

Complaint reference:
15 011 296

Complaint against:
East Devon District Council

The Ombudsman's final decision

Summary: I uphold Mrs C's planning enforcement complaint as there was fault by the Council but I do not consider it caused Mrs C an injustice requiring a remedy.

The complaint

1. The complainant, whom I shall refer to as Mrs C, complains the Council has failed to enforce a planning condition which required a window at a neighbouring property to have restricted opening and obscure glass. Mrs C says because of the Council's fault she now suffers from overlooking to her bedroom and garden.

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. If the Ombudsman is satisfied with a council's actions or proposed actions, she can complete her investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i)*)

How I considered this complaint

4. I read the papers provided by Mrs C and discussed the complaint with her. I have considered some information from the Council and provided a copy of this to Mrs C. I have explained my draft decision to Mrs C and the Council and provided an opportunity for comment.

What I found

Background and relevant legislation

5. Planning authorities may take enforcement action where there has been a breach of planning control and it is 'expedient' to do so. It is for the planning authority to decide whether it is expedient to take action.
6. Section 171A of the Town and Country Planning Act 1990, as amended, defines a breach of planning control as:
 - the carrying out of development without the required planning permission; or
 - failing to comply with any condition or limitation subject to which planning permission has been granted.

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7. However councils do not have to take enforcement action just because there has been a breach of planning control. Government guidance says:

“Effective enforcement is important as a means of maintaining public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control.” (National Planning Policy Framework 2012, paragraph 207).

Key events

8. The Council granted planning permission subject to conditions for a house to be built in January 1987. Condition four of the permission stated:

“The first floor bedroom window in the rear elevation and the bathroom window shall be fixed lights in obscure glass. (Reason – to protect the amenities of neighbouring properties.)”

9. The Council refused a planning application in 1999 to remove the condition and gave the reason as:

“The removal of obscure glazing from the window in question will result in an unacceptable degree of overlooking and loss of amenity to adjoining residents.”

10. Mrs C’s neighbour altered the window in 2013 to remove the obscure glazing and allow it to be opened.

11. Mrs C contacted the Council about the window in November 2013. The Council visited the site in November and spoke to the owner who initially agreed to provide obscure glazing in January 2014. The owner did not complete the agreed work.

12. The Council wrote to Mrs C in March 2014 to say it had considered the legality of the relevant condition and decided it could not be enforced because it did not contain the wording “in perpetuity” or maintained permanently thereafter.

13. The Council says the change to the window increases the overlooking mainly to Mrs C’s garden rather than to her bedroom window due to the acute angle between the windows involved. The Council says even if the condition had been worded correctly it would not use its discretionary enforcement powers as it does not consider the window causes sufficient harm to neighbouring amenity to warrant formal enforcement action.

14. Mrs C disputes the Council’s assessment of the overlooking from the window. The Council has provided plans and photographs to show the relationship between the two properties and the window in question. I am satisfied the overlooking between windows is not of a direct nature.

15. Mrs C was unhappy about the Council’s failure to reply to some of her earlier letters. The Council had already accepted this and apologised to Mrs C.

My consideration

16. I am concerned the wording of the original condition makes it unenforceable. When a planning permission is granted subject to conditions they form part of the permission to regulate specific areas concerning the development. The general point is that but for conditions making proposals acceptable it is possible planning permission would not have been granted. These types of condition should be valid for the lifetime of the development permitted and should contain wording to ensure developers cannot as here simply amend the window after the development is completed.

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17. I consider the Council's failure to include such wording is fault. However, I have to consider what, if any, injustice this fault has caused Mrs C.
 18. We cannot know for certain what impact the possibility of enforcement action through an enforceable condition may have had on the actions of the property owner. However, the Council has provided its reasons and evidence for not considering the overlooking causes sufficient harm to warrant formal enforcement action even if this was possible. This is a decision the Council is entitled to reach. In this context, I cannot say the fault in the wording of the condition has caused Mrs C an injustice.

Final decision

19. I have completed my investigation and uphold Mrs C's complaint. There was fault by the Council but I do not consider it caused Mrs C an injustice requiring a remedy.

Investigator's decision on behalf of the Ombudsman