



Northern Ireland

Public Services
Ombudsman

Investigation of a complaint against Ards & North Down Borough Council

Report Reference: 202003408

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The Role of the Ombudsman

The Northern Ireland Public Services Ombudsman (NIPSO) provides a free, independent and impartial service for investigating complaints about public service providers in Northern Ireland.

The role of the Ombudsman is set out in the Public Services Ombudsman Act (Northern Ireland) 2016 (the 2016 Act). The Ombudsman can normally only accept a complaint after the complaints process of the public service provider has been exhausted.

The Ombudsman may investigate complaints about maladministration on the part of listed authorities, and on the merits of a decision taken by health and social care bodies, general health care providers and independent providers of health and social care. The purpose of an investigation is to ascertain if the matters alleged in the complaint properly warrant investigation and are in substance true.

Maladministration is not defined in the legislation, but is generally taken to include decisions made following improper consideration, action or inaction; delay; failure to follow procedures or the law; misleading or inaccurate statements; bias; or inadequate record keeping.

The Ombudsman must also consider whether maladministration has resulted in an injustice. Injustice is also not defined in legislation but can include upset, inconvenience, or frustration. A remedy may be recommended where injustice is found as a consequence of the failings identified in a report.

Reporting in the Public Interest

This report is published pursuant to section 44 of the 2016 Act which allows the Ombudsman to publish an investigation report when it is in the public interest to do so.

The Ombudsman has taken into account the interests of the person aggrieved and other persons prior to publishing this report.

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Case Reference: 202003408

Listed Authority: Ards & North Down Borough Council

SUMMARY

I received a complaint about the actions of Ards & North Down Borough Council (the Council). It related to alleged breaches of planning control in a housing development site (the site) close to the complainant's dwelling. The complainant notified the Council that he believed a business adjacent to the site had moved a boundary fence leading to encroachment onto the site. He also reported that the developers were bringing and depositing waste materials onto the housing site and using this material to infill the land.

The complainant believed the Council did not appropriately investigate his complaint.

I obtained all relevant information, legislation, policy and the planning enforcement file.

My investigation found that the Council appropriately investigated the complaint and that its decision not to reopen the complaint upon receipt of additional information from the complainant was in accordance with its internal guidance. .

I concluded that there were no failures in the actions of the Council. I did not uphold this complaint.

THE COMPLAINT

1. This complaint was about how the Council investigated an allegation concerning the infilling of land on a housing development site (the site) by the developer and encroachment onto an area of the site reserved for a school by a neighbouring business. The complainant believed the Council had not investigated his complaint *‘effectively’*. He believed the Council took the word of the developer that it had not breached planning orders rather than independently verifying this. He also believed the Council should have reopened his complaint when he presented additional information to it.

Background

2. On 15 February 2016 the Council granted full planning permission to a development company (the developer) for *‘phase one of 100 houses, and a 2-hectare site set aside for future school, temporarily landscaped as open space’* at the Rivenwood development site (the site).
3. On 21 May 2019 a local councillor made a complaint to the Council’s Planning Department, on behalf of the complainant, regarding unauthorised building work and infilling of land at the site. The Council opened an Enforcement Case¹ (the EC). On 12 June 2019 the complainant contacted the Council about the unauthorised infilling of land at the site and was added as a complainant to the EC. The complainant said the materials used for infilling were contaminated waste². The complainant also alleged that a business adjacent to the site had moved a boundary fence between it and the site, thus encroaching on the site’s land (landownership issues).
4. Between May 2019 and July 2021, the Council took a number of actions to investigate the alleged breaches of planning control including site visits, meetings and surveys. On 22 July 2021 the Council concluded that the neighbouring business had not encroached on the site’s land and the land reserved for the school use had not been compromised. However, it also concluded the developer’s infilling operations were a breach of planning control³. Nonetheless, it considered it would

¹ Enforcement Case – a case which the planning authority opens when a complaint about an alleged breach of planning control occurs

² Contaminated Waste- Contaminated waste refers to any waste that contains hazardous or harmful substances, including chemicals, medical waste, asbestos, and radioactive materials. Such waste requires specific disposal methods to ensure that it does not harm human health or the environment. Such waste could emanate from a skip hire business.

³ Breach of Planning Control – the carrying out of development without the required planning permission.

not be expedient to pursue enforcement action in this instance. The Council closed the EC.

