

Decision under Delegated Powers

Officer Requesting Decision

Group Leader Development Management

Officer Making the Decision

Head of Planning and Regeneration

Recommendation

1. That the monitoring fees, currently set within the S106 Developer Contributions Supplementary Planning Document (2007) are updated in line with Table 4 of the report.
2. These fees will come into affect 1 March 2022, and will be reviewed annually.

Reason

1 & 2 To ensure an appropriate cost of monitoring Section 106 agreements and unilateral undertakings is recovered from applicants which is fairly and reasonably related in scale and kind to the development, in accordance with regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended).

Authority for Decision

General Delegation to Heads of Service includes authority to undertake the periodic review of charges raised within his or her service area and falling within the scope of the Council's Income and Charging Policy Framework.

Decision and Date



9 February 2022

Background

1. Monitoring fees for Section 106 agreements¹ were originally established within the Section 106 Developer Contributions Supplementary Planning Document (May 2007). Within this document Section 13 'Cost Recovery' identifies a monitoring fee for S106 payments and implementation of schemes as *'a payment of either 0.5% of the total sum of contributions or £500 per individual contribution, whichever is the less towards the Borough Council and County Council services (split pro rata depending on the*

¹ For the purposes of this report the term s.106 agreements refer to both bilateral agreements and unilateral undertaking.

services included in the agreement which require monitoring and or implementation).'

2. S106 agreements are monitored to ensure that much needed infrastructure is delivered in the right place and at the right time. Not only does this bring confidence to communities and elected representatives that the impacts of development are being mitigated, but it also ensures that development is brought forward in accordance with the planning permission and that service providers are compensated.
3. Whilst the charging for monitoring is set out within the Section 106 Developer Contributions Supplementary Planning Document (May 2007), the local planning authority has not been securing them in legal agreements for a number of years following a high court judgment (Oxfordshire County Council v Secretary of State for Communities and Local Government and Other [2015] EWHC). This issue was later re-examined by the Court of Appeal which came to a different conclusion (R (on the application of Khodari) v Kensington and Chelsea RLBC [2017] EWCA Civ 333). Following these judgements, local planning authorities and developers could agree whether a monitoring fee was justified on a case by case basis and included as a planning obligation in a section 106 legal agreement. This was the approach taken by the local planning authority on the strategic SUE projects.
4. In early 2019, the Government acknowledged the administrative burden that the monitoring of Section 106 agreements can have on local planning authorities. It proposed reform of developer contributions in a technical consultation on draft regulations to *"permit local authorities to seek a proportionate and reasonable contribution towards the monitoring and reporting of planning obligations through Section 106 agreements"*. This was met with overwhelming support by the respondents and in the 'Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019', which became law on 1 September 2019, Regulation 10 states under the sub-heading 'Fees for monitoring planning obligations' that *"such monitoring fees can be sought where costs are fairly and reasonable related in scale and kind and the sum to be paid to the authority does not exceed the authorities estimate of its cost of monitoring the development over the lifetime of the obligation."*
5. The charge set out within the Section 106 Developer Contributions Supplementary Planning Document (May 2007) is not up to date and it does not reflect an accurate estimated cost of monitoring. To rely on this charge as the basis for contributions would put the council at risk. Accordingly monitoring fees have not been included in legal agreements for the last few years with the exception of the strategic sites where the costs of monitoring were estimated and evidenced at the time of determining the planning application for these specific schemes. Monitoring fees collected over the last few years, with exception of the strategic developments, are from historic legacy agreements and the amount collected has been small and is diminishing.

6. This paper follows a comprehensive review of the monitoring fees including a time and motion assessment of monitoring activities and preferred options assessment. Following that assessment this paper seeks to amend the local planning authority's fees and charges for the monitoring of Section 106 legal agreements to ensure they meet the required legal tests and allow the local planning authority to recover its cost for monitoring Section 106 legal agreement and planning obligations. The establishment of any additional staff resource to undertake monitoring will be subject to a separate decision.

