

## NEW FOREST NATIONAL PARK AUTHORITY

NFNPA 591/19

### AUTHORITY MEETING – 18 DECEMBER 2019

#### SECTION 106 MONITORING FEES

**Report by:** Steve Avery, Executive Director

#### 1. Introduction

- 1.1 Planning obligations are legal obligations entered into to mitigate the impacts of a proposed development. Planning obligations are normally secured through a legal agreement under Section 106 of the Town and Country Planning Act 1990 (as amended) and are a mechanism through which development proposals can be made acceptable in planning terms. They are typically focused on site-specific mitigation measures and run with the land, meaning they are legally binding and enforceable.
- 1.2 The purpose of this report is to seek the Authority's support for the recommendation to introduce Section 106 monitoring fees which would take effect from 1 January 2020, subject to Planning Committee giving their support at their meeting on 17 December 2019.

#### 2. Background

- 2.1 For a number of years, local planning authorities have been charging monitoring/administrative fees in relation to Section 106 agreements due to the administrative burden that this activity generates. However, following a legal challenge on 3 February 2015 (Oxfordshire County Council v Secretary of State for Communities and Local Government and Others) the High Court held that administration and monitoring fees imposed to oversee planning obligations under Section 106 of the Town and Country Planning Act 1990 were not necessary to make the development acceptable in planning terms and thus failed the tests in regulation 122 of the Community Infrastructure Regulations 2010 (as amended). As a result of this judgment many planning authorities ceased charging for Section 106 monitoring.
- 2.2 However, earlier this year the Government acknowledged the administrative burden monitoring Section 106 agreements can have on local planning authorities. It proposed in a 'technical consultation on draft regulations to reform developer contributions' to "*permit local authorities to seek a proportionate and reasonable contribution towards the monitoring and reporting of planning obligations through Section 106 agreements*". This was met with overwhelming support by the respondents and in 'The Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019' which became law on 1 September 2019, Regulation 10 states under the sub-heading 'Fees for monitoring planning obligations' that such monitoring fees can be sought where:

- a) *the sum to be paid fairly and reasonably relates in scale and kind to the development; and*

*b) the sum to be paid to the authority does not exceed the authority's estimate of its cost of monitoring the development over the lifetime of the planning obligations which relate to that development.*

2.3 Despite the Government's intention to "*provide guidance on different methods that could be used to calculate monitoring costs*" as stated in its response to the 'Reforming Developer Contributions' consultation in June 2019, no such guidance has yet been made available, nor what 'fair and reasonable' represents in a particular circumstance. Until this has been provided, local planning authorities are required to establish their own charging regime and to justify the monitoring fees for Section 106 agreements.

### **3. Current Section 106 monitoring at the NPA**

3.1 There are two aspects to monitoring Section 106 legal agreements:

1. Financial monitoring and management of the monies associated with receiving developer contributions towards local infrastructure and mitigation measures; and
2. physical monitoring of compliance with the terms of the agreement, e.g. regarding buildings and infrastructure.

The monitoring of the receipt of financial developer contributions secured through Section 106 agreements is currently undertaken primarily by the Compliance and Legal Support Officer (who works within the Planning Enforcement team). This includes administrative tasks such as keeping the database up to date and more complex cases where financial compliance with agreements needs to be enforced. It also involves monitoring consented developments and contacting developers when the trigger for the payment of the agreed financial contributions has been reached (e.g. commencement of development, prior to occupation etc).

3.2 With our newly adopted Local Plan making provision for a modest increase in development in the National Park – including a limited number of housing site allocations for the first time since the National Park was designated in 2005 – the monitoring workload is likely to increase further. It is therefore proposed that the Authority makes use of the provisions introduced by the updated CIL Regulations in September 2019 to secure a proportionate fee for monitoring to support the Authority's increased resource requirements.

### **4. Implementing Section 106 monitoring fees**

4.1 The Section 106 monitoring fee should be proportionate to the respective agreement and reflect the time spent that is required to monitor individual agreements and their various covenants. There are several options to collect monitoring fees, as many examples from other local planning authorities have shown. However, in respect of the Oxfordshire County Council case, where the monitoring sum was calculated as a percentage of the total contributions payable and which was considered not to reflect an accurate assessment of the true costs involved in the monitoring, it is proposed to introduce a fee based on average hours spent, the number of covenants in the Section 106 agreement and the size of the development.

