

Consultation response

Planning for the
future

October 2020

CONTENTS

Introduction	4
The consolidated infrastructure levy	6
The opportunity to improve planning	6
Replacing the existing system	7
The commitment to deliver at least as much affordable housing onsite	8
Whether the commitment can be delivered	9
Next steps	10
Responses to consultation questions on Pillar Three	12
22(a). Should the Government replace the Community Infrastructure Levy and Section 106 planning obligations with a new consolidated Infrastructure Levy, which is charged as a fixed proportion of development value above a set threshold?	12
22(b). Should the Infrastructure Levy rates be set nationally at a single rate, set nationally at an area-specific rate, or set locally?	16
22(c). Should the Infrastructure Levy aim to capture the same amount of value overall, or more value, to support greater investment in infrastructure, affordable housing and local communities?	17
22(d). Should we allow local authorities to borrow against the Infrastructure Levy, to support infrastructure delivery in their area?	18
23. Do you agree that the scope of the reformed Infrastructure Levy should capture changes of use through permitted development rights?	19
24(a). Do you agree that we should aim to secure at least the same amount of affordable housing under the Infrastructure Levy, and as much on-site affordable provision, as at present?	19
24(b). Should affordable housing be secured as in-kind payment towards the Infrastructure Levy, or as a 'right to purchase' at discounted rates for local authorities?	20
24(c). If an in-kind delivery approach is taken, should we mitigate against local authority overpayment risk?	21
24(d). If an in-kind delivery approach is taken, are there additional steps that would need to be taken to support affordable housing quality?	21

25. Should local authorities have fewer restrictions over how they spend the Infrastructure Levy?	22
25(a). If yes, should an affordable housing ‘ring-fence’ be developed?	22

Responses to other questions **23**

5. Do you agree that Local Plans should be simplified in line with our proposals?	23
6. Do you agree with our proposals for streamlining the development management content of Local Plans, and setting out general development management policies nationally?	23
7(a). Do you agree with our proposals to replace existing legal and policy tests for Local Plans with a consolidated test of “sustainable development”, which would include consideration of environmental impact?	24
8(a). Do you agree that a standard method for establishing housing requirements (that takes into account constraints) should be introduced?	24
8(b). Do you agree that affordability and the extent of existing urban areas are appropriate indicators of the quantity of development to be accommodated?	25
10. Do you agree with our proposals to make decision-making faster and more certain?	25
12. Do you agree with our proposals for a 30-month statutory timescale for the production of Local Plans?	25
14. Do you agree there should be a stronger emphasis on the build out of developments? And if so, what further measures would you support?	26
17. Do you agree with our proposals for improving the production and use of design guides and codes?	26
20. Do you agree with our proposals for implementing a fast-track for beauty?	26
26. Do you have any views on the potential impact of the proposals raised in this consultation on people with protected characteristics as defined in section 149 of the Equality Act 2010?	27

INTRODUCTION

Shelter welcomes the opportunity to reply to this consultation on the white paper, Planning for the Future. As the country's leading housing and homelessness charity we have a major interest in how changes to the planning system will affect the country's housing emergency.

We are an unashamedly pro-housebuilding charity. We will only end the housing emergency by building many more social rented homes and we want to see many more, good quality homes being built across the country as a matter of urgency. We have put our full weight behind campaigning for more housebuilding at both a national, regional and local level with neither fear nor favour. And we know getting social housebuilding up to where it needs to be will take big changes to achieve. We want to see major changes to our housebuilding system and predominant model of development to deliver the social homes that the country needs.

However, the proposals currently in the white paper won't deliver the increase in social housebuilding we need when we need it. Planning isn't the fundamental barrier to increasing housebuilding, as established by the government's own independent review of build out. It's particularly the barrier to delivering more social rented homes. We want the government to be serious about increasing social housebuilding, but the major missing ingredient is investment.

We all know planning can be improved. We share support for many of the principles that the white paper outlines for the planning system – and in particular want to see the contribution that planning gain makes to delivering more social housing maximised. But the ideas in the white paper are far reaching and at an early stage in their development. By proposing to completely replace the existing system we're concerned that opportunities to deliver genuine change on a shorter timescale will be missed. We agree with those MPs and commentators who have described it as more of a green than a white paper. It will necessarily take years to fully work them through and provide proof of concept. Quicker changes could be delivered to improve the planning system and get more social rented homes now.

A further implication of the far-reaching and early stage nature of the proposals is that no single organisation will be able to respond to this white paper consultation and do every proposal justice. We have had to prioritise our response. While we have a general interest in the content of the white paper, our response focusses on the part that stands to have the greatest impact on social housebuilding: pillar three, the proposed consolidated infrastructure levy and how it links to other proposals in the other pillars.

Our overall view of the proposal for consolidated infrastructure levy is that it doesn't make sense to completely replace a system that has become vital for delivering social housing without proof of concept. This is particularly true when

known improvements could be made now and when we are in a time of serious economic uncertainty and acute housing need. Replacing the system would be inherently risky. To overcome this risk, the government will need to build in safeguards that make its ambition and commitment to deliver at least as much social housing onsite concrete. And it will need to overcome several fundamental challenges that its proposed infrastructure levy faces. This won't be easy and may not be possible. We are currently unconvinced that a flat rate levy will be able to deliver as much social housing as the existing system and cannot support the proposal until the government has evidenced that it would do so.

Our response includes an appendix with research from leading consultants Arup, who use several real world case studies to consider how the levy might perform and what detailed issues it will have to overcome.¹ Where appropriate we refer to this appendix throughout our response, but it is an important standalone piece of research and should be read as such. Our response is structured as follows:

- An outline of our overall argument
- Answers to consultation questions specific to the infrastructure levy
- Answers to other consultation questions insofar as they interact with the levy
- Research from Arup, *Planning for the Future White Paper: Testing the implications of the Infrastructure Levy through Case Studies*, as an appendix

¹ Arup, *Planning for the Future White Paper: Testing the implications of the Infrastructure Levy through Case Studies*, October 2020

THE CONSOLIDATED INFRASTRUCTURE LEVY

The opportunity to improve planning

We believe the planning system can be improved to deliver better results. We have been at the forefront of campaigning for improvements to Section 106 in recent years, notably working closely with government to close the viability loophole. We have campaigned for improvements to local affordable housing policies, such as in the City of Manchester. And we have advocated for further improvements so that planning obligations get more social homes built, such as removing the small sites exemption and considering the extent of lost affordable housing contributions as a result of permitted development. So, we're no strangers to the shortcomings of the current system or to thinking about how it could be better.

