

DECISION-MAKER:	AUDIT COMMITTEE		
SUBJECT:	IMPLEMENTATION OF MANAGEMENT ACTIONS – SECTION 106 AGREEMENTS		
DATE OF DECISION:	24 th JUNE 2009		
REPORT OF:	HEAD OF PLANNING & SUSTAINABILITY AND HEAD OF HIGHWAYS AND PARKING DIVISIONS		
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STATEMENT OF CONFIDENTIALITY**SUMMARY**

This report provides a progress report to the Audit Committee on the Council's Internal Audit Action Plan relating to Section 106 Agreements. Internal Audit undertook an assessment of Section 106 Agreements and reported on their findings on the 26th January 2009. The report evaluated five areas of risk, which were identified to ensure effective support in achievement of Management's primary objectives for Section 106 Agreements.

The risks evaluated were:

1. Whether the infrastructure need of Southampton City is appropriately identified and reflected through planning obligations;
2. Whether there is any failure to determine planning obligations in accordance with the relevant legislation and Council policy;
3. Whether there is any failure to enforce Section 106 agreements;
4. Whether there is any non receipt of Section 106 contributions from developers; and

Whether there is ineffective or inappropriate use of Section 106 agreements.

Internal Audit recommended four action plans, three of which were classified as 'High Priority'. A range of remedial actions and interventions have been put in place and are provided in the 'Detail', section of this report, below. As described in this report, these actions and interventions are currently being implemented to ensure that the governance, risk management and management control of Section 106 Agreements can be improved to achieve a substantial level of assurance on all four grounds.

In addition to the implementation of the agreed action plans, Planning and Sustainability Division is undertaking a range of other work related to S106 to: put in place an interim process for S106 to be applied during the economic downturn; update the policy guidance on Section 106; and review the case for introducing a Community Infrastructure Levy, as provided for in the Planning Act 2008, which would

supersede some elements of S106. Further details on these additional studies are set out in the Divisional Business Plan for completion in 2009/10 and will be reported to Cabinet in due course.

RECOMMENDATIONS:

- (i) To note the progress on the recommended Management Actions specified in the Internal Audit Report on Section 106 Agreements.

REASONS FOR REPORT RECOMMENDATIONS

1. To ensure appropriate governance of the process for completion of the recommended Management Actions following Internal Audit.

CONSULTATION

2. The Highways and Parking Division, together with the Planning and Sustainability Division, have consulted with Finance and Legal services to assist with the implementation of the agreed actions.

ALTERNATIVE OPTIONS CONSIDERED AND REJECTED

3. A full review of the recommended actions has been undertaken and these have been implemented accordingly.

DETAIL

4. The Internal Audit Report of 26th January 2009 reported on Section 106 Agreements for the period 2008/09. The report identified four action plans, three of which were classified as 'High Risk'. This report provides details on the progress against these recommendations.
5. **Action Plan 1: The infrastructure need of Southampton city is not appropriately identified and reflected through planning obligations (Medium Risk)**
6. Internal Audit judged the assurance level as 'Substantial Assurance' that the city's infrastructure needs are appropriately identified and reflected in planning obligations. Audit observations stated that the Supplementary Planning Guidance (SPG) clearly and transparently sets out the approach to collecting contributions, providing certainty to developers and reducing the need for ad hoc negotiations, thereby increasing the efficiency and consistency of the development control process for major planning applications.
7. There were no management actions recommended, although it was suggested that the origins of the charges set within the document could not be substantiated. In response, it is noted that the charging mechanisms were developed in consultation with relevant professional officers and were subject to consultation procedures with internal and external stakeholders. All due processes required for the formal adoption of Supplementary Planning Guidance were followed, including approval by Cabinet..
8. The mechanisms for calculating contributions are set out transparently in the document and have been applied successfully since the document was adopted in 2006. Furthermore, it is noted that S106 agreements cannot legally be linked to the overall infrastructure needs of the city, but must be specifically related to the impact of the development proposal in question

