

The Ombudsman's final decision

Summary: Mr X complained about the Council's failure to protect his home from surface water run off from a construction site. There was no fault in the way the Council considered this matter. However, we did find fault in the way the Council kept and published key documents and background papers in relation to its planning decisions. This fault caused Mr X unnecessary confusion and injustice. The Council has agreed to remedy the injustice caused to Mr X and make service improvements for the fault we have found.

The complaint

1. Mr X complained that the Council failed to ensure that an earth bund to protect his home and others from surface water flooding, was effective for its intended purpose. Mr X said the bund was part of a scheme for housing development approved on land on the hillside above his home.
2. Mr X said that during heavy rainfall, his garden was flooded with contaminated water from the development site.

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. I refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
4. If we are satisfied with a council'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

5. I read the complaint and discussed it with Mr X. I read the Council's response to the complaint and considered documents from its planning files, including the plans and the case officer's reports for outline and reserved matters applications.
6. I gave Mr X and the Council an opportunity to comment on a draft of this decision and I took account of their comments before making a final decision.

What I found

Planning law and guidance

7. Councils should approve planning applications that accord with policies in the local development plan, unless other material planning considerations indicate they should not.
8. Planning considerations include things like:
 - access to the highway;
 - protection of ecological and heritage assets; and
 - the impact on neighbouring amenity.
9. Planning considerations do not include things like:
 - views from a property;
 - the impact of development on property value; and
 - private rights and interests in land.
10. Councils may impose planning conditions to make development acceptable in planning terms. Conditions should be necessary, enforceable and reasonable in all other regards.
11. Planning decisions can be for ‘full’ applications, where all or most details needed to make a decision are provided by the applicant. On larger developments, applicants often submit ‘outline’ applications, with plans that give an indication of what is proposed to be built, and include some details, usually including details of access to the highway. An outline approval can be followed by a ‘reserved matters’ application, which will provide all or most of the details needed to make a decision.
12. We normally expect to find evidence of consideration of the key material issues in the case officer’s delegated report, which is written to advise the decision making body or individual.
13. We accept that delegated reports might be written differently, as their target audience is a professional planner, not a member of the planning committee. However, delegated reports still need to demonstrate the core issues have been considered and set out the reasons for judgements on planning matters, albeit briefly stated.
14. The purpose of the report is not merely to facilitate the decision, but to demonstrate the decisions were properly made and due process followed. Without an adequate report, we cannot know whether the Council took proper account of the key material planning considerations or whether judgements were affected by irrelevant matters.
15. An explanation of what happened that is given after the events, either in a complaint response or during our investigations, may provide relevant evidence, but it will not necessarily prove the Council acted without fault. This is because we need evidence that shows the Council exercised its discretion properly at the time its decision was made.

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16. The impact development might have on land drainage can be a material planning consideration. If land drainage is raised in an objection letter to a planning application, we would expect to see evidence to show the Council had taken the issue into account before it made its decision. Without some evidence to show the Council considered the issue, we cannot know whether it has exercised its discretion properly.
 17. However, even if we find fault in a failure to consider drainage issues during the planning process, it does not mean we will expect the Council to provide a significant remedy for the consequences. A grant of planning permission does not allow developers to cause damage to their neighbour's land. Because of this, we would not expect councils to pay compensation caused by the acts or omissions of private individuals.

Openness in local government

18. Decisions made by officers using delegated powers are controlled by the Openness of Local Government Bodies Regulations 2014. The 2014 regulations require that certain decisions and their background papers are publicised on council websites, as soon as is practicable after the decision is made.
19. The 2014 regulations apply to a decision that has been delegated to an officer, if it:
 - grants a permission or licence;
 - affects the rights of an individual; or
 - awards a contract or incurs an expense that materially affects the council's financial position.
20. The 2014 regulations require that any such decision should be made available to the public:
 - at the council offices;
 - on the council's website, if it has one; and
 - by any other means the council considers appropriate.
21. The written records should include the following information:
 - the date the decision was made;
 - the record of the decision, its reasons and the background papers relied on;
 - details of alternative options, if any considered and rejected; and
 - a record of any relevant conflict of interest.
22. The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 applies to council meetings, which should be held in public unless certain exceptions apply.
23. The 2012 regulations require the publication of:
 - the matter that will be considered/decided;
 - meeting details, including dates and time, venue;
 - details of the decision maker, or committee; and
 - details of relevant documents that will be considered.

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24. After the meeting has happened, the outcome of the meeting should be published, along with background documents relating to the decision at the council's office and on the council's website, if it has one.

