

Report by the Local Government Ombudsman

Investigation into a complaint against

Cornwall Council

(reference number: 12 000 843)

28 April 2014

The Ombudsman's role

For 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

Investigation into complaint number 12 000 843 against Cornwall Council

Contents

| | |
|---|----|
| Report summary..... | 1 |
| Introduction | 2 |
| Legal and administrative background | 2 |
| How we considered this complaint..... | 3 |
| Investigation | 3 |
| Conclusions..... | 8 |
| Decision | 10 |
| Recommendations | 11 |

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names used

Mrs Z - the complainant

Ms Y - Mrs Z's neighbour and the owner of the site

Officer A - Planning enforcement officer

Officer B - Senior legal officer

Officer C - Senior legal officer

Officer D - Planning enforcement team leader

Officer E - Area planning manager

Officer F - Locum senior legal officer

Officer G - Planning enforcement team leader

Report summary

Planning enforcement: equestrian developments

Mrs Z complains the Council did not reach appropriate planning enforcement decisions when her neighbour, Ms Y, put horses and carried out equestrian development on her agricultural land without planning permission.

The Council must take all material information into account when it reaches its decisions, including what, if any, enforcement action is expedient. It must record its decisions properly and take the appropriate action.

The investigation found that members of the Council's planning committee decided Ms Y could keep horses on the land but ownership and use should be restricted, to prevent commercial use. Members were not given the legal advice available, or told of officer concerns about the decision, so they could weigh up the differing views. The Council did not properly record subsequent decisions, especially whether enforcement action should be less restrictive than that authorised by the planning committee.

The Council served an enforcement notice on Ms Y but this was not as restrictive as members had intended as it did not restrict who owned and used horses on the land. Ms Y let the equestrian facilities to tenants who used them more intensively than Ms Y had done.

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council should:

- review all of the planning enforcement issues complained about for the site;
- within three months of the date of this report prepare a report for planning committee members to consider the options available for enforcement action;
- review its process to make sure members receive copies of earlier reports and decisions for planning enforcement matters when decisions are deferred and that the updating report refers to them;
- ensure that recorded decisions properly reflect the report recommendations they are referring to;
- amend its legal services referral forms to require copies of relevant committee decisions;
- apologise to Mrs Z; and
- pay her £400 for her uncertainty that enforcement action could have been different and avoided significant disturbance to her, and for the undue time and trouble she was put to in trying to understand the position and complaining about the events on site.

Introduction

1. Mrs Z complained that Cornwall Council:
 - a. failed to reach an appropriate enforcement decision relating to equestrian buildings and paraphernalia on land next to her home, as it did not consider all material evidence; and
 - b. failed to investigate her complaint that a septic tank had been installed which she considered may amount to a breach of planning control and building regulations.
2. Mrs Z said she was affected because her bedroom is on the ground floor overlooking the entrance to the field and she was often disturbed by the visitors to the field and activity there. She said the buildings put up were too close to her home resulting in unacceptable noise and smell, fire risks and pests.

Legal and administrative background

3. The Ombudsman investigates complaints about 'maladministration' and 'service failure'. In this report, I have used the word fault to refer to these. If there has been fault, the Ombudsman considers whether it has caused an injustice and, if it has, she may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1)*)
4. The Council has discretion to take enforcement action. It may issue an enforcement notice where it appears there has been a breach of planning control; and that it is expedient to issue it, having regard to the provisions of the development plan and other material considerations. (*The Town and Country Planning Act 1990, section 172(1)*)
5. Government guidance suggested the Council should decide whether the breach of planning control would unacceptably affect public amenity or the existing use of land and buildings meriting protection in the public interest. If the Council decided to exercise its discretion not to take formal enforcement action it should be prepared to explain its decision. (*Planning Policy Guidance 18 Enforcing Planning Control*) From 1 April 2012 Government Guidance said councils should act proportionately in responding to suspected breaches of planning control and should consider publishing a local enforcement plan to manage enforcement proactively in a way that is appropriate to their area. (*National Planning Policy Framework, paragraph 207*)
6. The Council must set out in an enforcement notice what constitutes the breach of planning control and what steps the Council requires to be taken or what activities are required to cease to remedy the breach. (*DETR Circular 10/97 Enforcing Planning Control: Legislative Provisions and Procedural Requirements*)
7. The Council's usual planning committee process requires an update note or a written report to be provided where officers consider an enforcement decision previously made by members of the planning committee should be changed.

