



The Commission for
Local Administration in England

Report
on an Investigation into
Complaint Nos 03/C/11999 and
03/C/13377 against
Darlington Borough Council

April 2005

Beverley House 17 Shipton Road York YO30 5FZ

**Investigation into Complaint Nos 03/C/11999 and 03/C/13377
Against Darlington Borough Council**

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Key to names used

Ms Underwood	The complainant
Mrs Wilkinson	The complainant
Officer A	Building Control Manager
Officer B	Director of Development and Environment
Officer C	Assistant Director (Public Protection)
Officer D	A senior planning officer
Officer E	The Council's Licensing Manager
Councillor Z	Chair of Licensing Committee
Councillor Y	Chair of Planning Committee

Report Summary

Leisure and Recreation and Enforcement

Ms Underwood and Mrs Wilkinson [these are not their real names for legal reasons] complained that the Council:

- (a) failed to ensure compliance with an agreement which attached to the planning consent for the development of the new stadium for Darlington Football Club, and
- (b) failed properly to consider subsequent applications for public entertainment licences for the football stadium.

Finding

The Ombudsman found that the Council had been placed in a very difficult position with the then owner of the football club who, seemingly, gave assurances which he did not keep. However, while acknowledging these difficulties, the Ombudsman believes that the Council did not do enough to protect local residents. They had a legitimate expectation that the Council would protect their residential amenity by ensuring compliance with the planning consent and the agreement which had been attached to that consent. The Ombudsman believes that the Council made a mistake in allowing the stadium to open, as it did, without the anticipated subsidised bus service, a residents' parking scheme, traffic regulations and highways improvements. This led to local residents suffering disturbance, inconvenience and traffic problems.

The Ombudsman found maladministration by the Council in the way in which it had dealt with applications for public entertainment. The result of this, the Ombudsman concluded, was that there had been an increase in the hours permitted by the public entertainment licences and that as a direct consequence of this local residents had suffered disturbances late at night.

Remedy

The Ombudsman recommended that the Council address the parking and general traffic problems in the roads surrounding the football stadium and the Ombudsman suggested that the Council work with both the football club and local residents to achieve the improvements which are undoubtedly necessary.

The Ombudsman believes that the Council should review its procedures to ensure that all the information necessary to enable proper consideration of an application for an entertainment licence is placed before the Licensing Committee. Moreover the Ombudsman recommends that the Council monitor the operation of the licences issued which serve to extend the hours of operation at the football club to ensure that local residents are not unreasonably disturbed.

The Council had agreed to pay Mrs Wilkinson £200 in compensation for her time and trouble in pursuing her concerns about licensing matters. The Ombudsman commends the Council for this but believes that a similar payment should be made to Ms Underwood. In addition the Ombudsman believes that both complainants should receive an extra £250 in recognition of the time and trouble taken in pursuing their complaints about planning consents and enforcement action.

Introduction

1. Ms Underwood and Mrs Wilkinson complain that the Council:
 - (a) failed to ensure compliance with a Section 106 agreement that formed part of the planning consent for a football stadium, and
 - (b) failed properly to consider applications for public entertainment licences for the football stadium.
2. For legal reasons, the names used in this report are not the real names of the people and places concerned¹.
3. An officer of the Commission has visited the complainants, has examined the Council's files and has interviewed Members and officers of the Council and an officer of the Highways Agency.
4. An opportunity has been given for the complainants and the Council to comment on a draft of the factual part of this report prior to the addition of the conclusion.

Background

5. In 2000 the Council resolved to grant planning permission for construction of a 25,000 capacity all-seat stadium close to the area where the complainants live. The application had attracted a lot of local interest. The Planning Officer's report refers to 2 rounds of consultation carried out by the Council with 433 letters and 3 petitions (with a total of 2,330 signatures) objecting to the proposals and a petition of 3,704 signatures in support of the proposals.
6. On 25 January 2000 the Council wrote to the Highways Agency as consultees stating:

“Condition 3 prohibits the developer from commencing any development connected to the provision of spectator capacity over 10,000 until the necessary highway improvements ... are in place and operational. This means that before work can start on the 10,001st seat, the required highways and transport works must be complete ...

The Borough Council is content that these conditions are legally sound and enforceable and as mentioned in [a] letter of 17 January 2000, if any breach of these conditions merited

¹ Local Government Act 1974, section 30(3)

enforcement action the Local Planning Authority would seek to enforce their terms.”

7. The Highways Agency in its response stated:

“As you are no doubt aware the Highways Agency has expressed concern over this development and in particular the provision of a 25,000 seat stadium. Traffic assessments have been carried out for a 10,000 seat stadium in addition to a 25,000 seat stadium. Whilst the Agency is in principle content with the smaller stadium capacity, subject to the carrying out of highway improvement at the ... roundabout; there are still highway matters to be addressed for the larger stadium capacity arising from the traffic assessment work and covered in the transport strategy report.

“However, we have recently been in discussions with your colleagues about the conditions to be attached to this development, should planning permission be granted, and the content of the Section 106 agreement. You have assured us that the conditions restricting the capacity of the stadium and the implementation measures identified in the transport strategy plan are reasonable, will be enforceable and will be enforced. You have also provided confirmation that the football club is content for those conditions to be attached.”