5. On 21 December 2021 the Council received a letter from the complainant regarding its decision not to take enforcement action against the developer. He alleged that the material the developer used to *'fill ground on the site of the proposed school was old infill from another site.'* He also stated he had a sketch from the Department of Agriculture, Environment and Rural Affairs' (DAERA) NIEA which showed that it was *'not a true representation of the land as it actually is now'*. The Council did not reopen the complaint.

Issue of complaint

6. I accepted the following issue of complaint for investigation:

Whether the Council investigated the enforcement complaint in line with the relevant legislation and guidance.

INVESTIGATION METHODOLOGY

7. In order to investigate this complaint, the Investigating Officer obtained from the Council all relevant documentation together with its comments on the issues the complainant raised.

Relevant Standards and Guidance

8. In order to investigate complaints, I must establish a clear understanding of the standards, both of general application and those specific to the circumstances of the case. I also refer to relevant regulatory, professional, and statutory guidance.

The general standards are the Ombudsman's Principles⁴:

- The Principles of Good Administration

9. The specific standards and guidance referred to are those which applied at the time the events occurred. These governed the exercise of the administrative functions and professional judgement of those individuals whose actions are the subject of this complaint.

⁴ These principles were established through the collective experience of the public services ombudsmen affiliated to the Ombudsman Association.

The specific standards and guidance relevant to this complaint are:

- The Planning Act (Northern Ireland) 2011 (the Act)
- The Waste and Contaminated Land (Northern Ireland) Order 2015 (The Order)
- Department for Infrastructure Enforcement Practice Notes 01-04 (the PNs)
- Ards and North Down Borough Council Planning Enforcement Strategy (2015) (the Strategy)

I enclose relevant sections of the guidance considered at Appendix 2 to this report.

Administration/ Planning

10. In investigating a complaint of maladministration, my role is concerned primarily with an examination of the Council's administrative actions. It is not my role to question the merits of a discretionary decision. That is unless my investigation identifies maladministration in the Council's process of making that decision.
11. I did not include all information obtained in the course of the investigation in this report. However, I am satisfied I took into account everything I considered relevant and important in reaching my findings.
12. A draft copy of this report was shared with the complainant and the Council for comment on factual accuracy and the reasonableness of the findings and recommendations. I have carefully considered the responses I received.

THE INVESTIGATION

Whether Council processed the enforcement complaint in line with the relevant legislation and guidance.

In particular this will consider

- i) How the original complaint was processed ;and
- ii) The decision not to reopen the complaint.

Detail of Complaint

How the original complaint was processed

13. The complainant believed the Council did not effectively investigate his complaint about an alleged breach of planning control comprising the unauthorised moving of a boundary fence and infilling of land by an adjacent business. He was concerned the

Case Officer (CO) *‘accepts whatever is presented by the developer and his associates, thus taking the easiest option of resolving any issues or complaints raised with him’.*

Evidence Considered

Legislation/Policies/Guidance

14. I considered the following legislation, policies and guidance:

- The Act
- The Order
- The PNs
- The Strategy

The Council’s response to investigation enquiries

15. The Council stated the following: it opened an enforcement investigation *‘on 21 May 2019...to investigate the alleged unauthorised land fill activities, alleged unauthorised change of use of land; and alleged development over land reserved by Planning Agreement for educational usage’.*
16. The Council stated the developer brought a *‘small amount of material’* onto the site reserved for a school and used it *‘to flatten out the site pending future development of the school site.’* It added that the *‘the CO determined that as the materials were being brought onto the site’* were not *‘the movements of materials from and within the site’* these activities *‘did constitute a breach of planning control’.* The Council stated *‘however, it was not expedient to pursue enforcement action.’*
17. The Council stated the following: the complainant *‘alleged that this material contained contaminated waste.* It *‘consulted’* with the NIEA at the time of the complaint and established that *‘no evidence of this type of waste had ever been found. Any other material brought onto the site was done lawfully to develop it in line with the planning approval. The correct waste licenses etc had been sought and granted’.*
18. The Council stated *‘In terms of the ground levels measured on the site, this was done with a handheld GNSS⁵ Korec high accuracy device..... Its accuracy is to*

⁵ GNSS Korec device – a piece of ground survey equipment

within 1cm. The evidence/information before the Council including land ownership details is that the boundary lines are as per the planning approvals with the spot levels⁶ taken on the site confirming this to be the case. The information provided does not change this.'

