

Business Improvement Working Group

Final Report on S 106 review

This review was initiated by the members of the Scrutiny & Overview Committee at the meeting on 14th September 2015 and suggestions received from members of the public with regard to items for the work programme for the year. It was clear from the initial S&O meeting that there was a perceived lack of consistency and transparency over the last few years with regard to the negotiation and agreement of current S106 agreements on major projects.

At the first meeting of the BIWG following the September S&O meeting on 13th October 2015 the process of reaching a final S106 agreement was outlined by the Development Manager. The working Group was then able to agree the Terms of Reference.

Terms of Reference

- Establish and clarify the existing process with a view to producing a briefing suitable for District & Parish Councillors
- Review West of Southwater strategic site as a case study to inform future major applications
- Review monitoring process
- Review financial reporting that is made available to District & parish Councillors
- Establish how Local Members can become involved in the process of S106 negotiation at an appropriate stage
- Be mindful of the impending changes to the process that the introduction of CIL would bring
- It was also agreed that additional meetings would be held on a monthly basis so that this review could be completed by April 2016

At the S&O meeting of 9th November it was agreed that two further items would be added to the Terms of Reference for the review being ;-

- Financial Appraisal of S106 outcomes in relation to affordable homes ratio
- Commission an immediate comparison analysis of S106 agreements supported by contributions from officers and a specialist firm of suitably qualified external legal advisors

In order to carry out this review it was essential that members of the working group had a clear understanding of the process, the timescales and the implications of Government Guidelines (See appendix 1).

The November meeting focused on clarifying the existing process for the members. To this end the Development Manager presented a schedule “The S106 process” to the members of the group outlining the process and timescale from receiving a planning application through to the final engrossment of the finalised S106 Agreement. There are two departments involved in this process and it is critical that there is good communication between departments and that each department is adequately resourced to cope with demand. Any failure in the inter-action between departments results in deadlines being missed which effect the statistics which are returned to Government who monitor the performance of all councils.

Summary of S106 Legal process

- Brief Instructions received from Case Officer
- Further Instructions/clarifications sort
- Undertaking for costs and proof of title requested from owner.
- Agreement drafted
- Draft sent to case officer and/or housing officer and West Sussex County Council for comment/approval
- WSCC will at this stage request its own undertaking for costs and may also insist on checking the title.
- Draft amended
- Draft sent to owner for comment
- Usually a process of negotiation in relation to the terms at this stage
- Final agreement circulated for approval
- Engrossments printed and sent for signature
- Engrossments returned and signed and completed in house
- Notification of completion circulated to case officer, local members etc.

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PLANNING LEGAL INSTRUCTION SCHEDULE S106 – PROCESS

TASK	RESPONSIBILITY	ACTION REQUIRED	TIME LINE
Validation of application	Team Leader/ Principal Officer	Check content of application and validate	Within 2 working days of receipt
Case Review	Team Leader/ Case Officer (TL/CO)	<p>TL/CO To identify likely recommendation and need for s106</p> <p>Instructions to be checked by Team Leader</p> <p>Send instructions to Legal Services via paper and or email including planning application, location plan, committee report (if any) and any other relevant information. Instruction memo to have determination date on it and details of agent and or solicitor.</p>	<p>On Day 21</p> <p>By date 28</p>
Draft s106/ Unilateral	Legal	<p>Instructions given to Principal Planning Solicitor who will assign matter to lawyer or outsource matter and ask Admin to set up new paper file and file on CIVICA (case management and time recording system)</p> <p>Admin to set up new paper file and CIVICA file and send out client care letter to case officer.</p> <p>Lawyer to advise if information is inadequate within two days of receipt of instructions</p> <p>Lawyer will endeavour to carry out the following tasks within three days of receipt of instructions Send out initial letter to applicant or agent or solicitor notifying of instructions to prepare legal agreement and requesting, within 7 days, the following information</p>	

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	Case Officer	<p>Office Copy Entries (to ascertain ownership of the site and any legal interests in it)</p> <p>Undertaking for Costs (the Council's legal, planning and monitoring costs must be paid).</p> <ul style="list-style-type: none"> • Contact by email WSCC legal team manager notifying of new legal agreement and requesting that the matter is allocated to lawyer • Contact by email planning case officer confirming that legal agreement will be drafted and request further information if required. <p>Draft s106 – send to case officer, solicitor, WSCC and any other party.</p> <p>Response/comments required from solicitor and WSCC</p> <p>Draft s106 to be available by Committee date where case is to be considered by committee (if possible). Lawyer to advise case officer when committee target cannot be met and why.</p> <p>to review content of draft s106</p>	<p>Within 7 days of receipt of draft agreement</p> <p>By Committee date or day 40</p> <p>Within 7 days of receipt of draft 106 from Legal</p>
Negotiate s106/UU	Legal	Conduct negotiations and seek agreement of draft, plans and conditions	Before determination date

