



## **Growth and Development Scrutiny Group**

**Wednesday, 17 July 2024**

### **Infrastructure Delivery**

## **Report of the Director for Development and Economic Growth**

### **1. Purpose of report**

1.1. This committee previously considered reports presented to it on 4 October 2023 relating to Infrastructure Delivery via Community Infrastructure Levy (CIL) and Section 106 of the Town and Country Planning Act 1990 (s106). At the conclusion of that meeting further questions were raised by members, being:

- (1) Member requested further detail in respect of the infrastructure triggers within a development and what measures are in place to track and enforce developers to deliver the infrastructure agreed when the application was approved
- (2) The Group requested a follow up item regarding when infrastructure delivery programmes are delayed and how it engages and communicates with Town and Parish Councils
- (3) To review how, when and why changes are made and the role of the Borough Council in this process – what powers does it have to influence the changes and when are they used
- (4) To review how the Borough Council engages and communicates with local stakeholders, including Town and Parish Councils and consider what improvements could be made
- (5) Reflecting on lessons learned through delivery of existing infrastructure in the Borough as a result of housing growth and changes that could be applied to future housing developments.

1.2. This report sets out to provide a response to these additional queries.

### **2. Recommendation**

It is **RECOMMENDED** that the Growth and Development Scrutiny Group considers the contents of this report.

### **3. Reasons for Recommendation**

- 3.1. To enable members to understand the current process in place for monitoring the collection of s106 and CIL contributions, and the penalties or enforcement mechanisms available under both regimes where payment is not forthcoming.

#### **4. Supporting Information**

- 4.1. Five additional questions were raised by the Growth and Development Scrutiny Group which are identified in paragraph 1.1 numbers 1-5. These are each dealt with in turn below.

##### **(1) Infrastructure triggers within a development and what measures are in place to track and enforce developers to deliver the infrastructure agreed when the application was approved.**

- 4.2. This section is broken down into Community Infrastructure Levy (CIL) and Section 106 (s106) as these are different processes.

##### **Community Infrastructure Levy (CIL)**

- 4.3. CIL payments are towards a strategic package of infrastructure projects which can only come forward when the total money is in place, the payments for each application are not specifically tied to infrastructure to make a specific development acceptable in planning terms. How CIL is collected is governed by legislation which is set by government.

- 4.4. Every chargeable development pays CIL contributions in line with the same rules (Instalments Policy) with some variations based on the financial scale of the CIL liability as follows:

- **Where the chargeable amount is less than £50,000:** Full payment will be required within 90 days of the commencement date or on substantial completion of the liable development whichever is soonest;
- **Where the chargeable amount is £50,000 - £250,000:** First instalment representing 25% of the chargeable amount will be required within 120 days of the commencement date or on substantial completion of the liable development whichever is soonest; and, the second instalment representing 75% of the chargeable amount will be required within 300 days of the commencement date or on substantial completion of the liable development whichever is soonest
- **Where the chargeable amount is over £250,000:** First instalment representing 25% of the chargeable amount will be required within 120 days of the commencement date or on substantial completion of the liable development whichever is soonest; Second instalment representing 25% of the chargeable amount will be required within 210 days of the commencement date or on substantial completion of the liable development whichever is soonest; Third instalment representing 25% of the chargeable amount will be required within 390 days of the commencement date or on substantial completion of the liable

development whichever is soonest; and, The fourth and final instalment representing 25% of the chargeable amount will be required within 570 days of the commencement date or on substantial completion of the liable development whichever is the soonest.

- 4.5. There are events which can cause a default on the instalments policy, for example if a developer fails to notify us of commencement of development, then when we become aware the full amount (plus additional interest from the date of actual commencement) will be due immediately. These penalties do ensure that for CIL developments developers do almost always notify us in advance of trigger events such as commencement of development. As instalments beyond commencement are calendar based these future events can be diarised in advance through the EXACOM monitoring package which we use.
- 4.6. Being calendar based these future events can be diarised in advance through the EXACOM monitoring package which we use. Owing to late payment interest, and forfeiture of the instalment policy if commencement is not notified developers are generally good at notifying the council of impending commencement of development. Officers also work with colleagues in Planning Policy who also monitor the commencement/completions of dwellings for plan making/ monitoring purposes.
- 4.7. The CIL regulations set out a number of penalty and enforcement mechanisms for cases of failure to notify of events, failure to pay on time, or refusal to pay at all.
- 4.8. The most common issue is a failure to notify of an event, such as commencement of development. This results in a forfeiture of any instalment payment option, as well as penalty interest being due from the day that the notifiable trigger occurred. Beyond this interest there is also the potential to impose surcharges, although most are small and must be warned about in advance.
- 4.9. Where it appears that a developer is unwilling to make payments at all the regulations give a number of options. These include a CIL Stop Notice, these allow for development to be halted until the CIL payment issue is resolved. A CIL Stop Notice can only be served after a CIL Stop Warning Notice which must have been served at least 28 days prior to any CIL Stop Notice.
- 4.10. There is also the option of CIL Liability Orders obtained through the court followed by various recovery powers including control of goods orders and ultimately imprisonment for non-payment.
- 4.11. Further details of these enforcement and penalty mechanisms are set out in Appendix A.

