

The Ombudsman's final decision

Summary: We found fault on the complaint made by Mr B on behalf of Mr and Mrs C about the way the Council considered the neighbour's application to discharge a planning condition. It failed to check whether the report received was amended or show it considered there was a satisfactory solution to the development's impact. There was no evidence of the tree protection and mitigation measures officers agreed. The agreed action remedies the injustice caused.

The complaint

1. Mr B complains on behalf of Mr and Mrs C about the Council failing to:
 - a) consult properly on a neighbour's application for the discharge of two planning conditions which required a full arboricultural survey and impact assessment, as well as detailed drawings for a terraced area, before development could take place;
 - b) consider whether the concerns raised by the previous tree officer were addressed when deciding to discharge the conditions;
 - c) revoke the discharge of the planning conditions; and
 - d) protect trees by way of Tree Preservation Orders.
2. As a result, they lost screening from the removal of trees on the neighbour's land and are concerned about damage to other trees, some on their land, which are not protected by the development carried out.

The Ombudsman's role and powers

3. If we are satisfied with an organisation'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)
4. 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 significant injustice, or that could cause injustice to others in the future we may suggest a remedy. (Local Government Act 1974, sections 26(1) and 26A(1), as amended)

-
5. When considering complaints, we make findings based on the balance of probabilities. This means that we look at the available relevant evidence and decide what was more likely to have happened.

Planning law and guidance

6. An application for any consent, agreement, or approval, required by a planning condition, or limitation attached to consent, must be made in writing to the council and give enough information to allow it to identify the consent. In addition, it needs to include details, and be accompanied by such plans and drawings, as are necessary to deal with the application. (The Town and Country Planning (Development Management Procedure) (England) Order 2015 section 27 (1) (a) and (b)).
7. A council must notify the applicant of its decision within eight weeks. (The Town and Country Planning (Development Management Procedure) (England) Order 2015 section 2).
8. The Courts decided the appropriate test for discharging a condition is whether the application is 'satisfactory'. A council has to look at whether a proposal is a satisfactory solution to the impact to which the condition referred. It does not have to be ideal. It also needs to look at whether the requirements of the condition cannot be read as imposing unreasonable requirements on the interested party. (Cathie, R (On the Application Of) v Cheshire West and Chester Borough Council [2022] EWHC 2148 (Admin))

How I considered this complaint

9. I considered all the information Mr B sent, the notes I made of our telephone conversation, and the Council's response to my enquiries. I sent a copy of my draft decision to Mr B and the Council. I considered their responses.

What I found

10. Mr and Mrs C's neighbour applied for planning consent for an extension with a raised patio area and steps down to a garden. When the planning inspector granted consent following the Council's refusal, a condition was attached to it. This said the development could not take place until a full arboricultural survey and impact assessment had been sent to the Council and approved.
11. The neighbour applied to have it discharged (application 1). The Arboricultural Manager (manager 1) was concerned about the root protection area for a protected tree on Mr and Mrs C's land. Manager 1 was concerned about the impact on it from the paving terraced area on the neighbour's land. He wanted more information about how this area would be protected along with foundation details for the patio. The Council refused the application.
12. Mr B's complaint is about what happened when the neighbour applied again to have this condition discharged (application 2). Although not directly notified of it, Mr B instructed a planning consultant and tree surveyor the same day the Council confirmed the application received was complete with all supporting information. Mr B intended to make representations against it.
13. The next day, his tree surveyor told him there were strong grounds to make representations. Mr B asked the Council when he had to send them by but discovered it had already approved the application. The new Arboricultural Manager (manager 2) had not been consulted.

-
14. Mr B claimed the neighbour's arboricultural impact assessment (the report) sent on both applications was identical. So were the proposed plans which gave no information about foundations for the patio. Nor was there extra information sent about the impact the works might have on Mr and Mrs C's protected tree. Mr B complained none of manager 1's concerns on application 1 were addressed on application 2 when the Council approved it.

Complaint a): consultation

15. Mr B argued the Council failed to consult properly, or at all, on application 2 before discharging the condition. He sent the Council representations anyway, even though it had already reached a decision on it. He also sent a report from Mr and Mrs C's own tree specialist.
16. The Council told him there was no statutory duty to consult.

