

Report

on an investigation into
complaint nos 10 014 203 against
Teignbridge District Council and
10 014 205 against
Devon County Council

19 September 2012

Investigation into complaint no 10 014 203 against Teignbridge DC and 10 014 205 against Devon CC

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The Local Government Act 1974, section 30(3) generally requires me to report without naming or identifying the complainant or other individuals. The names used in this report are therefore not the real names.

Report summary

Subject

Mr A complains on behalf of residents of a newly constructed housing estate about failure by the County and District Councils to secure completion and adoption of the road serving their homes. The construction of the road has not been completed and residents wishing to sell their homes have faced significant difficulty.

Finding

It was maladministration for the District Council to fail to notify the County Council when it issued a Building Regulations approval for the new houses. There was no maladministration in the way the District Council dealt with the planning enforcement investigation on the planning condition requiring completion of the highways works. There was no maladministration by the County Council in dealing with the developer about the highway works to be carried out.

Agreed remedy

As a result of my investigation the Councils have agreed to take action with a view to securing the completion of the necessary works and adoption of the road outside the complainants' homes. This provides a satisfactory settlement of the complaint.

Introduction

1. The complainant, Mr A, complains on behalf of himself and his neighbours. They live in a road on a small new estate where the roads have not been adopted as public highway, as intended, because construction was not properly completed. There is inadequate lighting and unsatisfactory landscaping. They face difficulty in selling their properties.
2. Mr A complains that the District Council failed to notify the County Highway Authority when it gave Building Regulations approval for the housing development. As a result, the County Council failed to serve a notice on the developer to ensure arrangements were in place to secure the completion of roads on the estate to an adoptable standard. He complains that the Councils are not willing to take further action to secure the adoption of the road and will not contribute to the cost of the works necessary to bring the road to an adoptable standard.

Legal and administrative background

3. The Highways Act 1980 makes provision for the making up of private streets:
 - S.38 gives highways authorities the power to adopt a highway, by way of agreement with any person liable to maintain it, as a result of which the highway becomes maintainable at public expense. An agreement under S.38 may contain provisions as to the dedication as a highway and the expenses of the construction, maintenance or improvement.
 - S.205 gives local highways authorities the power (but not a duty) to carry out works to improve the condition of a street, and to recover the expenses incurred in doing so from the owners of premises fronting the street. This provision is referred to as the 'private street works code'. The highways authority must serve a notice on owners of properties affected, explaining the proposals and costs and owners may object to the notices. If the objections are not resolved and the highway authority wishes to proceed, the matter can be referred to the Magistrates' Court to be determined.
 - S.219 and S.220 make provision for payments to be made to the relevant "street works authority" (here the County Council) by owners of land on which new buildings are to be erected. It applies to new buildings for which plans are required to be submitted under the Building Regulations and where the building will have a frontage onto street in which the street works authority has power to execute works. Unless one of the exempt categories applies, it is an offence to begin construction of a building before the owner has paid the highways authority or secured, through a bond, such sum as may be required by the authority for the cost of the works in that street. A district council (as building control authority) must notify the highways authority within one week of the grant of building

regulations approval that the plans have been passed, and the highways authority must serve a notice on the builder within six weeks of the plans being passed, specifying the sum required to be paid. One of the exempt categories is where an agreement has been made under S.38 of the Act (see above). These provisions are known as “the advance payment code” (APC).

Investigation

4. The investigation has included consideration of:
 - information provided by Mr A, in writing and during telephone conversations;
 - information provided by the District and County Councils in response to enquiries; and
 - relevant legislation.

Key facts

5. Planning approvals were given in March 2000 and April 2003 for the road of 12 houses in which Mr A now lives. Planning permission was given for 14 houses in an adjoining road in March 2003. Conditions attached to these permissions required completion of access roads and landscaping before occupation of the dwellings to be constructed.
6. The County Council has records of contact with the developer about the highway proposals for this site from 2002 onwards. Building work on the site started in September 2003. By October 2003 a plan titled ‘Application for Adoption S.38 Highway’ had been produced and had been given technical approval by the County Council. Between September 2003 and October 2004 County Council highways engineers undertook weekly inspections of highway construction and associated drainage provision (for which fees were due but apparently not paid until October 2005). A memorandum dated February 2005 stated that details of specification, layout and lighting had been agreed and instructions were issued to the County Council’s legal team for a S.38 agreement to be drawn up. Inspections continued after October 2004 until April 2005 when the highways engineer was instructed not to carry out any further inspections because there was no S.38 agreement in place.
7. An application for Building Regulations approval was submitted to the District Council in February 2004. Building Regulations approval was issued in April 2004. The District Council has said that, at that time, the procedure was for the relevant building control officer to notify the County Council when the Building Regulations approval was issued, so that the County Council could take appropriate action under the APC. However, the District Council has no record of any notification being sent on this case and the County Council has no record of receiving any. Consequently, no notice was served on the developer by the County Council under the APC.