We also share support for many of the principles in the white paper, i.e. that the system of developer contributions should be as transparent, consistent, speedy and certain as possible. We strongly believe that the share of planning gain that goes into affordable homes should be maximised rather than going into landowner windfalls and would support government action to achieve this.

However, planning is neither the biggest barrier to building more homes overall or more social housing in particular. This was the finding of the government's own Independent Review of Build Out, led by Sir Oliver Letwin, which demonstrated that market absorption dictates the pace at which developers build.² It accounts for why increasing planning permissions doesn't lead to a corresponding increase in housebuilding and won't without other reform.³ And it's also recognised by the general public. In a recent large poll for us by YouGov, 'wholesale planning reform' was the least popular of ten housing priorities, with the support of less than 9% of respondents.⁴

Like the general public, we are ambivalent about embarking on wholesale planning reform now. We see there are opportunities to improve the system. But there is also major opportunity cost in focussing government resources and legislative time on planning reform when we know the biggest priority for solving the housing emergency is investing in social housing. This would deliver more of the homes people on low incomes desperately need, boost housebuilding numbers overall, support a more resilient residential construction sector and boost the economy in the recession.

² MHCLG, Rt Hon Sir Oliver Letwin, Independent Review of Build Out

³ Shelter, 40% of homes granted planning permission go unbuilt, https://england.shelter.org.uk/media/press_release/40_of_homes_granted_planning_permission_go_unbuilt, accessed on 28/10/2020

⁴ Shelter, Building our way out, October 2020

We are also aware that there is a lot at stake in deciding to entirely replace the existing system of planning obligations, Section 106 and CIL.

Replacing the existing system of developer contributions

We agree that planning can be improved. But without proof of concept, there is an inherent risk in entirely replacing the existing system with something new and untested rather than seeking to build on what has become a vital tool for delivering affordable homes and particularly social rented homes. There is scope to improve on what we have, to make Section 106 more transparent, consistent and certain – and to get a larger share for affordable housing. For example, some of the approaches being taken at a local level could be developed, rolled out more widely and supported by national policy and the planning inspectorate, such as:

- A threshold approach, to increase the incentives to develop schemes with higher proportions of affordable homes
- Two tier planning responsibilities, such as in city regions where mayors are able to call in schemes with deficient affordable housing contributions
- Taking a tougher line with developers who propose schemes with affordable housing short of policy, including facing down appeals
- Setting affordable housing obligation policies that vary within districts, to reflect the greater opportunity to secure higher proportions of social homes in some neighbourhoods than others
- Clawback mechanisms on large schemes, to ensure that contributions are buoyant and outperformance of expected development value is reflected in community benefits
- Tightening loopholes that allow developers to avoid affordable housing contributions, such as through permitted development or 'small sites', and not creating new loopholes

These and other improvements can be considered in more detail before deciding to start afresh with the risk that gains made through Section 106 are lost for the future. Those gains have been significant, particularly important over the last decade, when national grants for new affordable homes were reduced and there was low or no grant for new social rented homes.

Government statistics show that by 2018/19 almost half of the new affordable homes delivered were funded through Section 106 nil grant. This was up from 16% in 2007/08, at the previous market peak. For specifically social rented homes, ten times as many were delivered through Section 106 in 2018/19 as with grant from either Homes England or the GLA.⁵

Research commissioned by the government shows the total value of agreed Section 106 affordable housing obligations was £4.7 billion in 2018/19 alone.⁶ This was significantly more than the £1.7 billion spent by Homes England and the

⁵ MHCLG, Live Table 1000C

⁶ This figure relates to the amount of affordable housing agreed and, given that not all permitted developments are delivered, not the amount built. MHCLG, The Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2018-19, 2020

GLA on affordable housing grant in the same year, and higher than any level of direct government spending on new affordable homes for at least a generation.⁷

Shelter is campaigning for government grants for social housing to be increased considerably. The current reliance on Section 106 is a problem, not least because Section 106 contributions are pro-cyclical and dry up in market downturns as we are now entering. However, while grant levels are low, the planning system has taken the leading role in delivering social housing and if they remain low it will remain just as vital.

As well as being high compared to government grant levels, the contribution made by Section 106 is also much larger than has been secured through any previous attempt to fund affordable homes through planning gain in England. It is the most successful national policy tool for funding affordable homes through the planning system we have had. And it has taken three decades to get it contributing as much as it currently does.

As a starting point, the attempt to address the risk of replacing Section 106 with a new infrastructure levy through a stated commitment to deliver at least as much affordable housing onsite is useful. However, the commitment should be to deliver more social rented homes. And further detail of how the commitment will be measured, enforced and delivered is needed before it has real meaning, as well as evidence to show that it can be achieved.

The commitment to deliver at least as much affordable housing onsite

The white paper commits to delivering at least as much onsite affordable housing through the infrastructure levy as is currently delivered through Section 106. This has since been reiterated by ministers including the Prime Minister. It is a useful starting point. However, since we need more social rented homes to solve the housing emergency and Section 106 has become so vital in delivering them, the commitment itself needs to be modified. The gap between the number of social homes we are building each year and the number that's needed is vast. In order to be worthwhile any reform to the current system must deliver:

- **more**, rather than 'at least as much' housing onsite;
- and it must specifically deliver more social rented housing, rather than the generic class of 'affordable homes', which includes home ownership products people on low incomes can't afford

Even with this modification, more detail and evidence will be needed for the commitment to have meaning. The government will need to set out:

- **How it will be measured.** How the counterfactual will be generated

⁷ Table 62, UK Housing Review, CIH, 2019

-
- **How it will be enforced.** What the mechanism will be for mitigating any failure to meet the commitment, e.g. grant top-up where it isn't met
 - **How the commitment will be ensured in the future.** For example, a commitment protected by primary legislation, rather than something open to amendment through regulation
 - **How it will be delivered.** How the policy will be designed to bring about the desired result, including evidence, such as statistical modelling and the results of real-world pilots, to show that the design is effective

Recent experience demonstrates the pitfalls a meaningful commitment on onsite social housing must avoid. A comparable pledge was made to replace every home sold through the Right to Buy when the scheme was revitalised in 2012. There was no clarity upfront about the technical details of the pledge or how it would be monitored. These only emerged over subsequent years. No evidence was ever presented to demonstrate the pledge was achievable. Subsequently, even after the technicalities became clear, the pledge was never met. Finally, as it was not backed up by any change in statute or enforcement mechanism, it's unclear how the failure to meet the pledge would be put right or what its status is now.

