

Item No. 6	Classification: Open	Date: 5 April 2023	Decision Maker: Not Applicable
Report title:		Affordable Housing Planning Enforcement cases.	
Ward(s) or groups affected:		multiple	
From:		Stephen Platts, Director of Planning & Growth	

RECOMMENDATION(S)

1. To note the work carried out in respect of planning enforcement of affordable housing obligations.
2. That the Council progress the planning enforcement cases as recommended and listed within the body of this report.

BACKGROUND INFORMATION

3. In 2015/16 concern was expressed in a compliant that the Council was not adequately monitoring affordable housing. That compliant was upheld by the Local Government Ombudsman.
4. To address that compliant the Council has undertaken a series of extensive audits of the affordable housing within the borough that was required to be provided through obligations within planning agreements. These agreements are often referred to as section 106 agreements by reference to the power under which they are made.
5. The audit process has looked at 188 developments and the section 106 agreements linked to them. The majority of developments were compliant. The affordable housing existing as described by the section 106 agreement.
6. 42 cases showed some deviation from the agreements that required further investigation by opening planning enforcement cases. To date 28 cases have been closed because the deviation has been remedied or the Housing Association has explained why an error in their audit return occurred.
7. 14 cases remain open a description of the position of each case is

the main matter to be considered by this report. 2 of the cases are considered to be more significant and are described more fully than the remaining 12 which are summarised.

KEY ISSUES FOR CONSIDERATION

8. **Gutenberg Court 177-184 Grange Road ref 11/AP/1390**
9. The Council entered into a section 106 agreement on 10th August 2011. That agreement secured nine affordable housing units. The planning committee report referred to nine social rented units.
10. Southwark law centre have noted this difference and have complained that the accommodation is let at a rent that is a percentage of market rent (affordable) rather than social rent. The result being that the current rent is higher than social rent.
11. Paragon Housing Association the Registered Social Landlord (RSL) that took the units is of the view that the section 106 agreement requires the rent to be affordable rather than social. The Council's legal department has reviewed the agreement. They agree with Paragon that the drafting of the relevant definition does refer to affordable rent and does not explicitly require social rent. The Council's legal advice is that there is therefore insufficient basis to take enforcement action.
12. The law centre says the agreement could be construed together with the committee report to require the units to be let at a Social rent. The Council's legal team disagree and consider that it is unlikely that a Court will construe the agreement in this way.
13. The agreement required 9 affordable housing units and these have been provided. The rent being charged does exceed that of Social rent, but it is still a form of affordable housing.
14. This site was referred to as part of the original ombudsman complaint in 2016. The Housing Association has operated on the basis that the units are for affordable rent for a number of years. To attempt to enforce a requirement for social rent will result in legal costs for the Housing Association and the Council. There is no clear prospect of the units switching to social rent so it is not considered to be in the public interest to pursue this matter further.

Cases similar to Gutenberg Court

15. Two further cases similar to Gutenberg Court with a similar wording of the section 106 agreement have also been identified. The number of units is not as great and the difference in rent is not as great, but there is in each case a difference.

Medical Centre St Giles House St Giles Road London Southwark SE5 7UD	3 units not let as social rent as per section 106 dated 12/5/11 (Planning Ref 11/AP/0196)	Not expedient to enforce on grounds that there is no clear breach.	Rents are controlled, but as affordable rather than social rent
20-30 Wilds Rents London Southwark	6 units not being let on social rented terms contrary to the section 106 agreement 3/8/11	Not expedient to enforce on grounds that there is no clear breach.	Rents are controlled, but as affordable rather than social rent

Former, 4 - 6 Bombay Street, SE16 3UX

16. This case was identified separately to the audit. The development has not been completely constructed and is not fully occupied. It is apparent that some flats identified as shared ownership have been sold privately. The developer is endeavouring to agree an alternative seven units or greater quantum of shared ownership housing with a Housing Association in respect of the remaining units in the development.
17. The Council is seeking an undertaking that no further flats are sold and that a payment in lieu of affordable housing is made if an agreement is not completed with a Housing Association in the next six months. If there is a failure to provide an undertaking and an amended agreement as described the Council will take legal action against the developer and purchasers of the original affordable housing units.

