



Section 106 agreements

May 2019



**Low
Assurance**

Purpose & Scope of Review

1. This review was requested by senior management to provide assurance on the Section 106 (S.106) process; this area has not been reviewed previously. It will provide assurance for the Section 151 Officer, the Annual Internal Audit Report and the Annual Governance Statement.
2. A review of the following areas related to a Section 106 (S.106) planning obligation:
 - The policy and guidance associated with requesting landowner/developer contributions and any calculations therein;
 - The negotiations necessary to agree the terms of a S.106 agreement and the finalising thereof by relevant officers;
 - The use of unilateral undertakings to secure landowner/developer contributions, agreed templates, legal implications;
 - The monitoring and enforcement of the terms of the S.106 agreement;
 - How to record, process and subsequently spend financial contributions. Who is responsible? What agreed procedures are required? Where should we report?
 - The implications of not spending financial contributions, returns to developers, challenges etc.

Background & Context

3. Section 106 of the Town and Country Planning Act 1990 relates to agreements regulating the development or use of land. The S.106 process is initiated through the Planning team with involvement from Legal Services and ends with other departments in the Council e.g. Education Services. Agreements under Section 106 are legally binding and require that provisions be made at the landowner's expense for affordable housing and/or financial contributions towards: affordable housing; education; open spaces; in connection with granting of permission for development of any size or type. The Council uses two types of agreements as noted below: –
 - S.106 agreements – where both the Council and the developer/landowner enter into the agreement. During the time of the review there were 209 S.106 agreements.
 - Unilateral Undertakings – where there is commitment by the developer/landowner only. During the review there were 10 signed unilateral undertakings in place.

4. The signed agreements and corresponding planning consents are available on the council's website to view.
5. Upon receipt of the agreed contributions from the landowner/developer, the responsible department or third party should be notified of the income and is obligated to spend it as detailed within the agreement and linked to affordable housing, education, open spaces and community projects.
6. The Community Infrastructure Levy (CIL) was introduced for England and Wales by UK Government in 2010 but the Corporate Director: Economies & Public Realm confirmed that the Council has not adopted CILs as they are not viable and so are still reliant on the S.106 process.

Audit Opinion

7. There are comprehensive policies in place for planning officers, landowner and/or developers to access which provides guidance on planning obligations. The policies and procedures are compliant with the relevant legislation e.g. Town and Country Planning Act 1990, which are reviewed and updated in line with changes required. Guidance and advice is also sought from Welsh Government when there are changes in the Planning Policy guidance. The relevant policies are listed below: –
 - Affordable Housing Supplementary Planning Guidance (SPG);
 - Affordable Housing Commuted Sums Policy;
 - Planning Obligations Supplementary Planning Guidance (SPG);
 - Local Development Plan (LDP) 2006–2021.
8. Further work has recently been carried out to identify the current open space provision which details the quality, type and who maintains the open space. The information will form part of the new Local Development Plan (LDP) and provide guidance for Planning Policy officers when consulting on future applications received relating to the open space requirements in areas where there is proposed development.
9. We identified good co-ordination between Planning Officers and Strategic Housing Officers within Planning and Public Protection Services, where officers work closely in the delivery of affordable housing and compliance with the adopted planning guidance.

10. However, we identified that there is no clear framework in place for the S.106 process. As S.106 agreements require cross-service involvement, it is essential that all parties are aware of the process and kept informed of the progress and status of the agreements. This would improve the efficiency of the collection of financial contributions and strengthen the communications between services involved in the process, in particular, if the landowner is not complying with the legally binding agreements that had been entered into. **(See Risk/Issue 1 for more detail)**.
11. There is no central register listing all S.106 agreements entered into by the Council that is accessible to all the relevant staff. In addition, the mechanism in place to monitor when agreed triggers have been reached is weak as the Council relies on the landowners to notify the Council when the trigger has been achieved. Our testing of 18 S.106 agreements highlighted occasions where landowners had not notified the Council where the developments have been completed as per the requirement of the signed agreement. The Council is privy to other sources of information that could be used to give a more reliable indicator for when to pursue the financial contribution through the Sundry Debtors process. This would be an added control and prompt further enquiry with the landowners if they had not already notified the Council. **(See Risk/Issue 2 for more detail)**
12. Our testing identified that information recorded on the S.106 database was not entirely accurate. A number of the agreements had expired or been superseded but the database had not been updated. The total potential financial contribution changed from £4,154,450 to £3,459,857 (17% variance) following an update of the S.106 agreements recorded by Planning Services. This demonstrates a lack of monitoring and reconciliation process in place to ensure the accuracy of the information. **(See Risk/Issue 3 for more detail)**
13. The review highlighted inconsistencies in the level of resilience of the key posts involved in the process, which are mainly stand-alone posts. There were good examples of resilience within the Business, Improvement and Modernisation Service, Finance Services and Education & Children's services as there were either documented procedures or arrangements in place where other officers could carry out the required elements of the S.106 process. However, Planning Services and Legal Services is more vulnerable as currently only the key officers involved in the process have the relevant knowledge and understanding. **(See Risk/Issue 4 for more detail)**

