

East Herts Council Report

Audit & Governance Committee

Date of meeting: 15 November 2022

Report by: Councillor Jan Goodeve – Executive Member for Planning & Growth

Report title: Section 106 Update Report

Ward(s) affected: All

Summary

- This report provides Committee Members with information on the 'Infrastructure Funding Statement Report 2021/22' prior to publication, along with an update on the collection and allocation of Section 106 contributions, potential legislative changes and the additional work undertaken by the Infrastructure Contributions & Spend Manager.

RECOMMENDATIONS FOR AUDIT AND GOVERNANCE COMMITTEE:

- (a)** To note and comment on the annual 'Infrastructure Funding Statement 2021/22' report, the update on the collection and allocation of Section 106 financial contributions and the work of the Infrastructure Contributions and Spend Manager.

1.0 Proposal(s)

1.1 As above.

2.0 Background

2.1 Since September 2019 an annual update report has been compiled by the Infrastructure Contributions & Spend

Manager to provide information on Section 106 financial contribution collection and allocation, including changes to legislative requirements and reporting requirements. Copies of these previous reports can be found on the Council's website:

- Performance Audit and Governance Oversight Committee 2019 [report](#)
- Audit & Governance Committee 2020 [report](#) - including the initial Infrastructure Funding Statement
- Audit & Governance Committee 2021 [report](#) – including the second Infrastructure Funding Statement

2.2 The November 2022 report to the Audit & Governance Committee provides the latest update, including the third annual “Infrastructure Funding Statement” and information on the collection and allocation of Section 106 financial contributions, potential changes to Section 106 legislation and the ongoing work of the Infrastructure Contributions & Spend Manager.

3.0 Reason(s)

3.1 As requested, and in line with Legislative requirements, this report provides an overview of the third annual ‘Infrastructure Funding Statement 2021/22’ prior to its publication on the council’s website – see **Appendix A – East Herts Council Annual Infrastructure Funding Statement 2021/22**. Further information is provided in this report on the ongoing identification, collection and allocation of East Herts Section 106 financial contributions, potential legislative changes and the additional work undertaken by the Infrastructure Contributions & Spend Manager.

- 3.2 Members should also note that in line with the council's key priorities, work is being undertaken with fellow Officers and external organisations to promote sustainability and secure this approach in any new Section 106 funding bids to assist with the aim of being carbon neutral by 2030.

Infrastructure Funding Statement 2021/22

- 3.3 The third annual 'Infrastructure Funding Statement 2021/22' report and the three (3) required CSV files have been compiled by the Infrastructure Contributions & Spend Manager in line with the Legislation requirements of the Community Infrastructure Levy (Amendment) (England) (No 2) Regulations 2019) and will be published on the dedicated [Infrastructure Funding Statement webpage](#) in December 2022.
- 3.4 The 'Infrastructure Funding Statement 2021/22' provides a summary of new Section 106 legal agreements signed, along with detailed information on financial contribution income and expenditure, and projects funded in the financial year 2021/22. In line with the Legislation, it also includes information on Section 106 financial contribution collection and allocation for previous financial years.
- 3.5 Members are invited to comment on the 'Infrastructure Funding Statement 2021/22' report attached as **Appendix A**.

Update on Section 106 contribution identification, collection, and allocation:

- 3.6 Details are provided below on the work undertaken by the Infrastructure Contributions & Spend Manager to secure financial contributions and identify projects for inclusion in new Section 106 agreements, the ongoing collection and

allocation of triggered financial contributions.

- 3.7 The Infrastructure Contributions and Spend Manager continues to ensure that all Section 106 agreements are identified and updated on the 'Master Section 106 Contributions Spreadsheet' to ensure a single central record is maintained on held and future contributions, and this information is updated on the Development Management module of the Uniform IDOX system.
- 3.8 Information on Section 106 agreements, the annual Infrastructure Funding Statement and how to apply for funding for projects is now available on a dedicated [Section 106 funding](#) webpage.
- 3.9 New Section 106 Agreements and Contributions - Members will be aware that Section 106 contributions cannot be an income source for the council, as all identified contribution uses must conform with the three tests set out in Regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010 to be included in any new Section 106 Agreement.
- 3.10 The Infrastructure Contributions & Spend Manager continues to work pro-actively with Senior Planning Officers on all potential new Section 106 Agreements from forthcoming developments. As planning applications progress to approval, work is undertaken with individual Senior Planning Officers and developers to ensure that all potential identified contribution obligations are appropriate, compliant, and sustainable, and have identified allocation uses. This can involve significant negotiations and in some cases changes to individual contributions, such as Affordable Housing requirements, following viability reports.
- 3.11 Further information on the Section 106 contribution

requirements typically required from developments meeting the threshold for Section 106 contributions can be found in the attached **APPENDIX B – Typical Section 106 Requirements – October 2022**. The specific Supplementary Planning Documents (SPD's) and the associated calculation spreadsheets can be found on the [Planning Policy Supplementary Planning Documents](#) webpages.

