

10 May 2021

**Complaint reference:**  
20 003 006

**Complaint against:**  
Basingstoke & Deane Borough Council

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

Summary: Mr X complained about the Council giving incorrect information about his liability to pay the Community Infrastructure Levy. Mr X says because of this, he lost the opportunity to revise his plans and owed the Council a significant sum of money. We find the Council was at fault. While this caused Mr X an injustice, we cannot say this was caused by the actions of the Council alone. In recognition there was also fault by a third-party agent, the Council agreed to reduce the amount payable by Mr X by half and cancel late payment penalties.

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## **The complaint**

1. Mr X complains about the Council's decision to apply the Community Infrastructure Levy (CIL) to his development because:
  - a) Both pre-planning advice and the case officer's report said it was not applicable; and
  - b) the Council failed to notify him until several months later when it was too late to revise his plans.
2. As a result, Mr X was presented with a large and unexpected bill with additional charges for late payments that he cannot afford to pay. This has caused significant distress and jeopardised his future plans for his retirement.

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

3. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I 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. I 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*)
4. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

## **How I considered this complaint**

5. I spoke with the complainant and reviewed the information provided.
6. I made enquiries with the Council and reviewed the relevant law.

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7. Mr X and the Council had an opportunity to comment on my draft decision. Their comments were taken into consideration before making my final decision.

## **What I found**

### **Law and policy**

8. Most development needs planning permission from the local planning authority (LPA). Developers may ask the LPA for 'pre application advice' about development proposals before making a planning application. Pre application advice does not bind the LPA.
9. LPAs may introduce CIL in their area. A CIL is a financial charge on development in its area that creates a net additional floor space of 100 square metres or creates a new dwelling. LPA's use CIL money for public works to support local development, for example, green spaces and transport services.
10. Legal rules reduce or remove the need to pay CIL for some development. For example, people that extend their own homes and then live in them for three years do not need to pay CIL.
11. However, self-builders must follow legal rules to secure a CIL exemption. So, before a self-builder starts work on their extension, they must send the LPA the relevant completed CIL form (Form 9). The LPA must also give the self-builder written notice of its decision on the claim before work starts. If work starts before an exemption claim is made and decided, CIL becomes payable in full.
12. There are legal appeal rights against LPA CIL decisions but, self-builders must both make their appeal and receive the appeal decision before starting work. If work starts, the appeal will lapse.
13. The Council implemented its CIL from June 2018.

### **Key events**

14. In June 2018, Mr X applied for planning permission to extend a property he had recently bought with the intention of living in it as his family home once works were completed. He continued to live in his current home.
15. Prior to submitting the planning application, Mr X had received informal, oral planning advice from the Council. He says CIL was not mentioned by the planning officer.
16. He was told by his agent/architect (the Agent) that CIL was not applicable because it was a self-build.
17. The Agent completed the planning application forms that included a CIL declaration form (Form 1). The Agent declared the square footage as being 145 square metres. Form 1 included information about the CIL process, including that work should not start on site before a Commencement Notice was sent to the Council.
18. The case officer's report recommended approval of the scheme. Included within the report was a statement that CIL forms had been submitted and "it would appear that the development would be exempt from any CIL payments given that the development would have a gross internal area of less than 100m<sup>2</sup>". That was not correct, because the size of the proposed development, as stated by the Agent, was 145 square metres. The error in the officer's report was a fault. The report was signed off by a more senior officer, who failed to note the error. That was a further fault.

