APPENDIX TWO

OMBUDSMAN DECISIONS – 1 APRIL 2011 TO 31 MARCH 2012

1. Ombudsman decision – not in jurisdiction and no discretion

Decision date – 21 July 2011

Ombudsman main subject area – Environmental services and public protection and regulation

Complaint

That the council introduced compulsory wheelie bins which are unsuitable for a large proportion of the houses in the council's area.

Background

Mr A claimed that a large proportion of the properties officers had assessed as suitable for wheeled bins were not, because some residents had to store bins at the front of their property, which was unsightly. He argued that residents should be given the choice of whether to use wheeled bins or sacks at their own expense. Mr A did not accept officers' explanations as to why this was not possible.

Ombudsman's conclusions

The Local Government Act 1974 says that the Ombudsman shall not investigate a complaint which, in her opinion, concerns something which affects all or most of the people living in the area of the council involved. Whilst recognising Mr A's concerns, the ombudsman considered that most residents were potentially affected by this issue. She therefore did not consider that she had jurisdiction to investigate this complaint.

The ombudsman pointed out that she did not criticise a council's policies unless they were utterly unreasonable. She had examined our policy regarding exemptions from using wheeled bins and concluded that it was not utterly unreasonable. She added that the policy stated that the council would consider exceptional circumstances and therefore was not operating a blanket policy.

2. Ombudsman decision – To discontinue investigation

Decision date – 26 August 2011

Ombudsman main subject area – Environmental services and public protection and regulation

Complaint

That the council unreasonably failed to provide an alternative to the standard large wheeled bins for collection of refuse and recycling from the complainant's property.

Background

Mr B claimed that his property was not suitable for wheeled bins. He lives in a detached property with a garage to the left and a side access to the right. He also has a double drive to the front of his garage and shrub area in front of his side access, which leads to the rear garden. Officers visited his property both prior to the introduction of wheeled bins and on several occasions after, and concluded that his property did not meet the exemption criteria as there was sufficient space on his land to accommodate the bins.

Ombudsman's conclusions

The ombudsman stated that it is for the council to decide on its policy in respect of refuse and recycling collection and that she could only consider whether the council was operating in accordance with its policy. She added that she did not agree with Mr B's assertion that his property met the exception categories.

The ombudsman said that there was clearly ample front garden area at Mr B's property to accommodate the bins and the fact that he did not want to change where he parks his cars or use part of the garden area that was given over to planting was his choice and did not mean he qualified under the exemption categories.

The only other factor the ombudsman could consider was whether the council had been utterly unreasonable in refusing to make a particular exception for Mr B. She added that this was a very stiff test and, in order to criticise the council, she would have to consider that it had reached a decision that no other reasonable body could have done in the same circumstances. The ombudsman said that she understood Mr B was annoyed that to accommodate the bins at the front of his property he would need to make some changes, but added that it was reasonable for the council to only make changes to the normal collection arrangements in the most exceptional of circumstances. She did not consider that the circumstances in this case were so unusual or exceptional and could not therefore say that the council's position was so utterly unreasonable that it amounted to maladministration.

3. Ombudsman decision – To discontinue investigation

Decision date – 17 February 2012

Ombudsman main subject area – Environmental services and public protection and regulation

Complaint

That the council delayed unjustifiably in remedying a breach of planning control in the use of land as an airfield by para-motors.

Background

Mrs C first contacted us in February 2010 to complain about the use of a field for the take-off and landing of para-gliders (also known as para-motors). She does not live near the site but owns a field approximately 800 metres from it. We did not receive complaints from any of the residents closest to the site.

