Planning Obligations (Section 106 Agreements) in England

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Summary

This briefing from the House of Commons Library looks at current policy towards planning obligations. It applies only to England.

What are planning obligations?

Planning obligations - sometimes known as section 106 agreements - are legally enforceable obligations made under section 106 of the Town and Country Planning Act 1990 (as amended). They are negotiated and made between a developer and the Local Planning Authority (LPA), to meet the concerns the LPA may have about meeting the cost of providing new infrastructure for an area.

When can planning obligations be used?

For planning obligations to be used, they must meet three legal tests set out in part 11 of the Community Infrastructure Levy Regulations 2010. A planning obligation may only constitute a reason for granting planning permission if it is

- necessary to make the development acceptable in planning terms
- directly related to the development and
- fairly and reasonably related in scale and kind to the development.

In 2014, the Government exempted developments of 10 units or fewer and developments with less than 1,000 square metres of floor space from the requirement to contribute towards affordable housing section 106 agreements. The policy was then withdrawn following a legal challenge to it, but was later reinstated in amended Planning Practice Guidance from 19 May 2016, following successful appeal by the Government.

LPAs must not double-charge developers for the same infrastructure projects.

Two areas of concern about planning obligations have been the restrictions on pooling contributions and the (alleged) lack of transparency about the viability assessments on which they often depend.

Pooling of planning obligations

The former Coalition Government made changes to how planning obligations interact with the Community Infrastructure Levy (CIL). Restrictions on pooling were introduced from April 2015 and have been lifted from September 2019.

From 6 April 2015, the use of pooled contributions toward infrastructure projects was restricted. Previously, LPAs had been able to combine planning obligation contributions towards a single item or infrastructure ‘pot’, but under the Community Infrastructure Levy Regulations 2010, LPAs were no longer able to pool more than five planning obligations together if they were entered into after 6 April 2010, and if it was for a type of infrastructure capable of being funded by the CIL. These restrictions applied even where an LPA did not yet have a CIL charging schedule in place. Affordable housing provision was not bound by these restrictions.

These regulations were designed to encourage LPAs to use the CIL rather than planning obligations to pay for local projects, but there were some issues with the restriction on pooling, with some in the planning industry arguing that this might result in developments stalling, and others suggesting that LPAs might have to become more creative in how they
applied planning obligations, perhaps by splitting infrastructure projects up into several smaller ones, thereby enabling them to pool more contributions.

Through a series of consultation documents and responses in 2018-19 the Government proposed to lift pooling restrictions. Initially this was only in specified circumstances, but the Government subsequently changed its position to lift pooling restrictions in all areas.

A technical consultation on draft regulations to reform developer contributions ran from December 2018 to January 2019. In it, the Government confirmed that it now proposed to lift pooling restrictions in all areas and argued that this and other changes would provide greater flexibility for funding infrastructure. The summary of responses to this consultation and the Government’s view of the way forward was published in June 2019. Here, the Government reiterated the argument for removing pooling restrictions, saying that “removing existing restrictions on the pooling of planning obligations towards a single piece of infrastructure will address barriers that could otherwise prevent development”.

The regulations are the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019, which came into force on 1 September 2019.

Disclosure of viability assessments

When seeking planning permission for developments including residential uses, developers will routinely submit viability assessments. Viability assessments are used by developers to help demonstrate to the LPA that an existing affordable housing obligation is economically unviable and should be overturned. Developers have often argued that viability assessments should be confidential because they contain commercially sensitive information, but (critics contend) this confidentiality limits transparency and accountability.

MHCLG launched a consultation on planning for the right homes in the right places in September 2017. In the consultation paper, MHCLG argued that making viability assessments simpler, quicker and more transparent could lead to better use of section 106 agreements.

The National Planning Policy Framework (NPPF) consultation proposals document in March 2018 argued (amongst other things) that viability assessments should be publicly available. The amended policies were set out in the draft text for consultation. The draft Planning Practice Guidance published with the draft revised NPPF expanded on MHCLG’s proposed new approach.

The revised and updated NPPF was published in July 2018, with some further minor amendment in February 2019. On viability, it now says that “all viability assessments, including any undertaken at the plan-making stage … should be made publicly available.” The more detailed Planning Practice Guidance on viability was updated in September 2019. Under the heading of accountability, it says that any viability assessment should be prepared on the basis that it will be publicly available – even in those exceptional circumstances where it is not, an executive summary should be.

Section 13.3 of the Commons Library briefing What next for planning in England? The National Planning Policy Framework looks in detail at concerns about viability and viability assessment.

Other Commons Library briefings on various matters to do with planning are available on the topic page for housing and planning.
1. What are planning obligations?

Planning obligations - sometimes known as section 106 agreements or “affordable housing levies” - are legally enforceable obligations made under section 106 of the *Town and Country Planning Act 1990* (as amended), to mitigate the impacts of a development proposal. They are agreements negotiated and made between a developer and the Local Planning Authority (LPA), designed to meet the LPA’s concerns about the cost of new infrastructure for an area.

