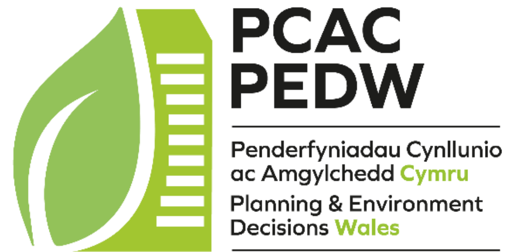
Planning Obligations & the Community Infrastructure Levy (CIL)



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Key legislation and policy

Legislation	• The Town & Country Planning Act 1990 (T&CPA) • The Planning Act 2008 • Community Infrastructure Levy Regulations 2010 • Community Infrastructure Levy (Amendment) Regulations 2014
National policy and guidance	• Planning Policy Wales • TAN 2 Affordable Housing • Welsh Office Circular 13/97 Planning Obligations • Circular 16-2014 - The Use of Conditions in Development Management • CIL – A Guide to the Production of a Charging Schedule (WG) 2011 • CIL – Affordable Housing and 'Meaningful Amount' for Local Communities – WG CPO letter 8 April 2013
Judgments	• Westminster City Council v SSCLG & Mrs Marilyn Acons [2013] EWHC 690 (Admin) • Hertfordshire CC v SSCLG & Other [2011] EWHC 1572 • Oxfordshire County Council v SSCLG [2015] EWHC 186

Background

1. S106 of the T&CP Act, as amended by the P&CA 1991, provides that anyone with an interest in land may enter into a **planning obligation**.

2. Planning obligations may be by agreement or by a unilateral undertaking (UU). An agreement is where all parties including the LPA jointly enter into an obligation; a UU is where the appellant/landowner and any other relevant parties enter into an obligation unilaterally without the LPA – a UU can therefore only bind the parties who make it and not the LPA because they are not party to it.

3. Obligations can be negative or positive; can provide for payments to be made; and be subject to conditions or time limits. They are most commonly used to help fund local infrastructure, ensure affordable housing is provided, ensure land away from the appeal site is used for a particular purpose e.g. as open space or compensatory habitat; transfer land or a building to the LPA e.g. as a community facility, and to promise not to do something e.g. implement an existing planning permission.

4. A completed obligation is a binding legal document. It cannot be unilaterally revoked by one of the parties, or revoked by a condition attached to a subsequent permission.

5. The **CIL regime** was introduced under the Planning Act 2008 and the CIL Regs came into force in 2010. Legislative competence for CIL has rested with the Welsh Government since May 2018[1]. Amendments made to the CIL Regulations by the UK Government after that date have effect only in England. The regulations applying in Wales are therefore the CIL Regulations 2010 as most recently amended in 2018.

6. The intention of CIL is to allow authorities to apply a tariff-based approach to secure financial contributions to provide infrastructure to support the development of an area, rather than make a development acceptable in planning terms. It applies to roads, public transport, open space, health centres, schools, but **not affordable housing** which will continue to be secured by planning obligation or conditions.

The Tests – CIL Regulation 122 and WO Circular 13/97

7. As the decision maker, and for proposed development which is capable of being charged under CIL, you are required to be satisfied that there is evidence before you which demonstrates that the obligation meets the tests of Regulation 122: i.e. that 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.

[1] Government of Wales Act 2006 (as amended by the Wales Act 2017); Welsh Ministers (Transfer of Functions) Order 2018

8. These are the essentially the same tests set out in **WO Circular 13/97**, which also requires that the obligation should be relevant to planning and reasonable in all other respects. However, the Circular is guidance whereas the Regulations are law. For obligations not involving chargeable development the tests in Circular 13/97 will need to be taken into account.

9. Regulation 122(2) of the CIL regs states that a planning obligation may only constitute a reason for granting planning permission for a development which is capable of being charged CIL (chargeable development) if the obligation meets these tests.

10. Reg 122 only applies in circumstances where an appeal is being allowed and planning permission granted. In appeals involving chargeable development which are to be dismissed for reasons not involving the planning obligation, it is not necessary to apply the tests (see also the section below on whether it is necessary to make a finding on an obligation).

