

## **The Ombudsman's final decision**

Summary: Mr X says the Council is at fault in its handling of planning matters for a site where he lives. The Ombudsman has found fault causing Mr X injustice. The Council has agreed to apologise to Mr X. On the balance of probabilities, the Ombudsman does not consider the fault would have altered the outcome of the planning application complained about.

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## **The complaint**

1. The complainant, who I refer to here as Mr X, complains that there was fault in the Council's handling of planning matters for a site where he lives. He says:
  - there is a discrepancy between the land referred to in a planning application for the site and the land referred to in the Committee report for the same application;
  - the minutes of the Committee which discussed the application do not accurately reflect what took place; and,
  - the Council failed to enforce the terms of a Section 106 agreement which has resulted in an uncompensated loss of public amenity.

## **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. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
4. 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*)
5. When considering complaints, if there is a conflict of evidence, we make findings based on the balance of probabilities. This means that we will weigh up the available relevant evidence and base our findings on what we think was more likely to have happened.

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## How I considered this complaint

6. I have considered Mr X's complaint and information he provided. I made enquiries of the Council and considered its response. Mr X and the Council had an opportunity to comment on an earlier draft of this statement. I considered all comments before I reached a final decision.

## What I found

### Legislative background

#### Section 106 agreement

7. A Section 106 Agreement is a legal agreement between a planning authority and a developer which aims to balance the impact of a development on the local area. They can seek to restrict the development or use of land, require the land to be used in certain way, or require financial contributions.
8. Section 106 agreements can be modified or discharged in two ways:
  - within five years of the date of completion of the agreement by agreement with the planning authority and the person to whom the agreement is enforceable; or,
  - after five years beginning with the date the agreement was completed.
9. Modification or discharge of a planning application should be done by submitting a planning application (although a letter as opposed to an application form can be submitted to the local authority). The planning authority will decide the application in one of the following ways:
  - if the agreement is no longer required to serve its original purpose it will be discharged;
  - if the agreement is still required for its original purpose but this can be achieved by modifying the agreement, then the agreement will be modified; or,
  - if the agreement still serves a useful purpose the application can be refused.

### What happened

10. Mr X's complaint concerns a site owned by a local recreation club (hereafter referred to as the site) in the town where he lives.
11. In 1988, the Council received a planning application seeking to erect a new clubhouse with parking, to convert an existing building into five flats, and erect nine new dwellings.
12. The Council granted planning permission subject to a Section 106 agreement which sought to retain some of the land at the site for sport and recreational purposes to benefit the residents of the local area. This area is marked in red on plans submitted with the agreement and included an area referred to as 'the putting green'.
13. The Section 106 agreement was agreed in December 1990.
14. In 2016 and 2017, the Council received two planning applications both seeking to build four dwellings on the area marked red on the Section 106 agreement. The Council granted planning permission for both applications.

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15. The Case Officer reports for the above applications acknowledged that legal agreements relevant to the site might need to be varied before the development took place.
  16. Development started at the sites before the applicant sought to vary the Section 106 agreement.
  17. In early 2018, the Council received a request, via letter, to discharge the Section 106 agreement for the site. The letter referred to land situated at the recreational club.
  18. The Council needed to register the application using a suitable address. It used the following as an address - *part of land north of the former putting green* - and gave the following description of the proposal:  
*Discharge of Section 106 agreement dated 11.12.1990*  
These details were used on the Council's planning portal entry for the application.
  19. I have been provided with a copy of the plans submitted with the application. These show the putting green outlined in red as in the plan submitted as part of the Section 106 agreement.
  20. Mr X is a volunteer with a local society. He considers planning applications for the local area and advises the society if an application conflicts with the society's objectives and missions for the town.
  21. Mr X considered the application to discharge the Section 106 agreement. He and his fellow volunteers concluded the application would have little effect on the use of land at the recreational club and so he did not propose the Society comment on the application. Mr X's view was formed on the basis that the application did not apply to the area known as the putting green.
  22. The application was considered by the Planning Committee as officers do not have delegated authority to determine applications seeking to discharge Section 106 agreements.
  23. The Case Officer report for the application said the site in question included the former putting green. It also explained that, in the years prior to it being developed, it had not been used for recreational purposes and so it recommended approval.
  24. Minutes of the Committee meeting show the application was the last one considered that day and was outlined by the Case Officer to Committee members. Members did not ask the Case Officer any questions or seek to debate the proposal before they approved the application.
  25. Mr X learned of the decision and sought clarification about what land was included in the application from council officers and his local councillors. However, no clarification was forthcoming, so he complained to Council on the following grounds:
    - it published false information as the application description and plans did not refer to the putting green;
    - it failed to respond to his enquiries about how the application was determined and whether the decision related to all land covered by the 1990 agreement;
    - it had failed to enforce the agreement during or following approval of the 2016 planning application for the putting green land; and,