Whether the commitment can be delivered

To properly respond to this consultation, we wanted to take an initial view on whether the commitment could be delivered in the real world. There are some proposals in the white paper – such as giving local authorities full discretion over how levy receipts could be spent – that would make this pledge impossible to deliver and these are clearly non-starters if it's to be achieved. But our biggest concern is that there may be issues with a flat levy that are so fundamental that, even with a robust commitment and inconsistent proposals dismissed, it can't deliver as much affordable housing as an individually negotiated approach.

To that end, we commissioned leading consultancy Arup to do a rapid review of several real world case study sites to determine how the infrastructure levy would need to have performed and what challenges it would need to have overcome to deliver at least as much as Section 106/CIL.⁸ Their work was done entirely independently and their findings are included as a research appendix to our consultation response.

Our conclusion from that research is that the infrastructure levy will face some major technical issues that will be difficult to overcome, if not impossible. These issues affect both the question of delivery on the commitment and more general practical problems. In summary, they include:

- How to set flat rates and flat thresholds that both maximise social housing contributions on sites that can achieve them, without making those that can't achieve them unviable – in their research, Arup looked at several case study sites in different areas, with high and low development values and varying remediation and land

⁸ Arup, Planning for the Future White Paper: Testing the implications of the Infrastructure Levy through Case Studies, October 2020

preparation costs.⁹ We cannot see a way to capture all of these under a single flat rate, even with an uncharged threshold, without either reducing the value captured on some schemes, making others (particularly brownfield sites) unviable or both. More locally set flat rates will likely do the job of balancing the two considerations better. But as the possible uplift on even adjacent sites can vary, even very local flat rates would face the problem

- How to ensure that essential infrastructure is delivered without putting social housing at the bottom of the priority list – Several of the sites Arup looked at included infrastructure improvements (e.g. road and public transport) in the Section 106 agreement that were needed before building could begin.¹⁰ It's unclear whether these could be delivered as effectively, quickly, etc under the white paper proposals. The mechanism proposed is for local councils to lead delivery using finance secured against future levy receipts. But it's uncertain that councils would have the risk appetite, capacity or skills to lead delivery of essential infrastructure in this way, how local council taxpayers would respond to the new debt liability, or how integration with the developer's scheme would be ensured. Furthermore, we're concerned that having paid for infrastructure with borrowing, councils would rationally seek to pay down that debt as a higher priority than securing social housing
- How to keep the benefits the levy aims to achieve in terms of speed and certainty, if steps are taken to try and mitigate the above challenges – For example, the white paper suggests keeping Section 106 for some purposes and we agree this would be necessary to mitigate against the issues above. But this will mean that negotiating time and uncertainty remain part of the system. Furthermore, in order to make flat rates as sensitive as possible, they will need to be set as locally as possible. But the more locally rates are set, the less 'flat' they are. Through mitigations we might replicate the features of the existing system

We are also concerned that the outline of the infrastructure levy may create unforeseen uncertainty and opportunities to game the system, which would need to be thought through and resolved.

For example, as well as levy *liabilities* being buoyant if they were charged on achieved sales prices (i.e. they would go up and down with the market), the value of in-kind social housing *contributions* would also be buoyant (their value as a contribution towards the levy would be calculated based on the difference between their value as social homes – i.e. anticipated future rental income – and equivalent market values. So, as market values change then their levy contribution value changes). This is likely to disincentivise building in-kind social homes in a rising market? Crystallising their in-kind levy contribution today, may leave a developer with liabilities left to pay tomorrow if sales prices rise in the meantime.

Next steps

The government will need to work through the issues above and provide proof of concept if it is to deliver on the commitment on affordable homes and maximise the share of planning gain that goes towards social housing. This will take time. It won't be possible to adequately address them all over the course of a bill process and a chaotic legislative process clearly increases the risk of a bad outcome. A

⁹ Ibid.

¹⁰ Ibid.

serious commitment to replacing a system that has built up over several decades will necessarily take several years. So, any legislation on an entirely new system should follow on from the necessary preceding steps to provide proof of concept.

These steps must include:

1. Making the commitment around delivery of more social housing robust. As a first step, more meat needs to be put on the bone of this commitment and what safeguards will be put in place to make sure it's delivered
2. Rigorous and transparent research to evidence that a flat rate/threshold approach is the best way to maximise planning's contribution to new social housing development, for example through computational modelling and prototyping. This would require developing one or several detailed hypothetical levy prototypes, and should involve looking at the application to real world sites
3. Limited pilots of a new approach, to test whether it can deliver in the real world and improve on it. For example, while we oppose the use of permitted development rights to create new homes, if these are retained piloting a new levy on permitted development schemes wouldn't jeopardise prospective Section 106 obligations
4. Detailed specification of a new approach and further consultation with stakeholders

Given the stated aim in the white paper to increase the share of planning gain that goes into new affordable housing, the government should also reverse or step back from decisions inconsistent with this aim. In particular, the extension of permitted development to included demolition and rebuild and proposed increase in the small sites threshold both put a larger share of planning gain back in landowners' pockets.

If the infrastructure levy is pursued without taking these steps, there is a major risk that the vital role that Section 106 plays in delivering social homes will be lost without effectively being replaced. The government should create a robust commitment to delivering more social housing through any planning changes and then only act when it has credible grounds for believing it can deliver on its promise.

RESPONSES TO CONSULTATION QUESTIONS ON PILLAR THREE

22(a). Should the Government replace the Community Infrastructure Levy and Section 106 planning obligations with a new consolidated Infrastructure Levy, which is charged as a fixed proportion of development value above a set threshold?