11. The statutory tests do not apply to **enforcement appeals** and thus a planning obligation offered in respect of an enforcement appeal on ground (a) should only be assessed against the Circular. This is because the definition of 'relevant determination' in Regulation 122(3) does not refer to enforcement provisions.

How do Planning Obligations and CIL work?

12. The CIL Regs enact into law current government policy on the use of planning obligations. They scale back the way that planning obligations operate by placing limitations in three respects:

    - putting the policy tests for planning obligations (set out in CIL Reg 122) on a statutory basis for developments which are capable of being charged the CIL; thus it is unlawful to require a planning obligation that does not meet the tests – see further information on the tests below;
    - ensuring local use of CIL and planning obligations do not overlap;
    - limiting pooled contributions from obligations towards infrastructure that may be funded by CIL (see the five obligation limit below).

The Five Obligation Limit

13. From 6 April 2015, s106 planning obligations designed to collect pooled contributions may not be lawfully used to fund infrastructure which could be funded from CIL.

14. Only very limited pooled contributions of up to five separate planning obligations, backdated to 6 April 2010, will subsequently be permitted towards infrastructure which could be funded by CIL.

15. The implications of this will be that Inspectors will need to establish whether the proposal includes a developer contribution for a specific infrastructure which may have

already accrued five prior obligations entered into after 6 April 2010. If this is not clear from the evidence, clarification via the caseworker will need to be sought from the LPA (copying in the appellant) to establish where the case stands in terms of the five obligation limit (see example in appendix 2). Any representations on such matters must be taken into consideration regardless as to whether they have been submitted outside the statutory timescales.

Points to Note

- CILs are a tariff based approach – they operate outside the planning obligations regime, such that an LPA will adopt its tariff approach which will be charged in £ per square metre on the net additional increase in floorspace of any given development.
- CILs only apply to 'chargeable development' as defined in s209 of the Planning Act 2008.
- CILs cannot include affordable housing, which should continue to be secured through s106 obligations / conditions.
- Anything included in a CIL cannot be subject to a s106 obligation as well ("double charging").
- Once a CIL is adopted, planning obligations are scaled back to those matters which are directly related to a specific site (where such matters are not included in the list of infrastructure projects published by an LPA).

Implications of the CIL regime on planning appeal casework

16. The CIL regime operates after the grant of planning permission and without the need for a S106 agreement. Once a charging schedule has been published, a planning obligation which seeks to provide funding or the provision of infrastructure which is intended to be funded, wholly or partly, by CIL, may not constitute a reason for granting planning permission[2]. For LPAs with a CIL in place, it is the responsibility of the LPA to collect the levy after planning permission has been granted. In such cases, issues / disputes over chargeable development should not normally be a matter for an Inspector.

What if a proffered planning obligation contains some CIL elements and other non CIL elements?

17. It may be possible to expressly identify (or ask the parties to agree between themselves) which parts of the obligation would still apply and which would not, and then to state in your decision that no account has been taken of the latter. Alternatively it may be appropriate to arrange for a letter to be sent to the parties explaining that you cannot take into account those parts of the obligation which are covered by CIL and ask for comments on whether the appropriate way forward would be to provide a new obligation dealing only with matters not covered by CIL.

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[2] S143 of the Localism Act 2011, which inserted S70(2)(b) into the TCPA 1990, allows "local finance considerations" (including CIL) to be considered when determining planning applications – but this subsection applies only in England.

What if there is no CIL in place?

18. If the five obligation limit has been exhausted, further obligations will be considered to amount to a tariff which should be implemented through CIL. Where an obligation makes provision for a number of staged payments, these will collectively count as a single obligation.

19. Where there is no adopted charging schedule in place, the legislative requirement not to accrue more than five obligations per project, will necessarily outweigh the requirement of development plan policies for developer contributions (see also the further section on SPG and tariffs).

20. If the five obligation limit has not been reached you would deal with the obligation in the usual way, having regard to the statutory tests and Circular 13/97.

What if there is no CIL and the '6th obligation' is considered necessary for the development to proceed?

21. It would be unlawful to place weight on such an obligation even if willingly proffered by the appellant. It will therefore be a matter of judgement by the Inspector as to whether, with no CIL and no ability to provide infrastructure via a s106, the proposal would place unacceptable burdens on existing communities, thus warranting dismissal of the appeal.

