



SPICe Briefing

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Planning (Scotland) Bill: Proposed Infrastructure Levy

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The Scottish Government introduced the Planning (Scotland) Bill ("the Bill") on 4 December 2017. Part 5 of the Bill proposes the introduction of an "infrastructure levy", which aims to help raise funds for essential infrastructure provision.



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Introduction

The UK and Scottish Governments have, over the years, introduced a range of measures to secure revenue from the development of land and to ensure that the infrastructure required to support development and other community benefits are provided by developers. Three short-lived national development taxes were introduced in the 1940s, 60s and 70s.

More recently Section 75 of the Town and Country Planning (Scotland) Act 1997, as amended, provided for planning obligations to be secured from developments. The scope of such obligations has gradually grown to include the provision of affordable housing and different types of infrastructure associated with the proposed development.

Increasingly planning stakeholders have raised concerns about the growing scope and complexity of planning obligations, including the time and costs involved in negotiation, the fairness of only covering a few large applications, and the openness to public scrutiny.

This short briefing outlines the operation of the current system of planning obligations in Scotland, the reasoning behind the infrastructure levy proposals, summarises the relevant provisions in the Bill and briefly looks at the operation of the Community Infrastructure Levy, introduced in England and Wales in 2010.

How do planning authorities currently secure infrastructure investment from developers?

Contributions towards infrastructure can be secured through a “planning obligation”, which is sometimes referred to as a “section 75 agreement”. The principle purpose of these agreements is to overcome obstacles to the granting of planning permission, which can include the developer contributing to the upgrade of infrastructure related to the development. The use of a planning obligation is considered by each planning authority on a case by case basis.

The Scottish Government sets out its policy on the use of planning obligations in ¹ Planning Circular 3/2012: Planning Obligations and Good Neighbour Agreements, which states:

“ 12. Planning authorities must consider each planning application on its merits and reach a decision in accordance with the terms of the development plan, unless material considerations indicate otherwise. Planning obligations have a limited, but useful, role to play in the development management process where they can be used to overcome obstacles to the grant of planning permission. In this way development can be permitted or enhanced and potentially negative impacts on land use, the environment and infrastructure can be reduced, eliminated or compensated for. Planning obligations should be agreed between the parties involved; developers should not be required to enter into a planning obligation. Where known in advance, the need for a planning obligation can usefully be set out in the development plan or as part of pre-application discussions.”

Planning obligations are legal agreements secured through Section 75 of the Town and Country Planning (Scotland) Act 1997. In essence, a planning obligation is a contract between the planning authority and the landowner (and possibly future landowners, depending on the terms of the agreement) which restricts or regulates the use of land, for example through requiring developers to mitigate against any potential negative impacts of the development through means set out in the agreement. This can include making a payment to the planning authority towards the development of associated infrastructure, e.g. expanding a school or improving a road. The issues covered by a planning obligation are such that they could not normally be enforced through a condition attached to planning permission.

Circular 3/2012 stipulates that planning obligations should not be used to require payments to resolve issues that could be resolved in another way, for example planning conditions or alternative legal agreements. Developer contributions can also be secured through; the Local Government (Scotland) Act 1973, which gives local authorities the power to enter into agreements for a purpose related to the discharge of any of its functions; the Roads (Scotland) Act 1984, which allows the roads authority to enter into an agreement with any person willing to contribute to the construction or improvement of a road; and less commonly, the Countryside (Scotland) Act 1967 and the Sewerage (Scotland) Act 1968.

Local residents and community organisations do not normally have any involvement in discussions around a planning obligation, which normally only involve the developer and planning authority.

Circular 3/2012 also sets out the circumstances in which planning obligations can be used, establishing five tests that a planning authority should use in deciding whether to propose a planning obligation, these are:

- the obligation is necessary to make the proposed development acceptable in planning terms
- the obligation serves a planning purpose and, where it is possible to identify infrastructure provision requirements in advance, should relate to development plans
- the obligation should relate to the proposed development either as a direct consequence of the development or arising from the cumulative impact of development in the area
- the obligation should fairly and reasonably relate in scale and kind to the proposed development
- the obligation should be reasonable in all other respects

Why is an infrastructure levy needed?

The ² report of the independent review of the Scottish planning system (commissioned by the Scottish Government) is clear about the importance of, and increasing difficulty in securing, investment in essential infrastructure to support development, stating that:

“ “Our review has concluded that linking infrastructure with planned development is the most significant challenge for the Scottish planning system at this time.” ”

It also outlines concerns about the ability of planning obligations to support infrastructure development where, and when, it is required to facilitate development, stating:

“ “At present local authorities place a heavy, and increasingly unviable, reliance on the private sector to fund infrastructure improvements, using the ‘blunt tool’ of Section 75 contributions. In areas where there is relatively low market demand, planning authorities are unable to recoup infrastructure costs through Section 75 agreements, further polarising the market and housing delivery. Statistics also illustrate the geographic variation in their use – two authorities accounted for 36% of all legal agreements in 2014-15. There is some evidence of innovation by planning authorities to make fair and effective use of planning obligations at a wider scale. However, even in more buoyant housing market areas, Section 75 agreements have limitations and there is compelling evidence that they contribute significantly to delays in the development management process. For major developments, a Section 75 is likely to double the decision making timescale. The proportion of major developments which include a legal agreement has declined from 30% in 2013-14 to 22% in 2014-15. There are also concerns that planning obligations are being used in some cases to correct existing deficiencies in infrastructure.” ”

What does the Bill propose?

