WEST OXFORDSHIRE DISTRICT COUNCIL

ECONOMIC AND SOCIAL OVERVIEW AND SCRUTINY COMMITTEE THURSDAY 28 JUNE 2018

APPLICATION OF MONIES RECEIVED THROUGH PLANNING SECTION 106 AGREEMENTS AND IN FUTURE FROM CIL RECEIPTS

REPORT OF THE HEAD OF PLANNING AND STRATEGIC HOUSING

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1. PURPOSE

To update Members regarding their concerns as to how developer funding is applied and to advise as to how matters may change in future.

2. RECOMMENDATION

That the content of the report be noted.

3. BACKGROUND

3.1 Members agreed at their last meeting to require that the Development Manager provide a briefing paper on the application of developer funding. At present such funding is derived entirely through the negotiations undertaken under the framework of section 106 of the Town and Country Planning Act 1990. Such agreements can be made either unilaterally (a unilateral obligation) where a developer promises to undertake various matters or pay sums of monies to mitigate harms or more usually by way of an agreement (a section 106 agreement) whereby this Council (and often the County Council) are a party to the agreement. Separately OCC can secure monies for highway works under section 278 of the Highways Act

3.2 Over the years Local Planning Authorities became increasingly skilled at using the provisions of section 106 to secure community benefits and this led to concerns being raised by the development industry to Government that the costs of such agreements were becoming disproportionate and that the time taken to negotiate them was holding back development. This in turn has led to the regulations regarding the application of 106 agreements being made tighter and separately the Government has introduced a separate mechanism to secure funding from developments as essentially a roof tax which will be collected through the Community Infrastructure Levy (CIL).

3.3 The main relevant regulations as applicable to these funding streams are set out below.

Section 106 Agreements

3.4 Planning obligations assist in mitigating the impact of unacceptable development to make it acceptable in planning terms. Planning obligations may only constitute a reason for granting planning permission if they meet the tests that they are i) necessary to make the development acceptable in planning terms, ii) directly related to the development, and iii) fairly and reasonably related in scale and kind. These tests are set out as statutory tests in the Community Infrastructure Levy Regulations 2010 and as policy tests in the National Planning Policy Framework. Local authorities are required to ensure that the combined total impact of such requests does not threaten the viability of the sites and scale of development identified in the development plan.

3.5 Planning obligations assist in mitigating the impact of development which benefits local communities and supports the provision of local infrastructure. In all cases, including where tariff style charges are sought, the local planning authority must ensure that the obligation meets the relevant tests for planning obligations in that they are necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind. Planning obligations should not be sought where they are clearly not necessary to make the development acceptable in planning terms and Government advice sets out that they must be fully justified and evidenced. Where affordable housing contributions are being sought, planning obligations should not prevent development from going forward and Government advice is that the LPA "should be flexible in their requirements".

3.6 Policy for seeking planning obligations should be grounded in an understanding of development viability through the plan making process. On individual schemes, applicants should submit evidence on scheme viability where obligations are under consideration. Wherever possible, applicants should provide viability evidence through an open book approach to improve the review of evidence submitted and for transparency.

3.7 Local planning authorities are required to keep a copy of any planning obligation together with details of any modification or discharge of the planning obligation and make these publically available on their planning register.

3.8 Local planning authorities are expected to use all of the funding they receive through planning obligations in accordance with the terms of the individual planning obligation agreement. This will ensure that new developments are acceptable in planning terms; benefit local communities and support the provision of local infrastructure. To ensure transparency local planning authorities are encouraged to make publically available information as to what planning obligation contributions are received and how these contributions are used. This information could be published in the authority's monitoring report or through separate periodic reports published on the local planning authority's website. Local planning authorities are expected to use all of the funding received by way of planning obligations, as set out in individual agreements, in order to make development acceptable in planning terms. Agreements normally include clauses stating when and how the funds will be used by and allow for their return, after an agreed period of time, where they are not.

3.9 Planning obligations can be renegotiated at any point, where the local planning authority and developer wish to do so. Where there is no agreement to voluntarily renegotiate, and the planning obligation predates April 2010 or is over 5 years old, an application may be made to the local planning authority to change the obligation where it "no longer serves a useful purpose" or would continue to serve a useful purpose in a modified way.

