15 September 2017

Complaint reference:
16 018 341

Complaint against:
East Devon District Council

Local Government OMBUDSMAN

The Ombudsman's final decision

Summary: The Council acted properly in negotiating a S106 planning obligation with the complainant. It then properly processed his planning application. The later liability for the Community Infrastructure Levy placed on the complainant was not due to any fault by the Council.

The complaint

1. Mr X complains that because of unnecessary delays in the Council's processing and approval of his planning application, he became liable for the Community Infrastructure Levy (CIL) once it was introduced on 1 September 2016, despite having previously secured a S106 agreement in May 2016. The difference in the amounts Mr X would pay is about £5,000.

The Ombudsman's role and powers

2. 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)***

3. 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

4. I have spoken with Mr X and considered written information from him.

5. I have considered comments and information provided by the Council.

6. I have considered:

- The Town and Country Planning Act 1990, Section 106
- the Town and Country Planning (Development Management Procedure) (England) Order 2015 (DMPO 2015);
- the Community Infrastructure Levy Regulations 2010 as amended;
- the Council's policies on validation of planning applications and the Community Infrastructure Levy; and
- the Council's Constitution in relation to planning decisions.

7. I have written to Mr X and the Council with my draft decision and given them an opportunity to comment.

What I found

Summary of events

8. In March 2016 Mr X made a planning application to the Council to extend and alter an existing outbuilding to form a separate dwelling.

9. Because Mr X was creating a new dwelling the Council needed him to make a contribution to the local infrastructure, under Section 106 of the Town and Country Planning Act 1990 (as amended).

10. It was the end of June 2016 when the Council validated the application and agreed the S106 payment. It then processed the application through the usual procedure, with public notification and consultations.

11. The Town Council objected to the proposal. As a result the Council had to refer the application to the Planning Committee Chairman's Delegation meeting for a decision, under the Council's Constitution.

12. The Council introduced its CIL charging scheme on 1 September 2016. It approved Mr X's application on 6 September 2016. It therefore charged Mr X about £5,000 under CIL rather than approximately £600 agreed under the S106 agreement.

13. Mr X complained to the Council it had delayed unduly in validating and processing his application and as a result he had become liable for the much higher CIL amount. The Council responded to his complaint but Mr X remained dissatisfied and brought his concerns to the Ombudsman.

The legal context and local policies

14. Section 106 of the Town and Country Planning Act 1990 as amended sets out the terms of the 'planning obligations' that a Council may agree with a landowner or person with interest in the land being developed. These agreements, commonly known as s106 agreements, are a mechanism which make a development proposal acceptable in planning terms, that would not otherwise be acceptable. They may cover issues such as protecting special habitats or ensuring local labour is used during the development.

15. The Community Infrastructure Levy is a planning charge, introduced by the Planning Act 2008 as a tool for local authorities in England and Wales to help deliver infrastructure to support the development of their area. It came into force on 6 April 2010 under the Community Infrastructure Levy Regulations 2010 as amended.

16. Councils have been able to choose whether to adopt the Community Infrastructure Levy (CIL) in their area. If they have adopted it they are required to provide a list of what infrastructure locally will be funded by CIL, known as a Regulation 123 List.

17. The Town and Country Planning (Development Management Procedure) (England) Order 2015 (DMPO 2015) sets out the information required by councils in order to validate a planning application, that is to accept it as having enough and suitable information for the Council to consider the application properly.

18. Councils should also have their own policy on the information they expect applicants to provide when they make a planning application, additional to the

national requirements. The Council has such a policy and this sets out that S106 and CIL agreements form part of the validation documents needed.

19. The Council's Constitution sets out how it will manage decision making across its functions. For planning it sets out a range of different criteria to determine whether an application should be decided by the full Planning Committee or by different schemes of delegation down to the Senior Planning Officer. One criterion says: "If the Ward Member is in agreement with the officer recommendation but the Town Council / Parish Council expresses a contrary view then the application will be determined at the Chairman's Delegations." This is a regular meeting at which the Chair of the Planning Committee will decide the applications.

What the Council did

20. The Council received Mr X's application on 13 March 2016. It advised Mr X's agent the location plan submitted was not acceptable as it was too old. In addition the application needed a bat and bird survey and a S106 application. Mr X had put in a previous application which he had withdrawn in December 2015 and since then the Local Development Plan had been adopted (in late January 2016). This altered the policy on affordable housing and open space contributions.

21. Mr X through his agent sent in the location plan and bat and bird survey on 15 March. The Council again advised the location plan was unacceptable.

22. Mr X says at this stage he chased the Council to provide the draft S106 document he needed. The Council has explained that, as it was a non-standard application for a barn conversion, it had to calculate the appropriate contribution specifically in relation to the location and this took time.

23. The Council sent Mr X a template for the S106 application on 5 April which set out correctly the contributions he was expected to make for affordable housing, public open space and habitat mitigation. Mr X felt these were too high and asked for a review of the amounts.

24. On 20 May the Government guidance on contributions changed, following a challenge in the High Court. This removed the need for affordable housing and open space contributions for Mr X's development. He still needed to make a contribution for habitat mitigation.