8. The Council resolved to approve the proposals. The resolution was subject to an agreement under Section 106 of the Town and Country Planning Act to secure the following:

“(i) the funding, by the applicant, of the design, setting up, administration and the monitoring of a controlled parking zone in the residential area to the north of the proposed stadium;

(ii) an agreement to restriction of the capacity of the stadium for 10,000 spectators and the implementation of the appropriate elements of the submitted transport plan for that first occupation and the implementation of the further agreed transport plan prior to any increase in capacity to 25,000;

(iii) appropriate restrictions on the use of the stadium for uses other than football matches in order to protect the amenities of nearby residential properties; and

(iv) an appropriate contribution to retain and improve local public rights of way and the integrity, security and bio-diversity of the ... local nature reserve.”

9. As the proposals represented a departure from the Council's Local Plan policies they were referred to the Secretary of State for a decision on whether the application would be called in for determination. The Secretary of State decided that the application should not be called in and could be determined by the Council. The Council gave planning consent, subject to conditions and the Section 106 agreement. The consent was issued in September 2000.
10. The consent was subject to a number of conditions including:
- “No part of the development relating to provision of additional spectator capacity above 10,000 spectators ... shall be commenced unless and until such time as the measures identified by the Highway Authority in the submitted transport strategy plan ... including any necessary highway improvements, have been completed and are operational.”
- “The stadium and its associated car park and service areas shall be used for the staging of football fixtures only and for no other purpose ... Exceptions to this condition will be ...”
- “The supporters bar shall be open between the hours of 11 am and 11 pm Mondays to Saturdays and 11 am until 10:30 pm on Sundays.”
- “The hospitality suite/restaurant and conference suite ... may be used for conference and restaurant use during the hours of 7:00 am until 11:00 pm on weekdays and Saturdays and 7:00 am until 10:30pm on Sundays.”
11. Ms Underwood and Mrs Wilkinson complain that the Council has allowed the development to proceed with the installation of 25,000 seats without seeking compliance with the transport plan, has allowed the stadium to be used for purposes other than football and has failed to ensure compliance with conditions relating to the use of the bars and hospitality area. They also complain that the decisions on licensing applications have been based on incomplete or inaccurate information.
12. They say that by failing to ensure compliance with the planning agreement and conditions the Council is eroding the provisions that it put in place to protect the amenity of local residents. As a result they say that they suffer unnecessary disturbance and parking and traffic problems around their homes. Their ability to gain access to their homes is severely restricted because of the traffic problems.

Investigation

Complaint (a): that the Council Failed to Ensure Compliance with a Section 106 Agreement that Formed Part of the Planning Consent for a Football Stadium

Legal and Administrative Background

13. Section 106 of the Town and Country Planning Act 1990 provides that any person with an interest in land may, by agreement, enter into an obligation restricting the use or development of the land and/or requiring specified operations or activities to be carried out.
14. Department of Environment Circular 1/97 gives guidance to local planning authorities on the proper use of planning obligations under Section 106. It states that Section 106 agreements should be necessary, relevant to planning, directly related to the proposed development, fairly and reasonably related in scale and kind to the proposed development and reasonable in all other respects.
15. Section 106A provides that a planning obligation may be modified by agreement between the planning authority and the person against whom the obligation is enforceable. It also provides that the person against whom the obligation is enforceable may apply after a relevant period for the obligation to be modified or discharged. The relevant period given in the Act is five years².

Capacity and Highways Issues

16. The agreement under Section 106 sets out action to be taken by the club. This includes the following:
 - (a) procurement of subsidised bus services from various locations, including the railway station and town centre;
 - (b) the provision of a car park management plan, the funding of off-site parking control orders – these orders to take effect 3 hours before the start of qualifying matches³ and ending at scheduled full time (defined as 105 minutes after kick-off time);

² Section 106A (1)(a) and section 106A (3) and (4))

³ A qualifying match is defined in the agreement as "any match in which the Club's first team is scheduled to take part or in respect of which the Council (following consultation with the Safety at Sports Ground Act Committee) reasonably apprehends an attendance in excess of 5,000 and has given notice of such apprehension not less than 14 days before the match."

- (c) some highways improvements to the road that runs past the stadium and a signing strategy for the safe and efficient movement of pedestrians and traffic on match days;
- (d) the promotion of public transport use through advertising and through employment of a public transport co-ordinator.

Additional highways improvements and provision of park and ride facilities were to be implemented before the club permitted admission of more than 10,000 people.

