

The Ombudsman's final decision

Summary: Mr A complains the Council has failed to enforce planning conditions on a development of flats opposite his home. The Council was wrong to tell Mr A there was no breach of condition to plant trees and shrubs. The Council has now considered whether to enforce the condition, but decided this is not expedient. The Ombudsman does not have the legal power to intervene in this decision.

The complaint

1. Mr A complained the Council, as local planning authority (LPA), failed to enforce planning conditions on a development of flats opposite his home. In particular, the developer did not discharge the following two pre occupancy conditions:
 - *'No apartment shall be occupied until full details of all proposed tree and shrub planting, and the proposed times of planting, have been approved in writing with the Local Planning Authority, and all tree and shrub planting shall be carried out in accordance with those details and at those times.'*

Reason: In order to protect and safeguard the amenity of the area.

- *No apartment shall be occupied until space has been laid out within the site for a minimum of 14 bicycle (sic) to be parked, and that area shall not thereafter be used for any purpose other than the parking of cycles'.*

The Ombudsman's role and powers

2. The Ombudsman investigates complaints of injustice caused by maladministration and service failure. I have used the word fault to refer to these. The Ombudsman cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. She must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3)*)

How I considered this complaint

3. I have considered:
 - Correspondence between Mr A and the Council
 - Photographs of the street scene
 - Council's planning documents
 - Minutes of the Planning Committee
 - The Government's National Planning Practice Guidance (NPPG)

- The Government's National Planning Policy Framework, 2012 (NPPF).
4. I have shared my provisional view with both parties and considered the comments received.

What I found

Factual background

5. Mr A complained to the Council in January 2013. People were moving into a new block of flats opposite his home before the pre occupancy conditions about landscaping and planting had been implemented and discharged.
6. The Council replied that it expected the developer to submit the landscaping scheme within a few weeks.
7. Mr A complained again in October 2013.
8. In October 2013 the Council told the developer it was starting enforcement action because the rear patio area of the block was '*still in a bit of a state*' and there was no cycle parking.
9. The Council told Mr A:
 - no enforcement action was needed for trees and shrubs because the developer had decided not to plant any
 - the condition did not require trees and shrubs to be planted, only for prior approval of any planting that did occur
 - the developer had indicated he did not wish to plant any trees or shrubs - the nature of the development with its associated density, limited space for planting and tenure / client group was such hard landscaping was more appropriate and it could not be said that without tree and shrub planting the development is unacceptable
 - areas marked as grassed on the original plan were mainly gravelled, the Council found this acceptable
 - the yard area had not yet been finished to standard and it would take enforcement action on this.
10. The Council and developer agreed the cycle storage and the developer ordered this in December 2013.
11. Mr A made a formal complaint in December 2013 about the failure to plant trees, shrubs and grass.
12. Mr A disagreed with the Council's view about the condition not requiring planting of trees and shrubs. The approved drawings clearly marked trees and shrubs and the condition refers to "details" of these. In Mr A's view planting was therefore not optional as the Council suggested.
13. Mr A said the absence of a properly planted frontage to the scheme blights the area and is out of keeping with the existing housing.
14. The Council's complaint response repeated its view there was no condition requiring planting. While no application to discharge the condition about cycle storage had yet been made, the cycle storage was on order. The Council was enforcing the developer re-do the walls and floor of the rear patio area.

15. The Council told the Ombudsman:
- The work on the rear patio was delayed due to poor weather over the winter but it, and the cycle storage, is now complete.
 - The Council accepts the plan shows low level shrubs and trees and so the public expectation would be there would be planting. The wording of the condition and the plan together would suggest planting was required.
 - The Council had not intended to require planting but rather to prevent the wrong species of tree, in the wrong area, which could cause problems for occupiers or neighbours.
 - The way the condition is worded it could be met by planting for a short period of time, not in perpetuity.
 - The Council accepts it reached the *'wrong conclusion on whether there was a breach of condition'*.
 - The Council says while it did not consider whether there was a breach of condition, it did consider if enforcement was possible and provided Mr A with a reasoned decision.
 - The Council does not consider the lack of planting makes the development unacceptable. It also considers any prosecution for failure to comply with enforcement action would be likely to fail and not be in the public interests.
16. In response to my provisional view, Mr A has provided the Planning Committee's minutes. These show the developer's planning consultant told the Committee *'there would be grass and shrubs on the frontage and trees in appropriate areas'*. The minutes show the Committee discussed concerns about the impact of the scheme on the street scene and that the amount of private amenity space was substandard (in breach of policy H16).