25. Mr X returned the S106 form on 25 May but the Council said it had not been completed correctly. Mr X then returned the revised form on 27 June.

26. Mr X sent in the location plan again on 29 June. The Council says this was the same one he had provided in March 2016 and it appears it took a pragmatic view that, as it had all the other information it needed to validate the application, it would accept it at this stage.

27. The Council announced its intention to adopt the CIL charging regime in May 2016. It publicised this on its website, in the local press and through a meeting with planning Agents locally. It advised individual applicants during their individual application processes. It would introduce the charging from 1 September 2016.

28. Once the Council validated Mr X's application on 29 June it then took the application through the usual planning process of public notification and consultation. The usual eight week period to make a decision was due on 24 August.

29. The Town Council objected to the proposal on 26 July.

30. The Council advised Mr X he would need to complete a CIL form but that he might not be liable for CIL. The Council says completion of the CIL form was precautionary and applied to all applications it was processing at that time.

31. The Council did not complete the application process within the eight weeks. It issued its report on the application to Ward members and the Planning Committee Chairman on 31 August. As the Town Council had objected, under the Council's scheme of delegation the application had to go to the Chairman's Delegation meeting. The next meeting was due on 6 September.

32. The Council approved the application on 6 September. As a result Mr X became liable for the higher CIL payment rather than the S106 payment.

33. Mr X asked the Council to consider whether he might be exempt from CIL due to the circumstances of his case and the timing of the decision. The Council looked into this but advised Mr X he remained liable for the CIL payments. Mr X has made the payments expected of him so far.

Analysis

34. The Council was entitled to get S106 papers completed before validation as this formed part of its validation policy. Mr X and his agent took several weeks to provide this to the Council. Mr X says this was because the Council would not provide clarity on the rates applicable, because the Council had not formally approved the rates. This followed its adoption of the new Local Development Plan in late January 2016.

35. The Council properly altered the S106 figure in May 2016 to reflect the changes resulting from the High Court judgement, removing the affordable housing element (approximately £70,000) and the open spaces element (about £1,000) and leaving about £600 toward habitation mitigation.

36. While the Council took three weeks to send Mr X the S106 template in April, which it has explained as necessary to calculate the specific contribution for a non-standard development, it took Mr X a month to return the completed form, after the national changes, in June 2016. He says this was because his bank took two weeks to sign it off but the Council then took a further two weeks to agree the clause in the agreement. The Council has provided evidence it told Mr X it agreed the revised clause verbally on the day he submitted it.

37. I do not consider there was delay by the Council, up to validation of the application. There was no period of inactivity by the Council and it had many other S106 applications to deal with at the same time. Mr X contributed to any delay in May 2016. The process to secure the S106 agreement and negotiate relevant clauses can take time and was affected by the Council's timescale to formally ratify the rates and also by the Government's change of policy in May 2016. I do not find fault in the actions of the Council during this period.

38. Once the Council validated the application it followed the correct procedures to process it. This should be an eight week period or less. If there is no decision at eight weeks the applicant may appeal non-determination to the Planning Inspector.

39. The Council says there was a high volume of workload in this period but it allocated resources specifically to applications subject to S106 agreements knowing that CIL was starting on 1 September.

40. The eight week timescale for determination of applications is a Government target rather than a statutory deadline. There is a right of appeal for applicants if the

target is missed. In this case the timing of the application once it was validated meant it would always be a tight time schedule to issue a decision before 1 September. The delays in completing the process on 31 August, when the officer's report was issued were unfortunate, but I do not consider they were deliberate or amounted to fault. The Council was aware of the higher workload due to CIL and allocated what limited resources it had available to try and avoid undue delay. When it did not decide Mr X's application by 24 August he had the right to appeal to the Planning Inspector. He says he did not because he had verbal assurances from the Council his application would be decided within a few days. While I understand his reasoning the option to appeal still remained open to him.

41. The consequence of the Town Council's objections to the application was the decision would be referred for Chairman's Delegation. The next available meeting for that was 6 September, after CIL was applied, so making Mr X liable for the higher amount. While again this was unfortunate the Council acted properly in following its constitution and passing the application to the Chairman's Delegation meeting.

42. The Council's CIL provisions cover the relevant habitat mitigation so the Council was entitled to discontinue the S106 agreement at the introduction of CIL.

43. The Government introduced CIL without provision for interim or hand-over arrangements from S106 agreements. It made it applicable on the date of approval or start of development. That meant there was no flexibility for the Council to waive or defer CIL liability for applications. There are often instances when a scheme is introduced on a certain day meaning some will benefit and some will lose out. In this case it is most unfortunate Mr X lost out but this was not due to any fault by the Council.

Final decision

44. The Council acted properly in securing the necessary S106 agreement from Mr X and appropriate documents to validate his planning application.

45. It processed Mr X's application through the usual procedures but took longer than the government's eight week target to determine the application. This was mainly due to having to take the matter to Chairman's Delegation under the Council's Constitution.

46. There was no fault in the Council's action leading to Mr X's liability for CIL payments.

47. I therefore do not uphold this complaint and have completed my investigation.

Investigator's decision on behalf of the Ombudsman