Officers asked Mrs C to keep a log of activity to enable them to assess the frequency of use. In addition, they engaged the owner of the site in discussions, both oral and written, regarding the alleged breach. A planning contravention notice (PCN) was served on the owners in October 2010 to obtain information from their perspective about the nature of the flying activities. In their response the owners indicated that the land had been used on only 26 occasions in 2010 and would not exceed 28 days by the end of 2010 or in any subsequent calendar year. On this basis the officers decided to draw a line under the investigation and monitor the situation again in 2011. Officers ensured Mrs C was kept informed of progress on the investigation

In August 2011 a principal planning officer (enforcement) met Mrs C to discuss our enforcement powers and to consider ways of progressing the investigation. It was agreed that officers would undertake weekend site visits, with a view to assessing the noise impacts of the development. The officer also agreed to write to the relevant parish councils, as representatives of the local community, seeking their views of the planning harm and/or merits of the use.

Officers subsequently undertook a number of weekend visits. On one of those occasions the enforcement team leader was able to witness activities relating to the alleged breach of planning control. No one was present on Mrs C's land at the time of the site visit; however, the noise of the motor was barely audible above background noise levels. It is important to note that the main London to Bristol railway line lies just to the north. In the officer's opinion, therefore, it was unlikely to have given rise to any loss of enjoyment of Mrs C's land, which is approximately 800m away. The officer ensured Mrs C was kept informed.

In October 2011 the principal planning officer (enforcement) contacted the user of the field to arrange a visit to the site so that officers could gauge more closely the noise impacts of the use. At that visit, officers took photographs and a series of short videos which record the noise associated with different phases of a typical flight.

Officers acknowledge that a breach of planning control has occurred, as the use commenced in 2009 (i.e. less than ten years ago) and does not benefit from planning permission. The unauthorised use therefore remains vulnerable to enforcement action until 2019 and in these circumstances cannot be considered lawful in planning terms.

However, having investigated the matter, officers did not believe that the use of the land gave rise to sufficient planning harm to justify enforcement action. Indeed the use is consistent with government guidance and planning policies relating to the enjoyment of the countryside by all. Although it is regrettable that the owner/ occupier of the site has chosen not to regularise the breach of planning control by the submission of a planning application, the use as it existed at that time was acceptable. Nevertheless, officers have also acknowledged that if a material change in the circumstances of the use should occur, they would be happy to further investigate the matter.

To summarise, officers visited Mrs C's land on a number of occasions, both during the week and at weekends; they did not observe the para-motors anywhere near her property on any of those occasions. In addition, they did not, during any of those visits, witness any activity that could from their experience be classed as a disturbance on Mrs C's land and, therefore, did not refer the matter to the environmental protection team for an assessment of statutory nuisance.

Ombudsman's conclusion

The ombudsman found no evidence of administrative fault by the council under its responsibilities for planning enforcement that gives grounds for additional investigation of the complaint.

The ombudsman stated that, whist she recognised Mrs C's upset and concern at the impact of the flying, she saw no reason to question the sufficiency of the investigations undertaken since 2010 or the conclusion of the officers, following site visits both during the week and at weekends, that there was no basis on which to take formal enforcement action, given the observed nature and frequency of the use and officers' assessment of what harm may be arising.

She continued that officers had responded to Mrs C about the progress of the enforcement investigation and explained their reasoning as to why they did not consider there was a basis for formal enforcement action. The ombudsman added that officers had acted positively and appropriately by confirming that they would re-investigate the matter if there was a material change in circumstances.

She concluded by asking us to keep the use of the site under active monitoring and review with further visits by officers when flying was most likely, and that officers provided the complainant with details of the visits they had undertaken.

Officers carried out further investigations in February/March 2012, but found no material change in the circumstances of the case warranting enforcement action.

With the agreement of Mrs C, however, enforcement officers approached the organisers of the para-gliding school with a map showing the location of Mrs C's land and a request that they avoid flying over or near it. The organisers were happy to co-operate and we have received no further complainant since then.

Mrs C has been advised that a continuing investigation into materially the same use, which according to the ombudsman had already been sufficiently investigated, could no longer be justified as an appropriate or efficient use of the council's enforcement resources. This is particularly the case given that the investigation involved weekend and after hours surveillance. However officers also reaffirmed their previous commitment to review the situation if and when a material change in the circumstances of the case or in the nature of the use was to occur warranting further investigation.

