

The Off-Site Rule

Improving planning policy to deliver affordable housing in London



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February 2016

Introduction

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Home Truths

In 2014, London First published Home Truths¹ which called for a bold approach to increasing housebuilding in London. The report made twelve recommendations including:

- using new transport infrastructure as a catalyst to unlock more housing development;
- introducing a 'Domesday Book' for surplus public land in London to register and coordinate the release of this land for housing;
- giving London's boroughs a real financial incentive to help them accommodate new homes and, where boroughs consistently fail to meet their housebuilding targets, giving the Mayor discretionary power to step in and determine a greater number of applications for residential development; and
- providing more support to boroughs that want to start building again by abolishing restrictions on local authorities' borrowing against the value of their housing stock, where this would be within prudential rules.

Home Truths makes it clear there is no simple solution to London's lack of housebuilding – increasing supply requires action on multiple fronts. One aspect of this challenge is to increase the consistency and transparency of the planning process in relation to affordable housing (see on page 4 for a definition), which would help to get more homes built. This briefing note addresses two specific issues:

- the need for greater clarity about the acceptability of building affordable housing off-site where it can be clearly demonstrated that this would result in better outcomes, either in terms of the quality, quantum or mix of homes; and
- the need for greater transparency about how payments in lieu of the physical construction of affordable housing are spent by boroughs, placing a fixed time limit on a borough to commit funds to affordable housing projects, after which the money is transferred to the Mayor to be used in one of the Greater London Authority's (GLA) affordable housing programmes.

1. Home Truths: 12 Steps to Solving London's Housing Crisis, London First: March 2014

Soon after London has elected a new Mayor in May 2016, the lengthy process of revising the London Plan – the spatial strategy for the capital – will begin. The proposals put forward in this briefing note could easily be incorporated into the Plan as part of the review; they would be a modest contribution to a broader overhaul of housing and planning policy that is required to deliver the 50,000 new homes a year that London needs.

Policy context

The London Plan has always placed a strong emphasis on delivering the affordable housing generated by a private development on-site, although the original version of the London Plan, adopted in 2004, made reference to two alternative methods of delivering the affordable obligation through off-site provision or a payment in lieu.

Following the election of Boris Johnson as Mayor in 2008, a full review of the London Plan was undertaken and a revised Plan was adopted in 2011. The objective of obtaining the ‘maximum reasonable amount’ of affordable housing was retained but the two alternative methods of delivery became embedded into policy (rather than in the supporting text – the so called ‘reasoned justification’). This increased their importance in the determination of planning applications.

The London Plan 2015² states:

Affordable housing should normally be provided on-site. In exceptional cases where it can be demonstrated robustly that this is not appropriate in terms of the policies in this Plan, it may be provided off-site. A cash in lieu contribution should only be accepted where this would have demonstrable benefits in furthering the affordable housing and other policies in this Plan and should be ring-fenced and, if appropriate, pooled to secure additional affordable housing either on identified sites elsewhere or as part of an agreed programme for provision of affordable housing.

The GLA and boroughs apply the ‘exceptional cases’ test rigorously for off-site provision or payments in lieu and it can be difficult to get support for either option. However, the fundamental issue in London is the lack of consistency and transparency in terms of the circumstances in which either are allowed. A similar scheme with similar circumstances incorporating either off-site provision or a payment in lieu may be accepted in one borough, but not in a neighbouring borough, which makes the system unpredictable and difficult to navigate.

Starter Homes

In addition to the traditional affordable housing products – see the next page – The Housing and Planning Bill³ has introduced a new affordable product – starter homes. These are new build homes only for first-time buyers under the age of 40 and sold at a discount of at least 20 per cent of market value. The price of these homes after the discount is applied will be capped at £450,000 in London (and £250,000 outside London) with regulations detailing, amongst other things, any restrictions placed upon buyers about selling or renting the properties.