The Bill would give Scottish Ministers the power to establish an infrastructure levy. This power would be additional to those described above, rather than replacing them. The detailed design work on the levy would, however, consider the relationship between the levy and planning obligations. Details of the levy scheme would be set out in regulations, which would be subject to parliamentary scrutiny, under the affirmative procedure, separate from the Bill.

The Bill defines the infrastructure levy as one which:

- Is payable to a local authority
- Relates to development wholly, or partly, within the authority's area
- Will be invested in infrastructure projects by the local authority

The Bill defines "infrastructure" as follows:

- communications, transport, drainage, sewerage and flood-defence systems
- systems for the supply of water and energy
- educational and medical facilities
- facilities and other places for recreation

Scottish Ministers would have the power to vary this definition, through regulations.

Scottish Ministers would also have the power to issue, vary and revoke guidance to local authorities on how the infrastructure levy powers should be used and the income generated spent. Guidance could apply to all authorities, some or just one. Local authorities would be required to have regard to the guidance when using their infrastructure levy powers.

Schedule 1 of the Bill sets out a framework for any future infrastructure levy regulations, specifically:

- who is liable to pay the levy, what types of development it will apply to, how the amount will be calculated and when it will be payable
- that local authorities will have discretionary powers to waive or reduce the amount payable, subject to conditions
- local authorities will have enforcement powers to help assess liability for infrastructure levy payments, including a power of entry to non-domestic property and to seize items found in the course of such investigations
- that it will be an offence to evade, or reduce liability to pay the infrastructure levy by providing, or causing another person to provide, false or misleading information, withholding information or obstructing an investigation
- allow, or require, local authorities to impose penalties for late payment

- prevent planning permission from being granted, or being deemed to have been granted, until there has been full payment of the infrastructure levy or any associated penalties
- allow a local authority to stop development until there has been full payment of the infrastructure levy or any associated penalties. The regulations may also make failure to stop development when requested by an authority an offence
- allow for the remission or repayment (with or without interest) of the whole or part of the infrastructure levy due, or any associated penalties
- create an appeal mechanism for developers, to Scottish Ministers or a person appointed by them, to dispute a requirement to pay infrastructure levy or against the amount payable. Fees may be chargeable for such appeals and provision may be made for the award of expenses incurred by parties taking part in any such appeal
- make provision about infrastructure levy accounts that must be kept by local authorities
- may require local authorities to transfer some, or all, infrastructure levy income to Scottish Ministers and, where this is the case, how these aggregated funds will be distributed amongst local authorities
- set out the particular purposes for which a local authority may invest infrastructure levy funds
- set out when local authorities can use current planning obligation powers, principally section 75 of the Town and Country Planning (Scotland) Act 1997 and section 53 of the Roads (Scotland) Act 1984, where this supports the efficient operation of the infrastructure levy system
- establish maximum penalties for infrastructure levy related offences

Community Infrastructure Levy: The Experience in England and Wales

The Community Infrastructure Levy (CIL) was introduced by the Planning Act 2008 and brought into force on 6 April 2010 by the Community Infrastructure Levy Regulations 2010.

The CIL shares some characteristics with the proposed Scottish infrastructure levy, being a levy that local authorities can choose to charge on new developments in their area to help pay for supporting infrastructure.

CIL charges are set by the local authority, based on the size and type of the new development. It is payable on most developments over 100 square metres or where a new dwelling is created. The local authority can set different rates for different geographical zones in their area and for different intended uses of development. This is a local decision based on economic viability and the infrastructure needed. There is no requirement for a local authority to charge the CIL if it does not want to. Structures which are not buildings, such as pylons and wind turbines, are not liable to pay the levy. Relief from the CIL is also available for development which relates to social housing and development by charities for charitable purposes. There are also exemptions from CIL for certain residential extensions and self-build homes.

In November 2015, then UK Communities Secretary, Greg Clark MP, and former Minister of Housing and Planning, Brandon Lewis MP, established a Community Infrastructure Levy (CIL) review group. The purpose of the review was to:

“Assess the extent to which CIL does or can provide an effective mechanism for funding infrastructure, and to recommend changes that would improve its operation in support of the Government's wider housing and growth objectives.”

The ³ final report of the review group was published in February 2017 makes a number of recommendations aimed at improving the operation of the CIL system in England and Wales. It also includes a list of characteristics that the authors consider should feature in any developer contribution system, namely that: it should

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- be capable of being consistently applied on a national basis in order to provide a stable regulatory and fiscal environment to which, as much as possible, all development contributes with sufficient local flexibility to account for variations in local markets, viabilities and development types.”
- provide greater certainty for developers, especially for those promoting smaller schemes, to give a better idea upfront of the quantum of developer contributions and timing. It should also be capable of accommodating the needs of those promoting larger schemes which require that the infrastructure is delivered in a timely manner. ”
- be simple, with streamlined regulations to improve the understanding and speed of implementation and to reduce the burdens of administration. ”
- encourage local authorities to grow their economies through development by offering a clear route through which necessary developer funded infrastructure can be delivered.”
- re-assure communities that the impacts of development will be mitigated with the risks of delivery attached to doing so assumed by those best able to bear it. ”
- recognise and accommodate the significant changes that are underway in the landscape and architecture of local government with the creation of combined authorities and cross-boundary working over housing market areas. ”
- be capable of implementation in a way that provides minimal disruption to those developers with existing permissions and for future planning applications during a transitional period and for those local authorities who have already adopted CIL. ”
- allow planning applications, especially those from smaller builders/developers, to be determined simply and quickly.”

The Scottish Government commissioned research into the ⁴ Introduction of an Infrastructure Charging Mechanism in Scotland, which has taken into account the findings of the CIL review and used the lessons learned to inform the consideration of options for a Scottish levy.

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