4. Ombudsman decision – not in jurisdiction and no discretion

Decision date – 14 March 2011

Ombudsman main subject area – Highways and transport

Complaint

That the council wrongly issued the complainant with an excess charge notice for failing to display a parking ticket. The complainant claimed that the ticket she had bout fell off her car window and was obscured from the car park attendant's view. That the council would not accept the proof the complainant provided and uphold her appeal against the notice.

Background

Ms D said she had paid for a three hour parking ticket and displayed it on her car's rear passenger window. She claimed that, when she returned to the car, the ticket had fallen off and was obscured from view on the edge of the rear passenger seat and that she had been issued with a penalty parking notice as a result. She appealed against that notice, but the appeal was not upheld. Officers explained that the alleged offence was failure to display a valid ticket. They added that the patroller would have checked the car thoroughly for any trace of a ticket before issuing the notice. Officers added that we had a duty to ensure the laws applying to the use of car parks were upheld; however, they allowed Ms D to pay a reduced fine of £50 if paid within ten days.

Ms D contended that officers had wrongly denied her appeal despite her providing a copy of the original ticket and offering a witness to support her case. She considered the car park attendant could have looked carefully into the car and see the ticket, which was partially visible and identifiable. Officers responded that there were strict guidelines to follow, which had been set by councillors, and each appeal was considered against the criteria. Officers added that the criteria was clear in cases of non display of a ticket and, in pay and display car parks, the onus was on the driver to ensure the ticket was visible before leaving the car. The fact that Ms D had supplied a valid ticket did not allow offices to cancel the fine because, even thought the ticket may be genuine, there had been instances of others getting tickets from other car park users. They added that they could only accept a supplied ticket when the car park attendant could see the serial number of a fallen ticket and it matched with the one sent in or the ticket was from a

registration linked machine; this was not the case with Ms D's ticket so officers could not cancel the fine. Officers added that they had to take this action to safeguard the interests of the council and provide an effective deterrent for unauthorised parking. It was therefore necessary to enforce all fines that may be due to a genuine mistake or incident.

Ms D alleged that the glue on the tickets may be substandard but officers replied that there had not been any similar cases suggesting such a problem.

Ombudsman's conclusions

The ombudsman stated that the council's Off Street Parking Places Order clearly states that a valid parking ticket should be bought and displayed on the front windscreen of the car. Ms D had attached her ticket to the rear driver side window and it had fallen off and obscured from view. The ombudsman appreciated the distress this may have caused her but added that the failure to display the ticket in accordance with the Order meant it was legitimate for the council to issue a notice. She did not therefore consider that this part of the complaint should be pursued further.

The ombudsman appreciated Ms D's comments that she could not send in any evidence that would be acceptable to the council, but added that the criteria was set by councillors and therefore a matter of policy. Setting policy is a matter for each individual council to decide and is not an issue the ombudsman investigates. What the ombudsman does investigate is a council's administrative actions. If there is no evidence of fault in the way the council carried out its administrative process, then it is unlikely there will be grounds for the ombudsman to question the merits of the decision reached by the council.

In this case, the documentation showed that officers issued the notice and considered the appeal in accordance with the council's criteria and procedures. Officers also replied in detail to Ms D's correspondence and allowed her extra time to pay the notice at a reduced cost. The ombudsman therefore did not see any evidence of administrative fault.

Finally, Ms D claimed that the appeal procedure is unfair as officers will only accept a registration linked ticket from her as proof of purchase. She added that she could not provide such evidence as there were no registration linked machines in the car park she used. The ombudsman responded that officers had said they would accept a ticket from a registration linked machine or if a patroller had been able to see the serial number of a fallen ticket. She added that she did not agree with Ms D that the appeal system is unfair as the council has several criteria allowing tickets to be cancelled in certain circumstances if a valid ticket is produced but that, unfortunately, none had applied in Ms D's case.

The ombudsman therefore concluded that there were no grounds to pursue the complaint and closed the case.

