



BRENTWOOD BOROUGH COUNCIL

INTERNAL AUDIT REPORT

SECTION 106 AGREEMENTS (INCLUDING AFFORDABLE HOUSING)
JULY 2022

LEVEL OF ASSURANCE	
Design	Operational Effectiveness
Limited	Moderate

IDEAS | PEOPLE | TRUST



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DISTRIBUTION

Ian Winslet	Strategic Director, Housing and Regeneration
Phil Drane	Corporate Director of Planning and Economy
Tracey Lilley	Director of Housing and Enforcement
Angela Abbott	Corporate Manager - Housing Needs and Delivery

REPORT STATUS LIST

Auditors:	James Savigar - Senior Internal Auditor Janine Combrinck - Director Greg Rubins- Partner
Dates work performed:	20 January - 14 February 2022
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EXECUTIVE SUMMARY

LEVEL OF ASSURANCE: (SEE APPENDIX I FOR DEFINITIONS)

Design	Limited	System of internal controls is weakened with system objectives at risk of not being achieved.
Effectiveness	Moderate	Evidence of non compliance with some controls, that may put some of the system objectives at risk.

SUMMARY OF RECOMMENDATIONS: (SEE APPENDIX I)

High	2
Medium	0
Low	0

TOTAL NUMBER OF RECOMMENDATIONS: 2

BACKGROUND:

Section 106 ('s106') agreements derive from the Town and Country Planning Act 1990. They are legal agreements between a planning authority (such as the Council) and a planning applicant, which ensure that the applicant's proposed development will also benefit the local community - for example through the provision of affordable housing. Section 106 agreements are usually attached to a planning permission to make acceptable development that which would otherwise be unacceptable in planning terms. The requirement to provide affordable housing within an otherwise private residential development is a common planning condition under s106.

Section 106 agreements normally require that the developer delivers a proportion of the new homes as affordable housing or that a financial contribution is made in lieu of on-site provision. Homes provided on site are made available to the planning authority or other registered provider to purchase at a discount for affordable housing. The Council's Local Development Plan (both the 2005 Local Plan and the newly adopted 2016-2033 Local Plan) seek for all developer sites above 10 homes to have 35% affordable housing.

In March 2021, the Council's Environment, Enforcement and Housing (EEH) Committee approved a Housing Strategy and Delivery Plan 2021 - 2025, aimed at delivering much needed affordable housing across the borough. A seven-year Affordable Homes Development Strategy 2021 - 2028 was further approved by the EEH Committee in July 2021. These strategies recognise that affordable housing needs to be funded through a combination of government grants, right to buy capital receipts and s106 agreements.

There is also acknowledgement that affordable housing delivery has not been at the expected levels for many years. Data reported to the Local Plan Hearing Session on 3 December 2021 showed that over the past five years actual delivery of affordable housing was only 10.7%. Steps were taken during the year to start to address that, including the employment of a Strategic Director of Housing and Regeneration.

We carried out an affordable housing audit as part of our 2015/16 audit plan, which focused on assessing how effectively the Council was managing its strategy around provision of social housing and developing the private rented sector to provide suitable and adequate affordable housing for the needs of the borough. We found that the Council did not have an up to date Affordable Housing plan but intended to implement one once the draft Housing Strategy that was in place at the time had been finalised.

As the Council now has up to date strategies and plans in place in this area, our audit this year focused on the s106 agreements process (covering Affordable Housing and other areas), as officers acknowledged that this was an area requiring improvement and therefore would benefit from being audited.

GOOD PRACTICE:

We identified the following good practice areas from our audit:

- Planning officers responsible for negotiating s106 agreements with developers demonstrated a strong understanding of the 2005 Local Plan, the Emerging Local Plan 2016 - 2033 (now adopted) and other strategic documents which guide the process for negotiating the agreements.
- Procedures for negotiating s106 agreements require that developers conduct viability assessments, where necessary, which are subsequently independently verified on behalf of the Council at the expense of the developer.
- System reports show s106 contributions held by the Council and those awaiting triggers before falling due to the Council, and the Council invoices developers when officers become aware that trigger points have been reached.
- The finance team has a robust procedure for ensuring contributions made by developers are accounted for accurately depending on the terms and conditions attached to the agreement and the stage of the Council's development expenditure.