- 3.12 In addition, the [‘Making a Planning Application’](#) webpage has further information on planning obligations and contribution requirements and a template Section 106 Agreement.
- 3.13 To assist with the creation of new legal agreements, a list of potential projects for inclusion in future Section 106 agreements has been created with input from Officers, Members, Town and Parish Councils along with many local groups and organisations. This ensures that any projects / groups identified for inclusion and funding in new Section 106 agreements are appropriate and provide a sustainable use of the received contributions, and that all parties are happy.
- 3.14 To facilitate the funding of council projects, fellow Officers are consulted on their potential projects and associated future funding requirements. This information is collated and used to assist Planning Officers with their pre-app discussions and Section 106 agreement negotiations with developers. Officers are also advised of the anticipated timescale for the receipt of identified Section 106 contributions to allow for capital programme planning and staffing allocation.
- 3.15 Significant work continues to be undertaken with the Legal Team prior to the confirmation of any new Section 106 agreements, to ensure that the individual contribution

wording allows for a spread of named projects to ensure resilience and that the funding is still useable should the individual project circumstances change.

- 3.16 Hertfordshire County Council (HCC) is responsible for the identification, collection and calculation of indexation on any contributions due directly to them – the [Guide to Developer Infrastructure Contributions](#) provides an overview of planning obligations HCC may seek as part of the planning process. It was approved for usage in July 2021 and replaces the previous ‘Planning Obligations Guidance – Toolkit for Hertfordshire’ (2008).
- 3.17 Indexation of East Herts Section 106 financial contributions – all financial contributions listed in any new Section 106 Agreements are subject to indexation. This indexation is calculated by the Infrastructure Contributions & Spend Manager from the base indexation date set out in the legal agreement to the payment trigger date for each contribution payable to East Herts Council using the identified Index.
- 3.18 East Herts Council Section 106 contributions are normally subject to Retail Price Indexation (RPI) – this provides for an increase of the base amount of the contribution in line with inflation. It is worth noting that the RPI index essentially does the same job as the Consumer Price Index (CPI) but typically tracks slightly higher, so the indexation figure produced is greater.
- 3.19 The calculated indexation is added to the original contribution amount when the specific trigger for payment is reached. The individual Section 106 Agreement set out the exact contribution amount and payment triggers of the specific contribution requirements and obligations.

3.20 **Appendix B** provides details on the typical Section 106 requirements from major developments, but the table below sets out which index and base date applies to the standard Section 106 financial contributions payable to East Herts Council:

Contribution Obligation & Policy	Index & Base Date of Index	Payment due / Timing
Affordable Housing Commuted Sum in lieu of on-site provision (EHDC) – HOU3	RPI - [month and year of committee resolution]	First Occupation
Allotments (EHDC) – CFLR1	RPI – May 2020	First Occupation
Bowls (EHDC) – CFLR1	RPI – May 2020	First Occupation
Cemeteries (EHDC) - CFLR1	RPI - [month and year of committee resolution]	First Occupation
Children’s Play and Provision for Young People (EHDC) – CFLR1	RPI – May 2020	First Occupation
Council Contributions Monitoring (EHDC)	RPI - [month and year of committee resolution]	On Commencement
Fitness Gyms (EHDC) – CFLR1	RPI – May 2020	First Occupation
Health Facilities <i>(collected on behalf of the Hertfordshire and West Essex Integrated Care Board (ICB))</i>	RPI - [month and year of committee resolution]	First Occupation
Natural and Semi-natural Green Space (EHDC) CFLR1	RPI – May 2020	First Occupation