14. Despite there being good processes in place for some elements of the S.106 process, there are a number of significant weaknesses that need to be addressed. Using root cause analysis, we highlight four risks issues in total as shown in the action plan below. Based on the risk issues identified, we are able to provide a 'Low' assurance rating.

Low assurance	Significant weaknesses in management of risks and/or controls that put achievement of objectives at risk.
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Action Plan

Audit Review of: Section 106 Agreements

Date: May 2019

Corporate Risk/Issue Severity Key	
0	Critical – Significant issues to be brought to the attention of SLT, CET, Cabinet Lead Members and Corporate Governance Committee
2	Major – Corporate, strategic and/or cross-service issues potentially requiring wider discussion at SLT and/or CET
3	Moderate – Operational issues that are containable at

Risk Issue 1	There is no clear framework in place to document the overarching S.106 process and key officers for the allocation of contributions received to the relevant areas.		
Background Detail	<p>There is no clear framework, overarching procedure or flowchart in place to document the overall process for the S.106 from the beginning of the process where contributions are agreed through to the end of the process where contributions are allocated to the relevant department or third party.</p> <p>Given the cross-service nature of the process, the role of the key officers involved in the various stages for the S.106 process is not defined nor is the interlinkages and communication requirements. The key officers involved in the S.106 process are aware of their own role within the service and there are continuity arrangements in place for the majority of services with the exception of the individuals within Legal and Planning.</p> <p>We identified that not all departments involved in the process had documented procedures in place to ensure contributions received are allocated accordingly to appropriate communities nor were contributions paid out monitored to ensure communities in receipt of contributions were benefiting from the contributions received within the community.</p> <p>In particular, Educational Services do not have a formal process in place to ensure all S.106 funds received are allocated to the correct local area and spent on education. Although no funds have been received in recent years, there needs to be a process in place to ensure any financial contributions from future developments is allocated. There is a significant amount of financial contributions due to the Council in the near future subject to approved larger developments being completed.</p>		
Action (Ref)	Agreed Management Action	Responsibility	Deadline
1.1	Initial scoping meeting to be arranged with representatives from each Service area to form a group to document the S.106 process. The Development Manager, Planning and Public	Head of Planning & Public	28/02/2019

	Protection Services will take the lead in co-ordinating meetings. Further actions will be known following the initial meeting.	Protection Services	
1.2	<p>Step by step process agreed at the initial group meeting. S.106 process should be as follows:-</p> <p>Step 1 – Log Heads of Terms and Estimated Build Schedule on Mapping System and Communicate these to Group members – (DM Team to lead)</p> <p>Step 2 – Monitor Developments and Chase Obligation (TBC – see 2.3 below)</p> <p>Step 3 – Reconcile what is owed and what is received (TBC – see 2.3 below)</p> <p>Step 4 – Document how money is spent (TBC – see 2.3 below)</p> <p>The above will be developed into a flow chart which will be circulated and agreed by group.</p>	Development Manager, Planning & Public Protection	30/04/2019
1.3	Development Control Officer & Planning & Public Protection Manager to attend future Highways & Environment Services (HES) Management team meeting to discuss the planning policy process due to a lack of awareness within HES of the overarching process in terms of the planning application process and access to the monies received in through the S.106 process. Further actions will be known following attendance at the meeting.	Development Manager & Planning & Policy Manager	30/06/2019

Risk Issue 2	There is no central register to record all S.106 agreement which all relevant parties within the Council has access to. Also, there is no effective mechanism in place to monitor where the agreed triggers have been reached to ensure that financial contributions are claimed from the landowners as specified within the S.106 agreements.
Background Detail	<p>There is no central register in place of S.106 agreements to enable relevant officers to monitor progress.</p> <p>Testing of 18 signed S.106 agreements, and discussions with key officers involved in the process, identified that there is no formal mechanism in place for monitoring that the agreed triggers have been achieved. As stated in the signed agreements, the landowner is required to notify the Council once the triggers have been reached so the Council can raise an invoice for the agreed value. Despite the legally binding agreements specifying timescales when landowners/developers are required to make financial contributions, the notification process depends on developers notifying the Council, which is not entirely effective or reliable.</p>

