

Bolsover, Chesterfield and North East Derbyshire District Councils'

Internal Audit Consortium

Internal Audit Report

Authority:	Bolsover District Council
Subject:	Section 106 Agreements (B008)
Date of Issue:	1st October 2024
Assurance Level:	Reasonable
Report Distribution:	Assistant Director of Planning and Planning Policy, Development Management & Land Charges Manager, Senior Devolution Lead for Planning Policy, Strategic Growth & Housing, Principal Planning Policy Officer, Strategic Director of Services, Director of Finance & Section 151 Officer, Chief Executive.



INTERNAL AUDIT REPORT BOLSOVER DISTRICT COUNCIL SECTION 106 AGREEMENTS

Introduction

In accordance with the annual audit plan, a review of the controls and risks in respect of Section 106 (S106) Agreements at Bolsover District Council has been completed.

Planning obligations under Section 106 of the Town and Country Planning Act 1990 (as amended), commonly known as S106 agreements, are a mechanism which make a development proposal acceptable in planning terms, that would not otherwise be acceptable. They are focused on site specific mitigation of the impact of development. S106 agreements are often referred to as 'developer contributions'.

According to the last Annual Infrastructure Funding Statement, published in October 2023, the Council received £367k in 2022/23 in S106 contributions adding to balances bought forward of £1.467m.

Scope and Objectives

The objectives of the audit include a review of the controls relating to the following: -

- Previous Recommendations are implemented.
- S106 contributions are sought in accordance with planning guidance and legislation.
- Signed s106 Legal Agreements are in place stating the triggers for payment, any interest due, the conditions of use and period by which spend must take place.
- Unilateral agreements are held.
- There is a record of all S106 contributions due, and this is promptly updated and monitored.
- Processes are in place to ascertain when conditions have been met on site and payment due triggered.
- Recovery processes are in place and are being followed for pursuit of S106 payments.
- S106 contributions are allocated for spend with the relevant department /third party and progress measured to ensure expenditure incurred in accordance with timeframes.
- Effective reporting processes to members and management are in place regarding S106 contribution amounts due, received and spent.
- Appropriate provision is made where it is likely that amounts must be returned to the Developer where scheme has not proceeded within timeframe.

Conclusion

The conclusion of the audit was that the reliability of controls have been assessed as Reasonable. The majority of controls are in place and operating effectively, although some control improvements are required. Please Appendix A for definitions.

Acknowledgement

The assistance of the Development Management and Land Charges Manager, Principal Officer - Planning Policy, and other planning staff was appreciated during the audit review.

Findings and Recommendations

Previous Recommendations

1. The previous report was completed in May 2022 and included one recommendation. This related to submitting an ad-hoc report highlighting where monies collected under S106 needed to be spent within the next 12 months to comply with the obligations of the agreement. This recommendation has been implemented and reporting arrangements are further discussed at paragraph 42.

S106 contributions are sought in accordance with planning guidance and legislation

2. A sample of 5 major planning applications were reviewed in each case the subsequent planning committee report, provided detailed consideration of S106 contributions required covering the main key areas and consultation with third parties such as Derbyshire County Council (DCC) and the applicable Health Authority.
3. At a later stage, if the developer has requested changes to the S106 obligation, matters are given due consideration with a further report to Planning Committee recommending acceptance or otherwise of the changes.
4. In one case sampled, the decision to accept a proposal to change the make-up affordable homes from 3 social rent and 2 shared ownership properties to 5 shared ownership was taken and documented by email by the Senior Devolution Lead for Planning Policy, Strategic Growth & Housing (20/00185/OUT & 22/00668/REM). As the change is within 5 years of when the planning decision was made, no further approval is required.
5. The Development Management and Land Charges Manager explained that where changes are not considered material, decisions can be taken by Officers under delegated powers. The Constitution does state that the control of development under planning legislation is delegated to officers subject to listed exceptions, one of exceptions relates to the size, scale or nature of proposals. In addition, in this case, as

the change was agreed within 5 years of the planning obligation being entered into, no further approval is required.

