

**AUDIT REPORTS WITH MODERATE OR LOW LEVEL OF ASSURANCE
ISSUED QUARTER 3 2018/19**

Community Infrastructure Levy & Section 106 Agreements – 10 December 2018

1 Introduction

1.1 In accordance with the Audit Plan for 2018/19, 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.

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 Previous audits have only covered Section 106 (s106) Agreements, as the Community Infrastructure Levy (CIL) was not in place.

2.2 The first audit of s106 agreements was undertaken in January 2015 at which time there was no formal monitoring being undertaken. A follow-up audit was, therefore, undertaken in March 2016 to review progress towards the adoption of a monitoring process.

2.3 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 makes 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."

2.4 The Community Infrastructure Levy differs from s106 agreements in that the levy can be applied to more general infrastructure projects where they cannot be linked to a specific development.

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:

- Community Infrastructure Levy
- S106 consultation and agreement

- S106 monitoring
- S106 income and expenditure.

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

- The Council will be able to raise appropriate income from developers towards infrastructure needs
- 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 agreed local plan
- The Council is aware when relevant milestones are reached in relevant development
- The Council receives all income and land due
- Managers and Members are aware of the status of each agreement
- Monies received are accounted for as appropriate
- Communities benefit as intended from the monies received
- The Council is not held responsible for the inappropriate use of contributions by other organisations.

3.4 As the CIL has been formally in place since only April 2018, it has only been covered in overview to ascertain whether the Council has appropriate processes in place for the future use and monitoring of income received.

3.5 One specific area that has not been covered in this audit is that of the inclusion of SUDS (Sustainable Urban Drainage Systems) in the s106 agreements. The issues with SUDS were touched upon in a recent audit of Flood Risk Management (FRM).

3.6 A recommendation included within the FRM report was to be addressed by staff in Neighbourhood Services but it is felt that Development Services staff need to be aware of the issues raised, so the risks identified in the report and the associated recommendation raised are repeated here for reference (although as it relates to a different audit, it is not included in the action plan at the end of this report):

Risks

SUDS that are not fit for purpose might be installed which may increase the risk of flooding.

Funds deposited by the developer may not be sufficient to meet ongoing maintenance costs.

Recommendation

A coordinated approach to managing the expansion of SUDS in the District should be adopted by involving all relevant senior managers to identify the potential problems and to propose solutions.

4 Findings

4.1 Recommendations from Previous Reports

4.1.1 The current position in respect of the recommendations from the audits reported in January 2015 and March 2016 were also reviewed. The current position is as follows:

Recommendation	Management Response	Current Status
January 2015		
1 A standard list of consultees should be drawn up for major applications.	Agreed. The recommended action will be complied with.	Whilst not a 'full' list of consultees, the Business Manager - Development Management (BM) has sent details of the relevant consultees to the Senior Planning Officers to ensure that all relevant contributions can be requested in respect of each major development. (See 4.3.2 below)
2 Evidence should be obtained to support all requests for s106 contributions for each individual application as appropriate.	Agreed. The recommended action will be complied with.	Sample testing confirmed that contributions included within s106 agreements were all supported by individual requests, although there were some discrepancies between the documents. (See 4.3.6 to 4.3.9 below)
3 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.	Agreed. The recommended action will be complied with.	The BM suggested that this does not routinely happen. The recommendation therefore needs to be revisited.

<p>4 A sealed copy of the relevant s106 agreement should be obtained.</p>	<p>Agreed. The recommended action will be complied with.</p>	<p>The copies of the relevant agreement held both on IDOX and the hard copy held in the Document Store were still the unsealed version. However, the agreements are thought to be legally enforceable whether sealed or not. Going forward, legal advice will be sought, but it is not thought relevant to obtain a sealed copy of this 'historic' agreement. Looking ahead storage of signed agreements needs to be consistently associated with Acolaid records Recent agreements covered during sample testing had all been signed / sealed as appropriate. (See 4.3.10 below)</p>
<p>5 The planned monitoring processes set out should be put in place as a key priority.</p>	<p>Agreed. The course of action is included in the Development Services draft Improvement Plan.</p>	<p>Recommendation was superseded by the follow-up Monitoring audit undertaken in March 2016</p>
<p>March 2016</p>		
<p>6 A specific protocol should be put in place for receiving all s106 agreements from Legal Services and recording them on the monitoring spreadsheet. Consideration should also be given to including reference to potential agreements on the spreadsheet when case officers deal with the planning applications.</p>	<p>Agreed. A protocol for the receipt of s106 agreements will be implemented. Potential agreements will also be included as suggested.</p>	<p>A number of recently agreed s106 agreements were found to not be included on the monitoring spreadsheet and none of the applications with anticipated agreements were included either, so this needs revisiting. (See 4.4.3 below)</p>