## **Section 106 (s106)**

- 4.12. A s106 is a legal agreement which identifies necessary infrastructure to make a planned development acceptable. Each s106 is a bespoke document and the required infrastructure and payment towards enhancing providing additional infrastructure, including triggers, are negotiated on a case by case basis.
- 4.13. All infrastructure requirements within a s106 need to be necessary, in scale and kind and relatable to the development, in line with the CIL regulations (often referred to as the request being CIL compliant).
- 4.14. The triggers for when payments towards infrastructure improvements or the delivery of specific pieces of infrastructure are dependant upon a number of factors. These can include:
- When the infrastructure is necessary, for example a new road junction is necessary in terms of highways safety prior to the occupation of any dwellings, or a new school is need prior to the occupation of 500 dwellings
  - Cashflow, ensuring that a developer is able to extract some value from their development (profit) in order to fund the contributions they are due to pay. Requiring 100% payment of all contributions at commencement might make a development unviable
  - Viability issues which cause reasons for delay to the provision of infrastructure
  - Phasing of the development.
- 4.15. Some triggers will be based on events (commencement, percentage occupation completion etc), others might be based on calendar time periods (for example a bus service contribution might pay an instillment at first occupation, with subsequent annual instalments until the 5th anniversary).
- 4.16. S106 agreements do include lists of events (usually the events which form triggers within the agreement) which the developer is supposed to notify us of, unfortunately some developers do not always provide this information.
- 4.17. For s106 monitoring as developers are often poor at notifying us when triggers are reached the planning team have adopted a practise of asking developers when they might expect the next trigger to be reached (for example when requesting contributions at commencement we might ask what their expected build rate is and when they might reach 10% occupation which is the next trigger). The Planning Contributions Officer keeps a log of these estimates to revert to developers if we have not heard anything further by the point where we had anticipated the next trigger to be reached.
- 4.18. Beyond that monitoring of s106 on site is aided by Planning Policy colleagues who undertake annual monitoring on delivery of affordable homes which can also help us to determine what level of occupation a site has reached; we also

undertake a bi-monthly update through Council Tax on major sites so that we can track occupations through council tax records.

- 4.19. Where triggers are based on anniversaries of events these can be diarised in EXACOM in the same way as CIL instalment dates.
- 4.20. Under s106 the enforcement method for non-compliance is a legal one by way of pursuing action for 'breach of contract'. The only alternative is engaging a mechanism for arbitration which most agreements contain, but this is mainly in relation to disagreements about what the agreement requires rather than a simple failure (or refusal) to comply with the requirement. There is no planning enforcement mechanism for non-compliance with a section 106 agreement, it would not be possible to serve a stop notice on a development, or a planning enforcement notice, in relation to failure to comply with s106 clauses, if it was important that works were halted then this could potentially be achieved via seeking an injunction from a court to that effect.
- 4.21. To maintain wider enforcement options wherever possible on-site infrastructure is best secured via planning conditions. There are cases where it is not possible to do so (for example footpath connections cannot be solely secured through a planning condition – their construction can, but securing a public right to access them can only be achieved through a legal agreement as planning conditions cannot require access to land to be granted to the public).

**(2) When infrastructure delivery programmes are delayed how planning engage and communicate with Town and Parish Councils.**

**s106**

- 4.22. For s106 agreements, as discussed above, there are triggers for the delivery of infrastructure on site or the payment of money to support the expansion or delivery of additional infrastructure.
- 4.23. If the delivery of infrastructure is to be on site there are clear requirements in the s106 which developers need to adhere to. If the delivery of infrastructure is to be facilitated by another body, such as the NHS, County Council then payment is taken to allow these bodies to undertake the works. When money is collected there is often a clause in the s106 which requires the money to be spent within a certain time period (often between 5-10 years). Therefore, it cannot be expected that the infrastructure required will be delivered in a similar timescale to the payment of the money by the developer to Rushcliffe.
- 4.24. On occasion there is a request from developers to change a trigger/timing of when that infrastructure can be delivered on site or payments made (more information on this is provided within the next section from paragraph 4.36). If changes to s106 are made which result in a delay to the infrastructure required on site, likely to be adopted by the Parish/Town Council, or off site highway works which are likely to affect the local community this change is shared with Town/Parish Councils and Ward Members. Additionally, if officers

are aware of delays due to unforeseen circumstances and a s106 has not been amended but it is known that there will be a delay Town/Parish Councils and local Ward Members are kept up to date on the situation until it is resolved.

