

## **Procedure: Section 106 Agreement Monitoring (B011)**

Proposed August 2022 update

### **Background**

Section 106 agreements are governed by the Town and Country Planning Act 1990. Amongst other things, they enable the District Council to secure contributions to services, infrastructure and amenities in order to support and facilitate proposed development. They work on the principle that developers should contribute towards any additional burden placed on the social and physical infrastructure of an area as a result of a development.

Therefore, developer contributions secured by a legal agreement often form reasons for planning approval for major development in the District. It is also more likely that a local community would be adversely affected by developments if obligations aren't met and the relevant contributions aren't made. This means if obligations required to make a development acceptable in planning terms aren't properly discharged then there is a risk of harm to the Council's reputation and public confidence in the Council's decision making.

Section 106 contributions received by the District Council are also subject to strict criteria on how and when they are spent. Expenditure must be relevant to a particular development and be spent within a set timescale (usually five years) otherwise the conditions of the agreement may have been breached, leaving the Authority open to legal claims from developers to recover contributions. Council departments must therefore be able to demonstrate how and when funds have been spent in order to reduce the risk of such claims against the Authority.

Consequently, it is important that the District Council has a robust procedure for recording and monitoring Section 106 obligations. The following procedures are intended to ensure that Section 106 legal agreements are discharged in accordance with planning approvals and that all obligations are met.

### **Procedure for Recording and Monitoring Section 106 Obligations**

The spreadsheet maintained within Planning ('the Planning Spreadsheet') is used to record current and future legal agreements, monitor compliance with planning approvals and ensure that obligations are fulfilled where triggers are reached. Obligations include financial payments towards infrastructure provision and also physical infrastructure such as affordable housing to be built on-site.

The spreadsheet maintained within Finance ("the Finance Spreadsheet") is used to record financial payments made to the District Council, the remaining balance of these monies and the date by which the monies must be spent, or else returned to the developer if not spent (typically a period of 5 years from the date money is received).

The following procedures cover:

- recording of Section 106 Agreements on the planning spreadsheet;

- responsibilities for monitoring the progress of agreements;
- recording and accounting for financial contributions;
- expenditure and budgetary control of financial contributions;
- monitoring and recording delivery of infrastructure; and
- management reporting systems.

The following procedures are organised around the key stages in the life of a Section 106 agreement: (1) when a planning permission is issued; (2) quarterly review; (3) when triggers are reached; (4) when payments are received; (5) when obligations have been discharged and (6) when there is a failure to comply with obligations.

## **1 Planning Permission Issued**

Once planning permission has been granted subject to a completed legal agreement containing obligations made under s.106 of the 1990 Act, and the planning permission has been issued, the following actions are required by the named Service areas / officers:

### **(i) Planning**

#### **(a) Relevant Case Officer**

E-mail copies of the legal agreement to:

- all other departments at BDC that would benefit from obligations in the agreement (normally Outdoor Leisure; Housing Strategy and/or the Arts Officer); and
- any departments at Derbyshire County Council that would benefit from obligations in the agreement (normally Education and/or Highways)
- any other external body that would benefit from obligations in the agreement such as the CCG (NHS)
- Planning Manager (Development Control) and nominated team member
- Planning Policy Manager and nominated team member

(b) Add a summary of the obligations in the legal agreement including relevant trigger points to the Planning Spreadsheet.

(c) Publish an electronic copy of the legal agreement on Public Access

(d) Retain original hard copy in S.106 Register

### **(ii) Legal**

(a) Register the agreement as a Land Charge - Land Charges do not need a copy of the whole agreement, they need:

1. names of the parties;

2. address of property;
3. date of agreement;
4. planning reference; and
5. a plan of the land.

## **2 Quarterly Reviews**

The responsibility for monitoring compliance with legal agreements is shared by a number of officers within different Service areas across the Council but is co-ordinated via the S106 Monitoring Group. However, officers are individually responsible for spending the monies and / or procuring services or works secured by legal agreements that relate directly to their Service area and ensuring any expenditure or works are carried out strictly in accordance with the terms of the legal agreement.

The relevant Service area will also be responsible for checking that monies are spent before any claw-back clause in the agreement is triggered.

To ensure efficient and effective monitoring of compliance with legal agreement across different Service areas, officers involved in the process are required to attend a quarterly S106 Monitoring Group review meeting.

