

This Report will be made public on 5 November 2018

Report Number: **OS/18/03**

**To:** Overview and Scrutiny  
**Date:** 13<sup>th</sup> November 2018  
**Status:** Non key decision  
**Head of service:** Chris Lewis, Planning Advisor  
**Cabinet Member:** N/A

**SUBJECT:** **ORIGIN AND DESTINATION OF SECTION 106 MONIES**

**SUMMARY:**

This report responds to the request from New Romney Town Council for a topic review on the “origin and destination of section 106 monies” and “lack of transparency on the same”.

The legislative and policy requirements of section 106 contributions and their close relationship with the Community Infrastructure Levy (CIL) are set out.

The report concludes that the council has sound governance procedures in place to ensure that section 106 contributions are collected and spent in accordance with best practice and legislative requirements.

**RECOMMENDATIONS:**

- 1. To receive and note report OS/18/03.**
- 2. To confirm that the annual reporting arrangements to Cabinet and Planning and Licensing Committee that are already in place for monitoring section 106 payments and CIL receipts are appropriate.**
- 3. To request that the Audit Partnership provide a timetable for an updated review of Section 106 agreements that includes the points raised by New Romney Town Council.**

## **1. BACKGROUND**

- 1.1 New Romney Town Council has proposed a topic review on the “origin and destination of section 106 monies” and “lack of transparency on the same”.
- 1.2 The Town Council ask the committee to focus specifically on the need for consultation with local first tier authorities to determine local needs prior to allocation of funds.
- 1.3 Their expected outcome is amended policy / procedures that include consultation with parish / town councils and transparent routine reporting.
- 1.4 The Town Council has said it would like to attend the meeting to make a statement to support their request.

## **2. SECTION 106 AGREEMENTS**

- 2.1 Section 106 of the Town and Country Planning Act 1990 allows a local planning authority to enter into a legally-binding agreement or planning obligation with a landowner, or persons who intend to develop that land, in association with the granting of planning permission. These planning obligations address matters that are necessary to make a development acceptable which would otherwise be unacceptable in planning terms, for example the construction of a new road access or the provision of a new area of open space. However a planning obligation can only be taken into account when determining a planning application if the obligation meets all of the following statutory tests:
  - necessary to make the development acceptable in planning terms
  - directly related to the development; and
  - fairly and reasonably related in scale and kind to the development.
- 2.2 S106 agreements can also involve an agreed payment that has to be made by the developer as a contribution to specific infrastructure necessary for the development to go ahead. However such contributions do not apply where the development is for 10 units or less and the proposed development doesn't have a maximum combined gross floorspace of more than 1,000 square metres. Contributions for a particular project can be pooled from a maximum of five development projects.
- 2.3 Depending on the circumstances of the case these planning contributions might be paid prior to the commencement of the development or at an agreed specific stage of the development process. All contributions have to meet the requirements of the Local Plan and the National Planning Policy Framework.

## **3. COMMUNITY INFRASTRUCTURE LEVY**

- 3.1** Where a council has a Community Infrastructure Levy (CIL) in place (as is the case at Folkestone and Hythe) then planning contributions on a specific site can't be collected through S106 unless the site has been exempted from CIL. As identified by the Core Strategy Local Plan, the council has four specific strategic sites where developments are charged using the section 106 procedure rather than CIL. These sites are:-
- Folkestone Seafront
  - Shorncliffe Garrison
  - Sellindge broad location
  - New Romney masterplan sites
- 3.2** The extent of the New Romney Masterplan sites is shown at Appendix A. Land developed and known previously as the former Romney Marsh Potato Company site has resulted in a total section 106 payment of £177,851. Land opposite Dorland, Cockreed Lane with permission for 110 dwellings requires a total Section 106 payment of £682,997 of which £168,000 has so far been received. A section 106 agreement has not yet been entered into for the remaining land included in the New Romney Masterplan site but if developed this would result in further financial contributions. Other sites in New Romney, outside the masterplan area, would be subject to CIL not section 106.
- 3.3** The Council will need to amend the CIL scheme next year to include Otterpool Park as an additional site where 106 payments rather than CIL applies.
- 3.4** Where CIL applies the rates vary depending on location. For residential development charging bands are £55.58, £111.15 and £138.94 per square metre. For example Romney Marsh including New Romney (but excluding the New Romney Masterplan sites) falls within area B which has a CIL rate of £55.58 per square metre. For retail development rates are £0 in Folkestone town centre and elsewhere in the district £0 for schemes up to £280 sq.m. Thereafter outside Folkestone town centre a charging rate of £111.15 per square metre applies for retail development. CIL does not apply to other land uses no matter where it is located in the district.
- 3.5** One of the purposes of CIL is to incentivise communities to accept growth. The levy places a responsibility on the district council to pass a 'meaningful proportion' of CIL receipts to parish/town councils twice a year. Government Regulations enacted on 25th April 2013 require that the meaningful proportion should be 25% of CIL receipts where a Neighbourhood Plan is in place and 15% in other areas (capped at £100 per dwelling).
- 3.6** The CIL Regulations state that a local council must use CIL receipts passed to it to support the development of the local council's area, or any part of that area, by funding

- (a) the provision, improvement, replacement, operation or maintenance of infrastructure; or
- (b) anything else that is concerned with addressing the demands that development places on an area.

**3.7** This gives parish and town councils considerable freedom to spend their proportion of CIL on the things that address the impacts of development on their area. Now that the Council has had an approved CIL scheme in place for two years it is likely that CIL contributions will grow as CIL liable schemes are developed.

