

## **Section 106(S106)/Community Infrastructure Levy (CIL) and Monies for Highway Works**

### **Report of the Head of Planning, Transportation and Environment**

#### **1. Summary**

The County Council has a significant, statutory role as an infrastructure provider, particularly relating to transportation and education provision. This report sets out the way in which the County Council secures S106 contributions and works. It describes how it engages in the local planning process in identifying and securing appropriate infrastructure funding to support new development. Within the current planning regime, this process involves Section 106 agreements and the use of a Community Infrastructure Levy.

#### **2. The mechanisms for securing developer contributions for infrastructure**

New development often has an impact on existing infrastructure and public services. The County Council works alongside Local Planning Authorities (LPAs) (usually the District Councils) to set out infrastructure requirements associated with new development to be included within emerging Local Plans. More specifically, infrastructure requirements, dates for delivery and sources of funding are set out in specific Infrastructure Delivery Plans which accompany Local Plans, and the Council's own Transport Infrastructure Plan.

On a more detailed level, when planning applications are submitted, developer contributions can be made by an applicant to the relevant Local Authority to fund improvements required as a direct result of the proposed development. This infrastructure is considered to be required to make development acceptable in planning terms and is often specifically included within District Infrastructure Delivery Plans.

Developer contributions are usually secured through Section 106 Agreements or the implementation of a Community Infrastructure Levy (CIL).

#### Section 106 Agreements

Section 106 Agreements are legally binding agreements between the applicant, the LPA and the County Council as Highway Authority and Local Education Authority. These Agreements set out the infrastructure, or level of financial contributions to infrastructure delivery, which needs to be provided by the developer to make the development acceptable to the Local Authorities at specific times in relation to the development in question. Because Section 106 Agreements are negotiated on a case-by-case basis they often vary in their structure and format. In some cases development cannot continue beyond a certain stage until the necessary infrastructure is in place.

#### Community Infrastructure Levy

CIL is a relatively new mechanism for securing developer contributions towards infrastructure delivery. It is a standard levy charged and collected by LPAs (as opposed to the County Council) on developments of a certain type with charges being set on the basis of development size. CIL applies to residential development and in some cases is also collected on retail and commercial developments. LPAs identify the rate of levy to be

applied on the basis of development viability rather than the type and scale of infrastructure which needs to be funded from it. The CIL rates are assessed by an independent Planning Inspector to consider their impact on development viability. This process can lead to the levy rates being altered. The LPA has to publish a list which sets out what CIL will be used to fund. The County Council provides advice as Highway Authority and Local Education Authority to inform the preparation of the CIL regimes in the Devon area. There is no firm link between viability and the list of items the CIL needs to fund. In practice there is nearly always a significant funding gap.

While it is not mandatory to implement a CIL, restrictions to the use of Section 106 Agreements effectively encourages this approach to infrastructure funding. In Devon, Exeter City, East Devon and Teignbridge District Councils have put in place a CIL regime while other LPAs are progressing similar CIL proposals.

The CIL regime establishes a range of infrastructure investment necessary to support the delivery of the Local Plan proposals, but once the developer has paid their CIL contribution, development can normally proceed and be implemented in full. Delivery of CIL-funded infrastructure is the responsibility of the appropriate Authority; in most cases the District Council or County Council. This is one of the principal differences between the CIL regime and Section 106 arrangements.

### **3. The County Council's role in the local planning process and its approach to securing developer contributions**

#### General approach

The County Council has a significant involvement in the local planning process. In particular, the Authority works proactively with the LPAs at all stages in the preparation of Local Plans, responds to planning applications and makes requests for infrastructure funding as Highway Authority and Local Education Authority. The Authority is a statutory consultee on these matters. Depending on the scale and nature of development, requests may also be made for developer contributions towards other infrastructure including library provision and extra care housing. The reorganisation of the internal planning teams to create a single planning unit which includes education planning has improved the effectiveness of the County Council's infrastructure planning and delivery functions.

The County Council generally responds to planning applications separately in its role as Highway Authority and Local Education Authority. Alternatively, for large scale, strategic applications on allocated sites where there may be significant infrastructure requirements, the planning team will prepare a single, corporate response on behalf of the County Council. Such responses cover highways and education together with other topics for which the County Council is responsible including libraries, extra care housing, minerals, waste and historic environment. As a guide, single County Council responses are generally made for housing applications of more than 350 houses or Local Plan allocated sites with significant infrastructure requirements.