8. At this Council, Council officers, acting under delegated powers, usually decide whether it is expedient to take enforcement action for breaches of planning control. It is unusual for planning enforcement to be considered by members of the planning committee.

How we considered this complaint

9. This report has been produced following the examination of relevant files and documents and interviews with the complainant and relevant employees of the Council.
10. The complainant and the Council were given a confidential draft of this report and invited to comment. The comments received were taken into account before the report was finalised.

Investigation

Background

11. Mrs Z lives down a private track (classified as a public byway) in an Area of Outstanding Natural Beauty (AONB). At the end of the track close to Mrs Z's home is a gateway to a field which runs next to Mrs Z's home and garden. The current owner of the field, Ms Y, bought it in 2009 and introduced horses. Most of the development to accommodate the horses occurred near Mrs Z's boundary and the field entrance. Ms Y installed a field shelter, a stable block, a hay store, caravan, manure heaps and fencing. She also had electricity and water connected.
12. Mrs Z complained about flies, rats, hay spores and pollution of the ground which she associated with the keeping of the horses and the developments. The Council's environmental health officers investigated several times but did not consider a statutory nuisance had occurred.
13. Mrs Z complained about Ms Y's unauthorised developments in 2010. She said the land was used for commercial livery in summer 2009 and 2010 as Ms Y had a tenant. Ms Y usually took the horses away to other land she controlled during the winter months. The Council reviewed its enforcement decisions and in March 2011 said:
 - the lawful use of the land was agricultural;
 - Ms Y had changed the use on the land from agricultural to equestrian as horses were being kept, having food brought in and being ridden there;
 - the stationing of the caravan was ancillary to the equestrian use of the land and was unauthorised;
 - the field shelter, stable block and the hay store extension were unauthorised buildings; and
 - commercial use had not been proven.
14. The Council decided to serve a planning contravention notice (PCN) on Ms Y to investigate the alleged commercial use of the land and to see what it was being used for. It would review earlier decisions not to take enforcement action, and consider issuing an enforcement notice particularly in relation to the stable block.

15. Between April and August 2011 Mrs Z complained about early morning and late evening disturbance when the horses were taken out for the day in the lorry. She said electricity had been installed to the hay store, that the field had been divided with fencing and horse schooling paraphernalia had been put out. She reported riding lessons when they occurred.
16. In May 2011 the Council issued a PCN to Ms Y to enquire about the use of the land for the keeping of horses, stables, shelter, caravan and horsebox. In her response to the PCN Ms Y said the land was used for equestrian/agricultural purposes and had been for over 200 years; the present use started in 2008. She said it was not used for business purposes or livery. She said her developments had been carried out for a longer period than Mrs Z's records. During 2011 Ms Y usually had four horses on site but they did not all belong to her.
17. In September 2011 Mrs Z's solicitor wrote to the Council requesting enforcement action. The Council said they would also ask the planning committee to consider this.

Key facts

What happened in November 2011

18. The Council told Mrs Z and Ms Y that members of the planning committee would visit the site before considering whether enforcement action should be taken. Mrs Z said Ms Y had removed her tenants, their horses and vehicles and she had tidied the site before the visit. Councillors who visited the site said there were no horses there when they visited it. Mrs Z wanted to submit evidence to the planning committee or have her solicitor attend and present it. The Council did not allow this based on its legal advice. Mrs Z's photographs were considered to show only a snapshot in time. Ms Y did not attend or provide evidence.
19. Officer A, a planning enforcement officer, prepared a report. Senior planning and legal officers considered it. He took into account Ms Y's intention to use the land herself rather than have tenants. The report described the site and alleged breaches of planning control. It set out the:
 - background;
 - Council investigations as to the lawfulness of Ms Y's activities and the impact on the amenity of neighbours and users of the public footpath; and
 - visual impact within the AONB.Officer A's initial view was that planning enforcement was not expedient at all but after advice from the area planning manager, Officer E, he amended his report to reflect that planning enforcement was not expedient in relation to some issues. Officer A's recommendations are set out in full in Appendix A paragraph 60.
20. In summary, Officer A recommended the Council under enforce to limit:
 - the site to six private horses (owned and used personally by Ms Y and her family, and not in connection with any business purposes); and
 - where manure could be stored.

