

Write-Off - Section 106 Agreement

Report of the:	Director of Finance and Resources
Contact:	Simon Young
Urgent Decision?(yes/no)	No
If yes, reason urgent decision required:	N/A
Annexes/Appendices (attached):	None
Other available papers (not attached):	None stated

Report Summary

A report seeking to write-off sums invoiced pursuant to a section 106 Agreement in relation to a development at Linton's Lane, Epsom

Recommendation (s)

That the sum of £374,498.27 be written off.

1 Implications for the Council's Key Priorities, Service Plans and Sustainable Community Strategy

- 1.1 Due to the purposes for which the sums to be written off could have been put, there are no direct implications for the Council's Key Priorities, Service Plans or Sustainable Community Strategy arising from this report.

2 Background

- 2.1 Landowners can provide planning obligations under Section 106 of the Town and Country Planning Act 1990. The usual purpose of such obligations is to make acceptable a development proposal which would otherwise not be acceptable. Traditionally, obligations deal with the use and development of land and the provision of payments to contribute to infrastructure improvements required to mitigate the impact of the development and to make the development acceptable.
- 2.2 Planning obligations are offered either by agreement with the Council as local planning authority, or by unilateral obligations provided by developers. These documents are generally referred to as "section 106 agreements", and there is also reference to "developer contributions".

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- 2.3 Since the adoption in Epsom & Ewell of Community Infrastructure Levy, s106 agreements are used only in relation to very site specific requirements and affordable housing contributions.
- 2.4 Persimmon Homes was granted planning permission in 2013 for a development comprising of 85 houses at Lintons Lane. The permission (13/00250/FUL) was subject to a s106 obligation to pay infrastructure contributions totalling £827K. The various contributions fell due for payment at various different stages of development.
- 2.5 The financial contribution of £827,246.59 comprised of:
 - 2.5.1 Education (Primary): £184,016.43
 - 2.5.2 Education (Secondary): £199,634.92
 - 2.5.3 Transport: £177,110.78
 - 2.5.4 Libraries £12,227.06
 - 2.5.5 Open Space (Children) £4,462.43
 - 2.5.6 Open Space (Parks and Gardens and Amenity Green Space) £22,396.10
 - 2.5.7 Open Space (Outdoor Sports Facilities) £ 121,544.24
 - 2.5.8 Environmental Improvements) £ 66,461.94
 - 2.5.9 Monitoring Charge @ 5% £ 39,392.69
- 2.6 The development had commenced and an invoice was raised on 15th December 2014 for the first initial scheduled payment and these monies (£282,761.17) were paid by the developer. Interest was applied to the original amount due in accordance with the contracted terms of the S106 agreement.
- 2.7 The initial invoice was in respect of:
 - 2.7.1 Monitoring £39,392.69 + £913.77 interest = £40,306.46
 - 2.7.2 Transport £88,555.39 +£2,054.16 interest = £90,609.55
 - 2.7.3 Open Space (Children) £4,462.43 + £103.51 interest = £4565.94
 - 2.7.4 Open Space (Parks and Gardens and Amenity Green Space) £22,396.10 + £519.51= £22,915.61
 - 2.7.5 Open Space (Outdoor Sports Facilities) £121,544.24 + interest £2,819.38 = £124,363.62

