

developer contributions for affordable homes and infrastructure —

anglo-scottish comparisons and lessons

part two: scotland and england compared — a three-stage story?

In the second part of a two-part article on developer contributions for affordable housing and infrastructure in England and Scotland, **John Boyle**, **Tony Crook**, **Stefano Smith** and **Christine Whitehead** look at what the two countries can learn from each other to make the contribution systems work better, and they consider whether infrastructure levies are an appropriate way forward

Once upon a time—back in the early 20th century—developer contributions were a local prerogative in a world without the national planning systems that we have today. Local authorities could negotiate contributions with developers, usually for on-site mitigation purposes; transport and infrastructure investment were generally entirely separate decisions.

Until the late 1960s, local authorities in England needed central government approval before using contributions, but, after this requirement was removed, they started to see the potential for delivering affordable housing through the planning system, as well as the infrastructure needed to make developments acceptable in planning terms.¹ In Scotland, unlike in England, there was growing use



Both England and Scotland are seeking ways to use developer contributions to help to meet the regional infrastructure funding needs arising from development

of planning conditions, which required developers to provide site-related infrastructure before they could start work.

Evolution of the role of developer contributions

In England the big change came in 1990 with the Town and Country Planning Act. This consolidated the rules into what became known as Section 106 agreements, and planning policy introduced affordable housing as a material consideration, while formalising the requirement that contributions pass the rational nexus test. In Scotland similar rules were introduced in the 1997 Town and Country Planning (Scotland) Act.

At this point, the formal legal framework for what we are calling stage 1—enabling site-specific infrastructure and mitigation, together with affordable housing—was in place. The rationale for the approach was generally strong—requirements had to be clearly site related or there had to be an evidenced shortage of affordable homes. Thereafter, the policy became more embedded, and in both countries (despite complexities and concerns about the negotiation process) it was increasingly accepted by all parties.

The policy was framed as an instrument aimed at ensuring that developers would contribute to the costs of infrastructure and affordable homes. Who would actually pay was not part of the discussion, but, because developers generally address additional costs by paying less for land, developer contributions are actually a de facto means of capturing land value from landowners. This aspect has become more central to the debate, particularly because it implies that, as long as the development remains viable and the landowner is prepared to sell, there is no negative impact on output.

At this stage there was already a perceived need for what might be called stage 2—the capacity to

require contributions to meet multiple-site, local and sub-regional infrastructure needs consequent on the development. Meeting these needs was seen as making the planning permission acceptable to the local community in planning terms.

Again, this was addressed initially by local authorities pushing the boundary. In England pooling contributions was enabled and, in 2010, the government introduced the Community Infrastructure Levy. This formalised an approach to enabling local authorities to raise funds for the broader infrastructure needs of the local area and its sub-region, directly related to the scale of development. Scotland, however, did not follow these approaches and so had to find other ways of taking account of these broader needs.

Now, at least in principle, we are entering stage 3—which, in both countries, addresses the question of whether and how developers can help to fund more wide-ranging regional infrastructure needs arising from development. The approaches to be employed are somewhat different (and still not entirely clear), but the problem to be addressed is the same: how to ensure that the infrastructure is put in place in a timely manner, and how to fund that infrastructure.

In this article, which follows on from our article in the preceding issue of *Town & Country Planning* surveying the story in Scotland in detail,² we examine each of the three stages—the first two in terms of the mechanisms actually employed, and the third by looking at what we know of the current proposals. We ask two questions: can the two countries learn from each other and so make the current systems work better; and are infrastructure levies an appropriate way forward?

The existing systems—learning from one another

Stage 1: Site-specific mitigation and affordable housing

Since the 1990s, developer contributions have made an increasing contribution to both site mitigation and affordable housing. Regular assessments in England and now in Scotland have shown growing numbers of agreements and higher contribution values.^{1,4} Moreover, the approach has become increasingly accepted by all parties, despite concerns about complexity, the costs of negotiation, and issues of relative power.

Site mitigation

Site mitigation in both countries is designed to ensure that proposed developments are acceptable in planning terms and that developers contribute to the costs of any mitigation needed to make it so—for example contributions to the provision of off-site infrastructure such as local roads. In both countries such mitigation must be clearly related to the development in question.

In both countries this works reasonably well, provided that local development plans are clear, up to date, and followed through and implemented

consistently. Where they are not, especially where plans are out of date or not followed, developers have difficulty in estimating what to pay for land, and so they, rather than landowners, may end up paying part of these costs, which impacts on their preparedness to build. Many developers now seek to reduce these risks by using options agreements which defer land price agreements until all the contributions are agreed with local authorities. Even so, this adds to risk. In both countries site mitigation is more challenging on large and complex sites where there are several developers and lengthy build-out timescales over which market conditions and costs often change.