Legislation/Guidance on Section 106 Monitoring Fees

7. The Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019 became law on 1 September 2019. Regulation 10 under the sub-heading 'Fees for monitoring planning obligations' the legislation says the cost of monitoring in relation to the delivery of planning obligations in the authority's area can be sought provided:

- a) *the sum to be paid fairly and reasonably relates in scale and kind to the development; and*
- b) *the sum to be paid to the authority does not exceed the authority's estimate of its cost of monitoring the development over the lifetime of the planning obligations which relate to that development.*

8. The Government's Planning Practice Guidance (paragraph 036, reference ID: 23b-036-20190901) gives further guidance upon how monitoring fees for S106:

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. Monitoring fees should not be sought retrospectively for historic agreements.

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.

Examples of how other Council's calculate and collect monitoring fees

9. The guidance allows for each Council to establish Section 106 monitoring fees to best reflect the proportionate and reasonable actual costs of monitoring.

10. This has resulted in a variety of methods employed by other Council's in collecting monitoring fees. Two main methods which appear to be used are a set fee per Section 106, a percentage of the total monetary obligations within a Section 106 or a fee per obligation. The fee per obligation appears to be the more popular choice with a significantly larger proportion of Councils using this approach. Basing the fee on a percentage of the value of the total agreement does not reflect the actual work involved in monitoring individual obligations within those agreements.
11. There are slight variations in the methodologies used to calculate the fee for each obligation. The fees also differ between Council's; however, this is expected as the fees should be reflective of actual costs as each Council will have different salary costs for their S106 compliance/monitoring officers and different processes in place.
12. Table 1 below outlines the monitoring fees for a number of council's across England which use the cost per obligation approach. These figures are correct as of November 2021.

Table 1		
Council	Cost Per obligation	
Leicestershire County Council	£300 of 0.5% whichever is the highest	
Melton BC (Developer Contributions SPD Sept 2021)	Case by case basis based on estimated time and resources needed and to be provided prior to commencement.	
East Suffolk	£408 per obligation	
South Downs	£440 per obligation (only those that require monitoring)	
Adur & Worthing	£300 per trigger (irrespective of number of obligations)	
Havant BC	£753.80 per non-financial head of term; or 5% of cost per financial head of term Capped at £10,833 per app (excluding ecological management)	
Harrogate	1-5/up to 1ha	£245
	6-10/up to 3ha	£294 (20% increase)
	11-49/up to 10ha	£343 (40% increase)
	50/more than 10 ha	£441 (80% increase)
Leeds (commencement)	£1,200 per obligation for green space and affordable housing commuted sums All other obligations £900	
Scarborough	£500 per obligation (guide) Could increase on commuted sums exceeding £25,000 or where multiple triggers payments/actions needed Could decrease if the sum is less than £5,000 to a minimum of £3000.	
Colchester	£400 financial contribution £570 all other clauses	
Braintree	£300 per obligation	
Mid Sussex	Up to 15 dwellings	£150 per obligation
	16 – 100 dwellings including commercial	£450 per obligation
	Over 100 dwellings	£500 per trigger
	£300 fee per approval required (ie management plan) Additional fee for site inspections where land is being transferred to District Council	

Plymouth	Number of financial obligations x number of trigger points x £667 And/or Number of non-financial obligations x £667		
Portsmouth	Obligations Monitoring Category	Fee	Notes
	Financial Contributions with commencement trigger	£310	Based on 1 day of officer time
	Financial Contributions with future trigger	£620	Based on 2 day of officer time
	Obligations governing construction timing or the management of the site during construction and/or occupation. For example - provision for viability re-assessments; restriction of occupation (for example student accommodation); shared car parking; employment and skills plans and, other management plans / strategies	£620	Based on 2 day of officer time
	On-site provision - for example: open space, affordable housing or highway works	£620	Based on 2 day of officer time
	Travel Plans - NB very large or complex developments may require a longer monitoring period with commensurate monitoring charges	£5400	Based on 2 days of officer time at a rate of £50 for the initial appraisal, plus 2.5 days p/a over 5 years for an annual review and administration
	Minor alterations to Legal Agreements Changes to existing agreements where no new elements are being introduced	£84	Based on 2 hours of officer time
	Major alterations to Legal Agreements Changes to agreements where new elements are being introduced	As per fees for new obligations	As per fees for new obligations

Harborough DC
(draft SPD early
2021)
<https://harborough.oc2.uk/document/28/2704>

Strategic Development Areas (SDAs) and/or major developments which involve substantial monitoring over a number of years will be subject to a monitoring fee which is commensurate with the hourly rate and the number of hours over the duration of the individual phases and/or the completion of the development.