My findings

17. I found no fault on this complaint for the following reasons:
- a) The Council needed to reach a decision on application 2 within eight weeks.
 - b) To ensure it met this deadline, the Council set out an 'Internal Target Date' on its website page for the application.
 - c) The Council was entitled to place a date on its internal system to record the deadline by which it had to decide the application. This is good administrative practice to ensure deadlines are met.
 - d) It was clear from the rest of the details on the website that this was a date for officers only. There was no target date on the website by which the public had to make representations. This should have alerted Mr B, Mr and Mrs C, that this was a different procedure to a full planning application, for example.
 - e) I am satisfied the Council had no legal obligation to notify neighbours of this application.

Complaint b): failure to consider previous officer's concerns

18. Mr B argued the Council failed to consider manager 1's previous concerns raised on application 1 when deciding application 2. Manager 1's concerns were: he wanted extra information about how the protected tree on Mr and Mrs C's land would be affected; the need for information about the foundations being used for the patio. Without this information, manager 1 said he could not approve it.
19. The Council accepted it mistakenly believed the report sent with application 2 was an updated version but later found out it was the same with minor amendments.
20. Despite this, it explained it understood manager 1's concerns were addressed through correspondence between him and the neighbour's specialist. It confirmed manager 1, who no longer worked for it, was happy with the report which he had previously seen before it was published. This is why the Council approved application 2 quickly. Manager 2 was later asked to review all the information after the Council's decision.
21. Mr B believed:
- there was no evidence of manager 1 or 2 being consulted on application 2.
- The Council accepted manager 1 was not consulted as he had already left but confirmed he was satisfied with amendments made to the report by the neighbour. It provided a copy of an email thread between manager 1 and another officer which said he was happy with the additional updates from the

neighbour's specialist and said, '*I can now approve the application if it is still open*'. This was about a week before the Council discharged the condition.

The only new information manager 1 had was an email from the neighbour's specialist which said: there was a typing mistake in the appendix which referenced the wrong tree; the encroachment of the terrace into the root protection area of Mr and Mrs C's tree was no more than 1%; with the neighbour's nearby tree, it was likely to have fused its roots with it; it is highly likely this competition would have inhibited their tree's root development under the terrace; there would be no direct conflict with the roots of their tree.

- the supporting report sent by the neighbour was identical for both applications. This meant the concerns raised by manager 1 on the first application were not considered or addressed.

The Council accepted the evidence the neighbour sent for both applications was the same, with only a minor correction in an appendix table. It claimed it ensured suitable measures to mitigate the impact on the trees were acted on despite the neighbour submitting the same report. It maintained it worked with the neighbour to mitigate the impact of the works on the trees.

The Council accepted it wrongly approved the previous report. It also pointed out the planning consent was approved by the planning inspector so there was a possibility some damage could happen to the tree from the works; and

- the report Mr and Mrs C sent was not considered.

The Council confirmed the report they sent was not considered or reviewed. It apologised for this and looked at addressing this processing error. A senior officer has since read the report and considered the actions taken by the neighbour were appropriate.

22. An internal email sent after the Council approved application 2, confirmed there were no amendments in the neighbour's report following manager 1's requests. It also noted the report did not show how proposed landscaping works would be done within the root protection area (rpa) of Mr and Mrs C's tree. The email said the plans, '*clearly show an encroachment into the rpa*' of this tree. It noted the Council would need to know the proposed method of works in this area.

My findings

23. I found fault on this complaint for the following reasons:
- a) The Council confirmed the neighbour resubmitted the report sent on application 1 with only minor amendments when making application 2. The amendments were only to an appendix table. The Council wrongly considered this was an updated report. The only amendments in the report were minor and irrelevant to the concerns raised on application 1. This was fault as the Council failed to properly consider whether the report had been updated to adequately address manager 1's concerns when it received it.
 - b) The legal test for discharging a condition is whether the application is 'satisfactory'. This meant the Council had to consider whether the information the neighbour sent proposed a 'satisfactory' solution to the possible impact on Mr and Mrs C's tree. It did not need to be an 'ideal' solution.
 - c) I found no evidence the Council properly considered whether what was proposed was a satisfactory solution to the potential impact on the protected tree.

d) On balance, I am satisfied the Council failed to satisfy itself that the requirements set out in the condition to be discharged were properly considered. This is because:

- the Council accepted the neighbour never submitted a fully amended arboricultural report.
- it referred to emails between the neighbour's specialist and manager 1, copies of which I have seen. In them, the specialist noted the correction of an error in the table's reference to the wrong tree. The specialist also gave a view about the limited encroachment of the terrace into the root protection area of Mr and Mrs C's tree, the likely fusion of roots, all of which meant there was a low likelihood of any real impact on the protected tree's development under the terrace.
- none of these views were supported by any evidence or explained what evidence had been considered when reaching them.
- manager 1 replied to the specialist saying he was happy and would approve the application. No reasons about why he was satisfied were given or what he had considered. I am not satisfied manager 1's consideration of the specialist's comments was rigorous enough.