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Draft Decision Notice	Case Officer	Case officer to check all drawings and prepare draft decision notice	Within no more that 10 days of recommendation/ resolution to grant planning permission
Final S106 Unilateral	Legal	Legal to get s106/Unilateral engrossed and signed by all parties and costs paid within the statutory time period unless otherwise agreed. Seek extension of time if date is due to expire.	Within 8/13/16 weeks (unless timescale extended in writing or subject to PPA)

A very detailed discussion was had by the members regarding the schedule and the timescales contained therein. Members then addressed the issue of member involvement in the negotiation of S106 Agreements. It was made very clear that all members feel very detached from this whole process and given the importance and implications of any S106 agreement to the local parish, and financial implications for the district, this is a situation that should be addressed. Members should be fully aware of current agreements and provisions/community benefits that will result from them. Also there must be an established procedure for members to be able to put forward their views and that of their electorate to the negotiating team so that these views can be incorporated where possible into future agreements.

It was noted and agreed that the actual negotiation of the agreement between the Legal Team and the Developer involved commercially sensitive data being presented and that it would not be appropriate for any member to be present at this stage. However, it was clear that an opportune time for members to discuss the contents of the agreement with case officer needed to be identified and the “schedule of the process” had to be amended to reflect these timescales.

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Members were also reminded that they currently have the right to contact the case officer of an application in their ward during the consultation period. Despite this, it was felt that this point in the process was often too late and that new recommendations should be made to address this. The working group therefore made the following recommendations:-

- 1 When members are notified of a major application (ie ten units or above) in their ward, this advice should also indicate if the application is likely to be subject of an S106 agreement. This would give the members an opportunity to take advice from Parish Councils as to opportunity and requirements and relay this information to the case officer before instructions are issued to the Legal Team to prepare draft agreement.
- 2 Members should be notified of the proposed “Heads of Terms Requirements” of the S106 agreement at the same time as the Legal Department are instructed to draft an agreement.

This would give the members a further opportunity to have discussions with the case officer. The member would also then be aware of the start of the “Consultation Period” and would have the opportunity to keep in touch with any responses to the consultation document.

Members also had grave concerns about the monitoring of the trigger points within the agreement for payment of financial contributions and expressed concerns that these monies due were collected in a timely fashion. Another major concern was expressed with regard to how all the agreements were recorded and data kept in such a way that it could be accessed and data extracted accordingly. The group were advised that a new post of “Planning Obligations Officer” had been created and was expected to be filled imminently and that this post would create a dedicated resource for the monitoring of S106 agreements which had not been available in the past. Also that new software had been recently installed which now provides the capability to store this data correctly whereas in the past this had been done manually.

The January meeting focused on the West of Horsham, Countryside Homes Application as a case study to establish the process and see if it was fit for purpose. It was pointed out to the working group that it was not the remit of the group to question the actual final agreement but to establish if the process/procedure that was current at that time had been followed and if changes/recommendations to the process/procedure would benefit the district.

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The Development Manager confirmed that the outline application had been made in 2009 when the initial agreement was entered into. The number of affordable housing units (20%) had been established at this stage and the developer was not required to confirm the size of the units at this stage as this was established during the reserved matters applications. There was an avid discussion with regard to the term “Units”. The main point of concern being that outline stage agreeing a per-centage of the overall units being built does not give a true monetary value receivable from the development. Given that Government Guidelines do not require the developer to provide a detailed breakdown of the unit types the question was asked and discussed as to if HDC would benefit by agreeing a monetary value of the overall expected GDP as opposed to a percentage of the number of units to be built. By the time the reserved matters application comes before councillors planning approval for the outline application will already have been approved along with the terms of the S106 agreement. Therefore the final mix agreed could have a negative effect on contributions received by HDC, also that the local housing need was not being directly addressed at outline application stage.

The group was advised that this method was in accord with Government Guidelines and not within the remit of HDC to revise policy to accommodate the option of negotiating a monetary value. The group was further advised that in the determination of the type of unit required by the district that the housing need is reviewed in consultation with the housing manager so that HDC get the required type of unit to accommodate those on the housing list and this can be more beneficial than a fixed monetary value. The Council does, as is the case with the West of Horsham agreement, often include a “Clawback” clause to allow further contributions to be claimed in the instances where developers are making profits in excess of original projections. It was noted that in the past these have not been included within all S106 agreements. In order to mitigate this the group agreed the following recommendation;-

- 3 That a “Clawback” clause be included in all future S106 agreements where the proportion of affordable housing does not meet the required level and where a reduced level has been agreed following a review of the viability of the development.

The group was also reminded that whilst HDC is responsible for the final agreement WSCC is also involved in the negotiation in respect of infrastructure. Unfortunately it was not within the remit of this group to comment on the performance of WSCC but to note that many of the delays in finalizing agreements and bringing applications to committee in a timely fashion are due to the poor response times from WSCC and that WSCC is now outsourcing work of this nature.

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The working group questioned the process when an amendment is requested to the original S106 agreement. Members were advised that a viability study would be required if an amendment was requested. The viability study would then be scrutinised very often by external professionals before any recommendation would be brought before planning committee.

