

Report

on an investigation into
complaint no 12 014 714 against
The London Borough of Brent

12 September 2013

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S30(3) Local Government Act 1974 requires that I report without naming or identifying the complainant or other individuals. The names used in this report are therefore not the real names.

Key to names used

Mr X - the complainant

Report summary

Subject

Highways

The complaint is about an application for a vehicle crossover from the highway. Mr X had planning permission granted on appeal by a Planning Inspector for a crossover to his driveway. The Council refused an application to construct the crossover under its powers as the Highways Authority. It then refused Mr X's appeal against the highways decision. The reasons the Council gave for its refusal of Mr X's application were based on the same facts that had already been considered and rejected by the Inspector. The Council's policy about crossovers only allows for an appeal on the grounds the application has not been processed in accordance with the policy. In his decision the appeal officer did not mention whether he had considered the reasons the Planning Inspector gave for granting planning approval for the crossover.

Finding

The Ombudsman found maladministration causing injustice because the Council fettered its discretion and failed to communicate its decision properly. Its policy allows no decision other than refusal, about a request for a crossover across a grass verge wider than 3 metres. There is no provision to exercise discretion or consider an appeal on grounds of exceptional circumstances of the case.

Recommended remedy

The Council has agreed to review its Domestic Vehicle Footway Crossover Policy to provide a right of appeal on the grounds of the exceptional circumstances and facts of a case; and not only procedural irregularity. It should set aside its decision on Mr X's application for a crossover and make a fresh decision considering all the facts and arguments (including the Planning Inspector's decision) that have been set out in his complaint and my report. The Council should give full reasons for how and why it reaches the decision it does. The Council should also pay Mr X £300 to recognise the injustice caused to him through the faults identified in this report.

Introduction

1. The complainant, Mr X, has planning permission for a vehicle crossover from the highway, across a grass verge, to his driveway which was granted by a Planning

Inspector on appeal. When he applied to the Council's Highways Department to have the crossover built, it refused to process his application. Mr X has complained to me because he believes the Council did not approach his application with an open mind. He also complains that it, as the Highways Authority, has failed to accept the independent decision of a Planning Inspector.

Legal and administrative background

The Ombudsman's role

2. The Ombudsman investigates complaints about 'maladministration' and 'service failure'. In this report, I have used the word fault to refer to these. If there has been fault, I consider whether it has caused an injustice and if it has, I 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. I must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3)*)
4. The Ombudsman expects someone to appeal to a court, tribunal or government minister if they have a right to. However, I may decide to investigate a complaint if I consider it would be unreasonable for a person to have to do so. (*Local Government Act 1974, section 26(6)*)

Planning Appeals

5. Where a local planning authority refuses an application for planning permission the applicant may appeal by notice to the Secretary of State¹. Usually the appeal will be decided by a Planning Inspector acting on behalf of the responsible Government minister.

Highways Authority

6. Any person may ask a highway authority to construct a vehicle crossing over a footway or verge in the highway. The highway authority may approve, or reject the application, or propose alternative works. In making this decision the highway authority must have regard to the need to prevent damage to a footway or verge².

The Council's Crossover Policy

7. The Council's Domestic Vehicle Crossover Policy says:
 - it must consider the need to prevent damage to the footway/verge (section 2)

¹ Town and Country Planning Act 1990 s.78

² Highways Act 1980 s184(11) & s184(5)

- it will refuse applications for a crossover across a highway verge that is greater than 3 metres wide because of the adverse effect this can have on the appearance of the street (section 18); and,
- unsuccessful applicants who believe their applications have not been processed in accordance with the criteria set out in this policy will have the right of appeal (section 32).

Investigation

8. As part of the investigation, my investigator has:

- considered the complaint and the copy correspondence provided by the complainant;
- considered the comments and documents the Council provided; and
- discussed the issues with the complainant.

Planning Appeal

9. Mr X applied for planning permission to make an access from his home to the highway. In May 2010, the Council refused planning permission. The reason it gave was

“The proposed vehicular crossover, by virtue of the resultant loss of existing highway grass verge which is considered to be an attractive feature forming part of the streetscene along this stretch of [...] Road would result in harm to the visual amenities of the locality, contrary to policies, STR11, BE2 and TRN15 of Brent's Unitary Development Plan 2004 and Supplementary Planning Guidance 3: 'Forming an Access onto a Road' and the 'Domestic Vehicle Footway Crossover Policy'.”