19. The Council stated that it closed the enforcement case on 22 July 2021 *'for the following reasons':*

- *'The Rivenwood development is still under construction and the Council are content that this is being developed in accordance with the approved plans.*
- *The Council are aware that some infilled soil was brought to the site . 'However, given its scale and the fact that NIEA Environmental Crime Unit are content this is not controlled waste site, the Council do not consider this is expedient to pursue and will not be taking no further action in this regard'.*

Relevant Council records

20. I examined the Council's Enforcement File (EF). I have attached relevant extracts at Appendix 3.

Analysis and Findings

21. For the purposes of this report, I examined the Council's actions in relation to how it investigated the issue of alleged encroachment by the neighbouring business. I then examined its investigation of the issue of unauthorised infilling by the developer. Following this I considered the Council's decision not to take enforcement action against the developer for a breach of planning control.

Encroachment

22. I refer to Section 138 – (1) of the Act ' Issue of enforcement notice by Councils' which states *'The council may issue a notice (in this Act referred to as an "enforcement notice") where it appears to the council—*
(a)that there has been a breach of planning control in relation to any land in its district;

⁶ Spot levels are points on a map that identify the height above mean sea level. They are used to determine the elevation of specific points, both existing and proposed, for planning purposes and creating 3D models.

23. Section 6 of the Strategy states ‘How will we respond to the information we are given?’ Paragraph 6.1 states when ‘*processing a complaint about a planning breach we will c) visit the site within the requisite time period and d) establish whether or not we believe there is a breach of planning control.*’
24. I examined the EF: It contained an Enforcement Report⁷ (the ER) which documented that as part of its investigation into the alleged encroachment onto the site by the neighbouring business, the Council carried out survey using a GNSS Korec device to measure points along the site boundary and the land belonging to the adjacent business. The Council plotted the survey information onto a map in February 2021 and overlaid it onto a site plan associated with the 2016 planning permission. The 2016 site plan identified the site boundaries when that planning permission was granted. Upon completion of this exercise the CO noted ‘*they (the survey measurements) demonstrate that the plant and hire business has not extended beyond their lawful boundary nor impeded the part of the Rivenwood site reserved for educational purposes*’. I am satisfied the Council appropriately investigated the matter of the alleged encroachment and whether the proposed educational use of the site was compromised.

Infilling

25. In relation to the allegation that the developer was bringing in material for the purpose of infilling on the site I reviewed the EF: it documented that as part of his investigation the CO visited the site on a number of occasions. He spoke to the site co-owner on 23 May 2019. The site co-owner told the CO that ‘*some materials were being brought into the site to level the land where the educational use was to be developed in the future.*’ I also note the CO determined this was development that required planning permission and was a breach of planning control.
26. On my review of the EF I note that as part of its investigations the Council also consulted NIEA on the nature of the waste materials the developer brought on to the site. NIEA advised that after its own investigation of the activities on the site it concluded that only ‘*disposal of topsoil and that no breach of the Waste and Contaminated Land (Northern Ireland) Order 1997 had occurred.*’

⁷ Enforcement Report- a report compiled by the CO

27. Paragraph 6.1 (d) of the Strategy states, '*when processing a complaint about a planning breach we will establish whether or not we believe there is a breach of planning control*' In summary, the Council's investigation established that the adjacent business had not encroached on the site's land. It also established that the developer had brought a small amount material onto the site for the purposes of infilling. The CO concluded this was a breach of planning control. The Council also established through its enquiries with NIEA that the materials the developer used for infilling were not in contravention of the Order. On this basis I am satisfied that the Council appropriately processed the complainant's allegations in line with its Strategy and established that it did not believe there was a breach of planning control in respect of the small amount of material brought onto the site.

Decision on enforcement action.

28. In relation to the Council's decision not to take enforcement action against the developer, despite establishing that it had breached planning controls, I reviewed Section 138 – (1) of the Act 'Issue of enforcement notice by Councils' which states '*The council may issue a notice (in this Act referred to as an "enforcement notice") where it appears to the council*

(b)that it is expedient to issue the notice, having regard to the provisions of the local development plan and to any other material considerations.'

29. I also reviewed the PNs and I note PN 1 Paragraph 8.1 'Introduction to Planning Enforcement' states '*Enforcement action against a breach of planning control may be taken when a council regards it as expedient to do so. Whilst not formally defined, **expediency** is taken as a test of whether an unauthorised development or activity is causing unacceptable harm to the environment and / or public amenity, It is considered good planning practice that any action taken against a breach of planning control shall be proportionate to the breach.'*
30. I also refer to Paragraph 6.2 of the Strategy which states '*we may also decide that although there has been a breach, it is not causing enough harm to justify taking further action. We will take into account why the breach may have happened, how many people are affected, how they are affected and whether there is a cumulative effect that adds up to an unacceptable situation.'*