Contribution Obligation & Policy	Index & Base Date of Index	Payment due / Timing
Outdoor Tennis (EHDC) – CFLR1	RPI – May 2020	First Occupation
Parking (EHDC) – TRA2	RPI - [month and year of committee resolution]	First Occupation
Parks and Gardens and Amenity Green Space (EHDC) – CFLR1	RPI – May 2020	First Occupation
Playing Pitches (EHDC) – CFLR1	RPI – May 2020	First Occupation
Recycling (EHDC) – 2 of the Herts Waste Development Framework	RPI – October 2008	First Occupation
Sports Halls – EHDC) – CFLR1	RPI – May 2020	First Occupation
Studio Space (EHDC) – CFLR1	RPI – May 2020	First Occupation
Swimming Pool (EHDC) – CFLR1	RPI – May 2020	First Occupation
Village Hall & Community Centre (EHDC) – CFLR7	RPI – May 2020	First Occupation

3.21 All current Section 106 agreements and their associated developments are actively monitored by the Infrastructure Contributions and Spend Manager to ensure that contribution payment trigger points are identified in a timely manner. Significant work is undertaken to confirm and calculate the indexation to be added to the individual contributions when triggered for payment and to ensure that they are collected on time. Because of this proactive engagement with developers, the payment of triggered contributions is now undertaken via

the issuing of individual Demand Notices rather than the issuing of invoices. These Demand Notices set out the contributions and indexation due when the contributions are triggered and allow for an easier payment process for both the developer and the council. Once received the contributions are added to the Master Section 106 Spreadsheet with individual budget codes created in collaboration with the Finance Team. This allows for the identification of individual contributions when they are allocated to their required use / project.

- 3.22 Late Payment of Section 106 Contributions – all new Section 106 Agreements contain a clause to cover any late payment of contributions by the developer. The standard wording for this clause stipulates that compound interest will be added to the overdue indexed contributions and will be calculated at 4% above the Base Rate of the Bank of England from the date the payment was due to the actual date of payment.
- 3.23 However, no late payment fees have been charged since late 2019 following a review of all current agreements and the proactive engagement with Developers by the Infrastructure Contributions & Spend Manager.
- 3.24 Procedure for allocation of received contributions by the Infrastructure Contributions & Spend Manager – once the triggered contributions (with the added indexation) have been received, the named recipient(s) are contacted and if they are able to progress the works outlined in the individual contribution wording, they are invited to complete the standard Section 106 funding application. Note: Every contribution now has an identified use / named recipient to comply with current Legislation.

- 3.25 If the recipients are not able to take their projects forward at this point, there is usually ten years from actual receipt date for them to use the contribution. This allows recipients time to plan the projects / works and obtain the necessary paperwork and permissions to back up their funding applications.
- 3.26 On receipt of the completed application form, along with copies of at least three quotations for the project / works to be funded by the Section 106 contribution and copies of any other permissions needed such as planning permission, the application is put forward by the Infrastructure Contributions & Spend Manager for review and approval. Once reviewed, approved, and signed off by the Infrastructure Contributions & Spend Manager, Senior Officers and the Executive Member for Planning & Growth, the funds are transferred on receipt of a signed Use Agreement Form.
- 3.27 The Use Agreement Form ensures that the funding is used by the recipient as per the contribution wording in the Section 106 Agreement and allows the council to reclaim the funds if they are mis-spent / not used in accordance with the individual legal agreement.
- 3.28 Ward Members are always informed of any successful funding applications from Section 106 contributions collected from developments in their area. Ward Members are actively encouraged to put forward projects / organisations in their area that would benefit from potential Section 106 funding. However, Members should be aware that any potential Section 106 funding is dependent on the approval of the associated planning applications for the proposed developments in their area or Ward.
- 3.29 This may seem to involve lots of paperwork, but it is a fair and

