

**Complaint reference:**  
13 021 012

**Complaint against:**  
New Forest National Park Authority

## **The Ombudsman's final decision**

Summary: Mr B complains on behalf of local residents about the way the National Park Authority considered an application for a commoner's house to be built in the national park. I found there was administrative fault.

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## **The complaint**

1. Mr B complains on behalf of local residents that the National Park Authority failed to properly consider a planning application for a commoner's house near to their homes.

## **The Ombudsman's role and powers**

2. The Ombudsman investigates complaints of injustice caused by maladministration and service failure. I have used the word fault to refer to these. 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**

3. I spoke to Mr B and considered the paperwork he provided. I requested information from the Council and considered the planning documents on the Council's website. Mr B sent me photographs of the partially built dwelling and barns taken from his property and from the property of other residents he represents.
4. I sent my draft conclusions to the complainant and to the Council to enable both parties an opportunity to comment before I reached a final decision. I considered comments from both parties before reaching a final decision.

## **What I found**

### **Background**

5. The National Park Authority is responsible for deciding planning applications in the national park, where development is strictly controlled. Mr B complains on behalf of a group of local residents. They complain the Authority had wrongly decided to approve a planning application to build a commoner's house on land near to where they live.

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## **Affordable Housing Policy**

6. The Authority's Core Strategy, which has been subject to independent review by an Inspector appointed on behalf of the Secretary of State and sets out its key planning policies, states housing availability is a major issue in the National Park.
7. The Authority's Affordable Housing policy, CP11, states housing to meet local needs will be permitted in, or next to, four defined villages in the New Forest. It also states small-scale affordable housing may be permitted across the national park as "exceptions". However, to qualify as exceptions the development should:
  - Meet a particular local need that cannot be accommodated in any other way;
  - Be subject to a legal agreement to ensure the dwelling built provides local-cost housing for local needs in perpetuity.
  - Be capable of management by an appropriate body, such as a registered social landlord or housing association.
  - Be located where there are local facilities (e.g. shops, schools and public transport).
8. The Core Strategy states that affordable housing proposals should meet the needs of local people identified in a housing needs survey and occupation is normally restricted to a local person. It defines a local person as "someone who lives or works in, or who has strong connections with the settlement or parish in which the scheme is proposed."

## **Commoners Dwelling Scheme (CDS)**

9. Commoning in the New Forest is the practice of grazing animals in the national park. To qualify as a commoner, an individual needs to own or occupy land with rights to graze animals in the forest. The Authority is committed to supporting commoning through the commoners development scheme (CDS). Proposals under the CDS are considered under the affordable housing policy of the Core Strategy.
10. Assessment of eligibility for the CDS is made by a panel, which the Authority says acts in an advisory role, offering technical advice to the planning committee. The panel is made up of members of the National Park Authority, a Verderer of the New Forest (an individual whose role it is to protect and conserve the forest and its practises, including commoning), two individuals with particular knowledge and understanding of commoning, a senior planning officer and the Executive Director who leads the planning department. The panel members are appointed by the Members of the Authority and are reviewed annually.
11. The panel considers whether the applicant can demonstrate a suitable history of commoning, whether the proposed development site has common rights of pasture and whether the applicant needs a commoner's dwelling. For example, whether the applicant can common from their existing dwelling or has access to any other property they can common from.
12. The CDS panel's decision on the applicant's eligibility for the CDS is considered as part of a planning application, addressed in accordance with planning policy. A review of the CDS in 2011 confirmed that acceptance of an application by the CDS panel does not guarantee that planning permission will be granted. The planning committee still needs to consider all material planning considerations.
13. Local residents are consulted on the planning application (in accordance with the usual requirements for publicising planning applications).

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14. If the Authority decides to approve the planning application, a legal agreement with the Authority is required, transferring the freehold of the application site to the Authority. Because the Authority has the freehold it can ensure the dwelling is used for commoning in perpetuity.