22. Inspectors need to have regard to the Conservation of Habitats and Species Regulations 2010. In the event that obligations exceeding the five obligation limit relate to an avoidance/mitigation strategy for a **European site** and the avoidance/mitigation strategy does not form part of a CIL charge, appellants will be unable to demonstrate that the proposal will have no likely significant effect on the European site.

CIL Chargeable Development

23. As per s209 of the Planning Act 2008, CIL only applies to 'chargeable development' (defined in regulations 6 and 9). The levy applies to development where the additional net internal floorspace exceeds 100 square metres, but it applies to all new houses and flats unless they are being built by self-builders.

24. Chargeable development relates only to buildings, but there are exceptions: including buildings into which people do not normally go or which they only go in intermittently; change of use not involving an increase in floorspace; and the change of use of a single dwelling house into 2 or more separate dwellings. There are also other exceptions for minor development (regulation 42); charitable development (regulation 43-48); social housing (regulation 49/49A); structures, such as pylons or turbines; and vacant buildings brought back into the same use (regulation 40). More detailed

guidance on what is defined as chargeable development and the exclusions is contained in paragraph 3 of the NPPG guidance on CIL.

Planning Obligations: considerations at appeal

25. This section outlines what you need to consider if you have a planning obligation in front of you.

Do I need to make a finding on the obligation?

26. You will need to **reach a finding** on the planning obligation (or the absence of one) in the following circumstances:

- If the lack of an obligation is a reason for refusal or clearly raised as a concern;
- If an obligation has been submitted without prejudice but is contested by the
- appellant as not being necessary;
- You intend to allow and an obligation has been submitted. This is because Reg 122 states that an obligation may only constitute a reason for granting permission if it meets the 3 tests – so you must make a finding even if the need for it is not contested;
- You are dismissing for other reasons, but an obligation would provide a legitimate benefit e.g. where it would provide affordable housing as a potential benefit to be weighed in the balance of your overall conclusions;
- It is argued that you shouldn't take the obligation into account because it is for infrastructure for which a CIL is in place (or in reverse, you are required to take it into account because it is argued that it is not CIL relevant infrastructure).

27. You will **not need to make a finding** on an obligation where it has been provided and is not contested but you are dismissing for other reasons.

Can you lawfully take the obligation into account?

28. The obligation cannot be a reason for granting permission in the following circumstances:

- it relates to chargeable development for which a CIL has been published i.e. double counting;
- pooled s106 contributions would be capable of being funded by CIL; in all cases chargeable development can no longer be funded by pooled contributions if 5 or more obligations for that infrastructure project or type have been entered into since 6 April 2010.

Does the obligation satisfy all CIL / WO Circular 13/97 tests?

29. Matters to consider might include:

- Necessary? Would the obligation resolve a problem that would otherwise lead to the appeal being dismissed? Without the obligation would there be material

planning harm? E.g. without a contribution, would there be a harmful effect in terms of the provision or availability of services e.g. is there evidence that existing facilities are at full capacity or failing to serve local needs, is there a shortage of school spaces, what would be the additional demands from the appeal proposal – is the evidence up to date?

- Would the development materially exacerbate any problems arising from an existing shortage? Circular 13/97 is clear that care needs to be taken where you are dealing with an existing problem. A contribution cannot be expected to resolve an existing problem but it could be used to stop it becoming worse.
- Where would the contribution be spent and what on? Is it directly relevant to the development? e.g. would extra school places serve the needs of those living in the development?
- How has the size of the contribution been established? Is it the right amount to resolve the problem specifically arising from the proposed development?
- Fairly and reasonably related? The use of a 'per dwelling' tariff makes it difficult to demonstrate that that this test has been met since it is a blanket sum and the Circular advises that development plan policies based on such are likely to be unacceptable e.g. it would be unacceptable to seek that all housing development of 30 dwellings or more should make a contribution to children's play since some of them might not be suitable for family homes (Circular 13/97 B17(iii)).
- Is the requirement for a contribution backed up, or justified by development plan policy/adopted SPG?
- Reasonable in all other respects? This is a matter of judgement based on the evidence.

