

# Minutes

## Performance Management Scrutiny Committee 27th July 2022



### Present

| Councillors         | Present   | Councillors               | Present   |
|---------------------|-----------|---------------------------|-----------|
| J Coleridge         | Yes       | S Rehman                  | Apologies |
| G Courtauld         | Yes       | B Rose                    | Yes       |
| Mrs C Dervish       | Apologies | P Schwier (Vice-Chairman) | Yes       |
| T Everard           | Apologies | N Unsworth                | Apologies |
| M Radley (Chairman) | Yes       |                           |           |

Councillor Mrs G Spray (Cabinet Member for Planning and Infrastructure), Mrs S Burder (Legal Executive – Property and Planning) and Mr N Jones (Lead Principal Planner (Section 106 and Infrastructure)) attended the meeting to observe. They did not take part in the meeting.

### 6 **DECLARATIONS OF INTEREST**

**INFORMATION:** There were no interests declared.

### 7 **MINUTES**

**DECISION:** The Minutes of the meeting of the Performance Management Scrutiny Committee held on 18th May 2022 were approved as a correct record and signed by the Chairman.

### 8 **PUBLIC QUESTION TIME**

**INFORMATION:** There were no questions asked, or statements made.

### 9 **SCRUTINY REVIEW INTO 'SECTION 106 – OPEN SPACES AND NHS EXPENDITURE' – FIRST EVIDENCE GATHERING SESSION**

**INFORMATION:** Members of the Performance Management Scrutiny Committee were reminded that at their last meeting they had agreed the Terms of Reference and anticipated Work Programme for 2022/23 for the Committee's review of 'Section 106 – Open Spaces and NHS Expenditure.' The Chairman of the Committee had submitted the topic for potential review in order to establish a clearer understanding of the Council's performance in respect of Section 106 Agreements and the reasons behind any delays in securing contributions. The Committee had also considered a supplementary report prepared by the Chairman which provided background information about the topic and included some performance data and initial observations. The report referred to the

Infrastructure Funding Statements (IFS) which the Council had published for 2019/20 and 2020/21 in respect of contributions from Section 106 Agreements. Whilst the IFS documents indicated that a number of excellent projects had been implemented, it appeared that the Council held circa £6 million in unspent contributions. The Chairman had sought further information from Council Officers regarding expenditure and a breakdown of the funds being held and an analysis of this data was set out in his report.

The Chairman reminded Members of the Committee that, due to the District Council Elections to be held in May 2023, there was limited time in which to complete this review and that recommendations would be submitted to Cabinet and Council in March 2023. In the circumstances, a focussed review would be required. It might also be necessary to call an additional meeting of the Committee in October 2022, or November 2022.

The Chairman was pleased to welcome to the meeting Mr Dominic Collins (Corporate Director (Growth) - Braintree District Council), Ms Emma Goodings (Head of Planning and Economic Growth - Braintree District Council) and Ms Kerry Harding, (Director of Estates – NHS Mid and South Essex Integrated Care System) (previously known as NHS Clinical Commissioning Groups in Mid and South Essex). Mr Collins, Ms Goodings and Ms Harding gave presentations to Members as part of the Committee's first evidence gathering session into 'Section 106 – Open Spaces and NHS Expenditure'. It was intended that the presentations should provide Members with a general overview of Section 106 planning obligations and, in particular, how NHS contributions were calculated and utilised. In order to assist Members of the Committee with their understanding of Section 106 obligations, a reading list with links to on-line resources had been included within the Agenda.

Mr Collins and Ms Goodings (Braintree District Council) gave their presentation in two parts – 'Part 1 - Policy Basis' and 'Part 2 – Local Approach'.

The main points were as follows:-

#### Part 1 - Policy Basis

Planning obligations were legal obligations entered into via a planning agreement under Section 106 of the Town and Country Planning Act 1990 in order to mitigate the impacts of a development proposal. Planning obligations related to land and they were legally binding and enforceable. Agreements could be made jointly between a person having an interest in land and the Local Planning Authority; or as a unilateral undertaking.

