

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

**Investigation into a complaint against  
Shropshire Council  
(reference number: 18 019 770)**

**24 January 2020**

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## The Ombudsman's role

For more than 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 G            The complainant

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## Report summary

### Planning & Development

Mr G complains the Council failed to consult with Sport England, before approving a planning application for development next to the home ground of a cricket club he represents. This meant the development was constructed without measures to mitigate the risk of damage from cricket balls.

### Finding

Fault found, causing injustice, and recommendations made.

### Recommendations

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*)

To remedy the injustice identified in this report, we recommend the Council:

- meets with the club to agree the most appropriate ball-strike mitigation measure. The agreed solution should be of adequate height and length to protect the new development, in accordance with the trajectory report. Once agreed, it is for the Council to seek the most cost-effective quote for the work. However, it should ensure the work is complete before the beginning of the 2020 cricket season.
- offers to reimburse the club for its cost in commissioning the trajectory report.

The Council has agreed to the above recommendations. However, we also recommend the Council:

- agrees to bear financial responsibility for future maintenance of the fence. It is for the Council and club to determine the best way to implement this, but the agreement should be made in writing by the time the fence is completed.
- offers to reimburse the club for its costs in hiring an alternative venue.

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## **The complaint**

1. The complainant, whom we will call Mr G, represents a local cricket club of which he is a member.
2. Mr G complains the Council gave permission for a new home to be built adjacent to the club's ground, without first consulting with Sport England. He says the club has been unable to safely use the ground since the home was constructed, because of the risk of damage or injury from cricket balls, and that consulting with Sport England would have highlighted this risk in advance.
3. Mr G considers the Council should fund the construction of a fence, as well as compensating the club for its costs in hiring an alternative ground since the house was constructed.

## **Legal and administrative background**

4. 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*)
5. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)

## **Planning permission**

6. Planning permission is required for the development of land (including its material change of use). It is for the local planning authority (LPA) to consider applications for development.
7. Planning permission may be granted subject to conditions relating to the development and use of land.

## **Consultation**

8. Article 18 of the Town and Country Planning Act (Development Management Procedure) Order (England) 2015 ('the DMPO') says:  
*Before granting planning permission for development which, in their opinion, falls within a category set out in the Table in Schedule 4, a local planning authority must consult the authority or person mentioned in relation to that category ...*
9. Part (z) of Schedule 4 of the DMPO names Sport England as a consultee for:  
*Development which ... is likely to prejudice the use, or lead to the loss of use, of land being used as a playing field.*

## **How we considered this complaint**

10. We reviewed the case officer's report, a trajectory report commissioned by the club, the Council's response to our enquiries and its correspondence with Mr G. We also consulted Sport England.

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## Findings

11. Mr G's cricket club's ground is in a rural area. There is a small cluster of dwellings close to the ground's southern boundary, separated from the cricket ground by a hedge.
12. In June 2016, the Council received an application for the construction of a new dwelling on the southern boundary, in between two existing ones. The proposed building was to be directly in line with the wicket.
13. In July, the Council granted permission. It did not place a condition on the permission for the developer to take any action to mitigate the risk of ball-strike.
14. Mr G says construction on the new dwelling commenced in Spring 2017. By the start of 2018 cricket season, the shell of the building was complete.
15. Mr G says it was at this point the club realised that, because of the building's proximity, and its placement directly in line with the wicket, there was a significant risk of ball-strike. The club proactively took safety measures, including constructing a fence along that portion of the boundary, but it became apparent this was inadequate; and so it decided to hire an alternative venue for its home fixtures.
16. The club then contacted the England and Wales Cricket Board (EWCB) for guidance. The EWCB recommended the club obtain a professional trajectory report, and in turn contacted Sport England for its own view. Sport England responded to say the Council had a statutory duty to consult it about planning applications under these circumstances; and had it done so, Sport England would have recommended the commissioning of a trajectory report, and that suitable mitigatory measures be taken.
17. The club then commissioned a trajectory report, from a private company endorsed by the EWCB. The report recommended the construction of a 15m high fence to protect the new dwelling and its occupants from ball-strike.
18. In November 2018, Mr G submitted a complaint to the Council. In response, on 5 February 2019, the Council explained it had discretion whether to consult with Sport England, and in this instance had decided not to.
19. Mr G says he spoke to a member of the Council's planning department on 12 February, who said he would refer the matter to the Council's insurers; but reiterated the Council was not at fault because it had made a conscious decision not to consult with Sport England.
20. On 15 February, Mr G submitted a Stage 2 complaint. The Council acknowledged this and said it would respond by 10 March.
21. Having heard nothing further, Mr G raised a complaint with the Ombudsman on 26 March.
22. During our initial enquiries, on 18 April, the Council confirmed the matter was currently with its insurers. However, due to the passage of time since Mr G had raised the Stage 2 complaint, we decided it was appropriate to proceed with an investigation.