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- the Head of Planning and Head of Legal Services had not exercised due diligence in the formulation of the documentation or the conduct of the Committee meeting. The application was determined at the end of a full day of proceedings and members would have been mentally numbed.
26. The Council replied saying the application had been appropriately determined by the Planning Committee. It also said that agreements were not material planning considerations and so this was not a matter for its planning function.
  27. Mr X remained unhappy and felt the Council's response did not address his concerns. He asked that it do so.
  28. The Council replied reiterating its earlier view.
  29. Mr X remained unhappy and approached the Ombudsman.

### **Analysis**

#### **The Council deceived Mr X and the public with the description of the application and the plans submitted with it**

30. The description for the application refers to land "north of the putting green". I consider that on looking at the description alone it would be reasonable to conclude the application did not include the putting green area.
31. I note the Council had to use an address for the application and this presented it with some difficulties. However, I consider that it could have indicated within the description that the putting green was included in the application.
32. As part of my enquiries the Council provided a copy of the plans submitted with the application. The plans were those used in the Section 106 agreement. The area covered by the agreement is outlined in red and includes the putting green.
33. However, the application description referred only to land north of the putting green. It did not say it included the putting green or that it related to all the land within the area marked red. For these reasons, I do not think the plan alone would have clarified the area covered by the application.
34. I consider the details supplied with the application did not clearly set out the land the application related to. However, I have seen nothing to suggest the Council wilfully set out to deceive Mr X and the public.
35. As a result of the fault I have identified, Mr X was not able to properly consider the impact of the proposal and this altered the view he gave to the society he volunteers for. This is injustice. While I acknowledge this, I consider that on the balance of probabilities any objections raised by the society would not have altered the outcome of the application.
36. A Section 106 agreement can be discharged if it no longer serves its intended purpose. In this case, it appears accepted that the land in question had not been used for recreational purposes for some years and so I consider the grounds given by the Council to discharge the agreement were valid.

#### **The Council has failed to previously enforce the terms of the Section 106 agreement**

37. Mr X suggests the Council should have taken enforcement action regarding a breach of the Section 106 agreement following the grant of planning permission for the land to be developed in 2016 and 2017. I do not agree. Enforcement action is discretionary and should only be taken if the Council concludes such action would be expedient. As it had granted planning permission for the area to

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be developed, I do not consider its view that such action would not be expedient to be flawed.

38. Further, the Council successfully sought from the developer an application for the Section 106 agreement to be discharged. For this reason, I do not find the Council at fault.

### **The Council's Chief Executive sent Mr X a misleading response**

39. Mr X says the Council's Chief Executive sent him a misleading reply to his complaint because he said the Section 106 agreement was not a material planning consideration however it may be relevant to other departments within the Council. Mr X feels this was misleading because the Chief Executive is responsible all the Council's administrative functions.
40. I do not consider the response is misleading as claimed. The purpose of the comments was to explain the relevance of the Section 106 agreement in respect of the planning process for the site. For this reason, I do not find the Council at fault.

### **The minutes of the Committee meeting where the application was determined do not reflect what took place**

41. Mr X says the minutes of the relevant Committee meeting do not show that the application was discussed after a full day of business. However, I find that they show the application was considered at the end of the meeting and the time is noted and so I consider they are accurate.
42. It is implied that members would have been too mentally exhausted by the end of the day to consider the application properly. However, if members considered this to be the case, they could have asked for the matter to be deferred. There is no suggestion this happened and so I do not consider there are grounds to conclude that members were too exhausted to properly consider matters.
43. It is also suggested that legal staff should have contributed to the debate on the application. I do not agree. It was for the Council's Planning Committee to decide if there were grounds to discharge the Section 106 agreement. For these reasons, I do not find the Council at fault.

### **Agreed action**

44. I have identified fault which caused Mr X injustice, in that the fault may have altered the way Mr X advised the society he volunteers for.
45. Within four weeks of this final decision, the Council has agreed to apologise to Mr X in writing for this injustice.
46. The Ombudsman will need to see evidence that this action has been completed.

### **Final decision**

47. I have completed my investigation and uphold Mr X's complaint on the basis that I find fault causing injustice. The Council has agreed to take action to remedy the injustice.

### **Investigator's decision on behalf of the Ombudsman**