31 May 2019

Complaint reference:
18 013 818

Complaint against:
Broxbourne Borough Council

Local Government & Social Care OMBUDSMAN

The Ombudsman's final decision

Summary: Mr Y complains about the Council's decision not to enforce against breaches of planning control at a development site close to his home. The Ombudsman does not uphold this part of the complaint because the Council was entitled to resolve the breaches informally. Mr Y also complains about the Council's decision to grant permission for noisy works under Section 61 of the Control of Pollution Act. The Ombudsman finds fault because the Council approved the application without visiting the site and noting errors in the measurements. This meant the developer was not required to install additional acoustic barriers, and so Mr Y suffered more disturbance than necessary for eight nights in total. The Council will apologise and pay £150 to Mr Y.

The complaint

1. The complainant, whom I will call Mr Y, complains the Council has:

- decided not to pursue enforcement action against a breach of a planning condition relating to a large nearby development;
- granted consent for works on the development's construction site under S61 of the Control of Pollution Act (1974). And, as a result, will not pursue the developer for causing statutory nuisance.

The Ombudsman's role and powers

2. 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)***

3. 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

4. During my investigation, I have:

- Discussed the complaint with Mr Y and considered any information he submitted;

- Made enquiries of the Council and considered its response;
- Consulted the relevant law and guidance around planning enforcement and statutory nuisance; and
- Issued my findings in a draft decision statement and invited comments from Mr Y and the Council. I considered any comments received before making a final decision.

What I found

5. Section 61 of the Control and Pollution Act (1974) allows developers to apply to the Council for 'prior consent', allowing them to undertake activities which may generate noise and vibration during construction of the development.

6. The developer's application for S61 consent should set out the intended works, the working hours and a site plan to show how it will reduce any potential impact to neighbouring residents using 'best practicable means'.

7. Councils will not grant prior consent if the developer has already started construction, other than minor preparatory works, at the time of submitting the application. Developers must submit applications to the Council at least 28 days before any planned works begin.

8. As long as the developer carries out any proposed works in line with the consent provided by the Council, it will become immune from any formal action against nuisance caused by vibration and noise.

Section 61 agreements

9. The Council granted planning permission in 2015 for a large development close to Mr Y's home. As part of the housing development contractors were required to re-surface part of a main link road close to Mr Y's address. As a result, the relevant section of the road had to be closed to allow for the required worked to be carried out.

10. The Highways Authority (the County Council) would not allow closure of the road during daytime hours because of the impact on other road users. This meant the developer had to undertake the required re-surfacing works throughout the night because this is the only time during which the road could be closed.

11. In June 2018, the developer put in a S61 application to the Council seeking permission to undertake disruptive works for four days in July 2018. The Council granted the necessary permission.

12. Resurfacing work began on 23 July 2018 and ended on 27 July 2018.

13. Mr Y contacted the Council on 1 August 2018. He had reviewed the S61 consent and noted a mistake in the developer's calculation of the distance between the site and the nearest residential property (Mr Y's house). Mr Y pointed out to the Council that the developer had noted a distance of 170 metres, but that in reality "…my bedroom window is 135 metres away from where these overnight construction works were taking place on the 26th July 2018. The garden office and the property boundary of my garden is even closer, circa 130 metres"

14. The work carried out in July was unsuccessful. The developer said this was due to the high temperatures, which had impeded their ability to surface the road to the required standard. As a result, the developer applied again to the Council to undertake works during the Autumn.

15. Shortly after receiving Mr Y's email, the Council contacted the developer: "the figure of 170M to nearest receptor is not correct as the properties located to the South West of the new roundabout are around 137M up to the old boundary of the highway. However, when taking in to account the new arm of the roundabout this distance reduces further… distances may be averaged, however this must be done from the nearest residential receptor in line with each piece of equipment and their anticipated use time"

16. Following the Council's feedback, the developer put in a revised S61 application on 8 October for works to begin on 15 October. This application sought permission for night-time work between 20:00 and 05:00. It calculated the nearest building to be 107 metres away from the site. The application included a map to display the measurements.

