

Decision Maker: Executive, Resources and Contract PDS

Date: 7 February 2019

Decision Type: Non-Urgent Executive Non-Key

Title: SECTION 106 AGREEMENTS: UPDATE

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Chief Officer: Nigel Davies, Executive Director of Environment & Community Services

Ward: Borough wide

1. Reason for report

This report provides an update on Section 106 Agreements.

2. **RECOMMENDATION(S)**

2.1 The Executive, Resources and Contract PDS are asked to note the report and the contents of the attached Appendices 1-5.

Impact on Vulnerable Adults and Children

1. Summary of Impact: The impact on Vulnerable Adults and Children is not expected to be significant.
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Corporate Policy

1. Policy Status: Existing Policy: IMP1 of the Unitary Development Plan
 2. BBB Priority: Children and Young People Quality Environment Safer Bromley Vibrant, Thriving Town Centres
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Financial

1. Cost of proposal: Estimated Cost Not Applicable
 2. Ongoing costs: Not Applicable
 3. Budget head/performance centre: S106 Deposits
 4. Total current budget for this head: £6.737m
 5. Source of funding: Unallocated S106 Deposits
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Personnel

1. Number of staff (current and additional): 2ftes
 2. If from existing staff resources, number of staff hours: from existing staff resources
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Legal

1. Legal Requirement: Statutory Requirement: S106 of the Town and Country Planning Act enables the Local Authority to make agreements with applicants to secure benefits relating to the granting of planning permission. This is reflected in Policy IMP1 of the Unitary Development Plan which relates to planning obligations.
 2. Call-in: Not Applicable: This report does not involve an executive decision
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Procurement

1. Summary of Procurement Implications:
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected): Section 106 agreements are made with the applicant for the benefit of the future occupants of new developments and also for the benefit of existing residents in the vicinity of a new development
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Ward Councillor Views

1. Have Ward Councillors been asked for comments? Not Applicable
2. Summary of Ward Councillors comments:

3. COMMENTARY

3.1 This is an update following the last report that was submitted to Executive and Resources PDS Committee in February 2018.

Background information

3.2 The detail of every S106 agreement is stored in at least one of Appendices 1, 2 and 3.

3.3 Appendix 1 records the 'negative/restrictive obligations' and include developments that are restricted by the S106 either by use, limitations on development within the curtilage or an obligation not to implement a previous permission.

3.4 Appendix 2 records the 'positive non-financial' contributions. These agreements form the larger proportion of planning obligations gained through Section 106. Mostly they relate to the provision of affordable housing units.

3.5 Appendix 3 records 'positive financial' contributions. There are 7 main service areas where monies are received through the use of S106 obligations: Local Economy, Community or Town Centre use, Highways/Traffic (including Transport for London), Education, Healthcare, Land (which records payments for landscaping), Affordable (which records payments in lieu of affordable housing) and Other (which records payments for any other contributions which do not fall into one of the above categories). The full Appendix 3 also shows that since March 2003 a wide variety of contributions have been negotiated through S106 agreements including funds for the education provision, travel plans, traffic calming/crossings, town centre improvement funding, public footpath maintenance, CCTV schemes and woodland management schemes. The Council uses the NHS London Healthy Urban Development Unit (HUDU) model, which gauges the impact that residential developments have on the capacity of health services. This formula produces a health contribution per unit.

3.6 Appendix 4 has been compiled from and updated using information from the Oracle accounting system and the Council's Public Register and Contribution record, which is held with the Public Register along with copies of all S106 legal agreements dating back to 1998.

3.7 Appendix 5 in the Part 2 agenda provides an update on the progress of financial contributions received to date that are outstanding together with target spend dates. The relevant Lead Officers listed in para 4.12 below have provided the information for the table.

3.8 If a S106 includes obligations from more than one category the details are recorded in each of the relevant appendices.

3.9 The full Appendices cover the period from March 2003 to date with details of over 356 sealed legal agreements. Copies of these documents are available to view in the Members Room.

3.10 The Committee may note that there can be considerable time delay between the issuing of a Section 106 grant of permission and subsequent implementation of development (up to 5 years) when the obligation becomes due. There is always a possibility that a development will not go ahead at all where a developer feels the development is no longer viable.

3.11 All S106 legal agreements are registered as a Land Charge against the property and are registered at the Land Registry with the title deeds of a property or piece of land.