31. I reviewed the EF. The file contained an 'Enforcement Case Closure Form' which is completed through a 'group' process. This group consisted of the CO, the Service Unit Manager and the Head of Planning. Although the group identified a breach of planning control, I note it considered it was not expedient to take enforcement action against the developer because the Council was 'content' that:
- *'the use of the land has not changed. Surveys have been carried out and all boundaries are in line with the approved planning permission.*
 - *with regards to the land reserved for educational use under the associated planning agreement⁸ associated with the planning permission this land is still retained for educational use*
 - *the Rivenwood development is being constructed in accordance with the approved plans*
 - *some soil used for infilling at the site was brought in. However, given its scale and NIEA are content it is not controlled waste⁹.'*
32. The Council issued a letter to the complainant on 3 September 2021 advising it was *'aware that some infilled soil was brought to the site. However, given its scale and the fact that NIEA Environmental Crime Unit are content this is not a controlled waste site, the Council do not consider this is expedient to pursue and will be taking no further action in this regard.'*
33. The purpose of this investigation is to establish if the Council carried out these investigations in accordance with the relevant guidance and legislation. I considered the Council's enforcement file relating to the investigation, and it is evident that the Council followed the appropriate guidance when it investigated the complainant's allegations. It is also evident that the Council provided a clear rationale for why it did not take enforcement action against the developer having established that a breach of planning control occurred.
34. I am therefore satisfied that the Council, when, exercising its discretionary enforcement powers, considered the degree of harm caused by the developer's unauthorised activities, and the proportionality of taking enforcement action, when

⁸ Planning Agreements - A planning agreement may facilitate or restrict the development or use of the land in any specified way, require operations or activities to be carried out, or require the land to be used in any specified way.

⁹ Controlled Waste – waste that is subject to legislative control in either its handling or disposal and includes contaminated waste

it made its decision not to do so. It also appropriately documented this rationale. On this basis, I am satisfied the Council processed and concluded on the enforcement complaint in accordance with legislation, policy and guidance. For these reasons I do not uphold this element of the complaint

Detail of Complaint

The decision not to reopen the complaint

35. The Council wrote to the complainant on 3 September 2021 to inform him of its decision not to pursue enforcement action against the developer. The complainant raised a complaint about this decision in a letter dated 18 December 2021 in which he said, *‘the infill is not soil brought in from other sites but old landfill material being brought across from [the business] ‘which is adjacent to the Rivenwood development; the developer used ‘this landfill material to fill ground on the site of the proposed school;’. He also said he had ‘now received a sketch of the same area from NIEA. The sketch is not a true representation of the land as it actually is now.’*

36. **Legislation/Policies/guidance**

- The Strategy

Council’s response to Investigation enquiries

37. The Council stated *‘the reference made to the infilled soil was made with regard to the evidence [the Council] had that a small amount of soil had been brought onto the site. It added ‘no action would be taken in this regard’*
38. The Council stated that in relation to an *‘allegation regarding historic landfill material being brought onto the site the Council liaised with the NIEA throughout the progression of this planning enforcement investigation’* (the Enforcement Case (EC)) and *‘no evidence of this type of waste had ever been found. NIEA had advised the complainant of this in March 2021.’*
39. The Council stated *‘any other material brought onto the site was done lawfully to develop in in line with the planning approval. The correct waste licenses etc had been sought and granted. The Council concluded there was ‘insufficient’ evidence ‘to warrant the reopening of the case.’*

40. The Council also stated *'I have reviewed the information attached to this letter and must reiterate that the Council cannot comment with regard to the NIEA investigation as this is a separate departmental body which operates entirely separate to planning legislation. I must also highlight that planning is not able to involve itself in any issues with regard to boundary disputes to which it would appear you are alleging. The Planning Department can only investigate issues relating to breaches of planning control'* It continued *'I do not consider that the attachments enclosed within your letter clearly identify that a planning breach has occurred or that the decision taken by the planning department, with regard to this boundary element, was incorrect'*.

Evidence considered

41. I examined the EF. I have attached relevant extracts at Appendix 3.

Analysis and Findings

42. For the purposes of this report, I began by examining the Council's actions in relation to how it considered the issue of the alleged *'old landfill'*. I then considered the Council's actions regarding the *'sketch'*.

