

The Ombudsman's final decision

Summary: Mr X complained the Council failed to ensure a housing developer complied with planning conditions and allowed work to take place without a construction management plan. He also said the Council failed to take effective enforcement action. The Council was at fault for a delay responding to Mr X's enforcement complaint, but it did not cause significant injustice. There was no fault in the Council's decision-making.

The complaint

1. Mr X complained the Council failed to ensure a housing developer complied with planning conditions and allowed work to take place without a construction management plan. He also said the Council failed to take effective enforcement action.
2. Specifically, Mr X complained:
 - a) The developer did not include details about play equipment in a discharge of condition application relating to the CMP, hard landscaping, boundary treatments, and solar panel details for phase D of development.
 - b) The Council discharged all conditions except the construction management plan (CMP). Despite this, the developer started building and it took the Council 8-10 weeks to take action.
 - c) The developer put in a revised CMP application which the Council discharged in just three weeks. He said the Council also passed an application about a pumping station and sub-station in under a month. He said these decisions were approved too quickly, without consultation, and should have gone back to the planning committee as they represent significant deviations from the approved plans.
 - d) Five planning breaches remain but the Council will not act because the developer is working towards correcting matters. There are significant safety issues because the adoptable pavements and roadways are still incomplete. There is also flood risk because drainage is incomplete.
 - e) The developer sold his home as including solar panels as part of sustainable development, but the developer has not installed them and has now removed them from plans.

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- f) The developer has significantly reduced the public space on site by installing a pumping station and sub-station. Mr X questions whether the development still meets the minimum requirements for open space.
 3. Mr X said this resulted in missing essential public amenities, incomplete and dangerous footpaths and roads, and work going ahead uncontrolled.

The Ombudsman's role and powers

4. We investigate complaints of injustice caused by 'maladministration' and 'service failure'. I have used the word fault to refer to these. We consider whether there was fault in the way an organisation made its decision. If there was no fault in the decision making, we cannot question the outcome. (*Local Government Act 1974, section 34(3), as amended*)
5. If we are satisfied with an organisation's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

How I considered this complaint

6. As part of the investigation I have considered the following:
 - The complaint and the documents provided by the complainant.
 - Documents provided by the Council and its comments in response to my enquiries.
 - Town and Country Planning (Development Management Procedure) (England) Order 2015
 - The National Planning Policy Framework.
 - Planning Practice Guidance.
 - The Council's Development Management Enforcement Policy (February 2017).
7. Mr X and the Council had an opportunity to comment on my draft decision. I considered any comments received before making a final decision.

What I found

Decision making in planning

8. All decisions on planning applications must be made in accordance with the council's development plan, unless material considerations indicate otherwise.
9. Material considerations relate to the use and development of land in the public interest, and not to private considerations such as the applicant's personal conduct, covenants or reduction in the value of a property. Material considerations include issues such as overlooking, traffic generation and noise.
10. General planning policies may pull in different directions (e.g. in promoting residential development and protecting residential amenities).
11. It is for the decision maker to decide the weight to be given to any material consideration in determining a planning application.
12. Councils delegate most planning decisions to their officers. The types of decisions delegated to officers are normally set out in a council's constitution or scheme of delegation.

Amendments

13. Where planning permission is granted, developers sometimes find it necessary to make changes and sometimes this happens during the planning application process.
14. If the Council decides the changes are 'material', it may require the whole or part of the process begins again with a fresh application. However, if the changes are considered 'non-material' the Council may allow changes without re-starting the process, but only if:
 - it considers the procedural fairness of doing so. It should consider whether it might deprive any third party of the opportunity of making representations they might want to make; and
 - the nature of the application remains the same, so the amended proposal is still substantially the same as the original.
15. This type of amendment is known as a 'non-material' amendment. There is no statutory definition of what is or is not a non-material amendment. The question is one of fact and degree and a matter for the Council to decide.
16. Councils should decide non-material amendment applications within 28 days.