New developments often bring wider impacts. A new housing development, for example, will result in more people living in an area and more people using local facilities such as roads, parks and leisure centres. New or upgraded facilities may therefore be required to cope with this, or the local authority might be keen for some of the housing in a new development to be affordable.¹

The Government’s Planning Portal highlights how planning obligations are used for three specific purposes, to:

- **Prescribe** the nature of development (for example, requiring a given portion of housing is affordable),
- **Compensate** for loss or damage created by a development (for example, loss of open space), or
- **Mitigate** a development’s impact (for example, through increased public transport provision). Planning obligations must be directly relevant to the proposed development.²

Section 106 of the *Town and Country Planning Act 1990* (as amended) allows developers to enter into “planning obligations” with a local authority to meet these requirements to secure planning permission for a development. The obligations may be provided by the developers “in kind” – that is, where the developer builds or provides directly the things necessary to fulfil the obligation, such as by building a number of affordable homes for an area. Alternatively, planning obligations can be met in the form of financial payments. In some cases, it can be a combination of both.³

Section 106 of the *Town and Country Planning Act 1990* (as amended) outlines how planning obligations might be used. A developer may enter into obligations

(a) restricting the development or use of the land in any specified way;

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¹ The *National Planning Policy Framework* (CP 48, February 2019) defines affordable housing as “housing for sale or rent, for those whose needs are not met by the market (including housing that provides a subsidised route to home ownership and/or is for essential local workers); and which complies with [one or more of the definitions of affordable housing for rent, starter homes, discounted market sales housing or other affordable routes to home ownership]”.


³ Department for Communities and Local Government (DCLG), *Planning Obligations: Practice Guidance*, July 2006: paragraph 2.3
(b) requiring specified operations or activities to be carried out in, on, under or over the land;
(c) requiring the land to be used in any specified way; or
(d) requiring a sum or sums to be paid to the authority [(or, in a case where section 2E applies, to the Greater London Authority)] on a specified date or dates or periodically.  

1.1 When can planning obligations be used?

To support a new development, planning obligations must help to meet the objectives of the local and neighbourhood plans for a particular area.

The Coalition Government also tightened up on when planning obligations can be used, by introducing three legal tests which must be met. (These were previously included as part of five policy tests set out in the Labour Government’s circular on planning obligations in 2005). They are now set out in part 11 of the Community Infrastructure Levy Regulations 2010, which placed them on a statutory platform, making them mandatory.

Each of these three legal tests must be met before a planning obligation can be used:

(2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—

(a) necessary to make the development acceptable in planning terms;
(b) directly related to the development; and
(c) fairly and reasonably related in scale and kind to the development.

The Government’s National Planning Policy Framework (NPPF), revised in July 2018 with subsequent minor amendment in February 2019, also sets out when and how LPAs should consider the use of planning obligations:

54. Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.

55. Planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. Agreeing conditions early is beneficial to all parties involved in the process and can speed up decision making. Conditions that are required to be discharged before development commences should be avoided, unless there is a clear justification.

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4 Town and Country Planning Act 1990, Section 106(1)
5 Office of the Deputy Prime Minister, ODPM Circular 05/2005: Planning Obligations, 18 July 2005
6 Community Infrastructure Levy Regulations 2010, SI 2010/948, Part 11
56. Planning obligations must only be sought where they meet all of the following tests:

a) necessary to make the development acceptable in planning terms;

b) directly related to the development; and

c) fairly and reasonably related in scale and kind to the development.

57. Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available.7

The Local Government Association’s Planning Advisory Service has published an overview of section 106 obligations, which provides links to several examples of appeal and examination decisions.8

1.2 Appealing against a planning obligation

A planning obligation may be modified or discharged at any time by agreement with the LPA.

If there is no agreement to renegotiate voluntarily, and the planning obligation predates April 2010 or is over 5 years old, an application can be made to the LPA to change the obligation if it “no longer serves a useful purpose”.9 If this results in a refusal, an appeal can then be made.

The Planning Practice Guidance (PPG) states that an appeal under section 106B of the Town and Country Planning Act (1990) “must be made within 6 months of a decision by the local authority not to amend the obligation, or within 6 months starting at the 8 weeks from the date of request to amend if no decision is issued”.10

The Growth and Infrastructure Act 2013 introduced changes (since repealed) to allow planning obligations which related to affordable housing to be renegotiated, to make a development more economically viable.

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7 MHCLG, National Planning Policy Framework, CP 48, February 2019: pages 15-6
8 Planning Advisory Service, S106 Obligations Overview, undated (accessed 22 August 2019)
9 Town and Country Planning Act 1990, Section 106A
10 MHCLG, Guidance: Planning Obligations, 19 May 2016, updated 1 September 2019: paragraph 011
1.3 Enforcement

Planning obligations are formal legal documents, and are registered as local land charges. This means that the land itself, rather than the person or organisation that develops the land, is bound by a planning obligation. This is something any future owner should bear in mind, as planning obligations can have significant effects on the use and value of land.

If a planning obligation is not complied with, it is enforceable against the person or persons who entered into the obligation or any subsequent owner of the land.

Planning obligations are enforceable by the LPA, either through the courts by application for an injunction or by carrying out any operations required by the planning obligation and recovering the cost from the person or persons against whom the obligation is enforceable.

1.4 How much affordable housing is delivered through planning obligations?

Section 106 agreements account for a substantial proportion of new affordable housing supply: 45% of affordable homes supplied in England between 2015-16 and 2017-18 were at least part-funded through section 106 agreements.

The charts overleaf show trends in affordable housing supplied through section 106 in more detail. The number of homes supplied increased by 78% between 2015-16 and 2017-18.

The most common type of affordable housing supplied through section 106 agreements was housing for Affordable Rent. Introduced in 2011, Affordable Rent can be set at up to 80% of the area’s market rent. 22,316 new homes for Affordable Rent were supplied over the three-year period, 41% of the total.

