Minutes

Overview and Scrutiny Committee

31st March 2010

Councillors	Present	Councillors	Present
J. Baugh	Apologies	A. M. Meyer	Apologies
G. Cohen	Yes	R. Ramage	Yes
M. Dunn	Yes	D. E. A. Rice	Apologies
Dr. R. L. Evans	Apologies	A. F. Shelton	Yes
M. Gage (Chairman)	Yes	Mrs. J. Smith	Yes
J. E. B. Gyford	Apologies	F. Swallow	Apologies

Officer Witnesses in attendance:

Sarah Burder, Section 106 Monitoring Officer (and Chair of the Section 106 Officers Group)
Darren Roberts, Development Control Area Manager
Tessa Lambert, Development Control Manager

Stuart Kay, Senior Planner was not able to attend in person, but submitted written answers to Questions 3, 8 and 9.

69. DECLARATIONS OF INTEREST

INFORMATION: There were no interests declared.

70. MINUTES

DECISION: That the minutes of the meeting of the Overview and Scrutiny Committee held on 10th March 2010 be approved as a correct record and signed by the Chairman.

71. QUESTION TIME

INFORMATION: There were no questions asked or statements made.

72. SCRUTINY HEARING WITH OFFICERS – STUDY INTO HOW CONTRIBUTIONS FROM SECTION 106 AGREEMENTS ARE MANAGED BY THE COUNCIL

Cllr. Gage welcomed Sarah Burder, Darren Roberts and Tessa Lambert to the meeting.

He referred to the Question Plan for the Scrutiny Hearing that had been previously circulated to Officers. This would form the basis of tonight's session so that Members could drill down on any underlying issues, and in addition Members would have the opportunity to ask supplementary questions.

For further information regarding these minutes, please contact Steve Bore, Scrutiny Manager on extension 2003 or e-mail stebo@braintree.gov.uk

The written answers provided by Stuart Kay to Questions 3, 8 and 9 were circulated and read by Members prior to the question and answer session commencing.

Sarah Burder made an opening statement summarising the key elements of Section 106 Agreements. She reminded the Committee that legal agreements which secure planning obligations make a scheme - which is otherwise unacceptable in planning terms - acceptable. The relevant guidance is contained in Government Circular 05/2005 and states that Section 106 Agreements must be:

1. relevant to planning;
2. necessary to make the proposed development acceptable in planning terms;
3. directly related to the proposed development;
4. fairly and reasonably related in scale and kind to the proposed development; and
5. reasonable in all other respects.

Points 2, 3 and 4 of the guidance are due to become law when the statutory instrument which deals with the Community Infrastructure Levy (CIL) is due to be passed on 6th April this year.

There are a number of specific things that a Section 106 Agreement can do as follows:-

* restrict the development or use of land in a specified way;
* require specific operations or activities to be carried out in, on or under the land;
* require the land to be used in a specific way;
* require a sum or sums of money to be paid to the local planning authority.

Sarah emphasised that the focus should not be on the benefit that a Section 106 Agreement can procure, but rather it is about what is necessary to mitigate the effects of the development and to make the proposal acceptable as a good quality development in land use planning terms.

The Chairman thanked Sarah for her opening statement, and then referred to the Question Plan and invited Officers to answer the questions.

A summary of the question and answer session is set out below.

Question 1 (i)

As regards the Section 106 agreements for the Maltings Lane development in Witham, would you provide the Committee with a brief paper setting out the history of the agreements. What were the original agreements, and what were the subsequent amendments and additions?

Answer by Darren Roberts

(i) Darren had previously circulated a briefing paper which had been attached to the Agenda and circulated to the Committee in advance of the meeting (see attached appendix).

Supplementary Question by Cllr. R. Ramage

Although not directly related to the Section 106 Agreement, the parking provision on the

Maltings lane development appears to be inadequate on the phase of the residential development that has been built, and in respect of the community amenities. Is there likely to be better parking provision on the next phase?

Answer by Tessa Lambert

As regards the adequacy of the parking provision, the County Council has now revised its parking standard. It did so after looking at a number of development schemes across the County including Maltings Lane. The County Council's previous standard was based on maximums - effectively saying to people you have got to reduce the number of cars. It was found that this policy was not working effectively and the County Council has therefore revised the policy to specify the minimum number of spaces required for new residential developments.

Answer by Darren Roberts

(Darren referred to a plan of the Maltings Lane development showing the housing, business park and community areas, and which parts had been developed to date).

The community areas will be built, but the timing is later than had been originally anticipated. We are constantly working with the developers on these aspects. Part of my role is to organise the Maltings Lane forum where we speak to a number of local residents regarding their concerns and trying to move things forward.

The impact of the recession has delayed the development, and a number of the Section106 trigger points will only be activated once the first house on a particular phase has been built.

We have to work within the terms of the Section 106 Agreement that has been agreed, although we do try to get the developers to provide facilities in advance of the trigger points if possible.

The new road that has now been built enables the developer to access the community areas. The planning application for the new school has been submitted, and hopefully that will be approved soon. There are trigger points that will happen shortly in relation to the transfer of the community centre land, the place of worship land and the health centre land.

Supplementary Question by Cllr. Mrs. J. Smith

What is the position concerning the number of dwellings on the site, and the various trigger points?

