

**REVIEW OF PROCESS FOR CONSIDERING REQUESTS TO DEFER SECTION 106 PAYMENTS**

*To:* **Cabinet**

*Date:* **27<sup>th</sup> April 2010**

*From:* **Acting Executive Director: Environment Services**

*Electoral division(s):* **All**

*Forward Plan ref:* **2010 / 025** *Key Decision:* **Yes**

*Purpose:* **To report on a review of the operation of the first six months of the process for dealing with developer Section (S) 106 deferral requests and seek a view from Cabinet on proposed amendments.**

*Recommendation:* **Cabinet is invited to:**

**Consider and comment on this paper and:**

- i). **Agree that financial viability evidence should be sought from the developer and will be an additional factor that will be considered when making a decision on the deferral requests (see paragraph 2.4).**
- ii). **Endorse the amendments to the authorisation limitations (see paragraph 2.7 and Table 1 paragraph 2.10)**

<b><i>Officer Contact:</i></b>		<b><i>Member contact</i></b>	
Name:	Joseph Whelan	Name:	Cllr Roy Pegram
Post:	Castle Court, CC1212	Portfolio:	Growth, Infrastructure and Strategic Planning
Email:	<a href="mailto:Joseph.Whelelan@cambridgeshire.gov.uk">Joseph.Whelelan@cambridgeshire.gov.uk</a>	Email:	<a href="mailto:Roy.Pegram@cambridgeshire.gov.uk">Roy.Pegram@cambridgeshire.gov.uk</a>
Tel:	(01223) 699867	Tel:	(01223) 699173

## **1. BACKGROUND**

- 1.1 As a result of the economic slowdown, the County Council has been receiving a number of requests from developers seeking to defer Section 106 (S106) contributions. This triggered the need for a process to deal with such requests. This process was approved by Cabinet on 7<sup>th</sup> July 2009.
- 1.2 Since July 2009, 36 individual requests have been received on 18 different developments across the County. In total, approximately just over a third of requests have been accepted, a third of requests have been rejected, while the remaining third have been accepted with some form of compromise with the developer. In general, the process has been working well, however, it is also considered that this is an appropriate time to review the current process and recommend areas where efficiencies and improvements could be made.

## **2. MAIN ISSUES**

### **Current Process**

- 2.1 The process that Cabinet endorsed is contained within Appendix 1 of this report. The 3-stage process comprises of the following:

- Stage 1 - Developer requests received by the County Council

Officers within the New Communities Service monitor and enforce all County S106 agreements. When a contribution is due, Officers will inform the developer that an invoice is about to be raised. This may then lead to the developer seeking a deferral. Alternatively, the developer may approach the County Council independently to seek a deferral for contributions which are due to be paid in the near future.

The Local County Member, District Member(s) and relevant Parish Clerk are informed of the request.

- Stage 2 – Assessment of Requests

The deferral request is circulated to Officers in the relevant spending services. Officers consider a set of criteria (Appendix 1) and make an assessment as to whether the request can be accepted or not.

- Stage 3 – Decision

The Officer assessment is put into a table along with the background justification. For deferral requests below £250,000, the assessment is considered by the Corporate Director: Finance, Property and Performance and a recommendation is taken to Cabinet as part of the Integrated Finance and Performance Report. For deferral requests which are greater than £250,000, the initial assessment is considered by both the Corporate Director for Finance, Property and Performance, and the Executive Director for Environment Services (See Appendix 1 for Current Authorisation Limits for Variations to S106 Agreements) and a recommendation is made to Cabinet. Deferral requests above £250,000

are presented to Cabinet as a separate report.  
At present, Cabinet make the decision on all S106 deferral requests.

The developer is informed of the decision and the New Communities Service ensures that the necessary actions are taken e.g. raising an invoice if the deferral request has been rejected.

The Local County Member, District Member(s) and relevant Parish Clerk are all informed of the decision.

## **Review of Current Process and Suggested Changes**

- 2.2 Whilst the current process is working well and has brought clarity to the process of deferrals, a review of this has given rise to a number of recommendations for improvements.