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11 Planning Portal, Planning Obligations and Agreements (undated, accessed 22 August 2019)
12 MHCLG, Live Table 1000C
Definitions: Affordable rent can be set at up to 80% of the local market rent. Intermediate rent refers to rent set at a level higher than social rent, but below market levels. Affordable home ownership includes homes for sale at a cost below market levels, provided to eligible households whose needs are not met by the market. Shared ownership lets buyers purchase a share of the property and pay rent on the remaining share.

Notes: Figures include partial-grant and nil-grant s106 funding.

Source: MHCLG, Live Table 1000C

Section 106 agreements are not limited to affordable housing provision, but there is evidence that affordable housing makes up the bulk of obligations that are delivered.

MHCLG commissioned a study which surveyed LPAs about planning obligations agreed or delivered in the 2016-17 financial year. 13 46% of LPAs responded, and the results were scaled up to generate England-wide estimates.

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13 Lord et al. (2018), The incidence, value and delivery of planning obligations and Community Infrastructure Levy in England in 2016-17
Developers’ agreed contributions for affordable housing totalled an estimated £4 billion in 2016-17 (this total includes commuted sums in lieu of affordable housing provision). This represents 80% of the value of all developer contributions under section 106 agreements – other contributions such as those for land, education, and transport totalled £1 billion.\footnote{Lord et al. (2018), The incidence, value and delivery of planning obligations and Community Infrastructure Levy in England in 2016-17, Table 3.1}

However, not all planning obligations are delivered in the form originally agreed. 65% of LPAs reported that at least one of their planning agreements had been renegotiated in 2016/17. LPAs were also asked to estimate how much of the planning obligations that they had agreed five years previously had been delivered by 2016/17. The charts below show their responses.

Almost half of LPAs said that over 90% of the affordable housing they had agreed in 2011/12 had been delivered, while 14% said that less than a quarter of the agreed housing had been delivered. The picture was somewhat different for direct payment planning obligations (including payments agreed under the Community Infrastructure Levy, discussed in section 3 below). 19% of LPAs said they had received over 90% of the payments agreed five years previously.

This discrepancy between agreement and delivery reflects the fact that agreements can be renegotiated, but also the fact that obligations can take time to deliver – this is particularly true of large housing developments.

### Delivery of planning obligations agreed in 2011/12 by 2016/17

<table>
<thead>
<tr>
<th>Proportion completed</th>
<th>Direct payment planning obligations (% of LPAs)</th>
<th>Affordable housing obligations (% of LPAs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 25%</td>
<td>19%</td>
<td>14%</td>
</tr>
<tr>
<td>25-50%</td>
<td>17%</td>
<td>0%</td>
</tr>
<tr>
<td>50-75%</td>
<td>26%</td>
<td>12%</td>
</tr>
<tr>
<td>75-90%</td>
<td>20%</td>
<td>26%</td>
</tr>
<tr>
<td>Over 90%</td>
<td>19%</td>
<td>49%</td>
</tr>
</tbody>
</table>

Source: Lord et al. (2018), The incidence, value and delivery of planning obligations and Community Infrastructure Levy in England in 2016-17, Table 5.2

The study authors note that monitoring the delivery of obligations is not always straightforward:

> The relative consistency amongst LPAs, irrespective of whether they are CIL or non-CIL adopting authorities, in receiving less than has been agreed is borne out through case study evidence. For example, some interviewees from both CIL and non-CIL charging authorities argued that it was part of the “game” for developers

\footnote{Lord et al. (2018), The incidence, value and delivery of planning obligations and Community Infrastructure Levy in England in 2016-17, Table 3.1}
to deliver only a proportion of what has been agreed in practice. However, it was also argued that verifying this was difficult as quantifying the proportion of development that delivered less than had been agreed in any S106 agreement was problematised by the significant share of negotiated settlements that include in-kind contributions. Verifying and enforcing the terms of a S106 can be difficult to monitor particularly in the context of large LPA areas and with fewer planning staff than in previous years.\footnote{Lord et al. (2018), \textit{The incidence, value and delivery of planning obligations and Community Infrastructure Levy in England in 2016-17}, Paragraph 5.7}
2. The interaction between planning obligations and the Community Infrastructure Levy

The Community Infrastructure Levy (CIL), originally introduced by the Labour Government in 2010, is a levy that local authorities in England and Wales can choose to charge on new developments in their area.\(^\text{16}\) It is basically a charge on new buildings and extensions to help pay for supporting infrastructure. In areas where a CIL is in force, land owners and developers must pay the levy to the local council. The money raised from the CIL can be used to support development by funding infrastructure that the council, local community and neighbourhoods want, like new or safer road schemes, park improvements or a new health centre.

Both planning obligations and the CIL are therefore designed to help pay for local infrastructure but there are differences in when the two should be used. The CIL is intended to provide infrastructure to support the development of an area, while planning obligations are used to make an individual planning application acceptable in planning terms.\(^\text{17}\) Most site-specific impact mitigation which is required for a development to be granted planning permission should therefore be done using a planning obligation.\(^\text{18}\) The CIL does not therefore need to be used for providing infrastructure on the site from which it is collected. The PPG on the CIL makes it clear that where the CIL and planning obligations interact, “section 106 requirements should be scaled back to those matters that are directly related to a specific site” and are not set out in a regulation 123 list.\(^\text{19}\) The “Regulation 123 list” was designed to establish the infrastructure projects on which CIL would or might be spent. Infrastructure not listed in Regulation 123 could then be funded by Section 106, with the expectation that this would result in significant scaling back of Section 106 contributions.

