

developer contributions for affordable homes and infrastructure — anglo-scottish comparisons and lessons part one: scotland

In the first part of a two-part article on developer contributions for affordable housing and infrastructure in England and Scotland, **Fanny Blanc, John Boyle, Tony Crook, Kath Scanlon, Stefano Smith** and **Christine Whitehead** look at the workings of the current Scottish system

Both England and Scotland have plans to introduce infrastructure levies. However, while both are aiming to find a new source of funding, particularly for larger-scale investments, their starting points and their suggested mechanisms are different. In particular, Scotland is aiming to introduce a levy additional to its current developer contribution system (usually called planning obligations) which will fund sub-regional and regional physical infrastructure. England, on the other hand, is looking to move away from its current split Section 106 and CIL (Community Infrastructure Levy) system to one that combines funding from developer contributions and CIL charges into a single levy for funding non-local infrastructure.

In the last few years we have been involved in regular research into how the current system

works in England, examining the process and the incidence, value and impact of Section 106/CIL.¹ In 2020/21 we undertook a similar study for Scotland² to help inform the Scottish Government's implementation plans for introducing the proposed levy.

In Scotland our research showed that, although developer contributions were less prevalent than in England, they worked reasonably well and, importantly, were generally accepted. This was particularly so for affordable housing, but securing infrastructure was more difficult, especially for off-site and sub-regional infrastructure. Most stakeholders saw developer contributions as strongly embedded in the planning system and becoming more certain and transparent over recent years. Contributions for affordable housing in particular are well understood—in part



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because national and local expectations are clear. As in England, the contractual nature of developer contributions also helps the system to work more effectively. But there were also significant differences across Scottish planning authorities in the way that the system was operated and in the range of activities affected.

The similarities and differences between the two countries raise important issues about what works and why. We have divided this present article into two parts. The first reviews the current Scottish system, which works in a rather different way from that in England and deserves to be understood and assessed in its own right. In the second (to be published in the next issue of *Town & Country Planning*) we compare these findings with those from England in order to draw more comparative conclusions and discuss the proposed structural reforms in both countries.

Developer contributions in Scotland—the legal framework

Developer contributions in Scotland evolved in piecemeal fashion but remain rather more restrictive than in England. The phrase ‘planning obligations’ is usually used to describe contributions. As in England, the developer contribution system was originally a mechanism to mitigate the immediate negative impacts of new developments. Over time it has evolved to secure funds for local and sub-regional infrastructure. In addition, again as in England, obligations have developed to secure contributions towards wider community needs, notably new affordable homes.

Planning obligations in Scotland are legal agreements made under Section 75 of the Town and Country Planning (Scotland) Act 1997. Although the Act itself does not tightly define their scope, their use is subject to five national policy tests designed to ensure that obligations are related to proposed developments. They can also be secured through Section 69 of the Local Government (Scotland) Act 1973, which gives local authorities the power to enter into agreements for any of its functions. They may be sought through Section 48 of the Roads (Scotland) Act 1984, allowing roads authorities to make an agreement with anyone willing to contribute to constructing or improving a road.

Section 75 obligations are enforceable, including against successors in title, if they are registered in the Land Register of Scotland or recorded in the General Register of Sasines. This is important as it gives confidence to the parties that obligations will be met. As in England, because planning obligations run with the land, they are appropriate where phased payments or in-kind provisions are sought and/or where sites involve multiple and/or changing developers.

In Scotland, unlike in England, much use is made of suspensive (‘Grampian’) planning conditions, especially when developers are required to secure infrastructure prior to development commencing. Conditions, while obliging infrastructure to be provided as a pre-commencement requirement, do not specify financial payments (and are thus consistent with the legal limitations imposed on planning conditions). However, they may introduce uncertainty about delivery, especially when a third party is responsible for the provision.

Developer contributions in Scotland—the policy framework

Policy about using planning obligations in Scotland is set out in detail in Circulars (most recently, that of November 2020). Obligations should be sought only where they are necessary to make development acceptable in planning terms. Planning authorities should set out their policies in development plans and in supplementary guidance. Policies should be supported by action programmes and action plans to ensure that they connect with the funding and delivery of infrastructure. Planning obligations should be used only where the relevant outcome cannot be achieved through either a planning condition or an alternative legal agreement (for example under Section 69 of the Local Government Act 1973).

Recent case law (for example *Elsick*³) and appeal decisions (for example *Armadale*⁴) have reinforced the need for a clear link between a proposed development and the infrastructure provided, and for contributions to be proportionate to the scale and nature of development impacts. Recent cases have also questioned the legitimacy of pooling

several contributions from small developments to cover the long-term mitigation arising from the cumulative impact of these developments.