7 A formal process should be established for updating the monitoring spreadsheet with any variations identified.	Agreed. A process will be implemented.	Given the above finding, no specific review was undertaken on variations to agreements.
8 The MSMO should be included in the monthly update emails from the IIO so that he can formally advise of the status of each of his sites.	The MSMO will update the master spreadsheet directly going forward.	The Site Delivery Officer(s) now have direct access to the spreadsheet, with a formal update report also being produced on a quarterly basis to provide updates on the progress at each development.

4.2 **Community Infrastructure Levy**

- 4.2.1 Every planning application is checked to see if it will become CIL liable, with builds over 100 square meters being potentially liable. Once the application is approved, an outline liability letter is then sent to the developer and a form will be completed by them to give further details of the development.
- 4.2.2 The Development Manager (DM) and the CIL Officer (CO) advised that they undertake sense checks on the weekly lists to see if all relevant cases have been reviewed as some may be borderline in terms of size, so the development will be measured.
- 4.2.3 Upon receipt of the completed form, it will be checked to ascertain whether there are any relevant exemptions, for which another form needs to be submitted.
- 4.2.4 Annexes / extensions for a private dwelling are exempt as are self-build properties. Exemptions are also available for social housing properties. The levy will also be reduced if there are existing properties on site that have been in recent use.
- 4.2.5 One unexpected positive aspect of CIL that the DM and the CO raised was that developers have discussed increasing the number of social housing properties on site in order to reduce their CIL liability.
- 4.2.6 The actual liability is calculated by the Acolaid system based on the information entered onto the Planning Obligations tab. A detailed liability letter will then be sent out to show the calculated figure.
- 4.2.7 Different zones have been established with the developments in the different zones attracting different multipliers. These were agreed by Council in November 2017.
- 4.2.8 The Systems & Business Improvement Officer (SBIO) provided a spreadsheet that had been generated from Acolaid which confirmed that the agreed figures

had been accurately input into the Acolaid parameters.

- 4.2.9 The CO advised that only six liable developments had been identified to date from the completed forms. These had potential CIL contributions due of approximately £2m. Six other cases were exempt and eleven others were ongoing and were being chased.
- 4.2.10 The developers in the six relevant cases are being corresponded with and site visits are also being undertaken to ascertain when the development has commenced and the others also have to be monitored (again via site visits as necessary) to ensure that the exemption reasons remain valid. It was flagged that a land charge will be put on the property in exempt cases so that the relevant income can be received if it is sold within three years.
- 4.2.11 One site has now commenced, with a signed commencement notice having been received as appropriate. A demand notice has, therefore, been issued so that payments can be received.
- 4.2.12 When received, monies will be spent against items on the 'Regulation 123 list' and the Council is required to administer this, although the actual projects may be undertaken by others (e.g. Warwickshire County Council (WCC)). The reasoning behind the formation of the list (along with the current list) were reported to Executive in April 2018 where the list was approved.
- 4.2.13 For each project there will also be a legal agreement put in place to ensure that, should the monies not be spent accordingly, the potential claw back of income would fall to the relevant body.
- 4.2.14 The Strategic Finance Manager has set up the relevant finance codes and a spreadsheet has been set up to show how the income has been distributed, although this has not yet been required.
- 4.3 **S106 Consultation & Agreement**
- 4.3.1 A review of recent planning applications was undertaken to identify those where S106 agreements were to be entered into. Testing was then undertaken to ensure that relevant consultation had taken place and that the contributions requested were being included in the signed agreements unless a relevant viability assessment had been submitted.
- 4.3.2 For the eight relevant applications identified, there were no two that had the same list of consultees. However, with the exception of one application (which turned out to be an amendment to an original agreement with none of the contributions being affected), the others generally covered the majority of the key consultees as identified in an email from the BM to the Senior Planning Officers. However, one did not include any NHS consultees and only three covered the Rights of Way consultee. Also, none included the Sports consultee, although they had submitted contribution requests in a number of cases.
- 4.3.3 However, as well as those consulted with directly, the BM confirmed that all applications are sent out for comment to a list of individuals and organisations

and they will then choose which applications they wish to comment on. This list includes the Sports consultee amongst others.