5. Ombudsman decision – Ombudsman's discretion

Decision date – 3 May 2011

Ombudsman main subject area – Other

Complaint

That the council:

- failed to properly investigate whether the complainant's family was properly denied access to a local leisure centre for artistic roller skating

- in endorsing the decision to restrict their access, failed to act impartially or consider the their comments
- unreasonably suggested a compromise solution that would have enabled them to use the leisure centre at specified times and then withdraw that offer and denied that any compromise had been offered
- unreasonably required the family to use an alternative leisure centre that was not suitable.

Background

It is important to note that this complaint is based on a decision made by SOLL Leisure (SOLL). Although council officers were aware of the difficulties, and had tried to be as helpful as possible, they were not involved in making any decisions. It would be inappropriate for the council to attempt to influence or overturn a decision made by its contractors so long as that decision was made properly within the remit of the contract and for the right reasons. Our role was to review the decision and conclude whether it was reasonable, and this was carried out using our formal complaints procedure.

Turning to the background to the complaint, Mr E's family were using a local leisure centre for artistic roller skating training and practice for their children. Mr E's children were previously involved with another roller skating group that also uses the centre (Group X). It was clear that there were significant personal difficulties between Mr E and the main coach of Group X and Thames Valley Police approached the council and SOLL following the receipt of various allegations from the main coach of Group X against Mr E. It is not for the council or SOLL to become involved in any personal issues and officers were careful not to do so. For that reason SOLL dealt with Mr E's issues on a purely operational and commercial basis and spent considerable time and effort in trying to do so at the highest levels within its organisation.

In June 2009 SOLL took the decision to restrict access due to potential public disorder. There is no written procedure to follow when a person's access is to be restricted; however, it was clear that a working relationship was not possible between the two parties and the groups needed to be separated. Group X has used the leisure centre for over 20 years and provides a significant income stream, and was therefore given priority for operational and commercial reasons. Mr E's family was not refused use of the leisure centre and were still able to swim and play sport. However SOLL would not accept any bookings for use of the centre for artistic roller skating.

The managing director of SOLL Leisure offered Mr E use of an alternative leisure centre at £8.20 per hour compared to the published hourly rate for exclusive use of the whole hall of £32.80. Mr E accepted this offer and in the meantime pursued the option of SOLL Leisure laying down temporary or permanent skating markings at the alternative centre. Unfortunately, this later proved to be cost prohibitive.

Council officers became involved formally when Mr E instigated our complaints procedure in May 2010; officers responded to that complaint at all three stages of the procedure. Officers were confident that SOLL Leisure and operated within its rights laid out in the contract.

Ombudsman's conclusions

The ombudsman recognised that Mr E did not believe the alternative leisure centre was appropriate and that the facilities provided there were not equal to those he had lost. However, she said that the leisure centre was able to restrict Mr E's access as it had done and she was satisfied that the council had properly considered the complaint about that. She added that it would be helpful for the council's leisure centres to have a clear policy to follow when a person's access is to be restricted and it was clear that

there was no policy in place. She therefore recommended that the council draw up a procedure for its leisure centres to follow in those circumstances to ensure fairness on all sides when problems occur. She stressed that she could see no evidence to suggest that the process in this particular case was not fair.

Officers are currently drawing up a policy for use in the council's leisure centres.

6. Ombudsman decision – No or insufficient evidence of maladministration

Decision date – 28 February 2011

Ombudsman main subject area –

Complaint

That the council failed to pay adequate attention to the impact building work may have upon a private sewer serving the complainants' home and the impact the completed building would have upon their enjoyment of their home in approving an extension to a neighbouring property.

Background

Mr and Mrs F live in a semi-detached property. In January 2008 their adjacent neighbours submitted a planning application for a rear extension that had both single and two-storey elements. Mr and Mrs F objected to the application because they felt the extension would block light to their home and garden. They also raised concerns the building would damage the shared drainage between the two properties. Officers considered these objections during the processing of the application but concluded that no overshadowing or harmful over dominance would occur. The application was subsequently approved under delegated powers and officers sent a letter to Mr and Mrs F advising them of that decision, although they never received it.

