

Cabinet

18 May 2021

Protocol for Planning Obligations Funding Allocations - Community Schemes

For Decision

Portfolio Holder: Cllr D Walsh, Planning

Local Councillor(s): All

Executive Director: J Sellgren, Executive Director of Place

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Report Status: Public

Recommendation:

That Cabinet:

1. Agrees the protocol for the award of planning obligations funding allocations to appropriate bodies (Appendix A of this report);
2. Confirms that the protocol will be used to consider eligibility of those bodies seeking to spend s106 planning obligations in accordance with the purposes for which the obligations were collected; and
3. Agrees the protocol will come into effect on 19 May 2021.

Reason for Recommendation:

To provide a framework for managing the allocation of s106 developer contributions to appropriate bodies which is clear, consistently applied, and which secures appropriate levels of accountability.

1. Executive Summary

- 1.1 Section 106 of the Town and Country Planning Act 1990 (as amended) allows local planning authorities to secure financial contributions from development to make a development acceptable in planning terms where it would otherwise be unacceptable. This is normally achieved by using the contributions to fund mitigation measures or specific infrastructure that is needed as a result of the development. Developer contributions under s106 are separate and in addition to the Community Infrastructure Levy (but should not duplicate this).
- 1.2 Developer contributions that are not collected via CIL are the subject of a legal agreement which will usually specify to a greater or lesser extent the planning purposes for which the money can be spent. It is normally the case that funds have to be spent within 10 years of receipt and, if not, the funds may be returned.
- 1.3 Under the provisions of the General Power of Competence (GPC)¹, local authorities have been given additional flexibilities to promote the economic, environmental and social well-being of their areas, as long as this is not prohibited by other legislation. It applies to all principal councils (district, county and unitary councils etc). It also applies to eligible² parish and town councils. Under these provisions, it has been possible for eligible parish and town councils to take on the responsibility of managing developer contributions which have been collected for local community infrastructure. Where this applies, funds can be transferred by the Local Planning Authority to the relevant 'competent' body to deliver the infrastructure. This recognises the role of towns and parishes as the first tier of local government and ensures that the funds are managed at a suitably local level to deliver the infrastructure needed by the community.
- 1.4 There are occasions, however, when the town or parish council are not GPC-eligible but could still be best placed to deliver the infrastructure. Alternatively, they may elect not to take on management of developer contributions, for instance where they do not have the resources necessary to administer the funds or procure the projects to deliver the infrastructure. It is also feasible that the terms of the s106 obligation could require, or benefit from, involvement of a specific expert body to deliver a particular piece of infrastructure. In such situations there may be better-placed organisations with the necessary capabilities and accountability to manage the funds, or alternatively the role could reside with the Local Planning Authority.
- 1.5 Whilst in many cases the town or parish council will be well-placed to manage such funds, it is important that due diligence is followed regarding

¹ Localism Act 2011

² An eligible council is one which has resolved to adopt the GPC, with at least two thirds of its members being declared elected and the Clerk must hold an appropriate qualification

the appropriateness of the relevant body to manage the funds before the money is handed over. This will also require the necessary assurances that the funds will be spent in accordance with the planning/legal requirements.

- 1.6 A protocol for planning obligations funding allocations has therefore been prepared in order to provide clear principles and a consistent approach, while also securing accountability for managing the obligations. This is set out in **Appendix A**.

2 Establishing a Protocol

2.1 When developer contributions are secured for local/community infrastructure it is often the case that the town or parish council will be best placed to oversee the implementation of these funds. This is something that was practiced by legacy authorities prior to April 2019 and to-date those practices have been subsumed within the new authority. However, Dorset Council currently has no formal protocol in place to guide decisions regarding the governance of community schemes funding. This raises potential risks:

- In the event that s106 funds are handed over to another body but are not spent in accordance with the purposes for which the money was collected, Dorset Council could face claims against it from the contributing developer to repay the funds;
- Where a body other than a town or parish council is interested in managing the implementation of the monies, there is currently no established process for assessing the suitability of that body, or for deciding on whether or not they would be qualified or better-placed than the town or parish council;
- It is important, even in the case of a town or parish council, to get suitable assurances that it complies with the general powers of competence and/or is otherwise 'competent' for the purposes of delivering the infrastructure.

