

Complaint reference:
15 006 279 & 15006973

Complaint against:
East Devon District Council

The Ombudsman's final decision

Summary: There is no fault in the way the Council reached decisions not to take enforcement action against the material used in an agricultural building and the installation of silencer coverings and fans in the roof.

The complaint

1. Mr B complains on behalf of himself and other residents of his village, that East Devon District (the Council), in respect of a general agricultural building erected near to his property:
 - has failed to enforce the planning condition requiring the materials to be dark grey. It has decided not to take any action against the applicant who has used light grey/white materials; and,
 - has failed to properly consider enforcement action against the erection of extractor fans on the roofs of the new building and several other existing agricultural buildings on the site.

The Ombudsman's role and powers

2. The Ombudsman investigates complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. She 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, she may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1)*)
3. The Ombudsman cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. She must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3)*)

How I considered this complaint

4. I have considered the complaint and the documents provided by the complainant made enquiries of the Council and considered the comments and documents the Council provided. I have also given the complainant and the Council the chance to comment on a draft of my decision and considered correspondence from Historic England.

What I found

Enforcement action

5. Building work which is not in accordance with a planning permission may be deemed unauthorised (a breach of planning control) and subject to enforcement action.
6. Councils have a power, not a duty, to take enforcement action. Government guidance recommends only using this power where it is proportional to the harm caused by the breach of planning control. Therefore even where someone fails to comply with a planning permission the Council may decide not to take enforcement action.
7. In order to take enforcement action the Council has to be satisfied that it is 'expedient' to do so. This means it has to be satisfied that the breach of planning control is causing harm to public amenity beyond the minor or trivial. It is not sufficient to only establish that something has been built in breach of planning control. It must decide that the breach is causing significant harm. It must also be satisfied that any action necessary to put right the breach is reasonable and proportionate to the harm caused.

Agricultural building

8. Mr B, and other residents, live near a farm with a number of agricultural buildings used for housing pigs. In 2013 the Council had refused planning permission for another general purpose agricultural building on the site on the grounds that it would significantly harm the setting and significance of nearby historic buildings and would have a significant detrimental impact on the character and appearance of the landscape (an Area of Outstanding Natural Beauty).
9. The applicant appealed. In February 2014 the Planning Inspector allowed the appeal and granted planning permission for the building. He added a condition requiring the applicant 'to submit samples of the materials to be used in the construction of the external surfaces of the building' to the Council for approval, in writing, before the development commenced.
10. In June 2014 the applicant sent proposals to the Council stating that the materials for the new building would match samples of those already present in the existing roadside workshop building on the main farm complex; specifically the upper walls and roof would be dark grey and the roof light grey. The Council approved these and discharged the condition in September 2014.
11. Mr B contacted the Council in October 2014 to say that the roof and sides of the building were white and a visual eyesore. The Council responded in December 2014 saying that the materials used were in accordance with those agreed under the discharge of conditions. It said while they may stand out at present, in time they would weather and darken. Along with the approved landscaping it considered the building would fit in with the surroundings.
12. Mr B responded saying that development had started in June 2014 before the details had been approved and he felt the materials would lighten due to sunlight rather than darken. He asked the Council to explain what action it had taken in respect of the breach of planning control.
13. The Council responded in February 2015. It said it did not request a sample because the applicant had referred to materials used on other buildings so officers could view them in situ. It said an officer had visited the site and agreed the materials were not exactly the same shade as those on existing buildings. But

it said there were various shades of grey boarding and sheeting present on buildings throughout the site. It did not consider it was in the public interest to take enforcement action against the applicant because the materials were acceptable in planning terms. It also said the materials would darken with time and the landscaping which had not yet been planted would screen most of the upper walls. In terms of the failure to submit the details of the materials before the building commenced, it said it was regrettable but as soon as the Council was aware that development had started it took action to ensure the details were submitted.

14. Mr B then complained to the Chief Executive enclosing photographs of the building. The Chief Executive replied saying the photographs were 'quite telling' and he would ask officers to reassess the issue of enforcement. Having had no further response Mr B made a formal complaint in July 2015.
15. The Council responded on 12 July 2015. To address Mr B's concerns the roof would need to be removed and replaced. To take this course of action the Council would need to show that the materials did not comply with the condition. It said it was debatable whether the materials complied with the approved details but repeated its view that different shades of grey were used across the site and match some other existing buildings on the site. Even if the Council did decide there was a breach it would have to be satisfied that the measures required to rectify the matter were reasonable and proportionate to the harm caused. Replacement of the roof would be expensive and have significant implications for the operation of the pig unit. Given its view that the materials would darken with time, the Council did not consider enforcement action was justified.
16. Mr B then complained to the Ombudsman. We asked the Council to investigate and respond to the complaint at stage two of its complaints procedure. It sent a further reply on 25 September 2015. It maintained its view that details had been submitted and approved and the condition correctly discharged. Although there was debate over the shade of colour used, it was not expedient to take enforcement action because the Council would not be able to refuse planning permission if an application for that specific colour of material was submitted.
17. Mr B complained again to the Ombudsman.