4.2 More specifically, the baseline for calculating the flat rate monitoring fee for Section 106 agreements includes the following:

- An hourly salary rate of £35.50 which mainly reflects the Compliance and Legal Support Officer's rate (with the support of other officers where required) Employer's NI and pension contributions have also been added, as well as overhead and travel costs.
- An estimated total time of eight hours for the duration of a covenant for a Section 106 agreement with up to five dwellings or an area of up to 1ha has been estimated. This estimate is based on a sample of past and current Section 106 agreements (see Table 1), and an estimate of time expected to be spent on Section 106 agreements coming forward in the near future (see Table 2).
- The total monitoring fee per covenant is therefore:  $£35.50 \times 8 = \mathbf{£284}$
- A percentage increase for certain type/size thresholds reflecting additional monitoring time required as shown in four bands:

	<b>Band 1:</b> 1-5 dwellings or up to 1ha of land	<b>Band 2:</b> 6-10 dwellings or up to 3ha of land	<b>Band 3:</b> 11-49 dwellings or up to 10ha of land	<b>Band 4:</b> 50+ dwellings or more than 10ha of land
Percentage increase	0%	20%	40%	80%
Monitoring fee per covenant	£284	$£284 \times 1.2 = £340.80$	$£284 \times 1.4 = £397.60$	$£284 \times 1.8 = £511.20$

4.3 Comparative fees for monitoring Section 106 agreements vary widely among different planning authorities and the suggested fee of £284 for smaller developments compares favourably to those set by other authorities, e.g. South Downs NPA who charge a flat fee of £440 per eligible covenant.

4.4 Monitoring activity includes reviewing and recording each Section 106 agreement and its obligations onto the software system, regular monitoring of the applicant's obligations to ensure that they are fulfilled and also the Authority's undertaking of their covenants within the agreement.

4.5 More specifically, development progress may need to be checked by site visits to assess whether triggers for paying contributions have been reached, records cross-referenced with other data held by the Authority over commencement of development, invoicing for payment, chasing and enforcing payments (if required), distributing payments to services, auditing expenditure and compiling reports. Liaison also takes place with other bodies such as Hampshire County Council and Portsmouth City Council (for the Solent Bird Aware mitigation scheme) – for example in respect of monitoring education and highway related obligations.

4.6 As outlined above, under the Authority's new Local Plan there are likely to be a number of developments coming forward that are of a larger scale than the typical profile of development in the National Park. These site allocations are likely to involve detailed legal agreements and therefore the resource required for monitoring will

increase. For these larger developments where there are a number of obligations requiring monitoring and it will take a number of years to complete, an assessment of the development proposed will be undertaken with the applicant to establish how many years of physical monitoring will be required.

- 4.7 Flat rate charges and the percentage charge will be reviewed annually to ensure that the threshold fee will continue to contribute to the costs of monitoring Section 106 agreements. The Executive Director of Strategy and Planning will determine any changes to the charges which will be enacted at the start of each new financial year (from 2021 onwards).
- 4.8 Monitoring fees for Section 106 agreements should be secured by way of a contractual covenant in the Section 106 agreement itself and in addition to the legal charge for drafting and checking the obligation. Fees should be payable at the same time as any legal costs or on execution of the legal agreement. A transparent overview of fees will be made available to the public.
- 4.9 The total monitoring fee per Section 106 agreement is capped at £10,000.

## **5. Conclusions**

- 5.1 The approval of a fee schedule aims to enable the Authority to recover its costs in monitoring future Section 106 agreements. It is important to note that this does not only include the receipt of agreed developer contributions, but also the monitoring of other measures required in the legal agreements. The fees have been based on current hours spent on financial monitoring. Thresholds have been created based on dwelling numbers and obligations in order to create a sliding scale which relates to an estimation of officer time spent on monitoring each obligation. In coming to conclusions about setting a 'fair and reasonable' fee, the calculated fees have been benchmarked against the fees that other local authorities are charging.
- 5.2 The same updated CIL Regulations (September 2019) that enable local planning authorities to seek proportionate monitoring fees also include an obligation to publish 'Annual Infrastructure Funding Statements' setting out the planning obligations received and spent in each year. This information will be publicly available online for all local planning authorities in the country and the first statement is due to be published by December 2020. The proposed monitoring fee schedule will be reviewed on an annual basis as part of the Annual Infrastructure Funding Statement to ensure that the fees collected reflect the true monitoring costs.

### **Recommendation:**

- 1. Members endorse the principle of charging a proportionate fee for the monitoring of legal planning obligations.**