

24 March 2015

Local Government OMBUDSMAN

Complaint reference: 14015052

Complaint against: South Tyneside Metropolitan Borough Council

### **The Ombudsman's draft decision**

Summary: This complaint is not upheld. In 2013 a developer resumed building a boat shed for which he had planning permission and had started building in 2001. Local residents complained but the Council found the developer could still build the shed. However, he had built it almost a metre wider than he should have done. There is no evidence of fault in the way the Council dealt with the breach of planning control and its decision not to take enforcement action. It kept residents informed throughout the process. The complainant says the shed is also 3 metres higher than it should be. The Council says it is not. There is no fault in how the Council decided the shed is the permitted height.

Local residents complained within a week that the shed was not being built to plan (too high and too wide) which the Council denied at first. The council eventually conceded, after it had been built and signed off, that it had been built without planning permission. There is evidence to show that the developer had gone sufficiently against the intention of the permission of grant in 1996 that he should have been told to stop work on the shed and submit a retrospective planning application where many of the objections to the development could be aired. The Council were at fault for failing to do this.

### **The complaint**

1. The complainant, whom I shall refer to as Mr X, complains the Council has wrongly allowed a developer to build and keep a boat shed despite many public objections. In particular he says
  - . It wrongly said the boat shed conformed with approved plans
  - . It has not taken enforcement action against the boat shed
  - . There has been a lack of information and public consultation

So much so that a Petition (see [petition.pdf](#) (ref. A) attached to letter of explanation) was raised. About 300 signatures were collected.

- . It took 15 months for the Council to admit the boat shed did not have planning permission

### **The Ombudsman's role and powers**

2. The Ombudsman investigates complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. She 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, She may suggest a remedy. (Local Government Act 1974, sections 26(1) and 26A(1))
3. 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))
4. The Ombudsman cannot investigate late complaints unless she decides there are good reasons. Late complaints are when someone takes more than 12 months to complain to the Ombudsman about something a council has done. (Local Government Act 1974, sections 268 and 34D)
5. If the Ombudsman is satisfied with a council's actions or proposed actions, she can complete her investigation and issue a decision statement. (Local Government Act 1974, section 30(1B) and 34H(i))

### **How I considered this complaint**

6. I have considered the complaint made by Mr X.
7. I have considered the Council's response to Mr X's complaint and I have discussed its response with a senior planning officer in the Council. I have considered planning documents and relevant law and case law.
8. I have written to Mr X and the Council with my draft decision and given them an opportunity to comment.

### **What I found**

Authorisation for the development and the decision not to enforce

9. In August 1996 the Council's predecessor, the Tyne and Wear Development Corporation, gave planning permission for a boat shed. Although the grant of that permission is too long ago for the Ombudsman to

investigate, the permission's 5 conditions are relevant.

- the permission lasted for 5 years (cond.1);
- development had to accord exactly with the approved plans (cond. 2);
- no work was to begin until the Council had approved the shed's outside appearance (cond. 3);
- no work was to begin until the Council had approved details of the end panels. "Thereafter these approved details shall be implemented to the full satisfaction of the Development Corporation prior to the commencement of any operations/works within the shelter" (cond. 4); and
- work on vessels was to take place between 7am and 7pm Mondays -Saturdays and not on Sundays or Bank Holidays (cond.5)

10. Let me begin by commenting on these 5 conditions. Condition 1 was a standard condition. Once a developer "implements" his permission he can take as long as he likes to complete the development. He can achieve lawful implementation by carrying out some basic foundation work and discharging certain pre-commencement conditions. The courts have held a trench one spade's depth is enough to create a lawful implementation.

11 The case of *Whitley & Sons v. Secretary of State for Wales and Clwyd County Council* (1992) established the need to discharge certain pre-commencement conditions. If development starts without having discharged pre-commencement conditions which are

(a) expressly prohibitive, and

(b) go to the heart of the permission,

the development will be unauthorised. If a development is unauthorised none of its conditions can be enforced.

12. Unauthorised developments may be retrospectively regularised by subsequent compliance with the condition. This can happen within the life time of the planning permission, in this case 5 years. It can also happen after the permission has expired, if the application to discharge the condition is made before the permission expires and the work carried out conforms to the details subsequently approved. The authority for this is the case of *R v Hart Aggregates Ltd V Hartlepool Borough Council*.