### **What happened**

15. Mr B complained there had been numerous faults with the way the Authority had dealt with the application. His complaint set out 17 areas in which he considered the Council were at fault and where it needed to take action. The process the Council followed is set out below, along with Mr B's concerns. In this statement I have referred to the applicant as Miss X.
16. In 2011 Miss X applied to build a commoners dwelling on a site near to Mr B and the residents he represents. Miss X lived 7km from the site elsewhere in the new forest. The CDS panel considered the application and concluded Miss X had done sufficient commoning to be eligible for the scheme, the her site had commoning rights, suitable access and she had funds to build.
17. In April 2012 the Authority told Miss X she had been accepted onto the scheme.
18. In May planning officers gave Miss X some pre-planning advice and in August she put in a planning application for a commoners dwelling, a large barn and a new access from the highway.
19. The Authority notified neighbours about the planning application and sent the parish council a standardised briefing document about new planning applications. In its briefing on Miss X's application the Authority stated "*The applicants have been accepted on to the Commoners Dwelling Scheme and thus the principle of a dwelling is acceptable...*"
20. The application was withdrawn because it had no supporting statement from the CDS panel and a further application was submitted and withdrawn as Miss X wished to re-consider the layout and design of the farm buildings.
21. Miss X revised her plans for the site in 2013 and the CDS panel met to re-affirm her eligibility for the CDS scheme. She made a fresh planning application which proposed a dwelling and two smaller barns. The case officer's report summarised the application and the comments the Authority had received supporting and objecting to the application. She summarised the CDS scheme, the panel's decision and the evidence the panel had received. She stated why the applicant's history of commoning was considered sufficient.
22. In terms of need, the case officer noted objectors had asked why Miss B could not common from her current house or other properties. She also noted objectors had questioned whether she was local enough to the site to justify an affordable housing exception. The case officer noted Miss X was not local to the parish nearest her site, but she lived elsewhere in the new forest. The case officer noted living in the parish was not a requirement of policy CP11. She stated as Miss X was an established commoner living within the national park this was acceptable.
23. In addition, Miss X asserted she needed 24 hour, on-site supervision of her animals and she needed grazing land with common rights of pasture. Without this she said her commoning activity would not be viable and would cease. The CDS panel stated Miss X's current address did not have land attached or have commoner's rights. However, the case officer acknowledged the applicant had been commoning from her existing address using a field she leased. She noted

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the applicant's family home did not have commoner's rights and is not available to the applicant in the long term.

24. Mr B told me someone had used Miss X's site for commoning before it was sold to her. The commoner using the site previously did not live on the site.
25. The case officer stated officers agreed with the panel decision regarding the applicant's eligibility for a commoner's dwelling but it was open to Members to consider the applicant's eligibility as part of the wider planning process.
26. Separate to the applicant's eligibility for the scheme, the case officer considered the scale, design and materials proposed for the dwelling and the barns. She considered they were acceptable. She stated the new development would inevitably alter the appearance of the immediate area but she considered it would fit into the character of the area. Overall the case officer considered the proposal was acceptable in planning terms and should be approved.
27. The planning committee agreed to grant planning permission subject to conditions and the completion of a legal agreement controlling occupation of the property.

### **The Complaint**

28. I have set out below Mr B's key concerns about the process and the way the Authority considered Miss X's application:
  - a) At stage one of the CDS process, the panel membership was biased towards commoners and could not have considered the application independently.
  - b) Mr B felt the planning committee could not impartially consider the applicant's planning application and resident's objections when the panel (including the head of planning) had already decided 'eligibility' for the scheme, which included planning issues. He noted the parish council briefing in September provided evidence of the way the planning department had interpreted the panel's decision. He felt the role of the panel should be clear and there should be separation between the staff on the panel and the staff considering the planning application.
  - c) Mr B and other residents did not get an opportunity to comment on or challenge Miss X's eligibility at stage one of the process. In addition to which Mr B complained that no minutes of the panel meeting were kept, so the meetings lacked transparency.
  - d) Mr B felt that the Authority should not have told Miss X she had been "*accepted onto the CDS Scheme*". He felt this pre-judged the question of eligibility and compromised further examination of this by the planning committee.
  - e) Mr B felt the Authority should give greater weight to the views of the Parish Council.
  - f) Mr B disagreed with the case officer's view that the impact of the development was acceptable.
  - g) Mr B felt the Authority failed to rigorously test whether Miss X met the criteria for the CDS scheme. This was in terms of need for a new house to continue commoning, her need for affordable housing and whether she met the 'local person' test.
  - h) Mr B felt the Council failed to properly ensure the legal agreement imposed the appropriate restrictions to ensure the Miss X's property would remain in use for commoning for perpetuity.

