

	<b>REPORT TO PLANNING &amp; DEVELOPMENT COMMITTEE TO BE HELD ON 17 JANUARY 2013 &amp; CABINET ON 22 JANUARY 2013</b>
	<b>Key Decision</b> <b>NO</b> <b>Forward Plan Ref No</b> <b>N/A</b>
<b>Corporate Priorities</b>  <b>Quality Environments</b> <b>Prosperous</b> <b>Safe and Healthy</b>	<b>Cabinet Portfolio</b> <b>Cllr D</b> <b>Holder</b> <b>Bastiman</b>

**REPORT OF THE HEAD OF REGENERATION AND PLANNING –  
13/10**

**WARDS AFFECTED: ALL**

**SUBJECT: SECTION 106 PLANNING OBLIGATIONS – ANNUAL  
UPDATE**

**RECOMMENDATION (S):**

The updated information on Section 106 planning obligations be received and noted.

**REASON FOR RECOMMENDATION (S):**

The monitoring of S106 planning obligations and the reporting of that information to Members is required to ensure that the process is transparent. Continued reporting of this information and the availability of reports on the Council's website enables the process of collecting, allocating and spending of commuted sums to be transparent and the Council more accountable to the electorate.

**HIGHLIGHTED RISKS:**

The risk associated with not monitoring legal obligations relating to planning applications is that the Council could be criticised for not operating a transparent and comprehensive framework for monitoring such obligations.

Without adequate co-ordination commuted sums could be spent on inappropriate schemes and not on priorities identified within the Council's various plans and strategies.

Without an adequate and co-ordinated system for monitoring S106 obligations and any subsequent commuted sums it is possible that should deadlines expire, commuted sums would have to be returned (plus interest) to the developers and required community facilities / affordable housing would not be provided.

## **1. INTRODUCTION**

- 1.1 At the meeting of the Development & Regulation Committee in August 2002, members approved a protocol for monitoring planning obligations negotiated under Section 106 of the Town & Country Planning Act 1990. The protocol was intended to meet the concerns of District Audit that a more transparent and comprehensive framework for monitoring financial and non-financial obligations was required. It would also ensure that the process is transparent, accountable and would allow ready access to information by the public and members.
- 1.2 It was also agreed that as part of the process an annual report on progress with the implementation of planning obligations would be prepared for consideration by members. The report is intended as an up to date statement of the current position as of 31 December 2012, and any developments over the last time matters were reported to Planning & Development Committee and Cabinet in January 2012 . The detailed position, especially for financial contributions is set out in the tables in Appendices 1-3, while the Assessment section of this report provides a commentary.
- 1.3 Table 1 in Appendix 1 provides an overall picture for financial contributions, according to their current status and broken down in terms of the type of infrastructure provided. Tables 2a - 5 then look at each type of infrastructure (including on-site affordable housing provision) within the context of the last 3 years. Finally, Tables 6a – 11 summarise the current position on individual Section 106 planning obligations according to category. These tables do not normally include obligations which have been fully executed by the developer, Council or other party – for example where a commuted sum has been received in full by the Council and the monies have been subsequently spent on a project in accordance with the terms of the agreement. The report concentrates on those obligations which relate to commuted sums and/or affordable housing provision. It does not normally list other non-financial obligations which contain ongoing restrictions or specific requirements imposed on developers.

## **2. CORPORATE AIMS/PRIORITIES AND THE COMMUNITY STRATEGY**

- 2.1 Planning obligations help the Council to achieve 3 of its 4 Key Aims; namely:
  - Quality Environments
  - Prosperous
  - Safe and Healthy

They also contribute to 'Accessible Communities' which is an additional priority referred to in the Community Strategy.

