

Section 106 Internal Audit Report – Key Findings

Audit and Governance Committee
28th September 2023



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Section 106 Agreements and Community Infrastructure Levy (CIL) Fund

Planning obligations under Section 106 of the Town and Country Planning Act 1990 (as amended), commonly known as **S106 agreements**, are a mechanism which make a specific development proposal acceptable in planning terms, that would not otherwise be acceptable. Each 106 agreement is a specific deed attached to an individual planning permission.

Planning obligations may only constitute a reason for granting planning permission if they meet the tests that they are necessary. They 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 to the development.

The **Community Infrastructure Levy (CIL)** is a planning charge introduced across England and Wales by the 'Community Infrastructure Levy Regulations 2010 (as amended)' and is used by Local Authorities to help fund a wide range of infrastructure required as a result of increased development (not an individual development like S106) in an area. It is based on the size and type of development and once a CIL Charging Schedule is set in an area, it is mandatory to pay and non-negotiable.

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Internal Audit Scope - 5 risks examined

- *Risk 1: Arrangements to ensure that appropriate S106 agreements are secured, in place and monitored to activate trigger points in a timely manner are ineffective, resulting in failure to identify and collect amounts due, limiting improvements to the local community and failure to meet obligations imposed during the planning process*
- *Risk 2: Limited strategic oversight and senior decision making in the process leads to reduced benefits/outcomes due to low levels of innovation and options appraisal against achievement of the Council's corporate aims*
- *Risk 3: Ineffective monitoring and accountability arrangements may result in a failure to implement schemes within agreed timescales, resulting in potential repayments to developers, unspent monies being unallocated and remaining on the Council's balance sheet, and planning obligations remaining unmet or becoming the responsibility of the Council*
- *Risk 4: Ineffective governance and monitoring arrangements leading to a lack of transparency around the level and status of S106 monies held by the Council, resulting in difficulties in managing the financial position of the service, a lack of strategic oversight by senior officers and Members, and reputational damage to the Council*
- *Risk 5: Recommendations made previously (2018 audit) have not been implemented, resulting in continuation of poor practice.*



Audit Opinion

An overall opinion on the control environment will be given on completion of the audit work. This opinion relates **only** to those risks identified or systems tested. Where the audit opinion given is either limited or no assurance, consideration will be given to including those areas in the Annual Governance Statement.

There are four possible opinions: good assurance, satisfactory assurance, limited assurance, and no assurance.

The following table explains the various assurance levels in terms of the controls in place and how testing has shown them to be operating. It also gives an indication as to the priority rating of recommendations you might expect at each assurance level, although please note this is for guidance only as the final opinion lies at the discretion of the Auditor.

Assurance Level	Explanation
Good Assurance	Controls are in place to mitigate against the risks identified in the terms of Reference. Testing has shown that controls are working effectively and consistently to ensure that key risks are well managed. No high level recommendations have been made although there may be a small number at medium level. Some changes in the control environment may be beneficial to enhance performance and realise best practice.
Satisfactory Assurance	Controls are adequate to address the risks identified in the terms of reference. Testing has shown that there are some inconsistencies in the application of the controls, and attention is needed to improve the effectiveness of these controls. Recommendations will normally be no higher than medium level.
Limited Assurance	Controls are either not designed to mitigate the risks identified in the terms of reference, or testing has shown there to be significant non-application of controls. There are likely to be a number of high priority recommendations and/or a large number at the medium level. Attention is needed to improve the quality and effectiveness of the control environment in order to ensure key risks can be managed well.
No Assurance	There is an absence of controls to mitigate against the risks identified in the terms of reference. The majority of recommendations made are high priority, and key risks are not being properly managed. Urgent attention is required by management to improve the control environment. This area may be considered for inclusion in the organisation's Annual Governance Statement. It may also be appropriate for this area to be included in the sections/directorate Risk Register, and for the action plan to address these fundamental weaknesses to become part of the Service Delivery Plan.

Headlines

- “No Assurance” opinion; consideration should be given to inclusion in the Annual Governance Statement and will be discussed with External Audit.
- Internal Audit had previously reviewed this area in 2017/18 and a significant number of findings from that Audit are repeated, in full or in part in the current review.
- Internal Audit are moving to a 2 phase approach on follow up work; 1) Agree completion of agreed actions 2) Confirming that actions have had the desired effect
- Detailed audit testing covered 15 agreements entered into during the period 2017 to 2022, plus 1 additional agreement entered into prior to that where concerns had been raised by the relevant Member (dated 2013).
- 93 legacy agreements were inherited from predecessor authorities. Of these, 8 were time limited with only 1 recorded as being fully committed. The 7 remaining agreements had not been committed within the required deadlines and the developers may request repayment of any uncommitted balance. Should any monies be committed after the deadline, there is a risk that these amounts may need to be repaid at some point in the future.

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Headlines

- Work is ongoing to identify the value of CEC specific agreements that have expired and the associated uncommitted balances. *In the last reporting year £9m of s106 contributions were spent.*
- Organisational understanding of the legal purpose, role, and functions of S106 agreements needs to be improved. *Training and awareness raising sessions will be progressed.*
- Need to ensure CEC achieves the most effective benefits from S106 developer contributions.
- Planning Service Review identified S106 as a key area of work as part of the modernisation workplan. *Environment and Communities working group ready to be stood up.*
- Insufficient resource in planning service to undertake role and discharge legal duties; no resilience in service delivery as only 1 post, resulting in unacceptable risks– *will be addressed via recruitment to 1 post immediately, in advance full service restructure.*

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Headlines

- Lack of clarity about roles and responsibilities across the 106 process – e.g. planning officer role; consultees/other services who are responsible for spending the contributions that have been secured; s106 monitoring officer role. *This will be addressed through training and awareness raising sessions including a full workshop.*
- New processes – including process maps – to be developed. *A more pro active process will be used moving forward. Short term actions will need support from other services who are responsible for scheme delivery – e.g. committing spend and implementing schemes.*
- Insufficient oversight by senior management and Members of S106 activity and delivery. Requirement for services to report back on spend and implementation of projects to planning services. *Regular reporting and updates to CLT and E and C committee to be implemented moving forward.*
- S106 is supported by an IT system “Exacom”; currently, this isn’t being used to best effect and doesn’t reflect all S106 agreements in place. *Ensuring full use of Exacom will provide up to date information and support more responsive and efficient monitoring and reporting.*

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Key Findings – Risk 1 (1/4)

Arrangements to ensure that appropriate S106 agreements are secured, in place and monitored to activate trigger points in a timely manner are ineffective...

Finding	Implication and Action	Management Response
<p>Policies and Procedures</p> <p>Although the Site Allocations and Development Policies Document has recently reviewed and ratified, several policy documents inherited from legacy councils have not been updated to reflect the requirements of Cheshire East. The key document is the Draft Developer Contributions Supplementary Planning Document (SPD) which went out to consultation in November 2022 and is expected to be adopted in late 2023/23.</p>	<p><u>Implication</u> Ineffective or out of date policies and procedures leading to inconsistent approach to the identification and recording of s106 agreements resulting in potential loss of income and reputational damage to the Council.</p> <p><u>Action</u> To complete the consultation process for the Draft Developer Contributions SPD, ensuring that all relevant services are included prior to presentation to the Environment and Communities Committee.</p> <p>Following approval the document should be shared with all relevant officers and published on the Council's website.</p>	<p>Management Response – Agreed</p> <p>Due to be presented to Environment and Communities Committee in Q3</p> <p>Timescale – November 2023</p>
<p>Roles and Responsibilities</p> <p>A significant risk to delivery and continuity arises from a lack of resilience in procedural documentation and staffing resource. The current arrangements do not provide appropriate contingency or cover in the event of absence.</p>	<p><u>Implication</u> Financial and reputational damage due to significant delays at various stages of the process or inappropriate application of the rules.</p> <p><u>Action</u> Establish the level of resource required to:</p> <ul style="list-style-type: none">• Bring monitoring of S106 agreements to an effective level• Maintain it at this level going forward.• Provide an appropriate level of contingency within the service	<p>Management Response – Agreed</p> <p>Management arrangements to be considered as part of wider Planning Review</p> <p>Timescale – Ongoing. Recruitment process underway</p>

Key Findings – Risk 1 (2/4)

Arrangements to ensure that appropriate S106 agreements are secured, in place and monitored to activate trigger points in a timely manner are ineffective...

Finding	Implication and Action	Management Response
<p>Identification and Approval of S106 Agreements</p> <p>A local Scheme of Delegation documenting the delegation of powers from the Head of Planning is in place, dated April 2020. However this was not readily available. It is appreciated that this is currently being reviewed and is awaiting formal approval</p>	<p><u>Implication</u></p> <p>The Local Scheme of Delegation may be out of date and not reflect the delegated powers, as detailed in the current Constitution which may result in decisions not being made by appropriate Officers, or Officers taking decisions without the authority to do so.</p> <p><u>Action</u></p> <p>Once approved, the updated Local Scheme of Delegation should be communicated to appropriate officers and uploaded to Centranet for reference.</p>	<p>Management Response – Agreed</p> <p>Timescale – updated SOD completed and undergoing approval process</p>
<p>Content of S106 Agreements</p> <p>There is a lack of consistency in providing for, and articulating, ongoing costs such as utilities and maintenance within s106 agreements</p>	<p><u>Implication</u></p> <p>Where ongoing costs are not provided for there may be unbudgeted financial strain being placed on services in future years.</p> <p><u>Action</u></p> <p>Commuted sums for future maintenance costs should be built into all S106 consultation responses by Services. This should be reflected in agreements where appropriate or, at the very least, built into future budgets to ensure that any additional costs as a result of a development are accounted for.</p>	<p>Management Response – Agreed</p> <p>Agreed processes/formulae as set out in the SPD will include maintenance where this is appropriate.</p> <p>Timescale – December 2023</p>

Key Findings – Risk 1 (3/4)

Arrangements to ensure that appropriate S106 agreements are secured, in place and monitored to activate trigger points in a timely manner are ineffective

Finding	Implication and Action	Management Response
Recording S106 Agreements The Exacom system is not being used to its full potential by recording both financial and non financial elements of s106 agreements. During 2022 all agreements up to October 2020 were migrated to the system, however, it has not been updated since and is currently over 2 years out of date.	<u>Implication</u> Processes for identifying potential S106 records are weak, resulting in failure to identify and collect amounts due, limiting improvements to the local community and failure to meet obligations imposed during the planning process. <u>Action</u> The Exacom should be brought up to date as a priority and utilised to its full potential.	Management Response – Agreed Work is underway to update Exacom records as a priority and recruitment to vacant post will assist in this. Timescale – Ongoing, recruitment process underway
Supporting Documentation Key documentation not consistently retained on the document management system.	<u>Implication</u> Failure to clearly evidence the S106 process and decision making, resulting in potential reputational damage if this is challenged. <u>Action</u> All information supporting the S106 process should be uploaded to the document management system to support and evidence decisions.	Management Response – Agreed Planning application system is the appropriate location. Timescale – November 2023
Trigger Points Although trigger points are clearly documented in s106 agreements, testing identified that this was not always the case on the Finance Master Spreadsheet	<u>Implication</u> Failure to identify that triggers have been achieved leading to limited oversight of monies due, a reliance on developers to make payment and potential financial loss to the Council <u>Action</u> A data cleanse of the Finance Master Spreadsheet should be completed to ensure that all relevant information is clearly documented. Moving forward, Exacom should be the primary record for all s106 related matters.	Management Response – Agreed To be undertaken in consultation with relevant services Timescale – November 2023

Key Findings – Risk 1 (4/4)

Arrangements to ensure that appropriate S106 agreements are secured, in place and monitored to activate trigger points in a timely manner are ineffective

Finding	Implication and Action	Management Response
Monitoring Capacity issues have resulted in overall limitation of proactive monitoring	<u>Implication</u> Lack of oversight of s106 agreements resulting in a failure to collect, commit and expend contributions within deadlines resulting in financial loss and/or challenge to the Council. <u>Action</u> The level of resource required to ensure that s106 agreements are subject to regular and effective monitoring should be determined and any shortfalls addressed.	Management Response – agreed as per previous actions in relation to resource, capacity and wider planning review
Recording Receipts, Commitments and Expenditure 8 contributions received between 2018/19 and 2021/22 totalling £5.8m were identified as unallocated.	<u>Implication</u> Contributions which are not committed and spent within agreed deadlines may be liable to be returned to the developer resulting in financial pressures on the Council as they remain responsible for fulfilling the planning conditions. <u>Action</u> This should be investigated and the monies allocated to the correct S106 obligation in order to ensure that the contributions are spent in line with the relevant deadlines.	Management Response – Agreed To be undertaken with input from Legal and Finance Timescale – October 2023

Key Findings – Risk 2

Limited strategic oversight and senior decision making in the process leads to reduced benefits/outcomes

Finding	Implication and Action	Management Response
Lack of strategic oversight for S106 at Committee and senior officer level, including awareness of contributions against triggers and deadlines, and key issues emerging.	<p><u>Implication</u> Lack of strategic oversight may lead to reduced benefits/outcomes and the potential for reputational damage following claims of bias or favouritism</p> <p><u>Action</u> Regular reports or briefings should be provided to senior managers and the Environment and Communities Committee with respect to S106 agreements. This should include information in respect of key/emerging issues and oversight of contributions due, received and spent.</p>	<p>Management Response – Agreed</p> <p>To be linked to Annual IFS report</p> <p>Timescale – December 2023</p>
Issues were identified in relation to consultation with services regarding potential s106 obligations and contributions. These related to potential missed opportunities for services to access developer contributions and a concerning lack of appreciation and understanding of S106 use, processes, and timescales by consultees.	<p><u>Implication</u> Inconsistent processes and lack of understanding of the decision-making process and timeframes by Services may result in delayed planning decisions, non-compliance with agreed targets and missed opportunities to identify potential contributions.</p> <p><u>Action</u> Consultation timescales and potential use and limitations of s106 contributions should be reiterated to consultee services. Consideration should also be given to introducing a standard consultation pro forma document detailing the proposed obligation, rationale and justification, along with any supporting documentation</p>	<p>Management Response – Agreed</p> <p>Work is already underway as part of the planning service review to improve performance of a number of internal statutory consultees within a number of services, which are adding delays to planning decisions on applications. Cross team working and action plans have been developed and are being progressed in this regard.</p> <p>Timescale – as per Planning Modernisation Plan.</p>
There are no formal procedures documenting the process to be followed in undertaking viability assessments which are required where developers challenge proposed s106 obligations as financially unviable.	<p><u>Implication</u> Informal policies and procedures may result in an inconsistent approach and ineffective record keeping to support viability assessments for both financial and non-financial benefits.</p> <p><u>Action</u> The process for undertaking viability assessments should be agreed and documented, including recording of decisions and retention of supporting evidence</p>	<p>Management Response – Agreed</p> <p>A workshop led by planning and involving key consultees will be held in October 2023 as an opportunity to deliver training, clarify roles and responsibilities and develop detailed process notes and process mapping as required. In addition, and building in this detail, working Policy & Procedures document will be produced in consultation with the relevant Services.</p> <p>Timescale – December 2023</p>

Key Findings – Risk 3 (1/2)

Ineffective monitoring and accountability arrangements may result in a failure to implement schemes within agreed timescales

Finding	Implication and Action	Management Response
There are no formal procedures documenting the agreed approach to enforcement of s106 obligations.	<p><u>Implication</u> Lack of documented procedures may lead to an inconsistent approach to enforcement activity and allegations of bias against the Council.</p> <p><u>Action</u> The approach to enforcement of s106 obligations should be agreed and documented to ensure a consistent approach.</p>	<p>Management Response – Agreed</p> <p>As per above response re workshop and development of policy and procedure document.</p> <p>Timescale – December 2023</p>
No records are retained to demonstrate that post development reviews are undertaken to ensure that the requirements of the S106 obligations have been discharged as anticipated.	<p><u>Implication</u> Obligations may not be fulfilled and/or contributions may be used for purposes other than in accordance with the s106 agreement leading to potential challenge to the Council and additional financial pressure to fulfil outstanding planning obligations.</p> <p><u>Action</u> Records of post development reviews should be maintained to demonstrate that all s106 obligations have been discharged in accordance with the agreement.</p>	<p>Management Response – Agreed</p> <p>Requirements to be detailed in policy and procedure document that is being developed.</p> <p>Timescale – December 2023</p>

Key Findings – Risk 3 (2/2)

Ineffective monitoring and accountability arrangements may result in a failure to implement schemes within agreed timescales

Finding	Implication and Action	Management Response
<p>There is no pro active monitoring or reporting to services and/or other external organisations receiving funds (e.g., NHS or Police) of obligations that are approaching their commitment spend deadline.</p> <p>In addition, there is no formal reporting of unspent balances and/or repayments to developers.</p>	<p><u>Implication</u> Spend may be committed after a deadline has expired which may result in a requirement to repay monies to developers should they make such a request.</p> <p><u>Action</u> Regular reports should be provided to Services and/or other external organisations receiving funds (e.g., NHS or Police) which highlight any obligations nearing their commitment/spend deadline date.</p> <p>A process should be introduced to ensure that services monitor, challenge, and report unspent and repaid balances, taking into account the risk that monies spent or committed after the agreed deadline may need to be repaid in future.</p>	<p>Management Response – Agreed</p> <p>It is proposed that a 6 monthly report will be produced and distributed as appropriate. In addition a s106 Officers Group will also be established.</p> <p>Timescale – First report to be produced December 2023</p>
<p>Inaccurate and inconsistent recording of time limited contributions v non time limited contributions make it difficult to draw meaningful conclusions as to whether contributions received have been committed and spent in accordance with agreed deadlines.</p>	<p><u>Implication</u> The position in relation to balances held is unclear and requires additional resources to “unpick” this situation, ensure funds are used in line with obligations of original S106 agreement and minimise the risk of repayments to developers.</p> <p><u>Action</u> A data cleansing exercise should be undertaken to ensure the accuracy of recording time limited and non time limited obligations.</p> <p>Moving forward, Exacom should be the primary record for all s106 related matters.</p>	<p>Management Response – Agreed</p> <p>To be addressed by the production of the 6 monthly s106 report as detailed above</p> <p>Timescale – December 2023</p>

Key Findings – Risk 4

Ineffective governance and monitoring arrangements leading to a lack of transparency around the level and status of S106 monies held by the Council

Finding	Implication and Action	Management Response
<p>Whilst the required Infrastructure Funding Statement (IFS) is produced and published annually, it is not formally reported to and approved by a relevant forum due to its nature as a factual monitoring report.</p> <p>In addition, the formatting and content, whilst detailed, do not directly reflect the guidance and could therefore be improved to assist the reader.</p>	<p><u>Implication</u> Ineffective monitoring and oversight arrangements may lead to a failure to provide the required administration of scheme monies in line with best practice.</p> <p><u>Action</u> Regular reports on S106 activity, including the review and approval of the IFS, should be reported to Place DMT to ensure that senior managers are aware of the latest position. A briefing should also be provided to Environment and Communities Committee for information purposes.</p> <p>Any issues requiring escalation should be provided on a regular basis to the Environment and Communities Committee.</p>	<p>Management Response – Agreed</p> <p>As detailed in previous actions, 6 monthly s106 report to be produced and more detailed reporting to Members as part of Annual IFS Report</p> <p>Timescale – December 2023</p>
<p>Whilst ad-hoc requests for information from Members are responded to, there is no regular reporting of monies due, received, committed, and spent to Members for their Ward areas.</p>	<p><u>Implication</u> Ineffective reporting of S106 information to Members may result in excessive queries which are time consuming to respond to.</p> <p><u>Action</u> Regular reporting of S106 monies to Member and other relevant Officers should be introduced to provide greater transparency and minimise ad-hoc queries. Roll out of the full Exacom system would greatly assist in this through the creation of reports.</p>	<p>Management Response – Agreed</p> <p>As above plus engagement with s106 Members Working Group</p> <p>Timescale – December 2023</p>

Key Findings – Risk 5

Recommendations made previously (2018 audit) have not been implemented...

Finding	Implication and Action	Management Response
<p>A significant number of findings from the 2018 audit are repeated, in full or part, in the 2023 report. This is partly as a result of the delays in implementing and utilising Exacom but the management responses cover the issues faced by the service in more detail.</p> <p>Full details of the previous actions and implementation status have been provided to CLT but this will be replaced by a summary in the final report.</p>	<p><u>Implication</u></p> <p>Risks identified in previous audit reviews have not been addressed resulting in no further improvements being achieved.</p> <p>Action – as per management response</p>	<p>Outstanding actions have been superseded by the current action plan which has been agreed with management along with timescales for implementation.</p>

What's next?

- Journey of the key findings through Audit and Governance Committee, Finance Sub Committee and Environment and Communities Committee.
- Audit and Governance Committee will receive assurance through Internal Audit follow up, and the oversight from other committees that actions are being implemented and achieving the desired change and impact, which fall broadly into two areas;
 - Arrangements to deal with the improvements to the administration and monitoring of S106 agreements
 - Improving the use and more timely spend of S106 funding
- An initial progress update will be provided to the Audit and Governance Committee in March 2024, with a further report detailing progress against implementation of actions will be presented to Audit and Governance Committee in 12 months.

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