The Bill places a statutory duty on local authorities to promote the delivery of starter homes, and a requirement for a proportion of starter homes to be delivered on all suitable reasonably-sized housing developments – with the proportion and the reasonably-sized site to be consulted upon. To support the changes made in the Bill, the Government will also change the definition of affordable housing in the National Planning Policy Framework⁴ to include starter homes.

The introduction of starter homes will significantly alter the type of affordable housing that is built in the future. This doesn't, however, affect the proposals made in this briefing note. There is no indication that starter homes could not be built off-site and the Bill states that regulations will address how the payment in lieu of the physical construction of starter homes will work.

3. The Housing and Planning Bill (February 2016)

4. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/488276/151207_Consultation_document.pdf

Affordable housing tenure definitions

There are different types of affordable housing provided to eligible households whose needs are not met by the market. Eligibility is determined by local incomes and local house prices. Affordable housing should generally remain at an affordable price for future eligible households or for the subsidy that has gone into building the home to be recycled for alternative affordable housing provision.

There are three main tenures of affordable housing:

Social rented housing

Owned by local authorities or private registered providers with rents set through the national rent regime. It may also be owned by other persons and provided under equivalent rental arrangements if agreed by local or national government.

Affordable rented housing

Let by local authorities or private registered providers to households who are eligible for social rented housing. Affordable rent is subject to rent controls which cannot exceed 80% of the local market rent (including service charges, where applicable).

Intermediate housing

Homes available for sale or rent at a cost above social rent, but below market levels. These can include shared equity (shared ownership and equity loans), other low cost homes for sale and intermediate rent, but not affordable rent.

Off-site affordable housing

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The current system

When homes are built for private sale (or indeed rent) the policy expectation is that any affordable homes required as part of the development are built on-site. This is not set in stone, and in some instances a developer can build the affordable component on a separate site – often referred to as a ‘donor site’ – hence the use of the term off-site delivery.

In addition to the London Plan policy guidance set out in Section 1 above, national planning policy⁶ states that local planning authorities should set policies for meeting identified affordable housing need on-site. This is unless off-site provision or a financial contribution of broadly equivalent value can be robustly justified (for example to improve or make more effective use of the existing housing stock), and the agreed approach contributes to the objective of creating mixed and balanced communities.

A new approach

The presumption in favour of affordable homes being delivered on-site should remain. Sometimes, however, the nature of a development, site characteristics or local housing need mean that off-site delivery can offer better solutions in terms of the quality, quantum and mix of homes built. For example, planning policy guidance in London⁷ is evolving to offer greater support for higher density development in Intensification Areas, Opportunity Areas and town centres.

Such areas of high density urban living, in particular town centres, are not generally suitable for family housing and in many boroughs the most pressing need for affordable housing is for larger family homes. A policy allowance for off-site provision can therefore support the delivery of the right housing in the right location and better meet local housing need.

Greater clarity is required about the acceptability of building affordable housing off-site where it can be demonstrated that this would result in optimised delivery, either in terms of the quality or quantum of homes built.

6. Paragraph 50 of the National Planning Policy Framework 2012

7. Paragraph 1.1.9 of the Mayor of London’s Draft Interim Housing SPG (May 2015)

The onus should continue to be on an applicant to put forward a case for off-site delivery during pre-application discussions with the local planning authority, although the authority should retain the right to seek off-site delivery if they have a clear planning rationale for doing so. However, London Plan policy 3.12 should be amended to provide a clearer basis for assessing the appropriateness of an off-site strategy. The policy should identify criteria against which the main application site can be reviewed, such as:

1. high land value location;
2. existing site-specific physical constraints;
3. constraints arising from designated heritage assets on the main application site;
4. proposed built form (e.g. a tower or other single core building);
5. unaffordable service charges arising from the nature of the proposed development;
6. the identified local housing need can be better met off-site (e.g. family housing); and
7. relationship between the donor site and the main application site.

These criteria would provide a good starting point for the applicant and local planning authority to discuss the suitability of a proposal. Providing greater clarity about the operation of this policy would not dilute the policy imperative to maintain mixed and balanced communities.