### **3. BACKGROUND AND ISSUES**

- 3.1 Section 106 of the Town and Country Planning Act 1990 allows Local Planning Authorities to impose restrictions or requirements on land, including the payment of monies towards infrastructure. Collectively, these are known as planning obligations and may take the form of a Section 106 agreement between a developer/landowner, the Council and possibly other parties, or alternatively, a unilateral undertaking provided by the developer alone. Obligations form part of a planning permission, but are only used when planning conditions are unsuitable, in part because of their complexity and the delay they can add to the planning process. Since 2010 former guidance relating to their use has been enshrined in law and this states that planning obligations may only constitute a reason for granting planning permission for the development if the obligation is: -
- (a) necessary to make the development acceptable in planning terms;
  - (b) directly related to the development; and
  - (c) fairly and reasonably related in scale and kind to the development
- 3.2 The two most commonplace scenarios where planning obligations are used is to secure monies for infrastructure required in connection with new development or to provide affordable housing. Provision has been made in the Planning Act 2008 that most financial contributions can also be secured by the Community Infrastructure Levy (CIL). A decision on whether CIL will be introduced in the Borough will take place as part of the decision-making process relating to Local Plan Replacement (Local Development Framework).
- 3.3 In 2007, the Council adopted Supplementary Planning Documents setting out the detailed guidance on thresholds, financial formulae and means of securing: (i) affordable housing, (ii) education, and; (iii) public open space, play and sports facilities for residential development. This introduced greater consistency and lowered the threshold for the minimum number of units for which obligations applied. The formulae in the SPDs are regularly revised to take account of inflation. The Affordable Housing SPD was subject of a more fundamental review in 2012. Other areas, such as transport and health are not currently subject to formulae for calculating commuted sums. Transport accounts for the majority of commuted sums which are not directly calculated with reference to supplementary guidance, but these amounts are normally determined in respect to the cost of providing specific highway infrastructure in the vicinity of the development site, relative to its scale.
- 3.4 The Borough Council is most often responsible for the expenditure of monies relating to affordable housing, public open space, play, sport and occasionally transport. The County Council either directly spends or has a key determining role in the expenditure of transport and education funds. Subject to suitable safeguards, monies may also be spent by other organisations, such as Parish Councils, statutory infrastructure providers or community groups.

## 4. CONSULTATION

- 4.1 Consultation has not been necessary with respect to the contents of this report since it primarily consists of reporting of an ongoing monitoring process. It has, however, been prepared with input from other service areas, including Environment and Countryside, Housing and Finance.

## 5. ASSESSMENT

- 5.1 Section 106 obligations negotiated in the course of dealing with planning applications have continued to result in a range of contributions towards infrastructure or community facilities required as a direct result of the proposed development. Most frequently, these obligations require payment of a commuted sum to be expended off-site. Table 1 in Appendix 1 shows the importance of these funds. If all developments with planning permission, and subject to s106 obligations, were to be implemented, this would raise £4,996,671, in addition to the £1,454,648 which has been received and is awaiting expenditure. Including monies owed, this gives total funds of **£6,499,153**.
- 5.2 The most significant s106 obligations completed since the last update report relate to Eskdale Park, Whitby and proposed superstore developments by Tesco and Sainsbury in Scarborough. However, there are a number of other major developments, such as Middle Deepdale and the Sands where the agreements are well advanced, but awaiting final completion. Reference to these pending obligations is made in the report where relevant, but since they are not finalised, they have been excluded from the Tables in the appendices.

### **Affordable Housing**

- 5.3 Planning obligations are an important mechanism for securing and retaining affordable housing. They are normally used to provide either a proportion of on-site provision on new residential developments or a commuted sum towards off-site provision. Not all affordable units are secured by this route. Where the planning applicant is a Registered Provider of social housing, then a planning obligation may not always be necessary since they are governed by other regulatory safeguards to ensure retention of affordable stock. Where existing housing is acquired by a Registered Provider this normally falls outside the planning process
- 5.4 The Affordable Housing SPD sets out the Council's policy for considering the level of provision within new residential schemes, and where applicable, the level of off-site contribution required. It was revised in 2012 to take account of the impact of current economic conditions on the viability of schemes. On larger residential schemes, (10+ or 5+ depending on the area) on-site provision has been reduced to between 20% and 40% provision with the higher requirements applying to more buoyant housing market areas, such as Whitby. At the same time, on smaller schemes residential schemes (of 1+ dwellings, where there is no requirement for on site affordable provision), the

revised SPD introduced the payment of a sum towards off-site affordable provision. In the case of both on-site provision and the payment of a commuted sum, this requires the completion of a Section 106 planning obligation. These new provisions only became fully operative for applications received after 1 August 2012. It is therefore premature to assess their impact as few planning obligations have as yet been completed under the new regime.