He recommended the Council take no action on the stables, field shelter and caravan. Officers were to monitor the site for 12 months because of concerns about the intensification of use and to report to members again if circumstances changed.

21. Just before the meeting Mrs Z complained about surface water run-off causing pollution. Mrs Z said this was not a new complaint but a repeat of the run-off.
22. A senior legal officer, Officer B, saw the report before the committee meeting took place. She told another senior legal officer, Officer C, who was due to attend the meeting that she had concerns about the recommendation. She gave Officer C a model condition to restrict ownership and use of the horses and said a plan was required, saying where manure storage was prohibited. Her views are set out in Appendix A paragraph 61.
23. Officer D, an enforcement team leader, presented Officer A's report to the committee in November 2011. His manager, Officer E, also attended the meeting. Members considered the report and the need for enforcement action.
24. Members approved Officer A's recommendation, but the decision set out in the minutes was worded differently, as set out in Appendix A paragraph 62. The decision confirmed that six horses were permitted on site, and they had to be owned or used only by Ms Y and her family, and not in connection with business purposes. The decision contained a further paragraph which paraphrased what was to be enforced and did not mention ownership or business use. Members also agreed to delay an enforcement notice until officers had investigated water run-off. A further report was to be made to the planning committee in early 2012.
25. We interviewed members and officers to establish what happened and what members had intended. Officer C cannot recall whether she gave legal advice about Officer B's concerns about the need for a plan for manure storage, or whether she supplied a differently worded paragraph to limit who kept the horses on the land. Officer D said he would not have referred to the ownership of the horses being limited as he considered members were concerned to prevent commercial use. He said he did not consider use could be restricted to Ms Y because an enforcement notice had to set out the positive steps Ms Y had to take and it could not apply conditions restricting Ms Y's actions. His manager, Officer E, agreed.
26. We interviewed six members of the planning committee. Members had difficulty remembering the details but said there was a debate and the consensus was that the recommendation in the report was approved. One member remembered saying that personal use by Ms Y and her family was the crux in the interests of neighbourliness. Another member recalled that they had tried to limit Ms Y and that he had suggested a separate condition requiring no commercial use. We are satisfied that members of the planning committee wanted to limit the ownership and use of the horses on the site as recommended to prevent commercial use by Ms Y.
27. After the committee, Officer D told Mrs Z and Ms Y of the committee decision as he perceived it but did not tell them the exact wording or mention the restricted use and

ownership. He did not check his view was reflected in the draft minutes. Mrs Z complained that members had not been shown the true impact of Ms Y's activities. Officer D also contacted the Environment Agency to establish if there was a water run-off problem on the site. He was told there was not. Mrs Z said the Environment Agency had only visited once in 2010 and the information it gave to Officer D was out of date and unreliable.

What happened in February 2012

28. The planning committee considered a report about water run-off in February 2012. The members we interviewed understood that the implementation of the November decision about the enforcement notice would be deferred to consider this other matter. Three members of the committee had not been present in November 2011, but the Council did not give the November report or a copy of the decision to any members in February. Officer D wrote the February report which said that the Environment Agency was satisfied there was no water run-off issue. His report only provided limited background information and did not set out the November decision fully. Officer D said he explained the background to members and Officer E confirmed that he did so.
29. Officer D told us he considered an enforcement notice that restricted the horses to those owned and used by the landowner and her family would not be enforceable. He said he made this clear verbally to members and they only limited the number of horses to six and said the location of manure should be by agreement with the Council. Although the officer thinks he made it clear to members of the committee, the members did not find it clear. Officer D did not set out the recommendation for a change to the November decision in his report or in a committee update sheet as is the Council's usual process. Officer D's recommendation, set out in Appendix A paragraph 63, referred to the November decision but did not reflect it in full.
30. When we interviewed the members they could not recall Officer D explaining a change was needed. Most members had difficulty remembering the matter in detail but their general understanding was that officers would proceed on the basis of the November decision.
31. The decision recorded in February noted the report and that no further action was to be taken for the reasons in the report. It is set out in Appendix A at paragraph 64. Unfortunately this does not make much sense by itself and the Council has not been able to find any more detailed decision note. It appears to relate to the water run-off report and that no action was needed in respect of this. There was no comment about the other issues so it appeared the November decision would stand.
32. Officer D told Mrs Z and Ms Y an enforcement notice would be issued.