Section 106 Agreements: Update

3.12 Appendices 1 to 3 of this report provide details of 6 new agreements since the last update in July 2018.

- 3.13 Appendix 1 shows a table with 3 'negative' S106 legal agreements.
- 3.14 Appendix 2 shows a table with 3 new 'positive non-financial' S106 legal agreements securing 72 additional affordable housing units.
- 3.15 The full Appendix 2 table shows that since March 2003 the Council sealed legal agreements that will potentially net 1693 new affordable housing units. This figure reflects the reduction referred to above.
- 3.16 As can be seen from the tables LBB will not necessarily receive all of these housing units unless they are built and handed over but the agreements are in place. In terms of revenue as a non-stockholding authority the Council does not gain direct asset value through Section 106 of the 1990 Town and Country Planning Act. All housing assets acquired are held by our partners RPs.
- 3.17 Appendix 3 shows 8 new agreements of specific 'positive financial gain to the Council.
- 3.18 Members should note that the detailed description of the agreement terms in Appendix 3 gives an indication of any time limitations on spend together with whether interest is accrued to the contributions.
- 3.19 Appendix 4 gives the details of the current balances the Council holds for S106 agreements, split by service area category mentioned in 3.5 above and by revenue/capital classification and the time limit for spending monies. The precise implications of the 'time limit' are set out in the individual planning agreements. The level of 'Commitments' in Appendix 4 has increased substantially in the last 24 months. This is mainly due to commitments to additional school and health projects, for example a grant agreement with the local NHS Clinical Commissioning Group. Members should note that Lead Officers who can provide further details have been identified for each of the service areas for which S106 contributions are received. They are:
- Highways, Road safety and Parking – Angus Culverwell
 - Local Economy – Kevin Munnelly
 - Landscaping – John Bosley
 - Housing – Sara Bowrey
 - Education – Rob Bollen
 - Healthcare/CCG – TBC
 - Community Facilities – Colin Brand
 - CCTV – Rob Vale

3.20 A complete set of Appendices 1, 2 and 3 has been left in the Members Room. 3.21 'Significant' new agreements are listed in the table below, with full details included in the appendices:-

Ref 411	North Orpington Pumping Station, East Drive Orpington	<ul style="list-style-type: none"> • Affordable Housing – 12 units Education - £231,680.22 • Health Contribution - £60,200 • Highways - £2,000
Ref 412 and 414	Land At Junction With South Eden Park Road And Bucknall Way Beckenham	<ul style="list-style-type: none"> • Carbon Offset to be agreed <p>Education and Health contributions in these agreements have been superseded by agreements under ref 413 and 415 below.</p>

Ref 413 and 415	Land At Junction With South Eden Park Road And Bucknall Way Beckenham	<ul style="list-style-type: none"> • Education - £462,811.72 • Health - £103,998
Ref 416	Maybrey Business Park Worsley Bridge Road London SE26 5AZ	<ul style="list-style-type: none"> • Affordable Units 51(40 affordable rent and 11 intermediate units) • Education £532,938.59 • Health £166,960 • Highways £4,000 • Carbon Offset £212,040 • Car Club • River Pool Walkway – retain, maintain and signage
Ref 417	Land adjacent to Bromley College, London Road, Bromley	<ul style="list-style-type: none"> • Affordable Units 9 (5 social rent/4 shared ownership) • Education £86,300.24 • Health £27,325.00 • Town Centre £19,500.00 towards creation of a pocket park on land at the junction of Tweedy Road and London Road • Carbon Offset £212,040
Ref 418	174-176 High Street, Orpington	<ul style="list-style-type: none"> • Controlled Parking Zone £3000 for pay and display bays or waiting restrictions or other highway works • £5400 for upgrading crossings at High Street and Sevenoaks Road, Orpington junction or other highway works • Car Club

4. IMPACT ON VULNERABLE ADULTS AND CHILDREN

- 4.1 S106 contributions are intended to address the impact of new development. They involve contributions to the general provision of Education and Health infrastructure and as such the impact on Vulnerable Adults and Children is not expected to be significant.

5. POLICY IMPLICATIONS

- 5.1 Development Plan policies play a crucial role in securing appropriate planning obligations. Policy IMP1 of the Unitary Development Plan 2006 (saved policies 2009) sets out the Council's approach to Section 106 agreements, and supports the objectives of 'Building A Better Bromley' including, Safe Bromley, Quality Environment, Regeneration, and Ensuring that all children and young people have opportunities to achieve their potential.
- 5.2 The sustainability of Vibrant Thriving Town Centres, and Regeneration of our Borough, are two of the Council's key priorities and Section 106 funding, where appropriate, can make a significant contribution in achieving two of the Council's main aims.
- 5.3 The Government sets out criteria for when planning obligations are sought in the National Planning Policy Framework (NPPF July 2018) paras 54-57, and full operational use guidance details are now found in the National Planning Practice Guidance (NPPG).

