

Consultation Response

Infrastructure Levy for
Scotland: discussion paper

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Planning Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government's discussion paper: *Infrastructure Levy for Scotland*. The sub-committee has the following comments to put forward for consideration.

General Remarks

We have limited our comments below to the proposed legislative changes and legal considerations, in line with the remit and expertise of our membership, and do not look to comment on the wider policy considerations.

We note that the powers to introduce the Infrastructure Levy for Scotland (the "**Levy**") are contained in the Planning (Scotland) Act 2019 (the "**2019 Act**"). The Society undertook substantial engagement on its provisions during the Bill stages.¹ In our Stage 3 briefing on the Bill, we offered "qualified support for the introduction of an infrastructure Levy which if operated appropriately, would provide an open and transparent basis for covering costs of new infrastructure." We also encouraged the Scottish Government to consult on and consider the operation of the Levy in further detail, as the practicalities of the Levy are not set out in the legislation. We therefore welcome the consultation exercise and the engagement that we have had with Scottish Government officials on the proposals.

We understand that the core criteria for the Levy include it: (1) being simple for local authorities to implement; (2) being predictable for developers to calculate; (3) taking account of viability, including other demands; (4) being proportional for developments of different sizes and types; and (5) being complementary to existing mechanisms. We are supportive of these criteria, and consider that these provide for a sensible core approach. In particular, we highlight the complexity of introducing a Levy, and consider that where feasible an approach as simple as possible should be pursued.

An important aspect of the section 75 system is the requirement for linkage between the contribution paid and the infrastructure on which it will be spent. We

¹ For more information, see [Planning \(Scotland\) Bill | Law Society of Scotland](#).

consider that an important element of the introduction of the Levy will be providing similar clarity as to how the funds will be spent. We anticipate that this will be linked to the idea of the Levy's credibility to those who will pay it. Consideration should be given to the related guidance and information which could be provided to those paying the Levy detailing these points and how it will be used towards the provision of infrastructure.

We note that Section 75 agreements currently operate within a controlled framework where there requires to be a relationship between the payment being made and the development of infrastructure. There is a potential for double charging where section 75 planning obligations are also in place in respect of a particular development; and it important there is clarity in whether this would be the policy intention, or otherwise how this would be avoided.

We note the consideration of viability throughout the Discussion Paper, and similarly highlight the importance of this factor when shaping the proposals.

As noted in our evidence on the Bill, there is considerable complexity and controversy for planning authorities, either individually or in a conjoined manner, imposing what may be considered as a local tax on new development, operated through the planning system. The experience of England and Wales in the roll out of the Community Infrastructure Levy has proven to be challenging, and we highlight that lessons can be learned from that.

Whilst our comments are focussed on the legal aspects, would note that there are many other wider/non-legal specific factors relevant to the proposals that should be borne in mind. For example, any economic implications, including for operation of the development market in Scotland. Thought also needs to be given to the related administration and resourcing implications of the proposals, including software/IT costs and reporting requirements (depending on the approach chosen). Additionally, consideration of any cumulative effects, for example in relation to the prospective introduction of a Scottish Building Safety Levy, is important in this context.

Issues for discussion

Setting the payable amount

Unit of charge

- Do you agree that the charge should be based on a calculation per square metre of development? Are there any options or issues we have not considered above?

We do not generally wish to comment on these questions. However, the various options for calculation of the levy appear complex with the potential for challenge.



We would recommend that the calculation should be as straight forward as possible and note that the Discussion Paper refers to the potential for a flat rate/set amount.

We would suggest that it would be helpful to run the numbers across various scenarios and metrics, covering a range of developments, to ensure that the metric/approach chosen doesn't present unintended consequences.

- Should the area of the development be calculated by internal or external measurement?

We have no specific comments to make.

- How should existing property that is demolished or redeveloped be treated in the calculation?

We have no specific comments to make.

Setting the Levy amount

- Do you agree that the Levy should be charged as a set amount per square metre?

We have no specific comments to make.

- Is it helpful to use average sale values to set the amount of the Levy? What other methods could be used?

We have no specific comments to make.

- How can a set amount best reflect local variation in development value? Do you agree that local authorities should set the zones across which the amount is set?

We have no specific comments to make.

- Should local authorities be allowed to charge the Levy only in parts of their area (or not at all)?

We have no specific comments to make.

- How could amounts for commercial and industrial development be set?

We have no specific comments to make.

The ILS and other demands on value

- Would it be helpful for local authorities to have discretion to waive or reduce the ILS in individual cases?

We have no specific comments to make.



- Should the impact of planning obligations and other charges / requirements be considered in this assessment?