In Scotland, unlike in England, significant use is also made of planning conditions to secure site mitigations by requiring developers to ensure that specific infrastructure is provided before development can commence. How this is done and financed is a matter for developers, because conditions may not directly identify financial payments. The evidence from our research showed that the use of conditions in Scotland, where legally enabled, is accepted, well understood, and can help to speed up the provision of infrastructure and assist in getting development on permitted sites under way.³

In England, the range of contributions has continued to be extended to cover more general community infrastructure—which has sometimes been regarded as ‘mission creep’. This trend has been much less obvious in Scotland, where there has been more emphasis on maintaining the site-specific rules. Importantly, in Scotland, recent court and reporter decisions have further restricted this creep.²

Affordable homes

The central role of affordable housing in developer contributions, particularly on-site provision of that housing, formalised in planning policy before and after the 1990 and 1997 Acts, could be argued to be inconsistent with the principles of developer contributions, in that they are not a consequence of the specific development. Rather, it is enabled by an evidence-based assessment of the need for affordable housing identified in local development plans.

In both countries developer contributions contribute significantly to providing new affordable housing. In this way, landowners who get the benefit of planning consent contribute to the costs of providing new affordable homes, especially in areas of high house prices, where low-income households are often priced out of market homes. Significant amounts are secured and delivered through these contributions, although the amounts depend on having clear policies in adopted plans and implementing them consistently (and also, in Scotland, on having long-term partnerships between housing providers and private developers).

While acceptance of the approach is high in both England and Scotland, in England affordable housing numbers tend to be the first thing cut during negotiations over viability, especially on large sites



Developer contributions have long played a major role in the provision of affordable housing

with multiple developers and long build-out times and when market conditions change, to protect site and wider infrastructure contributions. In Scotland, partly because of the availability of grant, the provision of affordable housing in almost all schemes is sacrosanct in high-valued areas, notably Edinburgh. In areas where there is less land value available, there is often less room for manoeuvre.

The biggest difference between the two countries is with respect to the types of homes provided. In England, there is considerable emphasis on shared ownership rather than rental units and on affordable rent rather than social rent. The dwellings are also generally quite small. A far bigger proportion of the total provided in Scotland is in the form of social rented homes. Moreover, the variety of sizes is greater and reflects local needs more directly.

An important reason for this difference is that, in Scotland, the availability of grants for affordable housing providers makes it possible to reduce the contributions required of developers (and thus also feeds through into higher land values). In England, on the other hand, there is a zero-grant default for new homes secured through planning obligations—although there are numerous exceptions.

Stage 2: Other community needs and non-site infrastructure

Not surprisingly, over the years there have been many pressures to extend the range of developer contributions as a means of funding necessary local infrastructure. Three distinct issues have been addressed to varying degrees:

- how to fund infrastructure which arises because of the cumulative effect of developments;
- the provision of infrastructure for community services which can be seen to be related to changes in demand arising from development in general; and
- the provision of broader-based sub-regional or even regional infrastructure.

Scotland has faced problems in dealing with the cumulative impact of small-scale developments, as, legally, resources cannot be pooled in this context. England, on the other hand, has addressed these issues by fixed tariffs and the legal capacity to pool contributions from a number of developments. Experience suggests that this type of problem is therefore reasonably easy to solve in ways consistent with general principles.

With respect to community services, developers have increasingly made contributions to education, wider transport services, open spaces, play and leisure facilities, and, increasingly, health facilities. Developers have concerns around 'scope creep' in what is required, which they see as impacting on viability and making it difficult to estimate appropriate land prices. Other requirements—such as obligations in England to secure biodiversity net gain on all developments needing planning permission—are raising similar concerns.

In Scotland, there has been some push-back, notably with respect to health facilities, which some developers think should be paid for by central government rather than by them. In Scotland, local authorities also face challenges in co-ordinating the spending of contributions where the infrastructure provider is outside the local authority, although less so where the provision is made by the local authority collecting and indeed spending the contribution.

Sub-regional and regional infrastructure

The principal problem facing both countries is that of securing contributions for infrastructure which is not directly related to mitigating the site-specific impact of new developments. How to secure contributions towards the wider infrastructure needed to support all new development, especially when this involves more than one local authority, is a major challenge. Indeed, the legal requirements that contributions exacted under Section 106 (England) and Section 75 (Scotland) agreements must be directly related to developments is often interpreted as preventing their use for broader infrastructure.