- 5.5 Largely as a result of the economic downturn, few new affordable units were secured by means of s106 obligations when monitoring reports were presented for the years 2009 and 2010. There is now an upward trend with 22 units having been provided through this route in 2011 and 39 units in the last year. These consisted of 19 affordable dwellings at Queen Street, Filey and a further 18 units at Larpool Lane, Whitby. These were both 100% affordable schemes.
- 5.6 In terms of unimplemented consents, the last year has seen approval having been given to 54 affordable units at Eskdale Park, Whitby. The total number of unimplemented commitments with planning permission currently stands at 293 which is similar to last year, but has approximately doubled since March 2010 when the figure stood at 148. These figures exclude later phases of High Mill Farm, Scalby where up to 137 additional affordable units could be provided, but the exact figure is to be determined at the reserved matters stage. Planning Committee has also recently resolved to approve two planning applications which will significantly add to the current figure of 293, but the obligations have not yet been completed. At Middle Deepdale up to 270 (or 20%) of the units would be affordable, although this would be subject to viability assessment. At Helredale Gardens/St Peter's Road, Whitby 91 units are proposed, but completion of the Section 106 agreement has been held up by a Village Green application.
- 5.7 The full picture of Section 106 obligations relating to affordable housing is summarised in Tables 2A and 2B in Appendix 2. Full details of individual cases are shown in Tables 6A and 6B in Appendix 3.
- 5.8 As stated before, the number of units secured through Section 106 agreements only paints part of the picture. In total, 108 new affordable units were provided in 2011/12 (April 2011 to March 2012) in the Borough. There have been 25 affordable housing completions to date in the current financial year. In the region of 50 more affordable housing completions are anticipated this financial year, of which at least 32 (Muston Road, Filey) would be through S106 obligations.
- 5.9 Tables 2B and 6B summarise those cases where payment of a commuted sum for off- site affordable housing has been agreed. The main sum waiting to be spent is the £463,144 received from Benchmark in connection with the Sands development. The other main sum is £131,000 arising from the McCarthy & Stone development at the former Cricketers Arms, North Marine Road and this should be due in the near future.

- 5.10 It is not a function of this report to determine how commuted sums are spent. The normal procedure for this is the relevant Service Unit to make a request through the Capital Bid Process as part of the Financial Strategy. Cabinet has agreed to spend £200,000 to develop temporary accommodation for the homeless at Alma Square, Scarborough. The intention is, subject to Member agreement, to spend the remaining money to stretch an existing programme that uses Prudential Borrowing, Homes & Community Agency grant (if available) and Registered Provider funds to purchase and refurbish empty homes, which are brought back into use as affordable homes/ temporary accommodation for the homeless. (This will be the subject of a separate report.)

### **Public Open Space/Play Equipment/Sports Facilities**

- 5.11 The SPD relating to such provision gives guidance as to whether this should normally be provided on or off site. While on-site provision would usually be expected on larger residential schemes, there is not an overriding presumption that this is in preference to an off-site commuted sum. For smaller developments on-site provision may not be practical and even on larger developments greater community benefit may be gained by improving existing or creating new facilities, possibly in the form of pooled contributions, which may also attract matching funding.

#### *On-Site Provision/ Improvement and Maintenance*

- 5.12 The process of ensuring provision of open space/play areas to an adequate standard, its adoption by the Council and procuring payment of commuted sums can be a drawn out process involving several Service Units. Whilst Section 106 obligations are a legitimate, and still sometimes the best, means of securing such facilities on behalf of the Council, the adoption procedures can give opportunity for delaying tactics to be employed. Consequently, the Council now normally secures the maintenance of public open space and play facilities by planning condition with payments by private agreement, outside the ambit of planning legislation, in cases where the land is adopted by the Council. In other cases maintenance provision is put in place in the form of a management agreement. Consequently, the cases summarised in Tables 3A and 7A in the appendices are largely historic, although a planning obligation will be used in the case of Middle Deepdale to secure open space and maintenance sums of circa £500,000.
- 5.13 Where monies in Table 7A have only been partially spent this reflects the fact that payments cover maintenance, which is phased over a number of years (normally 10). This explains why not all the sums collected have been spent yet. Among the sites where such expenditure is still taking place include The Intake, Osgodby, Crab Lane, Crossgate and Eden Drive (Barry's Lane), Scarborough. There are currently 3 cases, where adoption procedures are still to be completed. At Pasture Crescent, Filey, Castle Road, Whitby and Lismore Place/Wyecourt the developers have undertaken works to bring the sites up to suitable standard and the next stage is adoption by the Council.