10. It also said:

“the Council's Highway Authority will not support applications for vehicle crossovers to domestic properties where the crossover is proposed across a highway verge greater than 3m in width, this is because of the adverse effect this can have on the appearance of the street. This is set out in more detail in the 'Domestic Vehicle Footway Crossover Policy' produced by the Council's Transportation Unit.”

11. Mr X appealed to the Secretary of State. A Planning Inspector allowed his appeal. She considered the Council's reasons, mainly the effect the proposal would have on the streetscene. She concluded that *“because of the appeal dwelling's unique location, the adverse effects normally associated with vehicular crossovers traversing grass verges would not occur in this case”*, and *“to allow the appeal does not undermine the Council's ability to apply its policies effectively”*.

Crossover Application

12. Mr X then applied to the Council's Transportation Unit for a footway crossover from the highway to his driveway. The Council said it could not process his application because there was an area of grass verge outside his property. It said its footway crossover policy (section 18) says:

"Where an application for a crossover is proposed across a highway verge that is greater than 3 metres in width or any other grassed highway amenity area, it will be refused because the adverse effect this can have on the appearance of the street"³.

13. Mr X appealed. In his appeal he referred to the Planning Inspector's decision. He said the reason the Council had given for refusing to process his crossover application was the same reason the Inspector had considered and overruled.
14. On 11 March, the Council responded to his appeal and confirmed its decision not to approve his application. It said *"Although it is a pre-requisite to have obtained planning permission where applicable, this does not override the requirements of the Council's vehicle crossover policy and therefore applications will only be approved when the requirements of this policy are met"*.
15. Neither the decision, nor the appeal decision, gave any other reason for refusing the crossover than it would contravene section 18 of the Council's vehicle crossover policy and the purpose of the policy was to protect the appearance of the street.
16. The Council said the Planning Inspector made her decision purely on planning considerations, but it was now acting as the Highways Authority.
17. Mr X made a complaint through the Council's complaint procedure. The complaint procedure has three stages. Both the first and second stage complaint responses reiterated the Council's decision, and its reasons, for refusing to process Mr X's crossover application. The responses did not give any other reasons why it, as the Highways Authority, refused to process the application. The complaint officers were satisfied with the Transportation Unit's decision.
18. At stage three of the Council's complaint policy the Chief Executive responded to Mr X. He said the Council's Transportation Unit did consider the detail of the Planning Inspector's decision when considering his crossover application. But, he said, officers from the Transportation Unit *did not agree with the view expressed in the Planning Inspector's decision* that the close proximity of the vehicle crossover to neighbouring hardstanding would mean that it would be seen as part of the adjacent landscaping.
19. The Chief Executive's final response added some more detail to the Council's reason for disagreeing with the Planning Inspector's decision. But, he did not say

the Council had made the decision on any other basis than to prevent an adverse effect on the visual appearance of the street.

Mr X's view

20. Mr X says the Council wanted to refuse his planning application because it would have an adverse effect on the appearance of the street. During the planning consideration, the Highways Department was consulted and objected for this reason, and because it would contravene its crossover policy. But the Council had to accept the proposal had planning consent once the Planning Inspector upheld his appeal. He believes it is wrong for the Council, in its alternative guise as Highways Authority to reconsider the independent decision of the Planning Inspector, made with the authority of the Secretary of State.
21. Mr X wants to have his crossover approved. He is anxious that a proper decision should be made before his planning approval expires.

The Council's view

22. The Council says that, as the Highways Authority, it needed to determine Mr X's crossover application in accordance with the Highways Act 1980 section 184(5). It says this is separate and distinct from its powers under planning legislation. It says there is no requirement in s184(5) to approve a request on the basis planning consent has been granted.
23. It says it is reasonable in law for the Council as highways authority to arrive at a different decision to the Planning Inspector if the circumstances of a particular case warrant this. It says it has taken legal advice that confirms this.
24. The Council says that in considering Mr X's crossover application under the Highways Act it considered matters that were not entirely coterminous with the material planning considerations.
25. The Council says one of the considerations that it has to have regard to under the Highways Act is "*the need to prevent damage to a footway or verge*"⁴. It says that Mr X's proposal, as well as affecting the visual appearance of the verge and street, would increase the potential for damage to the grass verge. This would be because a crossover in this location would provide an opportunity for motorists to drive over the kerb and park on the grass verge. It says that potential damage to a grass verge is an issue specific to transportation, rather than planning considerations.
26. The Council accepts there is no documentary evidence, from when the crossover decision was made, that the Highways Authority took the detail of the Planning Inspector's decision into account. But it says officers involved in the decision

4 The Highways Act 1980 section 184(5)

remember taking the Planning Inspector's decision into account. It says the failure was in the way the Transportation Unit recorded, and explained, the decision to Mr X in writing; rather than in the way it was considered.