Claimed informal agreement to amend affordable housing provision

18. On two sites the operating Housing Association is claiming that they were allowed to vary the provision of social rented units by the GLA. The claim in each instance is that two socially rented units could be let as affordable rent. In each instance rental figures have been checked and the difference between total social rent plus service charge and total affordable rent inclusive of service charge is marginal.
19. These two cases are a breach of the agreement. There may have been an agreement between the Housing Association and the GLA about funding, but that will not alter the terms of the section 106 agreement.

20. In each instance the Housing Association financed the affordable housing in a particular way and have operated the development for a number of years in that manner. As there is little difference in practice between the two rents being charged and the number of units impacted is two on each site it will not be expedient to take legal action to seek to change the status of the units in question.

<p>Mabel Goldwin House 49 Grange Walk London Southwark SE1 3DY</p>	<p>Mix of affordable Housing does not reflect that secured in s106 agreement reference 14/AP/2102.</p> <p>Initially three, now two units let as affordable rather than social rent</p>	<p>Negligible rent difference. Claimed agreement to the change</p>	<p>RSL claim that the GLA allowed units to switch to affordable, although this is not recorded in the s106 or any variation.</p> <p>Flats 11 and 18 are both 2 beds.</p> <p>The current charges are:</p> <p style="padding-left: 40px;">Total charge (Inclusive of SC as Affordable)</p> <p>11 £201.27</p> <p>18 £200.93</p> <p>Comparison with other 2 beds let on social basis is shown below.</p> <p>Rent £164.87</p> <p>Service charge £35.91</p> <p>Total £200.78</p> <p>The addition of service charge has resulted in the affordable rent being 15p per week more</p>
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			expensive than Social Rent
44-50 Lancaster Street London Southwark SE1 0SJ	The S106 requires 4 social rented units, but the return shows 2 social rent and 2 affordable rent.	Negligible rent difference. Claimed agreement to the change	RSL claim that the GLA allowed units to switch to affordable, although this is not recorded in the s106 or any variation. The rents provided are:- Flat 1 is a 1 bed and the current all inclusive rent is £169.97 ; Flat 3 is a 2 bed and the current all inclusive rent is £178.73. These align with the social rent cap as inclusive rents.

Remaining cases

21. The remaining cases are summarized on the table below. The majority are awaiting confirmation that the breach has been remedied, whilst some still require further information to make a final decision on. The overall number of units of accommodation involved is relatively low in comparison to the 3480 social rent units in the borough.

Address	Breach	Position	Further action
7-13 Melior Street London Southwark SE1 3QP	one less unit provided as social rent than required by s106 dated 2/5/14 of 13/AP/3059	Breach admitted by Housing Association	Awaiting confirmation that the unit has been returned to social rent
Flat 504 22 Amelia Street London Southwark SE17 3BZ	1 social rented unit being let on affordable rent contrary to s106 ref 07/AP/0650	Breach admitted by Housing Association	Awaiting confirmation that the unit has been returned to social rent

118 Spa Road London Southwark SE16 3QT	One unit let on affordable rather than social rent, contrary to S106 connected to 09/AP/1098	Breach admitted, but with no explanation, difference in rent is substantial	Housing Association will be required to switch the unit to Social Rent as it appears to be entirely anomalous that it is let at affordable rent
Newington Industrial Estate 87 Crampton Street London Southwark	Flat 10 Flamingo Court appears to have been let in error as affordable rather than social rent	Breach admitted by Housing Association	The difference in the rent is substantial the Council will require reversion to Social Rent.
122-144 Southwark Bridge Road SE1 0DG And 124-132 Webber Street London SE1	3 Units let as affordable rather than social rent	Breach admitted by Housing Association	The difference in the rent is substantial the Council will require reversion to Social Rent.
2 Broome Way London Southwark SE5 7FY	Unit let as affordable rather than social rent	No explanation received	Further information required
Chambers Wharf Chambers Street London Southwark	One unit let at affordable rather than social rent	No explanation received	Further information required
Land At 1-20 Houseman Way 30-51 Houseman Way And 90-106 Benhill Road London SE5	Discrepancy with social rent - 22 in S106 but 18 provided by RP and 2 as affordable rent - therefore shortfall in social rent.	No explanation received	Further information required

