

The Ombudsman's final decision

Summary: Mrs X complains about the Council's decision to approve a neighbour's application for development. We found fault in the way the Council recorded its reasons for granting planning permission for the neighbour's development. But this fault did not cause Mrs X an injustice, so we have completed our investigation.

The complaint

1. The complainant whom I shall refer to as Mrs X complains the Council failed to consider its own planning policies when approving new housing on land next to her property. Ms X states the proposal conflicts with the Council's Local Plan policy LS1, the Council did not apply the sequential test needed for applications in flood zone areas. And the road access to the site was inadequate. Mrs X says this will have a detrimental impact onto her property and it increases the flood risk to her own land.
2. Mrs X also complains the Council encouraged her to progress a similar application on her own land. But refused it causing her to incur abortive fees which Mrs X wishes the Council to refund.

The Ombudsman's role and powers

3. We investigate complaints of injustice caused by 'maladministration' and 'service failure'. I have used the word 'fault' to refer to these. 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*)

How I considered this complaint

5. I have read the papers submitted by Mrs X and spoken to her about the complaint. I considered the Council's comments about the complaint and the supporting documents it provided. I have explained my draft decision to Mrs X and the Council and considered the comments received.

What I found

Development in Flood zones, the Sequential test and Exception test

6. Councils need to consider the flood risk vulnerability of land uses when considering applications for development in Flood zones. Flood zones are referred to in the Strategic Flood Risk Assessment for the area. The government issued guidance for Councils when considering applications in flood zones by using the sequential test. The aim of the sequential test is to ensure that areas at little or no risk of flooding (Flood zone 1) from any source are developed. This is in preference to areas at higher risk (Flood zones 2 and 3).
7. Where it is not possible to apply the sequential test and for the development to be in zones with a lower risk of flooding, the Exception test allows a method of managing flood risk while still allowing development to happen. This test needs to include a Flood Risk Assessment (FRA) and demonstrate the site will be safe for its lifetime without increasing flood risk elsewhere.

Council policy LS1

8. The Council has a planning policy for planning applications submitted in the Landscape Setting area (LS1) in its Local Plan Review 1995-2011. This aims to protect open land in the area from development due to its intrinsic merit and contribution to the distinctive landscape setting of the City. LS1 says that development which would harm the landscape setting of the City will not be permitted unless it maintains local distinctiveness and character.

Events leading to the complaint

9. Mrs X lives in a property in a development of three houses. The houses share an access road which runs alongside a stream. There is a bridge across the stream near the access road.
10. In 2016 Mr and Mrs X's planning agent asked the Council about building one or two houses on land behind their property. The Council gave detailed pre-planning advice in 2017 at a site meeting. It said due to the various physical and policy constraints it could not support a proposal for new houses on the site.
11. In 2017 Mrs X's neighbour submitted an outline planning application to build three new houses on land adjacent to his property and so next to Mrs X's land. The planning case officer prepared a report. It described the proposal and relevant planning policy guidance including Council policy AP2 - Sequential Approach. The officer said the applicant submitted supporting information including an FRA. The report noted the proposed plots were located in a Flood Zone 2/3 due to a risk of fluvial flooding from the stream during severe rainfall. There was also a risk of the nearby bridge becoming blocked with debris causing flood water to back up. The officer recommended raising the finished floor levels of the new houses up above ground level and building them to be resilient to damage from flood water.
12. The report said the proposed development was within a designated park and a conservation area so needed to ensure the landscape was protected from inappropriate development. The officer referred to the local plan saying development in such areas would not be permitted unless it maintained local distinctiveness and character. But considered the raised floor levels would not make the development any more prominent in the area. The report acknowledged the application site needed car access to it because of its location.

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13. The report noted two letters of objection, so the application went to a Delegation Briefing held with Planning Committee members. They confirmed officers could approve the application under delegated powers.

Reserved Matters application

14. Mrs X's neighbour submitted a reserved matters application for the proposal in 2017 for layout, scale, landscaping and appearance. Mrs X objected and expressed concerns about the width of the existing access road to support more cars. And building houses could have a damaging effect on to her property through increased flood risk from the nearby stream.
15. The planning case officer's report on the application explained the proposal and representations received including those from Mrs X. The report confirmed consultation with the Environment Agency who had no objection to the proposal. Although it commented the Council needed to be 'satisfied the flood risk Sequential test had been satisfied' according to government guidance. If it failed the test it was enough to justify refusing the application.
16. The planning officer's report assessed the proposal and said the outline application had been approved knowing the new houses needed to be raised up to address the flood risk. The officer considered the scale of the properties were not unreasonable with acceptable landscaping of the site. The report noted the objections about highway issues and flood risk, and these were considered with outline application. So, could not be reassessed or reopened with the reserved matters application. The officer recommended approving the application and Members approved it at a Delegation Briefing.
17. Mr X contacted the Council's Planning team in January 2018. He asked officers to reconsider their previous advice given to him and Mrs X due to the Council approving a similar application from his neighbour. Planning officers provided Mr X with more information about the issues needing to be addressed. The officers explained the neighbour's approval was an unusual situation and outcome and a major departure from the Council's policies. The Council considered it on information and argument submitted it was an exceptional case where the landscaping setting value was not as much as elsewhere.
18. The officer confirmed the Council considered the main issue of flood risk and landscape setting, but these were not insurmountable in that case. The officer advised that any new proposal from Mr and Mrs X needed to mitigate flood risk.
19. Mr X met a planning officer on site in February 2018. The officer explained to Mr X most of the site lay within a designated flood area of flood risk. And according to designated flood zone areas the flood risk lowered moving eastwards in the site (so towards the neighbour's land). The officer said even if Mr and Mrs X could mitigate the flood risk there were other key planning issues to consider. The Council says the officer advised Mr X any application would be a 'high risk' and that 'approval cannot be guaranteed'. The Council says there are no written notes of the site meeting.
20. Mr and Mrs X submitted a formal application to build three houses on the land in August 2018 but withdrew it after discussions with officers.

