

SUBJECT: CHARGING APPLICANTS FOR THE MONITORING OF SECTION 106 AGREEMENTS

MEETING: INDIVIDUAL CABINET MEMBER DECISION (ENTERPRISE AND LAND USE PLANNING)

DATE: 26 February 2020

1. PURPOSE:

- 1.1 The purpose of this report is to seek the Cabinet Member for Enterprise and Land Use Planning's approval to secure a reasonable and proportionate charging policy for the monitoring of section 106 agreements associated with planning consents. The aim of charging is to ensure that the system of using developer obligations to secure contributions, either in kind or financial, is cost neutral. The proper administration of the monitoring regime is resource intensive and the proposed charging schedule will alleviate demand on resources.

2. RECOMMENDATIONS:

- 2.1 To authorise a charge to cover the average costs of monitoring Section 106 agreement associated with developments. It is recommend that a fee of £200 (plus VAT if applicable) be charged per individual obligation within each S106 agreement. This fee would contribute towards recovering the Council's costs of monitoring the receipt and spend of S106 monies, ensuring essential infrastructure is secured.

3. KEY ISSUES:

Background

- 3.1 Obligations entered into by developers under the provisions of S106 of the Town & Country Planning Act 1990 represent a substantial source of financial contributions and benefits in kind for Monmouthshire County Council to address infrastructure pressures caused by new development. Over the last three years the Council has received an average of £1.8 million per year in contributions, relating to a range of necessary infrastructure including green infrastructure, education, recreation and transport provision. S106 agreements are also used to secure and deliver affordable housing for the County. The level of financial provision is dependent upon the demand the housing development will put on the existing infrastructure and to ensure compliance with the Local Development Plan. The figures vary per development depending on the site and the scale of the development.
- 3.2 It has long been the practice of other local authorities in Wales (and in England) to charge applicants entering into a S106 agreement a fee to cover legal costs. This is currently the case in Monmouthshire. Any legal fees associated with the drafting of Section 106 Agreements remain outside the proposed new Monitoring Charge. The legal department determine the charging schedule for the arrangement of legal agreements. Some Local

Planning Authorities charge a monitoring fee to cover the costs of monitoring the progress of development to see when payments triggers are reached, and to ensure S106 monies are spent in time and in accordance with the legal agreement. It is this latter additional charge that we wish to introduce. It is considered appropriate to recover the cost of monitoring the delivery of obligations.

Legislation and Guidance

- 3.3 Section 106 of the Town and Country Planning Act 1990 (amended by Section 12 of the Planning and Compensation Act 1991) provides the enabling legislation to allow Councils to enter into legal agreements with developers. These agreements contain clauses known as 'planning obligations'. Such obligations may be used to:
- restrict the development or use of land
 - require specific operations to be carried out
 - require land to be used in a specified way
 - require specific sums to be paid to the Council in accordance with a payment schedule.
- 3.4 Planning Obligations are a means by which local authorities may seek contributions from developers to enhance the quality of a development, provide community benefits and infrastructure and mitigate any negative impacts that may arise as a result of the development which might otherwise not occur.
- 3.5 Guidance on the implementation of the Act is provided in Welsh Office Circular 13/97, amended by the Community Infrastructure Levy Regulations 2010 (sections 122-123) and Welsh Government Policy Clarification Letter (CL-02-2010).
- 3.6 The Circular identifies broad principles on the basis that the planning system should operate in the public interest and should aim to foster sustainable development. Negotiations must be seen to be fair, open and reasonable. Obligations cannot be used to offer extra or unnecessary inducements in an attempt to satisfy objectors, influence the planning decision or have wider development implications where there are valid objections to a proposal.
- 3.7 Regulation 122, which details the limitation on the use of planning obligations, applies to all planning applications made to a local planning authority that are determined by the local planning authority, and to appeal and call-in determinations. A planning obligation may only constitute a reason for granting planning permission if it complies with the three tests stated in Regulation 122(2), namely, that it 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.
- A planning obligation which does not meet these three tests would not constitute a reason for granting planning permission.
- 3.8 Regulation 123 details further limitations on the use of planning obligations. In essence, a local planning authority cannot take into account or seek a planning obligation which contributes to or funds any specific infrastructure

project or type of infrastructure, if five planning obligations have already been entered into which contribute to or fund the same project or infrastructure type.

National Policy Context

- 3.10 The Welsh Government supports the principle of planning obligations and their subsequent negotiation and monitoring. Planning Policy Wales (Edition 10) Dec 2018 (PPW) sets out the key requirements of the 1990 Act and the Welsh Office Circular, providing the national context for local plan policies, and contains specific reference to planning obligations.