Enforcement action

33. In March 2012 Officer D asked the legal team to check the draft enforcement notice. The referral form he completed did not require him to provide a copy of the decisions the planning committee had made. The legal officer, Officer F, asked about and was shown the enforcement files. She did not see the decisions by members. Officer F approved the draft enforcement notice.

34. In April 2012 Ms Y told Officer D she intended to lease her field to a tenant for equestrian use for five years. A week later Officer D issued the enforcement notice. It required Ms Y, by 31 May 2012, to:
- remove any horses from the land that currently exceed six in total;
 - permanently make sure that no more than six horses occupy the land at any one time;
 - permanently stop storing of manure on the land hatched green on the plan attached to the enforcement notice; and
 - remove all manure from this area.
35. In June 2012 Mrs Z reported that two tenants had arrived on site with their four horses and paraphernalia. She overheard them discussing dividing the facilities. She said Ms Y had moved her caravan near the septic tank and used it independently of her tenants. Ms Y's two horses were also kept there. She said the tenants padlocked the gate overnight, blocking the public footpath.
36. Ms Y appealed the enforcement notice in June 2012. The Council lodged its case with the planning inspector and waited for a decision about whether Ms Y had to comply. Ms Y withdrew her appeal in January 2013 and had to comply with the enforcement notice in April 2013. The Council could not take enforcement action against a breach of the notice as it had not taken effect pending the outcome of the appeal between June 2012 and April 2013.
37. In May 2013 Officer G, a planning enforcement team leader, visited the site. She saw a timber boarded muck heap that she decided met the requirements of the plan. She found less than six horses on the site. She informed Mrs Z that Ms Y had complied with the enforcement notice and the Council would close its file.

The septic tank

38. In March 2012 Mrs Z reported to the Council that Ms Y had a septic tank installed and had laid trenches to have power installed. She said Ms Y quickly covered the trenches. Officer A visited the site in April. Ms Y said that she had installed a water holding tank because the water authority required her to do so if she intended to use a hose pipe. She said power cables had not been laid. Mrs Z said Ms Y's statement was not supported by the water authority when Mrs Z checked.
39. The Council's building control supervisor said Ms Y did not require building regulations approval for the works. The Council has explained that as the water tank is collecting surface water from a stable block, drainage systems in conjunction with stables are exempt from the Building Regulations. The Council's planning enforcement department considered it was not expedient to take enforcement action against the engineering works involved after an officer visited the site.

Conclusions

November meeting

40. Mrs Z complained that members had not been informed of the true impact of Ms Y's activities in November 2011. We have considered the report Officer A provided. It provided a fair assessment of events and gave his professional judgement for each enforcement issue. We have no reason to challenge the process he followed, which caused no injustice to Mrs Z.
41. The report referred to previous problems when Ms Y had tenants in 2011, and that Ms Y intended to use the land herself. The report recommended the ownership and use of the horses on site be limited to prevent commercial use. We are satisfied that members of the planning committee agreed with this.
42. The Council is at fault because Officer B's legal advice about the recommendations in the report should have been provided to members in a way they could understand, especially as a legal officer was present. If members had been provided with Officer B's model clause it would have provided a much clearer decision. They would have understood the difference of opinion between legal and planning officers and could have decided which view they favoured.
43. Members of the planning committee were satisfied that it was not expedient for the Council to take enforcement action in relation to the stables, field shelter and caravan. They considered a full report and visited the site. It was not necessary for them to consider evidence of earlier events on site from Mrs Z when these were summarised in the report. Their decision in relation to these issues was made without fault. Those developments may have affected Mrs Z's amenity, but it is not an injustice arising through administrative fault by the Council.