Affordable housing is defined as of reasonable quality; affordable to those on modest incomes; and covering the full range of affordable housing, including social rent, subsidised owner occupation (including shared ownership and shared equity), and intermediate homes. Provision through obligations must be based on identified local needs. Affordable housing should normally comprise no more than 25% of dwellings on any new housing development and can be required on any sized site. Planning authorities seeking higher proportions must justify them through local needs assessments. Contributions are normally fulfilled as either serviced land or completed dwellings, both sold at discounted prices to affordable housing providers.

Unlike in England, there is no zero affordable housing grant policy on developments subject to Section 75 agreements. Significant grants (up to around £80,000 per dwelling, depending on size and location), the value of which takes no direct account of the extent of contributions, are available to registered providers buying land or new homes at discounted prices.

The incidence, value and impact of developer contributions in Scotland

Our recent research examined the experience of developer contributions over the three-year period of 2017/18 to 2019/20. It was commissioned by the Scottish Government, following recommendations by the Scottish Land Commission in its advice to Scottish Ministers on land value capture.⁵ We collected a great deal of information on policy and data on agreements from all planning authorities.

We were very grateful for their help, especially as during the Covid-19 pandemic many staff were working from home. This allowed us to secure a clear description of how the planning authorities operated and, together with other related data, enabled us to undertake a valuation of developer contributions. We also undertook case studies of four different types of development with planning obligations in each of four planning authority areas in contrasting locations. We conducted stakeholder focus groups and interviews with staff from a wide range of organisations, including planning authorities, government officials, infrastructure providers, developers, registered housing providers, consultants, and professional bodies.

All but two of Scotland’s 34 planning authorities (i.e. including the two National Park authorities) used planning obligations. Three-quarters used them for affordable homes—and those who did not said there was no affordable need in their areas. Although contributions were agreed only on a small minority of planning applications (8% in 2019/20), they were mainly taken from large sites, so covered a much larger proportion of output.⁶

As Table 1 shows, as well as affordable housing, most planning authorities sought contributions for education, transport, open space and leisure provision, almost all of which went directly to the relevant planning authority to support their investment in these areas. Recently this list has expanded to include health facilities, although this was seen as ‘pushing the rules’. More generally, the fact that not all requirements have been set out in Local Development Plans has been creating some uncertainty for developers, many of whom talked about the way that there had been ‘creep’ in what planning authorities required in recent years. Unlike

Table 1
Number of authorities entering into agreements related to various infrastructure types, by year agreed

	Number of local authorities		
	2017/18	2018/19	2019/20
Schools and other educational facilities	16	15	14
Roads and other transport facilities	17	13	14
Sporting and recreational facilities	12	11	12
Open/green spaces	9	8	10
Public realm improvements	6	7	4
Medical facilities/emergency services	5	5	4
Environmental projects	1	–	2
Energy projects	1	1	1
Employment projects	2	–	–
Other	5	4	5

Planning authorities that had entered into agreements with developers in the preceding the years; n=20. Multiple answers permitted

Table 2**Value of developer contributions agreed for new affordable homes in Scotland, 2019/2020**

Type of contribution and dwellings (grossed-up survey totals)	Estimated grossed-up national total, £ million	Proportion of Scotland from top five local authorities, [#] %
Transfer of discounted land to registered provider for 2,700 dwellings*	82	45
Sale of completed units to registered providers for 1,150 social rented homes	161	44
Sale of completed units to registered providers for 505 mid-market rented homes	42	33
Sale of 180 market homes at discounted prices	15	44
Total	300	43
Commuted sum agreed with four local authorities in 2019/2020	1.8 [†]	–
Commuted sum for all uses paid to five local authorities in 2019/2020	8.5 [†]	–

The top five local authorities in a ranking of authorities by total value of estimated contributions

* All dwelling numbers rounded to nearest 10 as these are grossed-up numbers

† Not grossed up

Table 3**Value of financial contributions to infrastructure in Scotland, 2019/2020**

Financial contributions to infrastructure	Total sum agreed or paid to planning authorities providing information, £ million	Sum per planning authority providing information, £ million	Grossed-up total for Scotland, £ million
Contributions agreed with 13 planning authorities in 2019/2020	80.8	6.2	179
Contributions received by nine planning authorities in 2019/2020	54.5	6.1	186

in England, much use is made of planning conditions, mostly to secure transport infrastructure—and indeed developer contributions should not be claimed if a condition can meet the same objectives.