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- 2.8 A separate application was made during 2014 by the developer under section 73 of the Town and Country Planning Act 1990 to “vary” the conditions attached to the 2013 permission. This application was approved on 8 December 2014 (14//00910/REM), which was after the development had commenced under the original permission.
- 2.9 Although commonly referred to as a ‘variation’ section 73 applications actually result in the issue of a completely new planning permission. Both the original and new permissions remain extant. Because a section 73 application results in the grant of a new planning permission, it is necessary to impose all of the conditions which remain relevant from the original permission (usually changing only the conditions which was the subject of the section 73 application). It is also necessary to enter into a new section 106 agreement (or vary the existing agreement).
- 2.10 A new s106 agreement was not however entered into in relation to the new permission in error as planning officers mistakenly thought the original s106 would still apply.
- 2.11 The Council subsequently invoiced the developer on 13th November 2015 for payment of the next scheduled contribution (£374,498.27 – including interest). The developer replied to state that it was implementing the new permission and, as there was no s106 agreement attached to the new planning permission, there was therefore no liability for further contributions to be paid.
- 2.12 Notwithstanding this the developer later paid a £10,000 contribution towards ecological mitigation in respect of a European Protected Species Licence. This payment was received on 10th May 2015 – but the developer made clear this was to meet a separate statutory obligation, and not a payment under the original s106 agreement.
- 2.13 In summary, the total contribution amount was £827,246.59. The amount received to-date is £292,761.17 which includes some added interest under the terms of the s106 agreement. The total amount unpaid is £540,895.74 (which includes added interest on the initial debtors accounts raised).
- 2.14 The day after the response from the developer was received denying liability, Officers sought legal advice from leading counsel. Advice given suggested that most likely a pragmatic solution would be reached. Counsel advised that the Council should consider seeking to assist in getting the court to quash the second planning permission. This would have nullified the planning permission given, and the application would again be open for determination. A s106 agreement could then be pursued with the developer. This proposal was communicated to the developer and they initially responded positively that they would not challenge such a quashing. Subsequently, however, Persimmon’s legal representatives pointed out that in accordance with legislation by the time the Council had contacted the developer, the Council was out of time to

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bring an application to quash the second planning permission, and there was no other legal basis on which to require the developer to enter into a new s106 agreement.

- 2.15 As the time frame for quashing the second permission has expired further legal action would appear to be exhausted. There were delays in dealing with this matter following the intervention of the developer's solicitor, however, it is not considered this is likely to have materially affected the outcome, as the court would have been reluctant to allow an application which was already well out of time.
- 2.16 Since this matter, Community Infrastructure Levy has come into effect. Most financial contributions from potential developers will in future be determined under that regime. s106 obligations will be principally non-financial. This should mitigate the risks that materialised with this particular development. As part of seeking a resolution, the Council's Internal Auditors were requested to carry out a review of this matter to determine whether any further action could be taken. They recommended that the Council write to the developer explaining the situation. It was also recommended that the Head of Place Development should undertake a review of governance processes to ensure that adequate checks and authorisations are in place to provide assurance that, going forward, accurate documentation and contractual obligations are in place.
- 2.17 Since legal options were not available, the matter has been pursued in joint correspondence between the Chief Executives of Epsom & Ewell Borough Council and Surrey County Council, and the developer, in an effort to collect monies due as a result of their moral obligations, but no response was received.

3 Proposals

- 3.1 It has to be recognised that the sums invoiced on 13 November 2015, totalling £374,498.27 are no longer recoverable and it is therefore recommended that the sum be written off. The remainder of the contributions under the s106 agreement of around £166,397 have never been invoiced as they have not, and now will not, ever fall due for payment.

4 Financial and Manpower Implications

- 4.1 **Chief Finance Officer's comments:** *The financial implications are set out above. It is noted that the sums being written off (and the further sum which will never fall due for payment) would in whole or large part have been passed to Surrey County Council and are therefore not available to support infrastructure projects in relation to areas such as education, transport and libraries.*

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5 Legal Implications (including implications for matters relating to equality)

5.1 **Monitoring Officer's comments:** *The legal issues are covered in the body of the report. It is not considered that it would be possible to recover the sums outstanding under the original s106 agreement.*

6 Sustainability Policy and Community Safety Implications

6.1 There are no implications for the purposes of this report.

7 Partnerships

7.1 This matter has had an impact on Surrey County Council in that reduced funding is available to it. The County Council has been involved in discussions around this matter and has jointly written to the developer.

8 Risk Assessment

8.1 There are no risks arising from this report. The risk of recurrence of a situation such as this in future has been mitigated by training and a review of processes. This matter has also been the subject of an internal audit investigation.

9 Conclusion and Recommendations

9.1 The Head of Place Development agreed with the recommendations in the Internal Audit report. He had already reminded team members of the position in relation to s73 applications, and the requirement to vary the s106 agreement or enter into a new agreement.

9.2 This matter arose due to human error, compounded by a failure of governance controls, and the fact that this was not detected and actioned soon enough. As it is not considered that the outstanding sums are recoverable, it is right that they be written off for accounting purposes.

Ward(s) Affected: Town Ward;