8. The developer began the construction of the houses in March 2004 (before the grant of Building Regulations approval) and various plots were constructed between 2004 and 2008. Properties on the estate were sold and occupied from the end of November 2004. At that stage the roads were partially constructed but the street lighting was not installed, pavements had not been constructed, no landscaping had been done and the roads had not been surfaced to the required standard.
9. Solicitors appointed to act on behalf of the County Council sent a draft S.38 agreement to the developer's solicitors in April 2005 and sent a reminder of the need for an agreement on 26 July 2005. The developer's solicitor returned the draft agreement with amendments on 28 October 2005. The Council's solicitors responded on 9 November 2005, sending final copies of the agreement for signature. Reminders were sent on 14 February, 30 March and 5 June 2006. The developer's solicitor responded on 7 November 2006 advising that the developer was looking for an alternative surety so the agreements would need to be amended. They said they would send details. The Council's solicitors chased again on 30 October and 5 December 2007, 2 April, 18 June and 25 November 2008 and 21 April 2009. However the developer's solicitors did not respond and a S.38 agreement was not completed.
10. In October 2005 the developer paid the fee for the inspections already done, but no further inspections were carried out by highways engineers because there was no S.38 agreement in place.
11. Mr A bought his house in August 2006. On the advice of his solicitor, he retained a percentage of the purchase price pending completion and adoption of the estate roads. A number of other purchasers, but not all, also retained monies pending completion of the roads.
12. Mr A says he began contacting the District Council in 2007 about the lack of progress in completing the road construction and the landscaping as required by the conditions attached to the planning permission. Construction of houses on plots on the estate was still underway, and some plots had been sold on to other builders. The Council's records indicate that the first complaints about the lack of compliance with planning conditions were received in September 2008.
13. In October 2008 Mr A made a formal complaint to the District Council about lack of enforcement action and on 6 November 2008 the enforcement officer wrote to him about discussions he had had with the developer on his proposals for completing the necessary works. The options for enforcement action had been complicated by the sale of individual plots for self-build (which would require enforcement action against individual owners). So the District Council was not proposing further action at that stage, but said the situation would be monitored and if the matter was not resolved further action would be considered.

14. The District Council's enforcement officers were in regular contact with the developer by letter and meeting from the end of 2008 onwards. In response to each contact, the developer outlined his proposals for completing outstanding work on the roads and associated landscaping, but said that some matters had to be resolved with the owners of plots which had been sold.
15. In April 2009 the County Council wrote to the developer noting that, at a recent meeting with the District Council, the developer had said the highways would be covered by a S.38 agreement. It said that considerable works had been undertaken on the site without the agreement in place and without inspection. It advised that if it was still the developer's intention to have the roads adopted as public highways, a detailed construction survey would be required, together with revised layout plans.
16. In July 2009 the District Council wrote to the developer giving a deadline of 31 October 2009 for completion of the works, failing which enforcement action would be commenced for breach of planning conditions. Committee authorisation for enforcement action was given in August 2009. The developer initially said that work would be completed but that the deadline could not be achieved. In February 2010 the developer asked for a further 18 months to complete the work. The Council served an enforcement notice on the developer on 12 February 2010. In April 2010 the developer went into voluntary liquidation.
17. In May 2010 Mr A contacted the County Council to complain that the roads had not been completed and adopted. He was advised that the District Council had not notified the County Council of the Building Regulations approval, so that it had not been possible for the County to serve notice under the APC within the requisite six week period.
18. In June 2010 Mr A made a formal complaint to the District Council with a copy to the County Council. The District Council responded, confirming the above events, but noting that the County Council Highways officers had been in contact with the developer about the road construction. The District Council said it was not unusual for road construction to begin before a Building Regulations application was submitted and it assumed that purchasers had been advised by their solicitors about the lack of an APC notice, so that they could have ensured they were protected should the work not be completed.
19. Mr A then complained to the County Council. He disputed the County Council's view that the an APC notice could not be served once six weeks had elapsed after the Building Regulations approval was issued. He maintained that the County Council could have served a notice when it became clear that the developer was not responding to communications about the S.38 agreement.

