

**Committee: Scrutiny Committee**

**Date: 25 May 2021**

**Title: Planning Obligation Task Group**

**Author:** Councillor Criscione & Councillor Jones  
Assisted by Nigel Brown, Development Manager  
nbrown@uttlesford.gov.uk

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## Summary

At Scrutiny Committee on 25 June 2019 it was agreed to establish a Task and Finish Group to consider Planning Obligations and Conditions specifically:

- a. Their methodology; use; scope; negotiation; agreement; drafting; monitoring; enforcement and
- b. Their application in respect of affordable housing, education and other community benefits.

The Task and Finish Group had the following terms of reference:

- The process and procedures whereby Planning Obligations are considered, negotiated and managed by the Council;
- How Planning Obligations are enforced by the Council and contributions payable thereunder secured and paid;
- How members and the Community might better be informed of the process and outcomes in respect of Planning Obligations;
- The extent to which contributions arising under Planning Obligations might be spent for the delivery of affordable housing, education and or/otherwise, for the benefit of the community;
- Whether the Council achieves robust and achievable terms in regard to Planning Obligations which are fair and balanced to both the Council and developers;
- Whether Planning Committee members are provided with timely and comprehensive information to enable them to make informed decisions as to Planning Obligations
- How the Council and Essex County Council can optimise their work together related to Planning Obligations.

## RECOMMENDATION

The task and finish group requests Scrutiny Committee advises Cabinet of the following recommendations

- A. The creation of an Uttlesford Developers Contribution Document.
- B. More formalised and procedural approach for Town and Parish Councils to input into Planning Obligations
- C. Clearer and consistent reporting of Planning Obligations as part of recommending of major planning applications to Planning Committee
- D. Priority of populating EXACOM database, to allow enhanced reporting and public self-service requests
- E. Reflection of cases and projects on their completion to maintain improvement in delivery

## Financial Implications

1. There are likely costs regarding recommendation D, with respect of additional resourcing for inputting of historical data

## Background Papers

### Impact

- 1.

Communication/Consultation	
Community Safety	None
Equalities	None
Health and Safety	None
Human Rights/Legal Implications	None
Sustainability	None
Ward-specific impacts	None
Workforce/Workplace	None

## **Situation**

1. Members will recall from Scrutiny Committee on 25 June 2019 that it was agreed to establish a Task and Finish Group to consider the Council's implementation, monitoring and enforcement of Section 106 Planning Obligations
2. The Task and Finish Group had the following terms of reference:
  - The process and procedures whereby Planning Obligations are considered, negotiated and managed by the Council;
  - How Planning Obligations are enforced by the Council and contributions payable thereunder secured and paid;
  - How members and the Community might better be informed of the process and outcomes in respect of Planning Obligations;
  - The extent to which contributions arising under Planning Obligations might be spent for the delivery of affordable housing, education and or/otherwise, for the benefit of the community;
  - Whether the Council achieves robust and achievable terms in regard to Planning Obligations which are fair and balanced to both the Council and developers;
  - Whether Planning Committee members are provided with timely and comprehensive information to enable them to make informed decisions as to Planning Obligations
  - How the Council and Essex County Council can optimise their work together related to Planning Obligations.

## **Actions**

3. In response to this the group (or parts of the group) carried out the following actions, supported by the Development Manager,
  - Met with the Development Manager to assess the approach to the negotiation and policy/legal basis for negotiations for Section 106 Obligations
  - Met with the Council's Legal Officer on matters related to Section 106 Drafting.
  - Considered best practice in other Councils and organisations.
  - Approached Towns and Parish Councils (including survey) to consider third tier Councils' input in Section 106 Obligations.
  - Interviewed Other District Councillors including members of the Planning Committee