2.1 No “double-charging”

An important element in the interaction between the CIL and planning obligations is that there should be no double charging to developers for the same purpose; in other words, the CIL and a planning obligation cannot be used to fund the same infrastructure project. The PPG on the CIL states that it is expected that:

Where the levy is in place for an area, charging authorities should work proactively with developers to ensure they are clear about

\(^{16}\) Via the Community Infrastructure Levy Regulations 2010, as amended (SI 2010/948)
\(^{17}\) MHCLG, Guidance: Community Infrastructure Levy, 12 June 2014, updated 15 March 2019: paragraph 94
\(^{18}\) As above: paragraph 94
\(^{19}\) As above: paragraph 97. Regulation 123 of the CIL Regulations 2010 (SI 2010/948) limits the use of planning obligations. The charging authority’s list of individual projects that it proposes to fund from the CIL is commonly known as a ‘Regulation 123 list’. 
the authorities’ infrastructure needs and what developers will be expected to pay for through which route. There should be not actual or perceived ‘double dipping’ with developers paying twice for the same item of infrastructure.20

During a Westminster Hall debate on the CIL in February 2014, the then Planning Minister, Brandon Lewis, highlighted some further differences between the CIL and planning obligations, while also commenting on the issue of double charging:

With the levy, developers know up front what they will be charged and when payment will be required. Section 106 agreements, on the other hand, do not offer the kind of transparency that the levy provides, as contributions are determined through often lengthy negotiations between developers and local authorities. The levy enables local authorities to prioritise spending on infrastructure across their area to facilitate local growth and development. Authorities are also able to use levy funds to deliver infrastructure outside their area, by working with other local authorities, so long as it supports development in their area.

Section 106 agreements are site-specific and cannot be used to mitigate wider impacts of development. Individual section 106 agreements may be subject to viability testing, which can cause delays. That is not an issue for the levy, as local economic viability will have been tested at examination prior to adoption of the charging schedule. The levy does not replace section 106 planning obligations, but restricts their use in areas that have adopted the levy to ensure there is no double charging of developers.21

MHCLG, Guidance: Community Infrastructure Levy, 12 June 2014, updated 15 March 2019: paragraph 93

HC Deb 5 Feb 2014 c134WH
3. In more detail: affordable housing obligations

3.1 10-unit threshold for affordable housing contributions

The Coalition Government repeatedly expressed a desire to address delays in the planning process to increase the supply of housing. The 2013 Autumn Statement included a commitment to consult on a proposed new 10-unit threshold for section 106 affordable housing contributions, and in February 2014 a consultation was held seeking views on this threshold.

In November 2014, the PPG was changed to exempt developments of 10 units or fewer from the requirement to contribute towards affordable housing. Residential developments with less than 1,000 square metres of floor space were also exempt. In a Written Ministerial Statement confirming this change, the then Government argued that there was a “disproportionate burden of developer contributions on small-scale developers” and that the exemption for developments of 10 units or fewer would increase housing supply by freeing up the planning system.

Some local councils objected to the loss of income created by the exemption for sites of 10-units or fewer for affordable housing contributions. Areas where a large proportion of affordable housing contributions came from smaller projects, particularly those in rural areas, urban areas which were constrained by the Green Belt or those with a dearth of suitable large-scale sites, were concerned about the loss of income. Some LPAs were also confused about how to respond to this policy change where policies in their adopted local plans on developer contributions now conflicted with the PPG. For example, Chiltern District Council adopted an “interim approach.

In February 2015 it was reported that West Berkshire and Reading Councils had taken the government to court for judicial review on the grounds of “irrationality” over the decision to introduce these exemptions. They claimed that the policy change would effectively give state aid to small developers, distorting competition and breaching European laws. They also claimed that the new policy was irrational, because developers could already be exempted from planning obligations if these could be shown to make schemes unviable.

22 HM Treasury, Autumn Statement 2013, December 2013: paragraph 1.226
23 DCLG, Planning performance and planning contributions: consultation, March 2014
24 HC Deb 28 Nov 2014 55WS
25 Chiltern District Council, Affordable Housing Contributions - Validation Requirement, 2 March 2015
26 “Minister accused of ‘irrationality’ over affordable housing exemption”, Inside Housing, 4 February 2015
27 Reading Borough Council, West Berkshire and Reading Councils Join Forces to Challenge Government Changes to Planning System, 16 January 2015
In the case of *R (on the application of West Berkshire District Council and Reading Borough Council) v Secretary of State for Communities and Local Government* [2015] EWHC 2222 (Admin) in the High Court, the judge found that the Government’s new policy was “incompatible” with the statutory planning framework. Following this judgement the Government cancelled those paragraphs in the PPG which exempted developments of ten homes or fewer from section 106 obligations.

The Government appealed this judgement in the Court of Appeal and on 11 May 2016 had the High Court’s ruling overturned. The Government issued a press release following this judgement. On 19 May 2016, the Government amended the PPG on planning obligations to reintroduce the exemption from section 106 affordable housing contributions for developments of 10 houses or fewer. The specialist publication *Planning* reported that there was still the possibility that the matter could go to the Supreme Court for a further appeal.