13. Condition 2 is also standard. It is a simple statement of the law.

Condition 2 states:- "The development to which this permission relates shall be carried out in complete accordance with the approved plans and specifications." and when I could prove that the shed was not built to an authorised plan, contradicting Mr Cunningham's assertion that it was, I sent an email to planning enquiries on 10 Jan 2014. (see attachment: queryPO2014\_01\_10.pdf (B)).

This was intercepted by Mr Cunningham (see attachment: replyPO2014\_01\_13.pdf (C)) and I had to write again (see attachment: queryPO2014\_01\_14.pdf (D)). This was passed up to Mr Atkinson but it is worth remarking here that there has not been any satisfactory answer to my question "As the applicant has not discharged condition 2 why is there no retrospective planning application?" in any correspondence with the Council. The other conditions become irrelevant if condition 2 is not met.

14 Condition 3 is a pre-commencement condition. It is, for Whitley purposes, expressly prohibitive in its wording. However, it would be hard to argue in planning terms that it went to the heart of the permission.

15 Condition 4 is interesting. It says details of the end panels must be approved by the Authority and then implemented according to that approval. It does not say they have to be retained throughout the lifetime of the building. This is arguably a weakness in the original drafting but too long ago for the Ombudsman to now investigate.

16 The Authority's view is that condition 5 should not have been imposed because the site already had the benefit of unrestricted working hours. I cannot comment on this. I do not know how the business operated in 1996 and it is too long ago for the Ombudsman to investigate.

[This could have been dealt with if the Council had ask for retrospective planning application.](#)

17. The developers built the foundations before May 2001 but took no further action until September 2013 when building started again. Many residents then complained to the Council.

18 The Council investigated. It located the historic permission and plans. It had to decide whether the building was authorised.

19 We know work on the foundations started within five years of the approval. Building control inspectors confirmed it at the time. However, the developers had not met conditions 3 and 4 before starting work in 2001. The Council considered if this meant the permission had not been implemented (i.e. if commencement was in breach of the Whitley principle). It concluded conditions 3 and 4, although pre-commencement conditions did not go to the heart of the permission. The Council found the planning permission was lawfully

implemented. There is no fault in either the process or reasoning by which the Council reached this decision.

That they were not laid in accordance with the authorised plans (1m too wide) was overlooked by the Council. This could have been looked at if the Council had ask for retrospective planning application.

20. The Council then considered if the building accorded with the approved plans. The planning officer originally assigned the case considered the developers were building the boat shed to the measurements in the 1996 plans. Mr X says he told residents this at a public meeting. The Council accepts these measurements were wrong. A more senior officer checked the measurements; he found the width at ground level was just less than one metre wider than the permission allowed.

The Council did not initially accept the these measurements were wrong. Please see emails between Mr Cunningham who was the planning officer in charge of this case, Cllr Anglin and myself (attachment: nov-dec13Etrail.pdf (E)). Mr Cunningham is saying without any conditions that the shed is built to approved plans. Please note that Mr Cunningham was still saying that the dimensions of the shed were to the approved drawings in his response to me, mid January (see attachment: C) Mr Atkinson, the Planning Manager repeats this in his response (see attachment: replyGA2014\_01\_15.pdf (F) - at the end of the section about Approved Drawings), he says "The dimensions of the steelwork have been checked on site and they are in accordance with the measurements shown on the approved drawings. The variation in the angle of the pillars is not considered to be material." and like Mr Cunningham before him does not say what the dimensions are. There follows two emails from me and two responses from Mr Atkinson when he eventually concedes that the shed is not built to an approved plan (see attachment: corresGA2014-Jan-Feb.pdf (G)). Unfortunately he is being a politician and tries to skirt round the fact that the shed has been built 3m too high and I have had to attach all the email correspondence for you to be able to see that his admission should also include the fact that shed is built 3m taller as well as 1m wider. Please note he accepts the the gable end is 15.5m high but has no logical/plausible response to my proposition that the elevation in drawing 8296/14 is the river end of the shed and not the road end. Please also notice in all this correspondence he does not say that 8296/14 is not to scale or just an engineers sketch (see attachments: drawing8296/14.pdf (H) explanation14.pdf (J))

21. Mr X says the shed is also 3 metres higher than shown in the 1996 plans. He says a scale measurement from the plans shows a total height of 12.75 metres at one end of the shed. The Council says the permitted height at this end is 15.5 metres and this is the height as built.

