

The Ombudsman's final decision

Summary: Mrs X complains that the Council breached an assurance that it would call in a planning application. The Council is at fault as it wrongly informed Mrs X that a planning application would be considered by the Planning Applications Committee, delayed in notifying Mrs X of the error and the chair did not consider all the relevant information when considering whether to call in the application. These faults caused distress and uncertainty to Mrs X which the Council has agreed to remedy by apologising and making a payment of £250 to her.

The complaint

Mrs X complains that the Council:

- a) Breached an assurance and legitimate expectation that it would refer a planning application to the Planning Applications Committee for determination.
 - b) Failed to refer the planning application to the Planning Application Committee in accordance with the Committee's terms of reference.
 - c) Failed to act transparently and with integrity as officers withheld that the application would be determined by delegated decision until shortly before the application was determined.
 - d) Failed to disclose the traffic survey carried out by residents to the Chair of the Planning Applications Committee when she was considering if the application should be determined by the Committee or delegated decision.
 - e) Failed to provide evidence that officers had considered the legal requirement to refer the application to the Planning Applications Committee.
 - f) Failed to properly investigate her complaint.
2. Mrs X considers that as a result she was denied the opportunity to:
- Brief her ward councillor on the planning grounds for the application to be considered by the Planning Applications Committee;
 - Make a case to officers on why the application should be referred to the Planning Applications Committee in accordance with its terms of reference;
 - Assess the planning officer's recommendation to approve the application, make further objections including providing further information on the traffic impact of the application and attend and speak at the Planning Applications

Committee. Mrs X considers she would have been able to persuade members to refuse the application if it had gone to the Planning Applications Committee.

What I have investigated

3. I have investigated complaints a) to d) and f). I explain at the end of this statement why I have not investigated complaint e).

The Ombudsman's role and powers

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 an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
5. 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

6. I have:
 - Considered the complaint and the information provided by Mrs X;
 - Made enquiries of the Council and considered the information provided;
 - Invited Mrs X and the Council to comment on the draft decision. I considered any comments received before making a final decision.

What I found

7. The Council's constitution sets out the terms of reference for applications to be determined by the Planning Applications Committee. The relevant clauses to this complaint are:
8. *Clause (2) - Applications which are recommended for approval where an objection to the current proposal has been received which is based on material planning grounds, other than those applications where, in the opinion of the Director for Regeneration, Planning and Neighbourhoods, and the Programme Director for Planning and Development:*
 - *The objection can be overcome by the imposition of an appropriate condition;*
 - *Where the application clearly complies with the relevant condition; and/or,*
 - *Where the application clearly complies with the relevant planning policies in which case the decision may be taken by officers.*
9. *Clause (3)- Applications which the Strategic Director Growth and Opportunity, Director Planning, Transport and Sustainability or the Assistant Director Development Management and Enforcement wishes to refer to the committee.*
10. *Clause (4) – Any application where a specific written request is made by any member of the Council for the case to be reported to the Committee, where in the opinion of the Chair (in consultation with the Director for Planning and Neighbourhoods) there is a material planning reason for doing so.*

What happened

11. The following information is a summary of the key events in this case. It does not include details of all the events which occurred.
12. Mrs X lives close to a public building. The relevant organisation submitted a planning application to vary a condition of an existing planning application to increase the number of people attending the building. Mrs X and a number of other residents objected to the proposal.
13. The Council notified members of the Planning Applications Committee (PAC) and ward members of the application. In its email the Council explained the application would not automatically be referred to PAC but members could request the application be called in for determination by the PAC.
14. Mrs X contacted officer 1, senior officer. He said the application would require reporting to the PAC for determination if officers were minded to recommend approval. This was incorrect. The Council has said officer 1 did not realise the application was for a variation of condition which would not normally be reported to PAC.
15. A ward councillor requested the application be called in for consideration by the PAC. The material planning considerations raised by the councillor included concerns about parking and access. The chair asked officers to provide further information from the applicant's travel assessment about the parking stress under the existing and proposed schemes. Officers provided this information. The chair decided not to call in the application for consideration by PAC. In her email to senior officers, the chair said that she considered it would be difficult for PAC to reach a different conclusion to officers.
16. An officer sent an email to officer 2, senior officer, stating that officer 1 needed to email a resident to clarify some matters so he would ask the councillors to hold off informing residents of the chair's decision. Officer 2 agreed to this approach.
17. A few days before the chair decided not to call in the application, residents submitted a transport survey which they had commissioned.
18. A few days later residents submitted a further objection including their analysis of a travel event at the building. Officers considered the analysis but did not refer it to the chair as they considered it would not change their view.
19. Officer 2 sent an email to Mrs X explaining he had incorrectly told her that the application would be reported to PAC. He explained:
 - applications for variations of condition do not automatically require referral to the PAC.
 - Clause 2 of the PAC's terms of reference provided officer 2 to refer applications to PAC for determination. Officer 2 had been extensively briefed on the proposal and advised he was happy for it to be decided by delegated authority.
 - A ward council requested the application be called in under clause 4 of the terms of reference. Officers provided the chair with a briefing responded to the points raised by the councillor and the chair confirmed the application could be determined under delegated authority.
 - Officers had concluded their assessment and the application would be approved under delegated authority that day.