3.10 There are specific circumstances where contributions for affordable housing and tariff style planning obligations (section 106 planning obligations) should not be sought from small scale and self-build development. These circumstances are that;

- contributions should not be sought from developments of 10-units or less, and which have a maximum combined gross floorspace of no more than 1,000 square metres (gross internal area)
- in designated rural areas, local planning authorities may choose to apply a lower threshold of 5-units or less. No affordable housing or tariff-style contributions should then be sought from these developments. In addition, in a rural area where the lower 5-unit or less threshold is applied, affordable housing and tariff

style contributions should be sought from developments of between 6 and 10-units in the form of cash payments which are commuted until after completion of units within the development. This applies to rural areas described under section 157(1) of the Housing Act 1985, which includes National Parks and Areas of Outstanding Natural Beauty
- affordable housing and tariff-style contributions should not be sought from any development consisting only of the construction of a residential annex or extension to an existing home

3.11 Some authorities seek planning obligations contributions to pooled funding 'pots' intended to provide common types of infrastructure for the wider area. However there are currently limits on the number of agreements that can contribute to such pots (no more than 5) such that sometimes a site where a contribution could have been sought will be allowed to proceed without making that contribution as the LPA will need to ensure that it does not in the interim exceed the number of sites that can contribute and thus potentially miss out when a larger site comes forward subsequently.

106- Key messages

- Section 106 agreements are bespoke to each site
- Must be necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind
- What they can be used to secure monies for and the number of sites that can contribute to any particular piece of infrastructure is limited
- The monies and how they are to be spent are specified in the Committee report as part of the Heads of Terms section with indexation applied to ensure the value of contributions remains
- There is usually a payback if the monies are not spent on their specific purpose or within a prescribed timeframe

Community Infrastructure Levy (CIL)

3.12 As advised above the Government has sought to limit the use of tariff based obligations secured by way of 106 agreements but in its place has introduced CIL which is essentially a floor tax that would be generated across a wider range of developments than would be required to contribute under 106. The work to introduce CIL in WODC was initially intended to be undertaken alongside the introduction of the new local plan but at the most recent Local Plan Inspector's request this element was detached from that process. It is thus likely that the Councils CIL charging schedule will be submitted for examination later this year- although the exact date will depend upon the extent of any further evidence and consultation undertaken.

3.13 When introduced the levy may be payable on development which creates net additional floor space, where the gross internal area of new build is 100 square metres or more. That limit does not apply to new houses or flats, and a charge can be levied on a single house or flat of any size, but there are exclusions, exemptions and reliefs from the levy that may be available.

3.14 The following do not pay the levy:

- development of less than 100 square metres – unless this is a whole house, in which case the levy is payable
- houses, flats, residential annexes and residential extensions which are built by 'self builders' where an exemption has been applied for and obtained, and, in

regard to a self build home or a residential annex, a Commencement (of development) Notice served prior to the commencement of the development
- social housing that meets the relief criteria set out in regulation 49 or 49A (as amended by the 2014 Regulations) and where an exemption has been obtained, and a Commencement (of development) Notice served, prior to the commencement of the development
- charitable development that meets the relief criteria set out in regulations 43 to 48 and where an exemption has been obtained, and a Commencement (of development) Notice served, prior to the commencement of the development
- buildings into which people do not normally go
- buildings into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery
- structures which are not buildings, such as pylons and wind turbines
- specified types of development which local authorities have decided should be subject to a 'zero' rate and specified as such in their charging schedules
- vacant buildings brought back into the same use
- Where the levy liability is calculated to be less than £50, the chargeable amount is deemed to be zero so no levy is due.
- Mezzanine floors, inserted into an existing building, are not liable for the levy unless they form part of a wider planning permission that seeks to provide other works as well.

3.15 In England, levy charging authorities are district and metropolitan district councils, London borough councils, unitary authorities, national park authorities, The Broads Authority, Mayoral Development Corporations and the Mayor of London. Landowners are ultimately liable for the levy, but anyone involved in a development may take on the liability to pay. In order to benefit from payment windows and instalments, someone must assume liability in this way. Where no one has assumed liability to pay the levy, the liability will automatically default to the landowners and payment becomes due as soon as development commences. The Levy applies to development constructed by way of planning application, local development order, Neighbourhood development order, some Acts of Parliament, some forms of permitted development and some applications for lawful Development Certificates.