In October 2009 the neighbours sought to amend the previously approved extension to extend it a further 1.8 metres to the rear. Officers wrote to Mr and Mrs F advising them of these amendments and inviting their comments, but they did not receive that letter. Officers have forwarded a copy of that letter to Mr and Mrs F together with a screen print from the computerised systems confirming this letter was sent.

Officers prepared a further report considering the impact of these changes before they were approved.

In August 2010 Mr and Mrs F wrote to the council to complain that they had not been notified of the outcome of the planning application and that the resulting building work had resulted in damage to the shared drain, as well as increasing the height of a fence upon their land. As they were unaware of the amended plans, they also complained that the extension being built was larger than they understood. They said that the loss of light to the garden had required them to move their greenhouse and consequently reconfigure their garden. In September 2010 Mr and Mrs F sent a further letter showing that the extension had been constructed with two sky-lights and complaining that the extension abutted onto land on their side of the boundary.

Our enforcement monitoring officer advised Mr and Mrs F, on 17 September 2010, that the extension had been built in accordance with the approved plans, apart from the second sky-light. The officer asked the neighbour to submit a revised plan to regularise this change, which would be treated as a minor amendment.

On 20 September the head of planning advised Mr and Mrs F that officers had notified them of the changes in size of the extension, although acknowledged that they may not have received it. He also forwarded a copy of the officer's report to Mr and Mrs F so they could see the reasons why officers did not consider that the impact of the extension of their property was harmful.

In that letter the head of planning also advised Mr and Mrs F that the impact of new development on the structural stability of a sewer is not a material planning consideration. However, in light of Mr and Mrs F's concerns, he had spoken to one of our building control surveyors who advised that, when building regulations approval was granted for the extension, appropriate measures were taken to ensure that no structural loads were placed on the sewer and the sewer was protected by the construction of an appropriate load bearing lintel. The surveyor considered it unlikely that the new extension would have caused any collapse of the sewer.

Ombudsman's conclusions

The ombudsman stated that she could not uphold the part of the complaint concerned with whether or not Mr and Mrs F were informed about the changes to the proposed extension. She said that she accepted they were not aware of the changes but it was not possible for her to find that any failings by the council contributed to this.

The ombudsman noted that she had not seen a copy of the letter sent to Mr and Mrs F in March 2009, nor associated screen prints, which would have told them the original application had been approved. However, she added that, even if it could be established that the council was at fault, a letter notifying of a decision is of less significance than a letter notifying of proposed changes as it is only prior to a decision that neighbours have the potential to influence the decision. The ombudsman said that it was therefore doubtful that any significant injustice would arise to Mr and Mrs F were such a letter to go astray as a result of any fault by the council.

Turning to the impact of the extension on Mr and Mrs F's property, the ombudsman said that it is the case with most planning applications for domestic extensions will result in some impact on neighbouring properties. She added that this was not sufficient for the council to refuse planning permission. She noted that the officer reports on both planning applications considered explicitly the potential impact upon Mr and Mrs F's property. The ombudsman continued that it was clear that officers were mindful of both the size of the extension and its potential impact upon Mr and Mrs F's enjoyment of their home, which was why officers had asked for the second storey to be reduced in size and had removed permitted development rights for the neighbour to install any further windows. She added that it would have been helpful if the initial report had also considered the impact upon Mr and Mrs F's garden as their letter of objection had included comment about this. However, she said that it would not have been possible for us to refuse the application on the grounds that Mr and Mrs F may have had to relocate their greenhouse, as this would not have been a relevant consideration.

The ombudsman did not consider she could find any administrative fault in terms of how officers went about making the decision to approve the application. She added that she could only otherwise criticise a decision that had not been taken with fault if she thought it was utterly unreasonable, i.e. a decision that no reasonable council would come to. She said this was a very stiff test and did not consider it satisfied in this case. She acknowledged that Mr and Mrs F may disagree with some of the views expressed by planning officers but, having studied the plans and photos, she could not say the officers' views were utterly unreasonable.