Answer by Darren Roberts

Originally, it was planned that there should be 850 houses on the whole site, but there was a second planning application which increased that number by an additional 218 houses.

None of the extra 218 have been built yet. They are located in the western third of the estate, and there are Section 106 trigger points relating to the Art contribution (prior to 50th dwelling) and Off Site Open Space (prior to 107th dwelling).

In respect of the original planning permission, there was a section 106 obligation to build the main spine road after the 300th dwelling had been completed.

As well as increasing the number of houses, the second application brought forward and better defined the community facilities within the development.

The second application took some two years to process due to the time it took to agree the Section 106 details with the developer and a consortium of landowners. There were a number of legal issues to resolve and we had to be satisfied that the Agreement was watertight and to our satisfaction.

In summary, there are two planning applications that have been approved – the first for the complete site, and the second for the western third of the site, and on both of them there are Section 106 Agreements.

Supplementary Question by Cllr. M. Dunn

As regards the two Section 106 Agreements, it appears that the second Agreement is more comprehensive and more watertight than the first. Is it fair to say that in the 1990s the Council was less 'aggressive' in its approach with regard to negotiating Section 106 Agreements, and that nowadays any Section 106 Agreement that the Council negotiates will be a lot more watertight?

Answer by Darren Roberts

I was not a planner in the 1990s, but certainly the current approach is to ensure that the Section 106 Agreements are far more watertight and that there are no loop-holes that could be exploited by developers. We are also asking for more contributions in Agreements, but are also ensuring that our requirements are reasonable, appropriate and related to the proposed development.

In the case of the Maltings Lane development, some items were always going to be added to the latter Agreement such as the Art Contribution. This element was seen as relating more to the community facilities and not related as much to the general housing side of the development.

For the first Section 106 Agreement there were some key items that were needed such as the road network, the amount of affordable housing, the locations of the public buildings and the timing of certain phases of the development, and contribution towards the community centre. These were enhanced in the context of negotiating the second Section 106 Agreement when the second planning application was submitted which focused mainly on the business park and the community aspects.

Answer by Tessa Lambert

The strength of your negotiating position in relation to Section 106 Agreements depends on the soundness of your policy basis. Obviously, in the context of the second Section 106 Agreement we had a very recently adopted Local Plan as our policy basis. The Local Plan may not have been so up to date when the first Section 106 Agreement was made.

Supplementary Question by Cllr. A. Shelton

I see that there are 845 houses built or under construction, and that a number of the original Section 106 Agreement obligations relate to infrastructure works. How many of those infrastructure works are completed?

Answer by Darren Roberts

All of the road infrastructure that relates to those houses has been constructed although not all of those roads have yet been adopted by Essex County Council the highway authority as they are not yet of an adoptable standard. Until they are adopted, Barretts, the developer remain responsible for maintenance.

The green open space provision around the housing, including the balancing pond, has been completed.

The play areas have now been constructed, but with hindsight that is something that should have been completed earlier.

The only things that have not been done relate to the other third of the development where the business park and the community facilities are to be located.

Supplementary Question by Cllr. A. Shelton

I also note that in the first Section 106 Agreement the sum of £3/4m was due to be spent on improvements on the A12, but this has been spent on other improvements in Witham. Could you explain the reason for this?

Answer by Darren Roberts

The original intention was that this money should be spent on the A12 specifically on the widening of the road between Hatfield Peverel and Witham. However, it was necessary for the Highways Agency to conduct a public enquiry into these proposals which caused a delay. It was not possible for the money to be spent within the required time as specified in the Section 106 Agreement. The money therefore reverted back to the Council to spend on improvements to the road network in Witham.

Supplementary Question by Cllr. A. Shelton

In respect of the £275,000 contribution to the Community Centre in the first Section 106 Agreement, has that facility been built?

Answer by Darren Roberts

The subsequent Section 106 Agreement provides for £690,000 for the Community Centre. This facility has not yet been built.

Supplementary Question by Cllr. A. Shelton

In the first Section 106 Agreement, there is provision of £50,000 for Town Centre/Cycleways – has this been spent?

Answer by Darren Roberts

Yes - there are some cycleways that have been built/improved between the site and the town centre, and other cycleways in Witham.

Question by Cllr. Mrs. J. Smith

In respect of enforcement of Section 106 Agreements, who monitors Section 106 Agreements to ensure that the various timescales etc are being complied with. If they are not, how do we enforce them?

Answer by Sarah Burder

Monitoring of Section 106 Agreements is part of my responsibilities as Section 106 Monitoring Officer, and I ensure that both the developer and the Council adhere to their respective obligations under the Agreement. I am located in Asset Management and report to the Head of Asset Management.

Generally, I have a good working relationship with the major developers if I need to chase progress or ascertain whether Section 106 obligations have been triggered.

As a last resort, the Council could obtain an injunction to prevent the developer from continuing with the development if that developer was not adhering to his obligations under the Section 106 Agreement.

Also, if the Section 106 obligation requires the developer to pay a sum of money to the Council and this was outstanding we could take proceedings to have the company wound up.

Supplementary Question by Cllr. M. Dunn

As far as the Maltings Lane development is concerned, are you confident that all the Section 106 obligations that are required to be made to date have been implemented?