-
20. The Council issued the delegated decision shortly after officer 1 sent his email to Mrs X.
 21. Mrs X made a complaint to the Council. She complained that officer 1 had provided a written guarantee that the application would be considered by the PAC and delayed in notifying her of the error. Mrs X considered the delay prevented her from lobbying her ward councillor and the chair on the merits of taking the decision in public. She also complained the Council had issued the decision with haste following officer 1's email to her.
 22. The Council responded to Mrs X's complaint at its local resolution stage. It did not uphold her complaint. Mrs X subsequently requested her complaint to be considered at the Council's final review stage. Mrs X raised a number of issues including that she had a legitimate expectation that the application would be considered by PAC which had been denied by the Council, officers had misled the ward councillors and chair by not informing them that it undertaken to report the application to PAC and there was no evidence to show officers had considered if the application should be called in under clause 2. Mrs X also considered officers' conduct had fallen short of their code of conduct and requested the final review respond in detail on this matter.
 23. The Council apologised for raising Mrs X's expectations by officer 1 stating the application would be considered by PAC. The Council said this was a genuine mistake with no intention to mislead.
 24. Mrs X considered the Council had not responded to all the issues raised in her complaint so made a complaint to the Ombudsman.
 25. In response to my enquiries the Council has said:
 - It has acknowledged its error in advising Mrs X that it would refer the application to the PAC. It has apologised to Mrs X for the distress caused to her. However, it considers this did not prevent Mrs X from making her concerns known. Mrs X submitted objections to the application and she could have briefed her ward councillor on the planning ground for the application to be considered by PAC.
 - Officer 1 did not consider it was necessary to immediately correct the error as the application was still under consideration. It was not yet known what the officer recommendation would be or if it would require referral to PAC under a different clause of the terms of reference. It was decided Mrs X would be informed of decision making approach once officers had included their planning assessment.
 - Officers gave full consideration to whether the application should be called in for consideration by PAC in accordance with clause 2.
 - Officer 1 was on leave at the time the chair made her decision not to call in the application. The first opportunity to update officer 1 was on the day the decision was issued. The Council did not consider there was a need for further delay in determining the application which is in line with the National Planning Policy Guidance which encourages decisions to be made on planning applications as quickly as possible.
 - It considers it carried out a comprehensive investigation into Mrs X's complaint.

Analysis

Breached an assurance and legitimate expectation that the application would be referred to PAC and failed to act with integrity and transparency.

26. The Council has acknowledged officer 1 wrongly told Mrs X that the application would be reported to PAC. The application was for a variation of condition and was not a major application so would not be automatically called in.
27. It is not our role to establish if officer 1's email to Mrs X stating the application would be reported to PAC amounts to a legitimate expectation in law as we cannot decide matters of law. But Mrs X's expectations were raised by officer 1 incorrectly advising the application would be reported to PAC.
28. The Council has said it decided not to inform Mrs X of officer 1's error until it had completed the planning assessment of the application. I acknowledge the application could have been called in under other clauses of the terms of reference. But councils should be transparent, and be seen to be transparent, in their decision making. The Council's decision not to immediately inform Mrs X of the error and to inform her on the same day the application was determined gave the impression of a lack of transparency. On balance, this is fault.