Section 106 planning obligations could restrict the development, or use of land in a specified way; require specified operations or activities to be carried out in, on, under or over land; require land to be used in a specified way; or require a sum(s) to be paid to an Authority on a specified date(s), or periodically.

A planning obligation could be unconditional, or subject to conditions; any restriction or requirement imposed could be indefinite, or for a specified period; and the payment of any sum(s) could be for a specified amount and for an indefinite, or specified period of time.

Limits relating to planning obligations were set out in Section 122 of the Community Infrastructure Levy (CIL) Regulations 2010. A planning obligation could constitute a reason for granting planning permission for a development only if it was necessary to

make the development acceptable in planning terms; if it related to the development directly; and it related fairly and reasonably to the development in scale and kind.

The National Planning Policy Framework stated that Local Planning Authorities should consider whether development, which would otherwise be unacceptable, could be made acceptable by the use of conditions, or planning obligations. However, planning obligations should only be used where it was not possible to address unacceptable impacts through a planning condition. Furthermore, where up-to-date policies specified the contributions which would be expected from a development, any planning application which complied with these should be assumed to be viable.

The Government had published detailed guidance on planning obligations <https://www.gov.uk/guidance/planning-obligations>. This included guidance on evidence and policy; viability and negotiation/changing agreements; timeframes; restrictions to seeking obligations; vacant building credit; and monitoring and reporting, including Infrastructure Funding Statements.

In summary, planning obligations should only be used to make a development acceptable where it would not be otherwise; obligations were subject to negotiation based on policy and evidence; contributions secured via a Section 106 Agreement had to be spent in line with the Agreement and on schemes associated with the development to which they related; contributions relating to open spaces had to be used for publicly accessible space, not private space; and contributions could not be used to remedy existing issues, or for the general maintenance of existing facilities.

The Levelling Up and Regeneration Bill proposed that a new tariff should be established, which would be set locally. It was anticipated that this would operate in a similar way to the CIL, but further information was required in respect of how the tariff would be set; when contributions would be collected; and how affordable housing and other on-site requirements would be provided. Re-assurance was also required that contributions collected would be at least as much as those currently collected via Section 106 Agreements.

## Part 2 – Local Approach

The process for securing contributions via Section 106 Agreements was based on negotiations between a developer and Braintree District Council's Planning Case Officer. Contributions sought on behalf of others, such as Essex County Council and the NHS, were based on responses submitted following consultation on planning applications. Contributions for affordable housing and open space were secured in accordance with policies set out in the Braintree District Local Plan 2013 – 2033. On-site and sometimes off-site facilities were provided by developers. Trigger points were agreed for the payment of funds/completion of facilities throughout the course of a development. Section 106 Agreements were signed by all relevant parties, with planning permission being issued at the same time.

Contributions sought via Section 106 Agreements were based on policies set out in the Braintree District Local Plan 2013 – 2033. These included general policies and specific policies relating to affordable housing; open space; and transport and infrastructure. The specific policies were supported by evidence base documents. Policies in the Plan were

subject to a viability appraisal to ensure that they were reasonable for most developments.

Braintree District Council published an 'Open Spaces Action Plan' which supported policies in the Braintree District Local Plan relating to open space and allotments. The Action Plan included a list of potential future projects for publicly accessible open space, play space, formal recreation and allotments across the District. The Action Plan was the starting point for considering which projects could be included in Section 106 Agreements and for spending funds secured. It also provided evidence for developers as to how contributions could be spent on local projects. The Council updated and approved the Action Plan on an annual basis following consultation with Parish Councils, Town Councils, sports clubs and governing bodies.

Contributions secured on some sites might not, on their own, be sufficient to deliver a specific project and the Council therefore sought contributions from other developments, or other funding sources, in order to achieve the total funding required. Also, as larger projects might deliver better value for residents, contributions may be held by the Council until additional funding could be secured. More flexibility was now available, as previous restrictions on pooling no more than five contributions had been removed.