Previous research had shown that the potential for contributions was less substantial than in England (because development values are generally lower) and that contributions would inherently be more heavily concentrated in a small number of high-value areas than is the case in England. One of the more recent studies undertaken before ours estimated, based on annualised land values (and not details of agreements made by planning authorities), that £230 million per annum would be available for affordable housing and infrastructure.⁷

Our calculations were based on valuing the obligations agreed by each planning authority and

showed that, in 2019/20, £490 million worth of developer contributions were agreed, of which £300 million was for affordable housing (see Table 2) and £180 million was for financial payments towards infrastructure (see Table 3), amounting to £6 million agreed per planning authority.

The ratio between affordable housing and infrastructure contributions is thus about 2:1, comparable with the ratio in the most recent findings for England. Contributions for affordable housing had increased by more than a third over the three-year period of 2017/18 to 2019/20. We were not able to estimate the financial contributions to infrastructure for the two earlier years, nor to estimate the value of in-kind contributions to infrastructure for any of the three years, as relevant data were not available. However, the total raised in Scotland is not out of

line with the total for England (£7 billion in 2018/19), taking account of the relative population of each country (approximately 10:1 ratio between England and Scotland).

The vast majority of contributions in Scotland were delivered as long as developments went ahead and were not subject to revised planning consents. There was optimism among planning authorities that the value of contributions would increase over the next few years, covering a larger percentage of their estimated required infrastructure—although there was considerable concern that their estimates were over-optimistic.

Developer contributions are concentrated in a relatively small number of areas. The five largest contributing authorities, all in the Central Belt, accounted for 43% of the value of agreed affordable housing contributions in 2019/20. In these areas, the value of these contributions accounted for approximately 30% of the land value with planning consent. These planning authorities thus raised significant funds for new affordable homes and for infrastructure, including on large and complex sites. On these latter sites, this generally involved long negotiations with multiple agencies, including infrastructure providers whose plans were often not immediately consistent with one another. Renegotiations were often required to take account of changing market conditions that occurred during the long build-out of many of these schemes.

'Overall, it was agreed that developer contributions worked reasonably well in Scotland but were more concentrated on supporting the specific development in comparison with the situation in England'

In other planning authorities outside the Central Belt, but with the exception of North East Scotland, new development was typically on a smaller scale, where the main developer contributions were for affordable housing and small-scale development-related infrastructure needs.

It was generally accepted that landowners pay for these obligations because developers cover their obligations costs by offering lower prices than the full market value of sites with planning permission. The exceptions were where planning authority policy is unclear and/or where there are changes in what is required, creating uncertainty for developers when negotiating for land. This may mean that more of the costs of contributions are borne by developers.

There is also a risk that affordable housing grants enable higher land prices because the grant means that housing providers can pay more for land and for discounted new homes than if there was a zero-grant policy for Section 75 sites, as in England. On the other hand, developer contributions in Scotland secure social rented housing as a large proportion of the total agreed, made possible by the high level of grant adding considerably to the contributions coming from developers. New social rented homes accounted for some 70% of all new affordable homes secured via developer contributions in Scotland, whereas in England the proportion was only around 12% in 2018/19.

Overall, affordable homes secured in Scotland through contributions accounted for one in 10 of all new homes given planning consent. The proportion was also notably higher in high house (and land) price areas. In planning authority areas where house prices were in the highest quartile of all house prices, a quarter of all new homes were agreed as affordable homes to be delivered by developer contributions.

Overall, it was agreed that developer contributions worked reasonably well in Scotland but were more concentrated on supporting the specific development in comparison with the situation in England.

Affordable housing was generally accepted and enabled a variety of housing types and tenures to meet particular needs, especially in rural areas. Even so, there were areas that saw no need for affordable housing, given local housing market conditions.

The challenges of developer contributions in Scotland

Developer contributions in Scotland are not without challenges. Two stand out from our research: complex negotiations, and the provision of larger-scale off-site infrastructure.

With respect to the first issue, the very essence of how obligations take account of specific site circumstances as well as overall policy means that there is often considerable negotiation. The increasing use of tariffs and fixed charges has helped to reduce some of the uncertainties, especially on smaller sites. But on large sites negotiations can be long and complex with uncertain outcomes, not least when market circumstances worsen—as our case studies confirmed. Where contributions were used for funding or for in-kind provision by local authorities or housing associations, the processes involved were relatively straightforward as compared with those which involved other service providers (for example transport or water authorities).

The second challenge is the provision of larger-scale infrastructure, especially associated with large sites or where the requirement accumulates from a number of smaller developments. In both cases recent reporter and court decisions on appeals have increased the doubts about how far Section 75 can be used to address these requirements. More

generally, the tendency for ‘scope creep’ in what is required on matters not in plans or supplementary guidance has created further uncertainty.

Stakeholders generally agreed that planning obligations should focus on site-specific mitigation, including generated local needs, and that using planning obligations to secure major off-site and sub-regional infrastructure stretched too far what Section 75 was originally designed to achieve. There was also a clear consensus that planning obligations are not an effective means of addressing the cumulative impacts of a number of developments.