- 5.4 The London Plan (Policy 8.2: Planning Obligations) requires boroughs to give priority to affordable housing, public transport improvements, tackling climate change, learning and skills, health facilities, childcare provision and the provision of small shops and have clear local policies to these ends.
- 5.5 A Supplementary Planning Document (SPD) on Planning Obligations was adopted by the Council in December 2010. The SPD provides non-statutory guidance on the Council's general approach to planning obligations, and where possible the requirements, and mechanisms for infrastructure contributions.
- 5.6 The SPD also incorporates the implication of CIL regulations which came into force on 6th April 2010. CIL Regulation 122 places into law three statutory tests, explained in the Legal Implications section below.
- 5.7 The Council's is developing a local CIL alongside the Local Plan and producing a charging schedule with a CIL Regulation list of infrastructure projects taken from the Infrastructure Delivery Plan (IDP) Schedule (November 2016).
- 5.8 The Draft Local Plan was submitted for Examination in August 2017. The Draft Plan includes as part of the Appendices, the IDP Schedule Table of projects. The first of two public consultations for a Preliminary Draft Charging Schedule (PDCS) occurred in Spring 2018 and, following the gathering of further viability evidence, the second consultation of the Draft Charging Schedule (DCS) will occur in Spring 2019.
- 5.9 From 6th April 2015, Regulation 123 came into effect regarding scaling back of the 'pooling' mechanism for planning obligations; this will ensure that the use of s106 and CIL (regarding projects that will, when CIL is introduced in Bromley, appear on a published CIL 123 project list) do not overlap. In June 2015 an addendum to the SPD, to explain changes to unit threshold, and the pooling of s106's was approved by Executive.
- 5.10 As an interim arrangement, until a local CIL is adopted, when the Council will need to seek specific financial contributions from developers (e.g. '£x' for the provision of a new classroom at 'y' primary school or in the 'z' ward), rather than the historic/generic approach of seeking generic contributions (e.g. '£x for Education provision') and to comply with the regulations that only a maximum of five contributions are spent for such a specific item of infrastructure. The introduction of this part of Reg 123 does not affect s278 Highways obligations nor apply to affordable housing contributions. These interim arrangements are expected to last until a local CIL has been adopted.
- 5.11 In those cases where Affordable Housing Policy has not been met due to financial viability and subsequently there have been difficulties in the implementation of a specific project, the Council will consider whether the sum should be used instead for Affordable Housing.
- 5.12 Mayoral Community Infrastructure Levy (CIL) was introduced on 1st April 2012 (London Plan Policy 8.3). Bromley acts as a collecting authority on behalf of the Mayor. Mayoral CIL is collected on new development (as defined under regulations) at a rate of £35 per square metre in the Borough plus BCIS index rate for that year.

6. FINANCIAL IMPLICATIONS

6.1 The table below summarises the complete Appendix 3 (in the Member's room), giving a breakdown across the service areas of all S106 obligations agreed and details of whether the sums are confirmed (e.g. development has started) or provisional (S106 obligation agreed but development not started): -

Area	S106 Sums	S106 Sums	Total
	Confirmed	Provisional	
	£	£	£
Local Economy/Town Centre/Community Use	7,350,131	19,500	7,369,631
Highways/Traffic/Parking	1,549,943	13,500	1,563,443
Education	9,737,512	1,162,342	10,899,854
Healthcare/CCG	2,949,693	351,421	3,301,114
Landscape	288,077	0	288,077
Housing	14,105,699	274,186	14,379,885
Other	318,000	0	318,000
	36,299,055	1,820,949	38,120,004

6.2 Of the £36.3m confirmed sums, £27.870m has been received and £15.615m has been spent, leaving an unspent balance of £12.255m, excluding interest accrued of £21.74k.

6.3 The summarised financial position of the unspent balances across the service areas (detailed in Appendix 4) is as follows: -

Area	Unspent	Current	Latest
	Balance	Outstanding	Unallocated
	as at	Commitments /	Balance as
	31.12.18	Allocations	at 31.12.18
		£	£
Revenue			
Local Economy, Town Centre, Community Use	26,232	23,232	3,000
Highways/Traffic/Parking	267,472	67,673	199,799
Health/Primary Care Trust	1,677,901	315,280	1,362,621
Landscape	577	577	0
Other	353,300	300,000	53,300
Total Revenue Balance	2,325,482	706,762	1,618,720
Capital			
Housing	4,357,985	1,110,851	3,247,134
Education	3,227,919	1,357,031	1,870,888
Highways/Traffic/Parking	82,542	82,542	0
Local Economy, Town Centre, Community Use	2,282,327	2,282,327	0
Total Capital Balance	9,950,773	4,832,751	5,118,022
Total Section 106 Balance	12,276,255	5,539,513	6,736,742

6.4 The balance above includes interest that has accrued to seven of the S106 agreements within the revenue balances, totalling £3,400 and eight agreements within the capital balances, totalling £18,340.