## **CIL**

- 4.25. For CIL the way in which strategic infrastructure is delivered is through the priority funding list, this does set out timescales for these projects, but some of these are 10 years away and it is accepted that the timetable is subject to change. The priority funding list is a published document and is reviewed and updated every 3 years. The latest document can be found at [ifs-2022-2023.pdf \(rushcliffe.gov.uk\)](https://www.rushcliffe.gov.uk/ifs-2022-2023.pdf).

### **(3) To review how, when and why changes are made and the role of the Borough Council in this process – what powers does it have to influence the changes and when are they used.**

- 4.26. CIL delivery is updated through the funding statement, however it is not a specific agreement with developers and ‘amendments’ are not made.
- 4.27. Planning legislation allows for variations to s106 agreements and therefore Councils must consider them. A variation can be requested at any time, even if the development is completed, dependant upon what the s106 includes. This does not mean they have to be agreed. If an amendment to the s106 is requested this is something the Council must consider and determine if the amendment is acceptable. This request needs to be submitted to the Council, with appropriate justification, which will be considered by the planning and legal departments. If an amendment to the s106 is agreed this is often referred to as a ‘deed of variation’. If an amendment to a planning permission is sought (variation of a condition such as change to plans, materials, amendment to details) this will require a ‘deed of variation’ to ensure the s106 applies to the new planning permission which allows the amendments. Dependant upon the details approved through the amended planning permission this may require changes to the s106 to reflect any changes.
- 4.28. In terms of ‘why’ changes are made there are a myriad of reasons why an agreement might need to be renegotiated. Examples of s106 variations are given in the bullets below (n.b. this list is not exhaustive):
- change to the trigger (can be a number of reasons for this)
  - a key point in the agreement is unclear in its interpretation and a clarifying amendment is needed
  - changes requested by infrastructure providers as to how they will respond to meet demand or changes to demand (for example schooling or health provision)
  - where developments are brought forward over protracted periods there may be changes in context which affect provisions within the legal agreement.

**(4) How the Borough Council engages and communicates with local stakeholders, including Town and Parish Councils and consider what improvements could be made.**

- 4.29. S106 are the result of a planning application. During the planning application process all relevant stakeholders are consulted, including Town and Parish Councils. This is the opportunity for them to identify any local infrastructure needs which may be requested through a s106 for the development. This would then need to be assessed by planning officers to identify if this request meets the relevant tests for it to be classed as 'CIL' compliant to allow it to be requested through a s106.
- 4.30. It is often the case that a request would need to be justified with specific evidence as to costings and how the project would be delivered. If this is something a Town/Parish Council needs further information on how to achieve this planning officers can give further guidance on this.
- 4.31. Stakeholders which have a local influence but are also a wider organisation such as the NHS or Nottinghamshire County Council in respect of highways and schools are also consulted on applications. Regular meetings are also held with these stakeholders to discuss the issues relating to the delivery of these types of infrastructure, what their plans are and how (if at all) those plans might be changing and what money is available/has been received to deliver the infrastructure sought.
- 4.32. The Borough Council is the relevant stakeholder, in most instances, for sports and leisure facilities and even where such facilities are not directly provided by RBC the Communities Manager is aware of other needs and demands within the borough through the preparation of the Leisure Strategy and Playing Pitch Strategy.
- 4.33. S106 agreements are published on the Council's website as part of the planning file. Where there are any subsequent changes to the agreement that would impact stakeholders delivering the infrastructure those changes would be notified to them.
- 4.34. The council accepts that, particularly in cases where there are multiple amendments to an agreement these can become challenging to follow. It is not common practise for a 'revised agreement' to be produced, rather variations tend to be short documents with statements such as "delete paragraph 4.3 and in its place insert...".
- 4.35. Once there is more than one amendment it is necessary to have multiple documents open and to try and follow the changes, which may stack on top of each other. Whilst the Borough Council can advise of the changes and share the variation deeds it remains that they are not straightforward to interpret.

**(5) Reflecting on lessons learned through delivery of existing infrastructure in the Borough as a result of housing growth and changes that could be applied to future housing developments.**