Answer by Sarah Burder

Yes. I am aware of the key dates and maintain a close liaison with Darren Roberts as part of my monitoring responsibilities.

Supplementary Question by Cllr. Ramage

Has the economic climate had an impact on the progress of the development?

Answer by Sarah Burder

Yes. The developer has not progressed with the development as the recession has had an adverse impact on the housing market.

In some instances on other sites, where the developer was required to make a payment to the Council we have had to negotiate with the developer to allow an element of leeway. A number of developers have had some cash flow difficulties given the depressed state of the housing market.

Supplementary Question by Cllr. Ramage

There appears to be an excessive amount of lighting on the Maltings Lane development particularly in Gershwin Boulevard. Can you clarify who determines the lighting level and whether anything is being done about this?

Answer by Darren Roberts

Street lighting is a County Council responsibility, but I believe following discussions between the Developer and the County Council that some of the lighting is to be removed.

Supplementary Question by Cllr. Ramage

I ask this question on behalf of a member who is unable to be with us tonight.

In relation to the Section 106 obligation relating to the provision of a Health Centre, I understand that the contract has to be let by 31/5/10. What happens if the contract deadline is not met, and what are the implications for the Council in this eventuality as I understand the land reverts back to the Council.

Have we been pursuing the matter with the Primary Care Trust (PCT) and the developer with a view to ensuring that the contract is let in time?

Answer by Sarah Burder

With regard to whether the contract is let in time, that is dependent on negotiations between the developer and the PCT, and we do know that the parties are in communication.

As regards the transfer of the land, there is a requirement for the contract to be let by 31st May this year. In the event that it is not, the land does not revert to the Council. However, the consortium of landowners has the option of offering it to the Council, and therefore that land could be transferred to us. Negotiations could then continue with the PCT with a view to getting them to provide the Health Centre.

Answer by Darren Roberts

The land is allocated as a Health Centre in the master plan and that is what it should be unless there was a change to the planning application and the Section 106 Agreement. I understand that there have been meetings between the Developer and the PCT – it is an issue of what the PCT's aspirations are in terms of whether they can provide the building. The parties have been made aware of the deadline.

Question 1 (ii)

What lessons have been learnt as a result of the Section 106 Agreements on the Maltings lane development?

Answer by Darren Roberts

There are a number of lessons.

In terms of the phasing of the development, it would have been prudent if we had brought the phasing forward.

The location of the affordable housing has changed, and that has caused some problems with buyers who wanted to be aware of what was to be built next to them. This is more of a social than a planning issue, but in future the location needs to be decided early on with more certainty.

The play areas need to be provided at the same time as people are moving in, and not some four years later.

Finally, with major developments such as Maltings Lane the open space that currently comes to the Council to manage brings with it an associated financial burden in maintenance and management costs. In future, the open space that the Council receives through a Section 106 Agreement for major developments is going to be managed by the relevant developer's Management Company to the Council's satisfaction, but with the Company bearing the financial burden.

Supplementary Question by Cllr. R. Ramage

Would not the Land Charge Search in the house buying process reveal the location of the play area?

Answer by Darren Roberts

It would only be revealed if the area was specifically included in the Land Charge Search area.

For future Section 106 Agreements, the construction and phasing of the play areas would specifically require them to be provided at the same time as the houses are occupied.

Question 2

Are the limitations on the use of planning obligations sufficiently understood among the public, Town and Parish Councils, and Council Members?

Answer by Tessa Lambert

There is a general misconception about the limitations of what we can negotiate through Section 106 Agreements. Agreements should not be viewed as a betterment levy to achieve benefits to the community on a very ad-hoc basis. There are tests that the Council has to apply when seeking to negotiate Section 106 Agreements and those are the five tests that have been previously mentioned i.e that the matters agreed must be:-

* relevant to planning;
* necessary to make the proposed development acceptable in planning terms;
* directly related to the proposed development;
* fairly and reasonably related in scale and kind to the proposed development, and
* reasonable in all other respects.

The scope for negotiation, therefore, is limited. Negotiations also have to be underpinned by a sound policy basis. We cannot require contributions for which we have no supporting policy in the Local Plan or supplementary planning document.

In conducting negotiations, we have to ensure that we have a strong and sound case. If the developer declines to make that contribution and we refuse the application purely on that ground, we will have to ensure that we have a sufficient planning case to defend that refusal.

In terms of why there might be a limited understanding generally on the limits of Section

106 Agreements, it is not often that Parish Councils will come across a situation where there is a Section 106 Agreement being considered apart from occasional instances where there is an exception site involving an element of affordable housing. In the main, it is the town areas that experience the level of development that will actually justify the Section 106 Agreement.

In terms of District Councillor involvement, we would expect Planning Committee Members to have more of a working understanding. Also, Members on Local Committees should have some understanding as they will consider reports submitted, for instance, on cycle route schemes where they have been sought through Section 106 Agreements. The Local Committee will consider the detail of that scheme and how the financial contribution is going to be spent.

In respect of items like play equipment and public art, there would normally be some form of public consultation exercise. We would acknowledge that there have been some failings in the past on how those items have been handled, particularly with public art.