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- i) Mr B's complaint to the Ombudsman expressed concern that Miss X may, in the future, start a riding school from the property the Authority had allowed.
29. Mr B complained to the Authority in February 2014 and it responded in March. As a result of Mr B's complaint the Authority considered some of Mr B's wider concerns about its process in a report to the full Authority. I have not repeated the contents of the Council's response and report here. Key points in its response were;
- It had taken account of resident's concerns when re-appointing CDS panel members in June 2013.
  - It had decided to make the minutes of the CDS Panel meetings available to the public on its website to improve transparency. It has now done this.
  - It decided that all future planning applications for commoner's dwellings should be decided by Committee.

### **Other issues**

#### **Petition**

30. In December 2012, after correspondence with the Chief Executive of the Authority, Mr B presented a petition to the planning committee.
31. The rules on the Authority's website state members of the public may speak at a meeting provided they give notice. The rules permit each individual (or group) three minutes (or longer at the chairman's discretion).
32. Mr B's petition included ten points about the way the Authority administers the CDS. He provided me with a copy of the script he read from when he addressed the Committee. Mr B's script illustrated his points about the CDS using specific concerns about the application Miss X had submitted. That application was due to be considered by the Committee at the meeting. However, it was withdrawn, so it was no longer on the agenda.
33. Mr B complains that when addressing the Committee, he was interrupted on numerous occasions by the chair and another authority officer. They told Mr B his points were inappropriate because they related to Miss X's specific application and that was no longer to be debated. The Authority's view was that discussing the application after it was withdrawn was inappropriate because the applicant did not have the opportunity to respond to the points being made.
34. The interruptions impacted Mr B's presentation to the Committee. However, I note the three minute time period was re-started to allow some more time.

### **Analysis**

#### **The Process**

35. I am satisfied the panel acts in a similar way to other consultees in the planning process providing expert advice, such as highways officers or environmental health officers. I do not consider it is fault not to allow comments from the public at this stage: the public gets the usual opportunity to comment, including on whether CDS criteria are met, on any subsequent planning application.
36. I see no fault in the way the Authority appointed people to the CDS panel. They are appointed and reviewed annually by the full Authority Members. I recognise Mr B's concerns regarding perceived bias in terms of the membership of the panel. But its role is to advise the planning committee about adherence to the CDS criteria about commoning, and knowledge and expertise in this area is

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necessary. In addition, the panel is considering exceptions to planning policy, so planning officers would also provide appropriate input.

37. It follows that I do not consider I have grounds to recommend the panel membership should not include planning officers, to achieve separation between the staff considering the planning application and the panel members.
38. In this case the decision on the planning application was taken by the planning committee, not officers, so there was separation, and as a result of the Council's decision that future planning applications for commoner's dwellings should be decided by the committee, this will continue.
39. I agree with Mr B that, at times, there has been a lack of clarity about the role of the CDS panel however. It has been unclear whether it acts in a decision making or advisory capacity. Also, consultees are usually asked to comment on planning applications after they have been submitted. So the way the CDS panel considers elements of applications in advance is unusual.
40. The advisory nature of the panel was confirmed in the Council's 2011 review and in the case officer's advice to the Committee that it was for them to consider eligibility. However, the briefing note to the Parish Council in 2012 suggested otherwise when it stated acceptance onto the CDS meant the principle of a dwelling was acceptable. So the Authority should ensure it is clear in all cases that the panel is only making a recommendation. Provided the panel role is clear and applicants are told at the outset the panel decision is not a guarantee of planning permission, it is not unreasonable for the panel to confirm applicants have been "accepted into the CDS scheme". This indicates the panel's decision, not a planning decision.
41. When Miss X's application was considered in 2012 no minutes of the panel meetings were available to the public and the lack of transparency may have added to the complainants' uncertainty about how the panel functions. I note the Authority has now taken action to improve the transparency of the panel's meetings by publishing the minutes online. This is welcomed.