Planning conditions

17. Councils often apply planning conditions to a grant of planning permission to improve the quality of planning applications by mitigating any adverse effects. Planning conditions limit and control the way developers must implement planning permission.
18. To discharge a planning condition, an applicant must give a council information about how they intend to meet the condition. An applicant can apply to have all or part of a condition approved.
19. Councils should discharge planning condition applications within eight weeks.

Construction management conditions

20. Councils often impose construction management planning conditions on approvals for major developments. Typically, these conditions are aimed at reducing the impact and disruption caused by:
 - long working hours on construction sites;
 - nuisance from noise, dust, smoke and vibration; and
 - traffic from construction vehicles.
21. While construction management conditions may help lessen the harmful impact of major development, they cannot ensure it is avoided entirely. To justify formal enforcement action for this type of condition, councils usually need evidence of persistent breach of planning controls, that causes demonstrable harm to the public.

Planning enforcement

22. Councils can take enforcement action if they find planning rules have been breached. However, councils should not take enforcement action just because there has been a breach of planning control.
23. Planning enforcement is discretionary and formal action should happen only when it would be a proportionate response to the breach. When deciding whether to enforce, councils should consider the likely impact of harm to the public and

whether they might grant approval if they were to receive an application for the development or use. Government guidance encourages councils to resolve issues through negotiation and dialogue with developers.

24. Government guidance says: “Effective enforcement is important as a means of maintaining public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control.” (*National Planning Policy Framework July 2021, paragraph 59*)
25. Councils have a range of options for formal planning enforcement action available to them, including:
 - Planning Contravention Notices – to require information from the owner or occupier of land and provide an opportunity to rectify the alleged breach.
 - Planning Enforcement Notices – where there is evidence of a breach, to identify it and require action to remedy it.
 - Stop Notices - to prohibit activities without further delay where it is essential to safeguard the public.
 - Breach of Condition Notices – to require compliance with the terms of planning conditions already determined necessary for approval of the development.
 - Injunctions – by application to the High Court or County Court, the Council may seek an order to restrain an actual or expected breach of planning control.
26. However, as planning enforcement action is discretionary, councils may decide to take informal action or not to act at all. Informal action might include negotiating improvements, seeking an assurance or undertaking, or requesting submission of a planning application so they can formally consider the issues.

The Council’s planning enforcement policy

27. In exercising its enforcement policy, the Council aims to apply appropriate and proportionate remedies without taking formal legal action.
28. The Council will consider formal action where a party causing a breach is unwilling to comply with the Council’s suggestion of a voluntary solution.
29. The main source of the Council’s enforcement enquiries comes from reports made by members of the public.
30. The Council will inspect a site within ten working days of receiving an enquiry about a planning breach.

What happened

31. I have detailed below some of the key events leading to Mr X’s complaint. This is not intended to be a detailed account of what took place.
32. In 2017, the Council granted a developer planning permission for a new housing estate. That was after the local planning committee met to consider the application.
33. The Council’s report to the planning committee said the finished site will have extensive open space and landscaping, including a large open space with children’s play area and further significant open spaces. It said the proportion of open space is significantly higher than other recent developments in the area.
34. The approved plans included two play areas, a Local Equipped Area of Play (LEAP) and a Local Area of Play (LAP).

