

Complaint reference:
12 015 133

Complaint against:
Uttlesford District Council

The Ombudsman's final decision

Summary: Faults in the Council's handling of a planning application are remedied by the recommendations for noting this decision.

The complaint

1. In summary the complaint is that when granting planning permission and considering its enforcement powers the Council failed to:
 - properly consider use of its enforcement powers against a neighbouring development;
 - properly consider the impact on neighbours when granting further planning permission particularly in respect of drainage;
 - properly respond to complaints.
2. The complainants, whom I shall refer to as Dr B and her neighbours, say this has left them exposed to leakage from the landfill and flooding from the lack of drainage. They say the Council failed to control development at what I shall call Ashwell by its owner I refer to as Mr F.

The Ombudsman's role and powers

3. The Ombudsman investigates complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. If there has been fault, the Ombudsman considers whether it has caused an injustice and, if it has, she may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1)*)

How I considered this complaint

4. In considering the complaint I have:
 - spoken with Dr B
 - studied the papers, photographs and reports presented with the complaint;
 - put enquiries to the Council and examined its response;
 - shared with Dr B and the Council my provisional view and considered the comments received on it.

What I found

Use of waste landfill & impact on Water Courses

5. The Environment Agency (the Agency) is responsible for controlling dumping waste that may affect a watercourse such as a drainage channel or removal or

blocking of such channels. It has powers to prosecute offenders and will decide whether to prosecute in accordance with prosecution authorities criteria.

6. Essex County Council (the County Council) is a water authority with some responsibility for certain water courses and lead flood risk authority. It should be notified of any action likely to affect those water courses or likely to affect flood risk.

Planning controls and enforcement

7. The Council as planning authority must consider all planning applications received. It will decide whether to grant planning permission having considered how it affects the amenity of the area. It may liaise with the Agency and take the Agency's expert advice as part of its consideration. It may also liaise with the County Council as lead flood risk authority on flood related issues.
8. The Council has a duty to consider if it should use its enforcement powers to remedy any breach of planning controls or a planning permission. Government guidance under the National Planning Policy Forum (NPPF) says councils should only use enforcement action where it is expedient and in the public interest to do so. The test is whether the breach causes a significant harm.

What happened

Events leading up to the complaint

9. In 2000 the Council gave planning permission to knock down and rebuild Ashwell a property neighbouring Dr B's property. The owner did not implement the permission. Mr F bought Ashwell in 2005. In 2007 Ashwell burnt to the ground. The next day Mr F brought a caravan onto the site and built a wooden porch onto it. Mr F did not have planning permission. The Council decided not to take enforcement action provided Mr F fulfilled the planning permission granted to the previous owner in 2000. Mr F took eighteen months to rebuild Ashwell. Dr B says the Agency estimates during the build Mr F imported 100 lorry loads of waste which he spread over the land. This increased the height of the land by 1 metre. Mr F removed a drainage ditch to the detriment of Dr B and her neighbours because it prevented flooding of her home, her neighbours and a nearby country park.
10. Photographs show this earlier drainage ditch. The owner filled it in and did not provide a replacement. Dr B and her neighbours believe Ashwell now has inadequate drainage.
11. Dr B and her neighbours complained to the Council because Ashwell as rebuilt did not conform to the planning permission granted in 2000.

Environmental Issues – Land Drainage

12. Between 2007 and 2010 the Council liaised with the Agency on its progress with prosecuting Mr F for obstructing a watercourse contrary to Section 23 of the Land Drainage Act 1991. In 2009 the Agency told the Council it could not prosecute the notice served in 2008 because it had lapsed. Dr B and her neighbours say this shows the loss of the drainage ditch and the resultant inadequate drainage of the site continues to date.
13. In February 2011 the Council's environmental health officers considered the Agency's reports on the waste found at Ashwell. The Council says "...the analysis indicates that the waste material is not completely inert...From a contaminated

land perspective, it does not look as if it meets the current test of a Significant Possibility of Significant Harm...”

