1. **Introduction**

1.1 A planning obligation is a legal instrument and a negotiating tool available to a local planning authority (LPA) and a developer who is seeking planning permission in circumstances where planning conditions are not appropriate. Planning obligations can be either in the form of an agreement between the developer and the LPA or in the form of a unilateral undertaking given by the developer normally in the context of a planning of an appeal.

1.2 The current law governing planning obligations is set out in ss.106-106C of the Town and Country Planning Act 1990 (TCPA) and came into force on 25 October 1991 and affects only obligations entered into on or after that date. Prior to this date, a different set of legal requirements applied under the old style s.106 of the TCPA.

2. **What Can A Planning Obligation Do?**

2.1 Section 106 (1) states that any person interested in land in the area of a LPA may by agreement or otherwise enter into a planning obligation which:

2.1.1 Restricts the development or use of land in a specified way;

2.1.2 May require specified operations or activities to be carried out in, on, over and under land; or

2.1.3 Require the land to be used in any specified way; or
2.1.4 Require sum/s of money to be paid to the LPA.

2.2 The following points should be noted:

2.2.1 ‘Any person interested’- this means a person with a legal interest in land. This would include a freeholder, leaseholder and a mortgagee. All persons with an interest in the land subject of the obligation must be a party to it otherwise they are not bound by its terms. In addition, it cannot bind a superior title so a tenant entering into the obligation cannot bind the landlord but will bind all subsequent sub tenants. If the lease comes to an end then the obligation will only bind the original covenantor.

2.2.2 An obligation cannot bind parties who have existing rights in the land at the time the obligation is entered into unless they consent to be bound by it. If there is a mortgage on the property then the mortgagee must either be a party to the obligation or agree to be bound by it otherwise the mortgagee will be able to exercise its power of sale free of any covenants in the obligation.

2.2.3 A planning obligation can impose restrictive covenants e.g. restricting the development or use of land and positive covenants e.g. requiring works to be done or money to be paid.

3. **Formalities**

3.1 There are a number of formalities which planning obligations must comply with:

3.1.1 A planning obligation must be in the form of a deed;

3.1.2 The deed must state it is a planning obligation for the purposes of section 106;

3.1.3 It must identify the land subject to the obligation;

3.1.4 It must identify the parties to the obligation and state their interests;

3.1.5 It must identify the LPA by whom it is enforceable.

3.2 In addition:

3.2.1 A copy of the planning obligation must be given to the LPA and;

3.2.2 It is registrable by the LPA as a local land charge

4. **Government Policy**

4.1 In 2010, the Government introduced the community infrastructure levy (CIL) under part 11 of the Planning Act 2008. The Community Infrastructure Levy Regulations 2010 (as amended) 4 (CIL Regulations) came into force on 6 April 2010.

4.2 The CIL Regulations for the first time, set out in law, the tests that a planning obligation must comply with in order to be considered a material
consideration.

4.3 Regulation 122 of the CIL Regulations (Limitation on use of planning obligations) states that:

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

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

4.3 Government policy on planning obligations was previously set out in Circular 5/2005. This was cancelled, together with a number of other circulars and planning policy guidance notes, in 2012 with the publication of the national planning policy framework (NPPF) and its associated guidance in 2014, the national planning policy guidance (NPPG).

5. Planning Obligations & CIL

5.1 Where CIL is not adopted by an LPA, section 106 agreements will continue to be used, although an LPA’s ability to use more than five separate planning obligations to pool contributions towards an infrastructure type or project common piece of infrastructure was phased out after April 2015. This pooling provision doesn’t apply to affordable housing or any mitigation measures (for eclogy) relevant to Pagham Harbour.

6. Arun Policy & Procedures for S106

6.1 Commuted sums\(^1\) are secured by the Council for a range of infrastructure matters. The main ones are as follows.

   a) Highways
   b) Education
   c) Libraries
   d) Fire Service
   e) Health
   f) Public Open Space/Play facilities
   g) Leisure
   h) Community Facilities

6.2 Sums secured for Highways, Education, Libraries and the Fire Service are usually passported to West Sussex County Council as the provider of these services either directly or via ADC. As a result of the ‘pooling’ restrictions referred to above most Planning Obligations are now usually quite specific about which piece of infrastructure an obligation will be used to help fund. Furthermore, they must be supported by evidence to show how the contribution meets the tests under Reg. 122, as set out in paragraph 4.3 above. Similarly sums secured for Health purposes are usually passported to the NHS, again to support a specific facilities or location.

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\(^1\) A commuted sum is a payment secured through a legal agreement to mitigate harm caused by the development. It is often used to secure payments for the provision of infrastructure.
6.3 Sums secured for Public Open Space, Leisure and Community Facilities are often retained by ADC as the Council in the main is responsible for delivering these amenities and facilities. However, there are several examples of where sums, or facilities, have been provided directly to a Town or Parish Council where they are the main provider of a local facility. Where a commuted sum is secured to enhance play facilities or provide open space improvements, all such sums have been taken to the appropriate Joint Area Committee. The Committee is requested to recommend to the ADC Cabinet Member to approve the expenditure. Where a sum is to be provided to a local facility for play, or open space provision, and where the local provider is the Town or Parish Council, the sum is passed to that Council by way of a Deed of Agreement between ADC and the Town/Parish Council; this follows consultation with the Town/Parish Council. Since the requirement for the terms of the obligation to be more specific, and to limit up to 5 S106 sums to any one project, new S106 agreements identify where the sums are to be used where the off site provision is required.

6.4 Sums for leisure facilities are usually pooled because such infrastructure usually has a large catchment area such as a swimming pool or a sports centre. However this has become more difficult because of the pooling restrictions. Where there is a local requirement then this should be expressed in the form of a costed project.

6.5 For larger developments a need might be identified for community facilities to be funded either in whole or in part. Recently community halls have been built as part of the Site 6 developments at Bersted and Felpham. These may be available for a range of other functions such as children’s nursery, health and leisure activities, wedding facilities etc. In the case of the two examples quoted, one is now owned and operated via ADC, whilst for the other the intention is to transfer it to the local parish council once construction is complete.

6.6 Commuted sums are also secured for Affordable Housing and Pagham Harbour mitigation measures². With regard to the former it is not practical to try and restrict the use of commuted sums to a small geographical location given that there are limitations on how long such contributions can be held before they should be spent. In rural areas it can take a long time for contributions to accumulate due to the lower levels of ‘windfall’ development. Therefore the sums are usually pooled in order to deliver the required outcomes more quickly. For the Pagham Harbour mitigation, any commuted sums that are secured are spent on either wardening or additional space for informal recreation and/or habitat creation.

6.7 ADC is likely to review its policy and procedures over the next 12 months. Parishes which wish to influence how commuted sums are spent should include appropriate policies in their neighbourhood plans and develop costed projects. If the parishes seek to agree any costed infrastructure schedules for their area with ADC in advance of considering individual planning proposals, then ADC can take this information into account as a material consideration in determining any applications received. To inform how

² This refers to an established and agreed access management strategy for Pagham Harbour whereby all new development within the 400m - 5km buffer area of Pagham Harbour is charged per new dwelling. Tariff has been calculated to mitigate impacts upon the Special Protection Area through the implementation of access management measures, set up in partnership with Chichester District Council and RSPB.
individual Section 106 requirements are identified and subsequently spent, ADC is usually reliant upon either individual consultation responses from bodies such as the NHS, or alternatively evidence that has been collected as part of the Local Plan process and, in particular, work on assessing infrastructure issues and requirements.

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