#### **The decision in Miss X's case**

42. The panel established that Miss X had a sufficient history of commoning to be eligible for the scheme, she owned suitable land, it had suitable access and she had funds to build.
43. However, a key test in the policy CP11 is to ensure there is a local need for a dwelling could not be met in another way. Based on the information I have seen, I am not persuaded the case officer's report properly examined whether there was a need for a commoners dwelling at the site that could not be met in another way.
44. I say this because the site Miss X purchased had been used previously for commoning by someone who did not live on the site. In addition, Miss X did not live at the previous site she rented and commoned from.
45. The Authority took account of difficulties Miss X had in commoning from her previous rented site. But, the case officer's report does not show whether the Authority considered if it would be reasonable to expect Miss X to use her new site for commoning, while living elsewhere in the new forest. I understand that around half of commoners do not live on the sites they common from. I accept it may be beneficial to live on site and I recognise Miss X asserted that she may not continue commoning if she was unable to live on site with 24 hour access to supervise her animals. However, the test in policy CP11 is a need that cannot be

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met in another way. As commoning is widely practised without living on site, I do not consider the Authority has explained why it considered the need for a dwelling in policy CP11 has been met in this case.

46. In addition to questioning the need for a commoner's dwelling, Mr B says that Miss X did not meet the local person test and refers to the definition of a local person in the Core Strategy. However, this sets out an approach for affordable housing exceptions in general and describes the way in which housing need is "normally" determined. I accept the Authority's position that where commoning is concerned, a wider definition is used. The wording of the policy allows for this so, I do not consider the interpretation of local person by the Authority represents fault.
47. The case officer's report summarised the Parish Council's response to the planning application. Parish Councils are consultees within the planning process. However, they do not have decision making powers. Although the case officer did not agree the development should be refused, she included the Parish Council's comments in her consideration of the application. There was not fault in this regard.
48. I recognise the new development in the field alters the outlook. However, I see no reason to question the case office's judgement, and the committee's decision, that there would be no unreasonable overlooking or overbearing impact that warranted refusal.
49. I am satisfied that the Authority applied a legal agreement to ensure the property will be used for commoning in perpetuity.
50. Based on the evidence I have seen there was fault in the case officer's report. I am not persuaded the Authority has shown that it sufficiently considered the key policy requirement that a dwelling met a need could not be met in any other way.

### **Impact of the fault**

51. If we find fault in the way planning applications were considered, we have no legal power to revoke planning permission and generally we do not consider it is proportionate to recommend such action is taken by local authorities. Although I consider there was insufficient evidence to show the consideration of a need that could not be met in another way, I cannot say that a proper consideration of this issue in the case officer's report would have led to a different outcome.
52. I do not consider the development itself has caused any significant impact to the amenity of the complainants. There are no grounds in this case that warrant specific remedy for the complaints in relation to their amenity as a result.
53. I recognise the complainants disagree with the way the Authority has applied its policy. The complainants argue that they incurred legal costs in challenging the Authority's position. However, complaints can generally be brought without the need for legal advice. We would only consider refunding legal costs in exceptional circumstances. I do not consider the fault identified led directly to the complainants incurring legal fees or that there are exceptional grounds to warrant reimbursement of legal fees here.
54. I have recommended the Council makes a payment to recognise there was a degree of time and trouble in bringing the complaint.

### **Petition**

55. The rules allow individuals three minutes to address the committee about a petition. The petition itself was presented. However, I recognise Mr B feels

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strongly that he was prevented from properly addressing the committee because he was interrupted while addressing the committee about it.

56. Having reviewed the minutes and the transcripts of Mr B's presentation I do not consider that restricting Mr B's presentation to exclude references to the application concerned was fault by the Authority. Mr B was interrupted because the applicant would be unable to address the points he was making about their application. This was because it had been withdrawn from the agenda. I also note some further time was allowed when the timer was restarted.

### **Agreed Action**

57. The Authority agreed to review how it considers (and records its decisions about) the issue of a need that cannot be accommodated in any other way, in relation to commoners dwellings.
58. The Authority agreed to pay Mr B £300 to recognise the time and trouble he has been put to raising a complaint on behalf of local residents.

### **Final decision**

59. There was administrative fault that warrants a remedy.

### **Investigator's decision on behalf of the Ombudsman**