

Appendix D – CIL & S106 Member Protocol

Introduction

Following the implementation of the Community Infrastructure Levy (CIL) in the city on 5th October 2020, the way in which the council seeks and receives contributions from applicants to fund the provision or improvements to infrastructure is fundamentally changing.

This protocol has been produced to provide members with:

- An overview of the legal frameworks within which the CIL Levy and S.106 operate
- Information on how the approach to S.106 changes for all new major applications being approved
- Advice on how and when members can get involved in the process
- Guidance on how to work with officers on spending the accumulated S.106 funds (which stood at circa £19M at the end of 2019/20)

The protocol will be revised in Summer 2021 to include the arrangements to allocate funding generated through CIL, once agreed by TECC committee after consultation. This will include how spending of the Neighbourhood Portion (15-25% of the total) in the ward which generated the levy will be agreed.

During Autumn 2020, central government consulted on a white paper which may introduce significant changes to the national planning system, including replacing CIL and S.106 with a new national “infrastructure levy” which would be calculated using an entirely different set of criteria. It was announced in the Queen’s Speech that proposals for a Planning Bill would be taken forward.

New S.106 Agreements - Overview

All new agreements entered after 5th October 2020, will be negotiated in light of the development potentially being liable for the CIL Levy. This means that some areas of infrastructure provision (education, sustainable transport and parks and open spaces) will only feature in future S.106 agreements where they are either required on site (e.g. a new children’s playground) or in the immediate vicinity (e.g. new bus stop adjacent to the entrance of a development.)

CIL does not necessarily replace the requirement to have a S106 agreement, should one be necessary. In some circumstances both can be requested for the same development site. A S106 obligation is for site specific mitigation, to make the proposed development acceptable and to provide for specific on-site policy requirements, whereas CIL provides funding for city wide infrastructure improvements required because of demand from all new developments.

More detailed information on CIL and S.106 can be found within the revised Developer Contributions Technical Guidance, which was approved by TECC Committee in June 2020 – [INSERT LINK TO DOCUMENT>](#)

The example below shows how an existing S.106 agreement for a medium sized new housing development in Saltdean will change if planning permission is now granted for a larger development on the same site. The planning obligations that will still apply in this example have been highlighted in green:

Coombe Farm, Westfield Avenue, Saltdean - S106 Analysis				
	BH2016/01903		BH2020/00002	Comments
	Agreed		Estimated	
Affordable Housing	24 units		29 units	Both developments will propose 40% affordable housing split 50/50 affordable rent/ownership
Outdoor play & amenity space	Yes		Yes	Non-financial obligation to provide a childrens playground and associated outdoor space within the development
Artistic Component	£ 45,000		£ 53,400	The scope is agreed between the developer and BHCC, but implemented by the developer (therefore no funds are paid to the council.)
Education Contribution	£ 335,291		Nil	Education contributions were scaled back to only site specific under CIL
Local Employment Scheme	£ 32,300		£ 32,000	Payment to support training provided to apprentices and trainees on the site only.
Recreation Contribution	£ 223,186		Nil	Recreation contributions were scaled back to only site specific under CIL
Sustainable Transport Contribution to pay for :-	£ 105,000		Nil	Sustainable transport contributions were scaled back to only site specific under CIL
Coombe Vale Bus Stop - RTPI, kerb & shelter				CIL eligible
Saltdean Vale Shops - RTPI & kerb				CIL eligible
Saltdean Vale Westbound - RTPI, kerb & shelter				CIL eligible
Dropped kerbs & tactile paving - Wesfield Ave North at site access				Include in seperate S278 works agreement
Drop kerbs & tactile paving - Jct Wesfield Ave Nth & Coombe Vale				CIL eligible
Dropped kerbs & tactile paving - Wesfield Ave Nth & Westfield Rise				CIL eligible
Dropped kerbs & tactile paving - Saltdean Vale/Coombe Vale				CIL eligible
Bus stop improvements on Coombe Vale & Wesfield Ave North				CIL eligible
Footway improvements beyond Westfield Ave North to bus stops				CIL eligible
Local cycling infrastructure improvements				CIL eligible
Travel Plan	£ 81,600		£ 69,264	These are initiatives to encourage the new residents of the development to adopt sustainable travel behaviours
Community Infrastructure Levy (introduced w/e/f 5th October 2020)	Nil		£ 728,250	Approx £100k will be earmarked for investment in capital works to improve the local area as the neighbourhood portion of CIL. <u>See also note below re CIL Form.</u>
TOTAL CIL/S106 FINANCIAL LIABILITIES	£ 822,377		£ 882,914	
NB:				
The developer needs to submit a CIL Form for the project. This may identify buildings in use, which could reduce the CIL liability, and confirm the gross floor area of the development.				
There will also be a S278 requirement to provide a new pedestrian crossing and footway improvements to Westfield Avenue North.				

