

**CABINET**

**4 FEBRUARY 2020**

**KEY DECISION? YES**

**COUNCILLOR MARINA MUNRO**

**PLANNING AND ECONOMY**

**PORTFOLIO HOLDER**

**REPORT NO. EPSH2004**

## **ADMINISTRATION AND MONITORING OF S.106 AGREEMENTS**

### **SUMMARY AND RECOMMENDATIONS:**

This report seeks Cabinet approval to introduce a monitoring fee for s106 Agreements/Unilateral Undertakings. The Council has previously charged such a fee from 2012 until 2016 when it stopped for legal reasons. Since this time further case law and Government guidance has confirmed the ability and appropriateness of charging such fees.

Recently the Government has introduced additional responsibilities for producing an Annual Infrastructure Statement and the need to strengthen resources monitoring s106 Agreements has been identified.

It is recommended that Cabinet agrees:

1. To introduce an administration and monitoring fee comprising 5% of the total financial contributions offered to Rushmoor Borough Council in any S.106 agreement or undertaking up to a maximum of £25,000 for full or hybrid applications and £12,500 for outline applications. This should take effect in respect of any application received on or after 1<sup>st</sup> April 2020 and should be payable on implementation of the development.

## **1.0 INTRODUCTION**

- 1.1 This paper recommends that the Council adopts a scheme of charging for the administration and monitoring of S.106 agreements.

## **2.0 BACKGROUND**

- 2.1 In accordance with a decision of Cabinet in September 2012, the Council imposed an administration and monitoring fee comprising 5% of the total financial contributions offered in any S.106 agreement or undertaking up to a maximum of £20,000 for full or hybrid applications and £10,000 for outline applications. This took effect in respect of any application received on or after 1<sup>st</sup> October 2012.

- 2.2 Following the High Court case of **Oxfordshire County Council v Secretary of State for Communities and Local Government and Other [2015] EWHC (Admin)** the Council acted on advice from the (then) Head of Legal Services to the effect that fees for administration and monitoring of planning obligations in s106 agreements could not legally be collected as they were not necessary to make development acceptable in planning terms. Charging of Administration and monitoring fees therefore ceased in 2016.
- 2.3 In a subsequent case **R (on the application of Khodari) v Kensington and Chelsea RLBC [2017] EWCA Civ 333**, the Court of Appeal came to a different conclusion, finding that s106(1)(d) permits an obligation requiring a sum to be paid to a local authority and that the obligation to pay the monitoring fee falls within this section. The Court of Appeal decision also considered Regulation 122 of CIL. The decision indicated that, providing the formal recommendation in the planning officer's report or the committee debate prior to determining the application does not indicate that a monitoring fee is a reason for granting planning permission, then such an obligation is acceptable.
- 2.4 The latest version of National Planning Policy Guidance (NPPG) dating from 1<sup>st</sup> September 2019 states:

"Authorities can charge a monitoring fee through section 106 planning obligations, to cover the cost of monitoring and reporting on delivery of that section 106 obligation. Monitoring fees can be used to monitor and report on any type of planning obligation, for the lifetime of that obligation." and

"Fees could be a fixed percentage of the total value of the section 106 agreement or individual obligation; or could be a fixed monetary amount per agreement obligation (for example, for in-kind contributions). Authorities may decide to set fees using other methods. However, in all cases, monitoring fees must be proportionate and reasonable and reflect the actual cost of monitoring. Authorities could consider setting a cap to ensure that any fees are not excessive.

Authorities must report on monitoring fees in their infrastructure funding statements."

### **Receipts from S.106 Agreements**

- 2.5 In Rushmoor between 30 and 60 S.106 agreements or undertakings are completed in each financial year.
- 2.6 Receipts from S.106 undertakings are included in the quarterly reports to the Development Management Committee. In the first two quarters of 2019/20 receipts were £693,000 of which £39,100 comprised transport contributions sought under obligations to HCC. For the previous financial year 2018/19 the total receipts were £1,717,628.50 (of which £124,649.65 comprised transport contributions sought under obligations to HCC).

## **Practice by Other Authorities**

- 2.7 Whilst the legal proceedings referred to above gave rise to some scaling back, charging for administration and compliance monitoring of S.106 agreements is commonplace, with some using the receipts to fund specific posts. The approach is divided between levying a fixed fee, making a fixed charge per clause within agreements, and applying a charge based on a percentage of the financial element incorporated in each agreement or undertaking.
- 2.8 The following are on record as the current practices of a sample of Local Authorities:

Guildford Borough Council	£750 minimum plus £750 per payment trigger
Hart District Council	5% Monitoring and collection fee
South Downs National Park	£440 per covenant
Bracknell Forest	A scale of charges per obligation based on estimates of officer time at £80 per hour.
Plymouth City Council	£667 per financial obligation and trigger point
Braintree District	£300 plus £300 per obligation or trigger
Chichester District	Between £163 and £5,106 depending on number of residential units

## **Practice by Hampshire County Council**

- 2.9 Hampshire County Council resolved on 10<sup>th</sup> December 2019 to introduce a monitoring fee in respect of S.106 agreements with effect from 1<sup>st</sup> April 2020. Their adopted approach will be to charge a fee of £500 'per obligation' in respect of agreements to which they are a signatory. This is in effect a charge for each clause in the agreement relating to an HCC requirement.
- 2.10 Currently the only Rushmoor obligations affected by this introduction would be those where HCC is a joint signatory as Highway Authority where a transport contribution has been sought. This would either feature a single obligation in respect of the financial contribution, or in some circumstances possibly two or three where a travel plan or other associated provision is required. Such obligations would therefore typically involve HCC adding a £500 - £1500 fee in respect of such agreements.