Old landfill from the adjacent business

43. Paragraph 6.3 of the Strategy says *'Not every complaint about a breach of planning control justifies further action. We use our judgement based on experience, case law and the likelihood of success.'*
44. The complainant was concerned the infill was *'not soil brought in from other sites but old landfill material being brought across from'* a business *'adjacent to the Rivenwood development'* and that *'this landfill material'* was used to fill ground *'on the site of the proposed school and within the curtilage of a property at Movilla Road.'*
45. I examined the EF and I note that the Council; liaised with NIEA (the statutory body that regulates the disposal of this type of waste) during the course of its investigation into the EC. In March 2021 the Council formally consulted with NIEA, who responded that after investigation of the activities on the site it observed only *'disposal of topsoil and that no breach of the Waste and Contaminated Land (Northern Ireland) Order 1997 had occurred'*. The EF further documented that on visits to the site the CO only

observed soil being used for infill. On this basis I am satisfied that during its original investigation into the complainant's allegations the Council established the facts on the type of infill at the site. As such, I do not consider there was a requirement for the Council to re-open the complaint based on the further concerns from the complainant.

Sketch

46. I note the complainant said he was in possession of a sketch provided by NIEA. He said the Council did not consider this sketch when it carried out its investigation. I examined the Council's records, and I note that on 14 April 2022 the complainant's solicitor wrote to the Council stating that the complainant was in possession of a sketch '*sent by accident*' by an officer from NIEA which was '*a false representation of the fence line and the ground as it is today*'. The complainant's solicitor enclosed a copy of the '*sketch*' with his letter.
47. I note in its response to the complainant the Council stated the complainant '*appeared to be*' referring to a boundary dispute between the developer and the adjacent business. It stated that the planning department was '*not able to involve itself in any issues with regard to boundary disputes.*' I reviewed the Strategy, and I note Section 4.3 '*Things which are not a breach of planning control include: boundary disputes – these are a civil matter and cannot be controlled by planning legislation*'.
48. However, notwithstanding this, the Council reiterated to the complainant that the CO had surveyed the '*relevant part*' of the site and then overlaid the results onto the approved site plan which showed there was no change in '*the lawful boundary*' (paragraph 25 refers). I am therefore satisfied that the Council addressed the complainant's concerns despite not being required to do so by the relevant guidance.
49. In summary, I am satisfied that the Council appropriately considered the complainant's concerns about the developer using '*old landfill*' to infill on the site and a sketch he received from NIEA which he alleged was a '*false representation*' of the site boundary. On this basis I am satisfied that the Council's decision not to reopen the complaint was appropriate and in accordance with its internal guidance. Therefore, I do not uphold this element of the complaint.

CONCLUSION

50. I received a complaint about the actions of Ards & North Down Borough Council. I did not uphold the complaint for the reasons outlined in this report. I hope the investigation offers reassurance to the complainant that the Council's actions were appropriate and in accordance with the relevant guidance.

MARGARET KELLY

Ombudsman

March 2025

Appendix 1 - PRINCIPLES OF GOOD ADMINISTRATION

Good administration by public service providers means:

1. Getting it right

- Acting in accordance with the law and relevant guidance, with regard for the rights of those concerned.
- Acting in accordance with the public body's policy and guidance (published or internal).
- Taking proper account of established good practice.
- Providing effective services, using appropriately trained and competent staff.
- Taking reasonable decisions, based on all relevant considerations.

2. Being customer focused

- Ensuring people can access services easily.
- Informing customers what they can expect and what the public body expects of them.
- Keeping to its commitments, including any published service standards.
- Dealing with people helpfully, promptly and sensitively, bearing in mind their individual circumstances.
- Responding to customers' needs flexibly, including, where appropriate, co-ordinating a response with other service providers.

3. Being open and accountable

- Being open and clear about policies and procedures and ensuring that information, and any advice provided, is clear, accurate and complete.
- Stating its criteria for decision making and giving reasons for decisions
- Handling information properly and appropriately.
- Keeping proper and appropriate records.
- Taking responsibility for its actions.

4. Acting fairly and proportionately

- Treating people impartially, with respect and courtesy.
- Treating people without unlawful discrimination or prejudice and ensuring no conflict of interests.
- Dealing with people and issues objectively and consistently.

- Ensuring that decisions and actions are proportionate, appropriate and fair.

5. Putting things right

- Acknowledging mistakes and apologising where appropriate.
- Putting mistakes right quickly and effectively.
- Providing clear and timely information on how and when to appeal or complain.
- Operating an effective complaints procedure, which includes offering a fair and appropriate remedy when a complaint is upheld.

6. Seeking continuous improvement

- Reviewing policies and procedures regularly to ensure they are effective.
- Asking for feedback and using it to improve services and performance.
- Ensuring that the public body learns lessons from complaints and uses these to improve services and performance.