### *Off-Site Provision/ Improvement*

- 5.14 Payments for off-site open space, play and sports facilities make up the largest total of individual financial obligations, albeit that the sums involved may be less than for other forms of infrastructure. Table 3B shows global figures, while Table 7B provides details of individual cases. Since the last report was prepared some relatively substantial sums have been negotiated totalling £366,846 - the most significant of these being £323,672 towards St Peter's Play Area and other open space and sports facilities in the vicinity of Eskdale Park, Whitby. In addition, a replacement play area (or sum of up to £100,000) has in principle been agreed at or in the vicinity of the Sands development.
- 5.15 Individual sums on this and other areas of expenditure may not be sufficient to fund a meaningful project alone. Therefore the legislation allows for pooled contributions, as long as the expenditure directly relates to the development. Hence, the SPD indicates facilities should be accessible as in terms of a 5 minute walk to equipped play areas (400 metres) or 15 minute walk (1000 metres) to green space and sports facilities). Where there are several smaller developments within the same geographical area it allows the sums to be accumulated and reach a critical mass for a particular project, as well as being used to attract matching funding.
- 5.16 Historically, monies were allocated by Cabinet to projects emerging from the Play and Open Space Strategies as agreed by Cabinet. However, now they would normally come forward through the Capital Bid Process, again approved by Cabinet. Therefore, where a project is identified in the fifth column of Table 7B those in italics are provisionally agreed, whereas those underlined are confirmed projects as part of the Capital Bid Process or the planning obligation specifically identifies a project for expenditure.
- 5.17 A point of discussion arising from previous monitoring reports has been the expenditure pooled contributions towards open space and play, particularly where those sums were paid some time ago, but have not been spent yet. The most notable relates to contributions previously identified for expenditure at South Cliff and Valley Gardens. It is not the function of this report to decide how monies are spent, but to provide greater explanation a supplementary report has been prepared by the Environment & Countryside Service regarding these monies and is attached as appendix 4.
- 5.18 Planning obligations often include a repayment clause. This requires careful monitoring to make sure that potential funding is not lost. The penultimate column in Table 7B demonstrates that this is not a major concern at present for sums relating to open space/play/sport since none of the sums would have to be returned before 2018.

### **Education**

- 5.19 The threshold for securing an education contribution in the relevant SPD is normally 25 dwellings and then the County Council only requests a sum

where insufficient school capacity exists. Consequently, there are fewer schemes where such a sum is sought than for some other types of infrastructure. Table 4 in the appendices provides an overview on these funds, while Table 8 shows details of individual obligations.

- 5.20 No new planning obligations relating to education have been completed in the last year. Nor have any developments, where monies will become liable, reached the stage where payment is triggered. The overall sum has reduced following the decision to waive the sum liable on the Sands development, because in practice the majority of apartments have become second homes with no resident children. It had been anticipated that there may have been a request to reduce the obligation in relation to Muston Road, Filey, but no application has been received.

### **Transport**

- 5.21 Unlike other types of obligation, commuted sums for transport tend to be requested in response to specific impacts on local infrastructure, rather than having standard formulae/thresholds applied to all development. The County Council are now normally responsible for most expenditure across all the Borough, since the transfer of agency powers for the Scarborough area in April 2011. However, there are exceptions – for example the Borough Council would be responsible for securing funding (including expenditure of s106 funds) for road improvements at Whitby Business Park. Table 5 in the appendices provides a summary of the global picture and full details of individual obligations are shown in Table 9.
- 5.22 There have been some significant changes with respect to transport infrastructure in the last 12 months. New obligations have secured £200,000 in respect of Eskdale Park, Whitby, £357,000 for measures relating to the proposed Tesco development at Dean Road, and £135,000 relating to the extension of the Sainsbury superstore on Falsgrave Road. The Sands development will secure a new Park & Ride bus service to the new Water Park, as well as a payment towards cycle infrastructure. The Middle Deepdale agreement will also provide sums towards off site junction improvements and travel plan measures.
- 5.23 Sainsbury's have paid all sums relating to their Whitby superstore (as well as the first instalment for the Falsgrave Road store). The Whitby payments will play an important role in funding new link roads within the Whitby Business Park, for which there have been recent planning applications. The County Council will use the remainder of the Whitby superstore payments, together with other s106 payments towards the signalisation of the Prospect Hill/Mayfield Road Junction. Consultation on a scheme has taken place and a junction design agreed, but it is necessary to secure sufficient funding is in place before the works can proceed.

### **Health Infrastructure & Miscellaneous Obligations**

- 5.24 Contributions towards health infrastructure would improve local surgeries with £100,000 to be provided in connection with High Mill Farm, Scalby and £50,000 arising from Muston Road, Filey (see Table 10). Neither scheme has reached a stage when payments are due. The Middle Deepdale agreement is due to secure £250,000 towards health infrastructure.
- 5.25 Table 11 in appendix 3 shows some of the more important obligations not falling into other categories. These currently relate to the Tesco agreement for the Dean Road site. However other miscellaneous obligations which will form part of the Middle Deepdale agreement, including community facilities, provision for 3% self-build units, £140,000 towards a foul drainage feasibility study and £100,000 for a Regeneration Study for the centre of Eastfield.