2.2 It is therefore proposed that Dorset Council establishes a protocol for those situations where it is expecting to hand over developer contributions to local bodies. This does not have any bearing upon the purposes for which the money was collected in the first place as the subsequent spending is required to meet the terms of the legal agreement. However, it will provide the Council with a clear decision-making route for confirming the body that is best-placed to deliver the spending, and will establish the necessary safeguards to ensure appropriate accountability.

3 Summary of protocol

3.1 The protocol emphasises that Dorset Council is the accountable body for the spending of developer contributions and, when entrusting another body to discharge this function, it must ensure that:

- the funding is spent on facilities that can be demonstrated to be required because of the new development taking place;
- the projects supported are necessary, viable, will deliver the required social and community benefits, and will be well managed; and
- the process for handing over contributions is transparent and fair to all.

3.2 The protocol recognises that:

- a) town and parish councils that have the general power of competence will normally be well-placed to manage such funds due to their democratic accountability and ability to take a long-term interest in the delivery/ management of the project;
- b) there may be circumstances where such councils are not GPC-eligible bodies, or which decide not to take on the responsibility for managing the contributions (for example due to there being a better-placed organisation to implement the project);
- c) other 'not for profit' organisations may bid to manage the funds, subject to being able to demonstrate they have a general power of competence and are otherwise able to offer assurances about their suitability to the role;
- d) the recipient body will be required to enter into an agreement with the Dorset Council to confirm that the money will be spent in accordance with the purposes for which it was collected, and where unspent, liability for returning the funds will rest with the recipient body.

4 Financial Implications

3.1 Developer contributions are funds which are collected from developers via the planning system for specific mitigation and infrastructure purposes. The proposed protocol will provide the necessary assurances that, where community scheme allocations are made, this will be spent on the delivery of infrastructure for which it was collected, and will minimise the financial risk to Dorset Council of any claims by developers for the return of unspent funds.

4. Well-being and Health Implications

4.1 The protocol should streamline the process for allocating developer contributions to appropriate competent bodies in a way that is transparent and accountable. This in turn should assist in the effective delivery of social infrastructure which will benefit the health and well-being of local communities.

5. Climate implications

5.1 The collection and spending of developer contributions takes place in accordance with the adopted development plan policies which, in combination, seek to promote sustainable development. This might include local infrastructure which can meet needs locally (thereby reducing the need to travel) and mitigation measures to offset the impacts of development, such as natural greenspace, habitat creation and climate adaptation measures. The protocol will positively assist in delivering the principles of sustainable development.

6. Other Implications

6.1 None to report.

7. Risk Assessment

7.1 Having considered the risks associated with this decision, the level of risk has been identified as:

Current Risk: Medium
Residual Risk: Low

8. Equalities Impact Assessment

8.1 The protocol sets out a framework for managing developer contributions collected under the provisions of adopted statutory policies and does not affect the purposes for which these are earmarked. The statutory development plans have been the subject of Equalities Impact Assessment.

9. Appendices

**A: Dorset Council Protocol for Section 106 Community Schemes
Funding allocations**

10. Background Papers

10.1 None

Footnote:

Issues relating to financial, legal, environmental, economic and equalities implications have been considered and any information relevant to the decision is included within the report.