No. It doesn't make sense to replace the existing vital system until government has proof of concept that the new system will be better.

At this stage we don't believe that that the government has provided sufficient evidence that replacing the existing system of Section 106/CIL with a consolidated infrastructure levy will deliver more social housing onsite. As the housing emergency will only be ended by delivering more social homes, we can't support planning reforms that are inconsistent with that end.

We have campaigned for and are very supportive of the principle that a larger share of planning gain should go to social housing. We believe that it would be possible to reform Section 106 to achieve this, as well as to reform it by making it faster, more certain and more transparent. For example, existing local good practice and other changes could be expanded and supported by government, such as:

- A threshold approach, to increase the incentives to develop schemes with higher proportions of affordable homes
- Two tier planning responsibilities, such as in city regions where mayors are able to call in schemes with deficient affordable housing contributions
- Taking a tougher line with developers who propose schemes with affordable housing short of policy, including facing down appeals
- Setting affordable housing obligation policies that vary within districts, to reflect the greater opportunity to secure higher proportions of social homes in some neighbourhoods than others
- Clawback mechanisms on large schemes, to ensure that contributions are buoyant and outperformance of expected development value is reflected in community benefits
- Tightening loopholes that allow developers to avoid affordable housing contributions, such as through permitted development or 'small sites', and not creating new loopholes

However, entirely replacing the existing system, instead of building on it, risks jeopardising what has become a vital tool for delivering social housing and is the most successful policy tool for funding affordable homes through the planning system we have had. It has taken three decades to get Section 106 to the point where it is delivering £4.7 billion in affordable housing value a year.

To make sure that any proposed new system will deliver more than the system we already have, the government should commit to the following steps:

-
1. Making the commitment around delivery of more social housing robust. More detail is included on this in the response to question 24a.
 2. Rigorous and transparent research to evidence that a flat rate/threshold approach is the best way to maximise planning's contribution to new social housing development, for example through computational modelling and prototyping. This would require developing one or several detailed hypothetical levy prototypes, and should involve looking at the application to real world sites
 3. Limited pilots of a new approach, to test whether it can deliver in the real world and improve on it
 4. Detailed specification of a new approach and further consultation with stakeholders

Only after these have been completed will the government and stakeholders be able to determine that a new consolidated infrastructure levy would be an improvement.

There are good reasons to believe that it will not be able to achieve this. Our interpretation of research conducted by Arup on existing case study sites is that the levy will face some fundamental issues that it will be difficult to overcome.¹¹ Our view of the most significant challenges is set out below.

Setting flat rates that both maximise social housing contributions on sites that can achieve them, without making those that can't achieve them unviable

It is not clear that any flat rate levy and threshold, even set locally (see question 22b), can address differences in land values, land value uplift, remediation costs and build costs between sites. Thus, it's unclear how a flat rate levy, even with a liability threshold, can avoid creating a system that is simultaneously:

- **Not demanding enough for some sites**, so as to miss out on contributions where existing value is low, and uplift is possible through development
- **Too onerous for others**, so as to render low viability sites (due to low or no uplift because of an existing use value, low demand, or high remediation costs) unviable

The case studies compiled by Arup illustrate major variations in viability and land value uplift between sites and across the country. For example, their work looks at a development in Elephant & Castle in South London which had a very high relative development value, contrasting with developments in Erdington and Edgbaston in Birmingham, which are low value.¹² Likewise, they include a development in Gloucester on a greenfield site with low land remediation/preparation costs and a development in Leeds on a brownfield site with a high existing use value and significant land remediation/preparation costs.¹³ These variations are not only geographic differences local housing markets but also determined by multiple site-specific characteristics.

There is no obvious way that a single levy with a threshold could deliver increased benefits on some of these case study sites without reducing them on others or making them unviable. It is unlikely that more social housing could be

¹¹ Arup, Planning for the Future White Paper: Testing the implications of the Infrastructure Levy through Case Studies, October 2020

¹² Ibid.

¹³ Ibid.

delivered on sites where overall planning contributions were reduced. Thus, the government would be unlikely to meet its commitment/deliver a desirable result. There is also the clear risk of unintended consequences such as making brownfield development less deliverable, due to higher existing use values, as well as potential demolition and remediation costs.

Ensuring that essential infrastructure is delivered and ongoing costs paid without putting social housing at the bottom of the priority list

Several of the sites Arup looked at included infrastructure improvements (e.g. road and public transport) in the Section 106 agreement that were needed before constructing homes could be begin or be completed. For example, the development at Elephant & Castle included remodelling a junction and new underground station access and the developments in Bristol and Gloucester included contributions to highways improvements. Similarly, Section 106 agreements also included obligations to cover ongoing costs related to developments to make them acceptable. For example, the Section 106 at Grange Road in Gloucester included an obligation for ongoing maintenance of open space, landscaping and play areas.¹⁴ It's unclear whether these costs specific to individual developments could be delivered as effectively, quickly or at all under the white paper proposals.

The mechanism proposed for infrastructure is for local councils to lead delivery using finance secured against future levy receipts. No separate mechanism is proposed to cover ongoing costs. We return to fuller considerations of this mechanism and probable issues with it in the answer to Q22D. It's uncertain that councils would have the risk appetite, capacity or skills to lead delivery of essential infrastructure in this way, how local council taxpayers would respond to the new debt liability, or how integration with the developer's scheme would be ensured.

However, the challenge of using a levy that pays out at the end of construction to deliver critical infrastructure that's needed upfront or ongoing costs is not only limited to specific issues with council borrowing. Timing is the more fundamental issue. Where debt is used to pay for infrastructure upfront secured against future receipts, it will always be rational to pay it off before delivering any affordable homes. And debt secured against fixed one-off income can never cover ongoing costs indefinitely.

It's unclear whether – were the specific issues with council borrowing to be seen serious enough that it was ruled out as a mechanism – a better mechanism could be found as an alternative to debt. If it can't, there will be a need for some form of binding agreement upfront between the developer and local planning authority to make sure key infrastructure is delivered and ongoing costs covered, which will be similar to Section 106 and take time to negotiate and agree.