20. In August 2010 Mr A and other representatives of his local Residents' Association met officers from both District and County Councils to discuss the problems securing completion of the required highway works. Discussion covered:
- the reasons why no APC notice/S.38 agreement was in place
 - the retention monies held by some residents and the fact that some of the properties had since been sold by the original purchasers
 - the likely cost of completing the work, then estimated at around £100,000
 - the legal status of the highway land which, following the developer's liquidation, had devolved to the Crown
 - the residents' view that the Councils should organise and pay for the completion of the required works.

At the end of the meeting, officers agreed to respond to questions raised by residents about the outstanding requirements for the construction of the road, but no agreement was reached on a way forward.

21. The Crown Estates have offered to devolve the highway land on the estate to the residents' association or a management company for a minimal consideration. The County Council has identified that, as well as undertaking works to bring road surfaces, pavements and lighting up to standard, it will be necessary to establish what and where highway drainage has been installed and whether the installation is satisfactory. Mr A and another resident have carried out, at their own expense, much of the required landscaping work in the road.

22. The County Council says that:
- Its legal advice is that in the absence of notification of the Building Regulations approval it was unable to issue a notice under the APC
 - It has no powers to force a developer to enter into a S.38 agreement and demonstrably used its best endeavours to secure an agreement to bring about the adoption of the road
 - Developers often take a considerable period of time to complete a S.38 agreement, it is not unusual for developments to be almost, and sometimes wholly, completed before the agreement is in place
 - In the face of an unwilling or lackadaisical developer it was powerless to force such an agreement
 - Purchasers of properties on the estate were clearly able to see that the estate roads were not complete when they purchased their properties or their plots
 - There is correspondence between purchasers and the County Council which makes clear that there is no S.38 agreement in place
 - Purchasers of houses should take some responsibility for purchasing a dwelling with no assurance that the road would be completed and adopted by the Council, so that it would be unreasonable for the public purse to be expected to put right circumstances over which it had no control.

23. The County Council has said that, even if an APC notice had been served at the relevant time, it is unlikely the Council would have taken any action under it, because the developer was working towards a S.38 agreement. It also says that, at that time, APC notices were not issued as often as they should have been. Reliable processes were not in place at some of the district councils to ensure notification of all building regulations approvals. It says its enforcement regime has also not been as robust as it should have been and there have been no prosecutions. Practice has been reviewed recently and it is now pursuing developers more rigorously. In one recent case, the Council's litigation team was instructed to issue proceedings for non compliance with an APC notice but legal action was avoided as the developer completed the S.38 agreement.
24. The District Council says that:
- Prospective purchasers were, or should have been, advised by their solicitors at the time of purchase that the road was not completed and that there was no S.38 agreement in place so that there was no certainty that roads would be completed
 - The County Council knew that the development was proceeding and roads were being constructed before the application for building control was submitted in February 2004
 - It accepts that it failed to notify the County Council of the Building Regulations approval but says that later in 2004 the procedure was changed so that a weekly list was sent to the County Council
 - The Council has waived its normal fees and erected street signs which go some way to giving the appearance of normality and the roads are not in a dangerous condition.
25. Both Councils referred to the retention monies held by purchasers of properties on the estate and said that these should be used to secure completion of the works.
26. Mr A says
- There is no valid defence to the District Council's failure to notify the County Council of the building regulations approval
 - The advice given by the purchasers' solicitors is not relevant to this breach of the statutory duty
 - Purchasers would have understood that a S.38 agreement was being negotiated with the developer, which was not an unusual situation
 - The Councils should have alerted purchasers that the developer was unlikely to enter into a S.38 agreement
 - The majority of residents have made it clear that they are prepared to contribute to the cost of construction, although a few are not prepared to do so and cannot be compelled
 - Both Councils dealt with his complaint in a disgraceful manner, being dilatory and obfuscating, attempting to blame anyone rather than accept responsibility themselves