27. The Council has provided me with some emails from September 2011, when it was looking at the complaint at stage three. It says these show evidence of the consideration given by officers to the Planning Inspector's decision.
28. In response to a draft of this report the Council accepted that the wording of the appeal section of its Domestic Vehicle Footway Crossover Policy gives the impression that discretion is routinely fettered and exceptional circumstances are not taken into account. It agrees that the wording of this section of the policy should be changed. But, it says its officers do, in practice, exercise discretion. It has sent me examples of some recent decisions where discretion was exercised to allow exceptions to the policy where there were circumstances to justify this.

Conclusion

Fettering discretion

29. The Council's Domestic Vehicle Footway Crossover Policy section 18 says that where an application for a crossover is proposed across a highway verge that is greater than 3 metres in width ... *it will be refused* (see paragraph 12).
30. The policy provides a right of appeal⁵; but only on the grounds the application has not been processed in accordance with the criteria set out in the policy. It does not allow for an appeal on the grounds of exceptional circumstances that would justify an exception to be made to the policy.
31. The crossover decision and appeal decision only refer to the proposal not meeting the criteria of section 18 of the policy. The appeal officer did not mention whether he had considered the reasons the Planning Inspector gave for her decision that allowing Mr X's planning application in this unique location would not adversely affect the visual appearance of the street, or undermine the Council's ability to apply its policies effectively (see paragraph 11).
32. In Mr X's case the Council applied its policy in a blanket way, and the policy had no provision for considering whether an exception should be made. This was maladministration.

Consideration of the Planning Inspector's Decision

33. Mr X has argued that it was wrong for the Council to refuse his application under highways legislation when a Planning Inspector had considered the facts and decided the application should have planning approval.

5 LB Brent Domestic Vehicle Footway Crossover Policy s.32

34. What I must consider is whether I can find it was fault for the Council as Highways Authority to refuse to process Mr X's crossover application on the same grounds that a Planning Inspector had considered, and decided were not sufficient reason to refuse it.

Were the grounds the same?

35. Firstly, were the grounds the Highways Authority used to refuse the crossover facts the Planning Inspector had taken a view about? I am satisfied they were. Both the refusal and the appeal gave section 18 of the Council's crossover policy as the reason for refusal. This is about the adverse effect of the proposal on the appearance of the street. I am clear that this was also the main issue considered by the Planning Inspector.
36. The Council argues that its officers also considered the potential for damage to the grass verge, which was not something the Planning Inspector considered. It says that this is something it must consider under the Highways Act⁶ when deciding whether to build a crossover.
37. The Planning Inspector decided "the adverse effects normally associated with crossovers traversing grass verges would not occur in this case" (see paragraph 11). The adverse effects that she refers to may include damage to the verge. However, I cannot know this, because damage to the verge is not mentioned explicitly in her decision.
38. But, neither does the Transportation Unit mention the potential for damage in its crossover decision, or the appeal response. There is no contemporaneous evidence that it was a reason for the Council's refusal. The first time the Council said potential damage to the verge was a reason for refusing Mr X's proposal was in its responses to my investigator's enquiries.
39. Even the emails the Council has provided from September 2011 only mention vehicles using the proposed crossover to drive onto the verge in the context of the effect on visual amenity. There is some discussion in one of these emails (some months after the decision and appeal) about the potential for damage to the verge if an *alternative* proposal to construct narrow tracks, rather than a full hard crossover was adopted. But this was not raised as an objection to Mr X's original proposal.
40. The same email also mentioned consideration of potential damage to tree roots. But it says the Council's engineers said the crossover could be constructed without damage to the roots. So this was not part of the reason for refusal.
41. Moreover, the Highways Authority must notify an applicant of their decision⁷.
Where the decision is to refuse I would expect the Authority to give its reasons for

⁶ The Highways Act 1980 s. 184(5)

refusal. The only reason given to Mr X was that the proposal contravened section 18 of the Council's policy, because it would have an adverse effect on the streetscene. On balance of probabilities, I conclude the reasons the Council refused Mr X's crossover were on the same facts already considered by the Inspector.

