

East Herts Council Report

Audit and Governance Committee

Date of Meeting: 17 November 2020

Report by: Executive Member for Planning and Growth

Report title: Section 106 Policy and Financial Contributions Update Report

Ward(s) affected: ALL

Summary

RECOMMENDATIONS FOR AUDIT AND GOVERNANCE COMMITTEE:

- (a) To note the potential changes to S106 outlined in the 'Planning for the Future White Paper – August 2020'**
- (b) To comment on the update report on the collection and allocation of S106 financial contributions, and the first Annual Infrastructure Funding Statement Report**

1.0 Proposal(s)

- 1.1 This report provides Committee Members with an update on the proposed legislative changes and policy implications for Section 106 outlined in the Government consultation on the 'Planning for the Future – White Paper – August 2020'.
- 1.2 The report also provides information on the first 'Annual Infrastructure Funding Statement Report 2019/20' and on the identification and allocation process for S106 contributions, the S106 income generated in 2019/20, along with information on the additional work undertaken by the Infrastructure Contributions & Spend Manager over the last year.

2.0 Background

- 2.1 On 24 September 2019, the Performance Audit and Governance Oversight Committee received a report on Section 106 (S106) agreements contribution collection and allocation, and an interim update on the Internal Audit Report follow up. A copy of this report is available on the council's website:
<http://democracy.eastherts.gov.uk/documents/s49969/Section%20106%20Agreements%20-%20Update.pdf?j=9>
- 2.2 It was agreed at the Committee to have a follow up report in autumn 2020 to provide information on the progress of the actions identified within the initial report. Members have subsequently requested an update on S106 policy and practice at East Herts.
- 2.3 This report provides this information, and further information on proposed planning legislative changes and policy implications within the white paper consultation, and recent legislative changes to require S106 reporting via a published 'Annual Infrastructure Funding Statement'.
- 2.4 Members will be aware that S106 contributions cannot be seen as an income source for the council, as all identified contribution uses have to conform the three (3) tests set out in Regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010. Received contributions must be allocated in accordance with the contribution wording and Legal has confirmed that any deviation or non-conforming use may be subject to challenge and potential reclaim by the developer.

3.0 Reason(s)

- 3.1 In September 2019 the SIAS follow up audit report confirmed that the council had acted on the actions identified in the '2018/19 Internal Audit Report on Section 106 Spending Arrangements'. The follow up report confirmed that four out of

the five recommendations had been fully implemented, with the fifth partially implemented and was very complimentary on the work of the Infrastructure Contributions & Spend Manager.

- 3.2 The following report provides of a brief review of East Herts S106 policy and practice, along with the work undertaken by the Infrastructure Contributions & Spend Manager.
- 3.3 To ensure the timely collection and allocation of S106 financial contributions, the Infrastructure Contributions & Spend Manager continues to proactively monitor all current S106 agreements and associated developments. Officers within the council are consulted on potential projects and funding requirements from received contributions. In addition to this a list of potential projects for inclusion in S106 agreements for new developments has been created with input from Officers, Members and local groups and organisations.
- 3.4 The Infrastructure Contributions & Spend Manager continues to be consulted by Planning Officers on new S106 Agreements and any potential changes to policy and legislation.

Proposed planning policy changes

- 3.5 In August 2020, the Ministry for Housing, Communities and Local Government (MHCLG) released the 'Planning for the future – White paper August 2020' for public consultation on proposals to reform the planning system and introduce an Infrastructure Levy which, if implemented in its present form, will have implications for both planning and S106 provision in East Herts.
- 3.6 The council's Planning Officers have provided a full response to the individual consultation questions on the potential changes to the planning system and the new levy funding proposals of the White Paper. Members were also briefed on the proposals within the white paper on 15/10/2020. *A copy of the White Paper is attached as Appendix A.*

3.7 Implications for S106 in East Herts - There are benefits of introducing a levy as it avoids lengthy S106 negotiations, which can delay development. However, the council has concerns that a flat-rated levy across East Herts will have no relationship to mitigating the impacts of the individual developments. The flexibility of S106 agreements is an important means of ensuring the relevant infrastructure for a particular site comes forward. It is unclear how the levy will take account of site specific viability issues. More clarity is needed to explain how new development will fund competing infrastructure requirements to ensure sufficient infrastructure is funded. In addition, on-site levels of affordable housing must be maintained, or increased. Local authority borrowing against projected receipts to forward fund infrastructure will help with delivery, but does have risks if sufficient funds are not recouped from the development.