**3.8** A guidance note on the Community Infrastructure Levy (CIL) for Town and Parish Councils (February 2018) can be found on the council's website at the link below:-

[https://www.folkestone-hythe.gov.uk/media/4996/Community-Infrastructure-Levy-CIL---Guidance-for-town-and-parish-councils/pdf/Community\\_Infrastructure\\_Levy\\_\(CIL\)\\_-\\_Guidance\\_for\\_town\\_and\\_parish\\_councils.pdf](https://www.folkestone-hythe.gov.uk/media/4996/Community-Infrastructure-Levy-CIL---Guidance-for-town-and-parish-councils/pdf/Community_Infrastructure_Levy_(CIL)_-_Guidance_for_town_and_parish_councils.pdf)

#### **4. TRANSPARENCY**

**4.1** In those areas where section 106 payments are permissible, such as in the New Romney Masterplan area, there is an opportunity for parish or town councils to identify when consulted on a planning application the infrastructure that it believes is necessary to enable a proposed development to be permitted. This could be in the form of requiring the infrastructure in question to be included in the building works or it might be a financial contribution toward necessary infrastructure. However for this infrastructure or infrastructure contribution to be included in a section 106 agreement it must meet the three statutory tests set out above in paragraph 2.1 and be compliant with the requirements of the National Planning Policy Framework and National Planning Policy Guidance. Local planning authorities who require infrastructure or infrastructure contributions that do not meet these tests are at risk of losing planning appeals or being challenged in the courts with the additional risk of having to pay the developer's costs of appealing.

**4.2** Collection and spending of CIL funds are reported regularly through the Annual Monitoring Report (AMR) process. The most recent report was considered by Cabinet in December 2017.

<http://www.folkestone-hythe.gov.uk/moderngov/documents/g3227/Public%20reports%20pack%2014th-Dec-2017%2017.00%20Cabinet.pdf?T=10>

- 4.3** Section 106 agreements are the subject of an annual monitoring report to Planning and Licensing Committee. The most recent monitoring report was considered by the committee in January 2018.

<http://www.folkestone-hythe.gov.uk/moderngov/documents/g3245/Public%20reports%20pack%202018%2019.00%20Planning%20and%20Licensing%20Committee.pdf?T=103rd-Jan->

- 4.4** A confidential East Kent Audit Partnership Report on section 106 agreements was completed in June 2014 which included 15 recommendation set out in an action plan. A follow up progress report was completed in 2015 with a “reasonable level of assurance given on the system of internal controls in operation”. The Audit Partnership concluded that out of 15 recommendations, nine had been implemented, one was no longer relevant and one was pending implementation. The four recommendations that had not been completed related to detailed investigation of historic planning applications where section 106 funds appeared not to have been allocated to development projects.

## **5. CONCLUSIONS**

- 5.1** Financial contributions received by the district council via section 106 agreements are only applicable on four strategic development sites in the district.
- 5.2** The scope of 106 contributions has to be specifically related to the infrastructure requirements necessary for the development proposed to be permitted. However town and parish councils can make representations to the local planning authority with a well-argued planning case for a specific contribution to be a requirement of any planning permission granted. Ultimately it would be a matter for the Planning and Licensing Committee to decide if the requested contribution can be justified.
- 5.3** Arbitrary section 106 contributions can't be required and could result in an award of costs against the council at appeal or at judicial review.
- 5.4** Outside of the four strategic sites, Parish and Town Councils will increasingly receive their share of CIL receipts from developments being carried out in their areas and will have greater discretion on how these are spent on local infrastructure.
- 5.5** Transparency and good practice are achieved through annual reports to Development Management Committee in the case of section 106 agreements and an annual monitoring report to Cabinet in the case of the CIL scheme.

- 5.6** It is considered that the existing annual monitoring report process to Planning and Licensing Committee and Cabinet is a suitable system for ensuring transparency on section 106 agreements and CIL.
- 5.7** However the Audit Partnership has not assessed the effectiveness of the system for section 106 agreements since its update progress report in 2015 as it was waiting for the implementation of CIL. The auditor has advised that an audit review is included in the Audit Plan for this year. Some background work has already commenced and the audit itself is due to start in the next few weeks. The issues raised by New Romney Town Council have been drawn to the attention of the auditor.

## **6. RISK MANAGEMENT ISSUES**

<b>Perceived risk</b>	<b>Seriousness</b>	<b>Likelihood</b>	<b>Preventative action</b>
A planning appeal by a developer that required section 106 contributions that are not justified by legislation and National Planning Policy.	High	Low	Maintain best practice and take legal advice where necessary.
A judicial challenge by a developer that section 106 contributions received have not been invested in the infrastructure specified in the section 106 agreement.	High	Low	Maintain best practice and take legal advice where necessary.

## **7. LEGAL/FINANCIAL AND OTHER CONTROLS/POLICY MATTERS**

### **7.1 Legal Officer's Comments (NE)**

There are no legal implications arising directly out of this report.

### **7.2 Finance Officer's Comments (LH)**

There are no financial implications arising directly from this report.

### 7.3 **Diversities and Equalities Implications**

Individual section 106 agreements need to take account of diversities and equality implications.

## 8. **CONTACT OFFICERS AND BACKGROUND DOCUMENTS**

Councillors with any questions arising out of this report should contact the following officer prior to the meeting

Chris Lewis – Planning Advisor  
Telephone: 01303853456  
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The following background documents have been relied upon in the preparation of this report: None

### **Appendices:**

Appendix A: New Romney Masterplan Sites (Core Strategy Local Plan Policy CSD 8)