

INTERNAL AUDIT REPORT

FROM: Audit and Risk Manager
TO: Head of Development Services
C.C. Chief Executive
Deputy Chief Executive (BH)
Head of Finance
Development Manager

SUBJECT: Section 106 Agreements
DATE: 14 January 2015

1. Introduction

- 1.1 In accordance with the Audit Plan for 2014/15, an examination of the above subject area has been undertaken and this report presents the findings and conclusions drawn from the audit for information and action where appropriate. This is the first time that the topic has been audited.
- 1.2 Wherever possible, findings have been discussed with the staff involved in the procedures examined and their views are incorporated, where appropriate, into the report. My thanks are extended to all concerned for the help and cooperation received during the audit.

2. Background

- 2.1 The Government's Planning Advisory Service highlights that "planning obligations under Section 106 of the Town and Country Planning Act 1990, commonly known as s106 agreements, are a mechanism which make a development proposal acceptable in planning terms, that would not otherwise be acceptable. They are focused on site specific mitigation of the impact of development."
- 2.2 As well as the 'full' s106 agreements, Unilateral Undertakings can also be entered into under the Act, although these are just agreed by the developers and the relevant parties, with the council not being required to sign up to them.

3. Scope and Objectives of the Audit

- 3.1 The audit was undertaken to test the management and financial controls in place.
- 3.2 In terms of scope, the audit covered the following areas:
- Development identification
 - Consultation
 - Agreements
 - Monitoring
 - Financial control.

3.3 The audit programme identified the expected controls. The control objectives examined were:

- Developments which should give rise to S106 agreements are appropriately identified.
- All relevant elements are appropriately included within the agreements.
- Justification is available where S106 agreements are not entered into on viability grounds.
- Agreements are enforceable.
- Agreements ensure developments fit in with the emerging local plan.
- The council is aware when relevant milestones are reached in the development.
- Monies received are accounted for as appropriate.
- Communities benefit as intended from the monies received.

4. Findings

4.1 Development Identification

- 4.1.1 The Development Manager (DM) and the Development Team Leader (DTL) advised that developments that may be subject to requests for s106 contributions are identified through the application of criteria set out by the relevant statutory organisations.
- 4.1.2 As a general rule, it is anticipated that most 'major applications' (e.g. large scale housing developments) will require s106 contributions, due to the additional demands that will be placed on infrastructure and services. In most cases early discussions will be held with developers, including at the pre-application stage, in order to expedite the process.

4.2 Consultation

- 4.2.1 Consultation is undertaken as part of the processing of all planning applications, regardless of whether s106 contributions will ultimately be required. However, the organisations and individuals consulted will vary depending on the type of application.
- 4.2.2 The DTL highlighted that the starting point for determining the consultees for planning applications is the National Planning Practice Guidance which sets out the circumstances in which specific organisations are to be consulted.
- 4.2.3 The consultees for each application are identified when the application is plotted on the GIS system via Acolaid. The GIS Manager advised that when the application is being plotted, relevant constraints on the system would be pulled through based on the layers that had been selected and these had generally been set some time ago, although the DM indicated that they would be updated as and when criteria change.
- 4.2.4 The Administration Support Manager (ASM) and the DTL advised that some of the consultees identified by the system may not need to be consulted, depending on the nature of the specific applications, and they would, therefore, be removed. Others may also be added from the drop down lists available on Acolaid based on the nature of the development proposal and any additional constraints arising from its location.
- 4.2.5 It was also highlighted that some individuals and bodies are made aware of all applications received on a weekly basis in order that they can determine whether they wish to respond on specific cases. The ASM provided details of the weekly list recipients which are set up as Outlook contact groups. The weekly list is also available on the council's website.
- 4.2.6 During discussions with one of the Senior Planning Officers (SPO) regarding sampled applications (see testing details below), he advised that some consultees may not respond, depending on the scale of the application. For example, NHS bodies may not respond to the smaller 'major' applications if the scale of the development will not have major implications on their services and there are no relevant issues or requirements that they wish to raise.

- 4.2.7 Testing was undertaken on a sample of major applications, that had been approved during 2014, to check whether all relevant consultees were being given the opportunity to comment on the applications and, where relevant, whether their responses and any subsequent negotiations were being appropriately reflected in the s106 agreements reached.
- 4.2.8 As suggested during the discussions prior to the testing, the number of individuals / organisations consulted on each application, as per the consultation screen on Acolaid for each application, varied considerably, as did the actual consultees. Other potential consultees were covered by the weekly lists, so would have been aware of the applications and were able to respond should they have wished.
- 4.2.9 Whilst it is understandable that there will be some differences, it was not clear why different consultees were included on the lists where similar developments were sampled (i.e. the applications that related to large housing developments). The DTL explained that in the cases identified, different consultees had been included on the lists because of additional consultations over and above the statutory consultees. However, Internal Audit suggest that a standard approach could be adopted to ensure that relevant parties are given the same chance to respond to each application.