The PPG has since been revised again, following the revision and updating of the NPPF, and now expresses the exemption in terms of the NPPF’s definition of major development:

**Are there any specific circumstances where contributions through planning obligations should not be sought from developers?**

Planning obligations for affordable housing should only be sought for residential developments that are major developments. Once set, the Community Infrastructure Levy can be collected from any size of development across the area. Therefore, the levy is the most appropriate mechanism for capturing developer contributions from small developments.

For residential development, major development is defined in the National Planning Policy Framework as development where 10 or more homes will be provided, or the site has an area of 0.5 hectares or more. For non-residential development it means additional floorspace of 1,000 square metres or more, or a site of 1 hectare or more, or as otherwise provided in the *Town and Country Planning (Development Management Procedure) (England) Order 2015*.

In designated rural areas local planning authorities may instead choose to set their own lower threshold in plans and seek affordable housing contributions from developments above that threshold. Designated rural areas applies to rural areas described under section 157(1) of the *Housing Act 1985*, which includes National Parks and Areas of Outstanding Natural Beauty.

Planning obligations should not be sought from any development consisting only of the construction of a residential annex or extension to an existing home.

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28. *Secretary of State for Communities and Local Government and (1)West Berkshire District Council (2)Reading Borough Council* [2016] EWCA Civ 441

29. HM Government, *Judgment paves way to build more homes on small sites*, 11 May 2016

30. “*Court backs government plans to exempt small sites from affordable homes obligations*” *Planning*, 11 May 2016 [Subscription required – Members and their staff may obtain copies of this and other articles by ringing the Commons Library on 020 7219 3666]
See related policy: National Planning Policy Framework paragraph 63 and glossary
Paragraph: 023 Reference ID: 23b-023-20190901
Revision date: 01 09 2019 See previous version

31 MHCLG, Guidance: Planning Obligations, 19 May 2016, updated 1 September 2019
4. Improving section 106: recent Government consultations

4.1 Developments in 2014 and 2015

The Autumn Statement 2014 included a commitment to consult on measures to speed up planning obligations as part of the then Government’s pledge to deliver a faster planning system. The consultation was held between 20 February and 19 March 2015, and sought views on potential measures to improve and speed-up negotiating planning obligations and on the impact of affordable housing contributions on developments delivering new student accommodation.

The Government’s response to this consultation was published on 25 March 2015. The Government said that consultation feedback indicated that they should consider further the basis for strengthening the legislative framework for resolving delays in negotiating planning obligations. This might include setting stricter timescales for planning obligation negotiations and creating a mechanism whereby disputes could be resolved if the timescales were not adhered to. The Government also said that they would “undertake further discussions with relevant parties to further support dedicated student accommodation”.

In HM Treasury’s July 2015 Productivity Plan, Fixing the foundations: Creating a more prosperous nation, the then Government announced its intention to introduce a dispute resolution mechanism for section 106 agreements, to “speed up negotiations and allow housing starts to proceed more quickly.”

In the November 2015 Autumn Statement, the then Government said it would bring forward proposals for a more standardised approach to section 106 viability assessments, and extend the ability to appeal against unviable section 106 agreements to 2018.

4.2 National Planning Policy Framework 2019

The NPPF was first published in March 2012. On 5 March 2018, MHCLG launched the consultation on a revised and updated NPPF.

The NPPF consultation proposals document argued (amongst other things) that viability assessments should be publicly available.
amended policies were set out in the draft text for consultation. The draft Planning Practice Guidance published with the draft revised NPPF expanded on MHCLG’s proposed new approach.

4.3 March 2018 consultation on developer contributions

At the same time, MHCLG launched a consultation on supporting housing delivery through developer contributions. The consultation document set out the perceived shortcomings of the system at the time, including delay in negotiating and (where developers argue that agreed section 106 planning obligations will make development unviable) renegotiating section 106 planning obligations, and lack of transparency. The issues (according to MHCLG) were:

- The partial take-up of CIL has resulted in a complex patchwork of authorities charging and not charging CIL. Where CIL is charged, it is complex for local authorities to establish and revise rates. These can often be set at a lowest common denominator level;
- Development is delayed by negotiations for section 106 planning obligations, which can be sought alongside CIL contributions;
- Developers can seek to reduce previously agreed section 106 planning obligations on the grounds that they will make the development unviable. This renegotiation reduces accountability to local communities;
- CIL is not responsive to changes in market conditions;
- There is a lack of transparency in both CIL and section 106 planning obligations – people do not know where or when the money is spent; and
- Developer contributions do not enable infrastructure that supports cross boundary planning.

The consultation document went on to set out the Government’s objectives for reform:

- **Reducing complexity and increasing certainty** for local authorities and developers, which will give confidence to communities that infrastructure can be funded.
- Supporting **swifter development** through focusing viability assessment on plan making rather than decision making (when planning applications are submitted). This speeds up the planning process by reducing scope for delays caused by renegotiation of developer contributions.
- **Increasing market responsiveness** so that local authorities can better target increases in value, while reducing the risks for developers in an economic downturn.

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38 MHCLG, *Supporting housing delivery through developer contributions: Reforming developer contributions to affordable housing and infrastructure*, March 2018
39 As above: page 14
• **Improving transparency** for communities and developers over where contributions are spent and expecting all viability assessments to be publicly available subject to some very limited circumstances. This will increase accountability and confidence that sufficient infrastructure will be provided.

