15 April 2015

Complaint reference:
14 015 052

Complaint against:
South Tyneside Metropolitan Borough Council

Local Government
OMBUDSMAN

The Ombudsman's final 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, the developer 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.

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
- 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 26B 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 considered their comments.

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.

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.

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.

20. In response to the draft of my decision Mr X says because the foundations are too wide the permission was not lawfully implemented. The developer started work within five years, meeting condition 1. He could have done this by digging one trench. Instead the developer laid the foundations. If they are too wide this concerns compliance with condition 2, which is not a pre-commencement condition. The Council's view the permission was lawfully implemented is sound, even if the foundations are wider than shown in the plans. I should also say we cannot know if the foundations laid by the developers in 2001 were wider than allowed in the plans. In February 2014 the Council said the increased width gave greater structural stability. It is possible the developer widened the foundations laid in 2001 to provide improved stability.

21. The Council 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.

22. 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 decided the developer had not built the shed entirely in accordance with the approved plans and so had not met condition 2. The Council decided this was a breach of planning control.

23. 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.

24. 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.

25. Mr X says the Council should have made the developer submit new plans or take the shed down. The Council cannot make a developer submit new plans. It can request a new planning application as part of enforcement; it is then for the developer to decide if he wants to do this. The Council can only order removal as part of formal enforcement action. Any such notice to remove carries with it a right of appeal. The Council properly decided not to take enforcement action. It had no grounds to ask for new plans or removal of the shed.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. 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 Council says the permitted height at this end is 15.5 metres and this is the height as built.

32. It is too long ago for the Ombudsman to consider a complaint about the accuracy of the drawings accepted by the Development Corporation in 1996. In any event the applicant had written the dimensions and this is what the Council considered rather than measuring and scaling the drawings.

33. In response to a draft of my decision Mr X says the 15.5 metres height relates to the river end. He considers the land end should be 2.6 metres lower. He says the Council cannot prove 15.5 metres relates to the land end not the river end. I do not agree.

34. I have seen the 1996 plans. On plan 1/B the applicant has written the proposed elevations at the inland end as 12.5 metres plus 3 metres. Mr X says the Council should not have taken the applicant's word for this. The planning authority has to consider what an applicant applies for; it can grant or refuse this but it cannot make an applicant submit something different. This developer applied for a shed 15.5 metres high at the land end. The Tyne and Wear Development Corporation as planning authority approved this. The current Council had to accept this as the approved height. .

35. In January 2014 the Council wrote to Mr X about this. It said the overall structure on the plans is 15.5 metres at the land end and the foundations are 2.656 metres lower at the river end due to the gradient. It said the agreed structure is much higher at the river end. It said it had taken measurements on site and the shed as built matches these measurements. Since then the Council has consistently told Mr X the shed is the correct height.

36. I have seen the report written for the planning committee by officers of the Development Corporation in 1996. The report says the height is 15.5 metres. Mr X says it does not specify which end is 15.5 metres. The report says "the design, height and location of the proposed shelter can be seen in the display material which will be presented at the meeting". The planning committee also had the plans to refer to. 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.

37. Mr X says plan 14 shows 15.5 metres as the river end height. The Council has explained to Mr X why this is not the case. The developers submitted plan 14 in 2013 as part of their application to discharge condition 4. The Development Corporation did not approve plan 14 in 1996 and it is not a plan subject to

condition 2. It shows how the developers intend to attach the end panels. One drawing shows an end with the panels in place to provide an impression of the final appearance. The drafter has not specified which end this is and the drawings are not to scale.

38. The Council has provided a consistent and sound justification for its view the shed as built is the same height as that granted permission. The Ombudsman cannot criticise the Council's view.

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

39. 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.

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

41. 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 a public meeting and detailed letters.

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

43. 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.

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

45. 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".

46. 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.

47. In response to my draft decision Mr X says he does not agree the Council took five months to say the shed was not built to the approved plans. He says the Council has never admitted the shed is too high and has disregarded his arguments about this. The Council does not agree the shed is too high and has consistently told Mr X this since January 2014. It has not disregarded his arguments. It has explained why it does not agree with him.

Future development on the site

48. 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.

Final Decision

49. 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 decision on behalf of the Ombudsman