## Analysis

23. Mr G says the construction of the new dwelling effectively prevents the club from using its own ground. Although the club has constructed a fence, with its own players as labour, the fence is inadequate to mitigate the risk of ball-strike. It has

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- been forced to hire another ground for its home matches, and will be unable to return to its own ground unless a much higher fence is constructed. The club has obtained a quote for a suitable fence, which is nearly £24,000.
24. The Council's position is that it has discretion under the DMPO whether to consult with Sport England. In this case, the case officer and their manager discussed the proximity of the development to the club's ground, and concluded the 7m hedge was sufficient to mitigate the risk of ball-strike. The Council also says the club did not object to the planning application during its consideration.
  25. Article 18 of the DMPO gives LPAs the right to rely on their opinion, in deciding whether the application falls into a specified category; but if it does, the LPA *must* consult with the relevant body. So the LPA's discretion lies in whether the application is a relevant one, not whether it should be put for consultation.
  26. In this case, the Council says it considered the proximity of the club during the application, and decided the hedge was sufficient protection. We note there is no reference to this consideration in the case officer's report.
  27. However, if the Council did consider this issue during the application process, this demonstrates clearly it considered that the use of the cricket ground was likely to be prejudiced. Notwithstanding the Council's view the existing hedge was sufficient, it was obliged to consult with Sport England under these circumstances.
  28. Even if the Council had not considered the application prejudicial, however, we would still not accept the Council's failure to consult was appropriate. The law may give the Council discretion to decide whether an application meets the criteria for consultation; but this does not mean the Council's discretion can never be misapplied.
  29. In this case, the development is approximately 20-25m from the boundary, and approximately 46m from the far end of the wicket. The trajectory report says, even considering the club's players are amateurs, a fence of 22m in height would be needed to stop all shots. It recommends a fence of 15m as a reasonable compromise.
  30. The Council points out the trajectory report refers only to the two pre-existing buildings, and not the new development. We infer the Council considers this to reduce the report's weight.
  31. We do not agree. We can see the report contains a screenshot from *Google Earth*, which appears to have been taken before the new development started. This screenshot then informs the measurements in the report.
  32. However, the new development is marginally closer to the boundary than the two pre-existing buildings; it is also directly in line with the wicket. The trajectory report is clear there is a risk of ball-strike to the pre-existing buildings, so it logically follows there is an equal – if not greater – risk to the new development. We do not accept the report's weight is undermined by its reliance on an outdated screenshot.
  33. So, given the risk of personal injury and damage to property from cricket balls, and the trajectory report's conclusion that a fence even of 15m in height would not entirely negate the risk, we are satisfied the Council should have consulted with Sport England on this application. It not doing so is fault.
  34. We asked Mr G to comment on the club's failure to object to the application. He explained the Council's notification letter was delivered during the off season.

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- This meant it was not picked up for several weeks, and by the time the club was made aware of the application, it was too late to comment or object.
35. The Council has refuted this claim. It says the application was considered during the summer, which is the cricket season, and so the club's explanation does not make sense.
36. We do not consider this disagreement is material to our decision. Even if the club's comment was correct, we would not find fault by the Council in this respect, as it has no duty to chase up responses from those it notifies.
37. In any event, the Council's duty to refer applications to statutory consultees is not contingent on the receipt of persuasive objections from third parties. The proximity of the development to the club's ground was abundantly clear from the plans. The Council should have consulted with Sport England, regardless of the club's response.
38. And in fact, we note from the Council's website that the deadline for responses from the public and consultees in this case was the same – 5 July 2016. So, for the Council to have consulted with Sport England, within the normal consultation period, it would need to have done so while the application was still open for the club's comments anyway. So the club's failure to reply in no way explains, or excuses, the Council's failure to consult.
39. We contacted Sport England, and asked it to provide us with a retrospective view on the application. It explained it had already been made aware of the situation via the club's contact with the EWCB, and said:
- Had Sport England been consulted, we would have explained that due to the proximity of the proposed dwelling and its associated curtilage to the proposed cricket pitch, that a ball strike assessment should be undertaken to assess the risk, and to consider possible mitigation measures **prior to the determination of the planning application.***
- Sport England would have explained that it would not be sufficient to include a planning condition requiring the applicant to provide such an assessment after consent had been granted, as to do so would have assumed that there was an acceptable solution, which may not have been the case. The absence of a ball strike assessment would have led to Sport England **objecting to the application.***
- Sport England's advice would have been that the applicant should instruct [the company which produced the trajectory report] to undertake an assessment, and where this demonstrates that there is a risk of ball strike, to put forward appropriate proposals for mitigation in line with the recommendations in this assessment. Where this involves solutions such as ball-stop netting, in accordance with the agent of change principle as set out in Paragraph 182 of the NPPF, the applicant should make appropriate provision for the implementation and future maintenance of any proposed ball stop mitigation measures.*
40. Local planning authorities are not legally bound by consultee responses, including those from Sport England. So, even if the Council had consulted with Sport England here, it had the power not to follow its recommendations.
41. However, the courts have found that considerable weight should be attached to consultees' views. In the case of *R (East Meon Forge & Cricket) v. East Hampshire DC & Ors* ([2014] EWHC 3543 (Admin)), the judge quashed planning permission, in part because the LPA had failed to properly consider Sport