	<p>The Council has access to other sources of information that can be used to alert that the relevant triggers have been achieved. These are listed below: –</p> <ul style="list-style-type: none"> • Building Control – when the team are contracted to carry out a building control inspection of a S.106 site. The progress of the site is recorded on the ‘Tascomi’ system. However, not all developers use Building Control Services as developers can use other service providers. • Local Development Plan – The team receive affordable housing data, which may be relevant to S.106 agreements. The team also carry out annual housing land availability studies, which will identify sites where the development has commenced or the triggers have been achieved on sites where S.106 agreements are applicable. • Planning Enforcement Team – While Planning Enforcement Officers are inspecting a site with a S.106 agreement attached, they can notify the Principal Support Officer of progress. • Revenues Service – where new properties are completed and registered with Council tax services with a new address. 		
Action (Ref)	Agreed Management Action	Responsibility	Deadline
2.1	This will be incorporated as part of Risk Issue 1 as part of the Initial scoping meeting with representatives from each service area.	Head of Planning & Public Protection Services	28/02/2019
2.2	All new S.106’s to be mapped on a central system to be agreed with the group. Heads of terms and developers estimated development programme will then be circulated to the group	Development Manager, Planning & Public Protection	30/04/2019
2.3	The future monitoring of build and S.106 triggers is being explored as part of the Community Benefits Hub project. The Project brief has now been approved at the Young People and Housing Board (7/02/2019) and a Business Case, to include this monitoring role, will be developed. Until then the Development Management team will continue to circulate new S.106 terms to the group and map as agreed.	Frameworks Manager/Legal Services Manager/Development Manager	30/06/2019
2.4	Development Control officer and Frameworks Manager to meet with officers within HES to discuss the proposed community Benefits Hub and the links between S.106 process and the community hub process.	Development Manager/Frameworks Manager/Legal Services Manager	30/04/2019

Risk Issue 3	The current process in place is not effective in terms of ensuring the S.106 agreements are updated to reflect the true status of the applications. This has resulted in an overstatement in the potential contributions due to the Council.		
Background Detail	<p>There is no reconciliation between S.106 contributions received to actual contributions recorded on the database to confirm its accuracy. The testing of the S.106 agreements demonstrated that a number had expired or been superseded.</p> <p>The Senior Finance and Assurance Officer, who allocates S.106 income to the appropriate ledger cost code, confirmed they are not being made aware of the financial contributions due to the Council to monitor that it is received. This would act as an independent reconciliation.</p> <p>A summary of the testing results showing the amounts outstanding is available in Appendix 1 – Root Cause Analysis.</p>		
Action (Ref)	Agreed Management Action	Responsibility	Deadline
3.1	Will be incorporated as part of Risk Issue 1 as part of the Initial scoping meeting with representatives from each service area.	Development Manager, Planning & Public Protection	28/02/2019
3.2	Reconciliation process is already in place for money received . No process is required for money expected, this is the monitoring process	Finance Officer/BIM	<i>Complete</i>
3.3	The monitoring role will reconcile money owed . Until an Officer is in post new S.106's will be mapped by the Development Management team and info circulated to the group. Need to confirm as part of initial signing of s.106's a "monitoring fee" to potentially cover the costs longer term of the monitoring post.	Development Manager/Frameworks Manager/Legal Services Manager	30/06/2019

Risk Issue 4	There is a lack of resilience and continuity arrangement in place for the key processes of the S.106 process.		
Background Detail	<p>Suitable contingency arrangements are in place within some of the services/teams involved, for example the Housing Strategy team and Finance. However, we identified pockets within other key services where the resilience arrangements were weak, specifically:</p> <ul style="list-style-type: none"> • There are written procedures in place for drawing up a S.106 agreement within Legal Services, but these procedures are not accessible to other staff within Legal to ensure the work can continue when the relevant officer is absent from work. • There are no written procedures in place for the drawing up of Unilateral Undertakings. • There are written procedures in place for the Planning & Public Protection Service, but the process has not been undertaken by another member of the team during periods of absence. 		
Action (Ref)	Agreed Management Action	Responsibility	Deadline
4.1	Documenting the steps taken in Legal Services for the completion of S.106 agreements and Unilateral Undertakings when instructed by Planning and Public Protection. This process would also feed into Risk Issue 1 for the overarching process.	Team Leader Places, Legal, HR & Democratic Services	31/01/2019
4.2	Initial training given to Officers in P&PP in order to ensure cover to Support Officer responsible for mapping and circulating terms of new s.106's.	Development Manager, Planning and Public Protection	31/03/2019
4.3	Investigation into options for dealing with Risk 2 to ensure resilience in the documenting and monitoring role.	Corporate Group set up to examine Risk 1	30/04/2019

