Planning Obligations, Viability and the Community Infrastructure Levy (CIL)

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Responsibility of	**Subject Lead for Planning Obligations & 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 • The Town and Country Planning (Development Management Procedure) (Wales) Order 2012
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 • Development Plans Manual Edition 3 March 2020
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

	• Greenfields (IOW) Ltd, R (On the Application Of) v Isle of Wight Council & Anor [2025] EWCA Civ 488 (16 April 2025) • Tiwana Construction Ltd v Secretary of State for Housing, Communities and Local Government and another [2025] EWHC 1485 (Admin)

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

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

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.

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).

13. At the time at the time of writing, there are currently only three LPAs with adopted charging schedules. These are Caerphilly, Merthyr Tydfil and Rhondda Cynon Taf.

The Five Obligation Limit

14. 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.

15. 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.

16. 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

17. 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.

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

18. 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.

What if there is no CIL in place?

19. 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.

20. 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).

21. 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?

22. 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.

23. 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

24. 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.

25. 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

26. 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?

27. 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).

28. 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. However, the planning obligation need not be determinative. If it is a material consideration you must assess it and explain why it does not outweigh your reasons for dismissing the appeal[3].

Can you lawfully take the obligation into account?

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

[3] Tiwana Construction Ltd v Secretary of State for Housing, Communities and Local Government and another [2025] EWHC 1485 (Admin)

- 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.

30. S106(9) sets out what is a legally sound planning obligation. It must be executed as a deed which:
    a) states that the obligation is a planning obligation;
    b) identifies the land in which the person entering into the obligation is interested;
    c) identifies the person entering into the obligation and states what his interest in the land is; and
    d) identifies the local planning authority by whom the obligation is enforceable.

- Have all the relevant parties entered into it?
- Does it seek to impose an obligation on any other person against whom the obligation is enforceable? S106A(5) prevents this.
- 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?

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

31. 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?

32. 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.

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

34. 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?

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

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

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

37. *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.

38. *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 (see para 41).

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 or otherwise give clear reasons why you have not accepted it.

39. Regardless of any deadlines that you or PEDW have set – you would usually accept and consider a completed obligation if it is received before your decision is issued because it is binding on the parties and a material consideration. However, you do have discretion to not accept or consider a late submission of a planning obligation but you must have good reasons for doing so and clearly explain these in a procedural paragraph in your decision (see **Tiwana Construction Ltd v SSHCLG & West Suffolk Council [2025] EWHC 1485 (Admin))**. If you accept and consider but subsequently determine that you will not take it into account, or that it has no material bearing on your decision, then you must also clearly explain this. A completed and correctly executed obligation will have legal effect, even if you have not seen it. It will, therefore, bind the parties to do, or not do, whatever they have promised.

40. Article 29(2)(b) of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 requires the LPA to publish all obligations on its planning register. This is so members of the public have the opportunity to comment on the planning obligation before any planning permission is granted. A judgement from the Court of Appeal (April 2025)[4] found that the grant of planning permission, without following the legislative procedure was unlawful.

41. Whilst the case referred to had an active interested party involved who was concerned about the level of contribution being offered and had regularly been checking the Council's website tracking updates on the planning obligation, Inspectors must be vigilant to any detailed/specific concerns raised by IPs to heads of terms and/or draft planning obligations and if there is, ensure the planning obligation has been made available for a short period (perhaps five working days) for public inspection to ensure natural justice (there is unlikely to be any need for a formal re-consultation or for this to be done in every case routinely). This can be communicated via the Case Officer to the LPA.

Supplementary Planning Guidance (SPG) involving tariffs

[4] Greenfields (IOW) Ltd, R (On the Application Of) v Isle of Wight Council & Anor [2025] EWCA Civ 488 (16 April 2025)

42. 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.

43. 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. An obligation can be used to require the party not to implement all or part of an extant planning permission but planning permission can only be revoked by an order under S97 of the TCPA 1990.
- 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 13/97provides advice on exceptions to this, including highways works and open space principally for the benefit of the development.
- 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

44. 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.

Appeals to remove or vary a planning obligation

45. S106 A of the Town and Country Planning Act (as amended) 1990 (the Act) enables a planning obligation to be modified or discharged by the LPA. If they refuse or fail to determine in time, such an application, there is a right of appeal under S106B of the Act. The application to modify or discharge an obligation can only be made after five years beginning with the date on which the obligation is entered into. If not, the application was invalid and there is no right of appeal.

46. The regulations for s106B appeals are The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 which remain applicable in Wales (references to Secretary of State means Welsh Ministers).

47. The considerations in the appeal will be the same as other casework involving a planning obligation. You will also need to give consideration to the passage of time since the original deed was entered into and any material change in circumstances which alter the case for or against the need for a planning obligation.

