

REPORT TO: EXECUTIVE and COUNCIL

Date of Meeting: 15 January 2019

Report of: Director, Bindu Arjoon

Title: CREATION OF A SECOND POST OF CIL AND SECTION 106 MONITORING OFFICER

Is this a Key Decision?

No

Is this an Executive or Council Function?

Council

1. What is the report about?

- 1.1 This report seeks Executive and Council's approval to establish a new, second, permanent position of CIL and Section 106 Monitoring Officer at Grade 7 in City Development.
- 1.2 The new position, which will complement an existing position with the same job title and grading, will be funded through Community Infrastructure Levy receipts which are intended to be used for administration purposes, and through future receipts secured through Section 106 agreements for similar purposes. The postholder will work to ensure that both CIL and Section 106 monies are effectively monitored, secured, and spent in accordance with legislative requirements.

2. Recommendation:

- 2.1 It is recommended that Council approves the use of CIL-derived funds to create the new position – CIL and Section 106 Monitoring Officer.

3. Reasons for the recommendation

- 3.1 The administration required to collect and monitor CIL in Exeter continues to grow, and there is a need for additional resource to keep up with these demands. There are now more than 400 developments with planning permission which are CIL-liable, and each development has bespoke payment terms, often providing for payment in stages over the duration of several years. The number of cases is growing at circa 100 per annum.
- 3.2 The administrative burden of monitoring and collecting monies secured through Section 106 agreements has never subsided, and will grow again in future, (as explained below). There are currently over 600 Section 106 agreements, each a bespoke legal agreement. About half of these agreements are 'historic', while the other half require ongoing monitoring for staged and index-linked payments for a variety of capital and revenue purposes.

- 3.3 At the moment, there is one officer whose dedicated responsibility it is to monitor and collect both CIL and Section 106-derived monies, but it is recognised that this is not sufficient. A July 2018 ECC Internal Audit Report identifies a number of risks relating to Section 106 monitoring, with potentially considerable financial implications. The report identifies that there are operational resource constraints which impact negatively on the authority's capacity to expediently collect and consequently spend monies owed through Section 106 agreements. In particular, the report notes the high risk associated with the current lack of resource to monitor the progress of developments on the ground, meaning that trigger points for payment of S106-related monies may be missed and that the issue of associated invoices is delayed or overlooked altogether.
- 3.4 In the absence of any other resource to share the volume of work currently being undertaken, and which is expected to be undertaken in the future, the Principal Project Manager, Strategic Infrastructure Planning, is currently assisting with monitoring and collecting CIL. This can be as much as 50% of the postholder's time, although this varies depending upon work pressures. This is detracting from the postholder's capacity to undertake the core duties of the position, which are to focus on planning and delivering strategic infrastructure to support the City's growth. It will be particularly important for the Principal Project Manager, Strategic Infrastructure Planning, to dedicate time to the core duties of the position in light, for example, of the strategic delivery programmes identified in the Council's 2018-2021 Corporate Plan (see section 9 of this report below), which could include, for example, the planning and delivery of new Park and Ride facilities, and in light of Exeter's success in being selected as a 'case study' city by the National Infrastructure Commission, which has the potential to result in initiatives which focus minds at national Government level on the future infrastructure and associated resource needs of the city.
- 3.5 Community Infrastructure Levy receipts continue to grow in importance. Receipts currently exceed £10 million, and are forecast to be substantially more than the £24.75 million that was initially forecast in February 2015, shortly after CIL was introduced in Exeter. Reflecting Government expectations of the burden involved, the CIL regulations provide for up to 5% of CIL receipts to be used to administer CIL.
- 3.6 Whilst not as significant a source of funds as CIL at present, receipts from Section 106 agreements continue to be important, and will grow in importance going forward. When the Government originally introduced CIL, it envisaged that Section 106 agreements would decline in importance and usage. The CIL Regulations placed restrictions on the scope of, and frequency with which Section 106 agreements might be used – in particular CIL regulation 123 imposed a restriction on the number of planning obligations secured through Section 106 agreements that can be pooled to contribute financially towards the delivery of any infrastructure project or type of infrastructure. However, on the back of a recent consultation¹, the Government has made clear its intent to remove this pooling restriction², which means that the use of Section 106 agreements is likely to increase again, meaning that CIL and Section 106