The Council cannot back up the statement that the permitted height at the road end is 15.5m. Please see attachments: drawing8296/1A .pdf (K) and explanation1A.pdf (L) which I have attached along with drawing 8296/14 (H) and explanation (J). These are central to my proposition that the shed is built 3m higher than planned and as the Head of Development Strategy says himself in his Stage II reply "*Your letter of 9<sup>th</sup> May focuses on the dimensions of the shelter as being built and in particular your view that, as well as being wider than approved, the shelter is also 3m taller. You refer in particular to Drawing 8296/14. That would represent a significant deviation from the approved scheme.*". Both my explanations show that the shed has been built 3m higher than planned. The Councils counter to my explanation of 8296/14 are subjective statements such as "not to scale", "just an engineers Sketch" and such like.

22. I have discussed this with a senior planning officer. The Council accepts that using a scale measurement against the 1996 drawings would not give a measurement of 15.5 metres. It says this plan has several drawings using different scales and some are foreshortened; possibly to fit on the paper. It says these are likely to be engineer's drawings. It says what it relied on was the dimensions written on the plans by the applicant. The applicant stated the height at this end as 12.5 metres plus 3 metres making 15.5 metres.

The applicant can say what he wishes but the Council should not have taken him at his word. I have shown that he is using an error on the drawing (atts: K,L) to justify his flouting of Condition 2. It speaks of incompetence or worse for a senior planning officer to have overlooked this and not corrected the applicant and asked him to put in a retrospective planning application or remove the framework.

23. I have seen the 1996 plans and report written by the Development Corporation. The applicant has written the elevations on the plans. At the inland end this is 12.5 metres plus 3 metres. The land then slopes

away towards the river. So the height at the river end is 2.6 metres higher. The report says the height is 15.5 metres. From this it is clear the Development Corporation knew the proposed height was 15.5 metres at the inland end and gave permission for this. The Council is entitled to its view that the shed as built is the same height as that granted permission.

If you look again at the report you will see that it is not clear which end of the shed they are talking about. The Council is not entitled to its view that the shed as built is the same height as that granted permission. The explanation they have given you is a rewrite of the one Mr Atkinson gave me an email in January (att: F - under heading 'Approved Drawings'), it did not ring true then and it does not now (atts: K,L).

24. It is too long ago for the Ombudsman to consider a complaint about the accuracy of the drawings accepted by the Development Corporation. In any event the applicant had written the dimensions and this is what the Development Corporation considered rather than measuring and scaling the drawings.

I have shown that drawing 8296/14 drawn Aug 2013 (ref: H,J) and 8296/1A drawn April 1996 (ref: K,L) both indicate a height at the road end of 12.5m and it does nobody any favours to question the draughtsmanship or integrity of architects/agents against the word of the applicant whenever the drawings were done for this development, be it in 1996 or 2013.

25. The Council considered the difference between the permitted width and the width of the built shed and decided not to enforce. Enforcement is discretionary and the Council explained to residents in great detail how it reached its decision. It explained the law and policy it considered. There is no need for me to repeat this. It decided the degree of departure from the plans - less than one metre - was "non-material" Given the overall scale of the building, its decision is sound. The Council took the view "comparing the as built development from that for which permission was granted, there are not considered to be any additional significant impacts to residential amenity that would justify taking enforcement action." In other words, there was not enough harm.