KEY FINDINGS:

We identified the following key areas where the control framework needs to be strengthened:

- There is a lack of ownership and a general control system for managing s106 arrangements, particularly regarding the engagement with developers, identifying the status of developments and tracking triggers to determine when payments are due from developers. Insufficient monitoring has led to one known instance of an alteration being made to an agreement during the year without sufficient notification being given to the teams involved in the management of s106 agreements. (Finding 1 - HIGH)
- There is a lack of sufficient control to ensure that commuted sums received from developers under s106 agreements have been allocated to expenditure schemes within the capital plan. This has led to approximately £2.5 million of s106 contributions being held by the Council towards the end of 2021/22 for which there was no clear expenditure plan, and which would need to be repaid to developers if not spent within the agreed timescales. (Finding 2 - HIGH)

CONCLUSION:

Affordable Housing targets have not been at expected levels for several years, although steps are clearly being taken to strengthen arrangements in this area. We found there to be a lack of ownership and an insufficient system of controls to monitor progress being made by developers against s106 agreements, the receipt of s106 contributions and the allocation of developer receipts to the capital plan. This exposes the Council to a risk of not receiving money owed by developers or having to repay contributions received if the funds are not utilised in time.

Overall, we provide limited assurance on design and moderate assurance on the effectiveness of the key controls.

We have raised two high priority recommendations.

DETAILED FINDINGS

RISK 2: DEVELOPERS FAIL TO COMPLY WITH AGREED SECTION 106 OBLIGATIONS.

RISK 4: THERE IS NO RECONCILIATION BETWEEN RECORDS HELD BY THE COUNCIL'S PLANNING AND FINANCE TEAMS TO CONFIRM THE ACCURACY AND INTEGRITY OF AMOUNTS RECEIVED BY WAY OF DEVELOPERS' CONTRIBUTIONS.

Ref	Significance	Finding
1	High	<p>Monitoring s106 arrangements</p> <p>S106 agreements between the Council and developers include triggers, which are the agreed points during the development at which any agreed financial contributions from the developer will become due to the Council. It is therefore essential that the Council has an appropriate function in place to monitor ongoing developments to identify when a s106 trigger has been reached and a payment is due from the developer.</p> <p>Agreements are recorded and stored on the Uniform system from which a query can be run to identify agreements with outstanding triggers. The Council commissions the services of an Officer at Thurrock Council who obtains information on agreement triggers, collates that information and notifies Finance when he becomes aware that a trigger has been met.</p> <p>However, we found that there is no joined up collaborative approach across the teams (Planning, Finance, Housing, Legal) to monitor s106 agreements and the activation of triggers included within them, with no routine procedure for reviewing the records of agreements held by each of the different teams involved.</p> <p>Our interviews with officers identified that this lack of integration of the services has resulted in at least one situation where a s106 agreement was modified by Housing without the officer responsible for monitoring triggers being made aware of the changes, and as such there was no follow up or engagement with the developer to determine whether the payment had fallen due. This related to one affordable dwelling at Mellon House, for which the Council agreed to accept a commuted sum of £105,000, being 35% of the value of the dwelling.</p> <p>Overall, we found a general lack of structure around the controls for monitoring s106 agreements, with a 'wait-and-see' approach often being adopted where the Council will wait for it to be brought to their attention that a trigger has been activated, as opposed to proactively making enquiries with developers as to what the current status of a development is and requiring regular updates. This is exacerbated by the lack of reporting or regular catch ups between the various teams involved in the management of s106 agreements, thereby preventing effective monitoring.</p> <p>Without these effective monitoring arrangements and joined up approach across the teams, there is a risk of the Council not being aware of payments due from developers, resulting in financial loss.</p>

RECOMMENDATION:

- a) The Council should identify an appropriate function to take central ownership of s106 agreements. This team should then lead on all aspects of s106 arrangements, including negotiating the agreements with developers and monitoring them from planning consent through to delivery.
- b) The function should ensure that there are sufficient mechanisms in place to liaise with developers, to monitor progress of developments. Progress meetings with the developers should be implemented, taking account of the size of developments and anticipated speed of progress.
- c) The function should also liaise with Finance to ensure invoices are issued accurately and in a timely manner.
- d) A central s106 agreement register/tracker should be put in place where all aspects of the s106 agreements can be recorded and monitored, including progress against trigger points and the status of any payments. This tracker should be owned by the responsible function recommended above and should be reported to each of the teams involved in the management of s106 agreements (Planning, Housing, Finance and Legal) on a regular basis (quarterly as a minimum) with each of the teams being required to provide updates as appropriate.