Conclusions, and issues for part 2 of this article

Developer contributions together with planning conditions have worked well in Scotland for securing funding for affordable homes and immediate site mitigation. The principles are generally accepted, and the central role of local authorities is clearly identified. As a result, the system is proving relatively easy to operate across the majority of areas and sites. The system is also fuelled by grants towards affordable housing provision.

The big challenges are funding major infrastructure and addressing the impact of cumulative developments, to which the system is not well suited. Hence the provisions in the 2019 Planning Act to establish a new Infrastructure Levy and to introduce Masterplan Consent Areas for major new development, both intended to address this challenge more directly. If the provisions are implemented, a new two-tier system of developer contributions in Scotland will be introduced, but there are no details yet as to how this will work. A more fundamental question, given that large-scale infrastructure impacts on the values of existing as well as new development, is whether any levy can do more than make a small contribution to the costs of such infrastructure.

In contrast, the new structure proposed for England in the *Planning for the Future* White Paper of August 2020 would, if introduced as intended (a preliminary analysis is provided in the March–April 2021 issue of *Town & Country Planning*⁸), move in the opposite direction, using a new sales tax (or Infrastructure Levy) to replace the existing two-tier system—of Section 106 planning obligations and the Community Infrastructure Levy—and fund mitigation, affordable homes and larger-scale infrastructure from the one levy.

In part 2 of this article (in the next issue of *Town & Country Planning*) we will look in more detail at what is proposed in each nation and use our evidence from both countries to see if there are lessons for each to learn from the other’s experience. More fundamentally, we will consider whether there is a simple one- or two-tiered approach that can work, or whether we might need a rather different (perhaps multi-tiered) approach to deal with the very wide range of requirements which probably cannot be achieved by traditional means.

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Notes

- 1 See T Crook, J Henneberry and C Whitehead: *Planning Gain: Providing Infrastructure and Affordable Housing*. Wiley Blackwell, 2016; A Lord, R Dunning, B Dockerill, G Burgess, A Carro, A Crook, C Watkins and C Whitehead: *The Incidence, Value and Delivery of Planning Obligations in England in 2016-17*. Ministry of Housing, Communities and Local Government, Mar. 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685301/Section_106_and_CIL_research_report.pdf; and A Lord, R Dunning, M Buck, S Cantillon, G Burgess, T Crook, C Watkins and C Whitehead: *The Incidence, Value and Delivery of Planning Obligations in England in 2018-19*. Ministry of Housing, Communities and Local Government, Aug. 2020. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907203/The_Value_and_Incidence_of_Developer_Contributions_in_England_201819.pdf
- 2 F Blanc, J Boyle, T Crook, K Scanlon, S Smith and C Whitehead: *The Value, Incidence and Impact of Developer Contributions in Scotland*. Scottish Government, Jul. 2021. www.gov.scot/publications/value-incidence-impact-developer-contributions-scotland/documents/
- 3 *Aberdeen City and Shire Strategic Development Planning Authority (Appellant) v Elsick Development Company Limited (Respondent) (Scotland)*. UK Supreme Court [2017] UKSC 66 On appeal from: [2016] CSIH 28. www.supremecourt.uk/cases/docs/uksc-2016-0157-judgment.pdf
- 4 POA-400-2004 (Planning Obligation Appeal). Planning and Environmental Appeals Division, Scottish Government, 9 Jul. 2020. www.dpea.scotland.gov.uk/CaseDetails.aspx?ID=120795
- 5 *Options for Land Value Uplift Capture: Advice to Scottish Ministers*. Scottish Land Commission, May 2019. www.landcommission.gov.scot/downloads/5dd687d6d2d6f_Initial_advice_from_the_SLC_to_the_Scottish-Government-on-land-value-uplift-capture.pdf
- 6 The proportion of sites had risen from 1% of planning applications in the three years 2004/05 to 2006/07, the last time a systematic study across all of Scotland had been undertaken — see M McMaster, G U’ren and D Wilson: *An Assessment of the Value of Planning Agreements in Scotland*. Social Research — Research Findings 11/2008. Scottish Government, 2008
- 7 *Introduction of an Infrastructure Charging Mechanism: Research Report*. Brett Associates, for Scottish Government, Nov. 2017. www.gov.scot/publications/research-project-identify-assess-options-introduction-infrastructure-charging-mechanism-scotland/pages/2/
- 8 T Crook, J Henneberry and C Whitehead: ‘Funding affordable homes and new infrastructure — improving Section 106 or moving to an Infrastructure Levy?’. *Town & Country Planning*, 2021, Vol. 90, Mar–Apr., 88–94