

The Ombudsman's final decision

Summary: The complainant says the Council gave poor planning advice and then contradicted that advice when granting planning permission for a development similar to that he had put forward. The complainant wishes the Council to pay his costs. The Council has shown it followed planning procedure and considered all relevant information when deciding in committee to grant planning permission. I therefore find but for an error in the officer's report the Council acted without fault and therefore I cannot challenge the merits of its decision.

The complaint

1. In brief, the complaint is that when considering pre-planning advice, the Council failed to:
 - Give consistent pre-planning advice and response to questions about that advice;
 - Impose the same planning conditions requiring local residency and offsite benefits on a later planning application the Council had said it would impose when giving the complainant pre-planning advice;
 - Explain why it gave planning permission for an application contrary to the advice given to the complainant.
2. The complainant, whom I shall refer to as Mr X, says this meant he has not been treated fairly and unnecessarily expended £1,455.00 on proposing a scheme. Mr X says he could have put in a similar scheme to the successful application but did not do so on the Council's advice.

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. We cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us

about something a council has done. (*Local Government Act 1974, sections 26B and 34D, as amended*)

5. The law says we cannot normally investigate a complaint when someone can appeal to a government minister. However, we may decide to investigate if we consider it would be unreasonable to expect the person to appeal. (*Local Government Act 1974, section 26(6)(b)*)
6. The Planning Inspector acts for the responsible Government minister. The Planning Inspector considers appeals about:
 - delay – usually over eight weeks – by an authority in deciding an application for planning permission
 - a decision to refuse planning permission
 - conditions placed on planning permission
 - a planning enforcement notice.
7. If 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

8. In considering this complaint I have:
 - Spoken with Mr X and considered the information presented with his complaint and comments received during the investigation;
 - Put enquiries to the Council and reviewed its responses;
 - Researched the relevant law, guidance and policy
 - Shared with Mr X and the Council my draft decision and reflected on any comments received.

What I found

The law, government guidance and advice

9. Planning permission is required for the development of land (including its material change of use).
10. Planning permission may be granted subject to conditions relating to the development and use of land.
11. Planning permission may be granted subject to a legal agreement to make otherwise unacceptable proposals acceptable in planning terms.
12. There is no duty to provide pre-application planning advice. Councils cannot insist developers seek such advice. It is accepted good practice, however, for councils to offer and encourage pre-application discussions. The Government's National Planning Policy Framework (NPPF) and Planning Practice Guidance (PPG) supports pre-application advice "to improve efficiency and effectiveness of the planning application system".
13. The Government's PPG "Before submitting an application", says councils should ask for a level of information proportionate to the development proposed. For example, the applicant would not need to provide all the information that would accompany a formal planning application but it needs to be enough to allow the

Council to take an informed view. The Council should give the prospective applicant clear advice on what information the prospective applicant should provide with a formal application and what consultations may be needed.

14. Pre-application advice is not binding on the Council. It can form a material planning consideration and considered when deciding a planning application.
15. Councils should act in good faith and with due diligence in providing pre-application advice. However, councils are not agents or consultants for prospective developers. Officers will respond to proposals or information put forward by the developer and whether they are likely to receive planning permission. They will give advice on how those proposals may be changed to better comply with relevant planning policies. If a developer wants a definitive view on whether the proposed development needs planning permission they may apply for a certificate of lawfulness of proposed development.
16. Before the decision of the Court of Appeal (in respect of *West Berkshire Council v Secretary of State for Communities and Local Government*) on 11 May 2016, the Council sought contributions from developers toward off site facilities. Following the decision in May 2016 the Council took legal advice and decided not to seek contributions from 5 July 2016. It adopted a Community Infrastructure Levy in March 2016.
17. 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.
18. General planning policies may pull in different directions (eg in promoting residential development and protecting residential amenities).
19. It is for the decision maker to decide the weight to be given to any material consideration in determining a planning application.