The Finance Spreadsheet is used at the S106 Monitoring Group to highlight any issues where claw back clauses may become an issue etc. Action points should be agreed at the quarterly S106 Monitoring Group review meetings within a S106 Monitoring Group Action Plan with target dates, and completion dates where actions are completed, whenever there is a risk that monies will not be spent within the relevant timescale, and/or there is a risk development will not proceed in accordance with the planning approval, and/or there is a risk that an obligation will not be met.

To ensure this monitoring process is robust, the following actions are required by the named Service areas / officers:

- (i) Planning Policy Manager (or nominated team member)
  - (a) Arrange dates for the quarterly S106 Monitoring Group review meetings for each financial year.
  - (b) Prepare agenda, minutes from previous meetings and S106 Monitoring Group Action Plan in advance of quarterly review.
  - (c) Chair S106 Monitoring Group and report progress on any relevant action points from the previous meeting at the quarterly review and record completion dates where actions are completed.

- (d) Review the Planning Spreadsheet (in partnership with Development Control team) and report developments where triggers have been met since the previous meeting.
- (e) Progress any relevant action points stated in the S106 Monitoring Group Action Plan in advance of the next meeting.
- (f) Following quarterly S106 Monitoring Group review meeting, prepare reports for the next available meetings of the Planning Committee and the Senior Leadership Team that:
  - i) highlights any sums at risk of clawback that need spending within 24 months;
  - ii) provides a summary of allocated sums for years 3 to 5 under each infrastructure heading.
- (g) Send out a quarterly email to all Members (copying in those on the Planning Committee) with a link to the Planning Committee quarterly monitoring report.
- (h) Send out quarterly email to those Members in Parishes where there are spending allocations within 24 months of their deadline with a link to the Planning Committee quarterly monitoring report.

(ii) Finance

- (a) Finance spreadsheet to be circulated prior to quarterly S106 Monitoring Group review meetings.
- (b) Highlight any new sums received and highlight any sums which need spending within the next 12 and 24 month periods.
- (c) Finance spreadsheet to be updated in respects of officer updates following quarterly S106 Monitoring Group review meetings.
- (d) Request Accounts Department to issue invoice where developer has not responded to two written officer requests for payments to be made when required.

(iii) Community Arts Development Officer

- (a) Manage workload to prioritise the timely spend of relevant S106 Agreement monies.
- (b) Attend quarterly S106 Monitoring Group review meetings and report on progress on relevant S106 Monitoring Group Action Plan points.
- (c) Progress any relevant S106 Monitoring Group Action Plan points arising in the quarterly S106 Monitoring Group review meeting in a

timely manner and provide updates to the Planning Policy Manager (or nominated team member) in advance of the next meeting.

- (d) Attend Planning Committee to report progress on any relevant S106 Monitoring Group Action Plan points.

(iv) Housing Strategy

- (a) Manage workload to prioritise the timely spend of relevant S106 Agreement monies.
- (b) Attend quarterly S106 Monitoring Group review meetings and report on progress on relevant S106 Monitoring Group Action Plan points.
- (c) Progress any relevant S106 Monitoring Group Action Plan points arising in the quarterly S106 Monitoring Group review meeting in a timely manner and provide updates to the Planning Policy Manager (or nominated team member) in advance of the next meeting.
- (d) Attend Planning Committee to report progress on any relevant S106 Monitoring Group Action Plan points.

(v) Leisure Services

- (a) Manage workload to prioritise the timely spend of relevant S106 Agreement monies.
- (b) Attend quarterly S106 Monitoring Group review meetings and report on progress on relevant S106 Monitoring Group Action Plan points.
- (c) Progress any relevant S106 Monitoring Group Action Plan points arising in the quarterly S106 Monitoring Group review meeting in a timely manner and provide updates to the Planning Policy Manager (or nominated team member) in advance of the next meeting.
- (d) Attend Planning Committee to report progress on any relevant S106 Monitoring Group Action Plan points.

**3. Trigger Points**

Typically, legal agreements will have a 'trigger point' when payments are required to be made or when affordable housing or other infrastructure should be delivered. In many cases, a trigger point will be related to the number of new houses that have been built and/or occupied. Planning officers are responsible for monitoring the trigger points for obligations including payments of commuted sums. To ensure this monitoring process is robust, the following actions are required by the named Service areas / officers:

(i) Planning

- (a) Planning officers will monitor all sites where 'trigger points' have not been previously met every six months.
- (b) Where a trigger point has been reached, planning officers will either:
- request discharge of the obligation from the developer and if requested by the developer: instruct the Accounts Department to raise an invoice in respects of a financial contribution or commuted sum; or
  - e-mail the officer from the relevant Service area that a trigger point has been reached in respects of an obligation for delivery of infrastructure.
- (c) Record discharge request/correspondence date on the Planning Spreadsheet.