APPENDIX A

Protocol for Planning Obligations Funding Allocations - Community Schemes

1. Introduction

- 1.1 Under Section 106 of the Town and Country Planning Act 1990 (the Act), as amended, contributions can be sought from developers towards the costs of providing community and social infrastructure where the need has arisen from the new development taking place. This funding is commonly known as a Section 106 contribution or planning obligation. This is separate and in addition to Community Infrastructure Levy (CIL).
- 1.2 The decision to require a developer to make a Section 106 contribution is made by a Planning Committee or by an officer with delegated powers before planning consent is granted. This protocol is not about how decisions are made to require a developer to enter into an agreement. Instead it concerns how Dorset Council may allocate funding collected under s106 to town and parish councils and to 'not for profit' organisations.
- 1.3 It is important to note that developer contributions may only be spent on infrastructure where the infrastructure is necessary¹ as a consequence of the development. These are secured through a legal agreement under the provisions of section 106 of the Act. The s106 Agreement will specify the purposes for which the contribution can be used.
- 1.4 The Localism Act 2011 provided greater flexibility for local authorities to pass on responsibility to deliver infrastructure to appropriate bodies (see Section 2). Consequently, some community infrastructure is delivered by, and is the responsibility of, town and parish councils or community organisations.

2. Organisations' Eligibility for Project Funding

- 2.1 The Localism Act 2011 gave eligible Councils in England *'the power to do anything that individuals generally may do as long as they do not break any other laws'* – this is known as the General Power of Competence. This means that Councils, once adopting the power, no longer need to ask whether they have a specific power to act. It is a power of first resort.
- 2.2 An eligible town or parish council is one which has resolved to adopt the GPC², with at least two thirds of its members being declared elected. The Clerk must hold an appropriate qualification³.

¹ (Regulation 122 Community Infrastructure Regulations 2010, as amended)

² (Parish Councils (General Power of Competence) (Prescribed Conditions) Order 2012

³ Certificate in Local Council Administration or an equivalent qualification.

2.3 Dorset Council is able to allocate funding collected under s106 to town and parish councils. However, funding can also be allocated to 'Not for Profit' organisations, such as:

- Educational Establishments
- Company Limited by Guarantee with Charitable Status
- Registered Charitable Organisation
- Unincorporated not for profit organisation.

2.4 Where infrastructure funding is to be allocated to external bodies, Dorset Council will require some assurances that they are suitably 'competent' for the purposes of delivering the funding. The following sections of this protocol set out the principles and criteria that will be used by Dorset Council when deciding on the allocation of planning obligations funding. It also sets out certain conditions that need to be met.

3. Principles and criteria for allocation of planning obligations to eligible bodies

Principles

3.1 Dorset Council is the Local Planning Authority and is the accountable body for the spending of S106 monies and therefore must ensure that:

- The funding is spent on facilities that can be demonstrated to be required because of the new development taking place.
- Projects supported are necessary, viable, will deliver the required social and community benefits, and will be well managed.
- The process is transparent and fair to all.

3.2 Before any funding can be released by the Council for a given project, key criteria must be met to offer the Council a degree of security that monies will be spent appropriately and in the manner to which they were intended.

Criteria for assessing the award of allocations

3.3 When assessing proposed projects or the eligibility for award of monies the following criteria will be used.

3.4 The organisation shall confirm to Dorset Council that it:

- has a general power of competence or equivalent powers through its articles or similar; and/or
- is an appropriately constituted body (or acting on such a body's behalf) which has a bank account and is suitably placed to deliver and maintain the infrastructure.

3.5 Applicants shall provide the Local Planning Authority with evidence of the following:

- a) the need for the project (e.g. identified in a development plan, community consultation or identified in a s106 obligation):

- For existing assets – provide the Local Planning Authority with sufficient assurances that an increase in usage of the asset will arise as a result of awarding the funding (i.e. a greater number of people will use the facility);
- For existing or new assets - a broader usage of the asset as a result of awarding the funding (e.g. use by disabled people, older or younger people who may not have had access previously);
- b) value for money for any work proposed;
- c) that the recipient has tenure of the land identified to benefit from the funding or a lease for a suitable period i.e. proportional to the grant awarded, or written agreement of the landowner;
- d) support in writing from the local town or parish council (for recipients that are not town or parish councils) or reasons as to why this has not been provided;
- e) that planning permission has been granted for any works funded or is not required;
- f) that a complete funding package is in place with the offer of a s106 grant;
- g) That there is financial sustainability for delivering and maintaining the asset in perpetuity;
- h) confirmation that, where appropriate, the facilities provided will be open to the general public with no membership restrictions in relation to the Equality Act 2010, and will have wide public and community benefit; and
- i) a contract agreement signed prior to release of funding between the applicant and the Council detailing the terms under which the money is granted.

