

Report to: Scrutiny

Date: 11 July 2022

Title: Methodology for collecting monitoring fees in connection with the compliance with/of S106 Legal Agreements

Report of: Ian Fitzpatrick, Deputy Chief Executive and Director of Regeneration and Planning

Cabinet member: Councillor Colin Swansborough, Cabinet member for climate change, place services and special projects

Ward(s): All

Purpose of report: To seek Cabinet approval to implement a regime S106 monitoring and apply monitoring fees in accordance with this report.

Decision type: Non-key

Officer recommendation(s) to the Cabinet: That Cabinet authorise the incorporation of S106 Monitoring fees

Reasons for recommendations: The proposal to implement a suite of charges to support the staffing resource in the monitoring and compliance of approved S106 Legal Agreements

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1 Introduction

- 1.1 Officers withheld moving on this issue during the C19 period as the construction industry does play a significant part on the local, regional, and national economy and any additional financial burden may be impactful during that period. It is considered that as all C19 restrictions have been lifted and the construction industry is finding its feet that it is a prudent time to review this issue.
- 1.2 This report identifies that that there is an ongoing financial burden carried by the Council in terms of seeking to ensure that the 'Heads of Terms' and subsequent obligations within a legal agreement are monitored and more importantly complied with.
- 1.3 This report seeks authorisation to invoke a charging regime that in part will require

the developer to pay for this monitoring.

2 Proposal Methodology

2.1 In formulating the parameters of the fee charging regime Officers have reviewed and analysed a range of S106 agreements for a targeted group of applications shown in Table 1 below.

2.2 The analysis included:

- An estimate of the number of hours for each monitoring task, based on practical experience of the current monitoring
- Considering which obligations should qualify as chargeable obligations for monitoring purposes, obligation
- Preparing a bespoke arrangement fee negotiated for larger and more complex agreements

2.3 **Table 1 Section 106 agreements for a specified group of applications that have been chosen for a blend of application types, geographical locations and scale of development.**

Application Number	Site Address	Development
200742	Gate Court Dairy	60 apartments
210485	Woods Cottages	40 houses
210247	Bedfordwell Road	100 units flats and houses
210412	28-30 Bedfordwell Road	Care Home
210324	41 Brampton Road	31 employment units
200855	Ocklynge Chalk Pit	18 houses
190766	Friday Street Farm	250 houses
210339	63 Cavalry Crescent	20 units flats and houses

2.4 Officers have reviewed the time taken to review a simple agreement and informed that it would take approximately 17 person hours to conclude. This along with a reasonable hourly rate of £60 per hour (including on costs) has been worked into the following charging regime.

2.5

Column A This column outlines the type of development threshold that will apply to the monitoring charging	Column B This column includes the sum chargeable by the development type in column A and includes the monitoring fee and the number of qualifying obligations Please note exemptions and additional charges below	Column C This column includes charges in addition to that chargeable under column B and are incremental by additional qualifying obligations up to a fee cap	Column D Maximum chargeable monitoring fee
Rural exemption dwellings	£480 (8 hours at £60ph)	Nil	£480
Modification/variation to S106	£480 (8 hours at £60ph)	Nil	£480
1-9 dwellings (Minor Non-residential)	£1020 (17 hours at £60ph)	£240 per additional obligation to a cap of (5 x £240)	£2220
10 - 19 dwellings	£1860 (31 hours at £60ph)	£240 per additional obligation to a cap of (10 x £240)	£4260
20 – 50 dwellings (Small scale Major Non-residential)	£2460 (41 hours at £60ph)	£240 per additional obligation to a cap of (20 x £240)	£7260
50+ dwellings (large scale major non-residential) and all other types not referred to above	Bespoke arrangement fees based on multiples of the above		
EXCEPTIONS and other charges			
Travel Plan	A separate fee will be	Nil	

	chargeable by the County Council		
Highway Works	a separate fee will/may be chargeable by the County Council	Nil	
Local Labour Obligations	a separate monitoring fee will be charged for this obligation in addition to the fee derived from columns B & C above	Nil	
Change of tenancy in connection with First Homes	£480	Nil	

2.6 If the suggested monitoring fees had been applied for the specimen group of applications, it would have generated in the region of £25,000 in monitoring fees as per the table below

Application Number	Site Address	Development	Monitoring Fee (£)
200742	Gate Court Dairy	60 apartments	4320
210485	Woods Cottages	40 houses	2460
210247	Bedfordwell Road	100 units flats and houses	4920
210412	28-30 Bedfordwell Road	Care Home	1860
210324	41 Brampton Road	31 employment units	2460
200855	Ocklynge Chalk Pit	18 houses	1860
190766	Friday Street Farm	250 houses	4920
210339	63 Cavalry Crescent	20 units flats and houses	1860

3 Definition of qualifying obligation & Commencement

3.1 A qualifying obligation is any obligation contained within a S106 agreement that attracts a Monitoring Contribution because its implementation and/ or adherence requires monitoring by the Council. It is common within S106 Agreements to have 'Heads of Terms' which result in more than one qualifying obligation. By way of an

example see below. In this example there is only one Head of Terms but two qualifying obligations and as such the number of qualifying obligations that need to be monitored and this should be the basis for the evaluation of the fee requirement and informs the charging schedule above.