14. Officers visited the site in March 2011 and held a case conference in April 2011. The conference decided that “... as there had been no general raising of the level of the land and the fill did not pose a significant possibility of significant harm, the file would be closed...”
15. Dr B and her neighbours dispute the Council’s decision on raising the land. Other tests they say show hot spots suggesting harmful material may be present.

Planning Permission for traveller site

16. In July 2012 Mr F applied for permission to create a traveller site at Ashwell. The Council publicised the application by erecting a site notice and delivering neighbour notification letters to Dr B and her neighbours. Dr B says it did not notify the local parish council or the local airport 6km from the site although it normally does so.
17. The Council received objections to the application from the local parish council, 89 residents and a 73 name petition. Natural England did not object subject to the applicant complying with the development as shown on the application.
18. The case officer’s report has five pages showing the objections received, as well as six pages recording the parish council’s objections and a page on the petition. The case officer considers the objections, the impact on amenity and the local plan policies. The case officer’s report notes the development is contrary to local plan policies. The report says the development will not so significantly impact on the amenity of the area to warrant a refusal.
19. The report specifically addresses the issues of travellers. It says the use is contrary to policy on limiting development in the countryside but screening proposed in the application will lessen the impact on residential properties and the street scene.
20. In the report the case officer notes the proximity of the airport and the NPPF policy to protect new residents from unacceptable risk of noise pollution.
21. The case officer recommends approval for a temporary permission in the face of the large number of objections on grounds of:
 - The district does not have enough gypsy/traveller sites;
 - The development will impact on the countryside protection zone but the need for gypsy/traveller sites outweighs this breach of policy;
 - Granting a temporary permission expecting the applicant to find a site outside the countryside protection zone away from the noise of the airport.
22. The Council granted a temporary planning permission for four years from August 2012 with conditions attached. The permission will expire in August 2016. Under the conditions the developer needs to provide to the Council for approval:
 - Details of the foul drainage works’ exact position and course, type and discharge of final effluent into an identified watercourse;
 - Surface water disposal arrangements.
23. The conditions also imposed an obligation on the developer to carry out and submit to the Council:
 - An investigation and risk assessment assessing the nature and extent of any contamination of the site. An appraisal of the remedial options and

proposals for preferred options following DEFRA and the Agency's guidance.

24. Dr B and her neighbours complain the Council presented to committee information that contradicted itself and the planning portal failed to display all the documents seen by councillors. Residents say the Council ignored them. It failed to consider the impact on them of the waste dumped on the land and the flooding caused by the removal of the drainage ditch.

Enforcement of planning controls

25. In November 2012 Dr B and her neighbours met with the Council to discuss concerns about breaches of planning controls. The Council opened enforcement investigations into allegations of:
- a. Failure to erect the stables as shown in the 2000 planning permission;
 - b. Breach of conditions on external lighting (wrongly placed and lit all night);
 - c. Breach of conditions controlling burning waste on site;
 - d. Pollution of a ditch alongside the highway;
 - e. Contamination of the land;
 - f. Breach of conditions preventing commercial use;
 - g. Failure to comply with landscaping conditions;
 - h. Erection without permission of sheds, a gazebo and a piggery.
26. In each case (except for item d above) the Council investigated the allegations and found breaches of planning control. It had to decide in line with government guidance under the NPPF whether the harm caused merited enforcement action. The question is whether it is expedient and in the public interest to do so.
27. In breaches a, b, f and g above the Council decided it was not expedient to take enforcement action. For breach c there is not enough evidence of a breach. Breach d is not a planning matter because pollution of a waterway is within the remit of the Agency. Dr Johnson says the Council failed to pass on the concerns to the Agency. Breach e above about contaminating the land remains an open investigation. Although open the Council did not report this fact to the Planning Committee when it considered, and deferred, an application to discharge conditions on the planning permission.

