

Section 106 agreements

City of York Council

Internal Audit Report 2017/18

Business Unit: Economy and Place Directorate
 Responsible Officer: Assistant Director – Planning and Public Protection
 Service Manager: Head of Development Services
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	P1	P2	P3
Actions	0	3	2
Overall Audit Opinion	Reasonable Assurance		

Summary and Overall Conclusions

Introduction

Planning obligations under Section 106 of the Town and Country Planning Act are a legal mechanism designed to mitigate the impact of a development proposal in order to make it acceptable in planning terms. Obligations are often referred to as 'developer contributions' and are either non-financial ('in-kind') or financial in nature. Non-financial obligations include on-site provision of, for example, affordable housing, open space and highway infrastructure while financial contributions are sought in lieu of on-site provision.

The terms of the agreement will typically include trigger points requiring either payment or another action by the developer (in the case of in-kind contributions). Planning Enforcement monitors the implementation of planning permissions to check that, where trigger points are reached, payments are being made. Upon receipt of a financial contribution from the landowner, the responsible department is notified of the income and is obligated to spend this as detailed within the agreement. As at the end of January 2018 the council had received a total of £4.05m in developer contributions during 2017/18.

Objectives and Scope of the Audit

The purpose of this audit was to provide assurance to management that procedures and controls within the system ensure that:

- Planning obligations are effectively monitored and subject to enforcement action where required
- Developer contributions are only used for the purpose(s) outlined in the agreement
- Accounting records are maintained to evidence all expenditure

The audit did not include a review of the accounting for, and use of, education commuted sums. These will be subject to a separate review to be carried out in 2018/19.

Key Findings

Review of the current enforcement caseload and supporting evidence on the development management system (Uniform) revealed that monitoring and enforcement of Section 106 agreements is not being undertaken effectively. During the period of the audit the Planning Enforcement Team were undertaking a period of work on Section 106 agreements following the appointment of the new Principal Planning Officer (Enforcement) which has brought the monitoring and enforcement of the agreements up to date. The outcome of that work is detailed within agreed action 1.1 of this report.

At the time of audit testing, a significant proportion of the council's open enforcement cases were more than 10 years old and many had been held at the same initial site visit pending status for several years. Enforcement cases were consistently only being raised on Uniform after the agreement has been in place for several years, obligation tables documenting the fulfilment of developer obligations were not being regularly maintained and some evidence of enforcement action taken was not available on Uniform.

All capital expenditure reviewed from 2016/17 and 2017/18 was found to have met the covenants placed on the council through the related Section 106 agreement. Based on the evidence available via the ledger and from supporting documentation it was possible to determine for almost all revenue expenditure reviewed that it had been spent in accordance with the deed but insufficient information was available for two transactions from which to confirm the appropriateness of the expenditure.

Adequate accounting records are being maintained for contribution expenditure. For capital expenditure the amounts are transferred from the holding account to capital financing codes at year end rather than being posted to specific schemes. However, supporting working papers detailing the nature and location of the spend are available to support the transactions recorded on the ledger and it is possible to reconcile the amounts recorded on the working papers to the amounts drawn down from each Section 106 agreement on the holding cost centre. Furthermore, transaction narrative on the ledger invariably includes reference to the agreement by quoting the Finance reference number or development name which enables identification of the amounts being transferred. Revenue expenditure is posted directly from the commuted sums holding account to the relevant cost centre but these cost centres are city-wide in scope and a lack of supporting information (or incompleteness of information) means that it is not always possible to determine with absolute certainty that the monies were used in accordance with the deed.

Overall Conclusions

The arrangements for managing risk were satisfactory with a number of weaknesses identified. An acceptable control environment is in operation but there are a number of improvements that could be made. Our overall opinion of the controls within the system at the time of the audit was that they provided Reasonable Assurance.

1 Monitoring and enforcement

Issue/Control Weakness

A significant proportion of the council's open Section 106 enforcement cases were a decade old or older and their monitoring status had not been changed for several years.

Risk

Developers fail to comply with the obligation and sufficient mitigation for the development is not achieved.

Findings

At the time of audit testing (March 2018) the council had 185 open planning enforcement cases relating to the Section 106 agreements it has entered into. Of these 185 cases, 34 (or 18%) were more than 10 years old, with several being as many as 15 years old.

It is recognised that planning permissions are usually valid for up to three years and that, in the case of large-scale schemes, a longer period can be agreed of up to five years. Clearly development does not always commence immediately upon the granting of planning permission and this can mean that cases can be open for three years or occasionally longer before the development even commences. The majority of Section 106 agreements do not require any contribution or action by the developer until commencement. Depending again on the scale and complexity of the development, the agreement will contain various trigger points requiring contribution or actions over its lifespan. Therefore, it is not unreasonable that enforcement cases remain open for several years before all of the obligations have been discharged. Whilst it is unlikely that every development for which the Council had an open monitoring case had been delayed such that it was necessary for the case to have remained open for an extended time, since the audit was completed the situation has been rectified with cases brought up to date.

