

Complaint reference:
16 005 626

Complaint against:
London Borough of Southwark

The Ombudsman's final decision

Summary: When imposing conditions for providing social housing through Section 106 Agreements the Council failed to implement a structured procedure for supervising compliance. It has now begun a borough wide audit into compliance.

The complaint

1. In brief the complaint is when imposing conditions in Section 106 Agreements with developers requiring social housing provision in a development the Council failed to:
 - Properly check compliance with housing provision conditions under section 106 Agreements;
 - Explain how it checks compliance;
 - Explain why it has not undertaken a borough wide audit to check compliance with Section 106 Agreements long after completion of developments.
2. The complainant, whom I shall refer to as Mr X, says the Council is failing to ensure delivery of the social rent or affordable housing the planning committee intended developers to provide. That causes an injustice to those who would otherwise be able to bid for these homes.

The Ombudsman's role and powers

3. The Ombudsman investigates complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. She must also consider whether any fault has had an adverse impact on the person making the complaint. I refer to this as 'injustice'. If there has been fault which has caused an injustice, she may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1)*)

How I considered this complaint

4. In considering this complaint I have:
 - Read the information presented with the complaint;
 - Put enquiries to the Council and reviewed its responses;
 - Shared with Mr X and the Council my draft decision and reflected on comments received.

What I found

5. Section 106 of the Town and Country Planning Act 1990 allows councils to enter an agreement with a developer to whom it grants planning permission to achieve a planning gain. These may make a development more acceptable.
6. Councils may enforce the agreement. The Council may seek a court injunction if the developer or subsequent owner fails to comply with its duty. This is a discretionary power so it may not always follow that a failure will lead to action.
7. In deciding whether to use a Section 106 Agreement the Council must be satisfied it is:
 - Necessary to meet planning objectives;
 - Directly relates to the development;
 - Fairly and reasonably related in scale and kind to the development. (*National Planning Policy Framework paragraph 203, & 204*)
8. A Section 106 Agreement may:
 - Restrict the development or use of the land in any specified way;
 - Impose a condition to carry out specified action in, on, under or over the land;
 - Impose a condition to use the land in a specified way;
 - Impose a condition on the developer to pay sums to the Council on a specific date or periodically.
9. Councils may condition Section 106 Agreements to secure affordable housing within a development for which the Council grants planning permission. Each Section 106 Agreements where the Council wants some affordable or social housing contains a clause setting out what social housing units must be included. However, there is no standard clause. So when reviewing compliance the Council considers the wording in each agreement. Then it decides if the development meets the conditions set out in the agreement.
10. Social rented housing and affordable housing now have specific meanings. For my purposes I shall use the term social housing units.
11. Mr X says the Council has failed to supervise compliance with the Section 106 Agreements it entered with many developers over several years. In granting planning permission the Council's planning committee intended that the developers provide social housing units as set out in the Section 106 Agreements. Residents seeking affordable rented homes could apply for these homes. Mr X provided evidence showing that by failing to supervise compliance some developers have failed to provide the right number of social housing units. Or retained them after the first tenants left.
12. Without planned supervision and enforcement action Mr X fears residents will not have the housing councillors intended. In response to my enquiries the Council says it is taking legal action in response to several of the breaches identified by Mr X. It also accepts it did not have a systematic supervision procedure to check compliance. It relied on developers' voluntary compliance. The Council planned and recently introduced a new comprehensive supervision procedure. It recognises it needs to conduct a borough wide audit to check the provision developers have created. And check social housing units remain available as social housing units.

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13. In response to Mr X's concerns the Council says it has surveyed the 43 developments and sent Mr X its findings. The Council had to plan and set aside money for the full borough wide audit. It has set aside money to carry it out. The work will take until well into 2017 to complete.
 14. They survey is only part of the procedure. Once the Council discovers any failure to comply with the original conditions it must then consider if it should take enforcement action. Such action must be proportionate to any harm caused. That means failure to comply does not automatically mean enforcement action by the Council. It also needs to continue to check compliance in the future.
 15. The Council says:

"It is our intention to conduct an annual audit of all housing in the borough, as secured by a Section 106 Agreement. The purpose of which would be to maintain the agreed stock and to guard against any ... reclassification of units. The results of this annual survey will be published."
 16. As with all agreements the Council may agree to changes in how many social housing units the developer must provide but only in exceptional circumstances. The annual survey means the Council will contact each housing provider every year to confirm all properties secured by a Section 106 Agreement remain available as social housing units. Some of these properties will be subject to further investigation to ensure the accuracy of the audit rather than relying simply on developers returning a completed questionnaire.
 17. Councillors and Cabinet Members have approved the plans for an annual audit to help with deciding on whether to take enforcement action.
 18. In commenting on my draft decision Mr X says the Council charges developers an administration fee of 2% of the sum agreed in the Section 106 agreement. This is partly intended to cover the costs of monitoring compliance with the agreement. He believes therefore the Council could put more resources into both the audit and supervision of Section 106 Agreements.

Analysis – is there fault leading to injustice?

19. Until now the Council did not have a proper procedure for checking compliance with Section 106 Agreements. It relied on developers honouring the duty under the agreements. That failure means the Council does not know if developers provided all the social housing units intended under the agreements. It may act as encouragement for unscrupulous developers to agree to something they do not intend to provide knowing nothing would happen. So the Council's introduction of compliance checks is welcomed.
20. The Council accepts that fault. It has already reviewed compliance in many developments. It is rolling this out into a borough wide annual audit to ensure compliance. Until that audit is complete it is hard to know how many social housing units all section 106 agreements called for and how many developers delivered. Or indeed, how many remain social housing units.
21. An annual audit is costly, and the Council has set aside money to enable officers to complete the task and continue with it. The next stage will be to consider what, if any, action the Council should take where it identifies non compliance.
22. The Council failed to properly oversee compliance with Section 106 Agreements but proposes remedying that through the borough wide audit. It has already shared with Mr X its findings on some of the developments about which he

complained. It will need to consider now what action, if any, it should take for any non compliance.

Final decision

23. The Council failed to have in place a procedure for supervising compliance with Section 106 Agreements but it recognised that failing and has remedied it by agreeing to an annual audit.

Investigator's decision on behalf of the Ombudsman