

**Report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint against
Cornwall Council
(reference number: 17 014 828)**

24 January 2019

The Ombudsman's role

For 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names used

Mr B The complainant

Report summary

Application to Register a New Village Green

Mr B complains the Council has delayed unnecessarily in processing his application to register a new village green, which he initially submitted in 2008. He also complains it failed to update him on the progress of the application.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy the injustice caused, we recommend the Council:

- makes a decision on whether to hold a public inquiry within two months of the date of this report;
- writes to Mr B and sincerely apologises for the failures mentioned in this statement. In its apology, it should provide assurances these failures will not happen again and make a commitment to prioritise his application and deal with it in an expeditious manner;
- provides a written update to Mr B once a month on the status of his application until this is determined. It should not wait until he requests this update and should set a recurring reminder so it proactively carries out this task; and
- pays Mr B £300 for the uncertainty caused by its fault and a further £300 for his time and trouble in making this complaint.

Introduction

1. The complainant, who we shall refer to as Mr B, complains the Council has delayed unnecessarily in processing his application to register a new village green, which he initially submitted in 2008. He also complains it failed to update him on the progress of the application.

What we have investigated

2. Mr B has previously submitted three complaints to us about this matter. We referred the first back to the Council in January 2012 as it had not fully considered the complaint or exhausted its own complaints procedure. We decided the second in January 2014 and found the Council was at fault, then discontinued the third complaint in August 2016. Consequently, we have investigated what happened after we decided the second complaint in January 2014. However, when assessing the injustice caused by the fault we have found in this complaint we have taken the whole history of this matter into account, including the period before January 2014.

Legal and administrative background

3. We investigate complaints about ‘maladministration’ and ‘service failure’. In this report, we have used the word ‘fault’ to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as ‘injustice’. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)

How we considered this complaint

4. We produced this report after examining documents provided by the complainant and relevant employees of the Council.
5. We gave the complainant and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.

What we found

Legislation and guidance about village greens

6. Section 15 of the Commons Act 2006 allows land to be registered as a town or village green. Any person can apply to the relevant commons registration authority to request this if “a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years.”
7. Guidance issued by the Department for Environment, Food and Rural Affairs (DEFRA) states:

“The registration authority may decide to inquire into the application. This may take the form of a hearing before an officer of the authority or of a neighbouring authority, or the case may be heard before a committee of the authority. Alternatively an independent inspector may be asked to conduct a public inquiry... The Court of Appeal has ruled that in determining

applications where there is a dispute, the registration authority should consider convening such a hearing or inquiry”.

What happened

8. In February 2008, Mr B applied to the Council to register some land as a village green on behalf of a group of 146 residents.
9. In July 2010, the Council decided to hold a non-statutory public inquiry so the application could be considered in more detail by all the relevant stakeholders. Mr B says the Council stated this inquiry would be held “as soon as possible”.
10. In December 2011, Mr B complained to us about the way the Council was dealing with his application. In particular, he complained about unnecessary delays and its failure to respond to the group’s correspondence. We referred the complaint to the Council as it had not fully considered the matter or exhausted its own complaints procedure.
11. In September 2013, Mr B complained to us that the Council had failed to determine the application and was not responding to his correspondence about the matter.
12. In January 2014, we found the Council was at fault and noted there had been significant delays in the application process, especially in relation to the arranging of a public non-statutory inquiry. The Council accepted that it had not dealt with the application in a timely manner, despite many assurances that it would do so. It agreed to arrange the inquiry within the following six-month period and provide updates to Mr B and us every two months, until the inquiry date was set.
13. The Council then arranged for an inquiry to be held in November 2014. However, it cancelled the inquiry after an interested third party complained he had not been properly notified about it.
14. The third party told the Council he had new information and evidence which the Council had not seen when it decided in 2010 to hold the inquiry. The Council decided it should consider the evidence and determine whether it had any impact on its previous decision to hold an inquiry.
15. The third party put forward his submission with supporting evidence in March 2015. The submission contained detailed legal arguments on why he considered the application could not succeed and why an inquiry should not be held. Mr B then provided detailed arguments to show why he considered an inquiry was necessary.
16. The Council decided to obtain legal advice from Queen’s Counsel. Counsel gave his initial advice in June 2015 and his final advice in August 2015.
17. In March 2016, the Council then issued its draft decision on the matter. It decided it should reject the application on the grounds that use is ‘by right’ and not ‘as of right’ as required by Section 15(2)(a) of the Commons Act 2006. It also proposed it could determine the application without holding a public inquiry.
18. In April 2016, Mr B complained to us again about the way the Council was dealing with his application. He said there were failings in the way it reached its draft decision to reject his application, and stated it should adhere to its previous commitment to hold an inquiry.
19. The Council then invited Mr B to make an oral representation before it reached a final decision. Mr B made his representation in June 2016.