Planning Law and Guidance

17. NPPF states the purpose of planning conditions is to *'enhance the quality of development and enable development proposals to proceed where it would otherwise have been necessary to refuse planning permission, by mitigating the adverse effects of the development'*.
18. The NPPF says planning conditions should only be imposed where they are:
- necessary
 - relevant to planning and
 - to the development to be permitted
 - enforceable
 - precise
 - reasonable in all other respects.
- This is known as the six tests. (NPPF, paragraph 206)
19. Local Planning Authorities have powers to enforce planning law under the Town and Country Planning Act 1990 Part VII. The powers are discretionary.
20. Generally, a Council is expected to take enforcement action where serious harm to local public amenity is being caused.

21. In deciding whether to take enforcement action, the Council will need to consider:
- the type of condition
 - how well the condition meets the legal tests
 - the planning harm (as now perceived)
 - what it wants to achieve and whether under-enforcing will resolve the situation.

Analysis

22. There was delay by the Council in ensuring the developer completed the work on the rear patio and cycle storage. 2013/14 was a mild winter so this does not adequately explain the delay. The developer did not complete the work until well into 2014. Mr A however does not have a view of the rear patio or storage area. While there was fault, I find there is no personal injustice to Mr A from the delay.
23. Mr A is personally affected by the view of the block of flats as he lives opposite. Mr A has provided photographs which show the houses on the street are of a more traditional style and mostly screened with mature trees and shrubs. The flats are modern and have no landscaping to screen or soften their impact.
24. I agree with Mr A a condition to plant trees and shrubs was imposed. The following evidence supports Mr A's interpretation:
- The developer told the planning committee it would plant trees and shrubs. This is not equivocal. The committee passed the application and drafted the conditions on this assumption.
 - The Council told Mr A (in response to his complaint) that it anticipated receiving a landscaping plan soon. It did not at that point say landscaping was optional.
 - The planning permission states the reason for the condition about trees and shrubs as: *'to protect and safeguard the amenity of the area'*. If the Council's only concern was with choice of species to protect residents and immediate neighbours it should have worded the planning harm in these terms. The suggestion is of a wider public harm.
 - This description of planning harm fits with the concerns reflected in the committee minutes about the private amenity areas being substandard and impact on the street scene.
 - The developer's plan showed trees and shrubs.
25. I am not persuaded the committee members intended landscaping to be optional.
26. The assurance by the developer that trees and shrubs would be planted perhaps led the committee to be less precise in its wording than it could have been.
27. I recognise the Council disagrees with this interpretation of the condition wording. If a condition is open to different interpretations this signals the wording is not precise enough and would fail the six tests. Imprecise or ambiguous conditions may also impact on the ability of Councils to bring successful prosecutions.
28. In response to the Ombudsman's investigation, the Council now agrees it was wrong to tell Mr A there was no breach of condition.
29. Where a planning condition is breached a Council must decide whether it is expedient to take enforcement action. Expediency is guided by whether the breach causes unacceptable harm to amenity.

30. The Council has considered whether to enforce the developer replacing grassed areas with gravel. It has decided gravel is an acceptable alternative due to the density and tenure / client group. The Ombudsman has no legal power to intervene in the professional judgement of Council Officers. The gravel areas are not visible from Mr A's house and cause him no personal injustice.
31. During the course of the Ombudsman's investigation, the Council said it will not enforce the condition for planting trees and shrubs because:
 - The lack of planting does not make the appearance of the development in the street scene unacceptable.
 - The prospects of any successful prosecution are low and not in the public interests.
32. Conditions should only be attached to planning permissions where they are judged to be necessary and the permission would not be granted without the condition (NPPF six tests). If the Council considered the development acceptable without planting it should not have imposed a condition to plant trees and shrubs. If a condition is not necessary, it fails the six tests.
33. While the Council told Mr A at an early stage of his complaint it found the lack of planting acceptable, I do not agree this was a 'reasoned decision'. The Council did not explain why the position had apparently changed from that of the Committee. The Council only explained its rationale about prospects of a successful prosecution during the course of this investigation. This was fault.
34. Mr A has however now had an explanation why the Council will not take enforcement action. The Ombudsman cannot intervene in this decision.

Final decision

35. The Council was at fault in the way it considered Mr A's complaint. It was wrong to say there was no condition to plant trees and shrubs.
36. The Council was at fault in imposing a condition which did not meet the six tests (NPPF).
37. The fault by the Council has now been remedied as the Council has recognised a breach of condition did occur.
38. The Council has decided not to take enforcement action. The Ombudsman has no legal power to intervene in this decision.

Investigator's final decision on behalf of the Ombudsman

This page is intentionally left blank