24. I consider these failings caused Mr and Mrs C an injustice. This was in the form of distress as they have the uncertainty and frustration of not knowing whether the decision on application 2 might have been different but for the fault found.

25. In response to my draft decision, the Council provided copies of emails between manager 2 and the neighbour about appropriate tree protection and mitigation measures in place. The email exchange took place five months after the discharge decision.

Complaint c): failure to revoke discharge

26. Mr B believed the Council should have revoked its decision to discharge and failed to consider his request to do so.

27. The Council said it was not in the public interest to revoke its decision. This was because the potential harm to the roots of the protected tree on Mr and Mrs C's land was limited. This was agreed by manager 2 and advice from the then Head of department.

28. I have seen the email from the Head which refers to section 97 of the Town and Country Planning Act 1990 which allows revocation where it is 'expedient'. The email noted there was a responsibility to pay compensation for the costs from the grant of consent until the revocation. It also noted the neighbours could object which meant the appeal would go to the secretary of state. The officer suggested talking to the neighbours and getting their agreement about how they would construct the patio in terms of damage to the roots of Mr and Mrs C's tree.

29. The Council said manager 2 visited the site and confirmed he was satisfied with the tree protection and mitigation works.

My findings

30. I found no fault on this complaint. The Council was entitled to consider it was not 'expedient' to revoke its decision on application 2.

Complaint d): failure to make Tree Preservation Order

31. Mr B claimed the Council failed to consider a request for a Tree Preservation Order (TPO) for a tree on the neighbour's land which was eventually removed. A

TPO is an order a council can make to protect a specific tree, or group of trees, for example.

32. Mr and Mrs C had asked the Council to make a TPO on a tree within the neighbour's land because under the consent granted by the planning inspector, the tree would be removed. An officer visited the site a few days later.
33. The Council decided it would not make a TPO for this tree. The reason was because it was not in a high enough category for its species. The Council explained the planning inspector had already granted consent to the neighbours which would include the removal of this tree as it was in the area of the proposed patio area. For this reason, it said it would have been 'perverse' to have put a TPO on the same tree.
34. The Council believed it would have acted unreasonably to seek a TPO to an unprotected tree after the appeal decision. This was because doing so would be considered as frustrating the neighbour's ability to carry out the consent.
35. Mr B claimed the refusal was based on failings such as: wrongly stating there was an updated tree survey report; a lack of consultation with Mr and Mrs C; failing to consider the planning inspector's view that this was an important tree; believing it could not make a TPO until it revoked its decision to discharge the condition.

My findings

36. I found no fault on the complaint about the Council failing to make a TPO for the tree on the neighbour's land. The Council considered the request and correctly pointed out this tree was to be removed under the planning consent granted by the planning inspector.
37. Making a TPO would interfere with the neighbour's right to carry out the planning consent granted. The Council was entitled to reach this decision after taking account of all the circumstances.

Agreed action

38. I considered our guidance on remedies.
39. The Council agreed to take the following action within four weeks of the final decision on this complaint:
 - a) Send Mr and Mrs C a written apology for failing to properly: check whether the report sent with application 2 was fully amended; satisfy itself when it made the decision to discharge the condition that there was a satisfactory solution to the development's impact on a protected tree; show what tree protection and mitigation measures officers agreed with the neighbour and whether these were implemented.
 - b) Act to ensure there is a process for checking whether subsequent reports sent in support of discharging conditions have, or have not, been amended.
 - c) Act to ensure officers make decisions based on evidence received and give reasons for them.
 - d) Remind complaint officers of the need to send evidence in support of claims made to us in response to our enquiries.
 - e) Provide Mr B, Mr C and Mrs C with details of the tree protection and mitigation measures agreed with the neighbour.

-
40. The Council should provide us with evidence it has complied with the above actions.

Final decision

41. I made the following findings on the complaint made by Mr B on behalf of Mr and Mrs C:
- Complaint a): no fault;
 - Complaint b): fault and injustice;
 - Complaint c): no fault; and
 - Complaint d): no fault.

Investigator's decision on behalf of the Ombudsman