Will the planning obligation be effective?

30. Is the obligation an obligation? In **Westminster City Council v SSCLG & Mrs Marilyn Acons [2013] EWHC 690 (Admin)** the obligation was concerned with achieving car free housing and prevented the owner from applying for a parking permit. However, the decision was quashed because the obligation did not relate to a use of land and was merely a personal undertaking which was not capable of being registered as a land charge.

31. Will the obligation do what it is supposed to do? is it sufficiently clear and detailed? Does it contain any anomalies or errors?

32. Is the obligation enforceable? Does it set out clearly and precisely what steps need to be taken to fulfil the obligation? Does it have time limits to confirm when any actions are required to be carried out?

33. Is the obligation legally sound?

- Have all the relevant parties entered into it?
- Has it been executed as a deed?
- Is it dated?
- Has it been signed and witnessed?

- Does it state that it is a planning obligation?
- Does it bind successors in title?
- Is the site clearly identified?
- Does it clearly refer to the relevant planning application / LPA? When would it take effect?

What if the planning obligation is incomplete, flawed or missing?

34. An incomplete or flawed obligation won't carry any weight.

35. If one has been provided but is incomplete or flawed, consider taking the following action:

36. *Written representations*: you are not obliged to delay your decision, but before the site visit you could consider asking the parties if they intend to provide a completed version, giving a deadline for them to do so and make it clear that the decision will not be delayed after that date.

37. *Hearings and Inquiries*: if an obligation is reasonably likely to be submitted before the event, ask the case officer to write to the parties stating that any draft should be provided no later than 10 working days before the event. At the opening check what progress has been made and that any draft should be finalised before the end of the event. If there are any procedural matters, such as it has not been signed, it is reasonable to point this out but avoid commenting on the planning merits of an obligation. If the obligation has not been provided by the end of the event e.g. because signatures have needed to be obtained, you might allow a short period for the document to be completed, stressing that you will proceed with the decision after this time. Remember to consider whether in the interests of natural justice, any of the parties need to be given an opportunity to comment on a final version.

Always accept a completed obligation if it is received before the decision is issued, regardless of any deadlines set.

A completed obligation will have legal effect even if you have not seen it and it is a material planning consideration which must be taken into account. You must therefore assess it in your decision.

Supplementary Planning Guidance (SPG) involving tariffs

38. Some LPAs have introduced SPGs that seek contributions towards infrastructure and facilities. When faced with appeals that involve such SPG, decisions should have regard to the advice in WO Circular 13/97, PPW and the CIL Regs. The SPG should be founded on a current development plan policy, during whose preparation the principles of a tariff mechanism should have been considered and if necessary, examined. Where there is no development plan, you should be satisfied that the appropriate consultations have taken place, that the SPG was founded on robust and

credible evidence/information and that the SPG is adopted. A useful SoS decision in England sets out some the concerns that can arise (APP/T2215/A/08/2078475). Whilst this is based on English guidance some of the principles are likely to apply in Wales.

39. However, where SPG seek contributions in respect of development for which 5 obligations have already been pooled, the CIL regs will necessarily outweigh the SPG.

Other Practical Points

- Do not impose a condition requiring the completion of an obligation. Planning permissions can be granted 'subject to conditions'. However a planning permission cannot be granted 'subject to a planning obligation'. This is because the obligation is a separate legal document.
- Do not duplicate an obligation with a condition - Circular 13/97 says that if there is a choice between imposing conditions and entering into a planning obligation, the imposition of a planning condition which satisfies the tests is preferable.
- Do not revoke a planning permission with an obligation.
- If a UU has been submitted, ensure that the LPA has had the opportunity to comment on it.
- Subsequent **maintenance costs** arising from the benefit to be provided should normally be borne by the LPA (or other body in whom the asset is to be vested). Whilst an element of maintenance might be necessary to get the asset up and running this should be time limited and not required in perpetuity (para B14 Circular 13/97).
- Payment of lump sums – the scale of payments is required to be reasonably related to the scale and nature of the development and calculation of payment should be clearly set out in development plans/SPG. It would be inappropriate to conclude that the payments were necessary if the intended purpose and/or expenditure was not specified.