17. Ms Underwood made a complaint to the Council in 2002 that the Council had allowed the installation of 25,000 seats without requiring compliance with the terms of the planning agreement. The Council replied in December 2002 confirming that the football club had not complied with parts of the agreement but had given an assurance that it would comply before the stadium opened and that when the stadium opened it would have 25,000 seats.
18. The Council chairs a Safety Advisory Group which meets to consider safety issues relating to matches held at the football ground. The group is made up of representatives from the Council, the Police and Fire and Rescue Services, the Football Licensing Authority and the football club. While the stadium was under construction, the Group also included representatives of the contractors. Officer A, the Council's Building Control Manager, attends these meetings. He says the continued use of the football club's previous ground beyond the 2003/4 football season was unlikely to have been possible because the ground did not meet safety requirements and would have required considerable expenditure to bring it up to an acceptable standard. During the construction of the stadium building control officers carried out regular visits to ensure compliance with Building Regulations. They were aware that 25,000 seats had been installed. He says his brief, and that of the Safety Advisory Group, was to ensure the stadium was built in a manner that would be safe for a 25,000 capacity crowd. He was aware of the planning restrictions relating to use for more than 10,000. He says it would be for the planners to take any necessary enforcement action.
19. Officer A says he was involved with the development from the start and had in fact visited another stadium built by the same contractors with the same architectural and engineering team. The initial stages of the project went without any major problem. He says the contractor then pulled out of the project. He dealt with the new main contractors during this time but then work slowed down significantly, to the point where his officers were visiting to check compliance and were finding that no progress was being made. He believes this was due to the developing financial problems of the owner of the club. The owner began to use sub contractors to carry

out different aspects of the work leading to difficulties with the main contractor. Officer A says that, because there were difficulties in monitoring progress and ensuring compliance with planning requirements and building regulations, he kept a close eye on the development and it was agreed that the Safety Advisory Group meeting would be extended to include other issues relating to planning and highways. He says that because of the problems with this development the Safety Advisory Group met every month rather than the more usual three or four times a year.

20. In December 2002 the Council's Chief Executive and a senior officer met the owner of the club. The Council's files indicate that the owner had, for some time, been seeking to persuade the Council to release the club from some of the restrictions attached to the development.
21. On 10 February 2003 the Council's Chief Executive wrote to the owner of the football club identifying the key highway and transport requirements. The letter states:

"My reason for writing is to clarify the work which needs to be done before the stadium opens. There is quite a lot of off-site work to do and I want to avoid the situation where we cannot approve the use of the stadium when you are pressing to open it."

22. The letter refers to the Transport Assessment, the improvements to the trunk road required by the Highways Agency, the improvements to another road and the residents' parking scheme. The letter also makes it clear that there are other highway, transport and planning requirements to be addressed and annexes are attached to the letter identifying the position regarding planning conditions and obligations.
23. Following a further meeting, the Chief Executive wrote to the owner of the club on 21 March 2003 listing required works and stating:

"The purpose of the meeting was to outline the critical issues which must be addressed if the new stadium is to be available for the start of the 2003/4 football season ... I am very concerned about the timescales that we now have to work to and, as we discussed, all these works need to be carried out very quickly if we are to get the stadium open for the start of next season."

24. On 8 April 2003 a special meeting of the Safety Advisory Group was held, attended by the Chief Executive and senior officers and representatives of the contractors, Fire and Rescue and Police Services and the Football Licensing Authority (FLA). The minutes of the meeting record that the question of capacity at the stadium was

discussed in detail. The owner of the club was maintaining that it would be ready to open with a 25,000 capacity. The minutes state:

“[the representative of the FLA] expressed the view that, whilst he was aware that the majority of the seats were in, he thought it would be a nonsense to take out the seats merely to comply with the Planning Permission requirements which were drafted some 4 years ago.”

25. The Group decided to meet on a weekly basis to monitor progress.
26. On 30 July 2003 an officer of the Highways Agency met with Council officers to discuss creating an emergency access to the stadium from the roundabout on the trunk road and the outstanding works required to the trunk road. The Highways Agency officer says that none of the required works for the trunk road had been carried out and nor had the club entered into an agreement (under Section 278 of the Highways Act 1980) to fund the works. He says he expressed concern about the stadium being permitted to open without completion of the works and with no Traffic Regulation Orders in place. The Highways Agency entered into an agreement with the Council under Section 6 of the Highways Act 1980 to allow the Council to carry out works to the trunk road to create an emergency access. The Highways Agency officer says he understands that this was required before the stadium could be granted a safety certificate.
27. The ground has a safety certificate for 11,510. Officer A says this is restricted to significantly below the 25,000 because there are insufficient toilet facilities. Conditions are attached to the safety certificate relating to stewarding of the ground to take account of some of the issues raised at the Safety Advisory Group meetings. These include the movement of people both inside and outside the stadium before, during and after matches.
28. In August 2003 Ms Underwood learned that the stadium was due to open. She wrote to the Council expressing concern about the failure to ensure compliance with the planning agreement, particularly with regard to the capacity of the stadium and the residents' parking schemes. The Council replied on 7 August saying:

“In respect of the issues you raised, the Council does not anticipate attendance at football matches exceeding 10,000 (there may be exceptional occasions when this could occur and will be managed accordingly). It is not intended to implement the two phases of residents' parking in the first instance ...

“None of the issues you have raised as being reasons for the stadium remaining closed are ones that the Council considers appropriate for the use of an Injunction or Stop Notice which are the only realistic options to stop the stadium opening. It is considered neither would be reasonable as the risk to safety is quite capable of being managed without the need to close the stadium.”