Generally, there are points at which Members and Parish Councillors may have had an involvement in Section 106 Agreements, but it is unreasonable to expect every Parish Councillor to have a working knowledge of what is clearly quite a complex subject.

Supplementary Question by Cllr. A. Shelton

In item 5 of the Information Pack the role and duties of Departmental Responsible Officers are listed and this includes liaising with Parish/Town Councils/Ward Members. As a Ward Member for 11 years I have yet to be consulted on any Section 106 Agreement. Although my Ward is not located in a town there has been a Section 106 Agreement in Pebmarsh involving social housing, but I was not consulted when I believe I should have been. Can you comment?

Answer by Sarah Burder

The reference in the Information Pack relates to consultation regarding sums of money that are to be paid to the Council for a specific purpose under a Section 106 agreement as opposed to the inclusion of affordable/social housing that has been specifically negotiated in accordance with the Council's supplementary planning guidance on affordable housing. I would expect the relevant departmental Responsible Officer to consult the Parish/Town Council and the local Member on Section 106 monies in relation to play areas, cycleways etc.

Supplementary Question by Cllr. M. Dunn

Over the past three years during Section 106 negotiations, have there been many instances where developers have refused to make contributions that we requested and has that resulted in the planning application in question being refused?

Answer by Tessa Lambert

I can recall a planning application in Notley Road, Braintree for special needs accommodation for older people and there was an expectation of a certain level of financial contribution in lieu of affordable housing within that development. We indicated that it should be at a set level which the applicants did not agree to, and the application was subsequently refused. The application went to appeal and was dismissed. In terms of

being in a position to refuse that application we would have had to involve valuers and surveyors to support our case and to provide evidence that the financial contribution should be set at that level. There would have been a whole exercise in assessing the viability of the scheme with or without that contribution, because the developer's argument would have been that the contribution was set too high and therefore the scheme was not viable. There was quite a detailed argument about land valuations.

In other situations there will be cases where we adopt a certain negotiating position and that may be challenged, and as a consequence we may have to concede certain elements.

The proposed CIL has a lot of advantages for both the Council and the development industry. It will identify very clearly a charge that will be related to a specific element of the development e.g. per house, per sq. metre, of commercial development etc. Developers will have more certainty of what to include in their costings. The charging level set by the Council will have to be supported by evidence that sets out what infrastructure the proposed new development needs, and what that will cost and how it will be applied to that new development on a pro-rata basis. It is a much more logical system to follow and will introduce a greater level of consistency.

In respect of Section 106 Agreements, our negotiating position depends on the soundness of our plan and the evidence that we have to support the contributions that we are seeking. There have been examples of applications that have gone to appeal and we have been in situations where the Highway Authority, for example, has requested a certain level of contribution to fund pedestrian crossings, improvements to bus stop facilities. We have found ourselves in some difficulties at the appeal stage when the Planning Inspector has required evidence that this infrastructure is needed and that the costs in terms of the financial contribution are justified. In those circumstances, we have to be very firm with the County Council to ensure that they can show definitively that the development justifies that extra infrastructure.

Over the years, the development industry is getting sharper and consequently we have to be certain that we have a sound case. The level of costs awarded to a developer who wins an appeal has also been getting higher.

We therefore enter into negotiations before the application is made and explain to the developer fairly and clearly what the expectations are likely to be.

The areas that are more difficult are the smaller scale developments where we may get a Section 106 request from County Highways for a highways contribution, and we are not best placed to defend the need for that highway provision. Unfortunately, the Highways Authority does not always appreciate the need for a sound case when you are seeking a contribution from the developer.

Supplementary question by Cllr. M. Dunn

Is the Council hamstrung in some of its negotiations by the lack of policy, and are we as aggressive as we need to be in our negotiations with developers?

Answer by Tessa Lambert

We are assertive in our negotiations with developers. Negotiating skills are an integral part of a Planning Officer's day to day work. Where you have an adopted Local Plan it is a case of saying this is the policy and this is the expectation.

In the case of our open spaces strategy which becomes effective shortly, we can provide developers with a document which gives a clearly calculated formula for asking for a contribution of 'x' amount per dwelling to deliver for the authority as a whole the plans that we have for provision of new open space, provision of new allotments etc. It is all fully explained and that is your evidence base.

If the developer does not accept the open space argument we will refuse the application, and if there is an appeal the strategy will be put to the test.

Supplementary question by Cllr. M. Gage

If we were negotiating a major extension of development (say 150 to 200 houses) on an area that is not currently developed and we are seeking funds from that new development, but we were going to put the money towards regenerating the facilities for extending schools, enhancing a health centre, would we be in a much stronger situation if the policy that you laid out in the development plan actually listed those items?

Answer by Tessa Lambert

Yes – you would be in a much stronger position if the policy basis was strong.

Question 3

Would you update the Committee on the current position regarding the implementation of the Community Infrastructure Levy (CIL) and the likely timescales involved?

Written answer by Stuart Kay

Draft Regulations have been put before Parliament; they are due to come into force on 6th April, but parliamentary approval is still awaited. The other key date is 6th April 2014, after which the use of S106 planning obligations for pooled contributions towards items that could be funded by the CIL will cease. By 2014, if the Council intends to use pooled contributions to fund infrastructure it will have to have an adopted CIL Charging Schedule in place.