Turning to the issue of the sewer, the ombudsman said that it would have been helpful if the initial report on the planning application had mentioned Mr and Mrs F's concerns about the shared sewer. However, she added that the concerns here would not have been sufficient to refuse planning permission. All the planning officer could have done was add a comment that this was something building control officers should consider whilst the extension was under construction.

The ombudsman said that she was satisfied building control officers did ensure that the extension was being adequately constructed over the sewer during their visits to the site. Whilst she did not rule out the possibility that the extension may have damaged the sewer there was no evidence to convince her that this was the case. Even if it could be established it would be difficult for her to see how the council could be held accountable when no attempt was made to alert the council in May 2009 when the collapse came to light.

Finally, Mr and Mrs F had alleged that the neighbour had failed to supply correct certification with their planning application detailing land ownership. The ombudsman said that she regarded this as a complaint against the neighbour rather than the council, which should be considered alongside allegations of encroachment onto or beyond the properties' shared boundary. The ombudsman said that, whilst she would have expected the council to consider an allegation that an incorrect certificate was supplied, no such objection was raised in March 2008. She considered that there was nothing the council could reasonably be expected to do at the stage the complaint to the ombudsman was made, and noted that it had no role to resolve disputes over land ownership or trespass.

For all these reasons the ombudsman discontinued her investigation.

7. Ombudsman decision – Discontinue investigation – injustice remedied

Decision date – 28 September 2011

Ombudsman main subject area – Environmental services and public protection and regulation

Complaint

That the council:

- failed to manage rubbish collection contractors
- failed to address complaints in a satisfactory or timely manner.

Background

Mr G complained that the bin crews had acted unreasonably while carrying out collections in his village. He stated that bin collectors had been seen urinating against the wall of the village hall and had used inappropriate language. He further complained that his metal dustbin had disappeared; he believed it had been stolen when refuse was collected. He also claimed that a bin lorry had reversed over his grass verge causing damage to it.

Officers advised Mr G that, because the contractor had changed since the incident of anti-social behaviour, they no longer had any contractual power over the company. However, officers accepted Mr G's explanation of events and apologised sincerely for the conduct. Officers also undertook to write to the new contractor to ensure there was no repeat of the behaviour. They also noted thee had been a delay in responding to Mr G's initial call to the contractor and stated they would take it up with them.

With regard to the metal dustbin; officer stated they could not verify what had happened but, in view of what Mr G had told them, apologised and agreed to pay £50 compensation.

Mr G alleged that the contractors had reversed over his drive causing damage; however, our contractor's tracking information indicated that none of its vehicles were in Mr G's area on the day the alleged damage was caused, i.e. 24 November 2010. Mr G subsequently provided contact details for a witness and a strategic director wrote to Mr G on 21 March 2011 stating that the witness had been unable to confirm the date, which

made clarifying the location of vehicles difficult. Mr G contacted us again in May 2011 for progress in resolving the issue of the grass verge. Officers responded that, although the contractor's information was still that no specific vehicle was in Mr G's area at the time of the incident in November, we accepted that vehicles were there every week. Therefore the contractor agreed, as a gesture of goodwill, to organise the repair of the damage. Mr G replied that he had already carried out repairs and asked us to pay £50 towards the cost, which we agreed to do.

Ombudsman's conclusions

The ombudsman said that we had accepted there were issues with aspects of both the behaviour and response of our refuse contractor to issues that Mr G raised. Officers had apologised and taken up the issues with the new contractor to prevent any reoccurrence. We had also agreed to pay compensation for the loss of his dustbin.

The ombudsman said there was a delay in resolving the issue of the damage to the grass verge but that our intention seemed to have been to get to the bottom of the matter. We had agreed to pay Mr G £50 towards the cost of repairing the verge, which the ombudsman considered was a reasonable remedy.

The ombudsman therefore discontinued her investigation.