What happened

Pre-application advice and planning application decision

20. Mr X contacted the Council in March 2015 through his architect to seek pre-planning application advice on a proposal to build a small development of homes. The 2010 and 2012 planning permissions established the principle of developing the site within a local conservation area for two bedroom semi-detached homes. Mr X's application asked for advice on a proposal to revise a condition of the existing planning permission to replace the plans showing the design of the proposed homes.
21. In the letter of application Mr X explains the reasons for proposing two schemes (A and B) and why he believed the original scheme had not been built. In his view, the approved scheme had homes that were too small and had design flaws that would affect the amenity of those living in them.
22. On 15 April 2015, the Council responded to the pre-application advice application saying both Scheme A and B were not suitable. The Building Conservation Officer had commented on the proposal. The Council said the design shows cross winged sections that would not be in keeping with the symmetrical appearance of other nearby properties. The advice also said the proposal would not reinforce the distinctive characteristics of the conservation area in terms of scale, form and design.

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23. The Council said the current planning permission could still be implemented if started before 29 November 2015. That current planning permission did not have a condition attached restricting the properties to local needs occupancy. A later application may have such a control imposed if considered a new application.
24. On 20 April 2015 Mr X's architect wrote to the Council asking for further discussion on:
- Why the decisions made in 2010 and 2012 based on mirroring neighbouring property had not been implemented. Mr X believing the proposal to be uneconomic;
 - The eclectic mix of properties within the area rather than any consistent pattern;
 - Discussion on Mr X's Scheme B which he says the Council barely commented on in its decision;
 - How the approved scheme met the access, parking and servicing standards;
 - Whether any new scheme would now have a local needs occupancy restriction imposed on it whereas the existing and previous permissions did not have such a restriction.
25. On 5 May 2015, the Council in response issued its pre-application advice rejecting the proposals. It decided the applicant could present an amended or new scheme for consideration.
26. Mr X's architect wrote to the Council on 8 May 2015 expressing disappointment at the Council's advice. While accepting Scheme A of the two schemes did not meet the Council's criteria the architect argued Scheme B did. He pointed out he had found cross winged extensions in the area (although not in the immediate neighbouring properties). So, Mr X's architect could see no reason for opposing them. He also pointed out that in his view the development which had current planning permission was uneconomic and therefore could not be started before 29 November 2015. He asked if the Council was saying if that development did not start before 29 November 2015 it would impose a local needs occupancy condition on any later planning permission.
27. Following further discussion Mr X presented to the Council a planning application for a development of three bedroom semi-detached homes on 21 June 2015. Mr X's architect advised him he would need to excavate the ground floor to meet the Council's view any new property should not exceed the height of the existing neighbouring buildings.
28. The Council gave publicity to the application and consulted with statutory consultees. The Highways and Conservation officers offered objections and the Parish Council commented on the proposal. On 10 August 2015 Mr X's architect commented on the reasons for objection presented by the Council's Conservation Officer and Highways Officer. He challenged the professional view of the officers.
29. The case officer considered comments received from the publicity given. The case officer's report refers to the previous pre-planning application advice and discusses why officers disagree with Mr X's view the Council should not impose a local need occupancy condition. The report says because the 2012 permission has yet to start the Council may impose this condition as part of a new planning permission, which it must consider under the current development plan unless material considerations indicate otherwise.

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30. The Council refused the application on 28 August 2015. The Decision Notice said the Council considered the proposal would have a harmful effect on the setting of listed buildings nearby. It said it was contrary to NPPF and local plan policies. The Decision Notice referred to the Council's adoption of Policy SP2 in September 2013 (that is after the existing planning permission). This policy meant the Council must consider imposing a local needs occupancy condition on future planning permissions. It could not approve the application without imposing such a condition which the applicant had said should not be applied.
31. The Council refused planning permission and that gave Mr X the right to test the Council's view by appealing to the Planning Inspectorate. Mr X decided not to appeal.