A team of Braintree District Council Officers monitored the funds held and those which were expected to be received via Section 106 Agreements. Specific projects were identified and were prioritised based on deadlines for expenditure. The Council's normal procurement and approval processes for expenditure had to be followed. Support was also given to Parish Councils and Town Councils, if required, in delivering schemes on land owned by them. Officer resources had to be balanced between delivering schemes funded via Section 106 Agreements and other corporate schemes and priorities.

Information relating to Section 106 Agreements was available in various formats. For major applications submitted to the Planning Committee for determination, details of proposed Section 106 Agreement Heads of Term, if applicable, were included within the Agenda report. Section 106 Agreements were also published on the planning portal section of the Council's website alongside the corresponding planning application. As required by the Government, Infrastructure Funding Statements were produced and information was supplied in the requisite format. Information relating to contributions secured for particular Parishes could be provided on request.

It was reported that Braintree District Council had never handed back to a developer any funds which had been secured via a Section 106 Agreement. Contributions received via Section 106 Agreements were not classified as a 'tax' and they could not be spent randomly. However, contributions did not have to be spent in the Parish or area where the related development was taking place. Instead, contributions could be spent where the impact of the development might reasonably be felt. Contributions received via Section 106 Agreements could be pooled and used alongside funds from other sources in order to deliver schemes. However, expenditure of Section 106 contributions was often not linear. If they wished, Parish Councils and Town Councils could take the lead on spending contributions.

The full presentation may be viewed at:

<https://www.youtube.com/channel/UCwX0X9mAHKp42SA1QOB6qjQ>

Members were then invited to ask questions of the Officers. In response to the questions that were raised, the following information was provided:-

- It was reported that Section 106 contributions could not be spent on remedying existing facilities eg. repairs to a playground, as expenditure had to relate to matters set out in Section 122 of the Community Infrastructure Levy (CIL) Regulations 2010. This sought to ensure that expenditure was focused on the provision of new facilities for new residents. It was not possible for the Council to change the basis on which Section 106 Agreements were negotiated.
- It was reported that negotiations took place between developers and the Council regarding the Heads of Term to be included in a Section 106 Agreement and that developers often 'pushed back' on initial suggestions. It was anticipated, that if the Levelling Up and Regeneration Bill introduced a new tariff arrangement which operated in a similar way to the CIL, contributions could be spent as required eg. contributions secured from a development in Sible Hedingham could be utilised for the benefit of residents living in Hatfield Peverel; or alternatively, contributions could be pooled and allocated to a larger project such as a new leisure pool.
- It was stated that time limits on the expenditure of contributions were set out in each Section 106 Agreement and that if contributions were not spent within this time they must be handed back to the developer. There were no apparent restrictions to contributions arising from developments in the Braintree District being spent in another District.
- Previously, the Government had stipulated the minimum number of new properties which would trigger the payment of Section 106 Agreement contributions. However, it was not known how many properties would be required as a trigger under the new tariff arrangement proposed by the Levelling Up and Regeneration Bill. This was subject to an announcement by the Government. It was possible that a national tariff would be set, but this could be affected by varying property values across both the country and the District.
- The Heads of Term of an existing Section 106 Agreement could be changed if, for example, priorities changed over a period of time. Developers would normally request any change, but all parties to the Agreement would have to be satisfied with it. The Terms of Agreements were kept as flexible as possible.
- Section 106 Agreements could contain trigger points at which contributions became payable eg. on completion of the 99th dwelling on a development of 100 dwellings. However, some developers sought to delay the payment of contributions by deliberately not building the requisite number of dwellings. This was a disadvantage to the system. Also, the non-linear nature of Section 106 Agreements meant that the Council did not necessarily know when contributions would be received. However, in order to avoid this situation the Council sought to secure early trigger points. Furthermore, contributions were index-linked so that if a development recommenced at a later date and the trigger point was subsequently reached, contributions would become payable at that time. It was not known if the Levelling Up and Regeneration Bill would introduce new controls, but it was possible that a Council-Tax levy might be imposed on dwellings which had planning permission, but which had not been built.