### Administrative Changes

- 2.3 Information is currently presented to Cabinet by way of a template containing information on the request for a deferral and the Officer assessment.
- 2.4 **SUGGESTED CHANGE:** It is proposed that when developers make initial contact regarding a deferral request, they should be instructed to complete a form that will ask specific questions about their deferral request(s). They will also be asked to provide any specific financial information that they wish to be considered. Financial viability evidence will therefore be an additional factor that will be considered when making a decision on the deferral request. This process will ensure that the approach to collection of information from developers is consistent and clear.
- 2.5 The template that is normally presented to Cabinet will therefore largely remain the same, apart from a minor amendment which will alert Members to any financial viability evidence that has been submitted.

### Authorisation Limits

- 2.6 As outlined above, all decisions on S106 deferrals are currently made by Cabinet.
- 2.7 **SUGGESTED CHANGE:** It is proposed that the authorisation limits be varied to give delegated powers to the Corporate Director: Finance, Property and Performance, in order to make decisions on deferral requests under £50,000. These decisions would then be reported to Cabinet as part of the Integrated Finance and Performance Report.
- 2.8 There have been a small number of instances where developers have sought to seek deferral of moderate S106 contributions by two or three months, or they have sought to pay the overall amount in instalments. For example, a deferral request below the £50,000 threshold has been received from a developer, who is seeking to pay their contribution off in instalments across six months. This proposal may be acceptable to Officers; however, the fixed calendar dates of Cabinet mean that a decision cannot be made swiftly.

- 2.9 For future examples of this nature, it is proposed that the same criteria for considering the request shall be applied as per all other requests, but the decision on whether the deferral is acceptable would be delegated to the Corporate Director: Finance, Property and Performance. This would mean that the receipt of the S106 funds will begin sooner, or if the request was rejected, the debt recovery would begin sooner. Cabinet would then be informed of the decision through the Integrated Finance and Performance Report at the next available opportunity.
- 2.10 In summary, it is proposed that the following changes are made to the Authorisation Limits for Variations to S106 Agreements. These have been discussed with and are supported by the Corporate Director: Finance, Property and Performance.

**Table 1: Proposed New Authorisation Limits for Variations to S106 Agreements**

<b>S106 deferral amount</b>	<b>Over £250,000</b>	<b>Between £250,000 and £50,000</b>	<b>Under £50,000</b>
Decision made by:	Cabinet as a separate report	Cabinet as part of the Integrated Finance and Performance Report	Corporate Director, Finance, Property & Performance
Recommendations made by:	Corporate Director: Finance, Property & Performance and Executive Director, Environment Services	Corporate Director: Finance, Property & Performance	Officer from Relevant Spending Service

#### Developers Ignoring Cabinet Decisions

- 2.11 In some instances, when deferral requests have been rejected by Cabinet, the developer has ignored the decision and continued to avoid payment. In these instances, the New Communities Service has been working closely with the Debt Recovery Team to ensure the debt recovery process is followed, which will sometimes lead to involvement from County Legal Services to issue proceedings to recover the debt. It is proposed that no changes are made to this approach and Cabinet decisions should only be reviewed if significant new evidence comes to light. The proposal to ask the developer to submit financial viability information in support of their request will hopefully improve the process and possibly reduce the number of developers who ignore the Cabinet decision on their deferral.

### Implications of Reduced Income

- 2.12 Consideration might be given to reducing the number of S106 deferrals which are accepted due to the possibility of reduced income for capital projects from other sources. However, it is considered that the current criteria are reasonable to all parties involved, and it would not be appropriate to reject deferral requests because of a likely reduction to other capital funding sources. Cabinet is invited to give a view on this matter.