17. The Council granted permission for the works. A senior Environmental Health Officer (EHO) visited the site on 19 October. They found sufficient controls in place for light mitigation, but felt the noise mitigation was unsuitable because the acoustic barriers were angled incorrectly. The officer also noted that more barriers were needed for the noise mitigation to be successful.

18. Three days later the EHO drove to the site. They noted the barriers had been re-angled following their feedback. The EHO also saw extra barriers being delivered.

19. Mr Y complained about light and noise nuisance from the site. He said this was interrupting his sleep. Officers arranged to visit Mr Y at his home address at midnight on 26 October. The officers noted light entering one of Mr Y's bedrooms but said this diminished once the curtains were closed. In their professional view, the officers felt the light was not considered a statutory nuisance.

20. The officers also observed the noise. The S61 allowed the developer to create noise up to 87 decibels. The officers felt the developer was using 'best practical means' to mitigate the noise and decided the noise was within the limits allowed by the S61 agreement. Mr Y was dissatisfied and complained to the Ombudsman because he felt the Council should have done more to protect his amenity.

21. In response to the complaint, the Council accepted that it should have visited the site before the works started in July. Had it done so, the Council may have noted the error in the distances quoted by the developer. And as a result, it is likely that further measures would have been required to reduce light and noise nuisance.

22. I find fault with the Council for approving an inaccurate S61 application. It is obvious from the records the Council only noticed the error once Mr Y had pointed it out. We know the Council would have allowed the works irrespective of the distance being 107 or 170 metres, because it allowed the works once the true distance was known in October. However, the Council did then insist on extra acoustic barriers, but only four days after the works started.

23. The fault in approving an inaccurate application, and a failure to visit the site before works started both in July and October, meant Mr Y suffered avoidable injustice. Although the Council did not identify a statutory nuisance, its visits only took place after the developer installed additional barriers. Therefore, I consider it is likely Mr Y suffered extra disturbance for eight nights in total during July and October 2018. I am mindful that, thankfully for Mr Y, this phase of works was not significant in duration. The injustice he suffered was not prolonged, although I am aware from Mr Y's noise diaries that he experienced disturbed sleep and headaches. The Council has agreed to apologise and pay Mr Y £150 to reflect the distress caused by its error.

Planning enforcement

Construction hours

24. When granting planning permission, the Council imposed the following condition: "no construction work or delivery of materials relating to this permission shall be carried out on any Sunday, Public or Bank Holiday nor at any other time, except between the hours of 08:00am – 6:00pm on Mondays to Fridays and between the hours of 08:00am – 1:00pm on Saturdays".

25. When imposing that condition, the Council says it was unaware the Highways Authority had refused to close the road during daytime hours to allow for resurfacing works. The Council says this only became apparent after it had granted planning permission and applied conditions.

26. Due to the refusal of the Highways Authority to close the road within the permitted construction hours, the developer had to seek permission from the Council to complete the works overnight, thus breaching the condition.

27. The Council had three choices. It could have invited the developer to apply under Section 73 of the Town and Country Planning Act to either vary or remove the condition. Alternatively it could seek an informal resolution with the developer, or take formal enforcement action against the breach of condition.

28. The Council decided that overnight works constituted a breach of condition. Instead of seeking a S73 application, the Council informally agreed that the developer could undertake works outside of the permitted hours. The Council did not pursue formal enforcement action.

29. The NPPF, at paragraph 58, makes clear that "… enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control. They should consider publishing a local enforcement plan to manage enforcement proactively..."

30. Paragraph 55 also states that planning conditions should only be imposed if they are necessary, relevant, enforceable, precise and reasonable.