The funding problem was addressed in England through the introduction of the Community Infrastructure Levy (CIL). This enabled local authorities to secure funding for off-site infrastructure where the rational nexus did not apply. Developers were required to pay a charge based on net additional square metres provided, to be used to pay the costs of defined infrastructure programmes. A mayoral CIL in London was also set up to help fund Crossrail, and there are intentions to enable the mayors of combined authorities to introduce similar levies to fund cross-boundary infrastructure.

However, CIL has not been as successful as had been hoped, especially for large and complex sites. Many developments are exempted from the charges; and, in contradiction to the intent of CIL, some of the funding also has to be used for very local, parish

level spending. Many authorities have not adopted a CIL on viability grounds, especially those wanting to protect affordable housing contributions in relatively weak markets.

Moving on to stage 3: Infrastructure levy approaches

Traditionally, larger-scale infrastructure was paid for by central government grants, but these are clearly limited. So it is not surprising that governments in both countries are seeking to find new sources of funding. Equally, it has been argued that there is plenty of potential for increasing developer contributions, which can still be paid for out of land value increases arising from granting planning permission. What is less clear is whether the rationale is still consistent with the original objectives of developer contributions or whether it is simply a land value tax by another name.

In this context, each country has proposed some more radical approaches based on introducing infrastructure levies, but each with rather different objectives—Scotland to address sub-regional infrastructure needs, and England to replace the existing Section 106 and CIL arrangements which are seen to cause delays and to be administratively burdensome.

Following commissioned research,⁵ Scotland put a potential infrastructure levy on the statute book in 2019, although the government has yet to implement it. The intention now is to introduce legislation in 2023–24. The levy is intended to 'capture a proportion of land value uplift, so that there can be public benefit from the value created by planning decisions and public sector investment'.⁶ The proposed levy would 'support the provision of infrastructure and services which will benefit and incentivise the delivery of development across a wider area, and help to unlock sites planned for development'.⁶ It would be collected by local authorities and spent by them on a defined list of infrastructure which covers a wide range of potential needs, including community (for example schools and health) as well as other kinds of infrastructure (for example roads, water, energy, and flood prevention).

To date, no decision has been taken as to the form the levy would take—for example either as a contribution towards defined costs (such as CIL in England) or as a charge on the value of the development created (as proposed for the Infrastructure Levy in England).

England is also considering a mandatory Infrastructure Levy, not as an additional mechanism but rather as a replacement for Section 106 agreements and CIL as part of a broader planning reform (although the latter now looks unlikely to happen). The intention is to replace the cost-based contributions of Section 106 and CIL with a levy based on the sales value of developments.

The Infrastructure Levy in England would be collected only above a value threshold based on the costs of development and an allowance for some

land value.⁷ It would replace the complexity and uncertainty of the current arrangements with a much simpler and more predictable approach and reduce the lengthy negotiations, which are seen as particularly problematic for SME (small and medium-sized enterprise) developers. The stated expectation is that this proposed system will raise at least as much funding as is currently delivered, including as many new affordable new homes, mostly still to be provided on site, as is the case under Section 106 agreements. Others see the potential for it to raise much more and become the equivalent of a quasi-hypothecated land value tax on new development.

The levy would be paid on the value of completed development when it is occupied. To ensure that the infrastructure necessary to make development acceptable in planning terms can be provided in a timely manner, local authorities will be able to borrow against anticipated revenues.

Although the simplicity and predictability of the proposed system is to be welcomed, it will not be without complexities. A preliminary assessment of the proposal, based upon modelling its impact on funds secured, showed that a national rate would be unlikely to achieve the government's objectives because it would either secure too little in southern England or (if it were to avoid this) it would make developments elsewhere unviable. Hence regional or sub-regional rates would be required.⁸

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The government has subsequently indicated that it would give local authorities the power both to set rates (which would almost certainly have to vary within an authority) and to collect and spend levies. The hoped-for simplicity is therefore unlikely to be realised. While it may well prove simpler and less risky for developers (although they lose their contractual Section 106 right to ensure that their contributions are used for infrastructure), it is likely to prove riskier for local authorities, and deciding on local levy rates and threshold levels will be challenging. An obvious concern, with respect to current government policy, is that without a mechanism for redistribution between areas, the levy is likely to be inconsistent with the levelling-up agenda.

