

**UPDATE ON RECENT SECTION 106 RESTRICTIONS AND RULING AND
PROPOSED APPROACH FOR POOLING CONTRIBUTIONS TOWARDS
PROJECTS FROM 6TH APRIL**

To: **Economy and Environment Committee**

Meeting Date: **21 April 2015**

From: **Executive Director, Economy Transport & Environment**

Electoral division(s): **All**

Forward Plan ref: **2015/045** *Key decision:* **Yes**

Purpose: **To inform Members of:**

- **the restrictions for pooling S106 contributions towards infrastructure projects which came into effect from 6th April;**
- **related Government guidance which sets a minimal threshold (10 houses) below which planning contributions should not be sought; and**
- **a recent High Court decision relating to monitoring fees for S106 obligations and the likely impacts of this for the County Council.**

Recommendation: **Committee is asked to:**

- a) **approve the proposed approach to pooling up to 5 planning obligations towards projects.**
- b) **Note the Government guidance on restrictions and the recent High Court ruling and likely resource implications of this for the County Council.**

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1. BACKGROUND

Pooling S106 contributions

- 1.1 The County Council has a successful track record of working with partners to negotiate and secure planning obligations via S106 agreements. Many of these have been pooled towards proposed improvements identified in the Area Corridor Transport Plans and Market Town Transport Strategies to support growth and help mitigate its impacts. This tariff style approach has served the county well for both transport and education in particular, where a charge is levied based on trips or pupils generated by a development.
- 1.2 However, the potential to pool contributions will be restricted from 6 April or before this in areas where an adopted Community Infrastructure Levy (CIL) is already in place, as CIL becomes the principal method for securing funding towards infrastructure needed for growth.
- 1.3 CIL enables a charge to be levied on most forms of development which is then pooled towards funding priority projects which have been identified on the Local Planning Authority's Regulation 123 list (the list). Inclusion of a project on the list does not commit the charging to spend funds on the project – it simply indicates that this is a potential scheme that could benefit from CIL funding. Therefore CIL should not be seen as a replacement to S106 or any other funding sources as it is certain that it will not generate enough money to fund the infrastructure required to support growth.
- 1.4 When CIL regulations first came into force in 2010, Government anticipated that CIL would be in place across most authorities by 2014 when the regulations were due to come into force. The Government then extended the CIL implementation deadline to 6th April 2015 to enable authorities to adopt CIL if they so wished to help secure funding towards wider infrastructure needs. Therefore CIL regulations on restricting S106 pooling are now in full force. All planning obligations must continue to meet the three statutory tests which have been in force since April 2010, where they must be:
 - 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.
- 1.5 The regulations also make clear that upon the adoption of a CIL, or by 6 April 2015 (whichever is the sooner), the use of planning obligations will be further restricted. No additional planning obligations can be used to fund an “*infrastructure project or type of infrastructure*” if 5 separate planning obligations have already been used to fund that project or type of infrastructure since 6 April 2010.
- 1.6 This means that S106 agreements are now restricted to providing for site specific infrastructure requirements or mitigating the impacts of the development. This is impacting on S106 agreements in Cambridge City and South Cambridgeshire where CIL is not yet in place and Fenland where CIL is not currently being proposed to be implemented. Therefore, planning obligations via S106 agreements will be the primary means of securing contributions in Cambridge and South Cambridgeshire over the next year or so until CIL is in place by circa spring 2016, and for Fenland this approach will need to continue for the foreseeable future.

Threshold for seeking contributions

- 1.7 In addition to the restrictions now in force, at the end of 2014, the Minister of State for Communities and Local Government announced that S106 contributions should not be sought for sites of 10 homes or less (which have a maximum combined floor space of 1,000sqm) and all residential annexes and extensions. Cambridge City has confirmed that they will not be seeking S106 contributions for small scale developments, although officers understand that South Cambridgeshire and Fenland are still seeking contributions where these are justified and fit with CIL regulations. This is an area which will need to be kept under review, as the Government position is that this Ministerial Statement now forms part of national policy. However, some authorities are challenging this.

Monitoring Charges

- 1.8 There has also been a recent High Court ruling which is impacting on local authorities' ability to seek and secure new contributions towards the monitoring of planning obligations. In *Oxfordshire County Council v Secretary of State for Communities & Local Government and others* {2015} EWHC 186 (Admin), it was held that administrative and monitoring costs incurred by a local planning authority in ensuring that planning obligations were observed were not an obligation in their own right (but an everyday function) and not necessary to make the development acceptable in planning terms. The decision does leave scope for charging monitoring fees, but makes clear that standardised fees should be avoided and rather fees should be justified with reference to the complexity of the development, multiple triggers for payment to monitor, etc.
- 1.9 Having discussed the issue with Cambridge City, they are to continue to seek monitoring fees having regard to the *Oxfordshire* decision. This means that the County Council is expecting to be able to continue to seek charges for monitoring fees in line with this view for the City.
- 1.10 In South Cambridgeshire, there has been significant challenge to the County Council seeking monitoring fees. As such, the monitoring requirements for each application are being assessed on a case by case basis, to demonstrate that a blanket approach is not being taken to ensure compliance with the ruling. However, this means that where there are no triggers, or there is limited requirement for monitoring, charges cannot be levied. A separate paper is expected to be brought back to Members in due course regarding the likely impacts and proposed approach on monitoring charges, as the current restrictions means that the costs of the monitoring service may not be covered.
- 1.11 Such significant changes are expected to impact on the County Council's ability to secure contributions and as such deliver the infrastructure needed to support growth into the future.