Main Issues

40. These might include:

- Whether a financial contribution is necessary to provide *[education/public transport/open space..]* in the area;
- The effect of the proposal on the provision of infrastructure and facilities in…;
- Whether the proposal makes adequate provision for any additional need for infrastructure, services and facilities arising from the development;
- Whether the proposal would exacerbate the identified deficiency in *[leisure/open space/ education..]* provision in the vicinity.

CIL appeals

41. Appeals can be lodged against some aspects of a CIL charge. Those which are dealt with by PEDW are listed in the table below.

Type of appeal	Grounds	Time restrictions
Surcharges (Reg 117)	Against a decision of a collecting authority to impose a surcharge	Within 28 days of the surcharge being imposed
Commencement of development (Reg 118)	Date of commencement wrongly determined	Within 28 days of the date the demand notice was issued
Issuing of a stop notice (Reg 119)	Against a decision of a collecting authority to impose a stop notice	Within 60 days of the date when the stop notice takes effect

Other Casework Matters That Might Arise

Affordable housing

42. If you have an obligation before you that provides for affordable housing, you should refer to the advice in TAN 2 Affordable Housing (10.14, 12.2 - 12.7, 13.3 and Annex A).

43. In particular that:

- Clauses to allow the lender to put the housing back on the open market if the RSL got into financial difficulty should not be used;
- There is a strong presumption that affordable housing provided by obligation will be provided on the application site. Development plans/SPG should set the exceptional circumstances where provision may not need to be on site and where off site provision or payment in lieu may be provided instead.
- Obligations should include a fall back mechanism to allow affordable housing to be provided through an alternative arrangement;
- Where occupancy criteria are specified in the obligation, that there is an ‘occupancy cascade’ to enable tenants to be found as soon as a unit becomes vacated.

Pay back clauses

44. Agreements sometimes include a clause which requires a local authority to pay back any contributions which have not been spent on the required purpose within a stated period of time. The presence or otherwise of a clause is unlikely to affect the validity of the obligation, unless you consider the payback period is unreasonably short which

might result in necessary contributions being lost. Pay back clauses in UUs will not be binding on the LPA.

Contributions to monitoring and legal costs

45. Sometimes LPAs seek to recover costs in terms of monitoring the obligation and then securing compliance with it. There is no formal guidance on this but you would need to consider whether such a requirement would satisfy the tests. In **Oxfordshire County Council v SSCLG [2015] EWHC 186**, the Inspector's view that the (relatively modest) administrative / monitoring fee was not necessary to make the development acceptable was upheld. It is common for applicants/developers to pay the LPA's reasonable legal costs but it will seldom be relevant to casework.

Transfer of land, contributions and UUs

46. In **Hertfordshire CC v SSCLG & Other [2011] EWHC 1572**, it was held that, in principle, an obligation may be used to transfer land to an LPA e.g. to build a school on. The facilities might be provided in kind by the developer or via a sum of money paid to the Council to cover construction costs. This would usually be achieved by means of an agreement in which the developer promises to provide the land/money and the LPA agree to accept and use the land for the intended purpose.

47. However, if the promise is made by a UU, the LPA will not be bound by it. You will therefore need to decide what weight can be given to it e.g. has the LPA given an assurance that it will accept and use the land for the intended purpose. However, the obligation may still attract weight even if there is no such assurance. In the Hertfordshire case, the Judge concluded that this was a matter of planning judgement and that the decision maker in that case had been entitled to conclude that the offer of land was reasonable and necessary and that the terms of the obligation would be effective.

48. In such cases, you should consider whether there are safeguards in place such as indexation of payments, arrangements for a bond or dispute mechanisms; and in order for the UU to fall within the scope of s.106. a valid planning obligation should normally be in the negative form i.e. not to commence development until xx land has been transferred / or not to occupy…

Off-site work covered by other legislation

49. Where off site works to an existing highway are required to mitigate the effects of new development (e.g. access/junction alterations, cycle paths) the developer will usually enter into an agreement with the LPA under s278 of the Highways Act 1980. However, if these works are necessary they will need to be tied into a planning obligation so that it is certain that they will be carried out i.e. before commencement/occupation. This can usually be achieved by means of an obligation executed under a combination of s278 and s106. The same principles apply to off-site water and sewage infrastructure. Grampian conditions can also be used to secure off

site works e.g. by requiring that the development shall not commence/ be occupied until certain highway works have been completed.