The Community Infrastructure Levy

The Government is in the process of introducing a Community Infrastructure Levy, to be raised on new residential and commercial development to make a financial contribution to the infrastructure needed to support future levels of development within each local authority area. Draft Regulations have been put before Parliament to become effective on 6th April or soon after parliamentary approval.

Currently contributions in cash or kind towards community infrastructure needs are negotiated as part of a Section 106 Agreement. Typically contributions towards schools, highways, community facilities, open space and other facilities are only sought from larger residential proposals. An increasing number of local authorities are setting out local tariffs to cover major infrastructure requirements, although application of the tariff is subject to negotiation and agreement through the S106 process.

The CIL definition of infrastructure includes road and transport facilities, flood defence, education and medical facilities, sporting and recreation facilities, open space and

affordable housing. It is not a finite list, and other types of infrastructure such as district heating schemes, police stations and other community safety facilities could also be funded through CIL. For the time being affordable housing will continue to be funded through S106 agreements and not the CIL. This is to enable affordable housing to be delivered on site to form mixed communities

Setting the CIL Charge

CIL will introduce a structured administrative process, with "charging authorities" and "collecting authorities". Most local authorities will adopt both roles. Under the CIL process, the Council will need to broadly identify:
the cost of infrastructure required to support development,
when development will come forward
what infrastructure is needed to support that development
what it will cost
what other funding sources are available to meet that cost, and
how much of that cost should be met by CIL.

The Council will have to decide which rate of CIL best meets the infrastructure costs, having regard to its effect on viability of development and the apportionment of CIL between different types of development and different parts of the District may be used to give flexibility to deal with varying land values, say between urban and rural areas.

Under the S106 process, charges are set out in supplementary planning documents which are subject to consultation but not to external examination. Under CIL, following consultation with local communities and stakeholders on their proposed CIL rates, the Council must publish a draft "charging schedule" which will set out the rate per square metre net floor space and which will be examined in public by an independent person (the CIL Examination). The examiner will have regard to costs, other funding sources, impact on viability of development and compliance with legislation; the examiner's recommendations will be binding on the Council. The Council would not need to adopt the final schedule presented by the examiner, but could submit a revised schedule to a further examination. A schedule cannot be adopted if the examiner rejects it. The Charging Schedule has an unlimited 'shelf life', but it must be kept under review.

The CIL Charge

CIL will be applied to most buildings that people normally use - it will not be levied on buildings into which people do not normally or only intermittently go. There is no liability on structures or changes of use not involving an increase in floors pace. The charge becomes a local land charge and is enforceable by the Council.

There will be a 100 sq m threshold on non-residential development. Exemptions and relief from liability to pay CIL are set out - most development allowed under the General Permitted Development Order, charitable development by charitable institutions and the social housing element of a development will be exempt. The Council can choose to consider giving relief where, exceptionally, the imposition of CIL will make a development unviable.

CIL will be payable within 60 days of commencement, and an instalments option will be available where the charge is £10,000 or more. There are provisions for charging authorities to accept one or more transfers of land as a payment 'in kind' for the whole or part of a CIL charge on charges of £50,000 or more. Up to 5% of CIL receipts can be used

to fund the implementation and running costs of CIL. The Charging authority must prepare an annual financial report. The Regulations provide for a detailed enforcement package.

Relationship Between CIL and S106 Obligations

The Regulations place limitations on the use of planning obligations. They enshrine in law three of the Circular 5/05 policy tests - the obligation must be:
- necessary to make the development acceptable in planning terms
- directly related to the development, and
- fairly and reasonably related in scale and kind to the development.

Section 106 obligations will be scaled back to dealing with site specific issues and affordable housing; they will not be able to provide for the funding or provision of relevant infrastructure and thereby secure double charging.

Transition arrangements

The use of planning obligations for pooled contributions towards items that could be funded by CIL will cease after a transitional period of 4 years. However, where an item of infrastructure is not locally intended to be funded by CIL, pooled planning obligation contributions may be sought from no more than 5 developments. Clearly local authorities wishing to introduce or continue with a tariff-based charging system will need to adopt CIL by April 2014.

The main opposition party has pledged to scrap CIL and instead introduce a new "single unified local tariff", with locally set rates published in local plans and a percentage of receipts raised by the tariff passed down to the community in which development takes place.

Supplementary Question by Cllr. G. Cohen

My understanding is that whatever Government wins power at the next election, Section 106 Agreements will be dead. Is that correct?

Answer by Tessa Lambert

Depending on the outcome of the election, we may be looking at either the progression of the CIL or something else.

In terms of Section 106 Agreements, if we are looking at the CIL for the future it is still the intention that Section 106 Agreements are maintained for provision of affordable housing so that would not form part of a CIL. It would need to be acquired through a planning obligation as it is now.

Section 106 Agreements will not be dead, but they might be reduced in scope and in respect of the contributions that they currently cover.

Supplementary Question by Cllr. M. Dunn

Do you have any view concerning the "single unified local tariff" proposed by one of the main opposition parties, in place of the CIL?