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35. The development was to be completed in phases and planning permission came with several conditions, including:
- No development on each phase shall take place until the Council approves a CMP for that phase.
 - No development on each phase shall take place until the Council approves engineering and construction details of the access roads.
 - The developer shall complete the carriageway and footway surfaces within each phase within three months of starting the penultimate house within that phase.
 - Before completing the first house on each phase, the developer shall provide details of the size, appearance, and location of solar panels.
 - Before landscaping works on each phase begin, the developer shall provide details of hard landscaping works, including play equipment.
36. In May 2019, the developer applied for permission to make changes to the layout of some houses on site, to accommodate a pumping station and sub-station.
37. The Council considered this was a non-material amendment application and approved the plans in June 2019. The planning case officer considered the changes would not materially alter the character of the development from the already approved plans, when looking at the overall scale and nature of the development.
38. In October 2020, the developer asked the Council to discharge several planning conditions, including a CMP for phase A of development. The Council approved all conditions except for the CMP, which it needed more details about.
39. Mr X contacted the Council on 15 June 2021 asking why the developer appeared to be progressing construction work on phase A of the development despite not having an approved CMP.
40. Mr X contacted the Council again about the lack of an approved CMP in July. In August he told the Council the developer had started construction work without a CMP in place. The Council opened an enforcement case on 23 August 2021.
41. Enforcement officers visited the site on 13 September 2021 and told the site manager that starting work without a CMP was a breach of planning control and the Council may issue a Breach of Condition Notice.
42. The developer contacted the planning case officer for a decision to discharge the condition about the CMP. It attached an earlier Council email containing written agreement to a revised CMP. The Council approved the revised CMP for phase A on 16 September 2021.
43. Also on 16 September 2021, Mr X complained the developer had not installed the play areas or finished the first phase roads.
44. The Council approved the CMP on 14 October 2021.
45. Mr X made a formal complaint about the Council's planning and planning enforcement departments on 19 October. He said he reported several breaches of planning and conditions, but the Council had not taken action. He said the developer compromised the safety and quality of life of residents.
46. The Council sent its stage one complaint response on 10 November 2021. It said planning enforcement takes time to look into and resolve. It confirmed there was a breach because the developer had not yet delivered the hard landscaping and

LEAP. It said it asked the developer for more information about the play equipment and for a timeframe for implementation.

47. The Council accepted it should have kept Mr X aware of progress.
48. Mr X questioned why the Council would not take enforcement action to send a message to the developer. He also said the Council approved the CMP too quickly, so the public did not have a chance to comment.
49. Mr X asked the Council to inspect the LAP on 6 December 2021.
50. The Council sent its stage two complaint response on 13 December 2021. It said the action taken is in the spirit of the planning application with compromise and negotiation to ensure a suitably fitting product for the community. It said it would consider enforcement action if the developer strayed.
51. Enforcement officers visited the site on 17 December 2021. They noted unfinished roads, a site compound three metres wider than agreed, and the LAP not installed.
52. The Council spoke with the developer in February 2022. The developer agreed to send details about the play areas, and about engineering and hard landscaping, plus provide an estimate on when they can finish the road surfaces.
53. The developer sent details for the LEAP in February and for the LAP in March 2022.
54. The developer also sent the Council a timetable for road surfacing and paths in March 2022. The timetable confirms:
 - The pumping station will be in use by the end of April 2022.
 - The developer will test road cores by the end of May 2022.
 - Remedial works and final surfacing will start by September/October 2022.

My investigation

55. In response to my enquiries, the Council told me:
56. It does not actively monitor planning conditions. Its policy is to be reactive to breaches brought to its attention.
57. It has approved several discharge of condition applications and two non-material amendment applications for the development.
58. The Council is considering details for the LEAP and LAP. If approved, the Council will seek implementation as soon as possible. If refused, the Council will seek alternate details or consider serving a Breach of Condition Notice.
59. The developer has until September 2022 to start road surfacing work. If it does not meet this deadline, the Council will again consider a Breach of Condition Notice.
60. It considers the site compound is fundamentally the same as approved, though slightly wider. This a minor breach, causing no unacceptable harm, and it is not taking action as a breach of condition.
61. It is possible to put in multiple applications to approve details required by a condition. The condition is not discharged until the Council approves all details. However, the Council accepts its decision notice approving details for the hard landscaping and boundary treatments could have been clearer that further details were required for the play equipment. The developer has now sent these details.

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62. The Council's decision to approve details for the CMP followed a 21-day consultation period including responses from the highways authority and environmental protection team, and comments from Mr X.
 63. The developer's plans to change the layout of some the houses to accommodate a pumping station and sub-station was a non-material amendment application. It was not an application for planning permission, so the requirements for publicity contained in the Town and Country Planning (Development management Procedure) (England) Order 2015 do not apply.
 64. Network capacity issues meant no more solar energy could not be harnessed at the site location. While a planning condition required approval of details about solar panels, it did not explicitly require solar panels to be provided. The reason for the condition was about appearance, not sustainability targets.
 65. The relocation of the pumping and sub stations was non-material in the context of the overall scheme. The amount of open space is considered suitable for the scale of the development.

