recording the details of the Section 106 agreement on an IT system; including all clauses, contributions and trigger points;
- Written approval of schemes as required by the legal obligation;
- Monitoring the progress of the development to identify when triggers have been met and when obligations are due to be paid;
- Undertaking site visits as required;
- Invoicing for financial contributions, including calculating indexation uplift and applying interest as per the terms of the legal agreement if the contribution is overdue;
- Ensuring compliance with the obligations contained within the legal agreement;
- Recording financial transactions for the purposes of reporting on income and expenditure of developer contributions;
- Managing the process of allocating and spending developer contributions in accordance with the terms of the legal agreement;
- Monitoring long-term compliance with in perpetuity clauses; and
- Publishing detailed information on financial contributions within the Annual Infrastructure Funding Statement; the S106 Report

In calculating an appropriate fee, and to ensure the Council remains compliant with the relevant legislation, a comprehensive account of the actual cost to the Council of monitoring S106 planning obligations has been drafted and a fee schedule based on the findings is proposed (Appendix 1).

The process involved breaking down the act of monitoring (including reporting on) a S106 planning obligation into the specific functions undertaken by the Council in

ensuring the compliance with those obligations. For each function a process note was written identifying the tasks that needed carrying out to fulfil a particular function. The process note includes the time taken (in whole hours) by the officer to complete the whole process. Where actual timings are not available an estimate of the maximum time a process should take has been inserted.

Each function has been assigned a pay grading based on the earnings of an officer undertaking that function. The proposed fees are calculated using the current relevant hourly rates with the grading taken as at the top of the pay scale including full on-costs. A cost has then been assigned to each separate function by multiplying the function cost (in GBP) by the time taken (in hours).

A decision has been taken to base the proposed fee charging schedule on the number of dwellings contained within a planning application. This eliminates the need for officers to calculate a bespoke fee for each S106 agreement by referring to a simple look-up table thus ensuring consistency in how S106 monitoring fees are charged.

The proposed charging schedule has been broken down into five bands, A to E (see Appendix 1). Each band is based on the type and number of obligations that are likely to be requested for the scale of development as set out in the North Devon and Torridge Local Plan 2018-2031. The proposed charging structure has been designed in such a way as to be completely transparent and straightforward to update.

Monitoring fees would be secured by way of contractual covenant in the S106 agreement itself in addition to the legal charge for drafting and checking the obligation. Fees would be payable at the same time as any legal costs or on the execution of the legal agreement.

Appendix 2 contains a summary of S106 monitoring process and how the Council's IT system for planning, Uniform, can be used to facilitate accurate monitoring. Uniform has been upgraded to enable proper use of its S106 monitoring function.

By way of example of the likely fee income that may be generated should Members resolve to introduce the proposed fees, had such a charging structure already been introduced, the Council could have recouped in the region of £100,000 in monitoring costs across 2021 and 2022.

The looking forward section in the Budget 23/24 and MTFs report, also reported to this committee includes income of £75,000 per year, which reflects the reduced budgeted level of planning income.

3. IMPLICATIONS

Legal Implications:

The proposed fee charging process takes into consideration relevant legislation, namely the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019; Fees for monitoring planning obligations, and the Local Government Act 2003, Section 93; Power to charge for discretionary services.

The Government is currently consulting on reforms to national planning policy, which includes proposals for a new Infrastructure Levy. Such a Levy may supersede Section 106 obligations; however, it is considered that there will still be a Council monitoring requirement.

Financial Implications:

The accurate charging of monitoring fees will assist in recovering the costs associated with monitoring and reporting on planning obligations (also known as S106 agreements).

Human Resources Implications:

The monitoring role is already carried out to a degree however the introduction of monitoring fees allows for this function to be properly resourced. It will be necessary to ensure roles are properly defined to guarantee efficient monitoring.

Sustainability/Biodiversity Implications:

No known issues identified for this report other than recognition that biodiversity net gain measures are secured via S106 Agreements so an improved monitoring function would have a positive impact.

Equality / Diversity:

No known issues identified for this report.

Risk Management:

Ensuring discretionary fees associated with the monitoring of s106 agreements are kept up to date mitigates against the cost of development being borne by the taxpayer and also ensures the Council is not charging for profit, thus maintaining compliance with the relevant legislation.

Compliance with Policies and Strategies:

The Planning Service is a statutory service, the effective operation of which is central to the delivery of Strategic Plan priorities around the themes of local economy; communities, health and housing; and environment.

Data Protection (GDPR) Implications:

No known GDPR implications.

Climate Change:

No known issues identified for this report.

Lead Member Views:

Date of Consultation – 19th January

Lead Member for Planning – Cllr Pete Watson

The effective monitoring of Section 106 Agreements is incredibly important to ensure that the planning obligations secured at the time of a decision, in order to make a development acceptable, are realised. Given the legislative ability to secure a monitoring fee exists, it seems entirely appropriate for the Council to seek to recoup

its costs. This will greatly assist in ensuring that monitoring is carried out robustly for the wider benefit of our communities.

4. RECOMMENDATION

That the Community and Resources Committee approves the introduction of a new charging mechanism for S106 monitoring, in line with the fees set out at Appendix 1, and to be implemented with effect from 1st April 2023.

SUPPORTING INFORMATION

Consultations: Date of Consultation: 19th January 2023

Officers Consulted -

Steve Hearse, Chief Executive
Staci Dorey, Head of Legal, Governance and Monitoring
Sean Kearney, Head of Communities and Place
David Heyes, Finance Manager

Contact Officer: Helen Smith, Planning Manager

Background Papers:

- a. Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019
- b. Local Government Act 2003, Section 93

Appendix 1: Proposed Charging Schedule

Appendix 2: Example Section 106 Monitoring Process