

TEWKESBURY BOROUGH COUNCIL

Report to:	Executive Committee
Date of Meeting:	20 March 2024
Subject:	Section 106 Indexation Write-Off
Report of:	Associate Director: Planning
Head of Service/Director:	Associate Director: Planning
Lead Member:	Lead Member for Built Environment
Number of Appendices:	1

Executive Summary:

Planning obligations are often secured through Section 106 legal agreements upon the grant of planning permissions. Sometimes these take the form of financial contributions that are index linked to reflect inflation.

In this case a number of historic S106 payments were miscalculated and in view of the Council's mistake in their calculation and the time that has elapsed since this error was identified, it is proposed not to pursue the recovery of the additional funding and that the debts are written off.

Writing-off of debt which is irrecoverable is recognised as good practice by the Department of Housing, Levelling Up and Communities, the Chartered Institute of Public Finance and Accountancy and the Department for Work and Pensions. Debts are only considered for write-off after the Council has taken all possible steps to collect and, as in this case, to establish if collection is legally justified and, if so, how likely it is to be successful.

Recommendation:

To APPROVE the write-off of:

- DEBT109301 for £74,694.95
- DEBT109302 for £44,533.22
- DEBT109303 for £39,491.73

Financial Implications:

Provision for bad debts is made in the Council's accounts.

Sums which remain uncollectable and not written off reduce the Council's collection and arrears performance which is monitored on a monthly basis and reported via DELTA quarterly.

Legal Implications:

One Legal was consulted in the reaching of this recommendation, highlighting that any attempts to recover the monies owed are unlikely to be successful.

Environmental and Sustainability Implications:

None directly relevant to the content of this report.

Resource Implications (including impact on equalities):

None directly relevant to the content of this report.

Safeguarding Implications:

None directly relevant to the content of this report.

Impact on the Customer:

None directly relevant to the content of this report.

1.0 INTRODUCTION

- 1.1** The Corporate Write-Off Policy states that the write-off of all Council Tax, Business Rates and Housing Benefit Overpayments over £20,000 must be authorised by Executive Committee.
- 1.2** The reasons for having to write-off debts vary; however, many of them such as the cessation of a business or the death of an individual are generally outside of the Council's control and, whilst taking reasonable steps to recover the monies due, it is necessary and appropriate to consider whether a debt should continue to be pursued.
- 1.3** Procedures are in place to attempt to recover outstanding debts, which can extend over a number of years; however, there comes a time when it is clearly futile and uneconomic to attempt further recovery action and the debts are recommended for write-off. It is important that processes and procedures are frequently reviewed to ensure maximum effectiveness in debt collection and recovery.

2.0 BACKGROUND

- 2.1** This report relates to the proposed write-off of bad debts associated with Section 106 agreements tied to planning application 12/01256/OUT 'Land At Perrybrook'. Section 106 agreements are legal agreements usually between the local planning authority and an applicant for planning permission. Planning obligations must meet three tests set out in the Community Infrastructure Levy Regulations 2010 (as amended) that they are:
- necessary to make the development acceptable in planning terms
 - directly related to the development; and
 - fairly and reasonably related in scale and kind to the development.

Regulation 122 (SI:2010/948)

- 2.2** Where obligations are paid over the duration of a development's build out or not collected in full at the commencement of development, it is common for any financial contribution secured to be subject to indexation. This indexation is applied to ensure that sums ultimately collected reflect inflation and are, usually, defined in the S106 Agreement or Unilateral Undertaking itself.

- 2.3** Planning application 12/01256/OUT 'Land At Perrybrook' included provision for three sums to be collected through Section 106. The sums were paid and it was only subsequent to their payment that the Council established that incorrect indexation had been applied to the sums calculated, on the original invoices sent.
- 2.4** The difference between the amount invoiced, mistakenly applying the RPI, and what should have been invoiced using the correct BCIS index are:
- The Pitches & Changing Rooms Contribution for £772,076.27 was paid to us by ERLP Brockworth SARL on 14/7/2020 this was made up of the agreed £685,000.00 contribution¹ and £87,076.27 indexation (RPI) the BCIS index would have resulted in the addition of £161,771.22 indexation a difference of £74,694.95 (**DEBT109301**);
 - The Community Facilities Contribution for £323,445.30 was paid to us on 14/3/2019 by ERLP Brockworth SARL, this was made up of the agreed £294,000.00 contribution² and £29,445.30 indexation (RPI) the BCIS index would have resulted in the addition of £73,978.52 indexation a difference of £44,533.22 (**DEBT109302**); and
 - The Gypsy and Traveller Contribution for £438,961.48 was also paid to us by the Society of Merchant Venturers on 14/3/2019, this was made up of the agreed £399,000.00 contribution³ and £39,961.48 indexation (RPI) the BCIS index would have resulted in the addition of £79,453.21 indexation a difference of £39,491.73 (**DEBT109303**).
- 2.5** The relevant developers were contacted when these errors were identified in 2022. At that time the developers wrote back to the Council stating that they were unprepared to pay the additional monies. The primary argument of the developers was that it was not their responsibility to ensure the correct calculation had been applied and they had paid the requested planning obligations in good faith.
- 2.6** Unfortunately, it appears no further action was taken by the Council's Head of Development Services at this time, to either follow-up on the recovery of the additional sums or to take formal steps to write them off. It is now approximately four years since the original invoices were paid and the prospect of successfully recovering these additional charges are unlikely if legal action is undertaken.
- 2.7** These conclusions and the recommendations of this report are based on advice provided by One Legal. The opinion received was that, unless it could be argued that the applicant had acted in bad faith and could reasonably have known the incorrect indexation was applied on the original invoice, any attempts to chase these unpaid debts through the Courts are likely to prove unsuccessful. In support of this they said that having reviewed the original invoices, on which no commentary was provided by Tewkesbury Borough Council on the indexation applied, it seems reasonable to conclude a debtor would just pay the invoice as calculated without reviewing the sums themselves or questioning the basis for their calculation. As a result of this it was recommended that these debts are written off.

¹ Schedule 2, Part 2, Paragraphs 3 and 4 of S106 Agreement signed 16 September 2015

² Schedule 2, Part 3, Paragraph 2 of S106 Agreement signed 16 September 2015

³ Schedule 2, Part 3, Paragraph 1 of S106 Agreement signed 16 September 2015

2.8 Members will be aware that the Council's processes for the collection and monitoring of Section 106 are currently under review with Internal Audit. It is anticipated that through the broader review steps will be taken to learn from this example, and indeed other instances where the Council has had to hand back Section 106 contributions which were not spent in time. This may include a full review of S106 agreements and checking that a consistent and correct application of any indexation is applied and referenced on invoices.

3.0 CONSULTATION

3.1 None

4.0 ASSOCIATED RISKS

4.1 None

5.0 MONITORING

5.1 Members are reminded that the fact that a debt has been written-off does not prevent action to recover the debt subsequently being taken if funds allow, provided such action is not statute barred through lapse of time.

6.0 RELEVANT COUNCIL PLAN PRIORITIES/COUNCIL POLICIES/STRATEGIES

6.1 None

Background Papers: None

Contact Officer: Associate Director: Planning
01684 272272 nick.bryant@teWKesbury.gov.uk

Appendices: Appendix 1 - 'Definition of Index in S106 Agreement signed 16 September 2015'
Appendix 2 – 'Invoice for DEBT109301'
Appendix 3 - 'Invoice for DEBT109302'
Appendix 4 - 'Invoice entry for DEBT109303'
Appendix 5 – 'Developer response to receiving invoices for Debts'