31. I cannot criticise the Council for taking an informal approach against the developer's breach of condition. However, it was fault for the Council to impose a condition which was not 'reasonable'. While the Council points out that it was the Highways Authority who prevented the daytime resurfacing works, the Council could have liaised with its colleagues in the County Council before deciding on and specifying construction hours. Failure to do so meant the Council applied a condition which the developer could not comply with, therefore being unreasonable.

32. The injustice to Mr Y is, in my view, not significant enough to warrant any remedy above what I have already recommended. The development would inevitably disturb Mr Y's enjoyment of his home. But this was mitigated by the S61 agreement. On balance, it seems more likely than not the Council would have allowed overnight construction, even if it had been aware of the County Council's refusal to close this road. These works were necessary for the developer to progress the build. They lasted eight nights in total. The Council's stance on this is clear because it eventually allowed some noisy works as per the S61 agreement.

Construction Environmental Management Plan (CEMP)

33. The developer also breached a condition about compliance with its CEMP. Among other things, the CEMP placed requirements on the developer to manage factors such as excessive dust and access to the site.

34. The Council received reports on 12 and 13 July 2018 that the development was causing excessive dust. The records show the Council contacted the developer to arrange a meeting to resolve the issue. The Council then received a further report that vehicles were accessing the site via an unauthorised route, again in breach of the CEMP.

35. Planning officers visited the site on 18 July 2018. Two days later the officers confirmed their conclusions in a letter to affected residents: "Recent weather conditions have unsurprisingly resulted in incredibly dry earth and have presented a considerable challenge to managing dust within the site… I consider closing the dirt roads rather than constant dampening to be a practical solution. Furthermore [contractor name] have ceased works to move the large soil heap from the south side of the site across to the [road name] until such time as the dry weather has broken…Following that site inspection and subject to the arrangements put in place, I do not consider there to be any breach of planning control which would warrant the Council taking any formal action in respect of the breach of condition"

36. The officer also said: "as a subsequent issue, but also related to the [CEMP] planning condition, I have also seen images of construction and delivery vehicles in [road name]. I understand that since then, the postcode has been removed from all paperwork and on Wednesday when visiting [road name] we viewed the signage erected either side of the entrance advising that there was no entry for development traffic… I am satisfied steps have been taken to resolve the breach and accordingly do not at this time consider it expedient to undertake any action in respect of that breach"

37. The Council then received a further report about unauthorised access to the site. It wrote to the developer asking for additional measures to direct delivery vehicles to the correct access point. The developer responded to confirm it had:

- introduced more signage
- informed visitors about access
- asked contractors to remove the incorrect postcode from all documentation
- asked contractors to call the site shortly before arriving
- agreed to survey the state of Mr Y's road
- considered introducing a gate

38. Although the developer had breached the condition about the CEMP, the Council decided it was not expedient to take formal enforcement action. This was because the developer had taken steps to reduce the dust and to route delivery vehicles to the correct access point. The NPPF encourages councils to resolve planning breaches in a proportionate way.

39. While Mr Y may disagree with the Council's approach here, there is no evidence of procedural fault. The Council acted promptly upon reports of the breaches, and after ensuring the developer had put appropriate measures in place, no further reports were received about dust and access. I have no grounds on which to criticise the Council's decision not to take enforcement action against these breaches, and so I do not uphold this part of Mr Y's complaint.

Agreed action

40. Within four weeks of my final decision the Council will:

- apologise to Mr Y for the injustice caused when it approved the developer's erroneous S61 application. The Council will also pay £150 to Mr Y in acknowledgment of the distress caused by the additional disturbance he likely experienced between for eight nights in 2018.
- consider whether to make site visits standard practice before granting S61 consent, especially for large scale developments such as the one complained about.

Final decision

41. I have completed my investigation with a finding of fault and injustice for the reasons explained in this statement. The above action is sufficient to remedy the injustice Mr Y experienced.

Investigator's decision on behalf of the Ombudsman