Answer by Tessa Lambert

I have not looked at the detail, but my understanding is that the policy is not formulated to

the level of detail that gives you enough information to form a conclusion. We would be governed by Government Guidance in the way that any "single unified local tariff" was implemented.

Question 4

As regards the reporting arrangements for the Section 106 Responsible Officers Group, are there any monitoring reports produced concerning Section 106 Agreement spends which are submitted to Management Board, Cabinet or the Planning Committee?

Answer by Sarah Burder

No. There are currently no formal reporting arrangements for the Responsible Officers Group. The Group provides a forum for discussion of general matters and internal procedures relating to Section 106 Agreements. I am more than happy to prepare formal reports and would welcome any guidance on the type of information that Members would like to see reported, and what those reporting arrangements should be.

Supplementary Question by Cllr. M. Gage

What do you see as the simplest way to inform Members. Would it be in the form of a spreadsheet similar to what was included in the Information Pack, for publication on the Council's web site?

(This leads to Question 6 which is taken below).

Question 6

We note that approved and draft Section 106 agreements are available on the Council's website linked to the relevant planning application. However, in the interests of providing easier access and greater transparency is it feasible to include on the website a central Section 106 agreement/data base so that Members, Parish/Town Councils, developers and members of the public can see, for each agreement, what site the agreement refers to, what the contributions were for and what progress has been made on spending those contributions?

Answer by Sarah Burder

I am happy that the bespoke database system that I use for monitoring Section 106 Agreements could be adapted and publicised on the Council's web site in spreadsheet form so that it could be viewed by both Members and the public, and updated quarterly. If members had any concerns on individual Section 106 Agreements, they are welcome to contact me direct for information and advice.

(Members commented that they felt monitoring reports should be submitted to the relevant Local Committee)

Supplementary Question by Cllr. G. Cohen

Would it be possible to include the status of each Agreement, and a journal of significant events?

Answer by Sarah Burder

It is possible. It's slightly easier in relation to financial elements and a spreadsheet would cover those aspects, but you have to be wary about raising expectations as Section 106 contributions will not be triggered until the development actually commences, or until the development reaches a certain stage.

Question 5

As regards the balances of those older Section 106 Agreements which are less specific in terms of outcome and location compared with more recent agreements, have the relevant approval processes been clarified in respect of the spending of those balances and, if so, can you update the Committee on what they are?

Answer by Sarah Burder

There are just a few older balances remaining. There is always a need to refer to the specific wording of the Agreements to ensure that this is complied with. All Agreements may be different in that they have been individually negotiated with the developer.

However, there is little guidance on what approval processes should be followed to actually utilise the Section 106 funds. Where there is an element of ambiguity or a decision needs to be made the matter is referred to the relevant Local Committee.

I would welcome any further guidance the Committee may wish to make on this point.

Supplementary question by Cllr. A. Shelton

The spreadsheet set out on page 46 of the Information Pack includes the Section 106 Agreement by Barrett Homes Ltd on land at Nether Court, Halstead and includes a note to use the Section 106 contribution within 10 years. Is it still in time?

Answer by Sarah Burder

There are no actual repayment provisions within this Section 106 Agreement – so the balance of just over £5000 is still available for use. I put the note on the schedule in the interests of good administration as obviously we still need to spend the monies within a reasonable timescale.

Question 7

Two of the consultation responses received from Parish/Town Councils (Black Notley and Sible Hedingham) request consultation on any draft Section 106 Agreements relating to developments in their respective Parishes.

Would you let us have your comments as to whether it is feasible/practicable to consult Parish/Town Councils on draft Agreements?

Answer by Tessa Lambert

Where we have a planning application that is received with a draft Section 106 Agreement we will notify the Parish Council as part of the standard consultation procedures and the Parish Council will have access to all the information.

For some larger developments, we will also advise the applicants to undertake some pre-application consultation including consultation with the local Parish Council and other interested groups. Some of the pre-application consultation will mean that Parish Councils may have an opportunity to look at the heads of terms of the draft legal agreement. It is quite proper at that stage for the Parish Council to indicate to us any comments that they may have on the draft agreement, and we would take account of those comments in the whole planning application process. We would explain to the Parish Council why we were not able to agree with their comments if that was the case.

It is difficult to do much more than that because once the planning application is received and it is accompanied by a draft Section 106 Agreement it tends not to change too much before you get to the point where a decision is made. However, where you receive a planning application and the need for a Section 106 Agreement emerges in the life of the application we may only have 3 to 4 weeks to make a decision on the application. The timescale gives us some practical difficulty in involving the wider community.

As a general principle, it is not possible for the Parish Council to be a party to the negotiation of a Section 106 Agreement as the process is not designed for that, but Parish and Town Councils do have an input as a statutory consultee to the planning application process. It is not feasible for us to involve Parish Council representatives in discussions with developers, because most of that discussion should have taken place anyway, and we are really quite constrained on the scope that we have on these matters. For a Parish Council to make a suggestion that we should achieve 'x', there has to be a policy basis for showing that the development justifies 'x'.

Question 8

Does the Council maintain a central record/register of items highlighted by Parish/Town Councils for community/infrastructure improvements so that they can be identified as priorities and taken into account when negotiating any Section 106 Agreements in that respective Parish Council's area (for example, see items highlighted by Terling and Fairstead Parish Council in its submission)?