3.16 The charging authority sets out its levy rates in a charging schedule. Levy rates are expressed as pounds per square metre. These figures are applied to the gross internal floorspace of the net additional development liable for the levy.

3.17 The Council's revised draft charging schedule published for consultation in January 2017 included the following CIL rates for residential and non-residential development.

Residential

Zone	**Type/size of scheme**	**Recommended CIL rate (£ per m^2)**
District wide	Schemes of 5 units or less (except certified 'self-build' which is exempt)	£200 per m^2
District wide (outside of the Cotswolds AONB)	6-10 units (inclusive)	£200 per m^2
District wide (within the Cotswolds AONB)	6-10 units (inclusive)	£100 per m^2

Zone	Type/size of scheme	Recommended CIL rate (£ per m^2)
District wide	Schemes of 11 units or more (except allocated Strategic Development Areas (SDAs) identified in the Local Plan 2031).	£200 per m^2
District Wide	Allocated Strategic Development Areas (SDAs) identified in the Local Plan 2031.	£100 per m^2
District wide	Sheltered housing	£100 per m^2
District wide	Extra care housing	£100 per m^2

Non-Residential

Use	Location	Recommended CIL rate (£ per m^2)
Offices	District wide	£0
Industrial	District wide	£0
A1 – A5 Uses	Designated Town Centres (as defined by the Local Plan)	£50 per m^2
A1 – A5 Uses	District-wide (outside designated Town Centres)	£175 per m^2

3.18 Liable development is the type of development specified in the charging schedule as incurring a particular levy charge. Where an existing building is being redeveloped, the nature of the redevelopment may impact on the levy charge. Charging authorities must set a rate which does not threaten the ability to develop viably the sites and scale of development identified in the relevant Plan (the Local Plan in England, Local Development Plan in Wales, and the London Plan in London). They will need to draw on the infrastructure planning evidence that underpins the development strategy for their area. Charging authorities should use that evidence to strike an appropriate balance between the desirability of funding infrastructure from the levy and the potential impact upon the economic viability of development across their area.

3.19 A charging schedule is prepared and adopted as follows.

- the charging authority prepares its evidence base in order to prepare its draft levy rates, and collaborates with neighbouring/overlapping authorities (and other stakeholders)
- the charging authority prepares a preliminary draft charging schedule and publishes this for consultation
- consultation process takes place
- the charging authority prepares and publishes a draft charging schedule
- period of further representations based on the published draft
- an independent person (the "examiner") examines the charging schedule in public
- the examiner's recommendations are published

- the charging authority considers the examiner's recommendations
- the charging authority approves the charging schedule

3.20 County councils are responsible for the delivery of key strategic infrastructure. Charging authorities must consult and should collaborate with them in setting the levy, and should work closely with them in setting priorities for how the levy will be spent in 2-tier areas such as Oxfordshire. Collaborative working between county councils and charging authorities is especially important in relation to the preparation or amendment of the so called regulation 123 infrastructure list, bearing in mind the potential impact on the use of highway agreements by the county council. Charging authorities must identify the total cost of infrastructure they wish to fund wholly or partly through the levy. In doing so, they must consider what additional infrastructure is needed in their area to support development, and what other sources of funding are available, based on appropriate evidence.

3.21 Information on the charging authority area's infrastructure needs should be drawn from the infrastructure assessment that was undertaken as part of preparing the relevant Plan (the Local Plan in England, Local Development Plan in Wales, and the London Plan in London). This is because the plan identifies the scale and type of infrastructure needed to deliver the area's local development and growth needs. In determining the size of its infrastructure funding gap, the charging authority should consider known and expected infrastructure costs and the other possible sources of funding to meet those costs. This process will help the charging authority to identify a levy funding target. The government recognises that there will be uncertainty in pinpointing other infrastructure funding sources, particularly beyond the short-term. Charging authorities should focus on providing evidence of an aggregate funding gap that demonstrates the need to put in place the levy.