When responding to planning applications as a consultee, officers liaise with the Local Member to inform them of the application, while discussions can take place to explain the nature of the application and the potential issues for consideration. This is particularly relevant if applications are large scale or contentious. Engagement also takes place with the relevant Cabinet Members.

### Assessing Section 106 transportation contributions

As Highway Authority, officers consider the transport impact that a development may have on the network by examining the detailed application form, drawings and, when required due to the scale of development, the Transport Statement or Transport Assessment submitted with the application. Through a consideration of the characteristics and condition of the current transport network and the likely development impact on the highway, a series of infrastructure requirements which the developer should provide, or to which they should contribute, are identified. Responses are prepared using local planning policy and national policy such as the National Planning Policy Framework. Every application is considered on its individual merits and therefore there is no formulaic response or calculation regarding developer contributions. Recent appeal experience has demonstrated that collecting contributions for a local transport related 'pot' is no longer acceptable. S106 contributions are required to be for specific works or items.

### Relationship with the County Council's capital programme

The County Council capital programme identifies the level of funding which is secured through developer contributions and spent on infrastructure. In addition, large numbers of minor infrastructure schemes such as junction improvements are provided 'in-kind' directly by developers through either S106 or S278 of the Highways Act where the developer delivers the scheme.

Irrespective of the type of infrastructure, any contributions sought must be directly related to the development in question. Paragraph 204 of the National Planning Policy Framework states that planning obligations must meet the following tests:

Necessary to make the development acceptable in planning terms;

Directly related to the development; and

Fairly and reasonably related in scale and kind to the development.

The application of these tests can cause concern at a local level where houses are being delivered but Section 106 contributions are limited only to those appropriate to meet the tests. Requests for inappropriate infrastructure requirements which do not meet the tests could lead to a planning appeal and potentially costs being awarded against the relevant Authority should an inspector consider requests to be non-compliant.

Whilst each application is considered individually, the County Council always considers the cumulative impact of development in assessing the appropriate level of contributions. This is easier where a Local Plan Authority has an adopted, and up to date, Local Plan.

More recently, the Government has introduced restrictions on the extent to which Section 106 contributions from a number of development proposals can be 'pooled'. This means that no more than five contributions can be aggregated in order to deliver a specific infrastructure requirement. This effectively encourages LPAs to prepare a CIL to appropriately fund infrastructure on large, strategic sites where several separate applications may be submitted.

### Community Infrastructure Levy

Unlike Section 106 Agreements, the CIL is related more closely to the Local Plan area rather than to specific, individual sites or applications. In some cases elements of infrastructure

included within the CIL regime will be identified as being needed to support the delivery of a strategic development proposal included within the Local Plan.

The Infrastructure Delivery Plan prepared alongside each Local Plan will identify the full range of infrastructure required, and identify the extent to which funding is required from CIL. The County Council works closely with the LPAs to develop a robust Infrastructure Delivery Plan and identify the extent to which CIL funding will be required.

Having established the rate of CIL to be applied and the payment regime, the overall scale of CIL likely to be available can be estimated, but there is no direct link between the collection of CIL receipts and the timing for investment in infrastructure. The need for infrastructure provision may therefore occur before sufficient CIL income has been secured to allow its delivery.

Discussions are currently taking place with individual LPAs in order to establish effective procedures through which CIL funds can be made available to support infrastructure delivery for which the County Council is responsible. This includes discussions with the Section 151 Officers from the District Councils.

The objective is to establish a coordinated approach to capital programming and a clear mechanism through which early delivery of infrastructure can be secured. In the case of Section 106 Agreements, funding is secure and early delivery can often be supported in advance of actual payment receipt, and a similarly robust mechanism needs to be put in place where CIL is the main source of funding.

#### **4. Challenges**

The County Council has an established approach and procedure for responding robustly to planning applications. This results in significant funding being secured for appropriate infrastructure where this is required to mitigate the impact of development. However, there are some challenges to the mechanism for securing developer contributions.

