

Section 106 Agreements and unspent developer contributions in England & Wales

Purpose

1. To provide the Senedd's Local Government and Housing Committee with views collated by the WLGA in relation to the Home Builders Federation report on unspent contributions in Section 106 agreements in Wales.

Background

2. Planning obligations / S106 agreements are required to secure necessary infrastructure when planning permission is granted and can either require payment of a commuted sum or require the developer to undertake works themselves (such as providing a school, affordable housing on site or necessary highways infrastructure) so there's never a straightforward comparison.
3. Cashflow is also an important factor to consider, payments are sometimes made in instalments as development progresses. Whilst sometimes part of these payments can be utilised (for design work for example), often the full amount is required prior to the sums being utilised for their intended purpose so it is not uncommon for contributions to 'build up' whilst Councils await the full payment for the agreed purpose.
4. Developers' contributions must be spent according to their negotiated purpose and within their agreed time limit, rather than returned to developers or left unspent.
5. In September 2023 the Home Builders Federation (HBF) published a report, '*Section 106 Agreements and Unspent Developer Contributions in England and Wales*'.
6. The HBF report is based on Freedom of Information (FOI) responses from 171 local authorities, constituting 50% of all local authorities in England and Wales. The 171 respondents hold a total of £1.4 billion in unspent developer contributions. Extrapolating these findings across all local councils suggests that almost £2.8bn is held unspent in contributions from home builders across England and Wales.
7. Of the 22 Welsh Local Authorities, 14 responded to the FOI request, they account for a total of £71,405,329 in unspent S106 contributions – an average of £5.1 million per council. If extrapolating out to all 22 Welsh councils, a total of around £112M is likely to be held unspent in Wales.
8. To understand what this means in Wales the WLGA contacted the three Local Authorities named in the report as the authorities who hold the most unspent Section 106 contributions: Cardiff City Council, Newport City Council and Pembrokeshire County Council.

Issues

9. Although the term 'unspent' is used throughout the report, the term 'committed' is preferred, as it relates to money that has been allocated for works to be undertaken or for revenue reimbursements that have yet to be paid.
10. Developers' financial contributions can only be spent according to their agreed purpose and within their agreed time limit as obligations have to meet the tests set out in Regulation 122 of The Community Infrastructure Levy Regulation 2010. Financial contributions, which remain unspent at the end of the specified period, will be returned to the payee along with any interest accrued. However, this time limit would ordinarily commence once the full payment has been made.
11. There will always be unspent funds directly after receipt of a financial contribution, they cannot be spent immediately as the various stages of delivering affordable housing on the ground take time. However, it is always done in compliance with the terms of the S106 agreement of which the developer is a signatory.
12. Councils in Wales remain committed to spending S106 money in an appropriate manner to deliver the requisite infrastructure in accordance with the S106 agreements and have sufficient oversight to ensure this happens.
13. The figures referenced in the report only relate to financial contributions and do not include 'in kind' obligations (where the developer builds the infrastructure), which make a significant contribution to infrastructure provision, including the delivery of affordable homes, schools, community facilities and open spaces on our strategic housing sites.
14. Contributions, due to the nature of the projects that they are used to fund, usually take over a year to spend, which is why the 'amount held' can appear high and why S106 agreements typically provide an expenditure period of between 5-10 years. Some of the reasons for this include:
 - a. **Lead times for large scale projects / strategic infrastructure:** For large scale projects there is a lead time between contributions being received (enabling a project to commence) and the associated project being completed/the funding spent. This can include for example, project design stages, site surveys, consultations, planning permission and construction periods, which, in some circumstances, can take several years. For strategic infrastructure projects (such as the provision of sustainable transport corridors), a s106 contribution will relate to a particular phase or section of that scheme, so expenditure would be governed by that project's wider delivery timetable.
 - b. **Securing additional funding:** There are a number of instances where a s106 contribution by itself will not be sufficient to fully fund a project. In these circumstances there will be a period of time where other

funding sources are secured, either through separate funding bids, or by securing additional s106 contributions (mindful of the pooling of 5 restrictions) to enable the project to then commence.

- c. **Community based projects:** Like points a and b above, where a S106 contribution is to be used by a local community group to fund a project, there will be a lead time in designing/implementing the scheme and/or there may be a need to secure other sources of funding, which will dictate the project delivery timescales and the expenditure of the associated contribution(s).
15. S106 agreements, of which the developer is agreeable and party to, normally require Affordable Housing financial obligations to be spent within a specific period. This allows councils to plan strategically to make the best use the s106 funding to maximise the delivery of affordable housing. It can also help to ensure that funding is available for any unplanned opportunities that may arise. Should the money not be spent by the deadline it is to be refunded to the developer. There is no evidence in the HBF report of funds in Wales not being spent beyond their deadlines.
 16. In respect of contributions towards AH, in order that AH provision in the first instance relates to the area within which the relevant development is to be delivered, the monies are often required to be spent within the “local” area and, if this is not the case (normally after 3 years), the monies can then be spent towards AH provision elsewhere. This can occasionally delay spend within those first 3 years. The HBF report does not address this.
 17. According to the HBF report, in Wales Cardiff City Council holds the most in unspent contributions (£23.3m), followed by Newport City Council (£9.5m) and Pembrokeshire County Council (£8.1m). Pembrokeshire County Council also holds the most in unspent affordable housing contributions in Wales (£4.4m).
 18. Each Council also responded with an update to the specific financial sums highlighted in the report:
 - With regard to the £23.2m referenced for Cardiff, this figure is broken down across nine different categories of infrastructure provision, which includes Affordable Housing, Schools, Open Spaces, Community Facilities and Highways/Transportation and each contribution is allocated to be spent in line with the terms of its associated s106 agreement, so all funds are committed as opposed to being ‘unspent’. In 2023/24 over £7.6m of S106 Contributions were spent.
 - The majority of the contributions in Newport City Council (i.e. £6,960,588) have already been ‘committed’ to schemes within the Capital Programme (via agreement with the Capital Assurance Group and Heads of Service). All unallocated sums remain with the timeframe of spend specified within the legal agreements.

- Although Pembrokeshire County Council currently holds £4.4m in unspent affordable housing contributions, this figure is somewhat skewed by 1 large contribution received in September 2022 for £2,335,548 which accounts for over half of the total value. This money has been earmarked for use at a new development planned in close proximity to the site from which the contribution was received with the construction likely to start at the end of 2024.

19. The report recommends that local authorities should publish an easily digestible summary of their annual reports on their websites, which include details of how money from developers is being spent. This is something that is currently under consideration by a number of Local Authorities in Wales.