

## **The Ombudsman's final decision**

Summary: Mr X complained the Council failed to take enforcement action against a building developer who was persistently breaching planning conditions imposed to protect residential amenity during construction work. There was unreasonable delay in the way the Council responded, which is fault that it has agreed to remedy.

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## **The complaint**

1. Mr X complained the Council failed to take enforcement action against a developer who has consistently breached planning conditions.
2. Mr X says his amenities and those of other residents have been affected by the Council's failure to take enforcement action.

## **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 report.
6. I gave the Council and Mr X an opportunity to comment on an earlier draft of this decision and took account of the comments I received.

## **What I found**

### **Planning law and guidance**

7. Councils should approve planning applications that accord with policies on the local development plan unless other material planning considerations indicate they should not.

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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 over another's land;
    - 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. It is possible to appeal against imposition of planning conditions for a short period of time after a decision is issued. After this, a developer who finds the terms of a condition burdensome may apply to have them varied. If the council refuses a variation application, the developer may appeal to the Planning Inspectorate.
  11. 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.
  12. While construction management conditions may help lessen the 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 breaches of planning controls, that cause demonstrable harm to the public.
  13. 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.
  14. Councils have a range of planning enforcement options 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.

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15. In addition to their planning powers, where councils consider there is serious harm caused by noise, vibration or dust pollution from work on building sites, a notice to stop or control a nuisance can be served using powers under the Control of Pollution Act 1974.
  16. The planning enforcement process we expect is as follows. We expect councils to consider allegations and decide what, if any, investigation is necessary. If the council decides there is a breach of control, it must consider what harm is caused to the public before deciding how to react. Providing the council is aware of its powers and follows this process, it is free to make its own judgement on how or whether to act.
  17. Government guidance indicates that formal enforcement action should be the last resort and councils are encouraged to resolve issues through negotiation and dialogue with developers.
  18. If councils decide to take enforcement action, they should act without undue delay. This is important as evidence may become 'stale' and less persuasive, and harm to the public may continue for longer than is necessary.

### **The Council's planning enforcement charter**

19. The Council publishes its enforcement charter and enforcement standards on its website. The charter states its purpose is to provide an efficient, professional and responsive service, to protect and enhance the area's built and natural environment.
20. The Council says that where an individual suspects a breach of planning control, they should complete its enforcement enquiry form and that this will ensure its officers have the information they need to act in an effective and timely manner. The Council says the speed of the investigation will depend on the quality of the information provided by the public.
21. The enforcement enquiry form asks complainants to provide:
  - their name and address;
  - the location of the site they complain about;
  - details of the alleged breach; and
  - photographic evidence, if possible.
22. The Council says, when investigating alleged breaches of planning controls, it will:
  - investigate all enquiries within 7 days;
  - notify the complainant of the outcome or need for further information, within 28 days.

### **What happened**

23. Mr X lives opposite a site that received planning permission for development more than a decade ago, but where construction work did not start until several years later.
24. For the size of the proposed buildings, the site is relatively small, and the footprint of the development was planned to take up a large proportion of it. The Council originally refused the application, but it was approved following an appeal to the Planning Inspectorate. The approved application included conditions intended to protect the public from the impact of construction works and problems caused by noise, dust and construction traffic.

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25. Mr X says that soon after construction began, he and others complained about breaches of the construction management conditions. Mr X says the Council's planning enforcement officer asked him to send details about alleged breaches, with dates, times and photographs showing what had happened.
  26. Mr X says over the next few years, the developer was continuously in breach of the construction management conditions. Mr X says he:
    - sent 48 photographs that included times and dates with a spreadsheet detailing the context, relevant conditions etc;
    - regularly completed enforcement enquiry forms with details including a further 27 photographs; and
    - sent emails to enforcement officers about what was happening.
  27. In March 2019, the Council sent a breach of condition notice to the developer, detailing several breaches of construction management conditions, including traffic and parking controls and obstruction to residents' access to their homes.
  28. In May 2019, the Council served a second breach of condition notice about hours of work on the site.
  29. During the next few months, the developer worked with the Council to comply with the notices. On occasions where there were further breaches, the developer provided explanations of the circumstances, including some situations which were outside their control.
  30. The Council reviewed its file at the end of the summer and the Council's solicitor recommended that it should not take the matter to court. The solicitor says this was because:
    - the Council had no evidence collected by its own officers;
    - the case was not supported by witness statements; and
    - the developer's response, that they had done all they reasonably could since the notices were served, amounted to a defence.
  31. By early winter 2019, complaints about breaches of planning conditions rose again. The Council's planning enforcement officer told me he did not consider these breaches would be resolved through further negotiation. He says he met with the solicitor in December 2019.
  32. The solicitor says that, at this meeting, she advised the Council would need better evidence before taking further enforcement action. The solicitor says the Council should get:
    - witness statements from complainants, with photographs supporting what was claimed in their allegations; and
    - evidence witnessed by the Council's enforcement officers as this is likely to be more persuasive to a court.
  33. Mr X provided a statement, as did some other residents. The planning enforcement officers sent the information to the Council's solicitor, who considered it.
  34. In February 2020, the solicitor wrote to Mr X to explain the information he had provided needed clarification. She explained there were 76 photographs and to be of use, they needed times, dates, reference numbers and details, so a court would understand the context and relevance of each image. Mr X refused to