Multiple alternative obligations

50. You may be presented with a number of alternative obligations e.g. a developer may offer obligations of varying levels of financial contributions for you to decide which is most appropriate with clauses to ensure that the others won't come into effect should the obligation be considered necessary and permission granted.

51. Such clauses are unlikely to affect the validity of the obligation, but you should explain in your decision which obligation is the minimum sufficient to make the development acceptable (if any are) and that this is obligation on which your decision is based.

Obligations that are conditional on Inspector's conclusions

52. Some obligations contain a mechanism that provides that for any obligation which an Inspector finds does not pass the tests shall have no effect.

53. You should consider each obligation making it clear whether it passes the tests. If you expressly state that the obligation is unnecessary and grant permission, matters relating to the effect of the mechanism would be for the LPA and the other parties to resolve.

Multiple Counterpart Obligations

54. Sometimes multiple obligations are provided which are identical but each is signed by a different party. They are usually provided where it has been difficult to get all the parties to sign the same document. They are best avoided, but if properly executed they are legally valid. Make sure you have copies of all the signed agreements each certified by a solicitor as a copy of the true original.

Keeping copies of planning obligations

55. The original copy should be kept by the enforcing LPA. The parties may need to be reminded of this.

Appendix 1: Casework Scenarios

Scenario 1

The lack of an obligation is a reason for refusal, the need for a contribution is contested by the appellant and no obligation has been provided:

Assess whether, on the basis of the evidence provided, harm would arise on any of the matters that the LPA believes that the obligation should cover. This would usually be a main issue.

Scenario 2

The lack of an obligation is a reason for refusal, the need for it is contested, but an obligation has been provided:

Appellants often provide obligations or UU as a safety net to avoid delay in the event that you find an obligation is necessary. Therefore despite the presence of an obligation, it remains contested and you should therefore assess and reach a finding on each element of the obligation. This would usually be a main issue.

Scenario 3

An obligation is provided and not contested but the appeal is being dismissed for other reasons:

It is not generally necessary to consider the obligation in any detail or reach a finding on it. It is usually sufficient to say that that whilst an obligation has been submitted it is not necessary to consider it in detail because the appeal is being dismissed on other substantive issues. The exception would be where the obligation would provide a benefit such as affordable housing which should be considered in the overall balancing exercise.

Scenario 4

An obligation is provided and not contested, but the appeal is being allowed:

It is necessary to consider the obligation in detail and reach a finding on it. If the obligation is not necessary or there is insufficient evidence to demonstrate that it is, you should explain that you have not afforded it any weight and has not been a reason for granting permission. This can usually be dealt with as an ‘other matter’.

Note that if the obligation is necessary but incomplete or flawed, it is likely that you would dismiss the appeal.

Scenario 5

The lack of an obligation is not a reason for refusal and one hasn't been provided. However, the LPA has commented in the appeal evidence that contributions are necessary:

If you are minded to allow, then you would need to deal with the lack of an obligation and make a finding. If the obligation is necessary then it could constitute a reason for dismissing and would be a main issue.

If you are minded to dismiss then you could deal with the obligation more briefly as an 'other matter' especially if the LPA only mention the issue in passing; but if the LPA's evidence is more detailed, it would be prudent to deal with it as a main issue and to reach a finding.

Scenario 6

The lack of an obligation is a reason for refusal, but an obligation is provided during the appeal:

If allowing, assess and reach a finding on the obligation; if dismissing for other reasons, there is no need to assess and reach a finding. However, the obligation should be referred to in a procedural paragraph or 'other matter' to explain that whilst it was a reason for refusal, an obligation has been provided which addresses the LPA concerns (if it does). The exception to this would be where it would provide a benefit such as affordable housing which should be weighed in the overall balancing exercise.