9. **Action Plan 2: Failure to determine planning obligations in accordance with the relevant legislation and Council policy (High Risk)**
- 10 Internal Audit judged the assurance level of this risk as 'Limited Assurance'. The report refers to inconsistencies and inaccuracies in the calculation of charges, which were not consistent with the Supplementary Planning Guidance (SPG) and suggests that verification checks were not undertaken.
11. The management actions recommend that:
1. Verification checks should be carried out and variations notified;
 2. Where other Divisions provide variations to the SPG specified contributions, explanation/justification be given (notification to be sent to them of this);
 3. Where site specific contributions are agreed with developers, a copy of negotiations should be kept on the Section 106 Agreement internal files.
12. In response, it is noted that it is a fundamental planning principle that each planning application is determined on its merits, taking account of material considerations including planning policies. The S106 Agreement is a bilateral, negotiated legal agreement with an individual developer. The SPG provides a framework for negotiation, but is not a blueprint. Excessive rigidity in seeking to apply the SPG, if it led to refusal of a planning application, could be challenged in the context of a planning appeal and therefore it is important for the Local Planning Authority to consider all the material circumstances with any application. The SPG states that it is neither prescriptive nor exhaustive, leaving considerable flexibility for the Council to negotiate planning obligations in individual cases with reference to national and local policies and site-specific considerations.
- 13 Because the SPG is not intended to cover the full range and complexity of different circumstances 'on the ground', variations need to be applied in the course of individual negotiations. Exceptional circumstances leading to variations are recorded. It is noted that the Audit identified three examples which did not accord fully with the SPG (from a sample of 14) and that in each case reasons were provided for the variations. Electronic records are retained of correspondence relating to each negotiated agreement.
- 14 **Action Plan 3: Non receipt of Section 106 contributions from developer (High Risk)**
- 15 Internal Audit judged the assurance level for this risk as 'No Assurance'. The amounts due were not processed through the Council's debtor system and therefore were not reflected in the Council's annual statement of accounts. All Section 106 Agreements were however recorded on the Finance Team spreadsheets. There has been some evidence of duplication within this system, where revised agreements have been put in place.
- 16 The management actions recommend that:
1. The use of appropriate debt recovery process be reviewed with finance
 2. Duplication of Section 106 Agreements be rectified by Finance and Development Control

- 17 The process for discharging planning obligations falls within the remit of the Planning Agreements Officer, who is responsible for the co-ordination of the entire S106 process. This includes ensuring that S106 Agreements are completed in a timely fashion (currently completing 80-90 per year) through monitoring, discharging planning obligations and ensuring Council compliance with its own covenants in the legal agreements. Once a S106 Agreement is completed, there are quarterly site visits to monitor the triggers for obligations and to check which have obligations outstanding.
- 18 Once the obligation is identified to have been triggered, and it remains outstanding, the Planning Agreements Officer will write to the developer requesting that the obligation is discharged within a reasonable timeframe. If the obligation is not discharged then the Planning Agreements Officer will write a second chase letter to the developer requesting that the obligation be discharged. If the developer still fails to respond adequately, a third letter may be written. It is at this point that a more robust process is required. However, it is to be noted that the overdue contributions are index-linked to retain their value.
- 19 Since the S106 Audit, a process has been implemented with the Council's Debt Recovery Team to instigate legal action where appropriate. We currently have 10 cases with the Debt Recovery Team. For two of these, short-term payment arrangements have now been established in order to discharge the obligations. A dialogue has been set up with all the other 8 cases. There are another 15 cases, which are likely to be passed imminently to Debt Recovery to begin legal action.
- 20 A review has been instigated to identify whether S106 contributions/obligations, once triggered, can be recovered through the Council's formal accounting process with the creation of an invoice for the relevant amount which is collected by the Council's Debtors Team. The Development Control Manager and Planning Agreements Officer have met with officers from Transactions and Debtors and currently comments are being sought from the relevant Financial Officers responsible for the S106 capital financing accounts, within which the S106 contributions are initially deposited.
- 21 Once this review is complete a decision will be made as to whether it is appropriate for the Council to collect S106 contributions through this formal process. If it is appropriate then the Planning Agreements Officer will still remain central to monitoring and identifying breaches of planning obligations, but the actual recovery of these obligations will be moved to a dedicated function within the Council, which can resource the process more comprehensively.
- 22 **Action Plan 4: Ineffective or inappropriate use of Section 106 contributions (High Risk)**
- 23 There is a significant backlog in the implementation of Highways obligations, for which the contributions have been received. At the time of the Internal Audit, this issue was being assessed by the Highways service partner, Halcrow Group Limited, in order to implement a forward programme of works.
- 24 The reasons for the backlog of the Section 106 works, are due to the significant increase in the Capital Programme, which has prioritised resources to target the condition of the roads in the City. With the new Highways Partnership, we have additional capacity to ensure that the S106 Agreement backlog can be dealt

with. There has been no loss of highway related contribution during the backlog, as there have been instances where the delays have provided opportunities to co-ordinate the S106 contributions into subsequently planned highway works.