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comply with the solicitor's request to re-state and re-order the information he had already provided.

35. Mr X tells me he refused because he considered it was the Council's job to arrange and prepare the evidence for prosecution. He expressed frustration that after years of repeated breaches of the same conditions and having always provided the information the Council requested, he was now being asked to start again. He says that before this, the Council had not specified a document naming scheme or format for photographs.
36. Mr X says he has sent plenty of photos with details and context in the enforcement enquiry forms he has forwarded to officers over the years. He says, if the Council wanted to clarify or cross-reference any of the information contained in his statement, it could look at its own records.
37. The Council's planning enforcement officer says he considered the information provided by Mr X had been good and demonstrated breaches of planning controls. The enforcement officer says he thought the matter was still with the Council's solicitors, but as he understood it, they were no further forward. The enforcement officer confirmed that his department has worked continuously through the Covid-19 lockdown and has been able to carry out site visits.
38. The Council's solicitor says she recalls that as well as explaining her position to Mr X, she had also explained what she needed to planning enforcement officers. She explained that while she can give evidence about the law and what might be needed to satisfy a court, judgements about planning matters were for the planning authority and its officers to decide.
39. Mr X says he is still providing information about continuing breaches of planning control.

### **My findings**

40. We expect planning authorities to act without undue delay when they investigate and decide allegations of breaches of planning controls. This is necessary to protect the public, the usefulness of evidence that is gathered, and to maintain faith in the public planning system. The importance of prompt action cannot be understated, and it is worth remembering the words of the legal maxim, 'justice delayed is justice denied.'
41. The Council's planning enforcement guidance and service standards set clear time targets for dealing with complaints, but many months after information was provided the Council's enforcement file remains open and the case undecided.
42. We expect complainants to co-operate with reasonable requests by council enforcement officers, but we do not expect them to be responsible to ensure the effective organisation and presentation of the evidence the authority needs to send its cases to court. That is the job of the planning authority. It must satisfy itself whether there is a breach of control and it has enough evidence to satisfy a court. Planning officers can take advice from legal and other experts, but ultimately the decision regarding whether and how to act rests with the planning authority.
43. The information that is needed to answer the questions posed by its solicitor should be in the Council's enforcement records. Alternatively, Mr X has said he would be prepared to be interviewed by an officer, remotely by video call, and answer any questions they might have.

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44. The Council should and could have made its decision sooner and its failure to do so is fault. Because of the delay it is possible that evidence already gathered is no longer relevant or useful. It is also likely that Mr X and other residents were caused inconvenience and harm to their amenity for longer than was necessary. I will recommend a remedy to resolve the injustice I have found.

### **Agreed action**

45. To remedy the injustice caused by this complaint, the Council has agreed to:
- a) apologise to Mr X for its failure to act without undue delay;
  - b) pay Mr X £250 for the disappointment, frustration and inconvenience caused by the delay;
  - c) pay Mr X £150 for his time and trouble in bringing his complaint to the Ombudsman's attention;
  - d) make a decision on what planning enforcement action if any is now justified and to take any action it decides is necessary without further undue delay; and
  - e) keep Mr X informed of its progress in line with its published planning enforcement charter and service standards.
46. The Council should carry out the remedy and report its progress to the Ombudsman within 6 weeks of our final decision.

### **Final decision**

47. I have completed my investigation as the Council accepted my findings and agreed to my remedy.

### **Investigator's decision on behalf of the Ombudsman**