The fact that a scheme is, for example, in a high value location would not mean that all sites in high value locations in central London would be eligible for off-site provision. The criteria would allow all parties to have a clear understanding of the factors that are taken into account when reaching a decision.

Matters for consideration

In revising London Plan policy, the following key issues would need to be addressed:

- 1.** The new policy should not be seen as, or become, an 'easy way out'. If the off-site process is pursued, the applicant would have to enter into viability-led negotiations.
- 2.** In developing a case for optimised delivery through off-site provision, some pragmatism is required, but generally an applicant must take into account the net additional provision arising from both the original site and the donor site(s). In other words, a donor site cannot simply accommodate the affordable housing generated by the development on the main site; that donor site will generate its own affordable housing requirement and the local planning authority has to consider the net additional provision of homes across all sites.
- 3.** Ideally a donor site should be located nearby, and preferably within the same borough, as the site of the main development. However, this is easier to achieve in some parts of London than others. Current policy places too much emphasis on provision within administrative boundaries and greater consideration should be given to provision within local communities and localised housing markets which can straddle borough boundaries. Similarly, off-site provision in areas of existing high affordable housing concentration will reinforce the existing housing tenure dominance and may not support mixed and balanced communities.
- 4.** Linked to (3), there could be a role for the London Land Commission to play. The Commission's register⁸ of surplus public land in London could be used to help identify donor sites in locations where boroughs and private developers are struggling to find a suitable site. This would also reduce the likelihood of the price of donor sites being inflated in the private land market.
- 5.** The timing of the delivery of a donor site is a key planning issue and can be controlled through a Section 106 Agreement. Whether the donor site(s) has to be delivered upfront, after a certain construction phase, or at the end of a project will have a critical bearing on cash flow and viability and thus the amount of affordable housing delivered.