Discharge of conditions

28. In October 2012 and March 2013 Mr F applied to the Council for the discharge of two planning conditions. The conditions concern the remediation scheme and foul water drainage.
29. The Council consulted the Agency. It advised "it is important that the ditch that is to receive the flows from the site has sufficient capacity to accept these and that discharge is able to flow without increasing the risk of flooding on or off site..." The Agency recommended the Council contact the County Council as the lead local flood authority for further comment.
30. Officers recommended discharge of the soil remediation scheme condition. They recommended refusal of the application to discharge the foul water condition. The Committee deferred both applications and the conditions remain in force. Officers continue to negotiate with Mr F on schemes that will enable them to discharge the conditions.
31. The Council launched further investigations into the drainage arrangements for Ashwell and neighbouring properties and the nature of the infill. Officers met with

Dr Johnson and her neighbours. They say this shows the Council failed to properly consider these issues before it granted planning permission. They say it is only in the discharge of the conditions the Council contacted the County Council for its advice. Die testing and investigations using CCTV cameras have not proved the true drainage patterns for Ashwell and neighbouring properties. Further tests are necessary. However they have suggested the ditch in Ashwell does not drain into Dr B or her neighbour's drainage system.

32. In an email dated 3 December 2013 to Mr F's agent the Council casts doubt on the assumption the original ditch for Ashwell is a culverted flowing ditch forming an acceptable drainage system. In other words that it is part of a connected drainage system rather than a soak away. The email says "The matter in question is whether a single pipe goes the whole length of a culverted ditch...a CCTV survey...does not indicate a pipe through to [a ditch within Ashwell]...There is doubt as to whether the ditch from in front of [Ashwell] is a flowing ditch and whether it is indeed not blind. Further details provided by the builder who built [Dr B's property] indicate this is not a culverted ditch...I appreciate that this now appears to be a sea change in my reading of the situation...I cannot recommend approval of the discharge of the condition..."
33. Before the Council can decide the applications for discharge of the conditions it needs to know if Ashwell has or needs a drainage system of its own to prevent flooding on Dr B's and her neighbour's land. Concerns about the impact on Dr B's and her neighbour's land caused by the infilling of a ditch within Ashwell is the central question for the neighbours. Their concern is raising the land by around one metre and removing a drainage ditch increases the flood risk for their homes. Dr B and her neighbours expected this central question to be answered before the Council granted planning permission. The Council says If the development does not proceed periods of heavy rainfall may result in a greater risk of flooding anyway. it says "...there is no evidence that the filled in ditch was key to securing effective run off...it was probably another blind arm." Residents argue its removal does nothing to improve drainage but can only limit it further.

Analysis

34. I have read and considered the comprehensive documentation gathered in this investigation. For legal reasons however I cannot take a view on events which happened before 2007. Some of the events post 2007 would be out of jurisdiction if they had been known at the time. However, because some information only came to light in 2012 following FOIA applications these are within my jurisdiction.
35. My role is to decide if the Council considered its enforcement powers without fault. My role is also to decide if the Council granted planning permission without fault. My role is not to decide the merits of the application or those decisions if properly made.

Enforcement

36. The Council is under a duty to consider using its enforcement powers in line with government advice. The Council did not judge it expedient to take enforcement action in most of the breaches identified at Ashwell. I cannot challenge the officer's judgement on whether to exercise this discretionary power. It acted without fault and so I cannot challenge its decision not to take enforcement action. The investigation into unauthorised tipping remains open.

Planning procedure

37. Planning applications must be given due publicity, the responses to that publicity considered, and the material planning considerations considered. If the Council does that it acts without fault.
38. The Council gave publicity to the planning application. The Council says it notified the parish council, the complainants say it did not. It should notify the parish council. The parish council presented objections to the Council so however it heard of the application it knew of it. The parish council's objections appear at length in the report to councillors and so they had the parish council's view before them. Any fault in notification did not therefore affect the final decision.
39. The Council did not notify the airport. The Council says it does not have to and noise issues are not dealt with through notifying the airport. The Council considered the likely impact of the airport on the site and imposed a time limit for the permission so the developer could find a site away from the noise of the airport. Therefore any fault did not affect the final decision.
40. The officers and Councillors recognised the importance of drainage and concerns about the waste spread on the ground. The conditions imposed under which the developer must carry out an investigation of soil conditions, and the exact positions and courses of the drainage system reflect the concerns of residents. The question is, in the light of what officers knew about the filling in of the drainage ditch, whether it is enough to put planning conditions on the permission to fulfil the duty to have all relevant information before councillors when they decided the application.