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20. In August 2016, we decided to discontinue our investigation into Mr B's complaint as the Council had not yet made a final decision on his application.
 21. In October 2016, the Council received a report from a specialist solicitor it had commissioned to review the application. The report recommended that a public inquiry be held.
 22. In mid-December 2016, the Council state the third party confirmed he had issued legal proceedings, following several threats to do so. Nevertheless, two days later it wrote to Mr B and said it was of the opinion that a public inquiry should be held. It provided him with a copy of the solicitor's report and asked him if he wanted to make any comments or suggestions in response.
 23. The day after it wrote to Mr B, the Council states it received correspondence from the third party's legal representative, mentioning regulatory and compliance issues and suggesting the matter should be referred to the Council's Monitoring Officer.
 24. The Council then wrote to Mr B saying it had decided to review its position before making a formal decision on what to do next. It added this review would take place in January 2017, and the letter it had sent him previously stating an inquiry would be held was withdrawn with immediate effect.
 25. When Mr B attempted to clarify the situation, the Council emailed him at the beginning of January 2017 stating the matter was "currently under a full review" and its views would be available later that month. It added, "once this has been finalised, an update will be provided as to how the matter will be progressed. In the meantime, it is not possible to comment until definite information is available".
 26. At the end of January 2017, the Council instructed its legal counsel to attend court following confirmation from the third party that he had issued proceedings. However, the Council states no application had been lodged.
 27. In mid-February 2017, the Council states the third party alleged the specialist solicitor who reviewed the case had a conflict of interest, and in response threatened to make an application for an injunction.
 28. At the end of May 2017, the Council's Monitoring Officer decided that external solicitors should be instructed to conduct a full review of the case. Consequently, in mid-June 2017 the Council sent a letter of instruction to the solicitors' firm it had chosen.
 29. In mid-September 2017, the Council received an initial letter of advice from the solicitors. At the beginning of October 2017, it held a meeting to discuss the advice and subsequently asked the solicitors to draft a report recommending what should happen next.
 30. In mid-December 2017, Mr B complained to us about the matter. He highlighted the constant delays and stated he had not received any updates for nearly a year. He requested an update on the progress of his application, and assurances the Council would keep him updated on the matter. He also asked that the Council dealt with his application in an expeditious manner, given the time it had already taken.
 31. At the beginning of March 2018, the Council states it gave instruction to the solicitor to draft a report.
 32. In mid-April 2018, we decided to hold the complaint open in abeyance after making initial enquiries of the Council. We did this so we could monitor the

Council's handling of the application in the hope that close oversight would hasten matters.

33. In mid-July 2018, the Council informed us it had received the solicitors' report. However, it added the report was not in the correct format and needed to be redrafted by its in-house solicitor before it could be signed off.
34. In mid-August 2018, the Council informed us the report was waiting to be signed by senior management.
35. In early-November 2018, the Council told us it had referred the matter back to the solicitors and further amendments were required before the report could be finalised. It added it could not give a timeframe for completion of this work.
36. Mr B states that when he made his application he collected 144 witness statements in support of it from the members of the local resident's group. He says the group is an informal structure, but many of the members often ask him for updates on the status of the application. However, he says he is unable to give any because of the lack of responses from the Council. He also notes that several members of the group have passed away since he made the application, and he is concerned this will impact on their ability to present their case and evidence at a public inquiry that the land has been in use for more than 20 years, should one be held.