Risk

Relevant bodies are unable to secure relevant contributions.

Recommendation

A standard list of consultees should be drawn up for major applications.

- 4.2.10 In the two cases where formal s106 agreements were required, evidence was generally in place to show that the requests received were being included in the agreements, or there was correspondence held relating to why certain items were not included. However, there were some anomalies with some items being included in agreements which were not supported by responses included on IDOX. The DTL explained that this can occasionally arise where consultation responses have not been received but where it is known that a requirement is to be included in an agreement, for example in relation to the provision of open space.
- 4.2.11 The SPO advised that some sections do not always respond to individual applications, but have standard responses in place. However, individual responses should be received to provide justification for each relevant case, as they need to be able to confirm that the requests are compliant with the regulations set out in relation to the Community Infrastructure Levy (CIL).

Risk

Challenges to s106 agreements.

Recommendation

Evidence should be obtained to support all requests for s106 contributions for each individual application as appropriate.

- 4.2.12 One of the applications reviewed did not lead to a s106 agreement because the scheme would not have been viable if contributions had been required.

The developer submitted an assessment to set out their viability case and this was appropriately confirmed by an independent consultant.

- 4.2.13 During discussions with the SPO, it was identified that consultees that had asked for contributions would not be formally advised as to whether this had been agreed (e.g. if a viability assessment had been submitted which led to no agreements being entered into on viability grounds).
- 4.2.14 Separate discussions on financial controls (see 4.5 below) with the Green Space Team Leader (GSTL) also flagged this as an issue, as he highlighted that he was not aware whether to expect any contributions. (NB this is relevant to contributions secured by condition as well as those included within s106 agreements.)

Risk

Relevant parties are unable to undertake appropriate budgetary planning.

Recommendation

Consultees should be formally made aware of the outcome of relevant applications including in relation to any contributions that are to be paid to them.

4.3 Agreements

- 4.3.1 The Senior Solicitor at Warwickshire Legal Services advised that agreements will be either be drawn up by the developer's solicitors or will be drafted by Legal Services. His colleague also advised that no 'model' document is maintained, but standard clauses are used, and these include a specific section on the legal basis of the agreements. This section makes reference to the relevant Acts and the appropriate sections therein.
- 4.3.2 The Senior Solicitor also indicated that any draft documents would be reviewed to ensure that any amendments were acceptable, although these would not generally affect the legal basis sections.
- 4.3.3 Where planning applications are to be subject to s106 agreements, the applications have to be decided by Planning Committee, as the council will be a signatory to the agreements reached. In the two relevant sampled cases, the applications had been appropriately reported to the committee.
- 4.3.4 The testing also checked to ensure that the applications had been appropriately signed and sealed. Copies of documents were held in one instance containing all of the relevant signatures and seals. In the other case, the copies held only contained the signatures of the owner and developer and did not bear the seals of the relevant councils.
- 4.3.5 The Land Charges Officer (LCO) advised that Legal Services now generally get the different parties to sign / seal different copies (counterpart agreements) and then send through all relevant copies. These have the same effect as a single copy with all of the signatures and are legally enforceable.
- 4.3.6 In the one case where all signatories were evident, these were covered on three separate copies of the agreement held by the LCO (awaiting scanning prior to be placed in the document store). In the other case, two copies were

held in the document store containing the abovementioned signatures, but it was not clear if the sealed copies of this agreement had ever been provided.

Risk

Agreements are not enforceable.

Recommendation

A sealed copy of the relevant s106 agreement should be obtained.

4.3.7 The DM advised that, on the whole, the agreements reflect the infrastructure needs related to the new developments and this would generally be the case no matter which local plan was being worked to. The approval of the applications themselves (as opposed to the agreements being reached) is where the main impact of the emerging plan is highlighted, although the agreements are obviously forward looking and will aim to support the plan as it moves forward.

4.4 Monitoring

4.4.1 The DM advised at the outset of the audit that the monitoring process is not currently functioning appropriately. However, he highlighted that plans are in place to remedy this and subsequently provided a copy of a draft service improvement plan which included this commitment. As a result, it was agreed that it would not be of benefit to undertake full testing of the process, but a sample application was chosen to ascertain how the process will work when the planned processes are adopted.

4.4.2 At the time of the audit testing, an immediate issue was noted in that Development Management staff were not able to provide a list of 'active' s106 agreements in order for a sample agreement to be chosen.

4.4.3 A list of a sample of potentially relevant applications was subsequently provided and a sample application was chosen from this list (W/11/0074), although the process described was more generic, with little specific reference being made to the chosen application.