- It was acknowledged that planning could be contentious and controversial and also that local people may not support the benefits negotiated on their behalf via Section 106 Agreements. However, Parish Councils and Town Councils were encouraged to keep details of their open space requirements, as set out in the Open Spaces Action Plan, up-to-date, as this helped Braintree District Council when negotiating. Furthermore, Parish Councils and Town Councils were encouraged to engage in the planning process even if they did not like a particular development and to make it clear what benefits they might wish to secure from a development. Once negotiations for a Section 106 Agreement had reached the Heads of Term stage it was too late to change them. It was acknowledged also that Parish Councils and Town Councils might not have the appropriate skills to deal with Section 106 Agreements, or the financial resources to match-fund contributions for specific projects if required. It was agreed that the process should be made as simple as possible and it was noted that Braintree District Council sought to assist Parish Councils/Town Councils where it could. Parish Councils/Town Councils could achieve financial benefits if they had an adopted Neighbourhood Plan.
- It was acknowledged that residents were often frustrated that benefits accruing from new development did not come forward 'on the ground' in a timely way. Furthermore, Infrastructure Funding Statements for 2019/20 and 2020/21 showed that contributions amounting to over £6m, which had been secured via Section 106 Agreements, including over £3.3m for open space provision, remained unspent. Some of these contributions had been secured some time ago. It was also acknowledged that if the District Council had more resources, benefits could be delivered quicker. However, it was reported that difficulties were currently being experienced in recruiting specialist staff. Alternatively, the work could be carried out by a sub-contractor. However, this could be expensive and it reduced the funds available. Communication was considered important particularly in order to address the public's perception of what could be achieved via Section 106 Agreement contributions. It was also important to measure the success of such contributions.

Ms Harding (NHS Mid and South Essex Integrated Care System (ICS)) gave her presentation. *It was noted that the ICS was a new partnership between organisations which met the health and care needs of Mid and South Essex.*

The main points were as follows:-

Process:-

An Integrated Care Board (ICB) Planning Policy Officer was the single point of contact for health.

Liaison took place with Local Planning Authorities on a regular basis to ensure that the process adopted remained current; and to keep up-to-date with changes to Local Development Plans, trajectory changes and the outcome of planning applications/mitigation requests.

All consultation documents were responded to on behalf of all ICS health partners. Major applications were presented to and discussed at meetings of the ICS Strategic Estates Group.

Separate Working Groups were established, as necessary, to respond to strategic/major infrastructure applications.

#### Planning Formula:-

The current planning formula for primary care was: 1,750 patients = 120sqm of space (NIA) @ £3,015 m<sup>2</sup>.

1,750 patients was considered to be the current optimal size for a single GP list.

120sqm of space was aligned to Department for Health guidance.

£3,015 per m<sup>2</sup> was based on the Building Cost Information Service (BCIS) cost multiplier for new build and extensions to health centres and hospitals.

The number of patients generated by a development was calculated using

Borough/District Council average household size taken from the 2011 Census.

Services most likely to be impacted - a 2km radius was considered to be a reasonable distance to access services without the need for a car, therefore enabling reduced car journeys and creating healthy/sustainable communities.

#### Evidence to Support Requests:-

Requests for Section 106 Agreement contributions should meet the requirements of the Community Infrastructure Levy (CIL) Regulations 2010 and evidence must be provided to show that a request is necessary to make the development acceptable in planning terms; that it is directly related to the development; and that it is fairly and reasonably related in scale and kind to the development.

#### Utilisation of Section 106 Contributions:-

Funding obtained via Section 106 contributions in order to increase capacity within health and care may be used for the reconfiguration of existing premises; to build a new facility; for IT infrastructure; for the refurbishment of the existing estate; for the extension of existing premises; or for fixed equipment.

#### NHS Criteria for Spend:-

Section 106 Agreement/CIL contributions were considered to be NHS capital and were public money which was subject to the NHS prioritisation and approval process.

Requests to a Council for the draw-down of funds required the submission of supporting evidence and an approved PID/business case.

Section 106 Agreement contributions were subject to abatement in accordance with the Premises Cost Directions 2013.