¹⁴ Ibid.

Opportunities to game or exploit the levy

Without proper development and testing (i.e. if the government proceeds too quickly to legislation) it will be impossible to work through all the undesirable incentives that may be created by the levy, such as increasing the pro-cyclical nature of planning obligations, and all the opportunities to game or exploit it. Given the nature of the levy, it would be rational for developers to act to minimise their liability and maximise the valuation of their in-kind contributions in ways that can't be fully anticipated or foreseen. Without piloting it will be impossible to determine what they are and whether they can be overcome.

For example, the white paper suggests that developers may seek to offer poor quality homes as in-kind contributions towards the levy and seeks suggestions on how to mitigate against this. Others have questioned whether charging the levy on final sale prices will create new disincentives for developers to invest in high quality design, specification or modern methods of construction on market homes.¹⁵ In our response to Q24B we highlight the potential that, with in-kind affordable housing contributions, it may be rational for developers to delay building affordable homes until the end of the development process or until the top of the market. In Q22D we discuss how developers may be put into an unfairly strong negotiating position with local planning authorities that have already borrowed against anticipated future levy receipts. There's also the possibility of avoidance measures, such as side payments between home buyers and developers to minimise sale prices and liability for the levy.

Keeping the benefits that the levy aims to achieve in terms of speed and certainty, if steps are taken to try and mitigate the above challenges

It's possible to imagine ways the preceding problems might be addressed. For example

- we've already mentioned that more localised levy rates are more likely to be more sensitive to differences in market conditions (see Q22B). For example, if there were different levy rates for South London and Birmingham then it would be more likely that the developments in Elephant & Castle and Erdington could have balanced the need to maximise contributions and viability considerations
- the white paper itself suggests retaining Section 106 for some purposes, and it's possible to imagine it being used to specify in-kind infrastructure contributions or obligations during the development process that the levy would be unsuited to. For example, Section 106 could be retained to deliver the ongoing maintenance obligations included in the Gloucester case study or the tenure mix specified in the Elephant & Castle Section case study
- it's possible to imagine something like an appeal process so that desirable schemes that are made marginally unviable by the levy could go through a more extended negotiation process. For example, the Birmingham case studies might have been able to go through an appeal process to establish whether it would be desirable for them to go ahead if levy obligations made them unviable

¹⁵ Lichfields, The White Paper, <https://lichfields.uk/grow-renew-protect-planning-for-the-future/the-white-paper/>, accessed on 27/10/2020

-
- it's possible to imagine mitigating against the possibility of gaming, for example with agreements between developers and local planning authorities specifying when affordable housing should be delivered

However, remedies such as these would add complexity to the levy. They would cut against the aim of the levy to increase certainty, speed, etc. and it's unclear whether this trade-off between simplicity and good outcomes could be surmounted. It's also unclear whether – even with mitigations – the levy would deliver higher contributions to social housing than the existing system. Delivering good outcomes in terms of the speed and level of social housing and the quality of the homes that get built should be a higher priority than the simplicity and speed of the planning process.

22(b). Should the Infrastructure Levy rates be set nationally at a single rate, set nationally at an area-specific rate, or set locally?

As above, we don't support the introduction of a consolidated infrastructure levy without proof of concept and we believe real world experience shows a flat rate levy will face some major challenges (see 22a).

There are two elements to this question. The first is what geographic level the levy should be set at.

We don't believe that setting local rates can entirely overcome the issues with a flat rate levy. The challenge of setting a rate that maximises contributions from sites that can pay without jeopardising the viability of desirable but less profitable sites isn't only about differences between markets. Important variations exist between sites, even when they are close by geographically. But the more local the levy the more sensitive it will be to general differences in market values. So, of the options presented, an area specific rate or locally set rate would likely be better at balancing the conditions of different sites than a national single rate levy and would thus be more desirable.

The second element is who should decide the levy rate for that geography (i.e. national, local or regional government). Our top consideration is how the choice of decision maker would affect the commitment to deliver at least as much social housing as Section 106. This would depend at least as much on what considerations they could legally use to make their decision as on who the decision maker was, which is not addressed in the white paper. For example, a local authority required to set a levy rate to deliver a level of social housing consistent with an assessment of local need would make different decisions from councils required to set rates to maximise market housing delivery. A Secretary of State bound by a robust legal commitment on social housing (see answer to Q24A) would differ from a Secretary of State able to arbitrarily determine rates.

In general, we believe that local councils are best placed to know their patch and would be better placed to set local rates. But the basis of their decision and the

evidence they use to justify should be consistent with local need for social housing and with the commitment on social housing.

If the government continues to develop plans the infrastructure levy it will need to set out how rate setting will relate to its commitment to deliver at least as much social housing (see answer to Q24A), national housing targets and assessments of local need (the first step listed in the answer to Q22A).

22(c). Should the Infrastructure Levy aim to capture the same amount of value overall, or more value, to support greater investment in infrastructure, affordable housing and local communities?

We believe that it would only be worthwhile implementing a new consolidated infrastructure levy if it could capture a larger share of value to deliver more new onsite social housing, and this had been rigorously proven. To achieve that without jeopardising other essential infrastructure or mitigations to make the development acceptable, it would be necessary to capture more value overall. As above, in our response to Q22A, we think there are reasons to believe this will be difficult for a flat rate levy to achieve.

We are enthusiastic about the principle of capturing a greater share of planning gain to deliver more social housing and have campaigned to that end in the past. There are improvements that could be made to achieve this short of entirely replacing the existing system of Section 106/CIL. For example, existing local good practice and other changes could be expanded and supported by government, such as:

- A threshold approach, to increase the incentives to develop schemes with higher proportions of affordable homes
- Two tier planning responsibilities, such as in city regions where mayors are able to call in schemes with deficient affordable housing contributions
- Taking a tougher line with developers who propose schemes with affordable housing short of policy, including facing down appeals
- Setting affordable housing obligation policies that vary within districts, to reflect the greater opportunity to secure higher proportions of social homes in some neighbourhoods than others
- Clawback mechanisms on large schemes, to ensure that contributions are buoyant and outperformance of expected development value is reflected in community benefits
- Tightening loopholes that allow developers to avoid affordable housing contributions, such as through permitted development or 'small sites', and not creating new loopholes

If the government continues to develop plans for the infrastructure levy we believe that evidencing that it could capture more value should be the key question for the research and modelling phase to answer (the second step listed in the answer to Q22A). However, desk-based research and evidence would be insufficient to establish that the levy could deliver more in the real world as it would be highly contingent on how developers, landowners and others modified their behaviour in response to the system. For example, we anticipate that some

developers/landowners would look to exploit weaknesses or game a new system to minimise their liabilities. As such, performance against expectations would also need to be a critical subject for assessment in the piloting phase (the third step listed in the answer to Q22A).