S106 Legal Agreements

6. Further to approval at Planning Committee, tests were undertaken to ensure that the S106 requirements had been accurately reflected within the S106 Legal Agreement. In 4 out of 5 cases sampled, signed S106 Legal Agreements are in place stating the triggers for payment, the basis for any indexation or interest due and the conditions of use and period by which spend must take place.
7. Only one query arose relating to application '22/00485 35 Red Land South Normanton' where the report stated that for Affordable Housing, in the region of 28 social rent properties and 24 shared ownership properties were required, however the S106 agreement referred to 70% affordable and 30% shared ownership which would require 36 social rent properties and 16 shared ownership properties.
8. The Planning Case Officer explained that this had been the understanding when the report was produced but was subsequently changed as the project was further defined. The proposal was for 100% affordable housing whilst the tenure had changed the number of affordable homes had not and a better offer was now being proposed.
9. As required by legislation and to aid transparency, the Council's website allows public access to its planning database for planning applications. All non-sensitive and non-confidential information and correspondence is disclosed including a copy of the S106 Agreement. More recent S106 agreements examined have been redacted to black out signatories of Council officers and of other parties, however there were some older agreements where this had not taken place. As confirmed by the Data Protection Officer, signatures constitute personal data so should not be published plus signatures can reproduced in an unauthorised or fraudulent way.

R1.	A review of S106 agreements on the planning database for public access, is undertaken to ensure signatures are redacted. Risk: Medium
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Central Record of S106 Agreements & Monitoring of Agreements

10. The amounts due under S106 agreements are payable by the developer subject to 'triggers' being met as defined in the specific agreement. Many payments triggered are dependent on the number of properties within a development currently built or occupied but there can be other triggers such as the payment of maintenance fee where a park has been provided but land transferred to the Council.

11. The Planning Service have documented procedures and a flowchart outlining the process for recording, monitoring and reporting S106 agreements. This includes responsibilities of other parties involved in the process such as Legal, Finance, Housing and Leisure Services.
12. Presently the planning processes are divided between the Development Management team and the Planning Policy team. The Development Management team are responsible for maintaining a 'tracker spreadsheet' of all 'live' S106 agreements. This includes adding new agreements, detailing triggers for each type of obligation and the current position against those triggers. The team is also responsible for notifying the developer and other parties such as Derbyshire County Council, the respective Health representative where appropriate) and recording the date of when notification and requests for payment were made and received.
13. Once all obligations have been met the S106 is removed from the tracker spreadsheet. Archived versions of the tracker are retained.
14. The Planning Policy team are responsible for visits to properties on a quarterly basis and update: -
 - the 'Quarterly Residential Completions Update -Progress' spreadsheet, and
 - and 'Obligation Trigger Review of Active Sites report'. This word format report contains the same information as the spreadsheet but also includes details of whether triggers have been met and additional narrative information.
 - The Action Plan which details where there is the risk to the development which is S106 related with actions for officers to undertake within an agreed timeframe.
15. The Finance Section are responsible for maintaining a spreadsheet of all amounts received and indicate where sundry debtor accounts are unpaid.
16. All documents form part of monitoring information provided to the Quarterly S106 Monitoring Group. The Group consists of planning and relevant departmental representatives and its role is to monitor progress of developments and the meeting of S106 obligations (including where appropriate, the collection and subsequent spend of 106 contributions).
17. The audit included selecting a sample of 5 applications with S106 agreements and following the extent to which the procedures have been followed.

Updating the Tracker Spreadsheet.

18. For the sample chosen from the planning committee reports, all had been recorded on the Tracker Spreadsheet provided on 12th July 2024.

The tracker spreadsheet included: -

- details of progress from December 2023 on-site visits, however it had not been updated to include the position from visits undertaken at the end of March 2024

and June 2024. This information was however available in the documents outlined at paragraph 14.

- The date requests for payment were made and when amounts were received were not recorded in every case. As mentioned at paragraph 15, the Finance spreadsheet does however record all payments received.

Staff explained that there had been a change in personnel during the period reviewed which led to the Tracker spreadsheet not being updated initially. The on-line Tracker Spreadsheet was viewed later in the audit which showed that it was being updated.

19. The first tab on the Tracker spreadsheet provides the summary position on live S106's whilst the remaining tabs appear to show the amounts paid each year to the Council and third parties from developers. However, there was no detail of amounts received by the Council in 2023/24 or so far in 2024/25. The Finance S106 spreadsheet already records when payments have been made so it's not clear why Council contributions are required on the Tracker spreadsheet.
20. There were no details of amounts received from DCC for 2024/25. It has confirmed by the Principal Officer (Planning Policy) that DCC will provide this information on a quarterly basis going forward.
21. Collectively, there is a good understanding of the position on each development as outlined in the supporting paperwork to the S106 Monitoring Group. However, there is some duplication in terms of the information being recorded on the Tracker spreadsheet and other planning documents presented to the S106 Monitoring Group. There is the opportunity to make the processes more efficient by consolidating the information into fewer documents, so that information regarding property and other triggers and their current status are updated only once. Spreadsheets can be designed to facilitate the automatic highlighting of meeting triggers with minimum input and provide concise quality management information. Utilising the IDOX database to provide the management information required should also be considered.