Local Policy Context

- 3.11 In February 2014 Monmouthshire adopted its Local Development Plan (LDP). The LDP proposes 4,500 new dwellings over the Plan period 2011-2021 with a broad dispersal of new development amongst the main settlements. A number of strategic housing sites are identified in the main towns ranging from 200 to 370 dwellings. The LDP recognises the importance of appropriate infrastructure to support new development. Indeed, the provision of key infrastructure to support the development of strategic sites is integral to the implementation of the LDP strategy. Policy S7 of the LDP sets out the requirement for new development to be accompanied by an appropriate level of infrastructure to accommodate this growth.

Research

- 3.12 Local Planning Authorities were contacted, both in England and Wales to gather enough data to enable the S106 Working Group to look at the different options when considering whether to introduce a charge for the monitoring of S106 agreements. The broad findings of this research were:
- Twelve local planning authorities (LPAs) were reviewed (11 Welsh including one National Park – BBNPA, and one English - North Devon);
 - Eight of the twelve LPAs charge an administration and monitoring fee.
 - There are four different ways for charging, these being: a percentage of the financial contributions being raised by the obligation, a percentage of the planning application fee, a fixed rate and a 'flexible' rate based on an Officer hourly rate that is calculated against the complexity and number of obligations required.
 - The percentage rates vary between 2 - 5% against the financial contribution within each obligation and 5 - 20% against the application fee. The most common seems to be 2% on contributions, and an average of 15% on the application fee with 10% & 20% being the most common.
 - Some Authorities apply a minimum fee, presumably when contributions are small to ensure costs are recovered – e.g. the Vale of Glamorgan minimum charge is £150.
 - Some Authorities apply a maximum fee – e.g. Rhondda Cynon Taff charge a maximum of £5,000.
 - Four of the twelve LPAs offer either/or charges (% of contributions or % of application fee) depending on which is the greater.
 - Some fees have been calculated on a service cost recovery basis to include officer time spent in the negotiation, administration and monitoring of the agreements.
 - 100% of LPAs add a separate charge for legal services (in addition to administrative/ monitoring costs).

Local Planning Authority Feedback

- 3.13 Nine Welsh Authorities were approached for feedback on the charging of planning obligations with three LPAs responding (Cardiff, Newport & Bridgend). Questions queried whether the service has been successful, what are the issues experienced with service delivery in terms of meeting their service standards, whether the service is valued by customers, recommendations to improve the service and how the fees were calculated. Responses are outlined below:

Resources

- The charges raised are intended to cover the cost of providing a monitoring service relating to the preparation of policy to support the infrastructure requirements contained in s106, pre-application negotiation of terms, the monitoring and enforcement of obligations over the life of the project and any reporting requirements to committee and the public.
- Success of the monitoring process can be limited primarily due to resources.
- A dedicated S106 Officer makes service delivery more achievable but with limited funds S106 agreements are delivered by officers as a 'bolt on'.
- The funds generated from the charges will normally contribute towards the employment of a dedicated officer to meet customer expectation and service standards.

Customer Service

- Without a dedicated officer, the service is generally reactive rather than pro-active.
- Positive feedback has been provided for having a single point of contact and a dedicated monitoring service, which provides improved knowledge of agreements and the processes involved, together with consistency and continuity.
- The Pre-application advice service of each LPA plays a key role in meeting service standards, as does the availability of supplementary planning guidance (SPG).

Cost

- The fees are accepted by developers in the large majority of cases as it is only a small proportion of the overall payment and is considered to be additional work that the planning application fee does not cover.
- Charges do not apply to contributions (such as on-site affordable housing) simply because of the difficulty in calculating the value of such contributions and the work involved in monitoring them is fairly minimal compared to monitoring and spending financial receipts.
- The fees are accepted by developers in the large majority of cases as it is only a small proportion of the overall payment and is considered to be additional work that the planning application fee does not cover.

Other Councils

- Other Councils have adopted a designated main point of contact (often a Principal Planner) or Technical Planning Administrator. Only one Authority has provided a target timescale for Service Standards (Blaenau Gwent). They aim to provide a first draft legal agreement within 3 weeks of approval at planning committee. All other Authorities aim to deal with agreements 'as quickly as possible'.
- Only two of the ten Welsh Authorities have a designated S106 Officer primarily due to resource/financial constraints. Feedback from some

Council's (e.g. Cardiff CC) and some customers have highlighted the benefits of having a designated Officer primarily due to consistency, continuity and subject knowledge.