MANAGEMENT RESPONSE:**Recommendation a), b) and c)**

A new structure for strategic housing is at design stage. The new structure includes a new post of Policy and Enabling Officer which will have multifunctional responsibility for Policy, Registered Provider and major application developer relations and related forums. The post will be the single point of contact for Section 106 agreements as they relate to affordable housing and lead/co-ordinator for all commuted sums held. The post holder will be the single organisational liaison point for affordable housing Section 106 with Planning, Finance and Legal. Given the significance identified in the audit, consideration will be given to accelerating the appointment of this post in advance of the wider Housing Department re-structure

Recommendation d)

A new tracker will be developed and held and co-ordinated within the strategic housing function. This will be reported regularly to the new Housing Committee at an interval agreed with the Chair.

Responsible Officer: Ian Winslet (Strategic Director, Housing and Regeneration)

Implementation Date: January 2023

RISK: DEVELOPERS' CONTRIBUTIONS ARE NOT SPENT BY THE COUNCIL IN A TIMELY OR APPROPRIATE MANNER.

2

High

Allocation of developer contributions

As part of the development planning process the Council may agree a commuted sum payment from the developer. This money enables the Council to develop its own affordable housing or make improvements in areas such as open spaces and healthcare facilities.

These commuted sums often come with triggers upon which the developer must make the contribution to the Council (e.g. set dates, unit development, unit occupancy, etc.) and conditions attached which require the Council to utilise the funds by a set deadline, failing which the Council must repay the money to the developer. In order to ensure the funds are utilised prior to these deadlines being met, it is vital the Council has sufficient procedures in place to allocate these receipts for use within the capital plan.

Our discussions with Finance identified that a spreadsheet is used to record contributions received and how they have been accounted for. The spreadsheet also maintains a record of expenditure made against a contribution which is updated when finance receive a notification that the relevant expenditure has been incurred. However, this only provides a basic record of how much of the contribution has previously been spent. There is no plan that sits alongside the spreadsheet to allocate contributions to specific projects or to indicate a future plan for utilisation of the funds prior to the repayment date being reached.

The records held by the Council and provided to us at the time of the audit indicated that there is approximately £2.6 million of s106 contributions held by the Council for which officers were unable to evidence an expenditure plan. This include the following amounts to be used by 31 March 2023:

- £170,490 - Doddinghurst Surgery, Outings Lane
- £37,152 - 114-122 Kings Road, Brentwood.

Overall, we have concluded that there is no robust system of control to routinely allocate contributions made by developers to the capital plan and that there is currently no ownership of the process to ensure contributions are utilised in a timely manner. Without this control there is a risk that contributions will not be utilised in time and would need to be repaid to developers.

RECOMMENDATION:

Responsibility for the recording, allocation and monitoring of s106 contributions to the capital programme should be clearly assigned and communicated to a team or individual within the Council, who should own the process for ensuring contributions are utilised on appropriate projects in a timely manner and prior to any contributions becoming repayable to the developers.

MANAGEMENT RESPONSE:

A new 'Section 106 officer panel' will be set up, led by an appropriate functional director, which will be populated by a representative from housing, communities, open space and environment together with finance and legal. The panel will 'own' the section 106 list of contributed sums, identify opportunities for their use and ensure that none are required to be returned. Governance and reporting arrangements for this panel will be agreed in line with the Council's constitution.

Responsible Officer: Ian Winslet (Strategic Director, Housing and Regeneration)

STAFF INTERVIEWED

BDO LLP APPRECIATES THE TIME PROVIDED BY ALL THE INDIVIDUALS INVOLVED IN THIS REVIEW AND WOULD LIKE TO THANK THEM FOR THEIR ASSISTANCE AND COOPERATION.

Ian Winslet	Strategic Director, Housing and Regeneration
Angela Abbott	Corporate Manager - Housing Needs and Delivery
Clive Collins	LB Thurrock Officer
Katharine Anastasiadis	Senior Accountant
Caroline Corrigan	Corporate Manager - Planning Development Management
Mike Ovenden	Associate Planning Consultant
Alistair Greer	Principal Accountant - Financial Reporting
Phoebe Barnes	Corporate Finance Manager

APPENDIX I - DEFINITIONS				
LEVEL OF ASSURANCE	DESIGN OF INTERNAL CONTROL FRAMEWORK		OPERATIONAL EFFECTIVENESS OF CONTROLS	
	FINDINGS FROM REVIEW	DESIGN OPINION	FINDINGS FROM REVIEW	EFFECTIVENESS OPINION
Substantial	Appropriate procedures and controls in place to mitigate the key risks.	There is a sound system of internal control designed to achieve system objectives.	No, or only minor, exceptions found in testing of the procedures and controls.	The controls that are in place are being consistently applied.
Moderate	In the main there are appropriate procedures and controls in place to mitigate the key risks reviewed albeit with some that are not fully effective.	Generally a sound system of internal control designed to achieve system objectives with some exceptions.	A small number of exceptions found in testing of the procedures and controls.	Evidence of non compliance with some controls, that may put some of the system objectives at risk.
Limited	A number of significant gaps identified in the procedures and controls in key areas. Where practical, efforts should be made to address in-year.	System of internal controls is weakened with system objectives at risk of not being achieved.	A number of reoccurring exceptions found in testing of the procedures and controls. Where practical, efforts should be made to address in-year.	Non-compliance with key procedures and controls places the system objectives at risk.
No	For all risk areas there are significant gaps in the procedures and controls. Failure to address in-year affects the quality of the organisation's overall internal control framework.	Poor system of internal control.	Due to absence of effective controls and procedures, no reliance can be placed on their operation. Failure to address in-year affects the quality of the organisation's overall internal control framework.	Non compliance and/or compliance with inadequate controls.

RECOMMENDATION SIGNIFICANCE	
High	A weakness where there is substantial risk of loss, fraud, impropriety, poor value for money, or failure to achieve organisational objectives. Such risk could lead to an adverse impact on the business. Remedial action must be taken urgently.
Medium	A weakness in control which, although not fundamental, relates to shortcomings which expose individual business systems to a less immediate level of threatening risk or poor value for money. Such a risk could impact on operational objectives and should be of concern to senior management and requires prompt specific action.
Low	Areas that individually have no significant impact, but where management would benefit from improved controls and/or have the opportunity to achieve greater effectiveness and/or efficiency.

APPENDIX II - TERMS OF REFERENCE

PURPOSE OF REVIEW:

Review of how effectively the Council is managing its Section 106 agreements supporting the provision of affordable housing.

KEY RISKS:

- Procedures for developing and agreeing Section 106 agreements are not well established and understood by staff, resulting in agreements that are not necessary, relevant, reasonable and viable
- Developers fail to comply with agreed Section 106 obligations.
- Section 106 contributions are not received in a timely manner in accordance with the agreements, which may result in financial loss to the Council.
- There is no reconciliation between records held by the Council's Planning and Finance teams to confirm the accuracy and integrity of amounts received by way of developers' contributions.
- Section 106 contributions may not be appropriately accounted for by the Council, as either income or receipts in advance.
- Developer's contributions are not spent by the Council in a timely or appropriate manner.

SCOPE OF REVIEW:

- Confirm whether processes for developing and agreeing Section 106 agreements within the planning application process are clearly defined, documented and understood by staff, and receive the necessary legal input.
- For a sample of Section 106 agreements, determine whether the Council is adequately monitoring progress made by developers against their Section 106 obligations.
- Determine how the Council ensures that financial contributions are received on a timely basis, in accordance with the agreements and status of underlying development activity, and follows up on outstanding amounts.
- Confirm how the Council reconciles between receipt of developers' contributions by the Finance team and Section 106 agreements held by the Planning team. For the sample of Section 106 agreements, we will also substantively check that developers' financial contributions accord with the underlying agreements, commuted sums and development activity completed.
- Determine how the Council ensures that Section 106 contributions are correctly recognised as either income or a receipt in advance liability.
- Confirm whether there are processes to ensure that Section 106 income is allocated appropriately to the Council's capital programme.

FOR MORE INFORMATION:

Greg Rubins

Greg.Rubins@bdo.co.uk

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