R2	Planning Managers review areas of duplication in respect of recording S106 contribution triggers and monitoring how these are met, with a view to consolidating information into one or fewer documents to record amounts once and provide effective management information. Risk: Low
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Unilateral Agreements

22. Unilateral agreements are undertakings which developers voluntarily enter in to and there is no obligation to complete as part of conditions imposed through the planning process. Unilateral agreements are formally recorded in a legal agreement; however, there is no clawback or spending limitations in respect of the Council. These continue to be monitored.

Notification of Triggers being met.

23. Monitoring information from April 2024 and July 2024 was examined which demonstrates quarterly visits to development sites are taking place and being effectively reported to the S106 Monitoring Group.
24. As mentioned in paragraph 12, within the Development Management team, individual case officers are responsible for notifying the developer and third parties that an obligation has been met and the amount due. Most agreements require the amounts required in the original agreement to be index-linked to reflect inflation or specific industry inflationary changes. Finance will determine the amount due when requested otherwise the amounts are determined by the case officers. This was evident from the sample selected for testing. Derbyshire County Council will determine their own indexation calculations for Education and Highways as necessary and will seek to recover these amounts due.
25. The process at BDC requires notification and request for payment to be done via email which includes providing details of the Council's bank account to facilitate payment. Where payment is not received a further email will be sent. The planning case officers liaise with Finance to assess whether payment has been received. A sundry debtor invoice is sent if no further payment is received or if the developer has asked for one.
26. The observations were that: -
 - The procedures do not specify the timeframe required between being notified of the trigger being met and sending the first, second and subsequent requests for payment. There is a risk therefore recovery processes may be inconsistently applied or the time taken to recover amounts due may be unnecessarily extended.
 - Whilst some dates are recorded on the tracker spreadsheet, it is not possible to readily identify the stage of recovery each is at.
 - It is not possible for the Development Management & Land Charges Manager to readily identify the amount owed in respect of S106 contributions. Some entries are shown as outstanding on the Finance S106 spreadsheet whilst the remainder needs to be established from individual entries on the tracker spreadsheet.
27. A sample of 4 planning cases was examined and correspondence provided showed that in 3 of the cases, request for payment had been within a month of being notified of the trigger being met. In the remaining case, the date of notification wasn't clear. Where payment hadn't been received, the case officers had chased the developer although at differing timeframes. Where the payment hadn't been received promptly, (in 2 cases) the timeframe between the first request and sending the sundry debtor account was circa 4 months and 16 months respectively, although there had been correspondence with developers during this period.

28. One of the cases sampled, related to Planning Reference 23/000367/OTHER (Chesterfield Road, Barlborough). In this case, the trigger was shown as met by 31/03/23 with the sundry debtor invoice being issued on 31/07/23 for £91,106 for a Sport Obligation. The amount remains unpaid and in dispute. Amounts are also outstanding to DCC for Education and Highways obligations. The matter was referred for external legal action during July 2024. A second instalment is now due to the Council for circa £90k. A recent application to vary the terms of the S106 had been received but was later refused which is understood to have confused matters further.
29. Discussion took place with the Head of Finance & Section 151 Officer, to consider the inclusion of all debts on the sundry debtor system once due and as a result reminders for payment will be automatically issued and complete arrears reports will be available. It also ensures that all debts due to the Council are included in the financial statements. The Officer's view was there would be confusion and potential for spending of S106 contributions before payment had been received. When an invoice is raised, the department is credited with the value of the invoice regardless of whether the amount has been received.
30. If the sundry debtor system is not to be used, the Tracker (or its replacement, as commented at paragraph 20) needs to encompass all dates of recovery actions taken with the document being monitored by management. The procedure notes should be updated to stipulate a timeframe for each recovery action to ensure recovery is not delayed and inconsistently applied.

R3	<p>Timeframes should be established between each stage of recovery. These should be defined in the procedure notes and effectively applied. If such requests for payment are not made via the Sundry debtor system, any alternative system should include these details and summary information available to management.</p> <p>Risk: Medium</p>
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Effective Allocation and Spend of S106 contributions

31. S106 agreements contain conditions regarding the spending of S106 contributions which the Council must abide by. These include timeframes for spend (usually contributions must be spent 5 years from receipt) and the specific purpose and area where expenditure must take place. Failure to spend amounts in accordance with conditions may lead to the Council refunding the developer inclusive of interest. With reduced funding, this may lead to the project not proceeding or the Council funding the project from its own resources.