• Allowing local authorities to **introduce a Strategic Infrastructure Tariff** to help fund or mitigate strategic infrastructure, ensuring existing and new communities can benefit.40

An [article in the specialist publication Planning](https://www.planning.co.uk/extras/news/law-and-regulation/2018/03/08) outlined various planning professionals’ views of the proposals.41 It was reported in June 2018 that the Home Builder Federation argued that the proposed changes amounted to a land tax in disguise.42

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40 MHCLG, *Supporting housing delivery through developer contributions: Reforming developer contributions to affordable housing and infrastructure*, March 2018: page 15

41 “Changes to developer contributions: the sector reacts”, *Planning*, 8 March 2018 [subscription]

42 “Land tax in disguise’ will worsen housing crisis, construction industry warns”, *Telegraph*, 2 June 2018
5. Pooling of planning obligations

One area of controversy has been the pooling of planning obligations, where restrictions on pooling were introduced from April 2015 and have been lifted from September 2019.

5.1 Introduction of the pooling restriction in April 2015

From 6 April 2015, the use of ‘pooled’ contributions toward infrastructure projects was restricted. Previously, LPAs had been able to combine planning obligation contributions towards a single item or infrastructure ‘pot’. However, under the Community Infrastructure Levy Regulations introduced in 2010, LPAs were no longer able to pool more than five planning obligations together if they were entered into after 6 April 2010, and if it was for a type of infrastructure capable of being funded by the CIL. These restrictions applied even where an LPA did not yet have a CIL charging schedule in place.

Affordable housing provision was not bound by these restrictions.

These regulations were designed to encourage LPAs to use the CIL rather than planning obligations to pay for local projects. The Government argued that raising money through the CIL was fairer, faster and more transparent than doing so through planning obligations. This was because the CIL is charged per square metre of floor space, according to rates set by councils, while planning obligations are often negotiated on a case-by-case basis.

There is formal process that local authorities must go through before they can adopt a CIL charging schedule. As of February 2019, 47 per cent of LPAs in England were able to make use of the CIL.

However, there were some issues with the restriction on pooling contributions from planning obligations. Some in the planning industry argued that this might result in developments stalling, with councils being forced to refuse or not determine applications that would have relied on the use of planning obligations to meet infrastructure requirements necessary for a development. Others suggested that LPAs might have to become more creative in how they applied planning obligations, perhaps by splitting infrastructure projects up into several smaller ones, thereby enabling them to pool more contributions. For example, a developer could be asked to make a contribution to a specific classroom rather than simply contributing to the expansion of a school.

43 Department of Communities and Local Government, Planning Reform: Community Infrastructure levy, accessed on 5 September 2019
44 National Audit Office, Planning for new homes, HC 1923, February 2019
45 ‘Why so few councils have a CIL schedule in place despite looming S106 restrictions’, Planning, 20 March 2015 [subscription]
In November 2015, the Government commissioned a review of the CIL. The independent review group submitted its report to Ministers in October 2016, calling for a new approach to developer contributions. The independent review group recommended a twin track approach - combining a low level local infrastructure tariff (LIT) and Section 106 - describing this as “the best of both worlds”. It also drew attention to some of the unwelcome consequences of the pooling restriction:

This means that the five-obligation threshold is often reached without it being possible to ensure all parts of the site contribute to the infrastructure required to mitigate the impacts of the development. This can perversely lead to the refusal of otherwise acceptable planning applications unless a way is found to address the pooling restriction. We found some highly creative examples of how this has been done, which hardly represent a good use of either developers’ or a local authorities’ time and resources. The pooling restriction can also prevent the apportionment of large sites into smaller development packages suitable for smaller scale house builders who are often able to deliver schemes more quickly but who generally find it difficult to access development sites which are contracted to the volume house builders. The pooling limitation was overwhelmingly viewed as unhelpful to the delivery of infrastructure to support development and a large number of the submissions we received sought its removal from the regulations.

5.2 Proposals for changing the pooling restriction

The Government’s March 2018 consultation identified the restriction on pooling section 106 planning obligations as an area for change. It proposed to create some flexibility, where the pooling restriction would be lifted in certain circumstances:

To address these issues the Government proposes to:

56. Remove the pooling restriction in areas:
   - that have adopted CIL;
   - where authorities fall under a threshold based on the tenth percentile of average new build house prices, meaning CIL cannot feasibly charged;
   - or where development is planned on several strategic sites (see Annex A).

57. Retain the pooling restriction in other circumstances. This will maintain simplicity by ensuring that other tariff based approaches are avoided by local authorities that have taken a policy decision not to implement CIL.

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46 DCLG, Consultation outcome: Community infrastructure levy review: questionnaire
47 A new approach to developer contributions: a report by the CIL review team, October 2016: paragraph 3.5.5
48 MHCLG, Supporting housing delivery through developer contributions: Reforming developer contributions to affordable housing and infrastructure, March 2018: page..
In the response to the consultation in October 2018, the Government indicated that (in the light of comments received) it would amend its proposal, so as to lift the pooling restrictions in all areas.\(^{49}\)

A technical consultation on draft regulations to reform developer contributions ran from December 2018 to January 2019. In it, the Government set out its proposals around reducing complexity, increasing certainty, market responsiveness, transparency and accountability, delivering starter homes and other technical clarifications. It reiterated its position on lifting the pooling restriction, confirming that it now proposed to lift it in all areas and arguing that this and other changes would provide greater flexibility for funding infrastructure:

14. Following the consultation, the Government has decided to lift pooling restrictions altogether. This will address the uncertainty, complexity and delay created by the restriction. It will allow all local planning authorities to seek section 106 planning obligations to fund infrastructure to help support, and bring forward, new housing, regardless of how many planning obligations have already contributed towards an item of infrastructure. This could speed up the delivery of infrastructure as local authorities will be able to raise funding from more developments, where appropriate, to pay for infrastructure.