**4. Receipt of Payment**

Payment should be received once a request for payment or an invoice has been issued. Finance should be notified and provided with a receipt once payment is received by the Authority. The Accounts Department will be responsible for taking payment and for unpaid invoices. To ensure monies received is spent by the relevant Service area within the relevant time period, the following actions are required by the named Service areas / officers:

(i) Finance

- (a) Where financial contribution is to be made to Bolsover District Council, Finance to update Finance Spreadsheet on a monthly basis.
- (b) Where financial contribution is to be transferred to Derbyshire County Council or other external body, Finance to update Finance spreadsheet on a monthly basis.
- (c) Finance to update monitoring group on payments received over the previous three months at the quarterly S106 Monitoring Group review meeting.
- (d) Finance to maintain a record of annual receipts and payments on the Finance spreadsheet.

(ii) Planning

- (a) Record payment date on Planning Spreadsheet on receipt of confirmation that payment has been received.

## **5 Discharge of Obligations**

Officers are individually responsible for spending the monies and / or procuring services or works secured by legal agreements that relate directly to their Service area and ensuring any expenditure or works are carried out strictly in accordance with the terms of the legal agreement. The relevant Service area will also be responsible for ensuring that Planning are updated when obligations have been discharged so the Authority can demonstrate that all obligations have been discharged within the relevant time period.

Officer updates on expenditure and delivery of infrastructure at quarterly S106 Monitoring Group review meeting will provide a robust framework to monitor discharge of obligations. To ensure that the Planning Spreadsheet provides an accurate record of current and discharged obligations and to ensure time limits are met, the following actions are required by the named Service areas / officers:

### **(i) Planning**

- (a) Update Planning Spreadsheet on receipt of confirmation that an obligation has been discharged.
- (b) When all obligations have been discharged provide confirmation of this to the developer and to Land Charges and move the record from the current Planning Spreadsheet to the archive spreadsheet.

### **(ii) Finance**

- (a) Remove record of legal agreement from the Financial spreadsheet once all monies received have been spent.
- (b) Record contributions where claw back clauses may become an issue as an Action Point to be monitored at the following quarterly S106 Monitoring Group review meeting meetings.

## **6. Failure to comply with Obligations**

Where a trigger point has been reached, planning officers issue a written request to the developer seeking discharge of an obligation. If there has been no response to two separate written requests and an obligation remains unmet, Legal will be instructed to send a further letter to the developer requesting compliance with the relevant obligation. The letter would state that if the obligation was not complied with to our satisfaction we would commence legal action. The method of enforcing a section 106 is contained within the section itself. There are two options set out:

- (a). The Council can do the work in default and the recharge the developer; or

- (b) It can apply to court for an injunctive order requiring the developer complies. This would normally be an order of specific performance requiring payment of the commuted sum. It could, depending on the wording of an obligation, also be an order preventing further development or further occupation of houses.

The Council's solicitor would be responsible for determining the most appropriate course of action on a case by case basis.

### **Management Reporting**

The main management reporting of the Section 106 process is as follows:

- officers involved in the process attend the quarterly Section 106 Monitoring Group where the monitoring spreadsheets and the S106 Monitoring Group Action Plan are reviewed.
- the budgetary position is reported the Quarterly Budget Monitoring Report which is prepared in Finance and presented to Executive.
- a summary / progress report taken to Planning Committee in respect of Section 106 agreements following the quarterly S106 Monitoring Group review meeting.
- a summary / progress report taken to Senior Leadership Team in respect of Section 106 agreements following the quarterly S106 Monitoring Group review meeting.
- a quarterly email to all Members (copying in those on the Planning Committee) with a link to the Planning Committee quarterly monitoring report.
- a quarterly email to those Members in Parishes where there are spending allocations with less than 24 months to run with a link to the Planning Committee quarterly monitoring report.

### **Freedom of Information Requests**

Freedom of information requests relating to S106 financial information are dealt with by the Chief Accountant.