Planning enforcement investigation and retrospective planning application

32. In October 2016, following a complaint to the Council that building work on the site was not following the approved plans, the Council's Enforcement Officer investigated. The Council wrote to the developer following a site visit saying the Enforcement Officer found the internal ground floor to be higher than shown on the approved plans resulting in the building being 0.2m to 0.3m higher than it should be. The Council asked the developer to present amended drawings for its consideration as an amendment to the current planning permission.
33. The applicant presented new construction drawings showing the levels. The applicant argued the roof height exceeded the approved height by 100mm.
34. The applicant also admitted a clerical error in the measurements for siting the development within the plot. Measurements had been taken not from the rear boundary but from another feature. The applicant presented new drawings showing the difference.
35. The Council publicised the developer's new application. It received objections from the Parish Council which also asked the Planning Committee to decide the application rather than officers using delegated authority. Mr X also raised an objection.
36. The Council's Conservation Officer offered no objections saying while the increase in ridge height was 'regrettable' in the officer's professional view "...it is relatively minor. The effect of the height difference is mitigated by the way the surroundings are experienced...the natural topographical experience of the surrounding rising land mitigates the ridge increase of c. 300mm...".
37. The Conservation Officer also commented on the spacing between the development and neighbouring listed buildings and detailing on the building. The Conservation Officer decided that "... the alterations...do cause some harm to the character of the conservation area. In my opinion however, the degree of harm is very much on the minor end of the scale and is so slight, as to cause very much less than substantial harm..."
38. The case officer's report erroneously referred to this as "...still for 2.no.two bedroom..." homes. The application sought permission for three bedroom properties. The Council's planning committee deferred a decision in February 2017 so it could make a site visit. Following the site visit the Committee discussed the application again and granted planning permission in March 2017.
39. The Council says that in its view the variations shown in the built property and in the application approved in March 2017 were close enough to the 2012 planning permission. The Council says it had no grounds on which to refuse planning

permission or issue an enforcement notice. It believes the buildings as built are acceptable in planning terms. The Council told Mr X the buildings do not go against the points raised by the Council in its refusal of his planning application.

Mr X's complaint to the Council

40. Following the grant of planning permission Mr X complained to the Council. He said it had provided him with poor pre-planning application advice. Mr X also complained that in granting the latest planning permission the Council had performed an 'about turn' contradicting its earlier advice.
41. In response, the Council said it had refused Mr X's planning application because of his introduction of a cross wing design and had also repositioned the proposed buildings within the site. This the Council said differs from the planning permission approved in 2017. The 2017 planning permission approved a design that did not include a cross wing feature and the position within the site is closer to that in the original 2012 planning permission.
42. Mr X says had the Council's planning officers properly looked at the site they would know it was not possible to set the new homes as far back on the site as the neighbouring buildings. In such positions Mr X says it would not be possible to have either windows or rear doors to the new houses. Mr X believes the Council approved an application which did not meet its guidelines and the application he made was for an amendment to the existing planning permission. Therefore, Mr X is perplexed that the Council used as a reason for rejecting his application the lack of a local need argument and yet said later when granting planning permission to another developer, it could not impose such a condition.

Analysis – was there fault leading to an injustice?

43. The law says the Ombudsman may not usually consider complaints about issues that took place more than twelve months before a complaint is made. However, I have exercised the Ombudsman's discretion to investigate the complaint because Mr X's complaint only arose when the Council decided the planning application in March 2017.
44. Pre-planning application advice does not bind either party. Councils are expected to exercise due diligence but in giving advice they are not expected to carry out the same rigorous assessment as for a full planning application. Therefore, it does not always follow that a decision to grant planning permission for something a council may have advised against must be made with fault. The Council may only reach a fully informed view of a proposal having considered all relevant material planning considerations following a full planning application.
45. I find the Council gave each planning application due publicity enabling people to comment on the proposals. I note Mr X commented on the application received in 2016. The case officer considered the responses to the consultations. In the case officer's report, there is an error in saying the proposal is "...still for 2.no.two bedroom..." homes. In fact, like Mr X's refused application permission was sought for three bedroom, semi-detached homes.
46. On the final decision in 2017 the approval was given by the Planning Committee following discussion and a site visit. I see nothing to suggest the reference to this being for two bedroom semi-detached homes caused confusion or affected the final decision. The application plans clearly show the three bedrooms and their dimensions. It was open to the Committee to approve the application with or without imposing conditions, or to reject it. Committee members decided on the merits of the application and were free to take a different view from that

expressed by planning officers. Councillors had before them all relevant information when they reached their decision including references to the pre-application planning advice in the planning history, objections and comments received and their understanding of the site gained through their site visit.