Analysis

66. I will address each of Mr X's heads of complaint (a to f) below.
67. Discharge of condition applications do not have to include the whole condition; they can be made in parts. The Council accepts it could have made clearer the developer had not included play equipment. However, that does not amount to fault.
68. The Council does not have a statutory duty to monitor planning conditions for breaches and it is not a requirement of the Council's planning enforcement policy to do so.
69. Mr X's initial report of a potential planning breach came in June 2021. He then made further reports in July and August 2021. It took the Council until 23 August to open an enforcement case. That was too long and amounts to fault. However, I do not consider it caused Mr X significant injustice, as I found it did not affect the outcome.
70. The Council's policy states it will carry out a site visit within ten working days of receiving a complaint. It did not meet that target here. Once the Council registered the enforcement case, it visited the site 15 days later. However, I do not consider this was an unreasonable delay. It is not significant enough to amount to a finding of fault.
71. Enforcement action is at the Council's discretion. It looked into Mr X's enforcement complaints and its site visits led to positive discussions between the developer and the planning case officer. That is in keeping with the Council's enforcement policy.
72. The Council approved the CMP about seven weeks after Mr X's report. I do not consider it took an unreasonable amount of time to resolve the matter.
73. As the Council intended to approve the CMP it did not consider enforcement action was necessary or proportionate. That decision was in keeping with its policy and was not fault.
74. The Council must discharge planning conditions within eight weeks and has a duty to act promptly. I have not seen evidence the Council failed to properly consider the CMP. The Council considered comments from statutory consultees

and from Mr X. It was therefore not fault to approve the CMP in about three weeks.

75. The Council considered adding a pumping station and sub-station represented non-material changes. As such, the Council had to decide the application within 28 days. It was not at fault for deciding it within about three weeks. As the Council decided the changes were non-material, there was no need for consultation or to go back to the planning committee.
76. There is no statutory definition of non-material. It is a question of fact for the Council to decide. Mr X may consider the changes significant, but the Council did not. I have not seen evidence the Council failed to properly consider its decision, or that it took its decision unfairly.
77. The Council has been in contact with the developer about incomplete parts of the development. The developer put forward a timescale in which it will complete outstanding work. The Council's enforcement policy confirms it will first take an informal approach towards enforcement and will not take formal action where a party is willing to comply with the Council's requirements. That being the case, I do not find the Council at fault for allowing the developer the chance to correct matters and complete any outstanding work.
78. I have not seen evidence the Council asked the developer to include solar panels as part of sustainable development. The Council included a condition to ensure the solar panels appearance was in keeping with the area. The developer's decision not to include solar panels was based on feedback from the local energy network. Mr X considers this should have gone back before the planning committee. I have not seen any evidence to suggest a lack of solar panels meant the scheme must be considered again, or that it would have led to a refusal of planning permission for sustainability reasons. The lack of solar panels is a private matter Mr X must raise with the developer.
79. The original plans and planning permission indicate the amount of open space at the development was sufficient and was greater than other similar developments in the area. The Council did not consider the addition of a pumping station and sub-station significantly changed the overall scheme. This was a merits decision and I have not seen evidence the amount of open space has significantly reduced.

Conclusion

80. While I do not dismiss Mr X's complaint, planning enforcement action is discretionary. The Council must consider breaches of planning control but has no duty to take enforcement action where it does not see fit to do so. National planning guidance recognises councils may wish to reach informal agreements with developers to resolve breaches.
81. I have not seen evidence the Council failed to consider Mr X's complaints. I have also not seen evidence the Council failed to properly consider the nature of the planning breaches when deciding what action to take. I therefore do not find the Council at fault.
82. I have also not seen evidence of fault in the Council's consideration of the developer's discharge of condition applications and non-material amendment application.

Final decision

83. I have completed my investigation. The Council was at fault for a delay responding to Mr X's enforcement complaint, but it did not cause significant injustice. There was no fault in the Council's decision-making.

Investigator's decision on behalf of the Ombudsman