Written answer by Stuart Kay

The Council does not maintain a central record/register of community/infrastructure improvements.

Currently Parish/Town Councils are consulted on all planning applications and have the opportunity to identify what community/ infrastructure improvements they consider to be required. These may be taken into consideration during negotiations on Section 106 Agreements.

Under the CIL the Council will consult with infrastructure providers and draw up a list of infrastructure projects or types of infrastructure on which it intends to be wholly or partly funded by CIL. This will provide a central record of a wide range of community and other infrastructure requirements as a basis for compiling the Charging Schedule.

Community or infrastructure improvements highlighted by parish and town councils must be deemed necessary to support the development proposed. As with S106 Agreements, CIL is about making proposed development acceptable - therefore any local infrastructure proposal must be justified by the development it is required to support and cannot address current deficiencies.

Question 9

As regards the point raised by Feering Parish Council concerning the cumulative effect of small developments on current infrastructures where no Section 106 Agreements are appropriate, is this particular issue one of the items that could be potentially addressed by the proposed CIL?

Written answer by Stuart Kay

One of the justifications for introducing the CIL is that at present a significant proportion of development is not contributing to the costs of providing infrastructure because of thresholds set on Section 106 contributions sought by most local authorities. The CIL will be chargeable for each new dwelling, and for commercial development the threshold will be just 100 sq m. So yes, CIL is designed to ensure that the cumulative effects of small developments are taken into account in the funding of infrastructure. The Council's Open Space Supplementary Planning Document, which comes into force on 1st April, includes provision for a tariff to be applied to individual new dwellings, to be secured through S106 Agreements.

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Officers then commented briefly on those issues/requests/suggestions raised by Parish/Town Councils during the consultation process for this study which had not already been covered by Officers in their written submissions set out in the Information Pack.

Feering Parish Council

(ii) Can section 106 monies that cannot be used for the designated purpose be channelled back to the Parish Council for local use?

Answer by Sarah Burder

No. The monies have to be used for the purpose specified in the Section 106 Agreement. However, in my four years in this post I have never had occasion to return money to a developer because we are unable to spend it for the specified purpose.

(iii) can section 106 monies relating to development in one District be used to improve the infrastructure in an adjoining District which is affected by the impact of the development?

Answer by Sarah Burder

In theory, you can do this, but the circumstances would be quite rare. The local planning authority would be the enforcing party so any financial contribution could only be paid to the local planning authority in question. You would have to have a separate arrangement to ensure that the contribution was correctly applied for the purpose that it was intended for.

Supplementary Question by Cllr. R. Ramage

Did that kind of arrangement apply at the River View development at Witham with Maldon District Council?

Answer by Darren Roberts

I do not believe that this development was subject to a Section 106 Agreement, but was the result of partnership working with Maldon District Council in connection with the extra care housing provided at that site which was made a condition of the planning permission.

Rivenhall Parish Council

Raised the issue that it does not gain any benefit from developments in the Parish particularly the extension to the Eastways Industrial Estate.

Answer by Darren Roberts

At Eastways there are four areas of new development, and the extension to Eastways is in Rivenhall Parish, but it is one long road which eventually finishes at the Colchester Road junction with Eastways in Witham Town. On each of the areas of new development, the County Council requested a sum of £10,000 to improve the Colchester Road junction to make better for HGVs and to improve highway safety. This case illustrates that Section 106 Agreements need to be reasonable and proportional to the development, and to make what would otherwise be an unacceptable development into an acceptable one.

Rivenhall Parish Council had wanted improvements to a cycle lane on the A12, but you could not really link the need for that to the new development. Consequently, we could not justify asking for the developer for a contribution. We did get some money for a cycleway that eventually links up to Rickstones School which is in Rivenhall Parish, so the Parish Council do get some benefit.

Sible Hedingham Parish Council

(i) Can the Parish Council be invited to be a party to appropriate Section 106 Agreements?

(Answer already covered by Tessa Lambert in her answer to Question 7)

(iii) Can the Parish Council be given a copy of the final Section 106 Agreement as a matter of course?

Answer by Sarah Burder

All completed agreements are put on the Council's web site and can be accessed by Parish Councils. The Parish Council is also notified when the planning application has been approved.

(v) Can Section 106 monies be allocated for the…… provision of allotments?

Allotments are covered in the Council's open space strategy, so the answer is yes we can require a Section 106 Agreement to make a contribution to allotments.

(vii) (a) What is BDC policy concerning Section 106 monies arising from the construction of wind turbines? (b) approximately what financial contribution can be expected for each wind turbine and what can this be allocated to?

Answer by Darren Roberts/Tessa Lambert

There is no specific policy regarding wind turbines and it would have to be considered on a case by case basis.

If it is a completely unacceptable development it would simply be refused.

If it was an acceptable development it may not possibly need a Section 106 Agreement, and may be approved subject to conditions. There may be circumstances where a sum of money may be required (for instance to mitigate noise), but you would have to consider carefully how Section 106 monies would be spent to benefit the community.

In this District, we have had only applications for 15m high wind turbines and not the very large and tall type of turbine that have been built in Norfolk.

Again, the five tests laid out in the Government's guidance would apply to any Section 106 Agreement.