## **3.0 DETAILS OF THE PROPOSAL**

- 3.1 The proposal is to impose an administration and monitoring fee comprising 5% of the total financial contributions offered to Rushmoor (Excluding any sums pursuant to obligations sought by HCC as a signatory) in any S.106 agreement or undertaking up to a maximum of £25,000 for full or hybrid applications and £12,500 for outline applications. It is proposed the administration and monitoring fee will take effect in respect of any application received on or after 1<sup>st</sup> April 2020 and should be payable on implementation of the development.

- 3.2 Based on past receipts it is estimated the total sum of S.106 contributions likely to be collected on behalf of Rushmoor in this financial year could be in the region of £1-1.5 million.
- 3.3 Application of a fixed fee approach would realise a total of some £42,000 (assuming an average of £700 per agreement and completion of the upper end of 60 agreements). A fee of 5% on all financial elements (other than those sought by HCC obligations) based on the above estimate across the board would, by comparison, realise between £50,00 and £75,000 in the year.
- 3.4 The monitoring fee would cover a proportion of the staffing costs incurred by the Council in producing section 106 legal agreements and towards the monitoring of the legal agreements which is required to satisfy the legal duty upon the Council to produce an Annual Infrastructure Funding Statement.
- 3.5 In particular following consideration of the management of s106 by the Head of Economy, Planning and Strategic Housing a post of Housing Enabling and s106 Officer has been created. This role will coordinate the overall monitoring of s106s to ensure that the Council has a robust process of collection of obligations and coordination of their expenditure and recording. Planning Officers, Legal Services and Revenues staff will also continue to play significant roles in the monitoring and collection of s106 contributions and a sum of £75,000 at the upper end of estimates is considered to be within the costs incurred by the Council in undertaking this function. The fee will be reviewed as part of the normal Council processes considering any impacts which arise and the appropriate level of the fee.
- 3.6 The imposition of a percentage fee on the total financial contribution is considered to be simple and transparent. It is consistent with the NPPF and CIL regulations and can be set out in standard letters advising applicants of the need for a S.106 agreement or undertaking.
- 3.7 A typical unilateral undertaking involves financial contributions in the region of £5000-£10,000 giving rise to a charge of an additional £250-£500. In exceptional cases such as Wellesley or proposed schemes for town centre regeneration, a pro-rata percentage fee in relation to the associated large and significant financial contributions could be substantial and would be difficult to justify in relation to the work generated. It is therefore considered that such contributions should be subject to a maximum of £25,000 for full or hybrid applications and £12,500 for outline applications.

#### **4. ALTERNATIVE OPTION**

- 4.1 The alternative option would be not to introduce an administration and monitoring fee. However, this could undermine the Council's ability to fulfil its legal requirements by producing an accurate Annual Infrastructure Funding Statements.

## **5. IMPLICATIONS**

### **Risks**

- 5.1 There are not considered to be any risks associated with the implementation of the recommendations of this report.

### **Legal Implications**

- 5.2 The annual monitoring requirements for section 106 agreements are set out in the Community Infrastructure Levy Regulations 2019 (as amended). The introduction of an administration and monitoring fee will enable the Council to satisfy these legal requirements.

### **Financial and Resource Implications**

- 5.3 Section 106 receipts are an important source of funding for the Council in delivering vital/important infrastructure and enhanced facilities for all residents in the Borough. In order to ensure that the Council is able to collect the income due against s106 planning obligations, this report proposes to introduce a monitoring fee which will be used to provide the necessary resources to administer and monitor s106 agreements.

The report indicates that between £50,000 and £75,000 could be raised through the additional charge. All such income would be ring-fenced against the costs the Council incurs in the administration and monitoring of s106 agreements.

### **Equalities Impact Implications**

- 5.4 No equalities implications have been identified arising from the proposed introduction of an administration and monitoring fee.

## **6. CONCLUSIONS**

- 6.1 The introduction of an administration and monitoring fee comprising 5% of the total financial contributions offered in any S.106 agreement or undertaking up to a maximum of £25,000 for full or hybrid applications and £12,500 for outline applications will enable the Council to satisfy the requirements of the Community Infrastructure Levy Regulations 2019 (as amended). The Council has charged an administration and monitoring fee in the past and planning guidance and legislation has recently confirmed that such an approach is acceptable.

## **CONTACT DETAILS:**

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