22(d). Should we allow local authorities to borrow against the Infrastructure Levy, to support infrastructure delivery in their area?

Delivery of essential infrastructure in a timely manner is fundamental to delivering development that can build out quickly, doesn't have adverse, unmitigated consequences for local communities, and locally popular. So, as discussed in our response to Q22A, some means of getting funds for essential infrastructure upfront would be needed under any system that paid out on occupation. However, using council debt against future consolidated infrastructure levy receipts to solve this could cause some foreseeable problems:

- Affordable housing could be pushed down the priority list. Having taken on debt to deliver key infrastructure, it would be rational for councils to seek to pay it down (and reduce interest payments) as a higher priority than securing affordable housing especially during a recession. Arup's case studies illustrate that these contributions can run into the multiple millions of pounds. For example, Great Park in Newcastle included the equivalent of £3 million in road works. This might lead to affordable housing delivery later in schemes (where it can currently make sense to deliver affordable housing early in schemes)¹⁶
- Councils might not be able to take on this role of leading infrastructure on all new major development. It's uncertain that they would have the risk appetite, capacity or skills to lead delivery of essential infrastructure currently delivered by Section 106 and to make sure that infrastructure is integrated with developers' schemes. This may mean that some significant developments requiring infrastructure are delivered more slowly, worse or not delivered at all
- Councils would be exposed to additional costs and financial risk. A council who had taken on large debts to deliver new infrastructure would be required to pay interest and be dependent on developers to deliver in order to pay down the debt they've accrued. There's clear moral hazard for developers under this system, as they would be insulated from the investment risk. And it's unclear how a local authority would push a developer to deliver more quickly. Local council taxpayers are unlikely to look favourably on this cost or risk

It's unclear to us that there is a more favourable alternative to councils borrowing that keeps the anticipated benefits of the levy in terms of time and certainty. For example, requiring in-kind infrastructure contributions on sites that require them could reduce the requirement for council borrowing and increased financial risk. But, as discussed in our response to Q22A, this mitigation would increase negotiating time and the perception of uncertainty and may end up replicating features of the existing system.

If the government continues to develop plans for the infrastructure levy it should include developing several prototype solutions to the problem of paying upfront

¹⁶ Planning for the Future White Paper: Testing the implications of the Infrastructure Levy through Case Studies

infrastructure costs with on-occupation levy contributions in the research and evidencing phase (the second step listed in the answer to Q22A). These should not only be subject to piloting but also several rounds of consultation with affected stakeholders, including councils, to understand how they would implement the approach (the third and fourth steps listed in the answer to Q22A).

23. Do you agree that the scope of the reformed Infrastructure Levy should capture changes of use through permitted development rights?

We have opposed recent extensions to permitted development rights that allow the creation of more new dwellings without going through the full planning process. In addition to concerns about quality and suitability of those new homes, a significant part of our objection is the lost contribution to new social housing that's made because permitted development is not subject to Section 106. So, if permitted development rights are retained in their current form, we support a new mechanism to capture planning gain and the equivalent contribution to social housing that would have been made had relevant developments gone through the full planning process. A new levy could be used for this.

However, we don't accept that it's necessary to entirely replace the existing system of planning obligations to solve the problem of lost social housing contributions created by some permitted development rights. For example, the levy could apply to permitted developments only.

If the government continues to develop plans for the infrastructure levy and retains permitted development rights in their current form, permitted developments would be a low risk cohort of developments for the pilot phase (the third step listed in the answer to Q22A)

24(a). Do you agree that we should aim to secure at least the same amount of affordable housing under the Infrastructure Levy, and as much on-site affordable provision, as at present?

We believe that it would only be worthwhile implementing a new consolidated infrastructure levy if it could capture a larger share of value to deliver more new onsite social housing. As such, if the government continues to develop the infrastructure levy, it will need to develop a robust commitment on social housing as its first next step. This should be commitment (not just an aim) to deliver:

- more, rather than 'at least as much' housing onsite;
- and it must specifically deliver more social rented housing, rather than the generic class of 'affordable homes', which includes home ownership products people on low incomes can't afford

Even with this modification to the proposal in the white paper, more detail and evidence will be needed for the commitment to have meaning. If the government continues to develop the infrastructure levy it will need to set out:

-
- **How the commitment will be measured.** How the counterfactual will be generated. For example, it won't be sufficient to compare the number of homes delivered nationally by the levy in future years to those delivered by Section 106 in past years as contributions are/would be dependent on levels of market delivery, which differ from one year to the next. Furthermore, some consideration would need to be given to geography and whether the commitment implies that more social housing will be delivered on every site or across a larger area, which shouldn't be any larger than a local authority area
 - **How it will be enforced.** What the mechanism will be for mitigating any failure to meet the commitment. For example, it would make sense for there to be a legal obligation for government to provide compensatory grant payments where it fails to deliver on its commitment. This would make sure the commitment was sustained into the future and wouldn't just be shelved by a subsequent government
 - **How the commitment will be ensured in the future.** As above, a commitment protected by primary legislation, rather than something open to amendment through regulation or without any legal basis would be resilient
 - **How it will be delivered.** How the policy will be designed to bring about the desired result, including evidence, such as statistical modelling and the results of real world pilots, to show that the design is effective. We outline the four steps we believe the government should take to be satisfied the commitment can be delivered in our answer to Q22A

24(b). Should affordable housing be secured as in-kind payment towards the Infrastructure Levy, or as a 'right to purchase' at discounted rates for local authorities?