If the impact of the wind turbine needs mitigating and that mitigation cannot be got through planning conditions then we may seek a Section 106 Agreement.

It would be difficult to put a figure on the financial contribution that would be included in a Section 106 Agreement for each wind turbine.

Witham Town Council

The Town Council highlights that it would welcome the opportunity for decisions on how Section 106 monies are spent to be devolved to the Town Council.

Answer by Tessa Lambert

We do realise that there are things we could do better in terms of involving Town and Parish Councils in decisions about how monies are spent, but that is not the same thing as devolving responsibility to them.

If, for example, we had a public art financial contribution we would need to seek advice on what would be most appropriate. We do not have an in-house source of advice and would therefore look to the local community through local interest groups, the Parish/Town Council and other routes for ideas as to what might be the best way of using this financial contribution to provide some public art. We are probably not getting that right at the moment.

The areas where the Parish Councils would have that sort of role are quite limited, because, for instance, if we already have a cycle scheme that has been achieved through a Section 106 contribution that would go through the relevant Local Committee anyway.

In summing up, the Chairman indicated that running through the Committee's enquiries there appeared to be a perception amongst members and Parish/Town Councils that Officers are constructing Section 106 Agreements with developers without sufficient consultation. It was also notable from the answer given to Question 8 that the Council does not maintain a central record/register of items highlighted by Parish/Town Councils for community/infrastructure improvements (including improving existing infrastructure) that could be taken into account when negotiating Section 106 Agreements.

Tessa Lambert indicated that the Council's open spaces strategy had tried to formulate a programme of works that will deliver new open space and associated infrastructure, and

these are then costed and worked back to a figure that will apply to each development. Possibly for the future a single proposed dwelling would need to make a Section 106 type contribution towards the provision of open space for the District as a whole. This could build up a fund and we could then look to the community to identify where the greatest need is in terms of open space provision, and make the process more transparent in that particular area.

In terms of an education contribution that a housing scheme would require, that is set out by the County Council based on a set formula.

Tessa emphasised that the purpose of the Section 106 Agreement is not to directly deal with any deficiencies in infrastructure that a Parish/Town might have, but that whatever the Agreement delivers has to be directly related to the development.

The Village Plan and Design Statement routes may give a focus for identifying the need for infrastructure improvements within a Parish/Town, and that would also provide the beginning of an evidence base.

The Chairman commented that the session had been particularly useful, and that Members would take into account the information that they had received this evening when determining what recommendations to make to Cabinet.

In closing the session, the Chairman thanked the Officers for attending the hearing and for giving full and frank answers to the Committee's questions.

The meeting closed at 9.15pm

M. Gage
Chairman

Appendix

Question 1 - Brief History of Section 106 Agreements – Malting Lane, Witham

Maltings Lane Progression and Section 106 requirements

Original Permission

Submitted 1991
Development Brief 1996
Approved 2000

Section 106 obligations:

Affordable houses – 4 acres of land + 6 acres at 50% market value
Community Centre - £275,000 contribution
Strategic play Area
Open Space – 28 acres; commuted payment for maintenance
Town Centre/ Cycleways - £50,000
Land for Church, School, Health Centre
Construction Code of Practice
Highways – Timing of Spine Road (300 dwellings)
A12 Contribution - £750,000 (subsequently spent on other improvements in Witham)
Not less than 800 and not more than 850 dwellings

Subsequent applications for Housing – 845 built or under construction

Outline Extension (06/1143/OUT) – Additional 218 houses, community area, business park, playing fields, school, etc
Submitted 2006
Approved November 2008

Section 106 obligations:

30% affordable
Highway works to be constructed including improvements to Spinks Lane crossing, pedestrian facilities on Hatfield Road, new bus stops (already provided)
Travel and Marketing Pack to be provided to occupiers
Education Contribution
Art Contribution - £100,000 or work of art – prior to 50th dwelling
Off site open space - £40,000 prior to 107th dwelling
Open Space to be transferred to management company
Community Hall – land transferred – payment of £690,000 to council- prior to 1st dwelling
Place of Worship Site – 0.2 hectares- must be erected in 10 years (i.e by 2019)
Health Centre – evidence of contract by May 2010
Playing Fields – 2ha or more – football pitches, tennis courts, changing facilities. Layout after 101st dwelling
Public Transport Contribution - £45,000 to the Council – prior to 1st dwelling
Traffic Management Contribution - £41,000 – prior to 1st dwelling
Cycle Way Contribution - £50,000 to County Council – prior to 1st dwelling
Bus Service Improvements – Commencement of a bus service – prior to 1st dwelling
Retail Units to be provided – prior to 50th dwelling, comprising a 1115sqm food store (roughly half the size of Tesco, Witham) and 3 x further retail units of 140 sq m

Business Park – application for at least one hectare of the business park to be made within 12 months of the commencement of development

Subsequent application for School – pending consideration
Application for road infrastructure approved in 2009 and this has now been built
No applications for housing or other built development to date.

Note most dates ‘kick in’ when building of residential units start. Because no applications have been received there is uncertainty over when this will be, regular contact is made with the representatives of the landowners.

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Darren Roberts, Development Control Area Manager, Development Services, Development Control