Background

25. Mr X's home backed on to a hill which was open land. Several years ago, a development company submitted an outline permission to develop the land for housing. The application was approved subject to further details being provided in a reserved matters application.
26. A reserved matters application was subsequently approved but the land was sold to another company. The new company wanted to vary the style and layout of the houses that had been approved, so submitted a new application to vary the approved planning permission.
27. The application to vary approval was considered by a planning case officer.
28. The case officer wrote a report which included:
- a description of the proposal and site;
 - a summary of planning history considered relevant;
 - a summary of comments from neighbours and other consultees;
 - a summary of planning policy and guidance considered relevant;
 - an appraisal of what were, in the officer's view, the main planning considerations, including impact on amenity, drainage and flood risk, and highway safety; and
 - the officer's recommendation to approve the application, subject to planning conditions. Some of the conditions related to drainage of the development.
29. The case officer's report was not saved on to the Council's website along with other background papers.
30. The variation application was approved by a senior manager using delegated powers.
31. After permission was granted, the developer sought to discharge planning conditions. The developer submitted documents relating to drainage conditions, one of which included details of a temporary scheme to deal with site drainage until permanent drains were installed.
32. The temporary drainage scheme options were:
- making no arrangements and allowing rainwater to soak into the site; or
 - installing 'primary' drainage infrastructure within approximately 26 weeks from the date of the condition discharge application.
33. If these options did not work/happen, then the developer might:
- seek permission from the local water company to discharge surface water into existing drains; or
 - install bunds (mounds of earth) to catch water and for it to be removed by a tanker vehicle.
34. The Council's case officer pointed out that the temporary drainage scheme suggested by the developer was not required by planning condition, and merely gave options of the measures the developer might take. The Council's drainage conditions required a scheme for the housing development it had approved.

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35. After construction work began, there was a heavy rainstorm. Surface water ran off the site and onto Mr X's garden. Mr X noticed that an earth bund was not 'V' shaped to catch water, but a straight line, which merely diverted water along the site before it ran onto his land.
 36. The case officer said that he visited the site and met both Mr X and a representative of the developer. The case officer said that the developer agreed to regrade and move the bund. The developer also said they would install an attenuation tank and other drainage to help drain the site during construction.
 37. Mr X complained because he felt the Council should have done more to protect him.
 38. During my investigation, I noticed that the Council's website did not include all the information I would expect to see. The website page for the variation application did not include a case officer report. The decision notices and some of the background papers, including correspondence with the developer about condition requirements, were also absent.
 39. On one of the condition discharge applications, the summary says the status is 'Final Decision', but further down on the same page, in the important dates section, it says 'Not yet determined'.
 40. I have discussed what I had found with a senior manager who explained that the Council is aware of the problem with publishing documents, and that it is caused by two different software programmes that do not work well together. The manager said that key documents, like the case officer reports should be 'pulled through' onto the Council's website, but this does not happen. The Council has been considering a software solution to the problem but expects it will take several months to resolve.

My findings

41. We are not a planning appeal body. Our role is to review the process by which planning decisions are made. We look for fault in the decision making process, and when we find it, we decide whether it caused an injustice to the complainant.
42. Before it made its decision to approve the variation application, the Council considered the plans, the site history, comments from consultees, including the public and other matters it considered relevant. Mr X's main concern is about the adequacy of the bund, but there is no evidence to show the Council required the bund for drainage protection.
43. When he realised the bund did not catch surface water, Mr X might have expected the Council should have required better protection before work began. As we are not a planning appeal body, we cannot say what we would have decided in these circumstances. These are matters of planning judgement for the Council to decide.
44. Providing the Council follows the proper decision making process, it is free to exercise its planning judgement as it chooses. The Council followed the decision making process we would expect and so I find no fault in its decision to approve the variation application.

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45. However, I did find evidence of fault in the way the Council keeps and publishes its planning records. The case officer report for the variation application is an important background document, as without access to it, it is difficult to understand how the Council made its decision and what weight it gave to the different planning considerations. It was not published on the Council's website and this was fault.
46. The variation approval was subject to conditions, which required more information to be provided and considered before a decision was made. I looked at some of the condition discharge applications including that which was related to drainage conditions. The condition discharge records do not include a decision outcome or some of the background documents that were considered before a decision was made. This was fault.
47. The summary of details on the website for one of the condition discharge applications shows the decision status as both final and not yet determined. This inconsistency was fault.
48. The faults I have found, particularly the failure to publish key documents has caused confusion and frustration for Mr X. I will recommend a remedy for the injustice caused by the fault I have found.
49. I recognise the Council might find this fault I have found difficult to resolve, but it is clearly possible that other people might be similarly affected or caused a more significant injustice. It is also possible that other council services might have similar compliance issues. Because of this, I would expect the Council to give this matter appropriate priority and resolve it without undue delay.

Agreed actions

50. To remedy the injustice caused by the fault I have found, the Council has agreed to:
- apologise to Mr X for the confusion and frustration caused by the failure to keep and publish proper records;
 - pay Mr X £150 for his time and trouble in coming to the Ombudsman; and
 - rectify its website records as they relate to this complaint, so Mr X can see how the Council made its decision on the variation application and condition discharge decisions and the documents it relied upon.
51. This part of the remedy will be completed within four weeks from the date of my final decision statement.
52. The Council will also:
- resolve the document management issue and publish documents in line with the regulations;
 - establish temporary solutions or 'work arounds' to ensure that as many documents as possible that should be available under the regulations are published on its website; and
 - check that other Council services whose work is caught by the regulations and ensure they are operating lawfully.
53. The Council will refer the remedy set out in paragraph 52 to its relevant scrutiny committee and ask it to monitor and check compliance. The remedy should be completed within three months from the date of our final decision. If any of the

changes necessary are not completed within that time, the Council should provide us with updates and reasons for delay at intervals of no less than three months until the remedy is completed. We may re-open our investigation if the Council does not complete the remedy within a reasonable time.

Final decision

54. There was some fault in the way the Council kept and published decision records. I complete my investigation because the Council agreed to accept my findings and recommendations.

Investigator's decision on behalf of the Ombudsman