#### **4. Legal and Policy Confines of Section 106 Obligations**

- 4.1 Before considering the opportunities of Section 106s it is important to consider the legal context within which they sit. The statutory limitation on the use of Planning Obligations sits within Regulation 122 of the Community Infrastructure Levy Regulations 2010. Although the Council does not operate the Community Infrastructure Levy (CIL), the statutory limitations of the use of S106 Obligations sit within this legislation; hence the often confusing term that Section 106 Obligations must be CIL compliant.
- 4.2 Regulation 122 does state that “ *A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is-*
- (a) necessary to make the development acceptable in planning terms;*
  - (b) directly related to the development and*
  - (c) fairly and reasonably related in scale and kind to the development*
- 4.3 Although there is some opportunity for some lateral imposition of these Regulations, all decisions around the negotiation of S106 Obligations, or their variation must have Regulation 122 at its heart.
- 4.4 The requirements of Regulation 122 are imbedded within Paragraph 56 of the National Planning Policy Framework (NPPF). Para. 57 goes further and states that any contributions sought must also be policy compliant.
- 4.5 The Council’s Development Plan continues to be the Adopted Uttlesford Local Plan 2005, supplemented by the increasing suite of Neighbourhood Plans. Notwithstanding the current stage that the Council is in with regards the preparation of its new local plan, any emerging plan and its emerging policies (including those related to infrastructure contributions), will retain low/moderate weight until significant milestones are reached in the progress of the plan.
- 4.6 On the point of Uttlesford not operating CIL, the Council has currently engaged consultants to consider the options around CIL. In light of the Council’s decision to withdraw the Local Plan in April 2020, the consultants did advise that they could not cost up the infrastructure requirements for the district without the Local Plan and associated Infrastructure Development Plan. As such, this work is currently paused.
- 4.7 The Council currently does not have a Developers’ Contribution Document (either adopted as guidance or policy). Essex County Council does have an adopted Developers’ Guide to Infrastructure Contributions Document which was revised in 2020.
- 4.8 The absence of a District Developers’ Contribution Guide, especially in light of the current transient nature and age of the Council’s Adopted Plan, is clearly a policy constraint in maximising Regulation 122 complaint contributions from development.

## 5. Current Processes for Agreeing Planning Obligations

- 5.1 The processing of planning obligations at Uttlesford has been the very traditional method currently implemented by the vast majority of Local Planning Authorities.
- 5.2 Recommended Planning Obligations, including their requirements, develop as a planning application is considered. As a result Heads of Terms emerge in line with Regulation 122. These Heads of Terms emerge through a combination of the following:
- a. Consultation responses from statutory consultees who request contributions in line with their own contribution frameworks for instance (but not exclusive to)
    - Essex County Council with respect of education and public transport
    - Clinical Commissioning Groups (CCG) with respect of health
    - Natural England with respect of impact on Recreational impact on protected habitats (Essex Coast RAMS)
  - b. Ongoing stewardship measures for
    - Public open space/recreation spaces (including first refusal for town and parish councils for adoption). Commuted sums for ongoing maintenance
    - Sustainable Drainage Systems
    - Public car parks etc.
  - c. Other matters that cannot be secured by condition for instance
    - Securing highway improvements proportionate to the development (preference is always for developer to carry out works, with financial contribution if Highway Authority do work)
    - Offsite works (including contributions if required)
- 5.3 In the majority of cases the Planning Obligation relates to major planning applications and the applications are reported to Planning Committee. Prior to the reporting of the matter to Planning Committee the Heads of Terms are agreed with the applicant, without prejudice to the decision of Planning Committee. The Heads of Terms are included as part of the recommendation, the recommendation is couched in negative terms that the application is refused if the applicant fails to enter into the S106 Obligation within a given time. This avoids the need to refer back to Planning Committee if the Planning Obligation is not progressed.
- 5.4 The Heads of Terms are reported in list form and include the full of list of requirements. Traditionally this has not included the monetary sums. The report does not include reference to triggers for actions or payments and deliberately avoids drafting matters at Planning Committee. This is primarily to allow the matter in terms of the completion of the Planning Obligation and the

consideration of triggers and drafting not to be unduly hamstrung by a Committee resolution. Only clear movements away from the Heads of Terms should be reported back to Planning Committee.