- 4.3.4 It is also noted that the BM's email was sent out after the sampled applications had been sent out for consultation, so it is anticipated that all relevant consultees should now be covered for each relevant application and it is felt that no recommendation is, therefore, warranted.
- 4.3.5 In the four cases where the s106 agreements have actually been completed, one fully reflected the consultation responses, and two were the subject of viability assessments.
- 4.3.6 In the other case there were two specific variations. The figure for the Open Spaces contribution had been changed with no apparent justification being held which resulted in the figure agreed being almost £100,000 less than that requested.
- 4.3.7 A request for NHS contributions was also omitted from the agreement as the request had not been picked up by the case officer due to the way that the document had been stored on IDOX. This resulted in a further 'loss' of just over £100,000.
- 4.3.8 It should be noted that the Open Spaces contribution would have subsequently been removed from the agreement, had it been included, as the relevant scheme is now covered by CIL. However, at the time of the report to Planning Committee (30 January 2018), the CIL Regulation 123 List had not been approved, so the Open Spaces contribution should have been included.
- 4.3.9 Another, similar, issue was noted in relation to an ongoing case where the agreement has not yet been entered into. A contribution request from the Police for £97,415 has not been included in figures being discussed as the document had been overlooked due to the way that it had been saved on IDOX.

Risk

Contributions requested may not be received.

Recommendations

A formal naming protocol should be introduced for documents stored on IDOX so that all contribution requests can be easily identified.

Consideration should be given to investigating whether the s106 agreement can be amended in the relevant case so that the NHS contribution can be secured.

The contribution request from the Police should be included within final s106 agreement in the relevant case.

- 4.3.10 Where agreements were in place they were all found to have been signed up to by all relevant parties.

4.3.11 The BM advised that all agreements are drawn up and / or reviewed by Legal Services. They will, therefore, ensure that the correct legal references are included within the agreements. Upon review of sample agreements, it was confirmed that standard clauses are included which make reference to the legal basis for the agreements.

4.3.12 Reports are presented to the Planning Committee prior to the agreements being formally agreed. A clause is included within the reports advising that, should the agreement be not signed up to by a specified date, the Head of Development Services is given delegated power to refuse the application.

4.3.13 The BM advised that it is up to the individual case officer to monitor compliance with these dates. However, he suggested that these are not generally enforced, with them being included as more of a tool to speed up the developer.

4.4 **S106 Monitoring**

4.4.1 A spreadsheet is currently in place that is the central record of S106 agreements, although the Site Delivery Officer (SDO) spoken to advised that he had noted a few omissions.

4.4.2 The spreadsheet shows each element of the agreement on a separate line and includes the triggers for each contribution. There are also columns to show (amongst other things) whether the contributions / land transfers etc. have been received or not and when they are due to be spent by (although there are numerous gaps in these columns). There is also a column to show the 'current position' although, again, this is not always updated for each (quarterly) update.

4.4.3 However, as part of the agreement testing undertaken (see above) it was noted that none of the agreements were been included in the latest monitoring spreadsheet. From discussions with relevant staff it was identified that no specific responsibility has been assigned to ensure that the spreadsheet is kept up to date for new agreements.

4.4.4 A project is currently ongoing to get the S106 information onto Acolaid. The Development Monitoring Officer (DMO) advised that the information is being input into the Planning Obligations tab on Acolaid for the individual applications, with a separate line for each obligation on the 'Purposes' tab on the page. As of yet, it was not clear as to who would be inputting new agreements.

Risk

The current status for all s106 agreements may not be known and it may not be possible for interested parties to have an up to date picture.

Recommendation

Responsibility should be formally assigned for the updating of the monitoring information, whether this is the spreadsheet or Acolaid once this has been fully implemented.