3.22 The charging schedule must be formally approved by a resolution of the full council of the charging authority. The resolution should include an appropriate commencement date, following or on approval. The charging schedule remains in effect until the charging authority either brings into effect a revised version or decides to stop charging the levy.

3.23 Planning permissions which first permit development on a day when the charging schedule is in effect will be liable for the levy.

3.24 The collection process steps are:

- in areas where the levy is in force, applicants for planning permission should include a completed copy of the Additional CIL Information form with their application – this will help the collecting authority to calculate the amount payable
- where planning permission is granted for development by way of a general consent – such as via the General Permitted Development Order or through a Local Development Order, the developer or landowner submits a notice of chargeable development to the collecting authority (unless the development is less than 100 square metres, or the levy rate for the development is £zero per square metre)
- where planning permission is necessary, or permission is granted for development by way of a general consent, the collecting authority will expect the developer, landowner or another interested party to assume liability for the levy by submitting an assumption of liability form. It may speed up the process of issuing a liability notice if this form is submitted before planning permission is granted

- the collecting authority then issues a liability notice to the applicant, the developer, and whoever has assumed liability for the scheme, which sets out the charge due and details of the payment procedure
- the relevant person(s) then submit a notice to the collecting authority setting out when development is going to start – a commencement notice
- the collecting authority issues a demand notice to the landowner, or whoever has assumed liability, setting out the payment due dates in line with the payment procedure
- on commencement of the development, the landowner, or whoever has assumed liability, should follow the correct payment procedure
- the collecting authority must issue a receipt for each payment received, and transfer the funds to the charging authority (if that is a different body).

3.25 Anyone wishing to claim relief or an exemption from the levy should make sure that they submit their claim in good time. Most forms of relief or exemption must be claimed and approved prior to the commencement of development. Where there are problems in collecting the levy, it is important that collecting authorities are able to penalise late payment and discourage future non-compliance. The regulations provide for a range of proportionate enforcement measures, such as surcharges on late payments. In cases of persistent non-compliance, collecting authorities may take more direct action to recover the amount due. For example, a collecting authority may issue a Community Infrastructure Levy Stop Notice, which prohibits development from continuing until payment is made and the stop notice is withdrawn. In those cases where a collecting authority can demonstrate that recovery measures have been unsuccessful, they may apply to a magistrates court to send the liable party to prison for up to 3 months.

3.26 Once collected the levy can be used to fund a wide range of infrastructure, including transport, flood defences, schools, hospitals, and other health and social care facilities, play areas, parks and green spaces, cultural and sports facilities, academies and free schools, district heating schemes and police stations and other community safety facilities. This flexibility gives local areas the opportunity to choose what infrastructure they need to deliver their relevant Plan (the Local Plan in England, Local Development Plan in Wales, and the London Plan in London). Charging authorities may not use the levy to fund affordable housing.

3.27 Local authorities must spend the levy on infrastructure needed to support the development of their area, and they will decide what infrastructure is needed. The levy is intended to focus on the provision of new infrastructure and should not be used to remedy pre-existing deficiencies in infrastructure provision unless those deficiencies will be made more severe by new development.

3.28 The levy can be used to increase the capacity of existing infrastructure or to repair failing existing infrastructure, if that is necessary to support development.

3.29 Local authorities must allocate at least 15% of levy receipts to spend on priorities that should be agreed with the local community in areas where development is taking place. This can increase to a minimum of 25% in certain circumstances.

3.30 Fifteen per cent of Community Infrastructure Levy charging authority receipts are passed directly to those parish and town councils (in England) and community councils (in Wales) where development has taken place Where chargeable development takes place within the local council area, up to £100 per existing council tax dwelling can be passed to the parish, town or community council this way each year to be spent on local priorities. Areas could use some of the neighbourhood pot to develop a neighbourhood plan where it would support development by addressing the demands that development places on the area.

3.31 In England, communities that draw up a neighbourhood plan or neighbourhood development order (including a community right to build order), and secure the consent of local people in a referendum, will benefit from 25% of the levy revenues arising from the development that takes place in their area. This amount will not be subject to an annual limit. For this to apply, the neighbourhood plan must have been made.