Firstly, it is important to acknowledge that the County Council is not the LPA. The statutory responses provided are used to inform the decision of the LPA, although there may be a number of competing planning issues associated with an application which affect the decision made and the level of contributions secured, even though the County Council is usually a signatory to the Section 106 Agreement. In addition, some LPAs have adopted policy positions which affect the level of contributions which they are prepared to secure. An example of this is where the LPA has adopted a position which means that they do not request contributions from the affordable housing element of a development. This sometimes results in a reduced contribution than that requested for education provision.

Secondly, viability can affect the level of contributions which, in the opinion of the applicant, a development can support whilst still providing a competitive return to the developer and landowner. Viability appraisals are often submitted with planning applications to demonstrate that the total level of contributions requested cannot be afforded which means that prioritisation over development funding is required. This can result in reductions in infrastructure funding secured even though the impact will be undiminished. It should be noted that the National Planning Policy Framework requires that development should provide competitive returns to willing landowners and developers. The levels of Section 106 contributions and CIL rates therefore have to be viewed in this context.

Thirdly, the position of the County Council as a significant infrastructure provider, but not a CIL Charging Authority (usually the District Council), is important. CIL receipts are collected by the LPA. The County Council then has to make a case to the LPA for an appropriate

amount of funding from CIL to be made available for County infrastructure. As already discussed, there are only two LPAs which currently charge CIL and therefore the mechanisms for ensuring that appropriate levels of funding are secured are still evolving. In general terms, in areas where CIL is in place, the County Council has less direct control of funding for County infrastructure which would have previously been secured through the Section 106 mechanism. It is therefore important to liaise on an ongoing basis with the LPAs to ensure the relevant funding is made available.

On a strategic level, the County Council has been successful in securing the funding required to deliver the transportation and education improvements needed to mitigate development impact. There are occasions when there is a necessary delay between the commencement of development and the provision of infrastructure because of competing infrastructure demands and the need for developer contributions to be paid in a timely manner to ensure development is viable. However, issues over cash flow can usually be overcome by flexibly improving infrastructure, securing funding from elsewhere (in the context of transport improvements) or applying temporary funding from other sources.

It should be noted that if insufficient funding is secured from development this has a significant impact on the ability to fund the necessary infrastructure, potentially resulting in a funding gap. This can be a particular issue in the case of education provision for which the only source of funding for additional capacity required to mitigate development is from developer contributions. For example, the principal source of schools funding from Government, the Basic Needs Capital Allocation, is specifically to meet educational needs resulting from demographic patterns, not new development. As such it is imperative that sufficient funding is secured from development.

## **5. Monitoring infrastructure funding from development**

Infrastructure funding from development is directly related to housing completions, whether the funding is secured through a Section 106 Agreement or whether it is derived through a CIL. This means that it is usually received in tranches. Contributions from various developments can often be aggregated (although recent regulations limit such 'pooling'). These arrangements mean that it is vital to monitor funding closely.

The County Council directly monitors existing infrastructure capacity, paying particular attention to highway and school capacities. In addition, the County Council monitors the receipt of funding from development in the context of agreed payment triggers and anticipated development trajectories. The increased use, investment in, and development of, appropriate software has improved the internal monitoring processes of the County Council. Ongoing discussions between the County Council and the LPAs are vital to ensure that funding is received when Section 106 Agreement triggers are reached. In areas where there is a CIL, the provision of funding for specific infrastructure is agreed at Member level and funding is usually provided as agreed to coincide with the actual provision of the infrastructure. A positive and collaborative relationship with the LPAs is vital.

## **6. Summary and conclusion**

The County Council has a robust procedure for informing Local Plan preparation and responding to planning applications, particularly as Highway Authority and Local Education Authority. Through such responses and ongoing discussions with applicants and the LPAs, contributions for infrastructure are secured through either through CIL or Section 106 Agreements. The way in which the County Council sets out appropriate levels of contributions is evidence-based, robust and relates to specific infrastructure requirements. Monitoring of funding receipts takes place through discussion with District Councils and a

series of internal processes to ensure that the funding received matches that required and previously agreed.

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**Electoral Divisions: All**

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Local Government Act 1972: List of Background Papers

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Background Paper	Date	File Reference
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Nil

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