4. Conditions

- 4.1 Any organisation in receipt of a 106 award or transaction will be required to adhere to the following conditions (and enter into a deed or equivalent agreement):

Purpose and use of Funding

- a) The Recipient shall use the Funding only for the delivery of the Project and in accordance with the agreed project description and any specific requirements of relevant development plan policies, planning permissions/conditions, and the terms of relevant s106 agreement(s)
- b) The Recipient shall not make any alteration or amendment to the Project without the prior written agreement of the Local Planning Authority.
- c) The Recipient agrees that it shall not apply for duplicate funding in respect of any part of the Project that the Council's funding in full under this Agreement.

Release of s106 Funding

4.2 The Local Planning Authority shall release the Funding to the Recipient at a mutually agreeable time. The trigger for any release shall normally be the point at which sufficient assurances can be provided by the recipient about the implementation of the project, such as evidence of an award of tender for construction with timeframes for commencement and completion.

4.3 The amount of the Funding shall not be increased in the event of any overspend by the Recipient in its delivery of the Project.

4.4 The Local Planning Authority reserves the right to consider each bid on its merits.

Repayment of Funding

4.5 Without prejudice to the other rights and remedies, the Local Planning Authority may withhold or suspend payment of the Funding (if applicable) and/or require repayment of all or part of the Funding / forfeiture of the asset if:

- the Funding is used for purposes other than for the delivery of the Project under the terms agreed with the LPA;
- the delivery of the Project does not start within the timeframes agreed with the Local Planning Authority;
- the delivery of the Project stalls and the Recipient is unable to provide the Local Planning Authority with any assurances that resumption and completion can be achieved in a satisfactory timescale to comply with relevant development plan policies, planning permissions/conditions or the terms of any relevant s106 agreement(s);
- the Recipient is, in the reasonable opinion of the Local Planning Authority, delivering the Project in a negligent manner;
- the Recipient obtains duplicate funding from a third party for the Project;
- the Recipient provides the Council with any materially misleading or inaccurate information;
- the Recipient commits or has committed a Prohibited Act;
- any employee or volunteer of the Recipient has:
 - acted dishonestly or negligently at any time, whether directly or indirectly, to the detriment of the Project; or
 - taken any actions which, in the reasonable opinion of the Funder, bring, or are likely to bring, the Council's name or reputation into disrepute.
- Upon delivery/completion of the Project, the Recipient shall return to the Local Planning Authority any unspent s106 funds within 6 months of the project's completion (unless agreed otherwise in writing with the LPA);
Any unspent funds that are returned to the LPA shall be subject to interest on the unspent balance in accordance with the terms of the transfer of funds.

5. Decision Making and Reporting Arrangements

5.1 Under Dorset Council's scheme of delegation to officers the Council has delegated to the Executive Director of Place authority:

"To allocate and distribute funding (including authorising payment) secured in connection with any permission (including any related planning obligation or CIL payment) consent or other approval granted under Town and Country Planning Legislation subject to the decision being in accordance with any strategy and/or policy adopted by the Council."

5.2 The Executive Director has nominated⁴ the Service Manager for Spatial Planning to make such allocation and distribution decisions on his behalf.

5.3 Officers will consult with the relevant Area or Strategic Planning Committee Chairman and the local ward members before making allocation and distribution decisions under this protocol. Decision notices will be published on the transparency pages on the Council's website.

5.4 Where officers intend allocating or distributing Section 106 contributions in excess of £500,000 they must consult the Section 151 Officer and ensure due diligence checks are undertaken before any payment is made.

5.5 The allocation and distribution of Section 106 monies shall be reported annually to each of the Area and Strategic Planning Committees.

⁴ Any future changes to nominated officers will apply where relevant