Analysis

18. I cannot find any fault in the process the Council followed in reaching its decision not to take enforcement action.
19. It accepts the applicant did not provide details of the materials before development commenced, but when it was made aware of this it took action to ensure the details were submitted and approved. It is unrealistic to expect a Council to monitor every planning permission to ensure conditions are adhered to. It has to rely on breaches being reported to enable it to investigate.
20. It decided samples were not necessary because the materials proposed could be viewed on existing buildings. An officer visited the site and agreed the materials did not exactly match the approved colours but noted there were a variety of materials of differing shades used across the whole site.
21. The Council decided that if a planning application for the lighter shades had been submitted it could not have refused permission and so it was not expedient to take enforcement action. The Council is entitled to reach that decision and I consider it has taken all the relevant circumstances into account.

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22. It also considered that the cost of replacing the roof would not be proportionate to the harm caused by the building and did not consider that Mr B's suggestion of painting the surfaces was practical. Mr B may disagree with the Council's view that the materials will darken but that does not mean its decision was wrongly made.

Extractor fans

23. In January 2014 Mr B and other residents met with the Council to discuss many issues about the adjacent site, including the concern that the existing pig sheds had been fitted with large roof-mounted extractor fans which were not shown on any planning application. The residents were concerned about their visibility along with the noise and increased odour they generated. The Council agreed to find out if the fans required planning permission.
24. Mr B contacted the Council in October 2014 to complain about the fans and the lack of response from the Council. Mr B had taken his own legal advice and believed the fans did require planning permission because they were alterations to stock buildings within 400 metres of the curtilage of a protected building.
25. The Council responded, at first saying that the extractor fans did require planning permission. It had commenced an investigation and would ask the owner to submit a planning application for them. The Council also said it had studied some aerial photographs and considered that some of the fans had been on the buildings for more than four years, so would be immune from enforcement action.
26. An officer visited the site but said due to historical abuse from the owner he was only able to view the fans from his car. Following further research and correspondence with the owner the Council said the units on the roof were covers to silence the fans; the fans themselves were housed within the ceilings of the buildings. This meant that it was the silencing covers which required planning permission; the fans were not development because they were contained within the roof space and therefore the interior of the building.
27. The Council had asked the owner to submit a planning application for the silencing covers on several occasions between December and March but none had been forthcoming. So the Council had gone on to consider whether to take enforcement action.
28. The enforcement officer wrote a report recommending no action. He said that removing the silencing units would increase the noise to the neighbourhood and so would cause more harm to residents. He also said the units were reasonably necessary for agriculture and for the wellbeing of the animals and that some of the units had been there for more than four years so no action could be taken against them. He concluded that it would not be in the public interest to take enforcement action as the units perform a vital function, were not an alien feature across the site and did not impact unreasonably on the surroundings. The Chairman of the Development Control Committee approved the decision on 6 May 2015.
29. Mr B pursued a complaint. He disagreed with the Council's view that the fans did not require planning permission and argued that they would protrude from the roof even without the silencers. The Council replied in July 2015 saying that while an alternative ventilation system would be preferable there was nothing preventing extractor fans from being used and the silencers actually reduced noise levels so were beneficial to local residents. It maintained its view that it would not take enforcement action.

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30. Mr B escalated his complaint on similar grounds. He also raised the issue of odour. The Council replied in September 2015 and said it maintained its view that no further action would be taken against the silencer coverings on one of the buildings but it would review the situation with the other buildings to see if new covers had been fitted.
 31. Mr B complained to the Ombudsman. He also said he considered the owner should also apply for an environmental impact statement.
 32. In response to my enquiries the Council has enclosed a recent letter from the Environment Agency, which is responsible for regulating the site and monitoring noise and odour. It had carried out six months of monitoring, involving visits on 26 occasions and at random times of the day. On each visit it monitored odour from five locations. It concluded that the odour was at an acceptable level.
 33. In respect of the environmental impact statement the secretary of state had decided as part of the appeal process (detailed above) that an environmental impact statement was not necessary for the construction of the building; while he considered the development would have some impact on the surrounding area it was not significant enough to require an impact statement.

Analysis

34. I cannot find any fault in the process the Council followed in reaching its decision not to take enforcement action.
35. It has investigated Mr B's complaint, reached its view about which part of the fans requires planning permission and tried to obtain a planning application. When this was not successful it considered all the circumstances before deciding not to take enforcement action. In reaching this view it has acknowledged that some of the silencers are immune from enforcement action anyway, they perform a useful function and without them the harm to the nearby area would be worse. Mr B may disagree with the decision but I cannot find fault with the way it was made.
36. As the secretary of state decided an environmental impact statement was not required for the construction of the new unit, it is unlikely one would be required for the addition of silencers for the fans to the roof.

Final decision

37. I have completed my investigation into this complaint as I am unable to find fault causing injustice in the actions of the Council towards Mr B.

Investigator's decision on behalf of the Ombudsman