This point can be illustrated when the status of the caseload is considered. A total of 75 (or 41%) of open enforcement cases have been given a 'site visit pending' status as per the case notes available on Uniform. This is the status initially assigned to a case when it is set up, before any monitoring or enforcement action is taken. The average age of cases set to site visit pending status is five years. Even if the generous assumption is made that all of the cases at site visit pending status relate to planning permissions that have not expired (i.e. up to a maximum of five years) and development has yet to commence, 24 (or 32%) of cases are six years or older and thus the permissions will have either expired or the developments will have commenced or been completed. Again, a significant amount of work has been done to bring all cases (including those historical cases at site visit pending status) up to date.

Overall, there was not a clear strategy by which to monitor active Section 106 agreements. To a certain extent, a risk-based approach was being taken in that Planning Enforcement resource has been deployed on the monitoring of the city's highest profile developments from which the largest receipts are expected but, beyond this, workflow and caseload management arrangements are not clear. This was not helped by the fact that, historically, resource dedicated to Section 106 monitoring and enforcement has been just 0.2FTE.

The service has provided a response to the findings above and this has been incorporated into the agreed action below which documents the work carried out to address these issues.

Agreed Action 1.1

Since the audit was carried out, all open enforcement cases have been reviewed and those left open have been classified as needing to remain open. No cases remain with a site visit pending status. The more recent open cases especially involve developments in varying stages of completion, some of which have triggers that are yet to be hit and which may be a number of years away. Some of the long running outstanding cases involve very large developments at sites including Germany Beck and Hungate. In such cases development could run on for a considerable number of years with obligations being fulfilled over numerous phases. The service feels that it would not be unreasonable that a case remains open during the period of construction running into decades and not just several years.

Since the audit was commenced, an additional resource was put into Section 106 monitoring. Enforcement cases are now being processed by a 1 FTE Planning Enforcement Officer, as required, in addition to the existing officer working 0.2 FTE. The service feels this has resulted in bringing older cases up to speed and securing outstanding funds. Some historical cases had already secured funds and were awaiting closing or development had simply not commenced. These cases have been reviewed and closed.

Monitoring is felt to be appropriately resourced and work is being undertaken on all active Section 106 monitoring cases and not just those involving high profile developments, although these will remain the greatest priority to the service for enforcement as they typically yield the greatest returns.

Priority

2

Responsible Officer

Head of Development Services

Timescale

Implemented

2 Raising of enforcement cases

Issue/Control Weakness

There is significant delay in Section 106 enforcement cases being raised following the execution of the deed.

Risk

Developers fail to comply with the obligation and sufficient mitigation for the development is not achieved.

Findings

Of the 10 most recently signed Section 106 agreements (as per the Finance monitoring database), only two enforcement cases had been raised on Uniform at the time of audit testing in April 2018. These two cases had been raised on the system between six and seven months after the deed had been signed. While this is not necessarily an issue as it can take some time for development to commence and thus for contributions to be required, it still does present a small risk that enforcement action is not timely. Furthermore, the process dictates that a case should be raised once Support Services has been notified that an agreement has been entered into and this is not happening.

Of greater concern is that eight of the sampled agreements had no associated enforcement case. Three of these agreements had been signed over a year ago and up to as long as 18 months ago. With no enforcement case having been raised on the system, no assurances can be given that these agreements are being actively monitored to ensure that developer obligations are fulfilled. The failure to raise an enforcement case on a timely basis prompted a review of the most recently raised enforcement cases to establish to which agreements the cases relate. It was found that, on average, the cases relate to agreements signed two and a half years ago and up to as long as five years ago.

Discussion held with Planning Enforcement revealed that it is likely that several of these cases will have been raised either due to a developer paying a contribution following the meeting of a trigger point or a compliance request being received from a solicitor. Other cases for which there has been a delay in being raised is likely due to the backlog of cases to be raised by Support Services. The delay in the raising of an enforcement case effectively means that the council is reliant on the developer honouring the terms of the agreement.

Agreed Action 2.1

The backlog of cases waiting to be logged has now been brought up to date. Going forward, Planning management will liaise with Support Services management to discuss resource issues.

Priority

2

Responsible Officer

Head of Development Services

Timescale

Implemented

3 Obligation tables and evidencing enforcement action

Issue/Control Weakness

Obligation tables have not been fully completed or updated and enforcement action recorded on Uniform has not been indexed to the case.

Risk

The council is unable to demonstrate the enforcement action it has taken on a case and the extent to which the case has been monitored.