Payments will generally be secured as shown in the requirements/triggers in each S106 agreement and the monitoring fee would be calculated on an hourly basis. The rate is currently set at £44.54 per hour (this is subject to being adjusted annually). It includes on-costs and an allowance for overheads.

Contributions / No. of residential units	1-10	11-30	31-50	51-100	101-251	251-500
Affordable Housing	0	5	6	8	10	12
Community Facilities	0	6	5	6	7	12
Police	2	4	4	4	5	7
Health (CCG)	2	4	4	4	5	7
Public Open Space						
Parks and Gardens	0	6	6	6	7	8
Amenity Greenspace natural & semi natural	0	6	6	6	7	8
Greenspace	0	6	6	6	7	8
Children & Young People open space	0	6	6	6	7	8
Outdoor sports facilities	0	6	6	6	7	8
Allotments	0	6	6	6	7	8
Cemeteries & Burial Grounds	0	6	6	6	7	8
Greenways	0	6	6	6	7	8

13. When reviewing the figures across the different authorities within table 1 above, the average fee per obligation is £484. Many of these fees are based on calculating an average time spent and applying an hourly rate. It is important to be able to justify the costs to meet the requirements of the regulations and basing this on evidence of average time spent time is a clear way of demonstrating this.

Charnwood data

14. The local planning authority at Charnwood Borough Council does not currently have a monitoring officer post. A technical post was on the establishment until October 2020 that provided support on compliance matters but this became vacant and was offered as a saving in the knowledge the role needed to be redefined to meet future monitoring requirements.
15. The role of monitoring S106's is important and this is acknowledged by Government in their guidance to planning authorities that section 106 agreements should be used to cover the costs of monitoring Section 106 obligations and reporting upon them to ensure transparency is maintained. Securing monitoring costs in section 106 agreements will therefore ensure the actual costs of a S106 compliance/monitoring officer post to be funded.
16. While the Council has not had a section 106 compliance/monitoring post, a member of staff in the Planning Enforcement Team has been covering this duty and monitoring the Section 106 agreements alongside their other duties. This person has recorded the time taken to undertake the monitoring of agreements. This time recording has been broken down per obligation and then further broken down into each task. This had allowed an average timescale to be provided per task and per obligation.
17. This data has been reviewed and discussions held with the member of staff and manager to ensure it is a true reflection of the time taken and can be used to define the monitoring costs of Section 106 obligations. It is therefore considered that this data is an accurate average of the time spent to carry out Section 106 monitoring.
18. **Table 2** below identifies the different types of obligation that appear in section 106 agreements and the average time spent monitoring per obligation. An additional column is included which identifies the cost to the authority for this time spent. The cost is calculated using the hourly chargeout rate of an officer at top of SO1 grade, which is considered the appropriate grade for a S106 compliance/monitoring officer, £38.94 (charge out rate for grade SO1 officer) x the time taken. It is important to note that these estimates are based upon an assumption of 1 trigger per obligation and the average timescale of monitoring a S106 agreements being 18 months from commencement of development to its completion.

