



c/o ** Market Place
Bermondsey SE16 3UQ
19 November 2016

Paul Warren
Investigator
Local Government Ombudsman
Coventry CV4 OEH

Complaint ref: **16 005 626**

Dear Mr Warren,

Thank you for your email dated 14th Nov with the Ombudsman's draft decision and invitation to comment on the draft notice.

Firstly, we have comments to make on the wording of the following paragraphs of the draft decision notice:

Paragraph 10

"Social rented housing and affordable housing now have specific meanings. For my purposes I shall use the term social housing units."

We would like to point out that according to [sections 68 and 69 of the Housing and Regeneration Act 2008](#), 'social housing' encompasses both social rented and affordable rented housing. In order to avoid confusion we suggest that the term 'social rented housing' is used throughout the decision notice. Social rented housing is the legal definition at the heart of our complaint and the distinction between affordable rented and social rented housing collapses under the blanket term social housing.

Paragraph 11

"Mr X says that by failing to supervise compliance some developers have failed to provide the right number of social housing units."

Having provided the Ombudsman's investigation with evidence that developers have failed to provide the right number of social rented housing units and is taking legal action in relation to several of the [43 potential breaches](#) we identified, we feel that this paragraph should be updated to reflect this.

We suggest the following revised wording:

"Mr X provided evidence showing that by failing to supervise compliance some developers have failed to provide the right number of social rented housing units."

Paragraph 12

“In response to my enquiries the Council accepts it did not have a systematic supervision procedure to check compliance.”

This fails to reflect the Council’s admission in its (3/11/2016) response to question 5 of the Ombudsman’s investigation that a ‘small number’ of the 43 instances we submitted, *“have resulted in under-provision and are currently progressing these through legal channels, including trial at the High Court.”*

We suggest the following revised wording:

“In response to my enquiries the Council has said that it is taking legal action in response to several of the breaches identified by Mr X and that it did not have a systematic supervision procedure to check compliance.”

Paragraph 13

While Southwark is taking legal action against 2 out of the 43 developments we submitted to them (Hartley’s Jam Factory [99/AP/1361], Signal Tower[09/AP/1940]), we do not believe it can be certain that there are *“no irregularities”* in all the other instances (Southwark’s response to Ombudsman question 5).

Southwark acknowledges that it has no systematic monitoring procedure and while its [27-page detailed table of responses](#) to our 43 breaches gives a paper trail from planning committee reports through to S106 agreements and their variations, it does not actually state what has been delivered on site. Instead it is simply relying on ‘trust’ and the assertion that *“the S106 requires all affordable rented homes to be social rent”*.

We leave it to the Ombudsman as to whether this is a matter that should be commented upon and how.

Paragraph 14

The Ombudsman has noted in paragraph 6 of the draft decision notice, that enforcement powers are discretionary. Southwark currently has 12,000 people on its housing waiting list, so the presumption should be that for as long as there is a shortage of social rented homes for those who are unable to afford any other tenure, then harm is always inevitably caused by the failure to deliver social rented housing. Therefore the presumption should be that any failure to deliver social rented housing in relation to S106 agreements should result in enforcement action.

Southwark notes that it has not taken legal enforcement action in the case of Bermondsey Spa (ref:10/AP/3010), but claims that it has instead negotiated the delivery of the 44 missing units on another site. This still results in a net loss of 44 social rented units over the two sites and while the Bermondsey Spa scheme has been completed, its social rented housing has not been delivered. Enforcement action in this case has therefore not been proportionate because it hasn’t supplied a remedy.

Paragraph 207 of the National Planning Policy Framework says that:

“Local planning authorities should consider publishing a local enforcement plan to manage enforcement proactively in a way that is appropriate to their area. This should set out how they will monitor the implementation of planning permissions, investigate alleged cases of unauthorised development and take action where it is appropriate to do so.”

NPPF [planning guidance](#) also notes that *“The provisions of the European Convention on Human Rights (Articles 1 & 8) are relevant when considering enforcement action. There is a clear public interest in enforcing planning law and planning regulation in a proportionate way. In deciding whether enforcement action is taken, local planning authorities should, where relevant, have regard to the potential impact on the health, housing needs and welfare of those affected by the proposed action, and those who are affected by a breach of planning control.”*

We therefore think that Southwark should publish a local enforcement plan and that the sentence *“failure to comply does not automatically mean enforcement action by the Council”* should be reworded as follows:

“While failure to comply does not automatically require enforcement action by Southwark, when deciding whether enforcement action should be taken, it must have regard to the potential impact on the housing needs of those affected by the proposed action.”

Paragraph 16

We feel that the outline audit procedure proposed by the Council is inadequate.

In addition to what is proposed, the Council should cross check delivery data with the government’s [CORE lettings data system](#), the annual audit should be subject to verification by external auditors, and formally approved by both the planning committee and the Council’s Cabinet. This will help ensure accuracy and improve accountability.

We believe that the planning committee has an important role to play, as this is the body which determines how much social rented housing should be delivered by a development scheme in the first instance, and is therefore in the best position to confirm that the provisions intended have been achieved. Its meetings are public and the body has formal oversight in place.

Paragraph 20

We note that Southwark has agreed to allocate £60,000 to pay for software and staffing resources for monitoring purposes (response to Ombudsman’s question 6). We think that this is a very small amount and is wholly insufficient.

Southwark charges developers a 2% administration fee on the sum total of financial S106 contributions agreed, among other things for the purpose of monitoring S106 conditions. As can be seen from the table below this amounts to a considerable sum each year. We believe that far more of it should be invested to ensure that the S106 affordable housing conditions are monitored and enforced.

The key figures regarding Section 106 for the 2012-14 period are:

Table 1	2013 - 14	2012 - 13	2011 - 12
Total Section 106 negotiated	£105,592,645	£72,005,235	£67,335,721.00
Total S106 collected	£19,705,011.78	£39,240,933.71	£18,305,488.34
Total S106 expenditure (committed to projects)	£9,544,502	£7,854,434	£7,229,488.34
Total funds (included committed) at March 2011	£91,649,986.70	£74,967,001.52	£35,247,763.27

Extract from the Council's most recent [S106 contributions report](#)

Paragraph 22

While Southwark Council has promised to remedy its faults going forward, we believe it must also remedy any past and previous loss of social rented housing. We suggest the following sentence be added to the draft decision:

“In addition the Southwark Council should conduct a retrospective audit from the date of 2005 and take action to recover any lost social rented housing identified.”

I have no objection to being identified in the decision notice as Mr Flynn, we have been publicising this issue through our website and will continue to do so. However, I will leave it with you whether to continue to referring to me as Mr X in the final decision notice.

I look forward to hearing from you and please do not hesitate should you require further details regarding any of the above.

Yours sincerely,

Jerry Flynn
35% Campaign
www.35percent.org