- 5.5 Following the resolution from Planning Committee, the Council's legal officers are instructed to complete the Planning Obligation. Recently the Council's Legal Officers have been resourced to retain drafting and version control of the emerging planning obligation. The Council's legal officers are looking at standardising clauses moving forward. Historically, delays have occurred where Essex County Council have been party to the obligation. Better liaising between legal teams, and between the County lawyers and their client areas, appears to be resulting in improvements in this area.

## **6. The Role of Town and Parish Councils**

- 6.1 Traditionally, Towns and Parish Councils have had limited input in terms of the scoping and consideration Planning Obligations. The role of third tier authorities is clearly a cornerstone of this Committee's consideration of Planning Obligations.
- 6.2 A survey carried out by the Task & Finish Group, directed at Town/Parish Councils and individual district councillors identified the following:
- 68.4% of respondents feel that they have a very good or good understanding of Section 106 agreements
  - 71.1% of respondents feel they have very little or no influence over the planning obligations process
  - 76.3% of respondents were not satisfied or completely unsatisfied with the level of engagement with UDC regarding s106 Agreements
  - 44.7% of respondents want to be consulted during pre-application stage, with a further 23.7% wanting input at the Officers' initial review, and 28.9% during the consultation stage
  - 84.3% of respondents do not feel sufficiently involved in the spending of s106 monies and would like more involvement
  - 84.2% of respondents support a wish list of projects for areas that might qualify for s106 monies
- 6.3 It is clear from the work that that the Task & Finish Group has with Town and Parish Councils that Third Tier Authorities do feel excluded from the process. As a result they do not consider that the best outcomes have emerged for the local communities from Planning Obligations.
- 6.4 Parallel to this consideration has been Sue Chadwick review of pre-application discussions and ongoing Planning Obligation matters specifically in Saffron Walden. This has highlighted and recommended that Town and Parish Councils become more centrally involved in pre-application discussions. This

is not a new issue; the Planning Advisory Service has advocated for many years the involvement of third tier authorities and ward members in pre-application discussions. It is not for this Task and Finish Group to duplicate the recommendations from Sue Chadwick. A working group including the Chair of Planning Committee and a sample of Third Tier Councils has carried out work on this point. From this work, is emerging a protocol for involvement of parish and town councils in pre-application discussions which will be reported to Planning Committee following consultation, later in the summer.

- 6.5 The Council's approach to pre-application discussions is changing significantly. The increased use of Planning Performance Agreements (PPAs) allows for a project based approach to the consideration of planning proposals from pre-application, through application and onto implementation. PPAs offer no guarantee of planning permission for the developer, but it does set the timeframes for the consideration of matters including resourcing. It also establishes the town and parish council within the process rather than outside of it. This is being confirmed within the emerging Statement of Community Involvement.
- 6.6 The more formalised approach of including the Towns and Parish Councils within the pre-application process rather than merely being a consultee of the planning application will certainly allow for a much more meaningful input in the negotiation of the Planning Obligation. This input would be certainly will be without prejudice to any principle objections to the development held by the Town/Parish Council. This engagement would also be in the full context of the need to comply with Regulation 122 of the CIL Regs.
- 6.7 Notwithstanding this commitment regarding pre-application/PPA discussions a formal process for the engagement of Town and Parish Councils in the negotiation of Planning Obligations is required, including any requests for variations.