4.4.4 The DM advised that the Enforcement team; the new Major Sites Monitoring Officer; and the Information and Improvement Officer will be at the forefront of monitoring. A spreadsheet will be maintained, listing all s106 requirements along with the key dates and thresholds and an early version of this spreadsheet was provided to Internal Audit after the audit testing. Monitoring files will also be in place, with reminders being set up to prompt for action to be taken.

4.4.5 Ongoing monitoring including, regular liaison with relevant partners at other organisations, staff within WDC (e.g. Building Control and Planning Policy staff) and the developers, will be undertaken to identify whether a development has commenced and, if so, the stage that the development has reached and whether the requirements of the s106 agreement have been triggered and/or received.

4.4.6 The DM highlighted that a monitoring system would be set up using Acolaid to ensure that the requirements of s106 agreements are rigorously monitored and followed up, making more effective use of systems already in place. In

that respect, the DM also highlighted that the ability to give system access to other relevant bodies, including Warwickshire County Council in particular, is being investigated to allow them to play an integral role in the monitoring process.

- 4.4.7 Following completion of the audit, Development Management staff have been instructed to start inputting the agreements onto Acolaid, in order for this monitoring to be undertaken.
- 4.4.8 He also suggested that the possibility of setting up a webpage was being looked into, detailing the stage that each relevant development has reached along with the requirements of the associated s106 agreement. This is to be progressed once the spreadsheet has been established. It is intended that the webpage will enable members of the public and other interested parties to access this information and understand the position in relation to each agreement.
- 4.4.9 It is considered by Internal Audit that the processes set out above should allow for appropriate monitoring to be performed when supported by relevant site visits etc. A general recommendation in relation to this issue is included, and it is suggested that this area will be re-examined in a follow-up audit to be included in the audit plan for 2015/16, allowing time for the processes to be set up.

Risk

The terms of the s106 agreements are not adhered to by developers.

Recommendation

The planned monitoring processes set out should be put in place as a key priority.

- 4.4.10 Whilst the DM was aware that the current monitoring situation was not acceptable, the planned processes highlighted above are intended to overcome that. He also suggested that he took assurance from others, such as Warwickshire County Council and the Strategic Housing Team (in respect of affordable housing provision), that contributions are being made.
- 4.4.11 He also highlighted that s106 contributions are now being included in relevant applications relating to major housing developments towards the costs of monitoring the developments.

4.5 Financial Control

- 4.5.1 The Assistant Accountant (AA) for Development Services advised that monies received in respect of s106 agreements are often originally coded to the main Development Control – Fees and Charges code or the capital receipt codes and are then transferred by journal to the relevant cost centre.
- 4.5.2 One of the main types of receipts at the council is for open space contributions. The GSTL advised that he is not generally aware of when the monies are received and will only find out upon receipt of spreadsheets from the Principal Accountant (Capital) which are received on, roughly, a quarterly basis. He highlighted that these spreadsheets cover both monies secured via

s106 agreements and those arising from standard conditions included in other planning applications (see recommendation at 4.2.14 above).

- 4.5.3 The AA also highlighted that the first monitoring contribution (as highlighted at 4.4.11 above) had been received and this had been transferred from the main fees and charges code to the Planning Policy cost centre.
- 4.5.4 Due to the lack of monitoring information available, no specific sample testing was possible to ensure that monies were being received as appropriate in line with the agreements in place.
- 4.5.5 Where contributions are due to other bodies, e.g. Warwickshire County Council who receive the significant proportion of s106 monies, the DM advised that most contributions will be paid by the developers directly to them, whereas some may come in to us first.
- 4.5.6 One such payment made during the current financial year was identified on the capital receipts code (re a highways contribution) and this was subsequently paid across to Warwickshire County Council as appropriate.
- 4.5.7 The DM advised that, as with the monitoring of developments to ensure contributions are received, there is currently no monitoring being performed to ensure that monies are being used as intended by the various infrastructure providers.
- 4.5.8 As the s106 agreements identify the purposes for which contributions are required, there is, therefore, an ability to monitor this. The DM advised that a key element of the forthcoming monitoring programme will be the monitoring of the use of funds for the purposes identified.

5. Summary & Conclusion

- 5.1 Following our review, in overall terms we are able to give a MODERATE degree of assurance that the systems and controls in place in respect of Section 106 Agreements are appropriate and are working effectively.
- 5.2 The procedures in place for entering into the agreements are generally sound and the issues raised in relation to this area only generate a small number of recommendations.
- 5.3 Internal Audit have concerns that there are no formal controls operating at present with regards to the monitoring of the agreements once they have been entered into and this may, ordinarily, lead to an overall limited level of assurance being given. However, the Development Manager has set out the processes that are to be introduced to address these issues and, as a result, it is considered that the assurance can be increased.
- 5.4 It is proposed that a follow-up audit on the monitoring aspects will be undertaken in the next financial year to ensure that the proposals have been implemented.

6. Management Action

- 6.1 The recommendations arising above are reproduced in the attached Action Plan (Appendix A) for management attention.

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