It is important to ensure that there is no duplication of payments between the infrastructure levy and planning obligations.

What kinds of development should pay the Levy?

- Do you agree that residential institutions should be excluded from the Levy?

We have no specific comments to make.

- Should the Levy be charged on all or some types of affordable housing?

We have no specific comments to make.

- How should commercial development, purpose-built student accommodation and build-to-rent housing be treated?

We have no specific comments to make.

- Should renewable energy infrastructure and related development also be subject to the Levy? How might that impact on voluntary community benefits?

Whilst the scope of the levy is in large part a policy matter, given the statements in the discussion paper that the purpose of the levy is that it is to be for a separate purpose to any section 75 obligations, it will be important to ensure the scope of the levy does not duplicate matters that are already capable of being secured via existing mechanisms such as section 75 obligations or conditions.

We note more generally the existing operation of the hierarchy of development criteria, and suggest thought could be given as to whether this could be a useful model for categorising and considering how the Levy could apply in different circumstances and for different scales of development.

Exemptions

- Do you agree that householder development should be excluded from the Levy?

We have no specific comments to make.

- Should self-build housing and very small developments be exempt?

We have no specific comments to make.

- Are there any other types of development that should be exempt?

We have no specific comments to make.

- Should there be exemptions for charities or other types of developer?

We have no specific comments to make.

- To what extent should exemptions be set nationally, or at local authorities' discretion?

We have no specific comments to make.

When should the Levy be calculated, and paid?

- When would be the best time for the Levy to be calculated and paid?

We have no specific comments to make on when the best time would be.

We recognise the difficulties for planning authorities in being able to front-load funding for infrastructure; whilst also noting that there are merits in the burden on development being eased in the early stages. Allowing for staged payments (i.e. back loaded) may be a helpful approach.

We highlight more generally that the points relating to timing can impact the financing arrangements for both the developer and the local authority; and care should be given to determining the approach to ensure that the chosen timing does not act as a barrier to the wider policy aims of the Levy.

- What arrangements could be made in the case of development benefitting from PDRs?

We have no specific comments to make.

- Is any special statutory provision needed to manage arrangements in LLTNPA?

We have no specific comments to make.

Who should be liable to pay?

- Do you agree that the owner of the land at commencement of development should be liable to pay the Levy?

We have no specific comments to make. However, there is potential for complication in relation to planning permission in principle, particularly in circumstances where the development may be phased over a long time. Consideration is also required of how amendments to a development – which may affect the type and/or amount of development - will be taken into account. We note that the CIL system contains mechanisms which deal with changes to development and would recommend that these are reviewed.

- If not, who should be liable, and how (and when) should they be identified?

We have no specific comments to make.

- Should there be specific provisions to prevent liability for the Levy being passed on to homebuyers?

We have no specific comments to make.

Penalties and enforcement

- Should there be a penalty fee if the Levy is not paid on time?

We have no specific comments to make on whether there should be a penalty.

If the policy position decided upon is to provide for a penalty fee, we consider that the possible penalties themselves should be well publicised and should be proportionate to the amounts involved.

We have no particular suggestion in relation to the level of the penalty other than to note that it should be reasonable and proportionate in the circumstances and reflect the desire to ensure compliance.

- If so, should it be a fixed amount or a proportion of the amount due?

We refer to our comments above.

- Should the penalty increase over time if the Levy is still not paid?

We refer to our comments above.

- Should the local authority be able to require development to stop if the Levy is not paid? Would this be effective?

We have no specific comments to make.

- Do you have any views on offences relating to failure to pay, failure to stop work, or attempting to evade full payment?

We have no specific comments to make.

What should the Levy be spent on?

- Are any changes needed to the definition of infrastructure?

We have no specific comments to make.

We note the broad definition of “green and blue infrastructure” at section 56 of the 2019 Act. Clarity would be welcomed as to how this definition will be treated in practice in the context of the Levy.

- Do you agree that the Levy should fund infrastructure identified in the development plan, or should local authorities provide a separate list?

We have no specific comments to make.

- How could the costs of administering the Levy be covered?

We have no specific comments to make.



Accounting for Levy income and expenditure

- Do you agree that the local authority should publish an annual report on infrastructure Levy income and expenditure?

We welcome this for reasons of transparency.

- How many years should reporting cover – six, ten, or a different period?

We have no specific comments to make.

- Are any other provisions required on accounting or collection of the Levy?

We have no specific comments to make.

Are there any other issues to be considered?

We consider that the Scottish Government should seek to review Circular 3/2012 in light of the levy to ensure that both are fit for purpose and to ensure clarity and certainty.



For further information, please contact:

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