2 KEY ISSUES

- 2.1 All the of outlined restrictions mean that there is a significant risk that less funding will be secured to support infrastructure delivery, particularly for those authorities without CIL. To this end, the County Council is working with partners to agree an approach to continue to secure contributions to projects that support growth, where this is possible,

and fits with the regulations ahead of CIL being adopted in most authorities. The S106 pooling restrictions will remain in force permanently, therefore it must be recognised that as CIL becomes the principal method for securing funding towards infrastructure needed for growth across the County; infrastructure projects appearing on the various Regulation 123 lists will need to be prioritised as they will not all secure CIL funding.

- 2.2 The County Council is working with Cambridge City and South Cambridgeshire to identify where, and what, development is expected to come forward during 2015 and then review current adopted strategies, plans and programmes to identify those projects needed to support growth and mitigate its impacts. The intention is to develop a list of projects (project list) for Cambridge City, South Cambridgeshire and Fenland district Councils for which up to 5 obligations can be pooled. Planning obligations sought to fund these projects must satisfy the 3 tests in paragraph 1.4.
- 2.3 As the pooling restrictions are now in force, it is critical that this approach is considered and agreed by Members. The intention is to update the project lists regularly to ensure that projects that may be required to support and mitigate the impacts of growth are identified. It is expected that officers will need to review these regularly with partners on the basis of the approach Members agree. This will ensure up-to-date lists which enable funding to be secured from developments as they come forward.
- 2.4 However, once 5 obligations have been sought for a specific project or type of infrastructure, no additional obligations can be sought towards this, and there are risks that sufficient funding will not be secured towards specific projects or infrastructure types given the uncertainties involved. This is especially true if the infrastructure requirement is significant in comparison to the scale of developments coming forward (for example 5 small developments in a village needing a new school).
- 2.5 Legal advice is currently being sought on what constitutes “infrastructure project” and “types of infrastructure” as it will no longer be possible to seek contributions towards generic types of infrastructure, as most of these have already been used more than 5 times to secure contributions since 2010. Legal advice is also being sought as to whether the approach we are proposing for transport projects is sound. We are proposing a methodology similar to that used in Area Transport Corridor Plans where development is assessed to determine trips and demand on the network. A per dwelling rate specific to these developments is then calculated towards infrastructure needed to mitigate the impacts of that growth on the network.
- 2.6 Members are asked to support the proposed approach of working with partners to identify projects for pooling up to 5 planning obligations and for officers to be able to update the list, as required as and when developments come forward.

3. ALIGNMENT WITH CORPORATE PRIORITIES

3.1 Developing the local economy for the benefit of all

Planning obligations help to develop the local economy for the benefit of all by funding infrastructure, and ensuring that the impacts of growth can be mitigated by investing such contributions in improvements or towards new infrastructure.

3.2 Helping people live healthy and independent lives

Planning obligations help fund infrastructure. Much of this infrastructure will help people live healthy and independent lives, e.g. by improving cycling and pedestrian facilities and improving access by healthy active means of travel.

3.3 Supporting and protecting vulnerable people

Planning obligations help fund infrastructure. Investment in infrastructure helps improve access for all.

4. SIGNIFICANT IMPLICATIONS

4.1 Resource Implications

Significant officer resource is required to collate and produce the projects lists and to monitor and track what obligations have been pooled against what projects.

4.2 Statutory, Risk and Legal Implications

It is essential that the County Council continues to secure the maximum amount of planning obligations via S106 agreements as possible, particularly until CIL is implemented in Cambridge City and South Cambridgeshire. Without securing the maximum amount of planning obligations via S106 agreements as possible, delivery of County Council infrastructure will be at risk.

4.3 Equality and Diversity Implications

No significant implications.

4.4 Engagement and Consultation Implications

Members have been regularly briefed on S106 and CIL developments.

4.5 Localism and Local Member Involvement

Members have been regularly briefed on S106 and CIL developments.

4.6 Public Health Implications

No significant implications.

Source Documents	Location
Area Corridor Transport Plans Transport Strategies for Cambridgeshire Business Plan/ Capital Programme	http://www.cambridgeshire.gov.uk/info/20006/travel_roads_and_parking/66/transport_plans_and_policies http://www.cambridgeshire.gov.uk/info/20043/finance_and_budget/90/business_plan_2013_to_2014