I understand the decision completely and know it is very hard to argue that a width of less than one metre difference was material but I think I have shown quite clearly that the shed is also 3m higher than planned and that the Council can provide you with no reliable evidence to support their claim to the contrary. The planning department appeared to be very helpful in providing information regarding this development but whenever anyone requested authorised plans with reference to the height or asked a straightforward question about the height of the shed the door is shut and they are referred to the complaints system. I observed this happening within days of the framework going up and resolved to avoid this trap as long as possible. I was made aware of the height issue from quite early on but decided to wait till I had heard from the Case Officer at the meeting arranged by one of our Ward Councillors before I tacked the Council on this issue. The case officer said at this meeting that the shed was built to an approved plan, legal was the word used by the Councillor and that was that. As you will have seen, I did not believe him and set out to prove otherwise. At first I could only question his word where the width was concerned as I could easily gauge it quite accurately but it was the height difference that I was really interested. It appears that the Case Officer accepted the word of the applicant that he was complying with the original application and there was no requirement for a retrospective planning application. It was apparent to all except The Council that there was something very wrong with the height of the frames.

I fell into the complaints system trap with my rather angry email to Mr Mansbridge on the 4<sup>th</sup> of April (see att: tohms2014\_04\_04.pdf (M)). I'm not proud of it but it was prompted by UK Docks using the slipway before the shed was finished. A very misleading front page article in the local press acting as a spoiler to our petition and echoing what was being said by the Principal Planning Officer did not help help my mood either. However in the middle of this email I say "You should know that it is over 50 ft high and that is what we have been saying for months now. **It's planned height is about 42ft.**" This was converted to a complaint 248789 by one of his staff and remains in limbo. The questions about the shed not being built to plan (the height particularly), being put into use before completion and the amount of misinformation being put about generally remaining unanswered.

I wrote a letter about a month later on May 2nd ( tohms2014\_02\_05.pdf (N)) when the North Shields Ferry went onto the slipway reminding him that he had said he would write to UK Docks about operating the slipway while the end panels were not fitted. I also took the opportunity in this letter to complain that he and his staff were using the complaints system to avoid questions about the 'legality' of shed.

26 I cannot fault the Council's decision not to take enforcement action. It is established in law that

enforcement action merely to respond to criticism without clear evidence of harm is likely to be considered unreasonable. Such cases are unlikely to succeed and lead to an adverse costs award.

27. When the Authority found the structure was wider than the approved plans, there were two possible decisions it could reach. It could have said the development was wholly unauthorised because it was in breach of the approved plans. In this case it could not enforce any of the conditions. Or it could have said the development was authorised but the structure as built was in breach of condition 2 of the permission. In that case it had to consider whether it was expedient to enforce condition 2.

28. It is not clear from the correspondence which of the two views the Council took. Writing to residents on 2 May 2014 it said: "The development has not been built in accordance with the approved plan. This means that the conditions attached to the permission are unenforceable against the building which was constructed." Yet in October the previous year it had discharged proposals for conditions 3 and 4. Writing to residents on 4 April and 2 May 2014 the Council told them it meant to enforce condition 4. It said it would "instruct" the developer to fix the end panels. If the development were, as it said, unauthorised, it would have no power in law to do this.

Mr Mansbridge' letter to the residents, May 2nd 2014 (see att: gmtoresidents2014\_05\_02.pdf (O)) he states under Development Permitted in 1996:

*"The approved dimensions of the steelwork are:*

- Proposed height 15.5m at the River Drive end.\* The gradient of the slipway is 2.66m over the length of the shelter. This would mean the height at the riverside end would be 18.16m above the slipway;*
- Proposed length 22m;*
- Proposed width 12.2m.*

*The measurements which the Council took on 17th September 2014 are:*

- Height at the River Drive end 15.5m and at the riverside end 18m.*
- Length 22.254m;*
- Width 13.1m;*

*Apart from the width these dimensions are either entirely in accordance with the approved plan, or subject to such minor deviation that they are properly categorised as non-material changes. It was following queries raised in mid-January that the plans were re-examined. We discovered that the overall width of the steelwork at ground level was shown as 12.2m on the plan, not 12.9m as previously understood."*

*\* I think that this statement is not true and have demonstrated in two ways (ref: H,J using the drawing 8296/14 and K,L using drawing 8296/1A). I think you should look at the way Mr Mansbridge and Mr Cunningham will not address the height issue and even when Mr Atkinson was a bit more forthcoming, he couched his response in such a way that it could easily be misinterpreted by those that chose to do so. I did respond to his letter asking him to re-examine 8296/14 and to provide the full frame drawing from which the detail was taken (see att: tohms2014\_05\_09.pdf (Q)). To give Mr Mansbridge credit he did arrange to meet with me to discuss these plans. Sadly neither drawing 8296/14 nor any drawings produced for the current structure were presented when I went to see him.*