Looking forward—learning from experience in England and Scotland

The experience in both countries, as well as the current proposals for change, raise a number of issues about how developer contributions might be better handled. In particular, can raising developer contributions through a single approach covering all types and sizes of developments work, given the complex variety and range of sites and circumstances involved? Additionally, should the amounts secured be related to the costs of provision—a fundamental principle of the original developer contributions approach—or to the value of the development being created? This is a choice which raises the more fundamental question of whether these policies are now being designed explicitly to capture land value increases or to secure developer contributions to infrastructure costs (with land value capture being an outcome but not an explicit objective, as in earlier developer contribution policies).

Depending on final decisions we may have two different levy approaches. The levy in Scotland may proceed as a cost-based approach, despite policy stressing this as a means of land value capture—whereas the English levy, as proposed, is to proceed as a value-based approach unrelated to the costs of mitigations and infrastructure. Each country will doubtless want to see how these different approaches work in practice and if there are lessons to be learned.

Based on our research in both countries, an alternative approach could be to have systems that are appropriate to the types of sites involved, because each site (or at least each type of site in terms of characteristics) is different. Such an approach would still depend on local authorities having clear and regularly updated local development plans; carefully identifying sites for development within these plans, clarifying how each would be treated in terms of developer contributions; and further clarifying how 'windfall sites', not allocated in plans but brought forward by developers, would be treated.

An obvious three-pronged approach might distinguish different types of sites: smaller sites; larger, more complex sites; and major developments. This would primarily build on and develop existing developer contributions practice rather than putting in place completely fresh approaches, which inevitably take time to bed in and thus risk undermining the implementation of new development (at least for the time it takes for new practices to evolve).

For small sites with short build-out times, including those where on-site provision of new affordable homes is not sensible, one could envisage a simple tariff. This could be based on floorspace or numbers of homes to be paid by developers towards the costs of site mitigation and the extra community needs generated by such developments, which cumulatively can be substantial. In England, use could also be made of planning conditions to achieve new infrastructure, building on the experience of Scotland.

For larger sites, including those with long build-out times and perhaps multiple developers, something along the lines of negotiated contributions to the infrastructural and community needs generated by these developments over time would be more appropriate than a fixed tariff. Even so, there might be a case for indicative rates, allowing for changes as conditions, revenues and costs change over the construction period.

For major developments, such as new villages, significant urban extensions, or substantial urban regeneration sites, one could envisage more partnership types of approach, taking account of the models set out in the Letwin Review in England⁹ and the masterplan consent areas now provided for in the Scotland Planning Act of 2019. These can involve several landowners and developers working in partnership and, within a clear developer contributions policy, set out what is required and shape the land value expectations of landowners whose land is to be acquired. The partnership would thus acquire land in a way that fully reflects the required contributions and realises the value inherent in the proposed new development when it is built out, helping to fund the infrastructure and community facilities needed.

Such an approach would be more acceptable than changes in compulsory purchase compensation that would mean only existing-use value would be paid to landowners whose land was acquired (as has often been proposed). Instead, clear policy on developer contributions would mean both partnership and private sites would get the same market value, one that had taken account of these required contributions.¹⁰

Conclusions

In both countries, there has been general acceptance by all parties of the principles of developer contributions for site mitigation, for community needs related to new development and for affordable housing provision; but there has also been acceptance that they cannot easily and effectively provide for infrastructure requirements needed for wider development. The reasons for introducing these new levies are not simply that levies might be better at raising funds than developer contributions, but that new approaches are needed not only to secure funding for non-site-specific infrastructure but also to ensure greater co-ordination, including the timing of all new infrastructure.

However, there are risks for both countries in introducing something brand new in terms of the proposed levies, which is why we suggest that there might be merit in thinking of adapting the existing systems. Introducing change within the current frameworks of policy and practice by clarifying, in particular, how they can simplify processes and be used for all three elements—site mitigation, community needs, and non-local infrastructure—might be less disruptive.

We also note that all new infrastructure, however funded, benefits existing residents and businesses, as well as the occupiers of the new developments. There is thus a much wider question as to whether we need better mechanisms than our existing land and property taxation framework to ensure that they too pay for these benefits.

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Notes

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- 2 F Blanc, J Boyle, T Crook, K Scanlon, S Smith and C Whitehead: 'Developer contributions for affordable homes and infrastructure — Anglo-Scottish comparisons and lessons. Part One: Scotland'. *Town & Country Planning*, 2022, Vol. 91, Jan.-Feb., 14–19
- 3 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/
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