

## Stonewater (2) Ltd v Wealden District Council [2021]



Stonewater were seeking to bring forward a 100% affordable housing scheme, on a site which had a s106 agreement securing a 35% affordable housing provision. WDC refused to grant them CIL social housing relief for any of the affordable housing units on the basis that a variation of the 106 agreement would be required first, committing all the dwellings to be delivered as affordable housing. WDC also argued that the existing s106 agreement should be interpreted as making it unlawful for more than 35% of the dwellings to be delivered as affordable housing. Stonewater challenged WDC's decision in the High Court.

### Key points

- The level of discretion available to local authorities when considering applications for mandatory CIL relief for affordable housing
- The interplay between s106 agreements and the CIL regulations
- The types of considerations that RPs should take into account when looking to overprovide affordable housing on a site
- Wider issues regarding 'overprovision' of affordable housing.

### Discretion available in granting CIL relief

- Social housing relief is mandatory relief, but it is necessary for the required conditions to be met for it to be granted.
- The Council is not entitled to consider the effect of granting the relief in determining the application (i.e. on infrastructure provision or the question of whether there would be a perceived over-concentration of affordable housing in a particular locality).

- The Council will use its discretion in determining whether the evidence submitted adequately demonstrates that the conditions will be met.
- Where the conditions can only be met if the Council exercises some further discretion (i.e. in varying or entering into a new s106 agreement), the Council may exercise this discretion and have regard to such factors as impact on infrastructure provisions in doing so.

## Interplay between s106 agreements and the CIL regulations

- There is nothing in the CIL Regulations which specifies the exact form of evidence required to satisfy the required social housing relief.
- A s106 obligation securing a dwelling as affordable housing is not a prerequisite to a claim for social housing relief, but it can be useful evidence that the dwelling will be used in a way that meets the criteria for relief. It will be for the decision maker to assess the weight of the evidence.
- NB: Stonewater didn't enter into the s106 variation to secure all dwellings as affordable housing, as requested by WDC, as it would have likely meant it was no longer entitled to Homes England funding (based on the principle that it was providing additional affordable housing over and above the levels secured in the s106).

## Considerations for RPs in over providing affordable housing on a site

- The judge in this case considered that delivery of more than 35% of the homes would be in breach of the s106 agreement. The 35% requirement as fixed, not a minimum.
- For any unconsented sites it would be sensible to try and build in flexibility for additional affordable housing when the s106 is being negotiated, if it may be required. This may be by way of a higher percentage being specified or the provision of 'at least' XX% affordable housing on the site i.e. the policy figure is a floor and not a ceiling.
- Where there is a consented scheme without the required flexibility for over provision of affordable housing within the s106, it may be necessary to enter into a s106 variation or at least consider obtaining written assurance from the Council they would permit this.

## Wider issues

- The decision might be viewed as a prescriptive reading of the CIL Regulations and a blinkered interpretation of the s106 Agreement. There are indications that it may be challenged.
- The decision does raise questions around the interpretation of affordable housing provisions.
- What policy reason might there be to restrict the amount of affordable housing in a scheme? How would such a policy meet the Reg 122 tests?
- Why should a developer not be free to dispose of any of the dwellings at less than market value?
- Why should a Council prioritise securing infrastructure funding over much needed affordable housing.





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