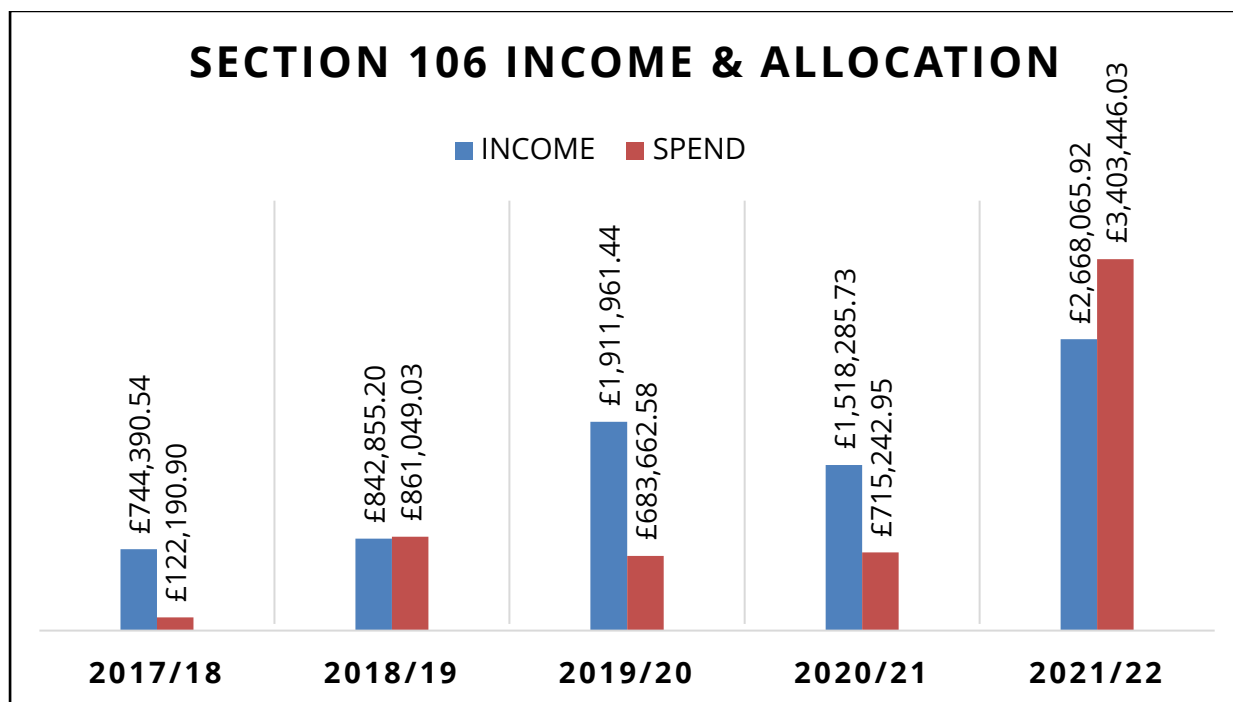
transparent process which is in line with the financial regulations and audit procedures of the council.

Update on Section 106 contributions in 2021/22

- 3.30 The Infrastructure Funding Statement 2021/22 (**Appendix A**) provides detailed information on the collection and allocation of East Herts Section 106 contributions in the last financial year. A snapshot of the financial highlights from the Infrastructure Funding Statement is provided below.
- 3.31 Total Section 106 income & expenditure - Members should note the following information on the total received Section 106 income & expenditure from 01/04/1996 up to 31/03/2022:
- Received contributions - £14,770,631.90
 - Spent contributions - £8,839,065.29
 - Allocated contributions* - £5,725,171.67
 - Unallocated contributions**- £206,394.94
- 3.32 *Allocated contributions include contributions identified for future allocation/transfer to Revenue Budgets for ongoing maintenance, Capital Budgets for major projects, Affordable Housing, specific named uses / projects and for transfer to external bodies (e.g., NHS via the Hertfordshire and West Essex Integrated Care Board).
- 3.33 **Unallocated contributions are available for internal and external funding application bids with certain caveats. Work is ongoing to identify projects to fit with these contributions.
- 3.34 Members will be aware that legal advice has confirmed that all Section 106 contributions can only be allocated in accordance with the specified contribution use wording in the individual legal agreement and within the vicinity of the associated

development. Any deviation or non-conforming use may be subject to challenge and potential reclaim by the developer.

3.35 Section 106 Income & Allocation over the last five (5) financial years - The graph below provides information on the total Section 106 contributions received and allocated by the council over the last five (5) financial years:



3.36 Members should note that the 2021/22 figures include:

- £2,668,065.92 collected from contributions triggered from thirty-six (36) contributions from seventeen (17) individual Section 106 Agreements.
- £3,403,446.03 allocated to twenty-seven (27) individual projects or uses from sixty-six (66) received contributions from forty-two (42) individual Section 106 Agreements.

Update on Section 106 Contributions in 2022/23:

3.37 Information has been provided on Section 106 contributions identified and allocated for spend / transfer in the 2022/23

financial year (01/04/2022 to September 2022):

- £738,370.42 has been collected to date as contributions triggered from three (3) separate developments.
- £618,344.91 identified for allocation / transfer in 2022/23 to date*.

3.38 *This includes the transfer of £180,828.09 health contributions collected by the council on behalf of the Hertfordshire and West Essex Integrated Care Board (formerly the CCG) for surgery expansions in Bishop's Stortford and Puckeridge. Plus, the use of £348,028.22 held Affordable Housing contributions to support a new Network Homes sheltered housing project in Bishop's Stortford and £65,988.60 maintenance contributions to support ongoing grounds maintenance of greenspaces previously adopted by the council.