## **6. IMPLICATIONS**

### **(a) Policy**

- 6.1 The issues in this report are within the Council's planning policies.

### **(b) Financial**

- 6.2 The costs of operating the monitoring system have to date been absorbed by the Planning Service budget. Monitoring charges were introduced in April 2011 to cover these costs.

### **(c) Legal**

- 6.3 If the system of planning obligations is not dealt with properly, there is a risk that developers and/or the community could mount a legal challenge to the Council's actions. District Audit would also criticise the Council if it has not reacted positively to previously raised concerns over the process of negotiating for commuted sums and the transparency of the system.

### **(d) Environmental**

- 6.4 Planning obligations have positive environmental impact; for example by providing and maintaining Public Open Space and Play Areas and access to decent homes through the negotiation of affordable housing.

### **(e) Staffing**

- 6.5 Monitoring is carried out by the Development Management section of Planning Services in consultation with other service areas such as Environment & Countryside and Housing.

**(f) Crime and Disorder Act 1998**

6.6 The implications for crime and disorder will be considered when the allocation of funds is determined and officers making recommendations will ensure that any proposed schemes have due regard to this issue.

**(g) Health and Safety Issues**

6.7 The Health and Safety implications are positive in that the allocation of funds towards health facilities, open space, recreation and play and affordable decent housing should have a beneficial impact on the health of the community.

**(h) Co-operation with Health Authorities**

6.8 The improvement of open space/recreation facilities and affordable housing has the potential to improve the health of the community. Where a commuted sum is negotiated for improvements to local health or medical facilities, this will be carried out with the full involvement of the relevant health body.

**(i) Equality Implications**

6.9 There are no implications for equality issues. Benefits from the allocation of Section 106 sums are generally community wide and not directed towards a specific group.

**(j) Human Rights Act 1998**

6.10 Improved open space and recreation facilities, affordable housing and other benefits through the Section 106 process will improve the general well-being of the community and provide greater options, for example, towards recreation, play and access to affordable housing.

**7. ACTION PLAN**

7.1 The following actions are identified:

<b>Objective</b>	<b>Target</b>
1 Continue monitoring of Legal Agreements	Ongoing
2 Prepare Monitoring Report	Annually



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**Background Papers:**

Appendix 1 - Overall Summary Table for Current Section 106 Funds

Appendix 2 - Summary Tables for Individual Types of Infrastructure

Appendix 3 - Current Status of Individual Section 106 Planning Obligations

Appendix 4 - Statement by Environment and Countryside Service on outstanding Section 106 Contributions

## Risk Matrix

<b>Risk Ref</b>	<b>Date</b>	<b>Risk</b>	<b>Consequences</b>	<b>Mitigation</b>	<b>Current Risk Score</b>	<b>Target Score</b>	<b>Service Unit Manager/ Responsible Officer</b>	<b>Action Plan</b>
1		Section 106 Agreements are not monitored adequately.	The risks associated with not monitoring legal agreements associated with planning applications is that the Council could be criticised for not operating a transparent and comprehensive framework for monitoring such financial and non-financial obligations	The continued monitoring of information and the operating of a Section 106 Protocol ensures that the process is openly accountable and allows ready access to information by the public and members.	B2	A1	Jill Low	None
2		Section 106 Sums are not spent.	Committed sums would be returned (plus interest) to developers and required community facilities would not be provided.	Regular monitoring and action in accordance with the agreed protocols/ procedures ensures that the sums are properly allocated.	B2	A1	Jill Low	None

## Glossary of Terms

Risk	An event which may prevent the Council achieving its objectives
Consequences	The outcome if the risk materialised
Mitigation	The processes and procedures that are in place to reduce the risk
Current Risk Score	The likelihood and impact score with the current mitigation measures in place
Corporate Objectives	An assessment of the Corporate Objectives that are affected by the risk identified.
Target Risk Score	The likelihood and impact score that the Council is aiming to achieve
Service Unit Manager	The Service Unit or Officer responsible for managing the risk
Action Plan	The proposed actions to be implemented in order to reduce the risk to the target score

## Risk Scoring

Impact	5					
	4					
	3					
	2					
	1					
		A	B	C	D	E
	Likelihood					

### Likelihood:

A = Very Low  
 B = Not Likely  
 C = Likely  
 D = Very Likely  
 E = Almost Certain

### Impact

1 = Low  
 2 = Minor  
 3 = Medium  
 4 = Major  
 5 = Disaster