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- England's response, which was to ensure mitigatory measures were installed to prevent cricket ball-strike – a virtually identical situation to that presented here.
42. So, in conclusion, we are satisfied the Council should have consulted with Sport England. It is clear Sport England would have recommended mitigatory measures be agreed before the application was decided, and that the developer meet the cost of this.
43. And although the Council would not have been bound by this recommendation, caselaw dictates it would need to have made a strong, evidence-based argument not to follow it.
44. On the balance of probabilities, we are persuaded the Council would have required the developer to install mitigatory measures if it had consulted with Sport England. We consider the lack of mitigation to be a direct consequence of the Council's fault.
45. This has caused the club a significant injustice. It has been unable to play at its ground for much of the 2018 cricket season, and the whole of the 2019 season. It has incurred expenses in hiring an alternative venue for those fixtures it should have been able to play at home. It also paid for the trajectory report, which is a cost which should rightly have been met by the developer.
46. The Council says the club's decision to hire an alternative venue was premature, because there was no evidence any damage had actually been caused by cricket balls, and also disproportionate to the risk, as the trajectory report suggests only a "low percentage" of shots would travel far enough to be dangerous.
47. We do not agree. We consider it entirely sensible for the club to have taken proactive steps to avoid injury or damage to property.
48. The trajectory report does not specify a percentage of shots which would present this risk. We accept, of course, that not every shot during a match will travel the same distance, or carry the same power; but the report says that even the 15m fence it recommends would not stop everything. Given, again, the potential consequences of ball-strike, we do not consider the club's decision to play elsewhere to be disproportionate to the risk highlighted by the report.

## Conclusions

49. We consider the Council should meet the cost of mitigation measures, to allow the club's ground to be brought back into use. As we understand it, there are several different possible solutions, such as a wire fence or panelling. It is not for us to say which solution is the most appropriate and cost-effective, and so we will leave this for the Council to agree with the club. However, the Council should pay close attention to the trajectory report when deciding on the solution.
50. The Council points out the club's quote is for a fence of 50m. It says this would cover the entire southern boundary of the ground, including stretches to either side of the new development, where the boundary instead abuts the pre-existing buildings' land. The Council says, as the club did not complain about a lack of fencing before the new development was built, it should only be expected to meet the costs for fencing off the new development, and not the pre-existing buildings.
51. From our own estimation, the boundary is actually longer than 50m, so a fence of this length would not cover the whole distance; but we do accept this appears longer than is necessary to protect the new development. The club's complaint

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- was generated by the new development, and not the pre-existing ones, and so the fault and injustice we have found here relate only to the new development.
52. So, on this basis, we agree the Council should bear responsibility for a fence of adequate length and height to protect the new development *only*. It is clear from the trajectory report the height should be 15m, but we will again leave it for the Council to agree the appropriate length of the fence with the club.
  53. Sport England has also raised the question of which side of the boundary a fence should be placed, and who should be responsible for maintaining it.
  54. Had this matter been addressed at the appropriate time, the Council would have been able to place a condition for the fence to be constructed on the development's land, and for maintenance to fall to the owner. Unfortunately it cannot do this in retrospect.
  55. There is nothing in Mr G's correspondence to suggest the club would oppose the fence being situated on its side of the boundary hedge. It may be the new development's owner would agree to it being located on their side instead; but if not, it does not appear there is any option except for it to be on the club's side. Either way, this is again a matter for the Council and club to explore and agree.
  56. However, we are satisfied the Council should also bear responsibility for future maintenance of the fence. As Sport England has said, it was the development which created the risk of ball-strike, as the cricket club was already there, and so we do not consider the club should bear any of the costs.
  57. The Council should also reimburse the club for its costs in hiring an alternative venue for its home matches, during the 2018 and 2019 seasons, and for its costs in commissioning the trajectory report.

## **Recommendations**

58. 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*)
59. Within one month of the date of this report, the Council has agreed to meet with the club to agree the most appropriate ball-strike mitigation measure. The agreed solution should be of adequate height and length to protect the new development, in accordance with the trajectory report. Once agreed, it is for the Council to seek the most cost-effective quote for the work. However, it should ensure the work is complete before the beginning of the 2020 cricket season.
60. The Council has also agreed to meet the club's costs in commissioning the trajectory report, within one month of our final report.
61. We also recommend the Council agrees to bear financial responsibility for future maintenance of the fence. It is for the Council and club to determine the best way to implement this, but the agreement should be made in writing by the time the fence is completed.
62. The Council should offer to reimburse the club for its costs in hiring an alternative venue.

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## **Decision**

63. We have completed our investigation. There was fault by the Council which caused injustice to Mr G, and the cricket club he represents. The Council should take the action identified in paragraphs 58 to 62 to remedy that injustice.