

Section 106 Agreements: I'm not dead yet

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Section 106 Agreements are used by local planning authorities to impose planning obligations on a development. The obligations often vary and depend on the size and type of development proposed. They can place numerous restrictions on the development to ensure a developer meets certain operations, obligations, and financial contributions.

For a number of years, there have been rumblings of possible reform to the planning system, particularly to Section 106 Agreements. In particular, Section 106 Agreements appeared to be in jeopardy with the introduction of the new Infrastructure Levy (proposed in August 2020 in the Future White Paper consultation), however three years on, Section 106 Agreements continue to be used and, the implied message is section 106 will be sticking around.

The proposed reforms

The Planning for the Future White Paper consultation of August 2020 proposed "Community Infrastructure Levy and the current system of planning obligations" to be "reformed as a nationally set, value-based flat rate charge." More specifically, the proposal aimed to:

- Set either variable or flat rates to raise more revenue while continuing to deliver at least as much, if not more, affordable housing
- Give local authorities greater powers to determine how developer contributions will be used
- Extend the scope of the consolidated Infrastructure Levy to remove its various exemptions

The outcome intended by the Government from such reforms are to achieve a "more engaging, equitable and effective system".

However, to date, this is an idea on paper, and we have yet to see how the new Infrastructure Levy will work in practice. Parliament's aim is to implement the change by use of the Levelling up and Regeneration Bill ("The Bill") which was introduced to Parliament on 11 May 2022. The current status of the Bill (as of March 2023) is that it is at the Committee Stage in the House of Lords.

The Bill is by no means a quick read, but a condensed summary of the impact to the trusty Section 106 Agreement, is that the Bill aims to introduce:

- Section 106 contributions are being replaced by the new Infrastructure Levy.
- Thresholds and rates for the new Infrastructure Levy under charging schedules set by the local planning authority.
- The levy is proposed to be charged on the property's value when sold and applied above a minimum threshold.
- The rates shall be set as a percentage of gross development value.

However, a 'carve out' remains for the Section 106 Agreement to be used for certain types of infrastructure and larger sites. Leaving ambiguity for those on the floor implementing these changes.

The real question is, when are we likely to see these significant changes take effect?

The Government ambitiously aims for the new Infrastructure Levy, along with other reforms under the Bill to be implemented by 2030. However, considering the changes practically, I consider there to be multiple hurdles to achieving this deadline.

Take, for example, the recently introduced Government policy about First Homes on 28 June 2021. Despite the existence of the White Paper, when introduced, guidance from the Government was to use model standard S106 provisions published in December 2021 to

assist developers and local authorities in negotiating the First Homes provisions. It is unclear how the requirement for First Homes shall be translated into the Government's planning reforms and how these fit with the proposed Infrastructure Levy.

Another example is Biodiversity Net Gain ('BNG') (introduced by the Environment Act 2021) which enables local planning authorities to secure a minimum of 10% Biodiversity Net Gain for new developments on-site or off-site. This shall be mandatory from a later date in 2023 but there is no clear picture of whether this will be dealt with via Section 106 Agreements or the emerging Conservation Covenants. Local planning authorities are beginning to adopt BNG as part of local development, and further clarity is needed from the Government to identify the preferred approach.

So, what next?

There remains uncertainty surrounding the future of Section 106 Agreements.

In simple terms, despite sometimes being complex and cumbersome to negotiate, Section 106 Agreements are familiar and accessible to local planning authorities and are trusted and effective in delivering the necessary obligations.

The Bill allows Section 106 Agreements to remain for larger sites but creates ambiguity for local planning authorities / developers moving forward. The risk - the new Infrastructure Levy may not be applied as widely as the Government had initially planned, leaving potential gaps in ensuring planning obligations are secured.

For now, there remain some unanswered questions:

- Is the Bill an intended death sentence for Section 106 Agreements?
- How will the new Infrastructure Levy secure the usual planning obligations expected in a Section 106 Agreement?
- Will the Infrastructure Levy apply to all sites, even those with viability concerns?

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