- 4.4.5 The DMO advised that the Triggers and Transactions tab should show dates of when the different stages had been reached, although he was unsure whether this part of the process would be automated, based on the information input into the 'monitoring data' fields within the Plotting tab.
- 4.4.6 There were potential issues flagged by the DMO in relation to amendments being put through as separate planning applications, as the monitoring data was input against the individual applications whereas the s106 details had been input against the outline application, so if the process were to be automated, it wouldn't tie up.
- 4.4.7 The 'module' is live, but has not generally been used so far. However, the DMO suggested that the relevant information would be input for the next round of development monitoring in October and would go forward from there.
- 4.4.8 There would also be a need to backfill certain information where developments or have not been completed or monies had not all been spent, but it was not felt that there was much point in inputting data in relation to completed schemes.
- 4.4.9 Looking forward, it is expected that reports would be generated from Acolaid to remove the need for the monitoring spreadsheet, with reports being tailored to meet the needs of different audiences.
- 4.4.10 The SDO advised that he monitors the developments in Warwick and South Leamington with his colleague covering the current Kenilworth development. A new post is being recruited to for the south Coventry / Kings Hill developments.
- 4.4.11 He highlighted that developments are predominantly monitored via site visits to check the percentage of the development that has been completed etc. as the trigger points are generally related to percentage complete / occupied.
- 4.4.12 Following the visits (which are generally undertaken prior to the end of each quarter), the spreadsheet would be updated to show the current position, with this information being included in the Development Contribution Monitoring Report that is prepared for the quarterly meeting attended by various Council staff as well as representatives from WCC. The latest copy of the monitoring spreadsheet includes the June 2018 updates as appropriate.
- 4.4.13 The quarterly meeting held on 1 August 2018 was attended as part of the audit and it was flagged that the meeting and the report have both evolved over time.
- 4.4.14 The DM advised that the meetings were originally just attended by himself,

the SDO and the SBIO, but the current attendance from other officers from both the Council and WCC was how it was always envisaged.

- 4.4.15 The Q1 report being discussed at the meeting was the first to include CIL information. It was highlighted that the report had historically been circulated to the previous Head of Development Services and Finance but it was now being sent to SMT and the relevant Portfolio Holder as well.
- 4.4.16 At the meeting, the possibility of publishing the report on the Council's website alongside the monitoring spreadsheet was discussed and it was agreed by those in attendance that this would be a good idea.
- 4.4.17 During the meeting, a representative from WCC advised that the way the Council monitors their s106 developments and the relationship between the councils with regards to the monitoring process is flagged as best practice with the other districts. This has also been identified in an audit report written by the WCC internal auditors.
- 4.4.18 Included within the monitoring report is commentary on which developments have reached triggers according to the monitoring that has been performed. The report also highlights that land transfers were not always happening in line with the agreements in place. The SDO highlighted that financial contributions had been the main focus but land transfers would also now be specifically monitored.
- 4.4.19 He also flagged that there had been issues with the developers not informing the Council when work had started but suggested that there had been no 'follow-ups' performed by the Council in these cases although this was now being addressed.
- 4.4.20 As suggested above, the monitoring reports are now being circulated to SMT and the Portfolio Holder. The DM advised that Finance & Audit Scrutiny Committee no longer receive regular update reports that had been requested at the time of the previous audit, although it was noted that they do get updates on the Infrastructure Delivery Plan (IDP), with the latest report (July 2018) including various references to s106 monitoring, with a specific s106 monitoring report (which was the previous version of the Developer Contribution Monitoring Report) being included within the appendices.

4.5 **S106 Income & Expenditure**

- 4.5.1 When a developer advises the Council that a trigger has been reached or where monitoring undertaken identifies this, an invoice will be raised and sent to the developer. The Q1 Developer Contribution Monitoring Report highlights that only one development had reached a trigger point in this period.
- 4.5.2 The SDO advised that he maintains a working spreadsheet (s106 contributions calculator), for financial contributions, with each agreement having its own tab. The spreadsheet includes any relevant indexing and shows invoices issued. This shows the relevant invoice raised in relation to the abovementioned contribution. This is separate from the main monitoring spreadsheet.

- 4.5.3 Upon review of invoices raised and payments received as per the relevant cost-centre code on TOTAL, it was noted that the contributions spreadsheet was not up to date. Eight payments had been received during the current financial year against three different developments but there was no record of these having been paid.
- 4.5.4 Another issue was that the payments in respect of one development did not tie in with the amounts shown on the spreadsheet. Three are for indexation payments only (which are not shown on the spreadsheet) and the other had been paid with a different indexation figure. The SDO highlighted that the 'indexation only' payments had been raised separately after the developer had failed to apply indexation when they made their initial payment, with the indices being correct based on when the first payment was made.
- 4.5.5 It was also highlighted that this spreadsheet was only meant to be a working tool, and that the main monitoring spreadsheet should be used to record all relevant information, including the payments made. However, as previously highlighted, the main monitoring spreadsheet was not up to date at the time of the audit and it did not record any information regarding the indices used to calculate the payments due.