Table 2		
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Types of Obligation <i>(based on 1 trigger per obligation)</i>	time	cost
Healthcare	09:20	£360
Police	04:35	£175
Affordable Housing	04:10	£164
Open Space	11:00	£430
Childrens Play/Off Site	04:00	£150
Allotment/Car Park/biodiversity/civic	03:50	£150
Youth/Adult Rec	03:50	£150
Balance Pond	03:50	£150
Discounted Market Homes	03:30	£136
Average	5:20	£215

19. It must be noted that these figures assume only one trigger point per obligation. These figures also assume that the average timescale for monitoring the Section 106 agreement is 18 months from commencement of development to completion. More complex S106's with more triggers, larger sums of money, requirements to approve documents will take more officer time to deal with. Therefore, a proportionate increase to the fee is necessary to ensure the monitoring costs for the S106 are recovered.
20. The list of obligations within table 2 includes a wide range of obligations and not all of these are included in all S106 agreements. A number of the obligations can be bespoke to certain sites. The main obligations which can be found on most Section 106's are Health, Open Space, Children's Play and Affordable Housing. It is therefore more appropriate to take an average of these obligations to ensure the costs are more reflective of the 'average' Section 106 agreement. An average time spent per obligation based upon the three main obligations sought in most Section 106 agreements is 7 hours, which approximately a day's work per agreement. Based upon a cost of £38.94 multiplied by 7.5 hours for a SO1 officer would result in a cost of £292.
21. In addition to the specific work required with each agreement, monthly monitoring of an application is necessary to understand the progress of the site and to keep up to date on trigger points. The average timescales of this is 20 minutes per month per Section 106 agreement. A Section 106 for a small-scale development takes on an average 18 months to implement and so the monitoring costs equate to 6 hours in total. Therefore, an additional fee of £234 for general monitoring per Section 106 agreement is considered necessary; however, this should

increase with the complexity of the development/Section 106 agreement.

Options

22. There are four options which could determine the monitoring fees for each Section 106 agreement. Table 3 below identifies each option and provides comments on each.

Option	Approach	Comments
1	Set fee per obligation	This is a clear approach, easy for all to calculate. However it would be based upon an average time spent, and does not take account of more complex Section 106's with a number of trigger points which will take longer to monitor than a more simple S106.
2	Bespoke fee set for each obligation	Separating each obligation with a separate fee can become more complicated to calculate and time consuming. Also it is not always possible to identify every different type of obligation, as some can be bespoke to the development. This could provide a more accurate cost for each obligation; however it doesn't take into account the greater time spent on more complex Section 106 agreements applying to larger developments.
3	Standard fee per agreement with the fee increasing in increments for more complex development/applications. Separate charge for monitoring the agreement that varies with the scale of the development.	This is a clear approach which will be easy to calculate and also takes into account the that the larger the development the more complex the Section 106 becomes and amount of time spent monitoring it increases.
4	A fee per agreement multiplied by the number of obligations/trigger points	This uses the assumption that the more triggers there are, the more complex the Section 106 agreement is. This can often be the case, but not always. Also this could be quite time consuming to calculate and will need a final draft of Section 106 agreement to give an accurate figure, this could result in time delays and more resources needed to

		calculate the monitoring fee.
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23. Reviewing all options, it is considered that Option 3 - A standard fee per obligation with the fee increasing in increments for more complex developments/applications is the preferred option. The cost is clear to applicants, the Council and is reflective of the average costs for Section 106's but also takes into account the added time spend the larger the application/development is.

Proposed Monitoring Fees

24. Based on the preferred option 3 in table 3 above, the proposed monitoring fees are as follows:

Table 4				
Group 1	Group 2	Group 3	Group 4	Group 5
<ul style="list-style-type: none">) 1-10 dwellings) >1,000 sq metres gross floorspace 	<ul style="list-style-type: none">) 11-50 dwellings) 1,000-3,000 sqm gross floorspace 	<ul style="list-style-type: none">) 51-150 dwellings) 3,001 – 5,000 sqm gross floorspace 	<ul style="list-style-type: none">) 151+ dwellings) 5,000+ sqm gross floorspace 	<ul style="list-style-type: none">) Significant Sites of 350 dwellings or more) 10,000 sqm floorspace
£292 per obligation + An application monitoring fee £234 per S106 agreement	£350 per obligation + An application monitoring fee £281 per S106 agreement (20% increase*)	£409 per obligation + An application monitoring fee £328 per S106 agreement (40% increase*)	£523 per obligation + An application monitoring fee £422 per S106 agreement (80% increase*)	Bespoke fee based upon complexities of the S106 agreement

25. The added percentages are considered to represent the additional time taken to monitor larger developments and also to reflect the increased triggers and complexities of the Section 106 agreements the larger the development is.