¹ Supporting Housing Delivery Through Developer Contributions – Ministry of Housing, Communities and Local Government – see:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691182/Developer_Contributions_Consultation.pdf

² Paras 25 and 52 - Government Response to Supporting Housing Delivery Through Developer Contributions – see:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752183/Developer_Contributions_Government_Response.pdf

will operate in parallel in future. The Government has also indicated that it intends to allow local authorities to seek a fee from applicants to be used towards monitoring the obligations in Section 106 agreements³. Such a fee would be in addition to the 5% of CIL receipts that can be used to administer CIL, and also to the element of Section 106 receipts which Exeter City Council is able to top-slice from S106 receipts and utilise to cover the professional costs involved in developing and delivering projects, as explained in Annex 2 to the April 2014 Exeter City Council Planning Obligations Supplementary Planning Document⁴.

- 3.7 An analysis of other comparable local authorities' resources indicates that they have expanded their capacities to monitor and collect CIL and Section 106 as the number of CIL liable developments has grown – see the table in section 8 of this report.

4. What are the resource implications including non-financial resources

- 4.1 The new CIL and S106 Monitoring Officer position can be funded in full from the 5% of CIL receipts which are intended to be used for administration purposes, and from monies which, in future, will be secured from applicants as a contribution towards monitoring Section 106 agreements, albeit that it is not yet known what the fee referenced in footnote 3 above will be. ECC Finance confirm that, based on future forecast receipts, 5% of CIL receipts alone is more than enough to fund the new position. There are consequently no financial implications for the General Fund. The new position is effectively self-funding.

5. Section 151 Officer Comments:

- 5.1 CIL and S106 payments form an important part of the funding available to the Council to deliver infrastructure improvements and run Council services. The section 151 Officer fully supports the efforts to improve collection and monitoring of these important funding streams. Whilst projections indicate that the post will be fully funded by the administration element of CIL, if this were not to be the case then the cost would be required to be funded from Council Tax. This is considered a low risk for the foreseeable future.

6. What are the legal aspects?

- 6.1 The legal position is summarised in this report. CIL is a planning charge, introduced by the Planning Act 2008 as a tool for local authorities in England and Wales to help deliver infrastructure to support the development of their area. It came into force on 6 April 2010 through the Community Infrastructure Levy Regulations 2010 with subsequent amendments. Outstanding payments under S.106 agreements are contractual and these can be pursued through the civil courts, although an effective method of reclaiming outstanding sums is by means of an adverse entry in the Local Land Charges Register, the latter warning potential purchasers that there is a debt attached to the land.

7. Monitoring Officer Comments:

³ Para. 53 - Government Response to Supporting Housing Delivery Through Developer Contributions – see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752183/Developer_Contributions_Government_Response.pdf

⁴ April 2014 – Exeter City Council Planning Obligations Supplementary Planning Document – see: <https://exeter.gov.uk/media/1659/planning-obligations-spd.pdf>

- 7.1 It is imperative that CIL and S106 payments are properly assessed, monitored and collected since they provide the funding available to the Council both to provide new infrastructure and infrastructure improvements and to run the Council's services. Accordingly the Monitoring Officer fully supports this report.

8. Report Details / Background

- 8.1 The number of CIL liable developments in Exeter is rising by around 100 per annum, and now stands at circa 450. There are circa 300 current Section 106 agreements relating to other developments. In addition, there are dozens of Deeds of Variation to Section 106 agreements. The progress of each CIL liable development, and each development to which a Section 106 agreement relates, must be monitored in accordance with bespoke payment terms. Accurate invoices must be issued at appropriate points in time.