## **7.0 The Section 106 Monitoring/Enforcement Process**

- 7.1 In January 2019, the Council created and recruited to a Section 106 Monitoring/Enforcement Officer. The post was funded by Section 106 Monitoring Charges. The post holder acquired a number of legacy cases.
- 7.2 The post has successfully monitored and helped deliver infrastructure from Planning Obligations, working with developers and Town/Parish councils to deliver infrastructure locally. The monitoring role is not exclusive to invoicing of payments from Planning Obligations, but also requires the liaising with parish/town councils to bring public open space and facilities to an appropriate standard in a timely fashion, to be transferred for adoption to town/parish councils.
- 7.3 During the pandemic the situation did become becalmed. The officer has been unable to carry out site visits, and some public open space has been delayed in transfer through no fault of this Council, our partner Councils or the

developer. In addition key developer links have not been available due to furloughing etc.

- 7.4 The processes and procedures around the monitoring process are currently the subject of an audit programme to ensure business continuity moving forward. It is suggested that this audit process and its ultimate reporting to GAP Committee compliments this Scrutiny Task & Finish Group Report. It is therefore recommended that this report not intrude on the ongoing work of Internal Audit.
- 7.5 The S106 Monitoring Officer deliberately sits within the Planning Enforcement Team. The priority on the implementation of a Planning Obligation will always be through monitoring and ensuring compliance. Where enforcement, following intervention is required then the priority should be on negative injunction action (i.e. prevention of building). Developers do want to comply, and early monitoring does ensure that triggers are met, and the developer is assisted to comply.
- 7.6 The operating of the S106 Monitoring/Enforcement Officer has been a success. The workings of this officer, not only allowed a dedicated officer to monitor compliance, it has allowed an element of reflection with both developers and town/parish councils over the effectiveness of the Planning Obligations.
- 7.7 As an illustration, on the point of public open spaces. Whilst Planning Obligations certainly over the past decade, have allowed town/parish councils first refusal to adopt the open spaces, the terms of the Planning Obligation have not always made the public open space attractive for town/parish councils to willingly adopt. This can be for a number of reasons:
- The town/parish council has had no input in the design of the facility
  - Planning Obligations have had an inconsistent approach to commuted charge periods (can be between 5-20 years)
  - Lack of clarity over approach to level of commuted sum
  - The matter is complicated by Sustainable Urban Drainage facilities being on Public Open Space Areas
- 7.8 As a result of this the stewardship of public open spaces has been taken over by Management Companies. This has resulted in the residents of these new developments appearing to be double charged (i.e. service charges and Council Tax). Although Management Companies may be unavoidable in certain circumstances, it is imperative that provided facilities and the terms of the Planning Obligation make it attractive for towns/parish councils to adopt, and this is committed to in the obligation.



## **8.0 Reporting of Planning Obligation Outcomes**

- 8.1 Currently the reporting of Planning Obligation outcomes is confined to the Council's annual report of accounts which includes Planning Obligation receipts. This is certainly not the preferred approach.
- 8.2 Parallel to the creation and filling of the role of the S106 Monitoring/Enforcement Officer, the Council acquired the EXACOM software package. EXACOM being a web based software allows interaction with the Council's IT systems. EXACOM is also the preferred interface of the Council's corporate system, IDOX. EXACOM does rely upon historic Section 106s being inputted, to allow further reporting. Sadly, the new officer role has been a victim of its own success, whilst picking up legacy cases and successfully delivering infrastructure, time and resources have not been available for the populating of the system with historic S106s and data. This does now have to be made a priority moving forward, and duly resourced.
- 8.3 A fully populated EXACOM database with its reporting and interaction with other databases can provide the following
- Ability to report on a case by case (i.e. development) basis on the collection and spend of monies, and the delivery of infrastructure
  - Ability to report on a project basis (i.e. pooled resources)
  - Ability to report on geographical/ward/parish basis
  - Ability to report on a themed basis (e.g. affordable housing).
- 8.4 The priority moving forward is for the database to be public facing and subject to appropriate audit and data protection checks, to be open for public self-service enquiries.
- 8.5 Additional to this, overdue formal reporting of Planning Obligation outcomes, in terms of figures or narrative will be able to be reported to appropriate Committees (especially Planning Committee) on a regular basis.