Procedure

48. S319B of the Act 'Determination of procedure for certain proceedings: Wales' does not apply to s106B appeals. Although we may use the criteria to decide which procedure is most appropriate we cannot insist that an appeal be determined by the written representation procedure against the wishes of the appellant or LPA. The Act (s106B(5)) gives either the applicant or the LPA the right to be heard (at a Hearing) if they so wish. If they indicate Hearing / Inquiry it must be a Hearing as a minimum.

CIL appeals

49. 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

Viability

50. Viability testing is the process for assessing whether a proposed site or development is financially viable, by looking at whether the value generated by a development is more than the cost of developing it. This includes looking at the key elements of gross development value, costs, land value, landowner premium, and developer return.

51. In England and Wales, national policy sets out a plan-led approach to development contributions and viability which makes clear that only where there are exceptional circumstances, should site specific viability appraisals be undertaken as part of the application / appeal process.

52. In summary, the approach is as follows:

- **The role for viability appraisals of development is primarily at the plan making stage.** This includes high level plan-wide viability appraisal (PWVA) and, key site specific viability appraisal (KSSVA) (PPW Paragraph 4.2.20 and DPM Paragraphs 5.86 – 5.108).

- **Development plans must include policies which make clear that developers will be expected to provide community benefits.** These benefits must be those which are reasonably related in scale and location to the development and can include matters such as the level and type of affordable housing, educational provision, public open space etc (PPW, paragraph 4.2.21).

- **Development plan policies must be clearly expressed, so that their requirements can be accurately accounted for (by the developer) in the price paid for the land**. They should be informed by evidence of infrastructure and affordable housing need and a proportionate assessment of viability to ensure that policies are realistic (PPW, paragraph 4.2.20 and DPM, paragraphs 5.86 – 5.126).

- **The cumulative cost of policies and the combined total impact of requests for infrastructure contributions should not undermine or unrealistically undermine the deliverability of the development plan or development sites** (PPW, paragraph 4.2.21 and DMP, paragraph 5.90).

- **Policy requirements should be set at a level that allows development to be deliverable, without the need for further viability appraisal at the decision-making stage** (PPW, paragraph 4.2.21 and DMP, paragraph 5.90).

- **Where up-to-date development plan policies have set out the community benefits expected from development, planning applications which comply with them should be assumed to be viable and it should not be necessary for**

viability issues to be considered further. As such, there should be no need for further viability assessments to be undertaken at application stage (PPW, paragraph 4.2.22 and DMP, paragraph 5.90).

- **Where planning obligations are negotiated on the grounds of viability it is for *either* the applicant or the local planning authority (LPA) to demonstrate that exceptional circumstances since the development plan was adopted justify the need for a viability appraisal at the application stage** (PPW, paragraph 4.2.22). For development plans in Wales that were adopted before 2018, there will be no requirement to demonstrate exceptional circumstances exist and a viability assessment for proposals can be submitted during the application stage.

- **Where a viability appraisal is submitted at the application or appeal stage it should refer back to the viability appraisal which informed the adopted development plan and reflect the approach taken in the PWVA and KSSVA during the plan making process** (DPM, paragraph 5.90).

- **The weight to be given to the viability appraisal is a matter for the decision maker, having regard to all of the circumstances in the case.** This includes whether the development plan and the viability evidence on which it was based are up to date and any change in the circumstances since the plan was adopted (PPW, paragraph 4.2.22).

- **Under no circumstances will the price paid for the land be a relevant justification for failing to accord with relevant policies in the plan.**

Viability Appraisals

53. A key element of understanding viability at both plan making and application / appeal stage is the production of a viability appraisal.

54. At plan-making stage the appraisals undertaken include: a high level PWVA which provides certainty that the development plan and its policies can be delivered in principle, taking into account affordable housing targets, infrastructure and other policy requirements; and, for sites which are key to the delivery of the plan's strategy, a KSSVA which provides a detailed assessment of anticipated / known costs, constraints and site specific requirements.

55. These appraisals are intended to inform the preparation of a development plan and should be undertaken prior to it being placed on deposit. The PWVA and KSSVA are an important part of a deposit plans evidence base and, as such, will be subject to scrutiny during the plan's examination.

56. At application / appeal stage, where exceptional circumstances exist, a SSVA can be produced in support of a proposed development. In this context, exceptional circumstances relate to matters which would significantly alter the viability of a development and include issues such as additional / unforeseen infrastructure or site development costs, a period of recession or significant economic changes which have

occurred since the plan was adopted and / or relevant changes in national planning policy. The appraisal is intended to inform the decision makers understanding of the financial soundness of a scheme and to allow a decision to be made on the granting of planning permission.

57. Viability appraisals generally include an explanation of the individual components of an appraisal and a development(s) model which includes the financial aspects of a scheme(s). Although there is commonality between appraisal models undertaken at plan making and application / appeal stage, the approach taken to the appraisals differs.