3.2	Heads of Terms	Affordable Housing	Trigger Point	To be monitored
	Qualifying Clause	Prior to the commencement of development to agree with the Council in writing the affordable housing scheme	Prior to commencement	Yes
	Qualifying Clause	75% of the open market units shall not be occupied unless and until the relative proportion of Affordable housing units have been provided	75% of the open market dwellings (100 dwelling)	Yes

3.3 This monitoring regime only applies to Council obligations and does not apply to those imposed by others like East Sussex County Council

3.4 This monitoring regime will commence on new resolution to grant planning permission with S106 after the date of Cabinet approval. All agreements that are currently in train will conclude under the existing regime without a monitoring fee.

4 Corporate plan and council policies

4.1 In the Council's Corporate Plan 'Creation of sustainable community wealth' and 'Building homes that people can afford to live in' are two of the main focusses in ensuring that the developers' legal agreements are rigorously monitored.

5 Business case and alternative option(s) considered

5.1 The monitoring of the S106 with aligned fee regime is commonly applied across many authorities across the Country. Historically this has been resisted by the Council given the fear that it may contribute to the decision of a developer to choose to place their development within a neighbouring authority.

5.2 It is the view of officer that given the relatively low cost in this charging regime compared to the overall costs of development that if the costs are known at the outset that the developers would be happy to pay.

5.3 The amount of income generated will of course be dependent on the number and complexity of the S106 agreed each year, but as is evident from the worked example above there is the potential for not an insignificant amount of money to be received. In part this money could help to support dedicated staff to support and assist monitor compliance with the S106 agreements.

6 Financial appraisal

- 6.1 It is appropriate to review the protocol and charging schedule every year, to ensure we continue to effectively recover costs. This will ensure that we are responsive to the needs of the customer and addresses the requirements for a more corporate approach to the issue of fees and charges, providing a clear framework within which to conduct annual or other reviews of fees and charges.
- 6.2 Fundamentally, the aim is to increase the proportion of income contributed by users of services where appropriate, rather than the cost being met from the general Council Taxpayers. The application of this charging regime falls within the existing staffing establishment and the increase in this fee income would help to support the existing staffing budget.

7 Legal implications

- 7.1 The Community Infrastructure Levy Regulations 2010 were updated in 2019 to allow councils to charge a fee to cover the cost of monitoring the delivery of planning obligations provided: -
- 7.2 (a) the sum to be paid fairly and reasonably relates in scale and kind to the development; and
- 7.3 (b) the sum to be paid to the authority does not exceed the authority's estimate of its cost of monitoring the development over the lifetime of the planning obligations which relate to that development. (Regulation 122 (2A)).
- 7.4 Planning Practice Guidance sets out that councils should work together to ensure that resources are available to support the monitoring and reporting of planning obligations.
- 7.5 It confirms that Councils may charge a monitoring fee through section 106 planning obligations, to cover the cost of monitoring and reporting on delivery of that section 106 obligation. Monitoring fees can be used to monitor and report on any type of planning obligation, for the lifetime of that obligation although monitoring fees should not be sought retrospectively for historic agreements.
- 7.6 In all cases, monitoring fees must be proportionate and reasonable and reflect the actual cost of monitoring and the guidance provides that councils could consider setting a cap to ensure that any fees are not excessive.

Legal Implications Provided 20.05.22-LDC-JCS.

8 Risk management implications

- 8.1 The Creation of this payment regime may have the potential to deter developers from investing into the area, although the for the reasons outlined above this is unlikely to be a consequence of this initiative. In addition, the charging regime is to be reviewed on an annual basis and if it was deemed to be an impediment to inward investment then the regime could be dropped or temporarily paused.

9 Equality analysis

- 9.1 An Equality & Fairness Analysis has been undertaken on these proposals/ this project. This has concluded that; the fees charging regime has been benchmarked with other similar approaches around the country and that there is annual review mechanism suggested that would enable either a % increase in-line with inflation or if there is evidence received in relation to affordability by sectors of the community then a reduction in the fee regime could be explored.
- 9.2 In general terms it is not a requirement for the protected characteristic of the applicant to be known prior to their use of the service. In this regard it is considered that the setting of a fee regime that looks to support the delivery of the service would not be impactful upon these characteristics.
- 9.3 As this regime falls to be considered after the resolution to grant planning permission where the merits of a planning case have been debated it is considered that this imposition of this payment regime would not disadvantage any person/body/organisation.

10 Confidence in the Planning System

- 10.1 As with all aspects of Planning Enforcement/Compliance the instigation of this payment regime will help to contribute to the monitoring of S106 Legal Agreement and thereby help to give the Council, Towns and Parish Councils and the Local Community confidence on the planning application process.

11 Appendices

- None