32. Project cost centres show the amount budgeted and actual amount of the contribution together with budgeted and actual spend. The information is encompassed within the Finance S106 Spreadsheet. The spreadsheet also shows the timeframe for spend and is colour coded to show contributions which must be spent with the next 12 months and 24 months, together with those that have lapsed the due date.
33. A sample of 5 entries from the Finance S106 spreadsheet were traced back to the initial S106 agreement which indicated that the correct timeframes and projected date for spend had been accurately recorded. Where expenditure had occurred to date, this was verified to the FMS. No issues relating to expenditure were identified except minor points mentioned at paragraphs 40 and 41.
34. As the minutes show, the S106 Monitoring Group review and chase progress made in respect to spending S106 contributions as allocated, particularly those requiring spend within the next 12 and 24 months. At the time of the audit, no amounts have been required to be returned to the developer.

Spending of Health S106 contributions

35. It was noted from the information provided to the Group that spending of the Health Contributions is towards the end of the 5 year period allowed, for example: -
 - For planning reference:16/00530/FUL -Station Road Langwith Junction. Health Spend of £16,000 is required by 30/01/25 but there has been no update as part of the March 2024 and June 2024 monitoring. There remains 5 months for the expenditure to take place.
 - For planning application reference 14/00531/OUT – Rosewood Lodge Farm, South Normanton, spend was required by 21/05/24. Amounts were paid to the NHS Derby and Derbyshire Integrated Care Board (ICB) and placed in their account on 10th June 2024, after the deadline. A new agreement has been established dated 21/05/24 between the two parties to indemnify the Council from any liability for refund as a result of not spending the S106 contributions within the timeframe.
36. Through discussions with staff, there has been delays in receiving updates from Health partner on 'selection / delivery of S106 funded projects. The S106 Monitoring Group is an internal group therefore third parties do not attend. Internal Audit were informed that S106 Health matters are discussed at the Derbyshire Infrastructure Planning Group but that due to absences and changes in key NHS staff attending, it has been difficult obtaining an update. A recent meeting attended by the Principal Planning Officer in September 2024 has been useful.

37. In September 2023, Planning staff ensured that planning committee members and the Senior Leadership Team were aware of the problems being encountered. As a result the Chief Executive met with representatives of the ICB to establish a way forward. Planning staff have taken all measures possible to seek spending of health funds without requiring the return of funds to the developer.

Spending of Art S106 contributions

38. A review of the Action Plan shows that the majority of actions relate to meeting the delivery Art of obligations. The Development Management & Land Charges Manager is reviewing processes to assess whether including more specific details regarding Art installation can be included within the S106 agreement rather further discussions taking place on meeting the trigger. Advice can then also be given at an earlier stage should separate planning permission be necessary.

Spending of Parks & Open Spaces and Outdoor Sports S106 Contributions

39. These are being monitored as previously outlined. Cater Lane West South Normanton (14/00551/FUL) POS contribution is showing on the finance spreadsheet as a nil condition balance outstanding. The FMS indicates that a purchase order was raised for £3,243 on 07/12/22 to South Normanton Parish Council but remains outstanding. The Leisure Officer has explained that a project for a youth shelter is being considered as part of a wider project. The project no longer appears on monitoring record as there is no requirement to repay the developer if unspent.

40. POS contribution from The Brambles Doe Lee (05/00735) is showing a balance of £1,846.44 for maintenance. In terms of spend, there remains a purchase order outstanding for maintenance for Glapwell Mountain Bike Trail. The purchase order was raised on 10/01/23 for maintenance covering 2022/23 and 2023/24 with an invoice only being received for 2022/23 maintenance. The project no longer appears on monitoring record as there is no requirement to repay the developer if unspent.

41. There are some agreements which do not include a timeframe for spend of the S106 contributions, especially where this relates to maintenance. However, it is envisaged that the Council would still require delivery of projects within a reasonable timeframe and therefore an annual review of progress for those without projects allocated S106 contributions should be reviewed.

R4	An annual review of projects allocated S106 contributions that do not have a timeframe for spend (for example maintenance), take place to seek assurance on delivery. Risk: Low
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S106 Reporting

42. Copies of the previous four Planning Committee reports, which at the date of audit testing included report dates of June 2023, September 2023, November 2023 and March 2024, were obtained. The Planning Committee reports provide detailed information to Members and are considered to accurately reflect the position regarding the specific S106 agreements which are nearing the obligation or 'use by' date or within the next 12 and 24 months.

Appropriate Provision for repayment of funds

43. The monitoring information is not stating any S106 contributions will not be spent by within the specific deadlines, therefore no provision has been made for repayments plus interest. Through discussions with the Head of Finance & Section 151 Officer, there is one agreement where funds are being retained on behalf of DCC and interest shall be due when paid over. Provisions are to be included at the next refresh of the Medium Term Financial Plan.