3.32 The neighbourhood portion of the levy can be spent on a wider range of things than the rest of the levy, provided that it meets the requirement to 'support the development of the area'. The wider definition means that the neighbourhood portion can be spent on things other than infrastructure (as defined in the Community Infrastructure Levy regulations). For example, the pot could be used to fund affordable housing where it would support the development of the area by addressing the demands that development places on the area.

3.33 Parish, town and community councils must discuss their priorities with the charging authority during the process of setting the Levy rate(s).

3.34 Once the levy is in place, parish, town and community councils should work closely with their neighbouring councils and the charging authority to agree on infrastructure spending priorities. If the parish, town or community council shares the priorities of the charging authority, they may agree that the charging authority should retain the neighbourhood funding to spend on that infrastructure. It may be that this infrastructure (eg a school) is not in the parish, town or community council's administrative area, but will support the development of the area.

3.35 If a parish, town or community council does not spend its levy share within 5 years of receipt, or does not spend it on initiatives that support the development of the area, the charging authority may require it to repay some or all of those funds to the charging authority.

3.36 Regulations prevent section 106 planning obligations being used in relation to those things that are intended to be funded through the levy by the charging authority. While parish, town and community councils are not required to spend their neighbourhood funding in accordance with the charging authority's priorities, Government expects parish, town and community councils to work closely with the charging authority to agree priorities for spending the neighbourhood funding element.

3.37 Charging authorities may pass money to bodies outside their area to deliver infrastructure that will benefit the development of the area. For example, these bodies may include the Environment Agency for flood defence or, in 2-tier areas, the county council, for education infrastructure.

3.38 If they wish, charging authorities may pool funds from their respective levies to support the delivery of infrastructure that benefits the wider area, for example, a larger transport project where they are satisfied that this would also support the development of their own area.

3.39 To ensure that the levy is open and transparent, charging authorities must prepare short reports on the levy. Charging authorities must publish a report on their website by 31 December each year, for the previous financial year. They may prepare a bespoke report or use an existing reporting mechanism, such as the annual monitoring report which reports on their development plan. Where a charging authority holds and spends the neighbourhood portion on behalf of the local community, it should ensure that it reports this as a separate item.

3.40 The levy is intended to provide infrastructure to support the development of an area, rather than making individual planning applications acceptable in planning

terms. As a result, some site specific impact mitigation may still be necessary in order for a development to be granted planning permission. Some of these needs may be provided for through the levy but others may not, particularly if they are very local in their impact. Therefore, the government considers there is still a legitimate role for development specific planning obligations to enable a local planning authority to be confident that the specific consequences of a particular development can be mitigated.

3.41 However as advised above as regards to 106 agreements there are policy tests on the use of planning obligations on a statutory basis, for developments that are capable of being charged the levy. Regulations ensure the local use of the levy and planning obligations does not overlap; and there is a limit on pooled contributions from planning obligations towards infrastructure that may be funded by the levy. In effect, the levy regulations restrict the use of generic section 106 tariffs for items that are capable of being be funded by the levy. Authorities who refer to generic types of infrastructure (eg 'education'), rather than specific projects, in their s106 agreements, will be unable to collect more than 5 contributions towards those generic funding pots.

CIL- Key messages

- It is not in place in WODC as yet
- The Council's CIL charging schedule is likely to be submitted for examination later this year
- The extent of qualifying development will be wider and the restrictions on how it can be spent are less proscriptive than for 106 agreements
- There will need to be a political process introduced deciding where the receipts received are actually spent and in trying to align Parish, WODC and OCC priorities wherever possible
- CIL is more akin to a tax than a planning levy and will introduce a whole new series of regulatory and bureaucratic requirements upon the Council.

4. ALTERNATIVES/OPTIONS

None- the report is to note.

5. FINANCIAL IMPLICATIONS

None arising directly from this report.

6. RISKS

There are risks in not assessing funding associated with applications in accordance with the appropriate legal mechanisms or in not spending it expeditiously as the funding may have to be returned.

7. REASONS

To ensure that any decisions issued are subject to the appropriate regulations.

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Background Papers:
None