Findings

In March 2016, Planning Enforcement introduced an obligations table which has been designed to record all of the developer obligations arising from each deed and consolidate evidence of their fulfilment. Only one of the 10 most recently raised enforcement cases was found to have an up-to-date obligation table held on Uniform. The results of this review were complicated by the fact that, while the most recent enforcement cases were reviewed (i.e. as per the date on which they were raised), the cases themselves generally related to historic Section 106 agreements entered into prior to 2016/17 where there was not a requirement for fulfilment of developer obligations to be recorded on the obligation table. There were, however, two cases relating to deeds entered into in 2016/17 and neither had an obligation table on Uniform. Obligation tables were available for both cases on the shared V drive but one had not been completed so as to record the developer contributions arising from the deed. Obligation tables were, in fact, found to be available on the V drive for all 10 of the most recently raised enforcement cases but these had either not been fully completed or had not been updated to reflect the fulfilment of developer contributions.

More generally, it was observed that not all evidence of enforcement action that is referred to in the case notes had been indexed to the case. In the absence of an obligation table for these agreements, it is difficult to understand the overall situation with regards the developer's fulfilment of their obligations under the deed and thus what information should be available on Uniform to evidence fulfilment or to demonstrate that appropriate and timely enforcement action has been taken on the meeting of trigger points.

Agreed Action 3.1

Officers will investigate the possibility of the use of dedicated software to collate the enforcement of agreements and subsequent spending of monies by the council's services and its partners.

Priority

2

Responsible Officer

Head of Development Services

Timescale

March 2019

4 System for recording compliance with agreements

Issue/Control Weakness

Council obligations are not routinely monitored meaning that the extent to which the obligations of any one deed have been fulfilled is difficult to ascertain.

Risk

Assurances that all obligations in a deed have been fulfilled may not be available.

Findings

The way in which the current monitoring system operates means that it is difficult to establish the exact status of any one agreement in terms of the extent to which both developer and council obligations have been fulfilled. While obligation tables should be being produced, at the time of the audit these documents only recorded fulfilment of developer contributions and, as discussed in finding 3, have not always been completed. Evidence of the council's fulfilment of its obligations is able to be determined through review of the ledger and of supporting working papers maintained by the spending directorates but this information is not reported back to one central database.

Agreed Action 4.1

Officers will investigate the possibility of the use of dedicated software to collate the enforcement of agreements and subsequent spending of monies by the council's services and its partners.

Priority

3

Responsible Officer

Head of Development Services

Timescale

March 2019

5 Evidencing expenditure on revenue cost centres

Issue/Control Weakness

Adequate supporting information is not available in support of all contribution expenditure posted to revenue cost centres.

Risk

The council has to repay to the developer the contribution plus any interest applied.

Findings

Accounting records and supporting working papers were available for all capital expenditure sampled across 2016/17 and 2017/18 and no issues were identified with the appropriateness of expenditure. Supporting information as to the nature of expenditure was less readily available for contributions posted to revenue codes on the ledger. No incidences of inappropriate expenditure were found. However, for a very small minority of expenditure sampled it was not possible to confirm the exact nature or location of the works performed in order to conclude that the stipulations of the covenant had been satisfied.

To an extent, the tracing of these amounts is made simpler as they are posted from the commuted sums holding account directly to the cost centre whereas, for capital expenditure, the contributions are posted from the holding account to directorate and, ultimately, corporate capital financing codes at the end of the financial year. However, the revenue cost centres refer to operations with a scope covering the entire city and Section 106 agreements can specify an exact location for use of the contribution or require use within the vicinity of the development (which is subject to its own specific definition). In the absence of supporting working papers detailing the exact nature and location of the expenditure, confirmation as to its compliance with the deed is not always straightforward to obtain.

Agreed Action 5.1

Officers will investigate the possibility of the use of dedicated software to collate the enforcement of agreements and subsequent spending of monies by the council's services and its partners.

Priority

3

Responsible Officer

Head of Development Services

Timescale

March 2019

Audit Opinions and Priorities for Actions

Audit Opinions

Audit work is based on sampling transactions to test the operation of systems. It cannot guarantee the elimination of fraud or error. Our opinion is based on the risks we identify at the time of the audit.

Our overall audit opinion is based on 5 grades of opinion, as set out below.

Opinion	Assessment of internal control
High Assurance	Overall, very good management of risk. An effective control environment appears to be in operation.
Substantial Assurance	Overall, good management of risk with few weaknesses identified. An effective control environment is in operation but there is scope for further improvement in the areas identified.
Reasonable Assurance	Overall, satisfactory management of risk with a number of weaknesses identified. An acceptable control environment is in operation but there are a number of improvements that could be made.
Limited Assurance	Overall, poor management of risk with significant control weaknesses in key areas and major improvements required before an effective control environment will be in operation.
No Assurance	Overall, there is a fundamental failure in control and risks are not being effectively managed. A number of key areas require substantial improvement to protect the system from error and abuse.

Priorities for Actions

Priority 1	A fundamental system weakness, which presents unacceptable risk to the system objectives and requires urgent attention by management.
Priority 2	A significant system weakness, whose impact or frequency presents risks to the system objectives, which needs to be addressed by management.
Priority 3	The system objectives are not exposed to significant risk, but the issue merits attention by management.

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