Report Recipients

- Head of Planning & Public Protection
- Development Manager
- Team Leader Places, Legal, HR & Democratic Services
- Head of Legal, HR & Democratic Services
- Head of Business, Improvement & Modernisation
- Head of Highways & Environmental Services
- Programme Manager, Education & Children Services
- Scrutiny Co-Ordinator
- Chair – Performance Scrutiny Committee
- Lead Member for Finance, Corporate Plan & Performance
- Corporate Governance Committee

Internal Audit Team

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Key Dates

Review commenced	July 2018
Review completed	October 2018
Reported to Corporate Governance Committee	5 th June 2019
Proposed date for 1st follow up review	July 2019

Appendix 1 – Root Cause Analysis

Root Cause 1 – There is no overarching process or procedure to document the S.106 process and the key people involved.

Underlying weakness – There are difficulties in establishing who the key officers are in the S.106 process.

When a S.106 is drawn up, there are a number of obligations agreed between Denbighshire County Council and the landowner/developers and other relevant parties.

The officers all carry out the necessary role/activity but the notification process is not clear to all parties and, in some respect, insufficient to ensure the agreed financial contribution is received from the landowner/developer.

Underlying weakness – There is no process in place within Education Services when S.106 contributions are allocated to Education services.

Education Services do not have a documented process in place to record agreed contributions and the steps required to ensure that they passed on accordingly to the education provision(s) within the area where the development has been completed. Although Band B proposals include potential S106 agreements for Bodelwyddan and Llangollen, such a documented procedure would assist the delivery of the projects.

Note: there has been no contributions due to Education Services in the last decade due to larger developments not being completed within the County; however, significant financial contributions are due in the near future subject to the completion of developments in Bodelwyddan and Llangollen.

Underlying weakness – there is no mechanism in place to monitor contributions are allocated to the same area as the S.106 agreement relates to and that the contributions have provided additional benefit to the community.

There is no monitoring of contributions paid out to ensure the following: –

- The agreed contributions are provided to the same area/community where the original signed S.106 agreement relates to.
- There is no mechanism in place for monitor the outputs or benefits the contributions have made to the communities following the contributions being allocated to the relevant third party provider.

Root Cause 2 – There is no formal mechanism in place internally to communicate when triggers agreed in the S.106 agreements have been achieved to ensure the financial contributions are received and allocated to the relevant community.

Underlying weakness – There is no formal mechanism in place to ensure that the Principal Support Officer is made aware of completed developments within the same service.

There are several areas where the information is known within the Planning and Public Protection Service, but not communicated to the Principal Support Officer. Although the teams listed below are not aware of the S.106 agreements in place, it would be good practice to notify the Principal Support Officer to ensure that all opportunities in improving the communication are utilised.

The key teams are: –

- Building Control – the team can be contracted as the Building Control inspectors for developments in Denbighshire. However, this source cannot be relied upon entirely for all developments as some building inspections are conducted by external agencies.
- Local Development Control – there are officers within the Planning Policy team and the Housing Strategy team who have information that may relate to the S.106 agreements in terms of completed sites. There is a monitoring programme in place for the annual housing land availability studies and the affordable housing data.
- Planning Enforcement team – advice of sites where site visits confirm that development is nearing completion or complete.
- Revenues Service – where new properties are completed and registered with Council tax services with a new address.

Underlying weakness – The various officers/teams are using different systems for the recording of the obligations and are not communicating with Planning once triggers have been achieved.

The different teams across various services involved in the S.106 process are using different systems for recording the status of sites.

There is no overarching mechanism or cross-linkages in place to ensure that all involved receive the necessary progress updates on the various sites that may be subject to S.106 agreements. This is also the case with teams working within the same service.

Root Cause 3 – There is no formal mechanism in place to monitor the financial contributions agreed to the actual contributions received.

Underlying weakness – There is no reconciliation process in place for the S.106 contributions to ensure the database was accurate to show when S.106s had expired or had been superseded (Links to Root cause 2)

The original figures received stated the following: –

- Potential financial contribution: £4,154,449.76;
- Total collected up to June 2018: £2,172,887.90;
- Outstanding contributions: £1,981,561.86.