## **9.0 Reflection on Planning Obligation Delivery**

- 9.1 The ability to reflect on a specific Planning Obligation Implementation or a project delivery journey cannot be overvalued. It is essential that part of the process of the implementation of planning obligations, and the delivery of projects and infrastructure should include looking back and reflecting. Reflection can be positive but even if critical can enhance the process moving forward.
- 9.2 The Task & Finish Group has therefore cause to suggest that regular review and feedback between members, officers, third tier authorities and applicants take place in order to identify areas where improvement is necessary. This will be brought about by open and positive dialogue between parties and the

raising of any issues through and beyond the formal planning application process.

- 9.3 In other areas, Local Planning Authorities have established Development Forums to create a collaborative platform for stakeholders to share non-specific issues that are being experienced in the planning process. This is with improvement in mind and could prove a useful forum for the Council to identify shortcomings, issues and actions in respect of planning obligations, particularly with future negotiations in mind.

## **10.0 Conclusions and Recommendations**

10.1 The outcomes leading to recommendations can be based on five key areas:

- A. Improved Policy Basis and Guidance to provide enhanced and more consistent approach to Planning Obligations
- B. More formalised and procedural approach for Town and Parish Councils to input into Planning Obligations
- C. Clearer and consistent reporting of Planning Obligations as part of recommending of major planning applications to Planning Committee
- D. Priority of populating EXACOM database, to allow enhanced reporting and public self-service requests.
- E. Reflection of cases and projects on their completion to maintain improvement in delivery.

### **A. Improved Policy Basis and Guidance to provide enhanced and more consistent approach to Planning Obligations**

- A.1 The creation of an Uttlesford Developers Contribution Document. This document will act as a policy of its approach to all matters specific to Planning Obligations. The document will be twofold
- Capturing of existing evidence base to provide ongoing contribution requests, taking the Essex Developers' Contribution Document as the blueprint in this area.
  - Provide specific guidance for developers over the Council's approach on specific matters (e.g. commuted sum maintenance periods)

## **B. More formalised and procedural approach for Town and Parish Councils to input into Planning Obligations**

- B.1 That the emerging Protocol for involvement of Town & Parish Councils at pre-application/PPA discussion (following the recommendations of the Sue Chadwick Report), be extended to include non-prejudicial input into planning obligations. Such input must be consistent with Regulation 122.
- B.2 Establish a procedure for the inclusion of Town and Parish Councils in Planning Obligation negotiations on appeals. Such input must be consistent with Regulation 122 and the specific appeal timetable.

## **C. Clearer and consistent reporting of Planning Obligations as part of recommending of major planning applications to Planning Committee**

- C.1 As part of the scheduled redesign of Planning Committee the reporting of Planning Obligation recommendations to be clearer and more consistent. This will include:

- Dedicated section on Planning Obligation recommendation (including CIL justification) and input from partner authorities
- Extend the recommendation to beyond Heads of Terms to include monetary sums where possible.
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## **D. Priority of populating EXACOM database, to allow enhanced reporting and public self-service requests**

- D.1 To resource and prioritise the populating of the EXACOM database with historic planning obligations before end of October 2021
- D.2 Establish quarterly reports to Planning Committee and other relevant Committees (where required), on specific developments, projects or themes
- D.3. Following appropriate audit and data protection checks, establish an outward facing self-service approach to planning obligations data.

## **E. Reflection of cases and projects on their completion to maintain improvement in delivery.**

- E.1 Formally establish a process for reflection, including review with partners, the community and developers around the delivery of specific development, infrastructure and projects.

**Risk Analysis**

2.

Risk	Likelihood	Impact	Mitigating actions
Problems with existing IDOX data including address data resulting in delay in re-engineering IDOX system	2	2	Early engagement with IDOX/ICT may need some temporary administration resources.

- 1 = Little or no risk or impact
- 2 = Some risk or impact – action may be necessary.
- 3 = Significant risk or impact – action required
- 4 = Near certainty of risk occurring, catastrophic effect or failure of project.