26. Significant developments can often be more complex and include a number of reviews, complex trigger points and bespoke obligations which are not included in most Section 106's and will also need to be monitored for a significant period of time. Therefore, the monitoring fees for strategic development should be bespoke to that project.

27. There are certain Section 106 documents which include the submission and approval of certain details/documents. This is work which is outside of the 'average' time spent calculations. The consideration and assessment of these details/documents, including administrative tasks, internal consultation (such as with the Natural & Built Environment

Team, Housing Service and Open Space Team), by an officer on average takes 7.5 hours, which equates to £292.

28. Open space, which is to be transferred to the Council/Parish, requires site inspections to ensure the layout is in accordance with the agreed details. The number of visits needed is dependent upon the development. This is an additional unknown cost outside of the 'average time spent'. A site inspection on average would take an officer 5 hours (including preparation and post site visit reporting), which equates to £195.

29. Therefore the following additional fees are also recommended:

-) Site Inspection Fee - £195 per visit
-) Approval of details/document - £292 per approval

30. **Table 4** outlines the proposed new monitoring fees for Section 106 agreements and Unilateral Undertakings.

Table 4. Proposed Fees	
Payment type	Fee
Section 106 Agreements and Unilateral Undertaking	
Group 1 <i>1-10 dwellings or less than 1,000 square metres gross floor space</i>	£292 per obligation + £234 application monitoring fee pre S.106 agreement
Group 2 <i>11-50 dwellings or 1,000 – 3,000 square metres gross floorspace</i>	£350 per obligation + £281 application monitoring fee pre S.106 agreement
Group 3 <i>51 – 150 dwellings or 3,000 – 5,000 square metres gross floorspace</i>	£409 per obligation + £328 application monitoring fee pre S.106 agreement
Group 4 <i>151+ dwellings or over 5,000 square metres gross floorspace</i>	£253 per obligation + £422 application monitoring fee pre

	S.106 agreement
Group 5 <i>Significant sites of 350 dwellings or more or over 8,000 square metres gross floor space</i>	Bespoke fee set on a case by case basis
Site inspection fee	£195 per visit
Approval of details/documents	£292 per document

Comments from HR

HR Advisor:

N/A

Financial Implications

The proposed changes to the fees will ensure that charges will reflect the true cost of monitoring work for Section 106 and Unilateral Undertakings as part of the planning authority's statutory duty under the Community Infrastructure Levy Regulations 2010 (as amended).

Risk Management

Risk Identified	Likelihood	Impact	Overall Risk	Risk Management Actions Planned
That the costs are challenged by applicants as not complying with the CIL regulations	2 (unlikely)	2 (significant)	(4) Low	Publish the schedule of fees and charges and ensure applicants are aware of them at pre-app stage
That the fees charged do not recover the actual costs of providing the monitoring required placing further burden on the council's resources	1 (remote)	1 (minor)	(1) Low	Review the fees to ensure cost recovery is achieved
Council not	(4)	(1)	(4)	Establishing a new

Risk Identified	Likelihood	Impact	Overall Risk	Risk Management Actions Planned
having resources to carry out the Local Planning Authority's requirement of monitoring Section 106 agreements	Probable	Minor	Low	Plannign Compliance Officer post funded by the Fees (subject to separate Decision)
Poor monitoring of Section 106 agreements could result in needed infrastructure being delayed or not being delivered or money having to be paid back.	(2) Likely	(4) Very Serious	(8) Moderate	Introducing monitoring fees and providing adquate resources for monitoring will allow close working with developers, other services within the Council and other agencies to ensure the delivery of infrastructure in line with the requirements of the Section 106 to mitigate the impacts of development.

Key Decision: No

Background Papers:
Section 106 Developer Contributions Supplementary Planning Document (2007)