Risk

Staff may not be aware of the contributions that have been paid or those that are outstanding.

Recommendation

The monitoring spreadsheet should be kept up to date and should include all relevant information.

- 4.5.6 An additional issue was identified by Development Services in that the processes for calculating the invoice amounts using the relevant indices and the subsequent raising of the invoices do not allow for segregation of duties, with the SDO being responsible for all aspects.
- 4.5.7 Upon further review of the indices used for the calculation of the abovementioned invoices, it was noted that the figures used for one invoice did not tie in with the RPI figures that were in force when the invoice was raised. Again, it was highlighted that the figure used would have been correct when the contribution amount was agreed as opposed to when the invoice was raised, but there was no evidence to show how the figure had been arrived at. This reinforces the risk raised by Development Services.

Risk

Errors in the contribution invoices may not be identified and the officer raising the invoices may be open to fraud and collusion attempts.

Recommendation

The process of calculating the contribution invoices should be amended so that the figures can be verified.

- 4.5.8 In terms of the accounting, the Assistant Accountant (AA) advised that all income received and payments made (with the exception of the monitoring fees) go through the same code. However, balances relating to income received will be moved to specific balance sheet codes at the year-end if monies have not been spent. Similarly, where payments are to be made, monies will be transferred back into main code from the relevant balance sheet codes.
- 4.5.9 The AA also highlighted that the finance details are also entered into the main s106 monitoring spreadsheet as and when monies are received or spent. This was confirmed upon review of the spreadsheet provided.
- 4.5.10 The SDO advised that payments would only be made following receipt of a signed legal agreement (see below). Once received, purchase orders are raised and the organisation is requested to raise an invoice as appropriate.
- 4.5.11 Two payments have been made during the current financial year in respect of hospital contributions and GP contributions and these were found to be supported by orders and invoices as appropriate.
- 4.5.12 The SDO also advised that there is currently no formal monitoring undertaken to ensure monies are being used as per the agreements in place. However, the Legal Agreements in place (see below) will help to ensure that the Council is not liable for repaying any monies that have not been incorrectly used when they have been paid to other organisations.

Risk

The Council may have to repay contributions received.

Recommendation

Formal monitoring should be undertaken to ensure that monies are being spent as stipulated in the s106 agreements.

- 4.5.13 Legal agreements are currently in place with NHS organisations in relation to contributions received for hospitals and acute care and GP surgeries. Sample agreements were reviewed and were found to be appropriately detailed.
- 4.5.14 The SDO advised that agreements have also been sent to the Police but signed copies have not yet been returned. He also highlighted that no agreements are required for Warwickshire County Council as they receive their contributions directly.

5 **Conclusions**

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 Community Infrastructure Levy and Section 106 Agreements are appropriate and are working effectively.

5.2 The assurance bands are shown below:

Level of Assurance	Definition
Substantial Assurance	There is a sound system of control in place and compliance with the key controls.
Moderate Assurance	Whilst the system of control is broadly satisfactory, some controls are weak or non-existent and there is non-compliance with several controls.
Limited Assurance	The system of control is generally weak and there is non-compliance with controls that do exist.

5.3 It is noted that whilst not perfect, the s106 monitoring performed by the Council is identified by WCC as being good practice with this being raised with the other districts.

5.4 Internal Audit also recognise that the level of monitoring performed is much improved compared to that in place at the time of the previous audits, but feel that controls need to be strengthened. In that regard, a number of issues were identified:

- Two recommendations from the previous audits, relating to informing consultees of the outcomes of applications and obtaining a sealed copy of a specific agreement, had not been actioned.
- Contribution requests had not always been identified when s106 agreements were being discussed and drawn up.
- The s106 monitoring spreadsheet did not include a number of recent agreements.
- The financial contributions spreadsheet also required updating to include payments received and missing agreements.
- The process for calculating and raising invoices needs to be amended to allow for checks to be performed.
- No specific monitoring was being undertaken to ensure that contributions were being spent appropriately.

6 **Management Action**

6.1 The recommendations arising above is reproduced in the Action Plan for management attention.