S106 policy and reporting changes

3.8 As part of recent changes to legislation Community Infrastructure Levy (Amendment) (England) (No 2) Regulations 2019) East Herts Council is now required to produce and publish on the council website an 'Annual Infrastructure Funding Statement'.

3.9 The 'Annual Infrastructure Funding Statement 2019/20' report and the three (3) required CVS files are the first to be produced by East Herts Council and have been compiled by the Infrastructure Contributions & Spend Manager in line with the Legislation requirements.

3.10 The 'Annual Infrastructure Funding Statement 2019/20' provides a summary of the agreements signed, along with details on the income and expenditure of S106 contributions for the financial year 2019/2020.

3.11 A copy of the completed report is attached as Appendix B and

Members are invited to comment on the report before it is uploaded on to the website before the deadline of 31/12/2020.

- 3.12 Other changes to S106 policy and practice - Members should note that the 2019 amendments now allow the council to charge a monitoring fee in new S106 agreements to cover the cost of monitoring and reporting on the delivery of S106 obligations. Therefore all new S106 agreements will now include a provision for charging a monitoring fee – negotiated on a site by site basis.
- 3.13 The 2019 legislation amendments also removed the previous restriction on pooling more than five (5) contributions on an individual project or towards a single piece of infrastructure. This means that, subject to meeting the three (3) tests set out in Regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010, the council can use funds from several S106 agreements to fund the same piece of infrastructure regardless of how many planning obligations have already contributed towards it. This provision is being used to help fund the council's major infrastructure projects, including Hartham and Grange Paddock Leisure Centres and Hertford Theatre.

Current S106 contribution allocation and project identification:

- 3.14 Details are provided below on the work undertaken by the Infrastructure Contributions & Spend Manager on the ongoing allocation of received financial contributions and work to identify projects for inclusion in new S106 agreements.
- 3.15 S106 contribution use - Members should be aware that S106 agreements are legally binding between the council and the other parties to the agreement, and the use of the contributions collected by the council is restricted to the actual contribution obligation use and to the specific wording within the legal agreement.

- 3.16 The council is legally bound to allocate / use the contributions as they are described within the legal agreement and not for any other purpose. Some contributions do have some flexibility in that they list the contribution use as “towards the provision of in the locality of the development”, which means that the contribution is available for funding applications for both internal and external projects as long as it fits the contribution obligation.
- 3.17 Covid-19 & S106 contribution allocation and receipt_– compared to the previous year there has been a reduction in organisations bidding for S106 funding as potential projects plans have been delayed due to the lockdown. Further information on the allocation of funding to date is given later in this report.
- 3.18 Along with delays to the actual commencement, construction and completion of sites, the Covid-19 pandemic has also had an impact on the collection of contributions due from developers. To help mitigate the impact of the pandemic, the council has implemented a triggered contribution deferral option for small and medium sized developers and continues to work closely with all developers to ensure the timely payment of contributions to East Herts Council.
- 3.19 S106 triggered contribution payment deferral - In August 2020, in line with Government Covid Legislation and the position taken by Hertfordshire County Council (HCC), it was agreed by Senior Officers to offer small and medium sized developers a deferral of financial contributions triggered between 01/04/2020 to 30/09/2020 for up to six months. The Infrastructure Contributions & Spend Manager instigated the application form development and sign off process for this. However, only one deferral application form was received and agreed.
- 3.20 Members should note that Seniors Planners and HCC are in

talks with The Bishop's Stortford North Consortium with a view to rescheduling the payment of contributions and trigger for future contributions.