15. Lifting the pooling restriction in all areas will also allow section 106 to be applied more consistently than under the proposals set out in the consultation document. It will avoid the situation where some areas have unlimited pooling while neighbouring areas still have the restriction in place. It will also create more certainty for developers and local authorities.

16. The regulations will allow local authorities to use both the Levy and section 106 planning obligations to fund the same item of infrastructure. Together with other reforms set out in this consultation, such as removing restrictions in regulation 123 of the Community Infrastructure Regulations 2010 (see paragraphs 48-53 below), this will give charging authorities greater flexibility for funding infrastructure. This will enable authorities to approve development that may otherwise have been refused. The Government will consider how guidance can be used to incentivise uptake and ensure that planning obligations are used effectively. In order to incentivise continued use of the Levy the Government proposes to require that, should authorities consider stopping charging the Levy, they should consult on doing so. The consultation would set out the expected impacts of ceasing to charge the Levy on funding infrastructure and how the authority intended to replace any lost funding. These proposals do not apply to the Mayor of London.\(^{50}\)

The summary of responses to this consultation and the Government’s view of the way forward was published in June 2019. Here, the Government reiterated the argument for removing pooling restrictions,


\(^{50}\) MHCLG, *Reforming developer contributions: Technical consultation on draft regulations*, December 2018: page 10
saying that “removing existing restrictions on the pooling of planning obligations towards a single piece of infrastructure will address barriers that could otherwise prevent development”.  

New regulations were introduced to the House of Commons in June 2019 under the affirmative resolution procedure; the regulations are the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019, which came into force on 1 September 2019. A timeline for procedural activity on the regulations is on the Parliament website. For comment on them, see “Eight things you need to know about the new 2019 CIL regulations”, Planning, 6 June 2019 [subscription required].

51 MHCLG, Government response to reforming developer contributions: A summary of responses to the technical consultation on draft regulations and the Government’s view on the way forward, June 2019: page 4
52 SI 2019/1103
6. Disclosure of viability assessments

Essentially, the delivery of affordable housing entails negotiation between developers and the LPA. It is widely argued, however, that developers’ financial viability assessments are prepared in such a way as to reduce or eliminate the affordable housing obligation. One area of concern has been the public availability (or not) of viability assessments.

When seeking planning permission for developments including residential uses, developers will routinely submit viability assessments. These assessments provide a raft of commercial data to an LPA, which ultimately goes to the deliverability of a scheme. Viability assessments are used by developers to help demonstrate to the LPA that an existing affordable housing obligation is economically unviable and should be overturned. It has been argued that the balance of power in this process has shifted towards developers; LPAs argue that they are under-resourced and ill-equipped to challenge developers’ claims about scheme viability.

The confidential nature of viability assessments has also been criticised. A Guardian article in 2014 argued that such arrangements “cloud the accountability and transparency of what should be a statutory public process”. Developers and councils have come under increasing pressure to disclose the details of viability assessments.

Courts and Tribunals have taken different approaches to the disclosure of viability in planning obligations. In the case of Royal Borough of Greenwich v IC and Brownie, a Ministry of Justice tribunal ordered the full disclosure of a viability report used to argue the case for a reduction in the number of affordable houses on a 10,000-home Greenwich Peninsula scheme. The Tribunal concluded that any harm in disclosing the information was outweighed by the public interest in understanding the reasoning for particularly controversial decisions.

In another court case, a decision by the Secretary of State to approve the development of the Shell Centre, London was challenged. Justice Collins said that the applicant’s contention that the developer’s report should be disclosed to the Planning Inspector at the inquiry was “not maintainable”. The Judge argued that “it must be open to applicants for planning permission to submit confidential material in support of their applications”.

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53 ‘The truth about property developers: how they are exploiting planning authorities and ruining our cities’, The Guardian, 17 September 2014
54 EA2014/0122
55 Westlaw UK, Case Comment: Greenwich RLBC v Information Commissioner Unreported January 30, 2015 (FTT (GRC); ‘Why developers could share less viability information following a tribunal ruling’, Planning, 13 February 2015 [subscription required]
56 George Turner v SoS CLG and others [2015] EWHC 375
57 Westlaw.UK, Summary of George Turner v SoS CLG and others [2015] EWHC 375
The law firm Denton’s UK Planning Law Blog raised questions about this decision. They argued that “inquiry evidence must be heard in public, unless the Secretary of State makes a – rare – direction for a shielded procedure for scrutiny of sensitive information”.

6.1 Planning for the Right Homes in the Right Places

MHCLG launched a consultation on planning for the right homes in the right places in September 2017. In the consultation paper, MHCLG argued that (as the Housing White Paper had already suggested) making viability assessments simpler, quicker and more transparent could lead to better use of section 106 agreements:

106. Viability assessments can be complex. In simple terms a site is viable if the value generated by its development is more than the cost of developing it. However, the range and complexity of variables in assessing this are such that the process is seen as being susceptible to gaming; and is often viewed with suspicion by authorities, communities and other observers. In particular, estimating future values and costs can be manipulated to reflect a range of outcomes. Furthermore, appraisals are often not published on the grounds of commercial confidentiality. This means that the process is neither easily understood nor transparent.

