

Taunton Deane Borough Council

Corporate Governance Committee – 25th July 2011

S106 Agreements – Review of Management & Controls

Report of the Strategic Director

(This matter is the responsibility of Executive Councillor Edwards)

1. Executive Summary

This report shares the key issues on the management of s106 Agreements for the Council.

2. Background

- 2.1 Section 106 of the Town and Country Planning Act 1990 provides the legal framework for Taunton Deane Borough Council (as the Local Planning Authority), when granting planning permission, to enter into an associated legally binding agreement for that land.
- 2.2 Traditionally, authorities use this framework to provide funding for changes to highways, contributions towards the provision of schools, the creation and ongoing maintenance of open spaces, the provision of leisure facilities and affordable housing.
- 2.3 s106 Agreements are negotiated by the Council's Development Management function. The associated documentation is then prepared by our in-house Legal Services Team.
- 2.3 The “obligation” in the agreement can be delivered by the Developer, or they can transfer a sum to the relevant local authority for them to carry out the obligation on their behalf. The obligation may not be activated until some time after the development begins.

- 2.4 The management of s106 agreements is currently spread through many departments.
- 2.5 The Audit Commission flagged concerns re the controls around the management of s106 agreements last year. Following this an internal audit review of the s106 process was commissioned (across Somerset) to try and gain some learning from other authorities. The internal audit report is attached at Confidential Appendix 1 for reference.
- 2.6 In addition, an outstanding s106 contribution was recently written-off as the developer was no longer in business. This highlighted some issues and Members requested that we review the legal documentation to see if this could be improved to provide the Council with more protection.
- 2.7 This report provides an update on those issues raised by our auditors, the legal document itself and what can be done to tighten this up, and sets out how these important legal agreements will be managed within Taunton Deane moving forward.
- 2.8 The final section of the report provides an early update on the new legal framework (Community Infrastructure Levy) that replaces the 1990 Act, and shares how this will be managed at Taunton Deane.

3. Issues Raised By The Auditors

- 3.1 The internal audit report identified the following key “issues”:-

Re Financial Risk to the Authority

- Initial guidance available to developers is not clear
- A central database system is available as part of an existing software package but is not used monitor s106 agreements
- No formal records of the internal working group are kept
- A payment had been incorrectly coded and spent

Re Legal and Reputational Risk to the Authority

- The council is maintaining 2 sites not in its ownership
- There is no single officer responsible for monitoring the implementation of s106 agreements
- Issues re access to the original documentation, and the risk that details in the database reflect the final agreements.

Re Ineffective Use of Manpower / Resource

- There is no recorded process for handling s106 agreements
- There are no management reports produced on s106 agreements.

Good progress is being made against each of the recommendations set out in the Internal Audit Report.

- 3.2 The Theme Managers have recently considered how best the responsibility for this area of work can be managed moving forward. It is important that responsibilities are identified, controls are put in place, and management reports are regularly produced.
- 3.3 The responsibility for the co-ordination and management of s106 Agreements will be consolidated in one post. It makes sense to finalise this as part of the changes expected with the Budget Review Project later this year. We cannot wait until this is completed to review the existing records.
- 3.4 Meantime, we need to carry out an in depth review to ensure all our records are “robust”. This will be done by the Community Development Team (led by Debbie Arscott). This postholder will need to work closely with colleagues in Planning, Legal, Housing, and the DLO in this review to ensure our records are complete. They will be responsible for ensuring we develop a robust database of current s106 agreements. This will ensure we have more transparency on developer contributions, where they are being directed, what has been spent and the trigger points for future contributions. The current paper based system will be replaced by the database within our planning system – Accolaid.
- 3.5 This is a short-term piece of work that will bring our arrangements up to an acceptable standard. A permanent solution needs to be found and will be developed as part of the forthcoming Budget Reviews. This is essential to provide a more robust framework for managing this important source of income for the Council. It is envisaged that a permanent solution can be put in place by the end of this year.

4. The Legal Document

- 4.1 The Legal Services Manager and the Growth and Development Manager have reviewed this issue and offer the following comment:-
- 4.2 The format and wording of each S106 agreement is based on the Law Society Model draft which is a standard draft used by many authorities. However, because of the individual nature of some of the larger agreements formats do vary.
- 4.3 The agreement is generally binding on subsequent land owners so that a subsequent purchaser of the land is bound by the obligations in the original agreement. Problems have however still arisen where subsequent purchaser has gone into administration with obligations outstanding but no

value left in the asset ie open space subject to an ongoing maintenance obligation which gives the land a negative value. Whilst technically this could be overcome by a performance bond, such bonds are very expensive and if required as standard for all agreements would reduce the overall level of contributions from S106 agreements. It may be possible to achieve some further level of protection by “frontloading” the agreement so that obligations have to be delivered earlier in the development but this again would have an effect on the viability of the scheme and might result in an overall reduction in the level of contributions.

5. Community Infrastructure Levy

5.1 The Community Infrastructure Levy (CIL) was introduced through the Planning Act 2008 and defined in more detail in regulations published in April 2010. CIL differs from previous approaches to planning obligations (s106) in that it explicitly allows a local planning authority to pool contributions from a number of developments to pay for infrastructure. Infrastructure is broadly defined in the Act as (see clause 216):

- a) Roads and other transport facilities
- b) Flood defences
- c) Schools and other educational facilities
- d) Medical facilities
- e) Sporting and recreational facilities
- f) Open spaces

5.2 The Council has now commenced work on its CIL (alongside an Interim CIL Charging Arrangement which will allow for the authority to capture an uplifted level of developer contribution prior to the final CIL being in place). This work is being led by Three Dragons and Roger Tym and Partners who undertook work on the Infrastructure Delivery Plan. Members will be consulted throughout the process prior to examination and adoption of the CIL in the latter part of 2012.

5.3 In future s106 will be restricted to works that are essential to bringing the development forward only, but will continue to include the delivery of affordable housing.

6. Finance Comments

6.1 The improvements outline in this report will provide more control on this key source of external finance.

7. Legal Comments

- 7.1 The use of legal agreements to secure obligations is well established with S106 agreements having been used since 1990. The sanction for failure to comply is either by way of an injunction to stop development or by court proceedings to recover cash payments as a debt. Such enforcement has rarely been needed in the past and the recent case is case of a land owner going in to administration probably reflects the current economic climate.

8. Links to Corporate Aims

- 8.1 S106 Agreements are a key source of funding to assist with the delivery of infrastructure improvements – supporting all Corporate Priorities.

9. Environmental Implications

- 9.1 Planning conditions can be used to support environmental issues.

10. Community Safety Implications

- 10.1 Planning conditions can be used to support community safety issues.

11. Equalities Impact

- 11.1 S106 Agreements provide infrastructure improvements to the benefit of the wider community. The changes outlined in his report are internal.

12. Risk Management

- 12.1 Failure to have a fully operational s106 database may lead to the Council failing to request contributions and therefore planning gain not materialising.

- 12.2 As set out in section 4 above, it is difficult to safeguard completely against a developer going into administration without either reducing the overall level of contributions across the board, or discouraging development by reducing viability. The use of bonds for other than for highway obligations is not general practice.

13. Partnership Implications

- 13.1 This report does not have any direct partnership implications.

14. Recommendations

- 14.1 Members of the Corporate Governance Committee are requested to support the changes outlined in this report to the management of s106 agreements.

Contact: Shirlene Adam, Strategic Director
01823 356310
s.adam@tauntondeane.gov.uk