It is unknowable at this stage whether an in-kind or a right to purchase approach would better overcome the issues outlined in our response to question 22a, or whether one or the other would lead to a larger number of social rented homes being delivered onsite. If government continues to develop the infrastructure levy, our preference would be for the option that achieves both and this should be subject to testing in the research and evidence phase (step two listed in our answer to Q22a). This testing should also consider whether either approach would be more open to exploitation or gaming.

For example, for in-kind affordable housing payments, as well as levy *liabilities* being buoyant if they were charged on achieved sales prices (i.e. they would go up and down with the market), the value of in-kind social housing *contributions* would also be buoyant. (Their value as a contribution towards the levy would be calculated based on the difference between their value as social homes – i.e. anticipated future rental income – and equivalent market values. So, as market values change then their levy contribution value changes.) Would this disincentivise building in-kind social homes in a rising market? Crystallising their in-kind levy contribution today, may leave a developer with liabilities left to pay tomorrow if sales prices rise in the meantime.

Notwithstanding this, either approach would need give local planning authorities a means to specify the types and tenures of homes to be provided onsite, consistent with the local need for social and affordable housing. This should be a duty, for example as part of the binding housing requirement (see response to Q8) and specified in bespoke development management policies (see response to Q6). The planning inspectorate should have regard to the need for social

housing in its 'sustainable development' test (see responses Q7) and be empowered to make changes to a local plan to ensure the types and tenures of homes needed are planned for as closely as possible.

24(c). If an in-kind delivery approach is taken, should we mitigate against local authority overpayment risk?

As discussed above in our response to Q22D, the implications of councils borrowing against levy receipts to deliver infrastructure and how that will affect their incentives to require social housing have not been fully worked through in the white paper.

It's clearly essential for the commitment on social housing as well as delivering development in general that, if the levy is developed and implemented, councils aren't exposed to increased financial risk by setting higher affordable housing requirements. So, given the in-kind proposal as it stands, some mitigation would be required.

However, it's unclear how the proposal to flip homes back to market would be desirable or practical. If those social homes were already occupied it would be unacceptable for their tenants to be evicted to settle levy liabilities. It would also be undesirable for the development of social homes to become as a rule part of the last phase of development to mitigate against this risk. And if the social homes hadn't yet been delivered and were phased earlier in the development process, it's unclear how it would be determined that the development was underperforming expectations. This issue indicates towards the problem of phasing discussed in Arup's response and unaddressed in the white paper.¹⁷

As discussed in our response to Q22D, if the government continues to develop the plans for the infrastructure levy, it should develop several prototype solutions to the problem of paying upfront infrastructure costs with on-occupation levy contributions in the research and evidencing phase (the second step listed in the answer to Q22A). The implications of these, how they interact with phasing, how any overpayment could be mitigated against, etc should be included as considerations in that phase.

24(d). If an in-kind delivery approach is taken, are there additional steps that would need to be taken to support affordable housing quality?

As above, this should be one of the considerations for how developers might game or exploit the system that should be considered as of a prototyping, evidence and research phase, if government continues to develop its plans for the infrastructure levy.

¹⁷ Planning for the Future White Paper: Testing the implications of the Infrastructure Levy through Case Studies

25. Should local authorities have fewer restrictions over how they spend the Infrastructure Levy?

No. Given the difficulties that the infrastructure levy appears likely to face in capturing a larger share of planning gain and delivering more social housing, we can't see any way that the government would be able to meet its commitment on affordable housing if councils were given more discretion over how they spent receipts.

25(a). If yes, should an affordable housing 'ring-fence' be developed?

NA

RESPONSES TO OTHER QUESTIONS

As discussed in our opening statement, we are focussing our response on the consolidated infrastructure levy. We have answered other questions where there is an interplay with the infrastructure levy proposal.

5. Do you agree that Local Plans should be simplified in line with our proposals?

We're unclear on how, within the proposals for local plans, local planning authorities would specify that developments provide on-site affordable housing, or the types, tenures and sizes of those homes as contributions towards the consolidated infrastructure levy. We're also unclear on how they would ensure that affordable housing was integrated through mixed tenure development and that housing was suitable and accessible.

Local authorities should be required to and be able to plan to meet the local need for a range of tenures and types of homes, in particular social rented housing. They must be able to do more than just determine the appearance and permissibility of the principle of development in an area. Furthermore, communities should be able to have a meaningful say in the planned housing mix. And for that engagement to be genuine outline permission or permission in principle, granted at plan stage, must be conditional on some agreement for onsite affordable housing delivery.

Finally, we're concerned that the proposed shorter 10-year local plan period may not be long enough to enable proper planning alongside major infrastructure. Our report, *Building Our Way Out*¹⁸, showed the impacts of failing to do so in places like Manchester and Kent, whilst identifying a need to plan for social housing development in line with long term plans for major infrastructure projects like HS2 in Crewe, Cheshire East.

6. Do you agree with our proposals for streamlining the development management content of Local Plans, and setting out general development management policies nationally?

The government has said that local authorities will have a means to specify types and tenures of homes, and to mandate on site affordable housing contributions that reflect the identified local need. This will be a crucial test for more detailed future proposals for local plans and more detail is needed to demonstrate how housing mix as well as other considerations such as space, light, accessibility, suitability, will be addressed in the new system.

¹⁸ Shelter, *Building Our Way Out*, 2020

7(a). Do you agree with our proposals to replace existing legal and policy tests for Local Plans with a consolidated test of “sustainable development”, which would include consideration of environmental impact?

If the government continues to develop its proposal for local plans, any test of sustainable development should include a requirement to plan consistently with the assessed level of affordable housing need, in particular the need for social rented homes. This would particularly apply to considering local policy on the infrastructure levy included in the local plan, for example the level and tenure of affordable housing required.

The need for social housing, and different types of home including accessible homes and homes for older people, should be set out within the standard method (see Q8), and carry weight in the planning inspectorate’s review of local plans.

We use the expression ‘plan consistently with the assessed level of affordable housing need’ intentionally. The planning system (developer contributions) won’t ever be able to meet housing need alone. Without an increase in grant for social housing it won’t ever be possible to deliver the need for them. So, in this situation the consolidated test for sustainable development should consider what weight and priority is given to delivery of social housing through the infrastructure levy in a local plan, given local market conditions.