Scenario 7

The LPA consider that an obligation is required, the appellant agrees, but a completed obligation has not been provided:

If you are dismissing on the basis of other issues, you would not generally need to make a finding, but explain the circumstances in 'other matters' (but remember to weigh any benefit in the overall balancing exercise). If you are minded to allow on the main issues, you need to assess whether an obligation is necessary, and if it is, you would dismiss on that basis. If you find the obligation is not necessary, you can allow - in both these circumstances it would be a main issue.

Scenario 8

The parties agree that an obligation is necessary, and one has been provided but it is not complete:

If you conclude that the obligation is necessary but cannot take effect because it is incomplete then you would be likely to dismiss (unless the matter could be dealt with by condition). This would need to be a main issue.

Scenario 9

The LPA consider that a contribution is necessary, and the appellant has made a direct payment to the LPA without any obligation or UU:

If you conclude that the contribution is not necessary then you should clearly indicate that the payment has had no bearing on your decision.

If you decide that a contribution is necessary you will need to consider whether there is sufficient legal commitment to guarantee that the contribution would be used for its intended purpose. Given that there will be no official record it might well be that the means of payment has not been properly secured. If so you will not be able to give it any weight.

Scenario 10

The lack of an obligation is a reason for refusal but since then a CIL charging schedule has been adopted:

If the parties are agreed on this, the position can be explained briefly in an 'other matter' or procedural paragraph i.e. that the LPA cannot charge twice for the same infrastructure. If part of the LPA's case at appeal relates to the absence of a mechanism for it to collect the CIL, you will need to set out the correct procedure e.g.
'The collection of the CIL contribution is undertaken by the relevant charging authority on service of a notice that planning permission has been granted in relation to chargeable development. As such, the requirement for, and enforcement of, the payment of a contribution in relation to…is not a matter for consideration in this appeal.'

Scenario 11

The appeal is a s73 where the original permission was subject to a planning obligation, but there is no obligation before you and you are minded to allow.

Tying an extant obligation to a new permission can be achieved by deed of variation rather than requiring a new agreement. Based on practical experience it is considered that as s73 decisions can be issued in the same way as a fresh application, permissions created by such decisions can also be dependent on a new agreement or deed of variation to the existing obligation coming forward.

Where the original permission was dependant on a S106, you will need to make a judgement as to whether any new permission that you might create would be similarly dependent. If such a dependency exists and there is no obligation or deed of variation, the appeal should be dismissed and the lack of an appropriate obligation cited in the reasoning.

If you are content that an appropriate obligation or deed of variation is present (or that a new permission can be created without the need for an obligation) the appeal can be allowed. This would create a situation where the original permission with the s106 and the new permission exist in tandem giving the appellant the opportunity to implement either one.

Appendix 2: Letter to LPAs to be used by case officers regarding the five-obligation limit

Community Infrastructure Levy Regulations 2010, Regulation 123(3) as amended

I refer to the above Regulation 123(3), concerning limitations on the use of planning obligations in the determination of planning applications and appeals.

In Wales, it remains the case that a planning obligation may not constitute a reason for granting planning permission where it provides for the funding or provision of an infrastructure project or type of infrastructure, and five or more separate planning obligations have previously been entered into on or after 6 April 2010 that already provide for the funding or provision of that project or type of infrastructure. Obligations requiring a highway agreement to be entered into are not limited in this way.

From my review of the appeal documentation, I note that your Council considers that a contribution/contributions secured by a planning obligation or obligations would be required to make this appeal proposal acceptable in planning terms.

Please could you clarify the number of planning obligations which have been entered into on or after 6 April 2010 which provide for the funding or provision of a project, or provide for the funding or provision of that type of infrastructure for which your Council is seeking an obligation in relation to this appeal proposal. This information is required for **each** obligation sought by your Council.

I would be grateful for your written response within 14 days of the date of this letter. A copy of this letter has been sent to the appellant for information, and the appellant should be copied into your response.

Additionally, I would ask that your Council (and the appellant) informs me **as a matter of urgency** of any further changes in circumstances on this matter as the appeal progresses, i.e. if any further relevant obligations have been entered into as a result of your Council granting permission and / or appeals being allowed. I would stress that it is in the interest of both your Council and the appellant to do so, as any failure to keep me informed could result in delays in the processing of the appeal and / or, at worst, unlawful appeal decisions being made.