To further review the level of affordable housing being achieved from S106 agreements at a comparable time period it was agreed to review the agreement for Highwood, Land West of Horsham and the Crest Development , Kilnwood Vale.

The three S106 agreements were then compared for consistency. The variance between these agreements was noted in particular the Kilnwood Vale agreement. The major difference with this particular agreement was pin pointed to the fact that this agreement was negotiated in conjunction with Crawley and included provision for the requirements of Crawley. Therefore this stand-alone agreement could not be used as a comparison for the other two agreements.

It was also noted that at the time of these agreements the national economy was just starting to come out of recession. Very few people were building or selling houses. Mortgages were not available. HDC was not meeting Government targets set for new house building. HDC had to encourage developers to build in the district and it is without question that target affordable housing levels were negotiated to facilitate this requirement.

The use of templates as a negotiation tool was discussed and the Development Manager confirmed that 2 template formats are in place as a starting point for negotiations. (see appendix 3 & 4) but given the variables between each particular site and location it would not be possible to have any one standard template that fits all. The idea of establishing an S106 review panel to review all S106 agreements and report back to local ward members has been explored. The Director of Planning, Economic Development & property has since advised that such a panel would in effect come under a planning function rather than a Scrutiny function and therefore would not be valid on legal grounds.

The best route forward to ensure transparency and member involvement would be for the recommendations as stated on previous pages to be adopted as procedure along with:

- 4 At briefings on planning applications the officers will present a summary of the heads of terms within current S106 agreements being negotiated
- 5 Heads of Terms within committee reports should explained in more detail than currently is the practice

To accommodate the fact that some developments will cross 2 wards and in the case of large scale developments in the town which could impact on a number of wards a further recommendation was agreed;-

- 6 The Chairman of the relevant planning committees would be sent copies of all the Heads of Terms at the same time that they are sent to Local Members. It would then be at the discretion of the Chairmen whether members from other wards should be sent the information as well.

During the review the group discussed the ongoing negotiations with regard to North Horsham development. Given the size and scale of this development the group were assured that this would be treated as a one off development and that special arrangements would be implemented in respect of seminars and briefings to ensure that all members are advised of progress, have an opportunity to put forward their views and engage in this process. This would be for the benefit of all members not just local ward members affected by the development.

Finally the group discussed the ongoing review in parliament of the Housing Bill and the changes that may be forthcoming on completion of this review. The impending introduction of CIL regulations later this year will have a major impact on the whole S106 process and the new guidelines that will result from this. Given this impending change any major recommendations for a change in process (other than those recommendations on previous pages) that could be made by this group would be ineffective and pointless. The recommendations contained within this report should be brought forward to Scrutiny & Overview and implemented immediately. These will if followed make the transition to CIL regulations a much smoother transition for all members and ensure full member involvement in the process.

Summary

Over the 6 months of this review the working group and the co-opted members have thoroughly gone through and reviewed the process used by HDC in the production of an S106 agreement. Whilst it is generally felt that the process is not perfect, the working group acknowledges the constraints of Government Guidelines which dictate this process.

In reviewing the sample agreements detailed earlier no fault can be found with the implementation of the process at that time. It is acknowledged that the economy at that time had a detrimental impact on the benefits that may have been received by the district in comparison with the current position but given the circumstances of that time the best outcome that could have been achieved, was achieved.

It should be noted in the work programme that this process should be reviewed again in 12 months to monitor how the implementation of CIL regulations have affected this process and to monitor the introduction of the recommendations contained within this report to ensure they have had the desired effect with regard to member consultation and input.

I would like to take this opportunity to thank all the members of the group for their conscientious and hard work and for their commitment shown in carrying out this review, which has been complicated and taxing because of the nature and complexity of S106 Agreements.

Recommendations within the Report:

- 1 When members are notified of a major application (ie ten units or above) in their ward, this advice should also indicate if the application is likely to be subject of an S106 agreement. This would give the members an opportunity to take advice from Parish Councils as to opportunity and requirements and relay this information to the case officer before instructions are issued to the Legal Team to prepare draft agreement.
- 2 Members should be notified of the proposed “Heads of Terms Requirements” of the S106 agreement at the same time as the Legal Department are instructed to draft an agreement.

This would give the members a further opportunity to have discussions with the case officer. The member would also then be aware of the start of the “Consultation Period” and would have the opportunity to keep in touch with any responses to the consultation document.

- 3 That a “Clawback” clause be included in all in future S106 agreements where the proportion of affordable housing does not meet the required level, following negotiation through a viability agreement.
- 4 At briefings on planning applications the officers will present a summary of the Heads of Terms within current S106 agreements being negotiated
- 5 Heads of Terms within committee reports should explained in more detail than currently is the practice
- 6 The Chairman of the relevant planning committees would be sent copies of all the Heads of Terms at the same time that they are sent to Local Members. It would then be at the discretion of the Chairmen whether members from other wards should be sent the information as well.

Brian O’Connell
Chairman of Business Improvement Working Group
April 2016

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