3.39 More detailed information on the all-new Section 106 agreements, contribution receipts and allocations for 2022/23 (this financial year) will be provided in the next Infrastructure Funding Statement which will be reported on and published in December 2023.

3.40 Allocation of held Section 106 funding – Significant work is ongoing to confirm the allocation of Section 106 contributions for identified purposes / projects and organisations once triggered and received.

3.41 This currently includes collaborative work with Hertford, Ware and Buntingford Town Councils on the implementation of children's play and sports projects to be funded with identified Section 106 contributions. Plus, work with fellow Officers on the use of held contributions for biodiversity and sustainability projects, as well as on specific play area and open space improvements across the District.

- 3.42 Funding of council services and projects - Members should note that certain services and major council capital projects also have Section 106 contributions allocated to them in both historic and new Section 106 agreements. Information on Section 106 contributions which has been allocated to council projects and services in previous financial year is provided in the Infrastructure Funding Statement 2021/22 (**Appendix A**).
- 3.43 Work is ongoing with fellow Officers to identify all potential Section 106 funding available to support current and future council projects. Information is provided below on anticipated Section 106 funding identified and allocated for specific East Herts Council capital projects. This will be used to fund these services and projects directly or to offset council borrowing when the contributions are triggered for payment.
- 3.44 Examples of Section 106 funding anticipated to be triggered over the next few years for major council projects:
- New Grange Paddocks Leisure Centre - £1,378,886.00
 - Hartham Leisure Centre Refurbishment- £304,211.00
 - Castle Park, Bishop's Stortford (cycle routes & footpaths) - £561,839.85
 - Pinehurst Community Centre Refurbishment - £152,467.86
 - Hertford Castle Gardens grounds - £17,942.47
- 3.45 In addition to funding council capital projects, specific Section 106 contributions are used to fund the provision of refuse and recycling containers to new properties on the associated developments. In 2021/22 a total of £56,784.22 was collected and allocated to the Waste budgets for this provision. Further funding for this use is anticipated as the major developments reach completion and residential occupation.

- 3.46 Transfer of collected Section 106 contributions - East Herts Council also acts as the collection authority for NHS health contributions on behalf of the Hertfordshire and West Essex Integrated Care Board (ICB). Significant work is undertaken with colleagues at the ICB to ensure the timely collection and transfer of these contributions.
- 3.47 In addition, East Herts Council also acts to collect and then transfer financial contributions due to Hertfordshire County Council from developments where the county council is the landowner.
- 3.48 Unallocated Section 106 contributions - Significant work has been undertaken to identify and allocate all historically unspent Section 106 contributions to potential projects that would benefit from this funding which comply with the individual contribution use.
- 3.49 Work is ongoing with the Environmental Sustainability Co-ordinator and the Sustainability Policy and Projects Officer to identify contributions that could be used to support both internal and external sustainability and biodiversity projects. This collaborative approach is also being used to provide sustainability advice to potential Section 106 funding applicants. For example, the potential for solar panels and electric vehicle charging points installation at community centres and village halls across the District.
- 3.50 Work is also being undertaken with the Parking Services Manager to identify and use any Section 106 contributions specifically for residential parking and traffic regulation orders. The Infrastructure Contributions & Spend Manager also works closely with colleagues at Hertfordshire County Council and attends the quarterly Officer Delivery Group to

ensure effective collaboration on the use of transport contributions held by the county council.

Potential legislative changes

- 3.51 As Members will be aware, Central Government consulted on potential changes to the planning system in summer 2020 through the Planning for the Future (2020) White Paper. Radical reforms were proposed, including the replacement of Section 106 and Community Infrastructure Levy (CIL) developer contributions with the introduction of a new Infrastructure Levy (IL).
- 3.52 However, these reforms were heavily criticised and, rather than proposing them in a separate Planning Bill, less radical changes to the initial proposals have recently been announced as part of the [Levelling Up and Regeneration Bill](#) (introduced to Parliament on 11 May 2022 and now at the Committee Stage).
- 3.53 The Levelling Up and Regeneration Bill still proposes to implement a new Infrastructure Levy, which put simplistically, will be a locally-set, mandatory charge levied on the final value of development and applied above a minimum threshold. It will replace the existing system of the Community Infrastructure Levy (CIL) and Section 106 agreements.
- 3.54 However, it should be noted that the Levelling Up and Regeneration Bill proposes that there will continue to be a more narrowly targeted role for Section 106 Agreements. They will continue to have a role in supporting the delivery of the largest sites and on sites where infrastructure integral to the operation of a development needs to be provided (for example flood mitigation measures). The continued use of Section 106 agreements will ensure there is a provision of in-

kind infrastructure, Affordable Housing, or funds to ensure the successful delivery of the project, (which will be the same amount as would have been secured under the Infrastructure Levy).