47. I find the case officer's error in the report was unlikely on the balance of probabilities to have resulted in a different decision from the one taken by councillors and therefore I cannot find an injustice arises from that error.
48. I find but for the error in the case officer's report the Council acted without fault in its consideration and grant of the planning permission in 2017. Therefore, I cannot challenge the merits of the decision made by the Council's Planning Committee.
49. When faced with a retrospective planning application councils must consider if the developer had applied for permission to build the development as built would it be acceptable in planning terms. So, while the Council may have advised against such a proposal it may consider the impact of the building as built is not severe enough to warrant taking enforcement action or refusing retrospective planning permission.
50. For Mr X the 2017 planning permission poses several questions:
 - The approved development is set forward on the land contrary to the advice given to him, in a similar way to his own proposal and contrary to the reasons given for refusing his planning application;
 - The Council has not imposed a local occupancy condition on the approved development having told him in 2015 it may have to do so for any application received after 29 November 2015;
 - The Council did not impose an off-site contribution or levy on the approved planning permission. Yet it refused Mr X's application saying his application made no off-site contribution towards providing open space, recreation or leisure facilities. Therefore, in Mr X's view it is contrary to part of its local plan strategy.
51. The Council does not deny the development as built is set forward on the site contrary to the advice it gave to Mr X about what it might approve. The Council must consider any application put before it on its merits. The pre-application planning advice is part of the planning history of the site and therefore a material planning consideration. It is not however, binding on the Council and does not mean it cannot approve an application for a development contrary to that advice. It has distinguished between the two designs for the developments. In its view while the approved development is not sited as the Council intended the design is not as large as that proposed by Mr X and does not contain cross wing sections. The Council takes a different view of the merits of the development from Mr X. In its view, it has not approved a development substantially the same as that it refused earlier or on which it gave advice. Mr X could have appealed the Council's decision on his application and he may have been successful. The refusal while a planning consideration does not mean the Council could not later grant planning permission for a similar development.
52. The law changed with the court decision in May 2016 which prevented councils from claiming a contribution towards off site facilities when approving small developments. When the Council came to consider the 2016 application it could not then impose such a levy. It also believed that the 2016 application was to vary the earlier 2012 application which it says the developer began on 27 November

2015. The Council had not imposed this condition on the 2012 application so it could not do so now.

53. Similarly, the Council says that as the 2016 application was for a variation of the earlier approved development it could not impose the local occupancy condition. In advising Mr X it may have to impose that condition it rightly let him know what changes it may impose in line with current planning policies. That depended on whether he started the 2012 development before that permission expired. The applicant for the 2016 application (2017 permission) had started work on-site by the end of November 2015. That means in the 2016 application the developer seeks permission retrospectively to amend the 2012 permission by submission of the drawings of the development as built in 2016. It is therefore an amendment to the earlier current planning permission. That planning permission did not contain a local occupancy condition and the Council therefore felt it could not impose one now.
54. Mr X could test the Council's decision to refuse his application through an appeal. I realise this may well have resulted in an appeal being heard after 29 November 2015 and the expiry of the earlier planning permission. However, that does not alter the fact I cannot challenge the merits of that planning decision because he had the right to appeal and have a definitive judgement made on that decision. The Ombudsman cannot give such a definitive view.
55. The pre-planning advice decision reflected policies current when it was given: i.e. in 2015. I recognise the dispute on the merits of cross wing developments and whether that would harm the conservation area. I cannot take a view on whether the existence of other similarly constructed properties within the area though not immediately adjacent to the development mitigates against the Conservation Officer's view. The Conservation Officer had to decide if the proposal would adversely affect listed buildings adjacent to the development site. In that officer's professional view, it would. It is for the decision maker be that officers exercising delegated authority or councillors in committee to decide what weight to give to the planning policies applicable to the site having considered consultees' views.

Final decision

56. I find the Council wrongly described the development in the case officer's report, but acted in all other respects without fault in its consideration of the planning applications and pre-planning advice application therefore I cannot challenge the merits of the decisions reached. The error in description is unlikely to have altered the final decision and therefore did not cause an injustice for which I can offer a remedy.

Investigator's decision on behalf of the Ombudsman