Failed to refer the application to PAC in accordance with the terms of reference

29. The Council has said officers 1 and 2 considered if the application should be referred to PAC under clause 2 of the terms of reference. The evidence provided by the Council shows officer 2 requested a discussion on the case. But there is no evidence to show officers considered if they should call in the application. On balance, I consider this to be fault as the Council should have an audit trail of its consideration of whether to call in the application and reasons for its decision.
30. But I do not consider the lack of record keeping means its decision not to call in the application is flawed. Officers approved the application subject to a condition which demonstrates they were satisfied objections could be overcome by conditions.
31. Mrs X considers the Council should have referred the application to PAC under clause 2 as she considered the conditions did not address the material considerations raised by the objections and the application did not comply with planning policies. The officer's report sets out why the Council considered the application complied with planning policies and why the objections could not be sustained. I therefore do not consider the decision not to call in the application to be flawed. But, in any event, I cannot say the outcome would be different as we cannot know if the PAC would have refused the application even if officers had called in the application.
32. Mrs X has said officers should have called in the application under clause 3. I do not know if officers gave any consideration to this clause. But it is not proportionate to investigate the matter further as I cannot say the outcome would have been different if the application had been considered by PAC.

Failed to disclose residents' transport survey to the chair when deciding if to call in the application

33. There is no evidence to show the chair considered residents' transport survey when making her decision on whether to call in the application. On balance, I consider this is fault. The chair made her decision not to call in the application because she considered members would find it difficult to reach a different conclusion on the impact including parking stress. But it is not clear how she

could reach this view without considering the residents' transport survey which took a different view to the applicant's survey. I am therefore not satisfied the chair had all the relevant information when making her decision and this is fault.

34. Councils should not appear to have a closed mind or predetermine planning applications before a decision is made. The chair, in deciding if the application should be called in, was considering if there were material planning considerations to warrant the calling in of the application. She was not determining the merits of the planning application. However, the chair's comment that it would be difficult for members to reach a different conclusion to officers gives the appearance of pre-determination. The Council should be alert to the risks of pre-determination when considering requests for call ins.

Complaint

35. The Council did not consider every point raised by Mrs X in her complaint, including her suggestion for service improvements. But I do not consider this to be fault as the Council appropriately focussed on the key issues. It would have been better for the Council to have explained to Mrs X why it would not address every issue but this does not amount to fault.
36. Mrs X considers the Council is at fault as officer 1 responded to her complaint. I do not consider this to be fault in the circumstances. Officer 1 would have had to be involved in the preparation of a response to Mrs X. Furthermore, a response direct from officer 1 does not cause significant injustice to her.

Injustice

37. Mrs X's expectations were raised by officer 1 wrongly informing her that the application would be reported to PAC. But this did not prevent Mrs X from making representations on the application as she submitted a number of objections. Mrs X's ward councillor also requested the application be called in for similar reasons to those raised by Mrs X in her objections. So, Mrs X was not denied the opportunity for the chair to consider if the application should be called in under clause 4. But I consider Mrs X was caused distress by the Council's apparent lack of transparency in notifying her of officer 1's error and it has undermined her trust in the Council's decision making. The Council should remedy this injustice.
38. I cannot know, on balance, if the chair would have made a different decision if she had considered residents transport survey when making her decision on whether to call in the application. So, I cannot know if Mrs X was denied the opportunity to present her objections to PAC. This causes uncertainty to Mrs X which the Council should also remedy.

Agreed action

39. That the Council:
- a) Sends a written apology and makes a payment of £250 to Mrs X to acknowledge the raised expectations, distress, loss of trust and uncertainty caused to her by the Council wrongly advising the planning application would be considered by PAC, lack of transparency caused by the delay in notifying Mrs X of the error and the failure to consider residents' transport survey when deciding whether to call in the planning application.
 - b) By training or other means, ensures the chair of the PAC is aware they should consider all relevant information when deciding whether to call in an application and, in making that decision, be alert to the risk of pre-determination.

-
- c) Provides evidence of the Council's record keeping of its consideration of whether to call in an application to PAC under its terms of reference.
40. The Council should take the action at a) within one month of my final decision. It should take the action at b) and c) within three months of my final decision.

Final decision

41. The Council is at fault as it wrongly informed Mrs X that a planning application would be considered by the Planning Applications Committee, delayed in notifying Mrs X of the error and the chair did not consider all the relevant information when considering whether to call in the application. These faults caused distress and uncertainty to Mrs X which the Council has agreed to remedy in a proportionate way. I have therefore completed my investigation.

Parts of the complaint that I did not investigate

42. I have not investigated complaint e) as Mrs X has made a complaint about this matter to the Information Commissioner.

Investigator's decision on behalf of the Ombudsman