- 3.21 However, any agreed delay / re-scheduling of the contributions for the Bishop's Stortford North Sports Development Fund will have an impact on launch of the funding programme and it will now be officially launched once an agreed contribution receipt timetable has been confirmed. In the meantime, work continues to ensure that the funding application and bid evaluation paperwork will be available online as electronic documents. The S106 Steering Group will be re-launched to evaluate the received funding bids once the fund is officially launched.
- 3.22 Ongoing contribution collection – the Infrastructure Contributions & Spend Manager continues to review historic S106 agreements, and to monitor all current S106 agreements and developments, to ensure contributions are collected as per the payment triggers.
- 3.23 This has resulted in the application of late payment fees to identified historically overdue contributions, which is in addition to the original contribution and indexation due. Further work is currently being undertaken with the assistance of the Legal Team to collect outstanding overdue contributions from a developer who has been reluctant to pay.
- 3.24 As originally outlined in the September 2019 report, the Master S106 Contributions Spreadsheet continues to be updated with all received contributions and details on actual and proposed funding allocations to ensure that all financial contribution information is located in one spreadsheet. The spreadsheet has information on the planning application, development location, individual contribution obligation wording and timescale for allocation and is RAG rated to assist with the identification of any contributions nearing their allocation deadline date. It now has additional information on

the future contributions due from new S106 agreements to allow the identification of future project funding. However, this is a sensitive document and as such it will not be publically shared with this report.

- 3.25 Members should note that the publicly available 'Annual Infrastructure Funding Statement Report 2019/20' will provide detailed information on the S106 agreements signed, and the contributions collected and allocated in the last financial year. This new annual reporting statement will be updated in December 2021 to provide information for the 2020/21 financial year.

Identifying projects for contribution funding in new S106 agreements

- 3.26 For new S106 agreements, the Council is bound by the District Plan and relevant Supplementary Planning Documents (SPD's) for the policies used in the calculation of S106 contributions and Affordable Housing requirements. These SPDs provides clarity and transparency to developers, residents and Planning Officers in calculating S106 contributions – providing details of the type of planning contributions that may be required, the qualifying development threshold and the level of financial contribution where appropriate.
- 3.27 The 2008 Planning Obligations SPD provides information on the S106 contribution requirements for East Herts. However, the recently adopted Open Space, Sport and Recreation SPD now outlines the contribution amounts for each of the different categories of sports & recreation and community facilities from any proposed new development – see <https://eastherts.fra1.digitaloceanspaces.com/s3fs-public/2020-05/Open%20Space%2C%20Sport%20and%20Recreation%20SPD.pdf>
- 3.28 Once the financial contributions due from a new development

have been identified and calculated, the Infrastructure Contributions & Spend Manager is consulted by Planning Officers to help provide information on potential projects and contribution use allocation for inclusion in the S106 agreement.

- 3.29 However, in challenging economic times the amount of S106 contribution sums can be an issue in the planning process and subject to development viability challenge by the developer which can result in a decrease in the final amounts agreed in the S106 legal agreement.
- 3.30 To assist with the project identification process, the Infrastructure Contributions & Spend Manager has created a list of potential projects that would benefit from S106 funding, and continues to work with the Town & Parish Councils, Members, various local organisations and groups in East Herts to ensure that future funding requirements are identified.
- 3.31 In addition, Infrastructure Contributions & Spend Manager has promoted the potential use of S106 funding for projects within East Herts on the dedicated Section 106 page on the Council's website, internally at Staff Briefings, at meetings with sports organisations and at the Village Halls Conference in November 2019.
- 3.32 A great deal of work is undertaken to ensure that the projects / groups identified for inclusion in new S106 agreements are an appropriate and sustainable use of the funding, and that all parties are happy with them.
- 3.33 East Herts S106 funding allocation procedure – as previously mention work is ongoing to consult with Officers within the Council, Members, Town and Parish Councils, local groups and organisations to publicise S106 funding opportunities and to help identify potential funding needs from both received and future S106 contributions.