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19. The Council granted planning permission in August 2019. The Decision Notice did not include any reference to CIL liability. Had the process been followed correctly, it would have included a statement that a Liability Notice would be sent separately. Mr X would also have been informed of the need to complete a Commencement Notice prior to any work starting, and of the penalties for not doing so.
  20. Building work commenced on site soon after planning permission was granted, without a Commencement Notice being completed. Mr X was still unaware of this requirement, although his Agent knew about the CIL rules.
  21. Following a site inspection in September 2019 by the Council's Building Control Team, the Council wrote to the Agent, to request completion of CIL Form 2 (Assumption of liability) on 30 September 2019. The Council also sent the form that would allow Mr X to claim a CIL self-build exemption. The Agent did not reply and so the Council send a reminder in November 2019. The Agent returned the completed forms on 28 November 2019. Upon receipt, the Council realised the incorrect exemption form had been sent, because the development was an extension rather than a new build.
  22. Having considered these forms, the Council became aware that Mr X was not living in the property, and so advised the Agent that the exemption could not be claimed if the development was not Mr X's main or sole residence.
  23. On 3 December 2019, the Council sent Mr X a Liability Notice. This informed him he was liable to pay £29,275 CIL and the sum would increase if it was not paid promptly. The CIL liability was registered against the property as a local land charge.
  24. Mr X contacted the Council to seek a resolution. He felt he should not have to pay the CIL because he had not been told about it by the Council.
  25. The Council said the payment was lawfully due and by not completing the Commencement Notice he had forfeited his opportunity to pay by instalments and had incurred late payment surcharges. The Council said it was following the relevant legislation and it was unable to exercise any discretion.
  26. This position was confirmed in the Council's stage two complaint response and in its response to my enquiries. The Council said:
    - Planning officers provide planning advice, not advice about how to avoid CIL liability.
    - The case officer's report contained incorrect information. This error was not corrected by the senior officer who signed off this report.
    - The Decision Notice should have included information about CIL liability. But the Council argued this would have made no difference because Mr X had been advised by his Agent that CIL did not apply.
    - Responsibility for advising Mr X about CIL lay with the Agent. He was aware the development was over 100 square metres and so should have advised Mr X accordingly.
    - Mr X could have downsized his plans in September 2019 when building control was aware the development had started.
    - The extension exemption did not apply in any event as Mr X was not in occupation. The Agent had incorrectly advised Mr X about this.

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27. The Council accepted there was some fault on its part and apologised to Mr X. It agreed to offer him some flexibility around payment, and to compensate Mr X for the costs of a further planning application should he decide to reduce to scale of the development. However, Mr X was unable to consider this as the approved development was underway by that point.
  28. The Council has also reminded staff of the need to include CIL information during the pre-application stage, and introduced procedures within the planning application process to ensure the CIL liability is accurately recorded.
  29. In response, Mr X says he would have made entirely different decisions had the Council given correct information from the outset. He was guided by the pre-planning advice and the subsequent statements about no CIL liability.
  30. He has acknowledged there was some fault by his Agent. But he says this would not have mattered had the Council given accurate information during the pre-application advice stage or when the application was approved. He says he did everything properly by asking the Council in advance and employing an Agent but the outcome has been financially devastating for him. He says the remedy proposed by the Council fails to recognise and compensate him for the injustice he has suffered.

### **Analysis**

31. At the pre-application stage, the Council says the purpose of advice is to provide guidance about whether planning permission will be needed, not how to avoid CIL. I am satisfied Mr X was not looking for CIL avoidance advice. However, in the absence of any specific obligation on the Council within its duty planning service to explain CIL where this is not the subject of the enquiry, I am unable to find the Council was at fault here.
32. Once the planning application had been made, the Council was at fault, as it has acknowledged, in that it included incorrect information in the CIL report, that error was not corrected when the report was signed off, and the Decision Notice was therefore incomplete.
33. Mr X is clear that had the Decision Notice included the correct information he would have downsized his plans, and I have no reason to doubt this to be the case. I accept the outcome would have been different had the fault by the Council not occurred.
34. The Council considers Mr X had the opportunity to alter his plans after it contacted the Agent on 30 September 2019. The Agent did not tell Mr X about this until early December, but the Council cannot be held accountable for the actions of the Agent, who was Mr X's representative in the interactions with the Council about this planning application and development.
35. The Agent had completed the CIL Form 1 as part of the planning application and stated the development was over the size threshold. The form included all relevant information about the process, including the requirement to complete additional forms if an extension exemption was to be claimed, and the requirement to complete a Commencement Notice before any work was started. Mr X says his Agent did not tell him about CIL, nor did it take action in response to the Council's email of 30 September.
36. It is clear that the Council's failings led to significant injustice for Mr X. However, the consequences of the Council's fault in August 2019 could have been mitigated to a degree if his Agent had communicated the request for a CIL liability

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form in late September 2019. On this basis it would not be appropriate to hold the Council wholly responsible for the injustice Mr X has been caused. My recommendation for remedy, set out below, reflects this consideration.

### **Agreed action**

37. Within one month from the date of my final decision, the Council had agreed to the following course of action:
  - a) Reduce the amount payable by Mr X for CIL liability by half, to £14,637.64;
  - b) Cancel all outstanding invoices for accrued late payment surcharges; and
  - c) Notify him in writing of the revised sum owing.
38. I am satisfied with the service improvements the Council has already put in place to ensure a similar problem does not recur. I therefore made no further recommendations in respect of this.

### **Final decision**

39. I have found fault causing injustice and the Council has agreed a suitable remedy. On this basis I have completed my investigation.

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