New S.106 Agreements (including Deeds of Variation) – Member Involvement

Whilst the focus will switch to planning CIL expenditure over time, members are encouraged to get involved in ensuring the comprehensive identification of new infrastructure for draft Section 106 agreements relating to planning applications in their ward. They are a part of the proper planning process and are not confidential.

However, it is essential that such arrangements are operated in a way that is seen to be fair, open, transparent and reasonable in order to retain public confidence in the fundamental principle that planning permission cannot be bought or sold. This has been widely acknowledged as a concern of the planning system nationally for some time with negotiations on S106 agreements being perceived as taking place “behind closed doors”.

This protocol provides a firm commitment to address this issue in the city and, coupled with the annual publication of the new Infrastructure Funding Statement, the approval of a refreshed Infrastructure Delivery Plan in Summer 2021 and the launch of public access to

the new CIL & S.106 database, all provides the opportunity for elected members and local communities generally to better engage in the process.

The opportunities and process for members to engage in the negotiation of a new S.106 Agreement for a pending major planning application in their ward is outlined below:

Scheme Phase	Member Engagement
Developer seeks Pre-Application advice	<p>The Pre-Application Service includes an option for applicants to select if they wish to have ward councillor input as part of the service. Where this service is requested, the Planning Service will notify ward members by email when a developer commissions the council to provide pre-application advice for a scheme in their ward and the contact details of the case officer. A ward member can contact the case officer within 7 days of being notified to discuss any potential S.106 that they feel should be considered if the application were to proceed further. The case officer will advise the councillor whether the item identified is likely to be eligible for inclusion within the S.106 agreement or otherwise.</p> <p>It is important for councillors to remember that this service is provided confidentially, members <u>MUST NOT</u> contact the applicant directly and the advice may result in a developer either not proceeding with a proposal or making significant changes to reflect the advice received. Pre-application advice is not published, although it may be referred to in subsequent officer reports to planning committee.</p>
Planning Application Submitted	<p>All members are notified of new planning applications received in their ward (either weekly or daily if registered with the Planning Register.) Not all planning applications will have sought pre-application advice and others may have changed significantly following advice given. If a ward member wants to discuss either the potential S.106 obligations to be considered and/or identify additional obligations for consideration, they should notify the planning case officer within 21 days of the planning application being published. Where notified, the case officer will ensure that they discuss the draft obligations with the ward councillor as they develop and keep them informed of any significant changes prior to the report on the planning application being finalised.</p> <p>It is important for councillors who are members (or substitutes) of Planning Committee take especial care to ensure that they do not compromise their impartiality in decision making and should note the further guidance below.</p>
Draft S.106 Heads of Term	<p>The planning case officer can provide a copy of the current draft heads of term to a ward councillor upon request.</p> <p>Councillors should note that negotiation of a S.106 Agreement is a commercial contract, the details provided <u>MUST</u> be treated in confidence and they should do nothing which may compromise the council's negotiating position with the developer.</p> <p>The officer report on the recommendation includes the detailed S.106 Heads of Terms agreed with the developer prior to the application being submitted to the planning committee for determination. Members can view copies of the report on the council website from 7 days before the date of the planning committee meeting.</p>
S.106 Finalisation	<p>Following a "Minded to Grant" decision by the Planning Committee, any amended terms (other than triggers for payments) would have to be submitted in a further report to a subsequent planning committee</p>

	meeting for agreement. The planning case officer will advise any ward member who has previously expressed an interest in the S.106 negotiations above accordingly. Once signed, a copy of the agreed S.106 agreement is available to view on the Planning Register with the rest of the planning application.
Deed of Variation	To be inserted following legal advice on 5-year rule for developers to seek a variation.- Clarification to be inserted following confirmation with Legal.