8(a). Do you agree that a standard method for establishing housing requirements (that takes into account constraints) should be introduced?

We support having a standard method for assessing housing need, but this must explicitly include a measure of the need for social rented homes now and in the future. By focussing on sale prices and median incomes, the measure of affordability current proposal for the standard method will have little relevance for households who need social rented housing and people on low incomes.

We therefore believe that a standard method must include:

- As inputs, the affordability and level of need for housing for low income households, such as the number of households in temporary accommodation and lower quartile incomes
- As an output, a separate assessment of the level of need for new social rented homes of different types, within an area
- Some consideration of how investment in infrastructure, such as transport infrastructure, will affect the future need for social housing

As above, it won’t typically be possible to deliver enough social housing to meet the local need through the planning system alone, even if the infrastructure levy is a great success. However, detailed assessments of housing need should remain free from assessments of the viability of delivering within the planning system. Where the need identified cannot be met by developer contributions

(Section 106 or the infrastructure levy), the detailed housing need figures should act as a framework to guide the use of other levers available for the delivery of affordable housing, such as government grant for social housing.

8(b). Do you agree that affordability and the extent of existing urban areas are appropriate indicators of the quantity of development to be accommodated?

See our response to Q8A. We believe that a better measure of affordability should be included in any standard method.

10. Do you agree with our proposals to make decision-making faster and more certain?

We want a system that is as fast and certain as possible without damaging the quality of the outcome. As discussed in our response to Q22A we're concerned that these proposals won't deliver that. The speed and certainty of the infrastructure levy may be overstated, given the fundamental problems the levy appears to face and the need to mitigate against them. Getting a good outcome in terms of delivering social housing and good homes should be the highest priority. This may mean taking time to negotiate individual and bespoke agreements. Furthermore, simply speeding up the planning process won't speed up development without other changes to encourage faster build out, such as increasing tenure diversity.

12. Do you agree with our proposals for a 30-month statutory timescale for the production of Local Plans?

The desire to speed up processes should not supersede getting a good outcome or giving communities the ability to ensure development meets their needs.

Any new system must enable and require planning authorities to plan for (and latterly ensure delivery of) affordable housing contributions of the tenures and types needed. Local planning authorities must have time to properly conduct the process, including appraising need, determining local infrastructure levy policy, potentially setting infrastructure levy rates consistent with need, reviewing against the sustainability test, etc.

Given the significant uncertainties about the design of the infrastructure levy, it's completely unknowable at this point whether 30-months is a feasible deadline to complete this work. It would be counterproductive if decisions were rushed or taken out of local hands as a result of insufficient time.

14. Do you agree there should be a stronger emphasis on the build out of developments? And if so, what further measures would you support?

We have strongly supported the government's previous work on speeding up build out and were contributors to Sir Oliver Letwin's independent review of build out. We recognise that the government has said that it will explore further options for speeding up build out and believe these proposals need significant development. It's a major missed opportunity even at this early stage that housing tenure isn't included in current considerations for increasing the speed of build out. This is a central part of increasing the diversity of development and must be a major part of systemic change to housebuilding.

Social rented homes are not affected by the same problem of low absorption rates as market homes, as there is huge demand in most of the country. As such, there's a critical interplay between build out and the proposals for the infrastructure levy. We are particularly concerned that the proposal for the infrastructure levy may incentivise developers to deliver affordable and social housing more slowly. For example, they may deliver homes at times that maximises their contribution against levy liabilities rather than at a pace that speeds up build out (see Q24B).

The planning system alone won't be able to deliver it and it will take investment and other reform to deliver. But we also recognised that it won't be possible to require different companies to build homes without engaging with the question of land ownership, for example.

17 and 20. Do you agree with our proposals for improving the production and use of design guides and codes?

Do you agree with our proposals for implementing a fast-track for beauty?

It's unclear to us how the proposals for design guides and codes and the fast-track for beauty will work with the infrastructure levy and planning for sufficient local social rented housing. Where the need for different tenures and types homes varies by locality, it's hard to see from the white paper how this will be accounted for in generalised and codified design standards. The risk is that function will follow form, rather than form following function. The issue of how affordable housing should be integrated as part of mixed communities is also unaddressed.

Furthermore, a planning fast track based on national development management policies will not enable locally sensitive, needs based, design. And given some of the issues we have identified with the infrastructure levy it would be highly problematic if the fast track allowed developments to circumvent the negotiation

and agreement that is likely to be necessary in any system that replaces Section 106.

26. Do you have any views on the potential impact of the proposals raised in this consultation on people with protected characteristics as defined in section 149 of the Equality Act 2010?

The public sector equality duty in the Equality Act 2010 clearly states that 'the steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.'¹⁹

Concerns have been raised regarding recent extensions to permitted development rights, which, without further measures to ensure accessibility standards are met, threaten the ability of local authorities to meet the public sector equality duty.

New routes to permission, or those with increased scope, outlined in the white paper must enable local authorities to scrutinise design proposals to ensure development design takes serious account of the needs of disabled people.

Furthermore, the provision of adequate levels of affordable, good quality and accessible homes within development is an equalities concern.

Shelter's response to question 6 in this consultation outlines concerns regarding the delivery of accessible housing for older and disabled persons. While we view these challenges as resolvable, more detailed proposals must take these concerns seriously and provide guarantees that any reforms or new system introduced can accommodate the increased delivery of suitable and accessible housing.

Furthermore, we are concerned that groups with protected characteristics who are overrepresented in homelessness statistics, such as BAME households, will be disproportionately impacted by any loss of social housing that arises from the implementation of the infrastructure levy as proposed. These challenges are outlined in questions 22 to 25 of this consultation response.

¹⁹ [Equality Act 2010](#), Section 149

Shelter helps millions of people every year struggling with bad housing or homelessness through our advice, support and legal services. And we campaign to make sure that, one day, no one will have to turn to us for help.

We're here so no one has to fight bad housing or homelessness on their own.

Please support us at shelter.org.uk

RH7439. Registered charity in England and Wales (263710) and in Scotland (SC002327)

Shelter
88 Old Street
London EC1V 9HU
0300 330 1234

shelter.org.uk

Shelter