The Council's response to Mrs X's complaints

21. The Council says it has issued planning consent for several sites located within the LS1 (Landscape Setting) area. And the designation does not mean an absolute restriction on development. Rather it must consider it alongside other relevant national and local policies and all other material planning considerations.

The policy is one of the Council's saved policies from the 2005 Local Plan and forms only part of its approach to landscape and setting in the city. The Council has a more recent policy in the 2016 Core Strategy.

22. The Council says it acknowledged during a recent planning appeal policy LS1 was outdated so had limited weight when deciding planning applications. The Council is preparing a new strategic plan to include updated landscape policies. But the plan is currently given no weight in planning decisions due to being at draft stage.
23. The Council says Mrs X's neighbour submitted an FRA by a reputable company with the outline application and correspondence with the Environment Agency. The FRA says the development would be safe for a lifetime and not increase flood risk to others. The Council says the officer's report comments on flood issues and the officer marked the FRA showing it had been considered. The officer included the mitigation measures referred to in the FRA as conditions in the planning permission. So, the Council was satisfied it had been considered by the officer. But accepts the report does not refer to passing the Exception test as part of the Sequential test as required by government guidance.
24. The Council recognises this was a weakness in recording its consideration of the application. But does not consider it resulted in a flawed decision about flooding issues. The Council confirms it has acted to ensure reports refer to the sequential test when necessary.
25. The Council confirms it consulted the Highway Authority about the application and it raised no objection to the proposed access. So, the Council considers it would have been unreasonable if it refused the application due to the access being unsuitable as Mrs X alleges.
26. The Council has explained the enquiries made by Mr and Mrs X about developing their land for housing. The Council says at site meetings while officers advised Mr and Mrs X they did not encourage or express support for the proposal. Rather officers advised it was high risk. So, does not consider Mrs X's request to refund her abortive fees justified. However, it does accept that some of the officer advice given in 2018 after Mrs X's neighbour gained planning permission could have been clearer. And explain the difference between Mrs X's proposal and their neighbour. But says Mrs X would have been aware her application only ever had a small chance of success.
27. In commenting on the draft decision Mrs X says officers were very positive about their re-submitted proposal in 2018 and they only pursued it due to this.

My assessment

28. The planning officer's report on the outline application does refer to the site being in a designated area as a valley park and conservation area. It refers to the need to protect landscape merit. The Council considers Policy LS1 now outdated so has less weight when deciding planning applications. While the report does not specifically mention Policy LS1 I consider there is reference to landscape merit and impact on the local area in the officer assessment.
29. The report also refers to the need for car access to the site. The documents show the Council consulted the Highways Authority on the proposal who had no objection. So, I do not consider there is evidence of fault by the Council in the way it considered the issues of landscaping setting and the highway impact of the development.

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30. The documents I have seen show the neighbour submitted an FRA with the application. The planning report referred to the FRA with Council policies on flood risk and sequential approach. The FRA showed a sequential test carried out by a reputable firm. The planning report explains the proposal is in a flood risk zone and the houses should have raised floor levels. The planning permission refers to conditions to mitigate flood risk. So, I consider there is evidence to show the Council considered the sequential and exception tests and the issues of the site being in a flood zone. Because of this I am satisfied the Council's decision to approve the application is a merits one it is entitled to make.
 31. But Councils do need to give clear reason for decisions to approve planning applications. And so, I consider it fault the Council did not refer to the sequential test in the planning report as part of its explanation for granting planning permission. This would make it clearer why it granted the permission.
 32. While I consider there was fault in the Council's recording of the decision, I do not consider it caused an injustice to Mr and Mrs X. This is because there is sufficient evidence to show the Council considered the issue of flooding and the sequential test when considering the planning application. The Council has acted to ensure the sequential test is referred to when necessary in reports which I consider is suitable action for it to take.
 33. The documents show Mr and Mrs X made pre-application enquiries of the Council. The Council explained its view of the proposal and highlighted some risks associated with the proposal. This included the likely issue of flooding. It was for Mr and Mrs X to decide whether they wished to continue with an application. Mr and Mrs X chose to approach the Council again after their neighbour gained planning permission for development. The Council does not have notes of the site meeting at which it says the officer advised the proposal was 'high risk'. But I am satisfied the Council documents show Mr and Mrs X were advised of the risks with the application. It was for Mr and Mrs X to decide whether to continue and there is always an element of risk an application may not be approved when being formally determined.
 34. It was at Mr and Mrs X's own risk and cost when they chose to submit an application to the Council with professional help which they later withdrew. If Mr and Mrs X decided to continue with the application and the Council had refused it, then Mr and Mrs X could have exercised a right of appeal to the Planning Inspectorate.

Final decision

35. I am completing my investigation. There was fault by the Council in the way it recorded its consideration of a planning application. But this did not cause an injustice to Mrs X.

Investigator's decision on behalf of the Ombudsman