With the scaling back of S.106 obligations following the introduction of CIL, the table below suggests areas where local members may wish to focus their comments and capture items that reflect priorities within the local community:

S.106 Category	Areas for Consideration
Affordable Housing	Proposals for payment of commuted sums in lieu of making provision within the development and the impact on local housing availability
Recreation, Sport & Open Spaces	Proposals which could be included <u>within the proposed development site</u> which may have a wider community use benefit (e.g. new play park, outdoor gym, skate park) not currently provided in the area.
Transport	Arrangements for pedestrian access, safety (e.g. provision of new zebra crossing), vehicular <u>access to the new development from the existing highway</u> and the provision of new bus stops or bike hubs
Public Realm Provision	Proposals for enhanced public realm <u>within the proposed development site</u> which may have a wider community benefit (e.g. art installation, lighting, public seating, waste bins)
Nature Conservation and Ecology	Opportunities to provide onsite facilities to support local wildlife and flora and fauna (e.g. hedgehogs, dormice, wildflower beds, community vegetable growing space)

It is considered that draft obligations for the local employment training scheme, the travel plan for the development, school and healthcare facilities are unlikely to require comments by local members. This is due to the fact that these obligations are either assessed and organised on a city-wide basis, decided by partners (e.g. NHS) or are directly provided for the new residents of the development.

New S.106 Agreements – Planning Committee Members

Section 25 of the Localism Act 2011 makes it clear that Councillors can both campaign and represent the views of their constituents without compromising their ability to take part in the actual decision-making process should they form part of a Planning Committee determining planning applications. As such there is an opportunity for Members to get involved in negotiations on Section 106 contributions both at the pre-application stage and through the formal planning process, as outlined above.

Key Point:

It is important to note however that the members role in pre-application and Section 106 discussions is to learn about emerging development proposals and help to shape schemes and any associated legal agreements to ensure the outcomes reflect the needs of their local community and ward.

Councillors are able to express preliminary views on emerging development schemes and associated Section 106 obligations at the pre- application stage but these must not be given in a way that could be perceived by others as having pre-determined their position in the event that they are, or become, a member of the Planning Committee that determines any subsequent application.

If a Councillor decides to express anything other than a clear preliminary view at the pre-application stage, or at this stage decides to represent a view on behalf of their local community or ward in support of their role as a community champion, their pre-determination of the scheme will require them to stand aside from the determination of any subsequent planning application.

Existing S.106 Agreements – Rules governing expenditure

The £19M of funds accrued for existing S.106 Agreements has been secured against existing planning permissions granted by the council. National policy and guidance make clear that planning obligations may only constitute a reason for granting planning permission if they meet the tests which are set out in the Community Infrastructure Levy Regulations 2010. These Regulations provide that, for a planning obligation to be used as a reason for granting planning permission, it must be:

- necessary to make the development acceptable in planning terms;
- directly related to the proposed development; and
- fairly and reasonably related in scale and kind to the proposed development.

Under the agreement, the council has undertaken to execute the infrastructure improvements identified in the S.106 to mitigate the impacts of the development granted permission, usually within a 5/7-year period from when we receive the money. There is therefore often little flexibility in where and what the monies can be spent on, as illustrated in the typical clause below:

INSERT TYPICAL RESTRICTED S106 AGREEMENT CLAUSE

The developer is entitled to have the monies paid refunded if the council is either unable to undertake the improvements within the time frame stipulated or if it decides the infrastructure is no longer required. They can also appeal to the Planning Inspectorate for them to instruct the council to refund the monies paid and formally discharge the obligation.

It is therefore important that members do not make contact direct with developers regarding signed S.106 agreements as any discussions could result in the developer seeking a refund of some of the monies that have already been paid or release from a non-financial obligation (e.g. provision of an artistic component on site up to a specified value.)

Existing S.106 Agreements – Member Involvement (Major Schemes/Programmes)

The table below highlights the arrangements that exist for members to participate in the strategic decision-making process for projects that will be funded (in part or full) through S.106 obligations:

Category	Funds (as at 1/4/20)	Mechanisms for Member Involvement
Affordable Housing	£5.75M	£3.5M was received from large developments commencing in 2019/20, significantly increasing the sums available. Receipts from these “windfall” sums are difficult to predict but, when received, are used to extend the various BHCC Housing Programmes. This includes purchase of land and dwellings, addressing viability issues for hard to develop sites, investing in environmental technologies and funding additional homes within the approved programmes.
Economic Development (Local Employment)	£1.05M	A review of the scheme, construction-based restrictions, receipts and plans for future expenditure has been commenced and potential options and changes to the existing charges in the Technical Guidance will be the subject of a further report to TECC in Spring 2021.
Education	£2.7M	P&R Committee agreed in October 2018 spending £1.3M as part of a £16M investment to create additional secondary places at 9 schools across the city. The remaining receipts will be utilised to support minor changes to pupil capacity across the estate due to fluctuations in demand and parent preference. Some of the funds will also be used to support major capital maintenance projects at existing schools (new boilers, re-fenestration, replacement roofs) to provide a better environment for pupils and staff. After the introduction of CIL, all off site projects will be the subject of future CIL funding bids rather than provided through S106 contributions.
Open Space / Leisure	£5.6M	Additional resources are being procured to support the delivery of the projects that form part of the wider strategy to invest in new facilities in the city parks, which represents over 50% of the sums held. The £1.1M held for Indoor Sports is being used to secure matched grant funding and allocated through the draft Sports Facilities Investment Plan, the Playing Pitch Strategy and the Local Football Facility Plan (amongst others) and the spend is approved through P&R committee. Some sums are held pending decisions on strategic infrastructure (e.g. swimming pools) and other investment programmes (e.g. Stanmer Park.) After the introduction of CIL, all off site projects will be the subject of future CIL funding bids rather than provided through S106 contributions.
Sustainable Transport	£3.9M	The sums identified relate to specific transport and highway measures which are primarily focused on sustainable transport (walking, cycling and public transport). They are often included in, or provide contributions to, wider local transport projects that are planned and delivered as part of the council’s Local Transport Plan [LTP] capital programme. This helps ensure that schemes are comprehensive and achieves value for money. In order to assist in the investment of these S106 sums, the LTP capital programme also includes an additional sum to provide an adequate level of financial and staff resource to design and deliver some of these S106 measures.