Conclusions

37. We found the Council was at fault in January 2014 as there were significant delays in the application process. Unfortunately, the Council does not appear to have learned from this as there is evidence of further delay in the period which followed. For example, it obtained legal advice from Queen's Counsel in August 2015 yet did not issue its draft decision until March 2016. In February 2017, it received a report of a conflict of interest from the third party but took until the end of May 2017 to decide that external solicitors should review the case. Then, at the beginning of October 2017 it decided to instruct the solicitors to draft a report after receiving their initial advice, yet it did not give instruction to do this until March 2018. Furthermore, at the time of writing it still has not decided whether or not to hold a public inquiry.
38. Considering these points, we can only conclude the Council was at fault for these unnecessary delays. It has not dealt with the matter in an expeditious manner and seems to consider it a low priority, given its lack of urgency. We appreciate the application process has been complicated by legal difficulties and threats made by the third party, however this in no way justifies the protracted delays and inaction, which has culminated in the Council taking over 10 years to consider the application. And it is important to remember the process has not yet concluded.
39. We have also found the Council was at fault for not keeping Mr B updated on the status of his application. It agreed to do this every two months after we decided his second complaint in January 2014, but states it thought, perhaps mistakenly, this was no longer a requirement after the third complaint was discontinued in August 2016. We believe it should have continued to keep Mr B updated as his application had not been decided and was outstanding, therefore the Council was, and is obliged to keep him updated until it makes a final decision. Moreover, at the beginning of January 2017 it told him it was reviewing the matter and would provide an update after it had taken a view later that month. It did not do this and

only provided an update after Mr B complained to us again in December 2017. This is clearly fault.

40. Clearly, Mr B has suffered some injustice because of the delays and the Council's failure to keep him updated on the status of his application. He has been inconvenienced as he has had to continually pursue the Council for updates when these were not forthcoming, and was compelled to submit several complaints to us in order to get a response. In addition, the Council's failure to deal with the matter more expeditiously means there is uncertainty whether or not the application process could have been concluded by now. Similarly, it is very difficult to ascertain what impact the passing of some of the group's members will have on the application process, and ultimately the final decision. The early collection of witness statements means the evidence supporting the application has been preserved, however there may be an impact if the public inquiry requires some of those who provided statements to give their evidence in person. Considering those who have passed are unable to do this, it may affect the application given these individuals are likely to have been older and perhaps able to offer more evidence in support of the 20-year rule.
41. Given these points, we recommend the Council makes payments to Mr B to remedy the uncertainty caused by its faults, and the time and trouble in making this complaint. We also recommend it decides whether or not to hold a public inquiry, apologises to Mr B, makes a commitment to deal with his application in an expeditious manner, and keeps him regularly updated on its progress. Details of our recommendations can be found in the section below.

Recommendations

42. To address the faults which have been identified, we recommend the Council:
- makes a decision on whether to hold a public inquiry within two months of the date of this report;
 - writes to Mr B and sincerely apologises for the failures mentioned in this statement. In its apology, it should provide assurances these failures will not happen again and make a commitment to prioritise his application and deal with it in an expeditious manner;
 - provides a written update to Mr B once a month on the status of his application until this is determined. It should not wait until he requests this update and should set a recurring reminder so it proactively carries out this task; and
 - pays Mr B £300 for the uncertainty caused by its fault and a further £300 for his time and trouble in making this complaint.
43. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

Decision

44. The Council was at fault for delaying unnecessarily when dealing with Mr B's application, and for not keeping him updated on its status. This has caused Mr B uncertainty and time and trouble, therefore we recommend the Council undertakes several recommendations to remedy this injustice.