Appendix 1

Assurance Level	Internal Audit Definition	Risk Register Link
Substantial Assurance	There is a sound system of controls in place, designed to achieve the system objectives. Controls are being consistently applied and risks well managed.	Minor / negligible impact
Reasonable Assurance	The majority of controls are in place and operating effectively, although some control improvements are required. The system should achieve its objectives. Risks are generally well managed.	Minor / moderate
Limited Assurance	Certain important controls are either not in place or not operating effectively. There is a risk that the system may not achieve its objectives. Some key risks were not well managed.	Moderate / Severe Impact
Inadequate Assurance	There are fundamental control weaknesses, leaving the system/service open to material errors or abuse and exposes the Council to significant risk. There is little assurance of achieving the desired objectives.	Catastrophic Impact

Appendix 2

Indicative Definitions of High Medium and Low Recommendations

Rating	Definition
High	<p>Risks that can have a catastrophic / severe impact on the operation of the Council or service - Must take action to mitigate or terminate if not possible to do so: -</p> <ul style="list-style-type: none"> • Death, extensive injury, major permanent harm • Unable to function without government or other agency intervention. • Significant impact on service objectives • Inability to fulfil obligations. • Short to medium term impairment to service capability • Adverse national publicity, highly damaging, loss of public confidence • Major adverse local publicity • High risk of fraud being able to occur e.g., key internal controls are not operating or are missing. • Direct link to a strategic risk occurring. • A serious breach of legislation/ legal requirements leading to substantial financial penalties or severe breach of data protection (report to ICO) • Substantial loss or damage to Council assets/or information
Medium	<p>Risks which have a noticeable impact on the service provided, will cause a degree of disruption to service provision / impinge on the budget - Check current controls and consider if others are required: -</p> <ul style="list-style-type: none"> • Medical treatment required, semi-permanent harm up to 1 year. • Short term disruption to service capability • Significant financial loss • Some adverse publicity needs careful public relations. • Isolated personal details compromised • Risk of fraud being able to occur • Direct link to identified operational risks occurring. • A serious breach of organisational policies and procedures • A breach of legislation / legal requirements leading to a moderate financial impact • Loss or damage to Council assets, information • Previously agreed medium internal audit recommendations remain outstanding.
Low	<p>Risks where the impact and any associated losses will be minor.</p> <ul style="list-style-type: none"> • First Aid treatment, non- permanent harm up to 1 month, no obvious harm or injury • Minor / negligible impact on service objectives • Financial loss that can be accommodated at service level / minimal. • Some public embarrassment, no damage to reputation, unlikely to cause any adverse publicity / internal only. • Minimal risk of fraud • No direct link to operational or strategic risks • A minor breach of organisations policies and procedures • A minor breach of Legislation / legal requirements • Low risk of loss or damage to Council assets
Advisory	<p>Not risk or control related.</p> <ul style="list-style-type: none"> • May enhance the service. • May achieve efficiencies. • May lead to an improved outcome

Internal Audit Report – Implementation Schedule

Report Title:	Section 106 Contributions 2024/25	Report Date: 1st October 2024
		Response Due By Date: 22nd October 2024

	Findings and Risk identified	Recommendations	Risk (High, Medium, Low)	Agreed	To be Implemented By:		Comments
					Officer	Date	
1.	Non-compliance with General Data Protection Regulation (GDPR) as signatures constitute personal data and could be reproduced in an unauthorised or fraudulent way.	A review of S106 agreements on the planning database for public access, is undertaken to ensure signatures are redacted.	M				
2.	Reducing duplication in the recording of data to provide effective management information.	Planning Managers review areas of duplication in respect of recording S106 contribution triggers and monitoring how these are met, with a view to consolidating information into one or fewer documents to record amounts once and provide effective management information.	L				

	Findings and Risk identified	Recommendations	Risk (High, Medium, Low)	Agreed	To be Implemented By:		Comments
					Officer	Date	
3.	Formal recovery process timeframe not in place to ensure timely and consistent recovery.	Timeframes should be established between each stage of recovery. These should be defined in the procedure notes and effectively applied. If such requests for payment are not made via the Sundry debtor system, any alternative system should include these details and summary information available to management.	M				
4.	Potential for S106 contributions without clawback not to be delivered.	An annual review of projects allocated S106 contributions that do not have a timeframe for spend (for example maintenance), take place to seek assurance on delivery.	L				

Please tick the appropriate response (✓) and give comments for all recommendations not agreed.

Signed Head of Service:		Date:	
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