## **3. SIGNIFICANT IMPLICATIONS**

### Financial Issues and Implications

- 3.1 A significant part of the Council's capital programme is funded through S106 funding. If S106 payments are deferred, there is the potential to have a financial impact on the Council if borrowing has to be undertaken to fill the gap temporarily left by the absence of S106 funding. This is fully considered for each deferral request when recommendations are presented to Cabinet.
- 3.2 To date for major developments in the Cambridge Southern Fringe, the County Council has agreed to undertake prudential borrowing to help provide major infrastructure schemes ahead of the receipt from the developer of capital contributions. The Addenbrooke's Access Road and the Cambridgeshire Guided Busway scheme are where this prudential borrowing has been utilised. The full costs of this borrowing will be recovered through the S106 agreement for these sites.
- 3.3 The other mechanism that is used to 'protect' the value of the contribution is through indexation. Using accepted indices the value (in pounds) the capital contributions are (generally) increased in order to protect their purchasing power. For this approach the capital contribution is 'indexed' from the date of the signing of the S106 Agreement to the date the payments is due. For example a contribution of £10,000 could be increased to £11,354 due to indexation.
- 3.4 The S106 agreements also provide for the opportunity to charge 'punitive' interest at 4% over the prevailing Bank of England Base Rate if payment is late. There are no instances where this mechanism has been brought into play though one debt that is currently being managed by the Debt Team may need to invoke this clause in the S106.
- 3.5 Cabinet is invited to comment on the current approach of the use of prudential borrowing, indexation and punitive interest and identify where changes should be considered.

### Resources and Performance Implications

- 3.6 If schemes funded by S106 payments are delayed, this could have an impact on the Council's performance and particularly the services that it provides to the Community. This will continue to be considered as part of any recommendations to Cabinet.

### Statutory Requirements and Partnership Working

- 3.7 The County Council has statutory responsibilities for the provision of certain services, such as education. Any agreement to defer S106 payments must not jeopardise the County Council's ability to deliver statutory services.
- 3.8 County Council Officers work extensively with partners including Cambridgeshire Horizons and the District Councils regarding the securing and management of S106 funding agreements. County Officers input into the District Councils' policy development and review work regarding S106. For deferral requests, County Officers will work closely with District Colleagues and the need for this close working is underlined by the fact that the developer may be seeking to vary the requirements that also affect the District and Parish Councils, such as public open space requirements or the provision community facilities or community development workers.

### Climate Change

- 3.9 There are no significant climate change implications.

### Access and Inclusion

- 3.10 There are potential access and inclusion implications should developers seek to defer S106 contributions relating to transport. These implications will need to be considered on a case-by-case basis.

### Engagement and Consultation

- 3.11 Officers within the Growth and Infrastructure Directorate make the relevant Local County Member, District Member(s) and Parish Council Members aware of deferral requests as soon as they are received. Officers within Growth and Infrastructure then alert the relevant Members as to the outcome when the final decision is made.

Source Documents	Location
Copies of S106 agreements are held by the New Communities Service	Castle Court A wing 2nd Floor
Original S106 agreements are held by the County Council Records Office	Shire Hall 023

## APPENDIX 1

The following criteria is used by officers when considering the appropriateness of S106 deferral requests.

- Which scheme the S106 money is allocated to (if any)
- When is the scheme programmed to take place
  - underway
  - completed
  - programmed to start
  - no programme at present
- What percentage is the S106 payment in relation to the overall scheme cost.
- What relationships are there between funding streams from separate S106 agreements. Pooling of contributions from different developments towards individual schemes is common practice and is a practice that is appropriate within the national planning guidance and circulars. An assessment would need to be made of the impact of a deferral of one S106 as to how it affects the pooled funding from a number of different S106 agreements.
- Any financial costs to the County Council if the S106 payment were to be delayed - cost of prudential borrowing and bridging finance and where these costs would be covered from – the default position is the developer
- Will the County levy interest for deferred payments – this is a standard clause within S106 agreements. A decision would need to be taken whether to invoke this clause.
- Instead of deferring payments, consideration will be given whether receiving the due amount in instalments is more appropriate.
- Developer risk – the use of bonds to protect the payment in the event of the developer entering a period of financial difficulty (late payment) or going out of business (no payment) is made at present. However the ability to secure bonds in the current financial markets is reported by developers to be difficult. The cost of bonds is an additional development cost.
- The social cost to the community because of the delay to the provision of infrastructure.