8. See <https://maps.london.gov.uk/webmaps/LLC/>

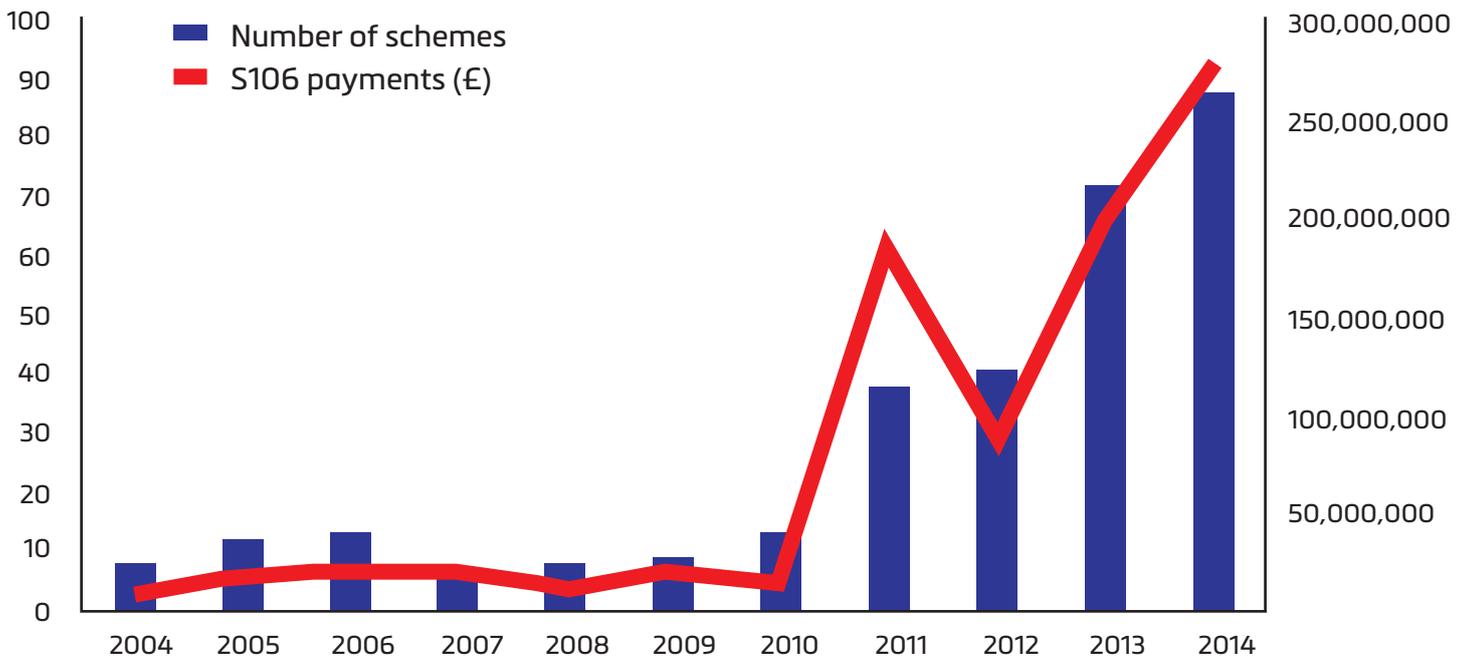
Payments in lieu

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The current system

In recent years there has been a significant increase in payments in lieu of affordable housing provision (also referred to as commuted sums)⁹. Figure 1 shows the number of private residential planning permissions in London from 2004-2014 which included a Section 106 payment in lieu of the physical delivery of affordable housing and the total value of these payments.

Figure 1: Section 106 payments in lieu 2004-2014



Source: London Residential Market Analysis, EGi, 2015

Between 2004 and 2010 only 70 residential planning permissions included a payment in lieu but since 2011, there has been a significant increase with 88 payments alone in 2014¹⁰. It has been estimated that in the past three years the value of payments in lieu represent 7,617 affordable homes¹¹.

9. EGi London Residential Market Analysis Report 2015.

10. London Residential Market Analysis, EGi: 2015

11. London Residential Market Analysis, EGi: 2015

There is, however, little information publicly available about how this money is spent. Indeed, because of the lack of transparency about how boroughs utilise this money, there are concerns that payments are not being used to support the delivery of affordable homes. Given the financial pressures facing boroughs, it could be that some money obtained by payments in lieu is used for general expenditure rather than to directly build or support the delivery of affordable homes.

A contributing factor to this situation is the limited guidance or legislation concerning payments in lieu. Where national planning guidance does offer advice, it is about the timing of when the payment should be made by the developer to the local planning authority. It does not address how the authority should spend the money or over what timeframe¹².

A new approach

The London Plan 2015¹³ policy guidance on payments in lieu states that:

A cash in lieu contribution should only be accepted where this would have demonstrable benefits in furthering the affordable housing and other policies in this Plan and should be ring-fenced and, if appropriate, pooled to secure additional affordable housing either on identified sites elsewhere or as part of an agreed programme for provision of affordable housing.

This policy should stay in place but possibly with the addition of new criteria for assessing the appropriateness of payments in lieu such as discussed in Section 2 in relation to off-site provision.

The onus should remain with the applicant to put forward a case for a payment in lieu during pre-application discussions with the local planning authority. However, the authority should retain the right to seek a payment in lieu if it is looking to fund a specific project such as the regeneration of a housing estate.

12. Paragraph 19 of the planning obligations advice in the National Planning Practice Guidance

13. Policy 3.12 (Part C): Negotiating Affordable Housing on Individual Private Residential and Mixed Use Schemes (London Plan 2015)

What needs to change is how payments in lieu are calculated, monitored and utilised. The points outlined below would make the system more transparent and accountable:

- **Clarity on calculation:** some local planning authorities use a fixed tariff, based on the average cost of building an affordable home in their borough, to calculate how much an applicant will pay if making a payment in lieu. Often this is a 'per unit' or 'per habitable room' tariff applied to the proportion of affordable housing once this is agreed. Some boroughs have a less standardised approach which creates uncertainty and leads to protracted negotiations. Local planning authorities should therefore be required, through GLA guidance, to establish a clear process for calculating what a payment in lieu will be. Such an approach – reviewed on a regular basis – and applied by each local planning authority through a standardised formula is the most transparent mechanism to achieve this.
- **Monitoring payments in lieu:** as part of the GLA's Annual Monitoring Report (AMR) process, local planning authorities should declare their income from payments in lieu versus their expenditure on the physical delivery of affordable homes.
- **Using payments in lieu:** local planning authorities should be given a fixed time limit to commit funds to affordable housing projects or the money should be transferred to the Mayor to be used in one of the GLA's affordable housing programmes. The timeframe to use the money could be three years as per the Right to Buy legislation where local authorities must return unspent receipts to the GLA¹⁴.

Matters for consideration

Requiring local planning authorities to declare their income from payments in lieu versus their expenditure on physical delivery is a small additional administrative burden as they should already be monitoring this information. The GLA's AMR provides a ready-made process to make this information publicly available.

Ensuring that boroughs have spent their payment in lieu income on affordable housing delivery and giving the Mayor a formal role in this process would require new legislation and statutory guidance.

Under the current system, assumptions can be made about the barriers to delivery that some boroughs might face to turn a payment in lieu into the physical delivery of affordable homes. For example, a borough may be short of land on which to build; new sites may be expensive to acquire; or a borough may not have the skills and resources to physically build the new homes.

To overcome these challenges, boroughs may find it easier and quicker to work with the GLA to deliver new homes from their payments in lieu and secure an agreement on nomination rights in return. Moving towards a pan-London approach is discussed further in the next section.

Cross-boundary co-operation

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Boroughs play a vital role in trying to meet the housing needs of their local communities but the need for more housing and, in particular, more affordable housing applies to the whole of London. And of course, administrative lines drawn on a map differentiating one borough from the next do not always reflect the geography of local housing markets which can straddle political boundaries.

Off-site delivery and payments in lieu both raise issues of cross-boundary delivery. Typically, but not exclusively, this relates to central London schemes that could support more homes in other parts of London where there is more space to accommodate housing growth and lower land values mean increased output.

There could be a role for the GLA, with its London-wide remit, to facilitate the cross-boundary provision of new affordable homes in London. Such a system would need clear rules and transparency, particularly in relation to how nomination rights between boroughs are addressed.

The introduction of the right to buy for housing association tenants funded through the sale of high-value council homes also has implications for cross-boundary provision. An amendment to the Housing and Planning Bill¹⁵ states that every high-value council home sold in London should be replaced by two affordable homes. While there is a lot of uncertainty about the detail of this process, if it is to work in practice it would seem likely that boroughs will have to work with the GLA, and possibly other partners, to facilitate the construction of the homes across the whole of London. Indeed, the Bill¹⁶ provides for the GLA, with the agreement of a borough, to step in and deliver a specified number of affordable homes as part of the two for one replacement.

Some London boroughs are being confronted with difficult choices about where to house their local residents with more and more cases emerging of boroughs rehousing residents in other parts of England¹⁷. This is a difficult issue which requires sensitive handling. But addressing London's housing needs within the capital's boundary must surely be the first, best option. At the moment, where there is agreement between boroughs, cross-boundary co-operation does take place. There is certainly a case for the GLA to play an active role in facilitating greater co-operation between boroughs. There is arguably a case for going a step further by giving the GLA enhanced powers to make this happen. More thought must clearly be given about how such a system would operate but as London seeks to deliver the 50,000 homes a year it needs, new mechanisms are needed to get more homes built.

15. Clause 72 (4) Reduction of payment by agreement, Housing and Planning Bill (February 2015)

16. Clause 72 (5) Reduction of payment by agreement, Housing and Planning Bill (February 2015)

17. 'High-cost London housing pushes out more low-income families', The Financial Times, 24 July 2015; 'Council considers new strategy', Inside Housing, 12 June 2015; and 'Strength in numbers', Inside Housing, 26 June 2015.