Plan wide viability appraisal and key site specific viability appraisal

58. Although the approach taken to the production of PWVA may vary, they typically include consideration of the following components:

- Notional sites or actual sites, which are generally distributed across local housing market areas, strategy areas etc.
- Development typologies or known schemes, which provide details of the scale, mix, tenure and density of sites.
- Details of any funding streams, specifically where public funding has been secured to assist the delivery of sites.
- Landowner sale value / agreed benchmark land value (BLV).
- Build costs and known legislative change that could impact on costs over the plan period.
- The average cost of S106, CIL and policy requirements particularly in relation to the provision of affordable housing.
- A contingency allowance.
- Developer return, including for example those associated with private market and affordable housing.
- Professional, sales / marketing, finance and legal fees / costs; and
- Sensitivity testing, intended to assess the viability of a range of affordable housing requirements in respect of sites of which are of different scales, mix and tenure and market / strategy areas.

59. A KSSVA provides more detail and certainty about the delivery of individual sites than a PWVA. They offer the opportunity to reflect local circumstances within the broader market / sub-market areas as well as some known costs, rather than simply a notional approach.

60. The viability appraisal should be based on the known / best available evidence and include the following details:

- The scale, mix, type, tenure, density and phasing of the proposed development.
- Land ownership and land value or BLV.
- Building costs.
- Site specific infrastructure costs.
- A contingency allowance

- Professional, sales / marketing, legal and finance fees / costs.
- The known cost S106, CIL and policy requirements.
- Developer return, including for example those associated with private market and affordable housing
- Estimated gross development value

61. The data to be included in the development models for the PWVA and KSVA should, where possible, be drawn from established sources e.g. the Building Costs Information Service (BCIS) and / or based on local derived evidence and agreed with the Development Plan's Viability Working Group.

62. The evidence contained in the PWVA and KSVA must demonstrate that the policies and proposals contained within the emerging development plan in relation to matters such as community benefits, in particular affordable housing, are sound and deliverable over the plan period.

63. Detailed guidance in respect of the approach to undertaking a PWVA and KSSVA is contained in Chapter 5 of the DPM.

Site specific viability assessment

64. Where a PWVA and a KSSVA are in place, the SSVA should follow the approach taken in these appraisals. If a PWVA or KSSVA isn't available, the SSVA should, ideally, follow the model prescribed by the LPA. Where a developer uses a different approach, the model presented must contain all of the relevant elements.

65. A SSVA should include the following information:

- **Build costs** based on appropriate data, for example that contained in the PWVA / KSSVA or BCIS. This should include a breakdown of the different components of the development e.g. for a residential development this would include costs for different house types, tenure, sizes, density etc.
- **Site-specific infrastructure costs**, which might include access roads, landscaping, sustainable drainage systems, green infrastructure, connection to utilities and decentralised energy systems.
- **Abnormal costs**, including those associated with treatment for contaminated / brownfield sites or listed buildings, phased or complex sites.
- **Contingency allowance,** intended, if necessary, to accommodate a change in economic circumstances / site specific issues
- **S106 / CIL and policy requirements,** including the cumulative costs of contributions towards matters such as affordable housing, infrastructure, biodiversity enhancement and any other relevant policies or standards.
- **Finance costs** including those incurred through loans.
- **Professional, sales / marketing and legal fees** incorporating organisational overheads associated with the site.
- **Developer return,** usually set at between 15 - 20% on revenue for market value houses and 6% on revenue for affordable houses.

- **Land values / BLV**, this should be based on the data contained in the PWVA. In the absence of the PWVA, the BLV should be based on the existing use value of the land, plus a premium for the landowner. The premium for the landowner should reflect the minimum return at which it is considered a reasonable owner would be willing to sell their land. The BLV must take into account S106, CIL and policy requirements, abnormal costs, infrastructure costs and professional site fees, and
- **Gross development value (GDV)**, is informed by locally derived evidence, which sets out the potential value of the development once the scheme is complete and ready for sale or rental. In the case of residential developments this typically includes details of the sales values of the house types.

Viability in the examination of Development Plans

66. Guidance in relation to the examination of PWVA and KSSVA is contained in PEDW ITM – Local Development Plans.

Viability in casework

67. Viability in casework can relate to a number of different factors, but generally it is concerned with the negative impact of unanticipated or abnormal development costs or the total cost of S106, CIL or policy requirements on the GDV of a site and the scale of the return to the site developer.

68. The starting point for appraisals is that:

    - All development proposals must be policy compliant, and

    - That the price paid for land is not a relevant justification for development proposals not being policy compliant.