- It is both legally and morally wrong for the Councils not to take all reasonable steps to secure completion of the work by using S.205 of the Highways Act to arrange for the roads to be made up and adopted.
27. Mr A says that the worry caused by trying to secure completion of the road outside his home has adversely affected him and his wife over a period of five years, having a debilitating effect on their health and well-being. He believes that the Councils should cooperate to secure adoption of the highway at the proper expense of the residents and that they should offer compensation to him and his wife for the worry they have endured.
 28. Prior to issuing this report, I recommended to the County and District Councils that they use their best endeavours to secure the completion of the necessary works and adoption of the roads which are the subject of this complaint.
 29. The District Council has now agreed to use its powers to resolve the ownership of the highway and to work with the County Council to co-ordinate completion of the works, with the costs charged to residents.
 30. The County Council is prepared to use its powers under S.205 to secure the completion of the works and adoption of the road. However it says it will not know whether the roads can be adopted until it has obtained further information on their condition and highway drainage, and the costs involved in bringing these to an adoptable standard. The County Council has therefore offered to commission its Engineering Design Group (EDG) to undertake the necessary surveys and design work required to establish these matters.
 31. The County Council has said that if it is to pursue action under S.205, the funds retained by the residents from their original purchases should be contributed towards the costs of the scheme, as this is the purpose for which they were originally retained. It will therefore only commence action under S.205 if those residents with retentions provide them, in advance, to cover the cost or part of the cost of the works.

Conclusions

32. It was maladministration for the District Council to fail to serve notice on the County Highways Authority at the time the Building Regulations approval was issued. This meant the County Council was not put on notice of the development. However, I find on the balance of probabilities that the County Council was unlikely to have taken any action under the APC notice, because the developer was working towards a S.38 agreement.
33. The District Council was not at fault in the way it dealt with the planning condition requiring completion of access roads and landscaping before occupation of the

dwellings. Between 2004 and 2006, when the County Council was working with the developer on the road construction, it had no reason to believe the roads would not be completed. Mr A complained after he had bought his home in 2006. The options then available to the District Council were to commence formal enforcement action or negotiate with the developer on completion of the works. I do not criticise the District Council for choosing the latter option. Unfortunately the Enforcement Notice served in February 2010 did not secure completion of the works and the developer went into liquidation. But I do not find maladministration here.

34. The County Council's view is that, in the absence of the notification from the District Council, it was not able to serve an APC notice on the developer. I can see no grounds to criticise this. The County Council took reasonable steps to secure the completion of a S.38 agreement with the developer. It was not able to force the developer to complete the agreement. I do not therefore find maladministration by the County Council.
35. There is no legal procedure available to the frontagers to ensure the highway is completed and adopted, as they understood would be the case. Although many of the original purchasers were aware the S.38 agreement had not been completed, and may have retained part of the purchase price to reflect this, by itself this could not secure the completion of the highway as intended.

Remedy

36. The relevant legislation does not provide for highways authorities to meet the costs of constructing and adopting roads serving new housing developments. Mr A and other purchasers were aware when they bought their homes that the roads had not been adopted and there was no agreement in place ensuring that this would be done. I have found no evidence of maladministration by the County Council and the fault by the District Council was limited to the failure in 2004. In those circumstances I cannot recommend the County Council meet the costs of the necessary works, and do not consider it appropriate to recommend that the District Council do so in the light of my conclusions at paragraph 32 above.
37. The District Council has agreed to take the necessary measures to resolve ownership of the highway land.
38. The County Council is prepared to use its powers under S.205 to secure the completion of the works and adoption of the road. However it says it will not know whether the roads can be adopted until it has obtained further information on their condition and highway drainage, and the costs involved in bringing these to adoptable standard. The County Council has therefore offered to commission its Engineering Design Group (EDG) to undertake the necessary surveys and design work required to establish these matters.

39. The County Council has said that if it is to pursue action under S.205, the funds retained by the residents from their original purchases should be contributed towards the costs of the scheme, as this is the purpose for which they were originally retained.
40. It does not seem unreasonable that Mr A and other purchasers reduce the burden on the public purse by making their retention monies available to the County Council to facilitate completion of the necessary works under S.205. The purpose of the retention monies was to secure completion of the works and they will be used for that purpose. The County Council has agreed to incur the costs of commissioning the necessary survey and design work.
41. Mr A says he and others have been very distressed by the continuing uncertainty and experienced significant trouble in their efforts to secure completion and adoption of the road outside his home. But I consider the agreement by the Councils to take the action described at paragraphs 37-39 above provides a reasonable settlement for their complaint and do not recommend any further remedy.

**Dr Jane Martin
Local Government Ombudsman
The Oaks No 2
Westwood Way
Westwood Business Park
Coventry
CV4 8JB**

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