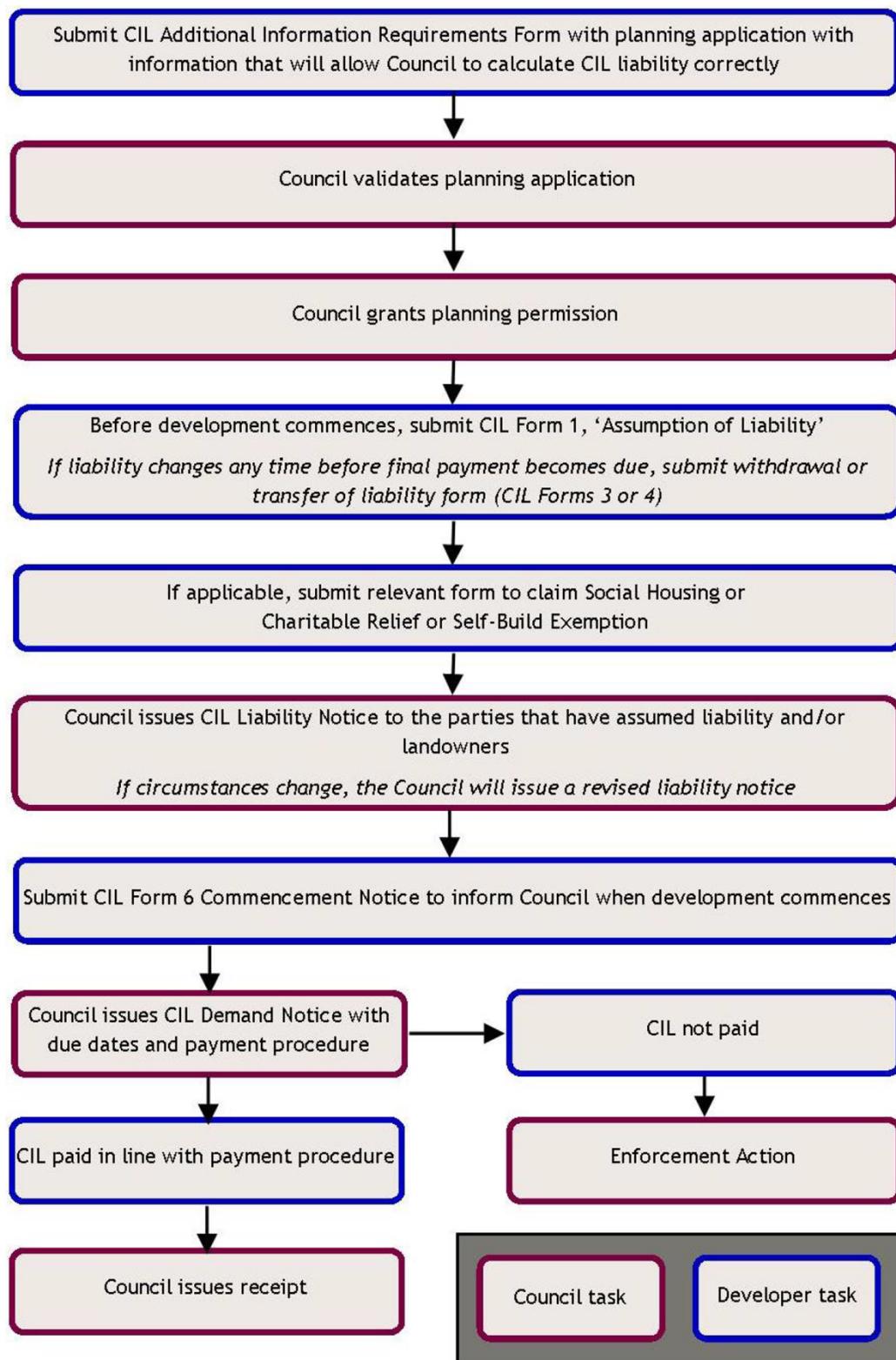
Community Infrastructure Levy

- 8.2 CIL is a tax, and the complexities of collection reflect this. The CIL collection process is summarised and illustrated in Figure 1 below. The CIL collection process for self-build developments is considerably more complex than the process shown in Figure 1. CIL collection typically involves the issue / receipt of multiple notices, and the issue of multiple invoices, especially in the case of medium to large scale developments which are typically phased. Enforcement action is complex, and necessitates the instigation of various forms of legal action, such as the issue of CIL Stop Notices, and application to court for CIL Liability and / or Charging Orders. CIL is relatively straightforward to monitor once a CIL Commencement Notice has been received from a developer, insofar as payments must be made within timeframes specified in the Council's CIL Instalments Policy. However, pursuing actions in relation to the non-payment of CIL in accordance with the CIL Instalments Policy, or on account of errors made in determining the CIL liability, can be particularly resource intensive. Many developments that are initially judged not to be CIL-liable in fact turn out to be CIL-liable, and it is only through careful monitoring that such changes in circumstances are uncovered. Monitoring to pick up on 'disqualifying events', which are events resulting in the reliefs from CIL no longer being applicable, (e.g. sale of a self-build dwelling within 3 years of completion) requires constant surveillance and investigation.