However, following further queries to confirm the valid S.106s we found that the figures have changed showing a decrease in the potential contributes that could be used for the benefit of the community:

- Potential contributions: £3,459,857.23;
- Contributions received to date – £2,174,637.48;
- Outstanding contributions – £1, 285,219.75; this figure includes sites not developed or potentially not being developed between 2013 and 2018. These developments are still within the agreed timescales of the planning application and the supporting S.106 agreement, which total £739,163.17 (as of 5 September 2018). This leaves an outstanding figure of £546,056.58 for older S106 agreements.

This demonstrates a lack of monitoring of S.106s records in terms of the accuracy of the status of the S.106 applications and the true potential financial contribution that could be available for community benefits.

Underlying weakness – The information on the database is not accurate and up to date.

There were a number of S.106 agreements that had expired or been superseded, which have not been updated on I-plan which feeds into the S.106 database.

Due to the volume of planning applications received, it is impossible to allocate the role of updating the planning applications and S.106 agreements to one person as the individual Planning Officers have the knowledge of applications within their allocated wards. As the individual Planning Officers have not updated the information on the I-plan system, the information on the S.106 database is not always accurate, including the status and the value of financial contributions due to the Council.

Underlying weakness – Not all key officers involved in the process are aware of the S.106 agreements in place.

The Senior Finance and Assurance Officer currently does not receive notification of the S.106s and unilateral undertakings until the financial contributions have been received and allocated to the ledger cost code (P16). The key officers in the relevant sections should be

made aware of the S.106 agreement to enable monitoring of the S.106 agreements and the associated financial contributions.

The review identified that relevant officers within the Planning and Public Protection Service were not always aware of the S.106 agreements either. Therefore, key officers may not know to notify the Principal Support Officer of commencements or completions of sites where financial contributes may be due.

Root Cause 4 – There is a lack of continuity for the key steps in the S.106 process.

Underlying weakness – Other officers within the services are not aware of the process for carrying out S.106 agreements when the key officers are absent from work (Links with Root cause 1)

There are key officers in stand-alone posts for the different steps of the process. However, not all services have continuity arrangements in place during periods of absence. Examples are: –

- Principal Support Officer, Planning & Public Protection – there are written processes in place but other officers have not received the training or are not aware of the guidance.
- Places Team Leader, Legal Services – the written procedures for the drawing up of S.106 agreements are not accessible (see weakness below) and no other officers within the service are aware of the process.

Underlying weakness – The written procedures within Legal Services are inaccessible to other staff who may need to undertake actions for the S.106 process during unforeseen periods of absence.

The written procedures in place for drawing up S.106 are not accessible to all staff as they are saved on the Places Team Leaders' C-Drive.

Underlying weakness – Not all processes carried out within Legal Services have written procedures in place

There are no written procedures in place for drawing up unilateral undertakings to ensure the unilateral undertakings can be drawn up by another officer within the team.

Appendix 2 – Risk Matrix and Assurance Ratings

Likelihood		>70%	Almost Certain	A						
	Event likely to occur in most circumstances	30–70%	Likely	B						
	Event will possibly occur at some time	10–30%	Possible	C						
	Event unlikely and may occur at some time	1–10%	Unlikely	D						
	Event rare and may occur only in exceptional circumstances	<1%	Rare	E						
					5	4	3	2	1	
					Very Low	Low	Medium	High	Very High	
					Service Performance	Minor errors or disruption	Some disruption to activities/ customers	Disruption to core activities/ customers	Significant disruption to core activities. Key targets missed	Unable to delivery core activities. Strategic aims compromised
					Reputation	Trust recoverable with little effort or cost	Trust recoverable at modest cost with resource allocation within budgets	Trust recovery demands cost authorisation beyond existing budgets	Trust recoverable at considerable cost and management attention	Trust severely damaged and full recovery questionable and costly
					Financial Cost (£)	< £50k	£50k – £250k	£250k – £1m	£1 m – £5 m	> £5m
					Impact					

Levels of Assurance	Definition	Management Intervention
High Assurance	Risks and controls well managed and objectives being achieved.	Minimal action required, easily addressed by line management.
Medium Assurance	Minor weaknesses in management of risks and/or controls but no risk to achievement of objectives.	Management action required and containable at service level. Senior management and SLT may need to be kept informed.

Low Assurance	Significant weaknesses in management of risks and/or controls that put achievement of objectives at risk.	Management action required with intervention by SLT and / or CET.
No Assurance	Fundamental weaknesses in management of risks and/or controls that will lead to failure to achieve objectives.	Significant action required in a number of areas. Require immediate attention from SLT or CET.