- 4.36. In respect of CIL the mechanisms are set out in great detail in the CIL regulations with limited scope for departure.
- 4.37. The council does produce an annual infrastructure monitoring report which will, in time, provide some insight into how infrastructure funding is being spent and this could, in turn feed back into reviews of the local infrastructure funding list. It will be particularly interesting to see, for example, how local parishes spend their local proportion of CIL funding and whether there are specific types of locally in demand infrastructure which might be taken into account in reviews of the strategic funding list.
- 4.38. For s106 the main issues which arise is that the way in which infrastructure is to be delivered changes between the signing of the agreement and when it comes to be delivered. When consulted on an outline application for a major development an infrastructure provider is making a best guess as to how they might deliver infrastructure perhaps more than a decade into the future. Other pressures which arise in the interim might lead to decisions which change those plans, but external changes, such as changes in government policy or legislation might also impact upon how a provider had intended to use funds secured through a s106 agreement.
- 4.39. Officers have more recently set up regular meetings with the NHS, Nottinghamshire County Council and colleagues within the Communities Team. These ensure regular dialogue is happening between the Council and relevant stakeholder to identify infrastructure projects and also identify when money has been secured and paid how this will be spent and the timescales of this. This has resulted in a better working relationship and a better understanding of key infrastructure issues in the borough.
- 4.40. In addition the Borough has established Development and Community Boards at Fairham, Newton, Sharpill and Bingham (with one planned for Gamston in the future). These provide the opportunity for developers to keep the town/parish council and local ward members informed of the progress of the development on these large strategic sites.

## **5. Risks and Uncertainties**

- 5.1. The risk that housing and other growth is not adequately supported by infrastructure are reduced by the Council working closely with infrastructure and service providers and by identifying infrastructure requirements early in the plan preparation process.
- 5.2. The Levelling Up and Regeneration Bill seeks to replace the current system of developer contributions with a mandatory and locally determined Infrastructure Levy. The Infrastructure Levy would be calculated on a final gross development value of a scheme or phase of a scheme, above a minimum levy threshold. It is intended to replace CIL, S106 and affordable housing developer contributions with a single flat-rate levy based on the final sale values of a development. Although primarily a financial contribution, the



Levy could require the contribution of on-site infrastructure within a development. So as it stands, a levy (CIL), in-kind developer contributions (S106) and affordable housing would be replaced with a mandatory levy and in-kind developer contributions (which may or may not include affordable housing). The specific details and timings for introduction of the Levy remain uncertain ahead of finalisation of primary and secondary legislation and relevant national policy and guidance. It is uncertain if a new parliament following the July elections would continue this proposal.

## **6. Implications**

### **6.1. Financial Implications**

The workload required in working with infrastructure and service providers to identify and deliver infrastructure required to support housing and other growth is undertaken utilising existing Planning Policy and Development Management resources. Where work is associated with specific planning applications, this is supported financially by the planning application fees for the planning application. The fees associated with the drafting of s106 are paid for by the developer. S106 agreements often include monitoring fees to cover the costs of monitoring (both staff and software), and up to 5% of the total of received CIL payments can similarly be used for funding the administration of CIL. Where additional resources are required this is considered as part of the Council's budget review processes.

### **6.2. Legal Implications**

The Council, as local planning authority, is legally responsible for preparation of the Local Plan and determining planning applications (apart from matters including minerals and waste development over which the County Council has responsibility). The NPPF sets out that the purpose of the planning system is to contribute to the achievement of sustainable development, with the identification and coordination of the provision of infrastructure to support growth identified a key aspect of achieving this. The CIL Regulations 2010 (as amended) sets the legal tests for planning obligations, including for infrastructure provision to support new development. The regulations state that planning obligations are only appropriate to make development acceptable in planning terms.

### **6.3. Equalities Implications**

An Equalities Impact Assessment is prepared as part of the plan making process and due regard is given to the implications identified in it. CIL as a levy applies universally where chargeable development takes place, the rate of CIL was set based on evidence base advising on what level of levy would be viable. Our rate was set very conservatively so that there was no realistic prospect of CIL charging giving rise to viability issues.

### **6.4. Section 17 of the Crime and Disorder Act 1998 Implications**

There are no crime and disorder implications associated with this report.

#### 6.5. Biodiversity Net Gain Implications

There are no biodiversity implications associated with this report.

#### 7. Link to Corporate Priorities

The Environment	The provision of infrastructure alongside and in close proximity to housing and other growth supports environmental objects. New development that is supported by sustainable transport facilities and services (walking, cycling and public transport) lowers impact on the environment. Green infrastructure is capable of delivering a wide range of environmental benefits.
Quality of Life	Ensuring that new development is sufficiently supported by new infrastructure is essential for maintaining the quality of life for both existing and new Rushcliffe residents.
Efficient Services	The provision of efficient services includes ongoing appraisal and alignment of resources to growth aspirations.
Sustainable Growth	A fundamental principle of sustainable growth is that new housing and other growth is supported by adequate and timely infrastructure

#### 8. Recommendations

It is RECOMMENDED that the Growth and Development Scrutiny Group considers the contents of this report.

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<b>Background papers available for Inspection:</b>	Report on wider Infrastructure Matters to Growth and Development Scrutiny Group 4 October 2023  Minutes from Meeting of Growth and Development Scrutiny Group 4 October 2023 giving rise to additional questions
<b>List of appendices:</b>	Appendix A – CIL Penalty and Enforcement Summary