Community, equalities (including socio-economic) and health impacts

Community impact statement

Equalities (including socio-economic) impact statement

Health impact statement

22. The provision of affordable housing is an important planning policy requirement. This is because there is a substantial under provision of this type of housing and a significant unmet need. This results in long waiting lists for accommodation for those in need who cannot access the housing market as easily as others.
23. A failure to provide affordable housing impacts those in need of accommodation. The audit has shown that apart from 4-6 Bombay street. Affordable housing units have been provided. No shortfall in numbers has been found, indeed overall more units than required have been provided. A common breach has though been the type of tenure that units are let under.
24. Social rent is the most protected type of tenure Housing Associations offer. The rent is calculated in accordance with a formula as opposed to being a proportion of market rent. In general this is the lowest rent and it is therefore this tenancy type that is generally sought to meet the needs of the most disadvantaged in terms of getting access to housing. In terms of the Public Sector Equality Duty, those with protected characteristics of age, disability, sex and race where a lack of access to the housing market is likely to be disproportionately higher provision of affordable housing will have a greater impact.
25. As the tenure with the lowest rent it is the hardest to provide. The report identifies instances where it has not been provided in respect of four units, but where no action is proposed. This is primarily because the rent being charged is only marginally higher than social rent. There are a further three cases relating to eighteen units where the section 106 agreement is not drafted in such a way that Social rent can be insisted upon. Finally there are five units where a breach is admitted, but a return to social rent has not been offered. The Council will require these units to revert to Social Rent terms.
26. These cases do have an impact on the community, but taking account of the overall level of provision of 3480 Social rent units it is clear that overwhelmingly compliance with the terms of section 106 agreements is being achieved. Overall more socially rented accommodation has been provided than was required. The impact of these cases overall is therefore not significant.
27. This report does refer to the potential to take legal action that either

directly or indirectly could in some instances deprive persons of their home or possessions. Prior to such action being taken full consideration of the persons Human Rights to a family life and to enjoy their possessions will take place. Any legal action will be in an open and public form where the effected person will have a right to be heard.

Climate change implications

28. Following council assembly on 14 July 2021, the council has committed to considering the climate change implications of any decisions. This report has no climate change implications.

Resource implications

29. This report refers to the potential to take legal action which would have resource implications for the Council. Legal action would only be recommended in this instance where there was a good prospect of success, the outcome, would be significant and the Council could recover its costs.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Director of Law and Governance

30. Comments from the director of law and governance must be sought, and included in the report, in respect of:
- Contracts
 - major regeneration projects
 - where any significant risks have been identified
31. Comments from the director of law and governance must be sought, and included in the report, in respect of contracts where the value is above the EU threshold.
32. This list is not exhaustive and when the report author is working closely with a lawyer a comment should always be sought.
33. Report authors are recommended to send a copy of all reports to legal services. Lawyers will give legal advice and provide comments when required.

BACKGROUND DOCUMENTS

34. The majority of these cases stem from the Council's Affordable Housing Audit. The returns from that audit have been used to identify a number of breaches.

Background Papers	Held At	Contact
Affordable Housing Audit	Planning Policy, Environment Neighbourhoods and Growth	Laura Hills, Planning Policy Manager
Planning Enforcement cases	Planning Enforcement, CIL and Section 106, Environment Neighbourhoods and Growth	Gavin Blackburn Planning Enforcement CIL and Section 106 Team Manager

AUDIT TRAIL

Lead Officer	Stephen Plats – Director of Planning and Growth	
Report Author	Gavin Blackburn – Manager Planning Enforcement, CIL and Section 106 Team	
Version	1.2	
Dated	5/4/23	
Key Decision?	No	
CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER		
Officer Title	Comments Sought	Comments Included
Director of Law and Governance	Yes	Incorporated
Strategic Director of Finance and Governance	No	No
List other officers here		
Cabinet Member	Yes/No	Yes/No
Date final report sent to Constitutional Team / Scrutiny Team	5 April 2023	