REPORT CONTINUES ON FOLLOWING PAGE

Figure 1 – CIL Collection Process

Summary of process (where development is granted planning permission)



Source: Reading Borough Council

- 8.3 Careful monitoring of the development at Brewer's Court (planning application 16/0469/03) determined that, rather than the CIL liability being £8,401.70 as initially calculated, the CIL liability was actually £83,542.03. Considerable efforts were made over many weeks to ensure that the £83,542.03 was the amount that was ultimately collected. Careful monitoring of the development at Rydon Lane Retail Park (planning application 16/0388/FUL) identified an unpaid CIL liability of £25,821.54, which was successfully reclaimed, but only on threat of legal action. Speedy enforcement action taken in relation to non-payment of CIL in relation to two developments at Bricknell's Bungalow (planning applications 16/0389/02 and 16/1293/03) means that the Council stands a reasonable chance of recovering £251,775.10 which might otherwise have been lost because the developer has gone into administration. Remedial legal action was successfully instigated to retrieve £26,059.60 in unpaid CIL from the development at 17 Bartholomew Street East (planning application 15/0129/03).
- 8.4 These are just a handful of examples of monies that might have been lost with less effectual monitoring. As the number of CIL-liable case grows, so does the need for resource to monitor the intricacies and volume of work involved. At face value, just one of the payments referenced in the preceding paragraph would be sufficient to employ a person for a year in the position which this report recommends is created.

Section 106

- 8.5 Section 106 agreements are significantly more complex and onerous than CIL to monitor. With CIL, the main trigger for initial and subsequent payment of contributions is the commencement of development. As long as commencement is monitored, subsequent payment/s can be sought in accordance with reasonably standard calendar based timeframes. With Section 106, developments must be monitored with much greater frequency and in much greater detail. The terms of payment are considerably more complex, and the trigger points for payment demand much more attention. Trigger points for payment are typically the number of dwellings occupied in any particular phase of development. There is consequently a need to regularly visit developments to monitor the number of dwellings built and occupied, and to cross-check assumptions with Council Tax records. In some cases it is even necessary to count the number of bedrooms in each dwelling, where this is a trigger for particular payments. The reality is that there is insufficient resource to effectively monitor developments from which Section 106 contributions are due, and whilst some developers will initiate payments of their own volition, others will not and need to be pursued. With only one person monitoring both CIL and Section 106, there is insufficient resource to pursue developers as rigorously as needs to be the case. This is recognised in the 18th July 2018 ECC Internal Audit Report on Section 106, which identifies this as a high risk.
- 8.6 The Internal Audit report identifies a number of other risks such as Section 106 payment terms not being accurately recorded in monitoring software, and spending departments not keeping accurate records of monies available for spend, meaning that S106 funded project delivery is delayed. New monitoring software will be implemented for CIL purposes from 1 January 2019, but there is currently insufficient resource to also use the software's S106 monitoring capabilities. The software suppliers estimate that it will take an individual 4-6 months solid to enter the details of the all of the S106 agreements in Exeter into the system simply to provide for them to be subsequently monitored accurately and effectively.

- 8.7 As referenced in paragraph 3.5 above, the use of Section 106 agreements will increase in future, on the back of signalled Government changes to the CIL regulations which govern how developer contributions are sought and secured.

Habitats Mitigation

- 8.8 It should be noted that responsibility for the administration and collection of payments for habitats mitigation also falls to the CIL and S106 Monitoring Officer, meaning that less time is available for monitoring and collecting CIL and S106. This is compounded by the fact that in April this year, a Court of Justice of the European Union ruling⁵ resulted in a change to the way in which the assessment of planning applications for their impacts on protected habitats must be undertaken, and this has given rise to more bureaucracy and more time spent on securing payments.

Comparison with Other Local Authorities

- 8.9 The table below contrasts resources at Exeter City Council with those available at comparable authorities.