29. The Council's senior planning officer, with whom I have discussed this, says the Council took the former view. In seeking to enforce condition 4, the Council "appealed to the developer's better nature." The point is academic. The end panels are in place. Only if there remained outstanding conditions which were both perpetual and enforceable would the point matter. The Council has explained why it could not seek to enforce condition 5. In the unlikely event of the developer removing the end panels, the Council could not insist on their reinstatement under the original condition 4 anyway.

30. Let me for completeness make one other comment. The Council discharged condition 4 in October 2013, after the permission had expired. This was the pragmatic and sensible thing for it to do. As Planning Authority it had nothing to gain by telling the developer he was too late to submit those details. Any challenge to the legality of the discharge is for the courts not the Ombudsman.

The alleged failure to consult and time taken to say the shed does not have planning permission

31. Councils have no duty to consult with the public on planning applications. Their duty is to publicise the application and take account of material representations they receive in response. A duty to publicise is not the same as a duty to consult. The duty arises when the application is validated, in this case in 1995 or 1996.

32. There is no duty to consult with the public on the discharge of planning conditions.

33. The Council had no duty to publicise anything in 2013. As enforcement authority the Council should keep those who complain about the development informed. The Council did this by public meetings and detailed letters.

I had not been invited to any public meetings, were there any? I have however been to two meetings

with the Council and both proved to be unsatisfactory:-

a) with the Principal Planning Officer, Mr Cunningham, Nov 25<sup>th</sup> 2013 where he said that the shed had been built to approved plans and it clearly had not.

b) with the Head of Development Services, Mr Mansbridge, 8<sup>th</sup> July 2014 to discuss drawing 8296/14 and any directly associated drawings. These drawings were not produced at the meeting.

34. Mr X says the Council took 15 months to admit the boat shed did not have planning permission.

35. The Council said in February 2014 the boat shed was not built in line with the permission. This is 5 months after residents had raised concerns. The Council had not ignored the situation in those months. It had taken measurements; dealt with applications to discharge conditions; and, negotiated with the site owners and residents.

Correction - the Planning Manager said that the shed was built not built to an approved plan in February but did not specify that he had or had not included the extra height in this admission. The extra height is something that the Head of Development Services disregarded altogether in his letter to residents in May and in any correspondence with me. Customer Advocacy in their initial reply to me in September disregarded the extra height as well. It was not until late November that an unconditional admission that the shed was built without planning permission was made by them.

36. In April and May 2014 the Council wrote detailed explanation of why there had been a breach of planning control.

37. Mr X was unhappy with the Council's decisions and explanations. He sent several e-mails to the Council about this. In September 2014 Mr X received the Council's final response to his complaint. This said the boat shed did not have the benefit of planning permission. In November 2014 Mr X e-mailed the Council again. It responded that it accepted the "the structure in question does not have planning permission".

38. The Council did not take 15 months to tell Mr X the planning status of the shed. Mr X may not have been clear about the status. However, I do not find the Council at fault for this. It tried to explain a very complex situation.

In September the reply from the excluded on a matter of opinion the question of the height in their final response. As I have hopefully shown to you all the responses from the council have ignored the fact that it has been built 3m too high. To admit that the shed was too wide while ignoring it was built 3m too high was no admission at all.

Future development on the site

39. The developers have submitted an application for more development and Mr X would like the Council to prevent this. The Council cannot do this. The owners are entitled to request planning permission for further development. The Council must properly consider any application made against the Local Development Plan and other material planning considerations. The current application has to follow this process.

It does not make sense to ask the Council for permission to duplicate a shed that has already been built without planning permission.

Draft decision

40. I have seen no evidence of fault, either by delay or otherwise, in the way the Council dealt with this acknowledged breach of planning control. It has provided a sound justification for its decision not to take enforcement action. The Ombudsman cannot question the merits of that decision. Throughout the decision-making process it kept residents properly informed. The complaint is not upheld. Investigator's draft decision on behalf of the Ombudsman