February meeting

44. The Council was entitled to rely on the professional view of the Environment Agency that water run-off on the site was not a concern. It was entitled to take the Environment Agency's view at face value even if the Environment Agency had not visited the site again. It did so without fault.
45. From the interviews, we are satisfied that members of the planning committee intended that the November decision was one that was going to be followed through rather than changed. Officers D and E, both experienced planning officers, should have ensured that the change to the November decision they considered necessary was appropriately documented and referred to members. The enforcement notice was issued on the basis of the change they considered necessary and should have been clearly authorised by members. Lack of clear authorisation caused injustice to Mrs Z as members did not authorise equestrian use by tenants on the site.
46. Three members of the committee had no accurate written information about the November decision. This should have been given to members with the February report.

The decision recorded in the minutes does not reflect the recommendations made in the February report which itself was inaccurate, and the decision was not adequately detailed. It implies no enforcement action was approved whereas members intended that an enforcement notice would be issued, but not in relation to water run-off. These are faults. The poor decision record caused Mrs Z great difficulty trying to understand the decision made. Officers and members did not check the wording of the minute before it was accepted as a true record of their decision.

Enforcement action

47. Officer F gave legal advice on the draft planning enforcement notice without seeing the formal decisions made by the planning committee, so her advice was flawed. Although the enforcement notice does not use the words members agreed, the Council has issued a notice it considers enforceable. The enforcement notice does not reflect the formal decisions made by the planning committee, it reflects the changes officers thought appropriate and what they perceived the decision to be.
48. A plan was introduced with the enforcement notice requiring manure to be removed from an area near Mrs Z's boundary and stored elsewhere. The Council was not able to enforce the notice it served between June 2012 and January 2013 because of Ms Y's appeal. Officer G investigated when the enforcement notice took effect and decided the enforcement notice had been complied with and no further enforcement action could be taken. This decision was reached without fault.
49. The November decision required officers to report back to the committee if the circumstances changed within 12 months. Officers should have provided an update report to members by December 2012 at the latest. A significant number of changes had occurred during the year. The Council considers only material changes related to the issues members had previously been asked to consider would have justified a report back to members, and that no such change occurred. But the November recommendation and decision did not limit change in circumstances to the issues members had previously considered and members' concern was about possible intensification of use of the site based on a report showing the problems that had occurred with previous tenants on site. Mrs Z was caused injustice as a review by members could have resulted in a clear direction about the activities on the site, as a whole.
50. As Ms Y did not exceed the permitted number of horses on the site, the Council had no grounds to take any action following the service of the enforcement notice because of the way the enforcement notice was worded.

Injustice

51. Mrs Z said she had suffered health risks from rats and flies coming from the stables and muck heap. The Council's environmental health officers investigated and did not establish an actionable nuisance. The planning enforcement team leader found the muck heap was outside the prohibited area, introduced to protect Mrs Z's amenity. Mrs Z has produced evidence of rats and flies affecting her in her home, but this has not been caused through fault by the Council.

52. Between November 2011 and June 2012 there were no horses on site. In June 2012 Ms Y put two horses on part of the field, and her two tenants brought a further four horses onto the land. Although Ms Y removed her horses in September 2012 and no longer visited the caravan, Mrs Z experienced disturbance and loss of privacy through the use of the stables by the tenants. She says that as a result of the November decision not being followed the use of the site has intensified. There are multiple tenants with more visitors, and Ms Y is not removing the horses from the site in the winter so there is much greater use of the stables. The planning committee intended that she should have a level of protection by limiting the ownership and use of the horses on the site to prevent commercial use. The Council says that it does not matter who uses the horses if equestrian use is acceptable. But that view does not take account of the additional development and daily activity by the tenants, very close to Mrs Z's home, which has caused her an injustice.
53. Mrs Z made a separate complaint about further unauthorised developments by the tenants which are not covered by the enforcement notice. We found the Council's decisions not to take enforcement action were made without fault.
54. Officers told Mrs Z what they perceived the decisions of the planning committee to be. Mrs Z was not told where she could view the formal decisions of the planning committee until after she complained to us. She was put to undue time and trouble looking for information (including requests to the Information Commissioner) as she did not understand what had been put to and decided by the planning committee. She also continued to report events on the site affecting her when she thought ownership of the horses by tenants there might be a matter for enforcement action.
55. Mrs Z was concerned that when Ms Y installed the water or septic tank and electric or water cables she was preparing to develop a dwelling where she had planning permission for a barn. The installations did not cause injustice to Mrs Z.