Local Authority	Population	Number of CIL / S106 Staff	Remit?	Number CIL-liable developments (Oct 2018)	Number of S106 agreements	Date CIL Charging Schedule came into effect
Exeter	128,900	One (1) staff member as follows: <ul style="list-style-type: none">• CIL + S106 Monitoring Officer	Dealing with CIL / S106 and all associated administration, plus enforcement, but also contributions for habitats mitigation (Exe Estuary, Dawlish Warren and East Devon Pebblebed Heaths).	450	600 +	1 st December 2013
Oxford	151,906	Three (3) staff members as follows: <ul style="list-style-type: none">• CIL + S106 Officer• CIL + Monitoring Officer• CIL + Monitoring Officer	Dealing with CIL / S106 and all associated administration, plus enforcement + monitoring housing completions. Team has grown from initial one staff member to three due to increasing volume and complexity of work.	1000+	900+	21 st October 2013
Poole	151,500	Two (2) staff members as follows: <ul style="list-style-type: none">• Planning Contributions Monitoring Officer• Planning Contributions Monitoring Officer	Dealing with CIL / S106 and all associated administration, but also contributions for habitats mitigation (Dorset Heathlands). Team has grown from initial one staff member to two.	210 (commenced developments)	51	2 nd January 2013
East Devon	142,300	Two (2) staff members as follows: <ul style="list-style-type: none">• Planning Obligations Officer• Planning Support Officer	Dealing with CIL / S106, but Planning Obligations Officer also develops S106 spend proposals in consultation with communities, i.e. contributes towards S106 negotiation and S106 financed project delivery.	100	1700	1 st September 2016

- 8.10 Despite the fact that they do not collect any more CIL than Exeter, some other authorities spend the entirety of the 5% of CIL that they collect for administration purposes on administration. For example, in 2016-17, Plymouth City Council applied the entire 5% of the CIL it collected for administration on administration⁶.

⁵ People Over Wind and Sweetman v Coillte Teoranta (C-323-17) - <http://curia.europa.eu/juris/document/document.jsf?docid=200970&doclang=EN>

⁶ <https://www.plymouth.gov.uk/sites/default/files/CILAnnualMonitoringReport20162017.pdf>

9. How does the decision contribute to the Council's Corporate Plan?

- 9.1 The Council's Corporate Plan 2018-21⁷ sets out a vision, which is to be supported by three broad strategic delivery programmes to address the City's current major challenges, each of which will give rise to the need to develop and deliver infrastructure projects. The three delivery programmes are as follows:
- Tackling congestion and accessibility.
 - Promoting active and healthy lifestyles.
 - Building great neighbourhoods.
- 9.2 The proposed new position of CIL and S106 Monitoring Officer will be critically important to ensuring that funds are monitored, collected and put to best use in delivering infrastructure projects which are identified as being integral to the delivery of these programmes.

10. What risks are there and how can they be reduced?

- 10.1 There is a risk that, because of the increasing number of CIL-liable developments, resources to monitor and collect CIL will soon be stretched so far such that the collection of CIL is compromised and funds which are essential to deliver priority infrastructure projects will not be collected as expeditiously and meticulously as might otherwise be the case. Small errors caused by lack of resource have the potential to result in the loss of very significant income.
- 10.2 The July 2018 ECC Internal Audit Report on Section 106 Agreements identifies a number of risks, some of which are considered to be more significant than others, in particular that it is not currently possible to monitor the triggers for payment of Section 106 contributions as effectively as needs be. If these triggers are not effectively monitored, invoices may be issued late or not at all, with the inherent risks this entails to the financial resources available to the Council to deliver necessary infrastructure in a timely and efficient manner. There is also a risk that the increasing volume of CIL-liable developments will further detract from the ability of the current postholder to invest the necessary time in monitoring Section 106 payments.
- 10.3 The recommendations in this report seek to address these risks.

11. What is the impact of the decision on equality and diversity; health and wellbeing; safeguarding children, young people and vulnerable adults, community safety and the environment?

- 11.1 The decisions will impact positively on health and wellbeing, the environment, and potentially community safety by ensuring that funds are raised for the delivery of infrastructure which may be necessary to promote health and wellbeing, and to deliver environmental enhancements and improvements to community safety.

⁷ Exeter City Council Corporate Plan 2018-21 – see: <https://exeter.gov.uk/council-and-democracy/council-information/corporate-plan-2018-21/>

12. Are there any other options?

- 12.1 There is an option not to proceed with establishing a new position of CIL and Section 106 Monitoring Officer, but in this scenario it is anticipated that the risks identified in paragraph 10.1 to 10.2 above would quickly become more apparent.

Director, Bindu Arjoon

Local Government (Access to Information) Act 1972 (as amended)

Background papers used in compiling this report:-

- Exeter City Council Internal Audit Report – S106 Agreements – Final Report - 18 July 2018
- See also the documents referenced in footnotes 1 to 7 in the body of the report above.

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