Different powers

42. The Council's duties and powers as Planning Authority and Highways Authority are separate. They are governed by different legislation. There must be the possibility the Planning Authority and the Highways Authority might take different decisions, when exercising their distinct powers, about whether to allow the same crossover proposal. However, it would be reasonable to expect some coordination between the different roles in these circumstances.
43. The Council says it is right for it as Highways Authority to refuse a crossover on the same grounds that a planning inspector has considered when allowing an appeal to the Secretary of State because the role and powers of the Planning Authority and the Highways Authority are distinct.
44. The Court of Appeal considered a similar case in *R v Warwickshire County Council Ex parte Powergen plc*.⁸ In this case the court said:

“Is it reasonable for a highway authority, whose road safety objections have been fully heard and rejected on appeal, then quite inconsistently with the Inspector's independent factual judgment on this issue, nevertheless maintain its own original view? To my mind there can be but one answer to that question: a categoric no.”

45. The facts of that case are different in that the Court was considering a decision of that highways authority under another provision of the Highways Act, section 278, and the objections were about safety, not visual amenity. But it is arguable that the logic is transferable.
46. The Court's conclusion was in the light that:
 - a. the site was central to the planning application and considered in detail;
 - b. the planning permission was granted following an appeal to the Secretary of State and not merely the Local Planning Authority itself; and
 - c. there were no new facts or changed circumstances whatever following the Inspector's determination of the appeal.
47. These considerations also apply in Mr X's case, so it is difficult not to draw the same conclusion that the Highway Authority should not maintain its original view.

⁷ The Highways Act 1980 s. 184(12)

⁸ QBCOF 97/0607/D

Fresh objections

48. Even if the original Transportation Unit decision to refuse to construct a crossover were to be set aside, it might be open to the Council to make a new decision to refuse on fresh or additional grounds. It might consider matters not fully considered by the Planning Inspector. These could include potential damage to the verge.
49. There are dangers in this approach. The Highways Authority was invited to make its objections to the planning process and have them considered. It would be reasonable to expect it to engage in this process and not hold back objections “in reserve” for it to use as reasons to make a different decision under the Highways Act. In an extreme case a Highways Authority might ignore the planning consultation entirely and then use its objections to refuse an application for a crossover later. I think this cannot be right, but whether it would be lawful is a matter the courts would have to decide.

Summary

Maladministration

50. There was maladministration in the way the Council dealt with Mr X’s application for it to construct a crossover.
 - a. It fettered its discretion. Its Domestic Vehicle Footway Crossover Policy allows no decision other than refusal, about a request for a crossover across a grass verge wider than 3 metres. There is no provision in the policy to exercise discretion or consider an appeal on grounds of exceptional circumstances of the case.
 - b. It failed to communicate its decision properly to Mr X. During my investigation the Council gave new reasons for refusing Mr X’s request that it had not previously given to him in its decision.

Injustice

51. These faults caused Mr X justifiable annoyance and uncertainty and caused him to take time and trouble to try to get a proper decision with reasons. That difficulty should have been avoided. This was an injustice to him.

Outside jurisdiction

52. I think it is arguable the principles set out by the Court in the R v Warwickshire County Council ex p Powergen case should also apply here. However:
 - i. the facts in Mr X’s complaint are not exactly the same;

- ii. the Council has taken legal advice that its actions were correct in law; and,
- iii. I am aware that some other local authorities share the Council's view on this.

53. So, whether it is lawful for the Council, in the specific circumstances of this case, to refuse to construct a crossover on grounds of visual amenity that have already been considered by a Planning Inspector, when deciding to give planning consent, is a matter that only the courts can decide. The same applies to the question of what fresh objections the Council may rely on after an appeal where the facts and circumstances have not changed in any material way. If Mr X wants a decision that the Council's refusal to construct his crossover is unlawful, he will have to apply to the courts for a decision. I cannot help him with this (see paragraph 4).

Recommended remedy

54. The Council has agreed to review its Domestic Vehicle Footway Crossover Policy to provide a right of appeal on the grounds of the exceptional circumstances and facts of a case; and not only procedural irregularity.

55. I recommend that the Council should also:

- a. set aside its decision on Mr X's application for a crossover and make a fresh decision considering all the facts and arguments (including the Planning Inspector's decision) that have been set out in his complaint and my report. The Council should give full reasons in writing for how and why it reaches the decision it does; and,
- b. pay Mr X £300 to recognise the injustice caused to him through the faults I have identified in this report (see paragraphs 50 and 51).



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