- All Welsh Authorities apply the administrative charge at the time of completion of the obligation

Recommended Approach

- 3.15 It is evident from feedback from developers and other authorities that monitoring fees need to be proportionate to the scale and complexity of the planning agreement being monitored. If fees are disproportionate they will not be accepted by developers and can even be challenged legally as was the case at Oxfordshire County Council v Secretary of State for Communities and Local Government and others [2015] EWHC 186 (Admin) where a Planning Inspector found that charges proposed by the county and district councils were unnecessary. The Courts supported that view in that instance but did not make a general ruling on the validity of such charges.
- 3.16 **In the light of this, it is recommended that the fee to be charged should be £200 (plus VAT if applicable) per individual obligation within each S106 agreement.** This would then be proportionate to the scale of the agreement and would be a reasonable charge in that it would cover the average costs of monitoring developments by the Council's Planning Enforcement Monitoring Officer, but no more than that, thus being less open to legal challenge. In this regard, the charge considered to meet the three tests set out in par. 3.7 above.

4. EQUALITY AND FUTURE GENERATIONS EVALUATION (INCLUDES SOCIAL JUSTICE, SAFEGUARDING AND CORPORATE PARENTING):

To Summarise:

Positive: This proposal will contribute towards recovery of the Council's costs of monitoring and improve the quality of developments. It will enable the Council to effectively monitor developments.

Future: Ensures that the Council continues to ensure that developments are delivering what is agreed within the application process and those obligations that benefits local communities are delivered in a timely manner.

Negative: Potential costs associated with this monitoring charge to customers.

Future: Continue to positively engage with customers and provide a service that is of a high standard, with an effective monitoring service.

- 4.1 In addition, an Equality & Future Generations Evaluation is attached as **Appendix 2.**

5 OPTIONS APPRAISAL

- 5.1 The options in relation to the proposed monitoring charge are to:

Authorise the application of the proposed monitoring charge.

Authorise the application of the proposed monitoring charge with amendments.

Do nothing in relation to the proposed monitoring charge.

Option	Benefits	Risks	Comments
1) Authorise the application of the proposed monitoring charge	The proposal would contribute towards recovery of the Council's costs of monitoring and improve the quality of developments	The option would have cost implications for developers although given the proposed scale of charging, these would be very minor compared to the overall project costs and would be most unlikely to affect viability of the development	This is the preferred option
2) Authorise the application of the proposed monitoring charge with amendments	This depends on the amendment; option 1 has been carefully evaluated and is considered to be fair and proportionate. It would meet the legislative tests while any amended scheme would also have to be appropriate in this context	Any amended scheme may not meet the legislative tests and could be at risk of legal challenge.	
3) Do nothing in relation to the proposed monitoring charge	Developers would benefit from a free service.	The opportunity to generate income to support this element of the Planning Service would be lost. There would be inconsistency among local authorities in SE Wales as the vast majority charge for this service. The ability to properly fund the planning enforcement monitoring post may be at risk and the quality of development would decline as a result	

6 **Recommendation:**

- 6.1 Based on the reasons above, Option 1 (to authorise the application of the charge) is the preferred option. To authorise a charge to cover the average

costs of monitoring Section 106 agreement associated with developments. It is recommend that a fee of £200 (plus VAT if applicable) be charged per individual obligation within each S106 agreement. This fee would contribute towards recovering the Council's costs of monitoring the receipt and spend of S106 monies, ensuring essential infrastructure is secured.

7 REASONS

7.1 Under the Planning Act (2004) and associated Regulations, all local planning authorities are required to produce a LDP. The Monmouthshire LDP was adopted on 27 February 2014 and decisions on planning applications are being taken in accordance with policies and proposals in the LDP. This monitoring charge proposal provides a way of ensuring that community infrastructure that is necessary to enable developments to be approved are properly secured in accordance with Policy S7 of the LDP.

8 RESOURCE IMPLICATIONS

8.1 There will be no negative resource implications, in fact as we are carrying out this duty with existing staff it will provide an income stream to the authority of circa £20,000, this has already been recognised as a saving in the 20-21 MTFP.

9 WELLBEING OF FUTURE GENERATIONS IMPLICATIONS (INCORPORATING EQUALITIES, SUSTAINABILITY, SAFEGUARDING AND CORPORATE PARENTING):

There are no significant equality impacts identified in the Assessment (Appendix 2).

There are likely to be beneficial impacts to the local community either economically or in qualitative terms e.g. ensuring green infrastructure is secured, as a result of the effective monitoring of planning obligations.

The actual impacts from this report's recommendations will be reviewed regularly with programmed periodic evaluations. The criteria for monitoring and review will include: collating data on numbers and types of obligations and the time taken to monitor these.

10 CONSULTEES

- S106 Working Group
- Legal Services
- Planning Department
- Enterprise DMT

11 BACKGROUND PAPERS

- Monmouthshire Adopted LDP (February 2014)

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