- 3.55 Full information on the proposed Infrastructure Levy can be found in The Levelling Up and Regeneration Bill – (see [Part 4, Clause 113](#) on page 131 of the Bill for the specific details). The accompanying Explanatory Notes provide further information on the Infrastructure Levy proposals in the Bill – (see page 110 of the [Explanatory Notes](#)).
- 3.56 Once the legislation is passed, the Infrastructure Levy charging authorities (generally the Local Planning Authority) will be required to charge the Infrastructure Levy, which will have Charging Schedule rates set as a percentage of gross development value rather than based on floorspace. But it should be noted that it is intended that the Infrastructure Levy will be introduced over time to allow a “test and learn” approach to the new regulations. Therefore, it is not anticipated to be introduced to East Herts for a while and we will continue to use Section 106 for the foreseeable time.
- 3.57 Further information will be provided to Members once details on the final Bill and associated new Regulations, along with the expected timescale for implementation, are available.
- 3.58 September 2022 Fiscal Statement – Members should note that the Chancellor announced changes to the planning system in England in the ‘mini budget’ on 23 September. These include changes to onshore wind planning policy and the creation of “Investment Zones”. The proposed “Investment Zones” will benefit from tax incentives, planning liberalisation and wider support for the local economy. However, the announced 38

“Investment Zones” do not include any in Hertfordshire, and so will not apply to East Herts Council.

Section 106 income generation and information requests

- 3.59 Monitoring Fee Income - the inclusion of a Monitoring Fee Contribution in new Section 106 agreements, following a change in the legislation in 2019, has generated significant income totalling £26,950.81 to date, which is fed back into the planning budget.
- 3.60 This Monitoring Fee income is itemised per financial year below:
- 2019/20 - £3,100
 - 2020/21 - £9,336.99
 - 2021/22 - £14,513.82
- 3.61 Section 106 Contribution Status Confirmation - Income continues to be generated from the provision of Section 106 status confirmation letters to solicitors and housing associations – the fee charged for this increased to £94.00 per enquiry response in April 2022. This income is itemised per financial year below:
- 2019/20 – £2,229.00
 - 2020/21 – £2,693.00
 - 2021/22 - £4,809.30
 - 2022/23 – £1,786.00 (nineteen confirmations to date)
- 3.62 Section 106 information requests - In the previous 12 months the Infrastructure Contributions & Spend Managers has responded to two Freedom of Information (FOI) request and two Member inquiries (via “Infreemation”) regarding Section 106 contribution collection and allocation.

4.0 Options

- 4.1 Members are invited to note and comment on the 'Infrastructure Funding Statement 2021/22' report, and on the ongoing work of the Infrastructure Contributions & Spend Manager.

5.0 Risks

- 5.1 The 'Infrastructure Funding Statement Report 2021/22 must be published on the East Herts website before 31/12/2022. 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 Section 106 contributions within the timescale set out in the individual legal agreements is reputational as it could result in public challenge and potential reclaim by the developer.
- 5.3 Significant work continues to be undertaken to ensure that this will not happen and that all contributions are identified, allocated and used within the period stated within the individual Section 106 agreements – this is usually 10 years from the date of actual receipt of the financial contribution, but several new agreements now stipulate five years from receipt.

6.0 Implications/Consultations

- 6.1 Feedback on the 'Infrastructure Funding Statement 2021/22 was sought from Senior Planning Officers, Head of Communications, Strategy and Policy, Deputy Chief Executive and the Executive Member for Planning & Growth.

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](#)

7.2 17/11/2020 - Audit & Governance Committee - [Section 106 Policy and Financial Contributions Update Report](#)

- 7.3 19/11/2021 – Audit & Governance Committee – [Section 106 Update Report](#)
- 7.4 **Appendix A** – East Herts Council Annual Infrastructure Funding Statement 2021/22
- 7.5 **Appendix B** – Typical Section 106 Requirements – October 2022

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