		After the introduction of CIL, all off site projects will be the subject of future CIL funding bids rather than provided through S106 contributions.
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Note – The Executive Director, Economy, Environment & Culture is preparing a strategy to spend the £115k contribution held across the community centre estate

Existing S.106 Agreements – Member Involvement (Minor Projects)

Although using the existing mechanisms above will enable members to continue to be involved in the promotion of schemes within their wards, it is recognised that there is some limited potential opportunity to progress small, local schemes (usually below £2,500 in value) from within existing S.106 obligations over the next 2/3 years, until the CIL Neighbourhood Portion has sufficiently accumulated through approved developments commencing.

These schemes could:

- Reflect changes in local priorities for minor improvements to existing infrastructure identified by ward councillors direct or through community groups
- Be additional projects to utilise small pockets of funding remaining following the completion of major schemes that would otherwise be refunded
- Provide an additional funding source to existing schemes being progressed locally using other funds

By adopting the protocol below, members will be able to promote local schemes but enable the council to contain the administrative costs in assessing these opportunities to a minimum.

Task	Responsibility	Notes
Capacity		
Each councillor will be limited to submitting no more than 2 bids per bidding round (one annual round per year) and each ward will not submit more than 4 bids in total per annual bidding round (subject to funding being available in the ward concerned.)	Ward Councillors (Bids supported by all ward councillors and then a majority will be considered before those supported by a single councillor.)	This measure will ensure that the administrative time consumed in processing low value expenditure is kept proportionate and efficient.
Feasibility		
Community Groups/Ward Councillors to discuss and identify potential projects using existing networks and ensure proposal sits within maximum funding threshold (£2,500)	Ward Councillor to confirm if any S.106 funds have been received in the area for the type of scheme proposed. If no funds are available, local member will advise community groups and task will be complete.	The Planning Service will initially provide all members with a list of unspent S.106 funds for their ward pending the roll out of the online Exacom module for members to access information direct.
Bid Submission		
Community Groups/Ward Councillors prepare bid submission	Lead Ward Councillor agrees to support bid, works with community groups to complete bid form and	The Planning Service will provide councillors with a link to the form to be used held in (members library?) It

	liaises with fellow ward councillors to ascertain if support is agreed.	will include section to identify which S106 & specific obligation the funds are being sought from.
Bidding Deadlines		
Bid window open from 01 – 31 October (deadline for submissions)	Lead Ward Councillor submits bid form electronically to (bespoke email address) in the bid window identified	Upon receipt, the CIL & S106 Manager will undertake a validation process and resolve any queries direct with the ward councillor submitting the bid (e.g. problems with fit with S.106 obligation.)
Service, Finance & S106 Review (Target 1 month)		
Service	Officer will review bid in context of service plans for expenditure and other priorities & discuss with Ward Councillor (s) if there are any conflicts	Service confirms agreement or not to the proposed bid. (Pass/Fail)
Finance	Check to ensure safeguarding & proper stewardship of proposed spend (including issues re proposed payments, VAT etc)	Finance confirms agreement or not to the proposed bid (Pass/Fail)
Bid Round Approval (Target 6 weeks)		
Authorisation	Head of Planning reviews each bid and recommendation & confirms/amends decision accordingly	CIL & S106 Manager submits report of analysis outcome for all submitted bids to TECC Committee with copies to ward councillors
Outcome	Councillors advised of outcome of process and letter confirming funding issued to organisation with details of how to receive funding	All funding approved has to be spent within 12 months of date approved otherwise it is automatically withdrawn.