(…) 111. While the deliverability of these plans needs to be tested, we want to ensure that this is done in a way which is both proportionate and effective. We are interested in views on whether changes to planning guidance could be made to improve the way that plans are tested for viability to ensure they are deliverable.

6.2 National Planning Policy Framework 2019

The NPPF consultation proposals document set out how the revised draft NPPF would change the policy on viability assessments, so that viability assessments would be publicly available and (MHCLG argued) there would be less scope for delay caused by negotiating developer contributions:

Paragraph 58 takes forward the reforms to viability assessment proposed in the Planning for the right homes in the right places consultation. The policy makes clear that where a proposed development accords with all relevant policies in the plan there is no need for a viability assessment to accompany the planning application. This should speed up the decision making process by reducing scope for delay caused by negotiation of developer contributions. The policy also expects all viability assessments to reflect the Government’s recommended approach which is set out in draft revised national planning guidance published alongside the Framework.

58 ‘Strange Tides – Courts and Tribunal Pull in Different Directions’, UK Planning Law Blog, 17 April 2015
59 MHCLG, Planning for the right homes in the right places: consultation proposals, September 2017: pages 33 - 35
The guidance says plans can set out when and how review mechanisms may be used to amend developer contributions to help account for significant changes in costs and values and provide certainty through economic cycles. Plans can set out how review mechanisms will be used to identify any significant increase in the overall value that occurs over the lifetime of a large or multi-phased development, and how that increase in value will be apportioned between the local authority and the developer to provide more certainty for delivering supporting infrastructure.  

The amended policies were set out in the draft text for consultation. The draft Planning Practice Guidance published with the draft revised NPPF expanded on MHCLG’s proposed new approach to assessing viability and argued that it should not be necessary at the decision-making stage:

**Should viability be assessed in decision making?**

As set out in the [draft revised] National Planning Policy Framework the use of viability assessment at the decision-making stage should not be necessary. Proposals for development should accord with the relevant policies in an up-to-date development plan and where they do no viability assessment should be required to accompany the application.

Plans should identify circumstances where further viability assessment may be required at the decision making stage. Where viability assessment is submitted to accompany a planning application this should be based upon and refer back to the viability assessment that informed the plan; and the applicant should provide evidence of what has changed since then. Any viability assessment should reflect the Government’s recommended approach to defining key inputs as set out in National Planning Guidance.

The revised and updated NPPF was published in July 2018, with some further minor amendment in February 2019. On viability, it now says:

57. Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning.
The PPG on viability was updated in September 2019. Under the heading of accountability, it says that any viability assessment should be prepared on the basis that it will be publicly available – even in those exceptional circumstances where it is not, an executive summary should be:

**Should a viability assessment be publicly available?**

Any viability assessment should be prepared on the basis that it will be made publicly available other than in exceptional circumstances. Even in those circumstances an executive summary should be made publicly available. Information used in viability assessment is not usually specific to that developer and thereby need not contain commercially sensitive data. In circumstances where it is deemed that specific details of an assessment are commercially sensitive, the information should be aggregated in published viability assessments and executive summaries, and included as part of total costs figures. Where an exemption from publication is sought, the planning authority must be satisfied that the information to be excluded is commercially sensitive. This might include information relating to negotiations, such as ongoing negotiations over land purchase, and information relating to compensation that may be due to individuals, such as right to light compensation. The aggregated information should be clearly set out to the satisfaction of the decision maker. Any sensitive personal information should not be made public.

(…)

See related policy: National Planning Policy Framework paragraph 57

Paragraph: 021 Reference ID: 10-021-20190509

Revision date: 09 05 2019 See previous version
7. Dispute resolution and further provision in the *Housing and Planning Act 2016*

Section 158 of the *Housing and Planning Act 2016*, not yet in force, will provide for a dispute resolution process designed to speed up section 106 negotiations. During debates on the then Bill, the Housing and Planning Minister at the time, Brandon Lewis, explained the new provisions:

> They provide for a person to be appointed to help resolve outstanding issues in relation to section 106 planning obligations. The new process will also apply only in situations where the local planning authority would be likely to grant planning permission if satisfactory planning obligations were entered into, ensuring that we only target sites where prolonged negotiations could stall development.

> After the appointed person issues their report on that mechanism, the parties will still be free to agree their own terms if they do not agree with the report, but only if they do so quickly. We want to encourage the parties to tie up their loose ends quickly. We are consulting on the finer detail of the process and we will bring forward regulations in due course.65

Chapter 10 of the Government’s February 2016 *Implementation of planning changes: technical consultation* provided further information about how the proposed dispute resolution mechanism would work.

Section 159 of the Act will provide the Secretary of State with powers to restrict the enforcement of planning obligations in relation to affordable housing in certain situations. Brandon Lewis said that the Government would later consult on how to use this power, which would be introduced through regulations.66

 Officials at MHCLG have told the Commons Library that measures to introduce a section 106 dispute resolution process will not be taken forward at this time.67

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65  [HC Deb 5 January 2016 c216-7](http://www.parliament.uk/housesofparliament/pa/201516/hsqhans/contents/30487.htm)

66  [HC Deb 5 January 2016 c217](http://www.parliament.uk/housesofparliament/pa/201516/hsqhans/contents/30487.htm)

67  Personal communication, 5 September 2019
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