- 3.34 Information on S106 agreements and funding for projects is now available on a dedicated webpage on the council's new website - <https://www.eastherts.gov.uk/planning-building/section-106-agreements-funding-projects>
- 3.35 Organisations / groups looking for funding are encouraged to complete the online 'Expressions of Interest' form on the dedicated Section 106 webpage. In addition Town & Parish Councils and the Local Members are advised of any specific S106 funding available in their area and asked to identify projects or propose organisations / groups for potential funding.
- 3.36 If S106 funding is identified as available for the use proposed in the submitted Expression of Interest form, or a contribution is received for a named project use, the organisation / group is asked to complete an application form as part of the audit trail for the funding allocation. Work is ongoing to make the application form electronic and online to assist with the funding process.
- 3.37 Once a completed funding application has been received from the group / organisation looking for funding, it is evaluated to ensure compliance with the S106 contribution obligation by the infrastructure Contributions & Spend Manager. It is further checked for compliance by Legal and the Deputy Chief Executive, along with the Portfolio Holder for Planning & Growth, before funding is agreed. When compliance with the contribution obligation use has been confirmed and the project / use agreed by the above Officers and Portfolio Holder, the funding is then allocated to the project / organisation and the local Members are then notified. The funding is transferred electronically to the confirmed account of the organisation or group.

S106 financial highlights:

- 3.38 The '2019/20 Annual Infrastructure Funding Statement'

provides further detailed information on the collection and allocation of S106 contributions between 01/04/2019 to 31/03/2020. *See Appendix B.* However Members should note the following figures for 2019/20:

- £1,911,961.44 collected from contributions triggered from sixteen (16) individual Section 106 Agreements.
- £684,062.58 allocated to individual projects or uses from thirty-eight (38) individual received contributions. This includes allocation to successful submitted funding applications, internal capital spends, revenue maintenance spends and transfers of specific contributions to the recycling budget.

3.39 Information is given below on the collection and allocation of S106 contributions triggered in the current financial year (from 01/04/2020 to date):

- £361,205.84 has been collected to date as contributions triggered from six (6) separate developments.
- £231,067.72 has been allocated to date this financial year – see below for further details.

3.40 As previously mentioned, Covid has had an impact on the organisations bidding for S106 funding as their project plans have been delayed. However, funding is currently being agreed for two community projects (Stanstead Abbots play area £40,022.36 & High Wych play area £75,278.00).

3.41 In addition, the transfer of £110,211.00 to BCAT Trust as the recipient for funding from the Buntingford Hopper Bus contribution is currently being arranged.

3.41 The first transfer of a health contribution collected on behalf of the NHS by East Herts Council is also being finalised (£5,547.36 of Mental Health Facilities contribution to be transferred to Hertfordshire Partnership University NHS Foundation Trust). Further information on the health contributions collected on

behalf of the NHS is available in the Annual Infrastructure Funding Statement.

3.42 Members should note that major council projects have also had S106 contributions allocated to them, and work is ongoing with Officers to identify all potential S106 funding for council projects. Council projects benefiting from S106 funding allocation include:

- Grange Paddocks Leisure Centre – £1,636,118.39
- Hartham Leisure Centre - £945,789.87
- Pinehurst Community Centre refurbishment - £21,763.71
- Hertford Castle Park Gardens works (as part of the Hertford Theatre Project works) - £30,316.00
- Tennis court relocation as part of the Castle Park Project in Bishop's Stortford - £56,262.00
- Parsonage Lane Play Area Project in Bishop's Stortford - £44,049.28
- Trinity Play Area Project in Bishop's Stortford - £84,007.39
- Bishop's Park Play Area Parkour Project in Bishop's Stortford - £58,610.34

3.43 Unspent S106 contributions - Significant work has been undertaken to identify and allocate all unspent S106 received contributions – this has identified the following sums and allocations:

- Revenue for ongoing maintenance (for the maintenance of parks and open spaces) - £784,796.94
- Waste & Recycling contributions - £749.65
- Monitoring fees (the Council is now legally able to charge a monitoring fee) - £5,700.00
- Affordable housing contributions (received in lieu of on-site provision) - £1,729,835.28
- NHS contributions (collected by EHC on behalf of the NHS) - £520,775.40
- Contributions received for allocation to named project uses within the S106 contribution wording – £1,797,552.60

- Unallocated received contributions - £951,271.53

3.43 NOTE: Unallocated contributions are available for internal and external funding application bids, but Legal advice has confirmed these contributions can only be allocated in accordance with the specified contribution use wording and within the vicinity of the development. E.g. £122,744.26 Outdoor Sports contribution 'to be used towards outdoor sports provision in Buntingford'; this can only be allocated if the funding application complies with this specific wording i.e. outdoor sports in Buntingford.

Ongoing S106 work and income generation

3.44 In addition to the collection and allocation of S106 contributions, work continues to ensure that all S106 agreements are identified and updated on the master spreadsheet and the Development Management module of the Uniform IDOX system.

3.45 All current developments are monitored to ensure that contribution trigger points are identified and the contributions are collected on time. Very good working relationships have been developed with the Development Management Team, Legal Team, Finance Team and the Housing Team to ensure joined up working and a consistent approach to contribution collection and allocation.

3.46 Income continues to be generated from the provision of S106 status confirmation letters to solicitors and housing associations – the fee charged for the letter increased from £83 to £87 in 2020/21 generating:

- 2019/20 – £2,229.00
- 2020/21 to date – £1,649.00

3.47 To aid this process, template S106 status confirmation letters for all S106 agreements have been drafted. Full guidance and

procedures for the provision of S106 satisfaction letters and the funding allocation process have been devised to aid resilience.

- 3.48 In addition, the Infrastructure Contributions & Spend Managers has responded to four (4) Freedom of Information (FOI) requests regarding S106 contribution collection and allocation to date in this financial year.

4.0 Options

- 4.1 Members are invited to comment on the Annual Infrastructure Funding Statement report, and note the ongoing work of the Infrastructure Contributions & Spend Manager.
- 4.2 Going forward Members are also asked use their local knowledge to assist the Infrastructure Contributions & Spend Manager with the identification of potential projects for funding from current and future S106 contributions.

5.0 Risks

- 5.1 The 'Infrastructure Funding Statement Report 2019/20' must be published on the East Herts website before 31/12/2020. To not do so would put the Council in contravention of the Community Infrastructure Levy (Amendment) (England) (No 2) Regulations 2019 and would be a reputational and legal risk for the Council. As the report has been written and is ready to be published this is a minor risk and the likelihood is unlikely.
- 5.2 The main risk of non-allocation of received S106 contributions within the timescale set out in the individual legal agreements is reputational, as this would result in the possibility of the funding having to be returned to the developer.
- 5.3 Significant work has been undertaken to ensure that this will not happen and that all contributions are identified, allocated and used within the time period stated within the S106

agreement – this is usually 10 years from the date of actual receipt of the financial contribution.

6.0 Implications/Consultations

6.1 Feedback on the Annual Infrastructure Funding Statement 2019/20 was sought from Planning Officers, along with further information on the full consultation response to the Planning for the Future – White Paper.

Community Safety

No

Data Protection

No

Equalities

No

Environmental Sustainability

No

Financial

No

Health and Safety

No

Human Resources

No

Human Rights

No

Legal

No

Specific Wards

No

7.0 Background papers, appendices and other relevant material

- 7.1 24/09/2019 - Performance, Audit and Governance Scrutiny Committee - Section 106 Agreements Update Report
<http://democracy.eastherts.gov.uk/documents/s49969/Section%20106%20Agreements%20-%20Update.pdf?J=9>
- 7.2 Appendix A – MHCLG ‘Planning for the Future White Paper – August 2020’.
- 7.3 Appendix B – East Herts Council Annual Infrastructure Funding Statement Report 2019-20

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