Decision

56. The Council has reached a number of flawed decisions related to planning enforcement on the site next to Mrs Z's home, described in paragraphs 42, 45 to 47 and 49. These have caused her the injustice of uncertainty as it is possible members could have reached a different view about what enforcement action was appropriate at the outset, or when circumstances changed. The disturbance and loss of privacy she experienced may have been avoided. Mrs Z has been put to undue time and trouble looking for information and reporting events on site.
57. The Council's decision in November 2011 that it was not expedient to take enforcement action in respect of the stables, field shelter and caravan was made without fault.
58. Its decisions in respect of the engineering works carried out to install the water tank and pipes were made by officers exercising professional judgement without fault.

Recommendations

59. To remedy the injustice caused we recommend the Council should:

- review all of the planning enforcement issues complained about for the site;
- within three months of the date of this report prepare a report for planning committee members to consider the options available for enforcement action;
- review its process to make sure members receive copies of earlier reports and decisions for planning enforcement matters when decisions are deferred and that the updating report refers to them;
- ensure that recorded decisions properly reflect the report recommendations they are referring to;
- amend its legal services referral forms to require copies of relevant committee decisions;
- apologise to Mrs Z; and
- pay her £400 for her uncertainty that enforcement action could have been different and avoided significant disturbance to her, and for the undue time and trouble she was put to in trying to understand the position and complaining about the events on site.

Appendix A

Recommendations in Officer A's report in November 2011:

60. Officer A recommended:

- Enforcement action be authorised in respect of the following:
 - a. that the storage of manure shall be in a location agreed with the Council;
 - b. the use in question is limited to the keeping of six private horses (owned and used personally by the land owner and her family, and not in connection with any business purposes);
- It is not expedient to pursue enforcement action to require either the cessation of the use of the land for keeping of horses or equestrian activities or the removal of the caravan.
- Notwithstanding the above recommendation it is considered reasonable that in view of previous concerns about the intensification of use that the Council's enforcement team monitor the site over the next twelve months and if circumstances change a further report be presented to members for consideration.

Officer B's view about the recommendation before the meeting:

- Bullet one a) requires a plan of the approved location to be agreed by members or enforceability may be affected.
- Bullet one b) the wording used may not be enforceable and alternative standard wording to reflect owner and family use was provided.
- Bullet two does not provide a reason why it is not expedient and members are required to give reasons for their decisions.

The decision by members of the planning committee November 2011

61. Members resolved that enforcement action be authorised in respect of the following:

- a. The storage of manure shall be in a location agreed with the LPA (no plan was attached).
- b. The use in question be limited to the keeping of six private horses (owned and used personally by the land owner and their family, and not in connection with any business purposes).
- c. Enforcement action to require either the cessation of the use of the land for keeping of horses or associated equestrian activities, the removal of the field shelter and stables or the removal of the caravan should not be pursued; in addition a further short report is to be brought back to committee in the new year once the recent allegation over polluted surface water run-off has been investigated. The enforcement notice to control the manure and number of horses should not be served until this report is considered by members.

- d. The enforcement team are to monitor the site over the next 12 months and if circumstances change then a further report is to come back to committee for consideration.

Recommendation in Officer D's report to the planning committee February 2012:

62. No action is taken in respect of the alleged surface water run-off and the previous committee resolution from the November 2011 committee meeting be taken forward, ie that no further action is taken in respect of the buildings and caravan on the site but that action is taken to limit the number of horses being kept on this site to no more than six at any one time and to ensure that manure is not sited in close proximity to the eastern boundary to the site.

The decision by members of the planning committee February 2012

63. Members resolved that the report be noted and no further action be undertaken for reason set out in the report.