Waste on the site

41. The Agency is responsible for the leakage of any contaminants in the waste on the land entering the water flows. Public health issues lie with the Council's environmental health officers. The officers say on current information the waste does not pose a substantial risk. Residents take a very different view and point to expert opinion in support of that view. I cannot challenge the officers' professional view. The condition demanding investigations allow the Council to take a different view on completion of those investigations. It can then decide if the proposals for remediation are acceptable. Therefore there is a mechanism for dealing with any waste issues.

Drainage

42. The material planning considerations relevant to drainage are:
 - The capacity of the physical infrastructure to cope with the discharge of water;
 - The likelihood of an increase in flood risk;
 - Local drainage issues such as the foul and surface water drainage arrangements.
43. Councils may decide the proposed use of the land is acceptable subject to the applicant meeting conditions imposed in the planning permission to cover the above issues. Where these issues are a prime concern as with this site, it is good practice to consider if approval can be given before more is known about the drainage arrangements.
44. Conditions imposed by the Council say the developer must produce plans for approval of the drainage he proposes for the site. They also say he must produce a plan showing the exact position, extent and nature of the drainage on the site.

That shows the Council lacked information on how the site drains now and therefore how the development may affect drainage in future.

45. Concern over drainage on this site is not new. The Council liaised with the Agency over a prosecution for removing a drainage ditch. The Council knew therefore the developer had compromised the drainage system before the application.
46. In deciding the planning application the Council considered the impact on neighbours and imposed conditions to protect their amenity. Such an approach is usually enough. However the history of the site and the incidences of flooding on the neighbour's property suggest drainage and flooding are central to any decision on the development of the site.
47. Drainage and flood risk have been important issues for both the Council and the Agency for some time. So best practice suggests the Council could have asked for the information set out in the conditions before granting permission. There is a real prospect with all the information coming to light now officers and councillors may have reached a different view and therefore a different decision. Until the developer produces the plans required under the conditions and the Council approves or rejects them we cannot know for certain. Failing that it may not be known until a new planning application is received, considered and decided.
48. In December 2013 the Council said there had been a "sea change" in the officer's view because of information coming to light during negotiations for the discharge of the conditions. It is my view given the importance of these issues to the principle of development better information at the time of the decision may have prevented the current uncertainty. The temporary permission dates from 2012. The developer is already into the second year of his four year temporary permission and may ask for an extension. If granted that will create further years of uncertainty for the residents. This has placed them in an unacceptable position. The Council says this is not true. It says "The neighbours face no more uncertainty than if the application had been refused solely on surface water drainage grounds. Reasons for refusal are there to advise the application of specific problems with the planning application, enabling the applicant where possible to revise the proposal to overcome the reason for refusal...it would now be open to the applicant to submit a fresh planning application...if the applicant does nothing and the conditions are not agreed as having been met, the permission expires in 2016..." If the Council had asked for more information before deciding the application while running the risk of an appeal for non determination, any refusal or decision could demonstrate full knowledge of the site and give greater confidence to the residents.
49. Dr B and her neighbours have lost faith in the Council's ability to manage development of this site and to protect their amenity.

Recommended action

50. To remedy the injustice caused by the faults identified I recommend and the Council agrees to:
 - a) Apologise
 - b) Place a note on the planning files to record this decision.
 - c) Place a note on the planning files recording my concerns about drainage and the need to consider if more than usual information is required in this instance which should inform any further decisions.

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- d) Advise planning officers of this decision and my view the Council should have liaised with other agencies given the flood risk and obtained more information before deciding the application.
 - e) Pays to Dr B the sum of £250 and £100 to each of her neighbours in recognition of their loss of confidence in the system and the time and inconvenience to which they have been put in making complaints to the Council and to the Ombudsman.

Final decision

- 51. The Council handled the application with fault. The remedy recommended remedies the injustice arising and until the Council discharges the conditions I cannot consider any further injustice.

Investigator's decision on behalf of the Ombudsman