Contributions should not be allocated directly to a GP/Practice.

#### Resources:-

The presentation included details of Section 106 contributions which had been secured and how these had been, or would be, allocated.

#### Next Steps:-

The ICS would continue to develop business cases in order to initiate development and expenditure.

The ICS would work with Primary Care Networks to develop clinical and estates strategies in order to develop plans for the expenditure of existing and future Section 106 resources.

The full presentation may be viewed at:

<https://www.youtube.com/channel/UCwX0X9mAHKp42SA1QOB6qjQ>

Members were then invited to ask questions of Ms Harding. In response to the questions that were raised, the following information was provided:-

- It was reported that contributions received by the NHS via Section 106 Agreements were subject to the same financial processes as any other NHS funding, in order to ensure that the best value was achieved. Abatement periods were set and funds could be recovered if necessary. If sufficient funds were received via Section 106 contributions, these could be spent exclusively on infrastructure projects without the need for match-funding. The NHS had been subject to a restructure and the former Clinical Commissioning Groups no longer existed.
- Reference was made to the time line between new housing developments being built and occupied, and mitigating infrastructure secured via Section 106 Agreements eg. improvements to GP practices, being provided. It was queried if something was blocking this process.
- It was reported that the NHS Mid and South Essex Integrated Care System (ICS) reviewed proposed development sites allocated in the Braintree District Local Plan and considered their cumulative impact. Work identified in response to this new development was implemented in phases where possible. In each case, it was important to consider the needs of patients and to ensure that the proposed process and model were right. However, work was dependent on the ownership of existing facilities and whether the owners were willing to do what the NHS sought to achieve. In some cases, the owners might also be required to commit funding to the proposed works. It was noted that some Doctors' Surgeries were owned by individual GPs, or groups of GPs. Capacity within the ICS Team had increased and it was hoped that this would improve the Team's impact. Braintree District Council and the NHS worked together in order to bring forward specific projects. As an example, a new Doctors' Surgery was being provided at Sible Hedingham where a private provider had also assisted. Braintree District Council might also be able to assist if it owned a building in which a Doctors' Surgery could be located.
- It was considered important to keep the public informed about proposed projects; their progress; and why some took time to implement. It was also important that the public should be made aware that GPs worked individually and that the NHS could not require them to relocate to a specific Doctors' Surgery in order to meet patient demand. It was acknowledged that communication had not been good in the past, but some Alliance Teams had now been established by the NHS which were able to spend more time in the community. It was considered important that the public should be informed about contributions received via Section 106 Agreements and how these were being used within the community.

The Chairman thanked Mr Collins, Ms Goodings and Ms Harding for attending the meeting, for giving their presentations, and for answering questions.

In terms of the next steps for the Scrutiny Review, it was proposed that Members of the Committee should seek to obtain evidence to support the recommendations arising from their review. In particular, Members of the Committee were requested to indicate what data, information and evidence they wished to receive, analyse and consider at forthcoming meetings of the Committee eg. previous Section 106 Agreement case studies; performance indicators; the value of Section 106 contributions overall; the value of Section 106 contributions being held on behalf of other organisations eg. the NHS and Essex County Council; and information about benchmarking with other Local Authorities.



**DECISION:** That Members of the Performance Management Scrutiny Committee advise the Council's Governance Service by 5th August 2022 of the data, information and evidence relating to Section 106 Agreement contributions which they wish to receive, analyse and consider at forthcoming meetings of the Committee in order to assist them in formulating their scrutiny review recommendations.

**REASON FOR DECISION:** To receive presentations from Mr Dominic Collins (Corporate Director (Growth) - Braintree District Council), Ms Emma Goodings (Head of Planning and Economic Growth - Braintree District Council) and Ms Kerry Harding, (Director of Estates – NHS Mid and South Essex Integrated Care System) as part of the Performance Management Scrutiny Committee's first evidence gathering session into 'Section 106 – Open Spaces and NHS Expenditure'.

The meeting closed at 9.14pm.

Councillor M Radley  
(Chairman)