69. A SSVA can be produced by either the site developer or the LPA for a development where it can be demonstrated that exceptional circumstances exist. PPW, paragraph 4.2.22, defines exceptional circumstances as *'where further information on infrastructure or site costs is required or where a recession or similar significant economic changes have occurred since the plan was adopted'*.

70. In effect, the definition provided in paragraph 4.2.22 is wide ranging and allows the decision-maker to take a pragmatic approach to determining what constitutes exceptional circumstance. As outlined earlier, the exception to this is land value which is intended to be at a level which ensures policy compliance.

71. Paragraph 4.2.22 also makes clear that '*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 development plan and the viability evidence underpinning it are up-to-date, and any change in circumstances since the plan was adopted'.*

72. This provision allows the decision-maker to make a balanced and reasoned judgment about whether, based on the evidence presented a scheme is viable. If the decision-maker concludes that a scheme is unviable they can, if they have the appropriate

evidence, consider how the scale or nature of the community benefits sought can be adjusted to make a scheme viable. In doing so, the decision maker must have regard to the need to ensure policy compliance.

73. Where an SSVA is produced it must be accompanied by evidence that demonstrates that exceptional circumstances exist that are relevant to the development and clearly explain how these circumstances have impacted on the GDV of the site. As far as possible any evidence presented as part of the SSVA should be reflective of local market conditions and be compliant with the policies in the adopted development plan. If this evidence is not available, the LPA and applicants / appellants should identify and evidence any adjustments to reflect the cost of policy compliance. This is so that historic BLV of non-policy compliant developments are not used to inflate values over time.

74. In cases where the need for and / or findings of the SSVA are disputed, a rebuttal appraisal should be submitted by the opposing party. The rebuttal must clearly explain those areas that are in dispute, the nature of the disagreement and, where appropriate, be accompanied by supporting evidence.

75. When reviewing a SSVA, Inspectors must be rigorous and satisfy themselves that the appraisal and any supporting evidence is comprehensive, accurate and consistent with the known and suggested facts of the case. Where there is insufficient, inaccurate or contradictory evidence is provided, for example in cases where no rebuttal statement has been submitted, the decision-maker can ask for additional information from the parties, but this should only be done where there is a compelling reason to do so.

Additional guidance

76. Additional guidance in respect of PWVA and SSVA is contained in PPW and the DPM. There is currently no detailed guidance for SSVA available for Wales. However, viability guidance was issued by the Ministry for Housing, Communities and Local Government (MHC&LG) in December 2024. The MHC&LG guidance provides advice in relation viability issues which are common to England and Wales and can be viewed at Viability - GOV.UK

Other Casework Matters That Might Arise

Affordable housing

77. 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).

78. 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.

75. In Tiwana[5], the judge made an obiter comment that "91. […] The divergence from the definition in the NPPF would go to the weight to be attached to the affordable housing as a factor in favour of the appeal but did not justify disregarding it entirely." Therefore, it follows that you should have regard to the provision of and proffered 'affordable housing' provided by an obligation and consider the weight to be attributed to it accordingly, even if it does not meet the definition in TAN 2.

Pay back clauses

79. 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

80. 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

81. 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.

82. 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

[5] Tiwana Construction Ltd v Secretary of State for Housing, Communities and Local Government and another [2025] EWHC 1485 (Admin)

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.

83. 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

84. 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

85. 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.

86. 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

Blue Pencil Clauses

87. Some obligations contain a mechanism that provides that for any obligation which an Inspector finds does not pass the statutory tests shall have no effect and consequently the owner and/or other covenanters shall not have liability for payment or performance of that obligation.

88. You should consider each and every obligation, making it clear in the decision which obligations pass the tests and whether those obligations amount to a material

consideration to which weight can be attached. 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.

Grey Pencil Clauses

89. Although less common, some deeds may contain a mechanism which gives the Inspector a degree of discretion to amend the amount provided within the obligation. These are sometimes known as a 'grey pencil' clause.

90. As an example: the obligation may say "the number of affordable housing units shall be either 10%, or "such other percentage as may be determined by the inspector". The parties may suggest differing percentages although you may come to a different conclusion for example finding that a specific amount between those figures would be acceptable. Whatever conclusion you reach, you must always be satisfied that the evidence supports it. These clauses must therefore be approached with caution, remembering that legally, you are only allowed to take into account relevant and material considerations.

91. In all cases where the deed either requires or allows the inspector to insert, delete or amend the contents of the obligation itself, the wording of your decision should make it completely clear whether you are doing so, and in precisely what terms. In such cases, it may also be helpful to refer back to the point in your conclusions.

92. You should also be mindful of fairness and ensure that any decision in respect of a 'grey pencil obligation' does not come as a surprise to the parties. It may therefore be necessary to seek the views of the parties, particularly where you conclude a different figure to the one suggested by the parties.

Multiple Counterpart Obligations

93. 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

94. 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.