- 25 Internal Audit judged the assurance level as 'Limited Assurance'. Audit observations identified that, at 1st April 2008, there were £2.7m of Section 106 obligations for Highways and Transport that had not yet been delivered, relating to contributions dating back to 2001/02 and involving some 314 sites.
- 26 The Halcrow Group were commissioned to estimate the cost of delivering all necessary works to complete the backlog, in order to enable works to be completed with a very high priority where the deadline for use of the contributions is close to expiry. If contributions are not spent within the period set out in the legal agreement (usually 5 or 10 years) then in most agreements the council will have covenanted to repay the money to the payee. It is therefore important to spend the contribution within the period specified in the agreement.
- 27 The management action from the Audit identified that the Highways Team is already dealing with this issue in conjunction with Legal and Finance, to resolve the issue of the backlog of works. It should be noted, however, that the information we have is an interim reporting stage, which may contain duplicate information, whilst the final review is to be completed by the end of June.
- 28 From a total of some 706 works items, there are an estimated 313 to be completed. Of these, 74 are 'strategic transport' works which under the terms of the SPG can be allocated to a broad range of programmed transport works within the city and are not subject to potential clawback.
- 29 For the outstanding tasks, a five year programme of works has now been scheduled, prioritising those that are closer to expiry in the 2009/10 programme of works. The 32 street lighting works will be covered via the Street lighting PFI contract. The strategic transport works will be phased at a later stage by the Transport Policy Team. The Chantry Bridge works will be phased once further on-site investigations are complete.
- 30 The following table, shows how the remaining 197 outstanding tasks (estimate) will be phased over the 5 year programme:

Table 1: Proposed Programme for Outstanding Tasks*

Type	Description	To be completed	Street lighting PFI	2009/10	2010/11	2011/12	2012/13	2013/14
1	Highway improvements	119	0	39	22	19	34	5
2	Street lighting improvements	37	32	2	2	0	1	0
3	Traffic Regulation Orders	9	0	2	1	2	4	0
4	Cycle	19	0	6	2	1	8	2

6	Bus Services/Car Club/Shirley Street Ahead	9	0	2	1	1	4	1
7	Bus stop improvements	36	0	3	1	13	15	4
8	Strategic transport contribution	74	0	To be phased following review by Transport Policy				
9	Chantry Bridge	10	0	To be programmed following further investigation				
	Total	313	32	54	29	36	66	12

*Note this is based on initial information and is currently being reviewed for a full report at the end of June 2009.

FINANCIAL/RESOURCE IMPLICATIONS

Capital

31 The Finance and Highways Services are currently undertaking a full review of the capital budget, relating to the completed and outstanding S106 Agreement tasks. Until this is completed at the end of June, the figures quoted below, only represent an initial report.

It is currently estimated, from this initial service review that there may be a potential surplus from the completed tasks.

32 Table 2, below, provides a summary of the financial position for the 197 outstanding Highways tasks (following the removal of street lighting, strategic transport contributions and Chantry Bridge, as explained earlier). The initial report shows there are currently some tasks with surplus funding, but considerably more requiring top up. It is clear that is likely to be a shortfall in resources to complete these works, once the Section 106 Agreement contributions have been appropriately utilised. Further discussions will be required to address this issue, when the shortfall has been quantified.

33 These draft figures are subject to update, following a review in June and a report to the Corporate Management Team in early July 2009.

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Table 2: Financial Situation for the Outstanding Tasks*

Type	Description	To be completed	Tasks requiring No Top Up	Top Up	Surplus
				Nos.	Nos.
1	Highway improvements	119	15	89	15
2	Street lighting improvements	5	0	2	3

3	Traffic Regulation Orders	9	2	0	7
4	Cycle improvements	19	17	0	2
6	Bus Services/Car Club/Shirley Street Ahead	9	9	0	0
7	Bus stop improvements	36	35	1	0
	Total	197	78	92	27

*These details will be verified, following a comprehensive review, due for completion at the end of June.

Revenue

35 None

Property

36 None

LEGAL IMPLICATIONS

Statutory power to undertake proposals in the report:

- 37 Circular 05/2005 provides guidance to local authorities in England on the use of planning obligations under section 106 of the Town and Country Planning Act 1990 as substituted by the Planning and Compensation Act 1991.
- 38 The terms of legal agreements set out the relevant planning policies relating to developments and the planning applications which apply.

POLICY FRAMEWORK IMPLICATIONS

- 39 The Local Development Framework sets out the relevant planning policies relating to developments and the planning obligations which apply.
- 40 The Supplementary Planning Guidance for the implementation of Section 106 Agreements was ratified by Cabinet in 2005/06.

SUPPORTING DOCUMENTATION

Appendices

1.	None
2.	

Documents In Members' Rooms

1.	None
2.	

Background Documents

Title of Background Paper(s)

Relevant Paragraph of the
Access to Information
Procedure Rules / Schedule
12A allowing document to be
Exempt/Confidential (if
applicable)

1.	Internal Audit Report ,S106 Agreements 08/09	
2.		

Background documents available for inspection at: Internal Audit

FORWARD PLAN No:

No

KEY DECISION?

No

WARDS/COMMUNITIES AFFECTED: