Bath & North East Somerset Council		
MEETING/ DECISION MAKER:	**Policy Development & Scrutiny Panel**	
MEETING/ DECISION DATE:	**27 September 2021**	EXECUTIVE FORWARD PLAN REFERENCE: *[Cabinet reports only]* E 9999
TITLE:	**Planning Gain**	
WARD:	All	
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List of attachments to this report: Please list all the appendices here, clearly indicating any which are exempt and the reasons for exemption		

1 THE ISSUE

1.1 The panel have requested an understanding of 'Planning Gain' – the financial contributions and other obligations related to new developments.

1.2 Areas highlighted by the Panel for a greater understanding relate to what planning gain is, how it is secured, allocated and maintained and what the high-level implications or issues are.

1.3 This report does not seek to make any recommendations but to present an overview of the issue for discussion.

2 RECOMMENDATION

2.1 None

3 THE REPORT

3.1 The Panel have requested an understanding of planning gain. The following will be discussed in turn in this report:

- Description of S106 and Neighbourhood CIL
- When we can get it
- Where it is allocated
- How is it maintained
- Higher level practicalities are understood

The report will also outline a potential reform to the current system which could have implications for the Council in the future.

What is 'Planning Gain'?

3.2 Planning Gain (or Planning Obligations) refers to the developer obligations required to obtain planning approval to ensure a development proposal is acceptable These may come in the form of affordable housing (or a commuted sum which is used to pay for off-site affordable housing), community infrastructure or other mitigation measures to counterbalance the local effects of the development.

3.3 Planning gains seek to capture some of the uplift in land value generated by the grant of planning permission. The purpose is to ensure that commercially viable developments are not socially or environmentally unsustainable.

3.4 In B&NES the Council achieves planning gain through S106 agreements and CIL. This report intends to give an overview of both S.106 and CIL.

Section 106 Agreements

3.5 Section 106 agreements are legal agreements entered into between the Council and the Developer and cover measures, or obligations, required to mitigate any negative effects of a development on the local area. Without these agreements, the developments would be unacceptable in planning terms.

3.6 S.106 agreements tend to be secured on larger development sites dealing with site specific issues including the provision of essential services (such as affordable housing) and infrastructure (such as access improvement and green spaces) directly related to the new development. Financial contributions that are secured via S.106 agreements are generally ringfenced to specific sites or projects and cannot be used to fund unrelated projects however in relation to very large developments the use of S.106 agreements could also extend to strategic infrastructure such as new schools; primary healthcare; and strategic highway and transportation improvements provided it is clear that they are a necessary part of the development.

CIL

3.7 Unlike S.106 agreements, CIL applies universally to all new developments (subject to certain criteria) and is levied at a rate of £100/sqm + indexation as set out in the Council's adopted Charging Schedule.

3.8 Whilst S.106 agreements are negotiated on a case-by-case basis, the advantage of CIL is that the rate is transparent and cannot be negotiated; developers are also unable to argue viability in relation to CIL. CIL is in effect a development tax. To ensure developers do not pay for the same infrastructure under both CIL and S.106 ("double dipping"), local authorities (Councils) are required to publish a list of what will be funded by CIL and those items cannot be covered by a S106 agreement. In B&NES the money secured under CIL is used to deliver the strategic infrastructure priorities of the Council across its district; these are published on the Council's Infrastructure List.

How the Council Obtains Planning Gain

Overview

3.9 In accordance with Reg 122(2) of the Community Infrastructure Levy Regulations (2010) a planning obligation may only constitute a reason for granting planning permission for development if the obligation is:

(a) necessary to make the development acceptable in planning terms,

(b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development.

3.10 The Council cannot seek a S.106 agreement if the reasons for the agreement do not meet these three tests. When securing financial contributions, the Council cannot secure more than is reasonably necessary for the specified purpose and cannot secure money speculatively to deliver infrastructure un-related to the development.

3.11 In B&NES, the requirement to seek planning gain is set out in Policy CP13 of the Core Strategy which prescribes the Council's commitment to ensuring new developments are supported by the timely delivery of the required infrastructure to provide balanced and more self–contained communities.

3.12 The key infrastructure needed to support the Core Strategy and Placemaking Plan is set out in the Infrastructure Delivery Plan (IDP) -. The IDP is an organic document, updated in consultation with relevant service providers and forms the basis for establishing B&NES Council's strategic (infrastructure) spend priorities. The IPD was most recently updated in 2020 to reflect the B&NES declaration of a climate emergency and nature emergency and to reflect the Corporate Strategy.

Section 106 Agreements

3.13 Planning obligations are secured via S.106 agreements which are negotiated with developers on certain sites and application types. Negotiation takes place before the application is determined and a planning permission cannot be issued until the legal agreement is signed. The Council has an adopted Supplementary Planning Document (SPD) setting out its approach to S.106.

3.14 S.106 agreements in B&NES are used to secure the following types of obligations:

- Affordable Housing including Extra Care Housing
- Transport Infrastructure Works
- Public Transport
- Green Infrastructure
- Adoption of On-Site Green Space, Allotments and Landscaping Schemes
- Tree Replacement
- Site Specific Targeted Recruitment and Training in Construction
- Fire Hydrants
- Education facilities
- Other Site-Specific Measures

3.15 The triggers for when an obligation is required will be dependent on the nature of development or size of site. Not all obligations have set triggers, for example obligations in respect of transport and public transport, as well as education facilities do not have triggers. In respect of obligations for affordable housing provision, tree replacement, green infrastructure, and fire hydrants, these are subject to triggers (i.e., certain thresholds of development). Details of each trigger is set out in the SPD as well as in the relevant Core Strategy/Placemaking Plan policies. When an application type hits a certain threshold to trigger an obligation, the developer will be required to enter a S.106 agreement.

3.16 The terms of each legal agreement will contain a clause requiring repayment of unspent funds to the developer within a certain timescale (usually 5-10 years).

3.17 Developers may seek to argue viability to lower the required amount of contributions/obligations but will need to demonstrate how providing a policy level obligation would make a site "unviable". In these instances, the Council is required to have the viability of the site and development proposal independently appraised before it can consider lowering the required obligation.

3.18 Where transport infrastructure works are of a strategic nature, they will be included in the Council's Infrastructure Delivery Programme and will be delivered through other mechanisms including CIL. For works that are directly related to a particular development and are required on-site or close to the site, the developer will be required to enter into a Section 106 legal agreement to secure the works required.

Collection of S.106

3.19 All Section 106 agreements are legal contracts between the developer and the Council requiring the Developer to undertake certain actions or pay certain monies within prescribed timescales. Each S.106 is unique and specific to the circumstances of the development.

3.20 Within each S.106 agreement there will be triggers for action, for example on a large housing site, transport infrastructure payments or requirements may be phased across the life of the development (i.e., pay £X prior to occupation of the 100th dwelling, or do not commence development of the 50th dwelling until a roundabout has been installed, etc.) S.106 monies will be collected in accordance with the relevant trigger and the Council may not request payment before a trigger is reached.

3.21 All S.106 agreements are recorded in a centralised database and it is the role of the CIL/S.106 Monitoring Officer (under the management of the Team Manager - Planning and Enforcement) to monitor sites and obligation triggers to ensure contributions and obligations are collected or discharged in a timely manner. Using the data base officers are able to track delivery of obligations across sites for ease of corporate reporting.

CIL

3.22 CIL is somewhat more straightforward than S.106 obligations. CIL is a tax on new development levied at a prescribed rate and is universally applicable. CIL is a regulated tax function of the Council and as such is prescribed by Statute. Having adopted CIL, the Council has little discretion or flexibility over its administration.

3.23 All planning decisions carry a CIL advisory note setting out what applicants are required to do to comply with CIL. The consequences of non-compliance can be severe (including loss of exemptions or reliefs as well as the addition of interest and surcharges).

3.24 CIL is payable upon commencement of development. There is an obligation on developers to notify the Council prior to commencing development. Once the Council has received notification it will issue a "demand notice" setting out how much is owed and when payment must be made by. There are limited options within the regulations to challenge or appeal CIL.

3.25 Since introducing CIL in 2015, the Council has generated over £19m; £15.5m of which was retained by the Council for strategic infrastructure, the remainder of which has been passed to Parish/Town Councils and to cover the administration of CIL. In 2019/20 the Council received £4,541,855.56 in CIL payments and spent £4,491,000.00 on projects including various school expansions, parks and green spaces, public realm improvements and waste and recycling.

3.26 CIL collection and administration is managed through the same database as S.106 agreements enabling officers to produce the required annual reports setting out how much money has been collected and how and where it has been spent.

Where Planning Gain is Allocated

S.106 Obligations

3.27 As set out above, S.106 obligations are principally site specific or otherwise prescribed by the relevant legal agreement. This means there is little discretion once permission is granted as to where the obligations are allocated as allocation is effectively enshrined in the legal agreement. Allocation is made on a site-by-site basis however the Council publishes an annual report setting out what projects or infrastructure has been delivered or funded by a S.106 agreement.

Strategic CIL

3.28 Strategic CIL is allocated to essential strategic infrastructure such as school expansion projects, highways, flood defences and waste facilities required to enable housing growth allocated in the Council's Development Plan and the spend is managed by the Council.

3.29 The infrastructure required for the district is set out in our Infrastructure Delivery Plan and the Council has drawn up a CIL Infrastructure List, containing a list of types of infrastructure that CIL funding can be spent on:.

3.30 Regarding the amount of CIL available for strategic projects, the Council must first allocate money to the Parish Council or local area where the CIL was generated ("neighbourhood CIL") (generally around 20-25%) and we use 5% of the total charge for the administration of CIL. The remainder (generally 70% or 80%) makes up the Council's Strategic CIL budget.

3.31 The Council is required to publish annual reports on its CIL and S106 allocation and spend in December each year (covering the previous year's spend). The 2019/20 report (published December 2020) is the most recent report.

Neighbourhood CIL (NCIL)

3.32 A proportion of the CIL funds collected from new developments is passed to the Town or Parish Council where the CIL was generated, for that council to address local priorities.

3.33 The neighbourhood portion of CIL can be spent on a wider range of items than the Strategic CIL, provided that these items support the development of the local area. This means that neighbourhood CIL may fund parish needs which aren't strictly 'infrastructure', such as affordable housing.

3.34 The Council allocates 25% of CIL funds in areas with an adopted Neighbourhood Plan and 15% (up to a maximum of £100 per tax year, per existing council tax dwelling) to other parish and town councils.

3.35 As Bath has no town or parish council, the Council retains 15% for allocation in the Bath City area. The Bath City Forum, representing the community in Bath, makes recommendations on allocating CIL funds within Bath and the Council's Cabinet makes the final decision on the spending of the Bath neighbourhood portion.

3.36 Spending of neighbourhood CIL is down to the parish/town council providing them with a more flexible approach for spending their CIL receipts in comparison to the powers of the District Council. Such wider spending powers for the Town/Parish Council allow the local community to decide what they need to help mitigate the impacts of development in their area.

3.37 Notwithstanding this freedom there are several factors that should be considered when Parish or Town Council are developing their NCIL spending plan. CIL cannot be used as a replacement for everyday Town or Parish Council expenditure and misspent NCIL can be claimed back by B&NES Council. Furthermore, there is often a temptation to spend NCIL receipts quickly on short term infrastructure projects, however Town and Parish Councils should consider the long-term housing growth and resulting infrastructure needs when developing plans for spending NCIL.

3.38 Towns/Parishes have 5 years to spend their portion of NCIL after which time it is required to be repaid to B&NES Council.

3.39 Parish and Town Councils are required to report their annual CIL spend to B&NES Council, this information is then reported in the (B&NES) Council's 'Infrastructure Funding Statement' (annual report).

How the Council Maintains Planning Gain

3.40 As described, the Council maintains a centralised database for all S.106 agreements and CIL liable developments. Once planning permission is granted, the details of the obligations are captured in the database which will set the flags for when certain triggers are reached. Monies secured for relevant service areas (housing, highways, economic development, green space etc.) is then drawn down and it is the responsibility of the service areas to update the database (or inform the CIL/S106 Monitoring Officer) to show when and where money is allocated or spent. Tracking spend through the database gives officers a better oversight of planning gain expenditure and enables accurate and transparent annual reporting.

Practicalities of Administering Planning Gain/Common Issues Raised

3.41 Whilst the onus is on developers/applicants to ensure they comply with CIL/S.106 it is the role of the CIL/S106 Monitoring Officer to ensure obligations are met and payments received in a timely manner. This often involves monitoring development sites and chasing applicants/developers once triggers are reached. Monitoring developments can be resource intensive and in 2020 the Council introduced monitoring fees which are payable by developers to ensure the Council has sufficient resources to cover the requirements to monitor sites.

3.42 The biggest risk to the Council with S.106 is the need to repay contributions if they are not spent in accordance with the terms of the agreement within a specified timescale. Therefore, accurate tracking of money is a critical part of the relevant officer's role. Where it is apparent that a S.106 agreement is nearing its repayment period officers will alert the relevant service area to ensure spend is undertaken. In most cases secured monies are spent in time and it is rare for the Council to issue refunds.

3.43 Where S.106 often causes confusion/issues is regarding the triggers. It is often assumed that S.106 infrastructure or funding will be paid or delivered on commencement of development and the Council deals with several queries each year from residents and Members as to why certain obligations have not been delivered, particularly on larger sites. On interrogation of the database in response to such queries the issue generally relates to one of triggering (i.e., a trigger for payment/delivery has not yet been reached). Whilst the Council reports annually the delivery of S.106 there is no mechanism to highlight outstanding triggers or obligations (other than referring interested parties to the original S.106 agreement).

3.44 With CIL, one of the biggest issues – and cause of complaints to Members and significant additional work to officers – relates to applicants defaulting on CIL either by failing to notify the Council of commencement or failing to secure exemptions and reliefs pre-commencement. This can result in the entire amount of CIL becoming payable immediately, the loss of any reliefs granted (for example self-build relief), the loss of the option to pay by instalments and the addition of surcharges (fines) and mandatory interest charges. CIL is highly regulated and non-discretionary and when a disqualifying event occurs the Council does not have the power or ability to reverse the situation nor the discretion to re-instate exemptions or reliefs, irrespective of the circumstances leading to the disqualifying event.

3.45 To assist applicants, the Council publishes an informative on all planning decision notices directing applicants to the CIL information on the Council's website and highlighting that failure to comply will result in the aforementioned consequences. The Council also publishes a 'Developers Guide' to set out the process and developer requirements under CIL and CIL advice and the consequences of non-compliance is also published on all CIL forms which are produced by Government. Despite the level of information produced to assist applicants this remains one of the biggest areas of compliant to officers by developers/applicants who in most cases had not appraised themselves or understood the published requirements. Since introducing CIL in 2015 the Council has issued 296 surcharges against disqualifying events totalling over £500k.

Future Considerations

3.46 In 2020 the Government published its White Paper "*Planning for the Future*". The white paper sets out three pillars of reform, with the third pillar – 'Planning for infrastructure and connected places' – containing an ambition to reform the system of developer contributions. It proposes the introduction of a new "infrastructure levy", being a reform and extension of the Community Infrastructure Levy (CIL) combined with the abolition of section 106 agreements and planning obligations.

3.47 The details have yet to be finalised or implemented however the proposed reforms to the planning system are likely to have implications for the Council in terms of its planning gain. Members should be aware of Government's intention to reform the current system however until the final reforms are implemented it would be impossible to say how these changes may affect the amount of money the Council currently generates from development for strategic infrastructure project delivery.

3.48 5 key areas for potential change include the following[1]. Once the final reforms are clarified, Members will be updated:

1 Scrapping both CIL and section 106 agreement developer contributions, to create a new "consolidated", nationally set infrastructure levy based on the final value (or likely sales value) of a development and levied at point of occupation. The new levy would be a nationally-set, flat rate charge and intends that it would raise more revenue than under the current system of developer contributions

2 The new levy could be used to "capture a greater proportion of the land value uplift that occurs through the grant of planning permission", and "use this to enhance infrastructure delivery". But, the paper says, such a move "would need to be balanced against risks to development viability".

3 Under the proposals, councils would be allowed to borrow against levy revenues, to forward-fund infrastructure.

4 The white paper also sets out plans for the levy to secure "at least as much" affordable housing. However, the difference between the units' sale price and the market price would be offset from the developer's final levy.

5 The scope of the levy "could be extended to capture changes of use through permitted development rights". This would allow such developments to "better contribute to infrastructure delivery" and make it "acceptable to the community".

[1] Planning Resource (14th August 2020) *"CIL Watch: Five Ways the Proposed Changes to the Planning System will Affect CIL*

6 STATUTORY CONSIDERATIONS

6.1 The content of this report draws on the Councils duties set out in the Town and Country Planning Act (1990), the Community Infrastructure Levy Regulations (201). Consideration has also been given to the *Planning for the Future White Paper*.

7 RESOURCE IMPLICATIONS (FINANCE, PROPERTY, PEOPLE)

7.1 This report does not pose any specific resource implications as it is intended to provide the Panel with an overview of the Planning Gain.

8 RISK MANAGEMENT

8.1 A risk assessment related to the issues in this report has not been undertaken as the report is for information purposes and not seeking to make a recommendation.

9 EQUALITIES

9.1 This report is intended to provide the Panel with information for discussion and does not make any recommendations therefore an EIA has not been carried out.

10 CLIMATE CHANGE

10.1 Planning Gain is itself intended to enable the Council to deliver its infrastructure priorities which themselves are intended to improve the climate and help the Council achieve carbon neutrality however no specific recommendations are being made by this report.

11 OTHER OPTIONS CONSIDERED

11.1 None

12 CONSULTATION

12.1 This report has been cleared by the relevant officers in finance and legal services.

Contact person	*Rich Stott – Team Manager – Planning and Enforcement*
Background papers	*N/A*
Please contact the report author if you need to access this report in an alternative format	