6.5 On 2 April 2014, Executive agreed to set aside £192,500 from S106 monies in an earmarked reserve for the future maintenance of Cheyne Woods and Cyphers Gate open space, in accordance with the criteria set out in the specific agreements. There is also a balance of £143,221 held in an earmarked reserve for the management and maintenance of Langley Waterside Nature Reserve from the Glaxo site development. The agreed annual management plans are now in place for each of the 3 sites and the 2018/19 plan will be delivered by 31 March 2019. The table below provides Members with an update on the use of these monies: -

Earmarked Reserves	Current Balance	Actual Spend	Outstanding Commitments	Latest Balance
	£	£	£	£
Management of Cyphers Gate Open Space	134,680	0	6,324	128,356
Management of Cheyne Woods	18,326	0	4,000	14,326
Management of Langley Waterside Nature Reserve	143,221	0	6,000	137,221
	296,227	0	16,324	279,903

6.6 As mentioned above, Appendix 5 provides an update on the progress of financial contributions received to date together with target spend dates.

7. LEGAL IMPLICATIONS

7.1 The power of a Local Planning Authority to enter into a Planning Obligation with anyone having an interest in land in their area is contained in section 106 of the Town and Country Planning Act 1990 (as amended by Section 12 of the Planning and Compensation Act 1991). Planning Obligations made under section 106 comprise both obligations and unilateral undertakings. Government advice on the use of section 106 is contained within NPPG paras 1-23.

7.2 A Planning Obligation may only be created by a person with an interest in the relevant land, and may be created either by means of an agreement with the Local Planning Authority or by means of a unilateral undertaking. An Obligation may restrict development or the use of land, need specific works to take place or need a financial contribution towards a work or service of public benefit.

7.3 The main features of a Planning Obligation are:

- It applies to the land, so enforcement of it would be against the person who agreed it (normally the applicant) or their successor in title.
- It can also be enforced by a legal injunction. Where a person has defaulted on a requirement to carry out works on the land, the Local Planning Authority may also enter onto the land to enforce the terms of the Obligation and to claim back its reasonable costs arising from this action.
- It can contain a restriction on use of the land or a requirement for works to be undertaken thereon, that can be for an indefinite period, a stated period, or a period defined by reference to some future event, e.g. the completion of specified works.
- Contribution(s) may be expressed as being due:
 - (a) Singly, on a specified date, or one that can be derived from defined future event(s),
 - (b) In instalments, the amounts of which can be stated or derived from a formula, that are payable on specified dates or on dates based on future events, e.g. stages of the development, and

(c) Singly or in instalments, the amounts of which can be stated or derived from a formula, that are payable on specified date(s), or at defined times after, the completion of the development, e.g. to contribute to maintenance needs.

- 7.4 A section 106 Agreement can be varied with the agreement of the Local Planning Authority; there is also a formal application and appeals process in certain circumstances. Section 106 contributions may be time limited in the agreement or undertaking. Even where this is not the case then section 12(3) Planning and Compensation Act 1991 Section allows a person to apply for a planning obligation to be discharged after 5 years and if money has not been spent or there is not a clear intention to spend within a reasonable time a local authority may be made to refund in such cases.
- 7.5 The planning system works on the principle that planning permissions cannot be bought from or sold by a Local Planning Authority. Negotiations to gain benefits from development proposals must take place in a way which is seen to be fair and reasonable. By working in this way, Planning Obligations can improve the quality of development proposals which might otherwise have to be refused.
- 7.6 Planning Obligations must be related to the scale and nature of the development being proposed. CIL regulation 122 came into force under the Community Infrastructure Levy (CIL) Regulations in April 2010 and places into law three statutory tests which are based upon the original five policy tests in Circular 05/05. The three tests are;
- a) necessary to make development acceptable in planning terms;
 - b) directly related to the development; and
 - c) fairly and reasonably related in scale and kind to the development.
- 7.7 The Council acting as Local Planning Authority cannot allow unacceptable developments because of unnecessary or unrelated benefits that the applicant may be offering. Equally applicants cannot be expected to pay for facilities which are only needed to deal with existing shortfalls in the area.

Non-Applicable Sections:	Personnel, Procurement
Background Documents: (Access via Contact Officer)	Budget monitoring files within ES Impact of Large Developments – Progress Monitoring Report March 2006 Shared file listing all S106 agreements Executive & Resources PDS Committee 10 July 2014 Executive & Resources PDS Committee 19 Nov 2014 Executive & Resources PDS Committee 3 June 2015 Executive & Resources PDS Committee 16 March 2016 Executive & Resources PDS Committee 7 July 2016 Executive & Resources PDS Committee 4 Jan 2017 Executive & Resources PDS Committee 17 July 2017 Executive & Resources PDS Committee 1 Feb 2018 Supplementary Planning Document (SPD) on Planning Obligations: Addendum to Changes to Pooling S106 Contributions and S106 Threshold Changes. DC Committee 24 March 2015 and Executive 10 June 2015