29. Officer B, the Council’s Director of Development and Environment, says he advised the owner of the football club that he should not have installed the 25,000 seats without first addressing the planning conditions and the Section 106 agreement. He says he considered whether enforcement action should be taken and whether the Council should apply for an order requiring the removal of the additional seats. He says he concluded that the Council would not succeed in such an action. He says the ground cannot be used for more than 11,510 in line with the safety certificate. The use of all of the 25,000 seats is not, therefore, permitted. He says attendance at matches at the ground very rarely comes close to the number permitted.
30. On 12 August the Highways Agency wrote to the Council seeking confirmation that it would press the developer to complete the works to the highway before the stadium opened, in line with the Section 106 agreement. The Council says officers considered in some detail whether to commence legal proceedings but decided against it. They took the view that the Council would be unlikely to be granted an injunction in these circumstances.
31. The stadium held an opening football match on 16 August 2003. Ms Underwood and Mrs Wilkinson report that there were significant traffic problems on the trunk road, caused in part by parking along the road and verges. A number of Council officers monitored the stadium and surrounding area before and after the match. Notes taken by one officer say that the turnstiles registered attendance of 8,945, excluding those in boxes and hospitality suites. Announced attendance is given as 11,600. The report of the monitoring exercise refers to significant traffic problems on the trunk road leading to the stadium, problems with movement of traffic into and around the stadium car park and problems relating to the purchasing and consumption of drinks from glasses and bottles that were then deposited in local gardens.
32. Officers prepared a list of issues for discussion at the subsequent Safety Advisory Group meeting. The group met to discuss reports from this and subsequent matches held on 25 August (total spectators recorded 4,666) and 6 September (total spectators recorded 5,889). The group agreed to write to the Highways Agency about the problems on the trunk road. The Highways Agency received letters from the Council’s Highways Department and from the police. The Council’s letter states:

“The Safety Advisory Group ... is becoming increasingly concerned about the incidence of verge parking and hazardous manoeuvres on the [trunk road] on match days. There have been four home fixtures to date and the amount of verge parking is gradually increasing. There were at least seventy cars parked on the verges to the west of [the] roundabout and the lay-bys in the vicinity of the stadium are all fully parked. As well as general road safety concerns, this practice is putting a significant number of pedestrians in an unsafe environment on the highway edge on the [trunk road]. The increasing use of the [trunk road] for dropping off/picking up is also causing congestion and, on most occasions, is creating a road safety problem.

“I understand an ... undertaking has now been signed by the Club and you are progressing the design checks for the works at the ... roundabout. Given the concerns being expressed by the Safety Advisory Group, could you please now also put in hand the bringing into operation of a Clearway order on the [trunk road] as soon as possible.”

33. The Highways Agency replied on 30 September indicating that no signed undertaking had been received from the developer and until this was received no work on progressing the Traffic Regulation Orders (TROs) could be made.

34. In a response dated 16 September to a further letter from Ms Underwood Officer B states:

“The Council has had officers, including myself, monitoring the first home matches and I cannot agree that there has been both traffic chaos and major inconvenience. A Football Stadium is inevitably going to generate significant traffic movement and pedestrian movement both before and after a match and this was fully taken into account when the Council granted the planning permission. The monitoring that the Council has undertaken is enabling fine tuning of the traffic management arrangements, both on site and off site to make minor improvements to traffic.”

35. In September and October 2003, following meetings between the owner of the club and the Council's Chief Executive, the Council wrote to the club setting out proposals for the use of monies already deposited with the Council by the club or obtained by agreement with the club's bank. The club had requested that the Council release some of the money in the light of works completed and the club's financial difficulties. The Chief Executive, in a letter dated 9 October, set out the money held by the Council and the purposes for which it would be used. This included £140,000

towards the costs of highways works, £50,000 towards a subsidised bus service and up to £60,000 for the residents' parking scheme.

36. The letters also refer to agreement that the club will promote public transport through existing arrangements (for example, its web site and match programme). The letter states that the owner of the club had indicated that he had signed the agreement with the Highways Agency for the works along the residential road and that these should be completed as soon as possible:

“You will be aware that the lack of completion of these works presents a safety hazard to the road user that is currently being managed with a line of traffic cones but this is only suitable in the short term ...”

37. The owner of the football club wrote to the Council on 27 October and in a long submission outlined the financial difficulties faced by the club. The letter explained that the demise of the ITV digital contract and other problems within football had altered the financial position of football clubs outside of the premiership in general and of his club in particular to the point at which the club would not be financially viable without the ability to generate revenue by other, non-footballing means. The letter referred to events such as concerts, car boot sales, trade fairs and numerous other activities. The letter proceeded to criticise the Council for seeking an injunction to prevent the football club from holding a car boot sale (see paragraph 53) and stated that without such events the football club would go out of business.

38. On 29 October a meeting was held at the Council's offices to discuss highways issues relating to the stadium. This was attended by representatives of the Highways Agency, the club and the Council. The minutes of the meeting indicate that the undertaking had still not been signed by the club. The minutes state:

“Darlington Borough Council are holding funds for works relating to the Section 106 Agreement and it may be possible for those works which are considered to be a priority to be funded from this budget.”

39. Twice during the first year of operation attendance levels at the ground exceeded 10,000. The first was the opening match on 16 August 2003 (paragraph 31). The second was a match held in January 2004 to raise money for the club. The owner of the club was by this time in financial difficulty and administrators had been appointed. Officer B says in the light of the very few matches that exceeded the 10,000 limit he did not consider it reasonable to pursue formal action against the club. He says he is doubtful that subsidised bus services would be effective in reducing parking problems. He says the current attendance is not at a level that

would justify any formal action but if it does become a problem then formal action can be taken. He says there have been problems with parking on the trunk road but not on the residential streets where the residents' parking scheme is in place on scheduled match days. The residents' parking scheme was implemented about 6 weeks after.

40. Ms Underwood and Mrs Wilkinson say the restrictions only apply to matches shown on the fixture list where attendance is expected to be over 5,000. It would not, therefore, apply to charity or Football Association cup matches. They say that when matches take place they have problems parking because the parking restrictions are not effectively enforced. They say that the wardens stop patrolling as soon as the match starts. When residents telephone the wardens to draw attention to breaches they are advised to contact the Council the following Monday. Ms Underwood says the last time she rang she was told that no-one could get there because there was a football match that day.
41. The complainants say that on match days they have to take a four-mile detour to get to their homes because of traffic leaving the stadium. They say that, although the stretch of road that runs from the trunk road past the residential area is closed to traffic on match days, this has not been properly enforced and so people leaving the stadium are permitted to drive along the residential street while the residents cannot gain access from the trunk road to their homes. They also draw attention to the fact that the residents parking orders are only in place for scheduled matches where anticipated attendance is over 5,000. This does not cater for those times when attendance is greater than anticipated. It is also difficult for residents to plan without knowing whether controls will be in place.
42. Ms Underwood and Mrs Wilkinson have also expressed concern about the safety of drivers and pedestrians on the trunk road.
43. In January 2004 Mrs Wilkinson wrote to the Highways Agency describing the problems resulting from parking on the trunk road during matches at which attendance was below 10,000. The Highways Agency response states:

“Darlington Football Club have not entered into an agreement with the Secretary of State for Transport to provide the improvements to the... trunk road which were identified as a planning condition. As the club is now in administrative receivership, this is unlikely to occur in the near future. However, the Highways Agency is determined that this will not compromise the safety or convenience of users of the trunk road, and to this end we are currently promoting traffic regulation orders designed to prevent the nuisance parking

on the trunk road verges in the vicinity of [the stadium]. It is anticipated that these orders could come into effect during early Spring 2004 subject to no objections being received.”

44. The Agency also wrote to Ms Underwood along similar lines and confirming that the Council and the Police had been in contact regarding the problems caused by those attending matches at the stadium parking vehicles on verges of the trunk road.
45. Since the stadium opened, the situation has developed and the Council has secured some compliance with the planning agreement.
46. The club has agreed to provide a bus service from the town centre. I have seen no evidence that a car park management plan was produced by the club but car parking and traffic movement has been addressed through the Safety Advisory Group. The club made a contribution to off-site parking control orders. However, there was delay in implementing the orders and the complainants describe difficulties following implementation, relating to enforcement and to residents being unable to predict when the orders are likely to be in place.
47. There have been some highways improvements to the road that runs past the stadium. The Council has, through the Safety Advisory Group, sought to monitor the safe movement of traffic and pedestrians. However, the complainants have raised issues relating to enforcement and the problems of traffic leaving the stadium and travelling through the residential area along roads when access was closed to residents.
48. The club has agreed to promote public transport use through advertising in its programme and website. It has not employed a public transport co-ordinator.
49. The additional provision to be implemented before the club permitted admission of more than 10,000 people has not been made.

The Use of the Stadium for Purposes other than Football

50. Mrs Wilkinson and Ms Underwood complain that the Council's inconsistency in entering into a planning agreement, taking formal action to ensure compliance with that agreement and then approving a planning application allowing events to take place at the stadium that are precluded by the agreement, results in residents having no confidence in the Council's ability to protect their amenity in line with the assurances the Council gave when the consent for the stadium was granted in 2000. They are, therefore, concerned that the club will extend its activities resulting in increased disturbance to local residents.
51. Officer C, the Council's Assistant Director (Public Protection), says when it became clear that there were problems with the progress of the development the Chief Executive arranged ad hoc meetings of senior officers to consider whether the Council should take any action. The concern was that the stadium would be left three-quarters built. The owner of the club was making suggestions for other uses of the stadium such as military fairs, computer fairs and car boot sales. He was advised that these would require a variation in the planning consent.
52. Officer A says he was aware of concern locally that the stadium might be used for pop concerts. He says he asked that checks be carried out and these established that while the steelwork may be adequate the concrete in the seating area is not. One of the Council's Environmental Health Officers indicated in an internal e-mail in April 2002 that she would object in the strongest terms to such a use on the ground of noise disturbance from the concert and noise and traffic problems from those entering and leaving such events.
53. In September 2003 the club advertised plans for a "giant" car boot sale. Officer B says he saw the advertisement outside the stadium and called a meeting of senior officers at which it was decided that formal action should be taken to prevent the sale going ahead. An application was made for an injunction, based on the failure to comply with the Section 106 agreement and the conflict with the Council's market charter (which prevents the holding of markets within 6.6 miles of the Council's market). On 10 October 2003 the owner of the football club agreed to be bound by an injunction preventing him from holding car boot sales.
54. In October 2003 the Council received a planning application for car boot sales to be held at the stadium. Mrs Wilkinson and Ms Underwood, among others, objected to the proposal. The Highways Agency issued a direction requiring a condition stating that the sales should not commence until the TROs were put in place to control parking on the trunk road. In January 2004 the Council granted a temporary consent

for twelve months with conditions attached, including the condition relating to the TROs.

55. Officer D, the Planning Officer who dealt with both applications, says many of the objections made during consideration of the planning application for the stadium refer to concerns that the stadium would be used for other purposes such as pop concerts. He says that part of the motivation for the Section 106 agreement was to reassure residents that the Council was aware of their concerns and was limiting the use of the site. He says planning case law has established that a stadium is not in the same use class as a concert hall⁴. He says the Council could not prevent planning applications for other uses of the land being submitted and the Council had to determine these applications on their merits. He assessed the application to hold car boot sales on its merits, taking into account the previous planning consent and the agreement that went with it along with the comments of consultees and objectors.

56. The officer's report to Committee states:

"Members will note that many of the objections submitted request the Council to uphold the restrictions in terms of the use of the stadium that limit the use to football related activities, it should be noted that in respect of the car boot fair or any type of similar retail activities and the holding of pop concerts, these are uses, which would have required planning permission regardless of the restrictions, and the S106 was used initially to address objections raised because it was suggested these uses would take place in any event. It is unreasonable to suggest that the present restrictions imposed by the S106 were intended to be a prohibition of any particular use since it is always open to an applicant to seek planning permission and any other necessary consents for any particular event.

"It is accepted that the existence of a professional football club plays an important role in the social and economic function of the town. A successful club raises the profile of the town and the continued existence of the club is a matter of public concern. Notwithstanding this, the Local Planning Authority should consider only material planning considerations in determining the application. The financial position of the club has been widely publicised but the issue should not carry any significant weight in the decision making process.

⁴ Rugby Football Union v Secretary of State for Transport, Local Government and the Regions [2002] 30 EGCS 134

“Given the above report the officer view is that a temporary planning permission for a one year trial run can be recommended favourably subject to appropriate conditions.”

57. The Chair of the Planning Committee, Councillor Y, confirms that Members took into account the concerns of residents that the stadium might be used for other purposes such as pop concerts and that this was the reasoning behind the conditions and the Section 106 agreement. He says the decision to grant permission for the car boot sales was based on the officer's recommendations taking into account all relevant planning considerations. Ms Underwood spoke at the committee meeting on behalf of objectors and he says she presented their case very well. He says the Committee had to judge the application on its merits, taking into account the conditions that had been attached to the consent granted three years earlier and the changes in circumstances since then.
58. Ms Underwood says, despite being advised by the Chair that the Committee should not take into account the financial status of the club at the time, one Member spoke in favour of approving the application on the ground that the club was struggling and needed the Council's support. Councillor Y confirms that one Member spoke along these lines. He says the vote on the application was seven in favour and three against approval. He did not consider that that Member's remarks were influential in the Committee's decision.
59. Councillor Y says that in his view a successful football club contributes to the town's prosperity in the same way as any other successful business. He does not consider that the Council has dealt with the club any more favourably than a business that might be considered to be an asset to the town. He says there was general concern in the town that the football club should succeed. He believes the Planning Committee took into account residents' concerns and that activity at the stadium was adequately controlled to limit the effect on residents.
60. Officer B says when the Section 106 agreement was made in 2000 the Council was dealing with a very different set of circumstances from when it dealt with the application for car boot sales. He says that after the football club went into administration the Council had to consider whether it wanted a large white elephant on the edge of the town or whether it could agree something that would work. He does not consider that there is a contradiction between the Council's decision to enforce the agreement by seeking an injunction to stop the advertised car boot sale and shortly afterwards approving consent for such sales. He says the sale that had been advertised was very different in scale from what was approved by the Planning Committee. The consideration of the planning application allowed the Council to exert some control over the size and nature of the sales that could be held on the site.

61. By December 2004 no car boot sales had been held because the TROs were not in place. The Highways Agency advertised its intention to make the Orders and received objections from residents, including Ms Underwood and Mrs Wilkinson, based on the feared knock-on effect of increased parking on surrounding residential streets. Some work has been done to implement the TROs but I understand from the Highways Agency that it still has some minor work to complete.

62. Ms Underwood and Mrs Wilkinson alerted the Council to advertisements for computer fairs and golf sales to be held at the stadium in September 2004. The Council says that the club's new owners were advised that there was no planning consent to hold the sales. The Council states:

"The Director of Development and Environment has suggested to the Club's new owners that they liaise with the appropriate staff from the Borough Council, including the Planning Officers, with a view to examining what the Club may be proposing as regards uses of the stadium and how we would approach such proposals."

63. Ms Underwood and Mrs Wilkinson have also asked about a press report indicating that the stadium car parks may be used as a park and ride facility for the town centre. In response to enquiries about this the Council says:

"The Council could be faced by a shortfall in car parking spaces in the town centre if a proposal to construct a new retail development on one of the main car parks in the town is taken forward. As a consequence officers have been looking at the possibility of some park and ride arrangements being introduced whereby the public could leave their cars on the outskirts of the town in a suitable parking location and be transported into the town centre by bus, as happens in a number of major cities ... One of the possible locations for car parking by reason of the fact that there is a large car park which is unused for a large part of each week, would be the [football] stadium ... it has been mentioned briefly to the club, who then went to the press giving the impression it was a firm arrangement and it is not. Appropriate consultation would follow if any proposals were to be firmed up. At present (August 2004) it has simply been mentioned verbally in a two minute officer conversation."

Complaint (b): that the Council Failed Properly to Consider Applications for Public Entertainment Licences for the Football Stadium

Legal and Administrative Background

64. The Council is a licensing authority responsible for the issuing of Public Entertainment Licences (PELs) for premises within its area. Licences for part of the stadium were issued under the provisions of the Local Government (Miscellaneous Provisions) Act 1982, Part 1 and Schedule 1. This provides for licensing authorities to issue PELs lasting for up to one year and to attach conditions to those licences.
65. Licences are renewable and the Schedule provides for licences to continue to have effect where an application for renewal is made before expiry of the previous licence but where no decision has been made by the licensing authority on the renewal application⁵.
66. The Council's guidance on its licensing procedures states:
- "Should the application be for a renewal ... the Borough Solicitor, subject to there being no objections, has the authority to determine such applications. If objections are recorded, the application will normally be referred to the Licensing Committee for determination.
- "If it is proposed to vary conditions of the licence, such as a change in the hours ... then you must obtain the approval of the Licensing Committee⁶."

The Complaints

67. Three areas within the stadium have the benefit of PELs: two hospitality suites and a supporters' bar. Ms Underwood and Mrs Wilkinson complain that these licences have been granted in contravention of the limitations set out in the planning consent, that they and other residents were misled by an advertisement placed in the local press which resulted in their representations not being considered by the Licensing Committee and that the Committee made its decisions on the basis of inaccurate information regarding the limits of the liquor licences granted for the same premises. As a result they say they suffer disturbance late at night and during the early hours of the morning as users of the bars leave the premises and make their way home through the residential area.

⁵ Local Government (Miscellaneous Provisions) Act 1982 Schedule 1 paragraph 8(1)

⁶ Darlington Borough Council Guide to the Licensing of Entertainment paragraph 19

Applications for the Hospitality Suites

68. On 30 May 2003 agents acting for the applicant licensees applied for provisional PELs for two hospitality suites for the hours of 11 am to 12:30 am Monday to Saturday and 11 am to midnight on Sunday. With the applications the agents sent a letter stating:

“we intend to publicly advertise this application in an appropriate publication during the course of next week and would appreciate details of when the appropriate committee will be convening to consider the application.”

69. The advertisement in the local press was included under the heading Darlington Borough Council Application for Public Entertainment Licence and states:

“Objections should be sent no later than 14 days after the date of this application ...”

The date of the application is given as 13 June 2003.

70. The Council’s Licensing Committee considered the application on 25 June, before the expiry of the 14 days given in the advertisement. A petition objecting to the granting of the licence was hand delivered to the Town Hall on 24 June. The petition was not presented to the Committee. Reference was made to it by a member of the public who was present but efforts to locate it during the Committee meeting were unsuccessful. The Committee considered an officer’s report which indicated that consultees (police and fire authorities and building control) had no objections, subject to building works being completed in compliance with Building Regulations and health and safety legislation. The report recommends a number of conditions relating to noise limits and capacity.
71. The minutes of the Licensing Committee meeting state that a member of the public attended the meeting to object to the football club being used for purposes other than football and referred to the petition that he had delivered to the Town Hall. The minutes also state that a planning officer responded to the objector to advise him of the planning conditions relating to the football club and in particular the two areas that were the subject of the licensing application. A provisional licence was granted, subject to satisfactory completion of the works, for the hours 11 am to 12:30 am on weekdays and 11 am to 12 midnight on Sundays.
72. Councillor Z was Chair of the Licensing Committee which considered the application. She says the objector referred to the petition that had been delivered to the Town Hall the day before and she asked for it to be found. Although the petition was not found at that time, she says she asked the objector to summarise the petition

and give an idea of how many signatures it contained. She says she believes the Committee was able to take into account local objections in this way.

73. Officer E, the Council's Licensing Manager, says that he learned of the advertisement about a week before the Licensing Committee meeting. He says he took the view that it was not important because it was not a requirement of the Council for applications to be advertised. He says he was not aware at that stage of the sensitivity of applications relating to the stadium in the locality.
74. Councillor Z says she recalls that the question of the misleading advertisement did come up at some point but as the Council did not normally require publication of applications for PELs she did not at that stage think that the advertisement was significant.
75. When Mrs Wilkinson and Ms Underwood made complaints to the Council about the misleading advertisement and the failure to present their objections and the petition to the Committee they received a reply which states:

“... because your objection and others were not put directly to the Committee, officers will not issue the full licence under delegated powers but the matter will be considered at a future meeting of the Licensing Committee.”
76. It was later discovered that this information was inaccurate and, having issued a provisional licence, subject to completion of building works, the Council had no means for bringing the matter for reconsideration by the Licensing Committee. This was explained to Ms Underwood and Mrs Wilkinson in a later letter and the Council apologised to them for misleading them.
77. In response to Ms Underwood's complaint about this Officer B stated that the Council did not publicise applications for PELs, nor did it require applicants to do so. The petition that had been handed to a receptionist at the Town Hall was delivered to his desk on the morning of 25 June. He was out of the office and did not see the petition until the afternoon, after the Licensing Committee meeting. Although the Council expresses some regret that the advertisement was misleading, the Council did not uphold Ms Underwood's complaint on the ground that it was not the Council that had placed the advert and the Licensing Committee, having been informed of the missing petition, considered that there was sufficient information to allow it to determine the application. Ms Underwood then made her complaint to me.
78. Mrs Wilkinson's complaint about the same issue was the subject of an internal investigation by the Council and some procedural problems were identified, relating to the receipt of hand delivered items, the information available and communication

between officers. It was also recommended that Mrs Wilkinson receive £200 recompense for the inconvenience to her and the injustice caused by the manner in which the Council dealt with her complaint. Mrs Wilkinson was dissatisfied with this proposal and made her complaint to me. The Council suspended this payment pending the outcome of my investigation into all of the complaints made by Mrs Wilkinson and Ms Underwood.

79. The internal investigation did not include consideration of the questions raised by Mrs Wilkinson and Ms Underwood regarding the apparent inconsistency within the Council of approving licences that go beyond the limitations set out in planning conditions or agreements. The complainants say that this is one of the examples of the Council allowing the erosion of the conditions attached to the planning consent that were intended to protect residents' amenity.
80. Councillor Z says the question of the apparent contradiction was raised at the Licensing Committee meeting and a planning officer had given details of the planning conditions. She says the planning officer was pressed to advise whether the conditions precluded the issuing of a PEL for different hours and he advised that they did not. She says she concluded that it was up to the Licensing Committee to make a decision on the basis of the information it had.
81. Officer D, who advised the Licensing Committee, says it would be for the planners to decide whether to enforce the condition limiting the hours. He says if they decided to do so then evidence might be brought regarding the licensing authority permitting longer opening hours for public entertainment.
82. The agent acting for the licensees wrote to the Council on 22 September 2003 indicating that the works were complete and requesting that the full licence be issued. Officer A replied on 29 September identifying outstanding works and indicating that he could not support the issuing of the full licence until these were complete.
83. On 14 October Officer E wrote to the owner of the stadium summarising two meetings he had held with the owner on site on 8 and 10 October. The letter confirms that no public entertainment may take place in the hospitality suites until all of the issues raised in Officer A's letter had been addressed.

The Supporters' Bar

84. The letter of 14 October also refers to discussions held about other parts of the stadium. It states:

"You identified your intention to develop additional rooms at the Arena to provide public entertainment up to 2 am. These

were [the supporters' bar] and the South West concourse. We visited both areas and I identified some issues that would need to be addressed in order that the application be properly considered. These issues were:

- a) dispersal of people leaving the Arena at 2 am
- b) noise reverberation due to the hardness of the surfaces and the shape of the room ...
- c) heating and ventilation of the room to prevent condensation and lack of fresh air
- d) separation of the toilets from the proposed entertainment area..."

85. The letter also confirms that applications for PELs for the supporters bar and south west concourse had been received and that they would be the subject of consultation with the Planning Officer and an application for planning consent for proposed alterations may be required.
86. Letters notifying those who had objected to the previous application were sent by the Council's Licensing Officer. Ms Underwood, Mrs Wilkinson and others wrote letters of objection. The application for the supporters' bar was for the hours of 11 am to midnight every day. Mrs Wilkinson refers in her letter of objection to the restrictions attached to the planning consent. Other objectors also draw attention to what they consider to be the creeping erosion of the Section 106 agreement.
87. On 29 October Officer A wrote to the owner detailing the works required before full licences could be issued on the four parts of the stadium (the two hospitality suites, the supporters' bar and the south west concourse). On the same date the owner withdrew the application for the south west concourse and asked that the application for a provisional licence for the supporters' bar be put before the Committee on 12 November.
88. The officer's report recommends that conditions be attached to any licence granted relating to hours: 11 am to 12 midnight every day, maximum numbers and noise levels. The report confirms that there were no objections from the Police.
89. Ms Underwood addressed the Committee on behalf of the objectors. She referred to a disturbance outside the stadium in the early hours of 1 November. She also objected to the extension of the hours from the 11 pm limitation in the planning consent to midnight in the licensing application.
90. The Chair of the Committee says she asked the police officer present to comment on the incident and she indicated that it had taken place following a private function. The Chair says she asked the applicant what hours had been granted under the liquor

licence and the applicant said 11am to midnight. Ms Underwood and Mrs Wilkinson complain that the information about the liquor licence was inaccurate, the liquor licence was limited to 11 pm and this was not corrected by officers at the Committee meeting. The provisional PEL was granted with the Chair using her casting vote to vote in favour. The Chair of the Committee says had she been aware that this information was inaccurate and the liquor licence limited the hours to 11 pm she would have voted to amend the provisional PEL to match these hours as she was aware that, in the past, applicants had sought extensions to their liquor licences on the ground that the Council had granted extended hours on the entertainment licence.

91. The Licensing Officer says officers did not have information about the liquor licence and so had no grounds to question the information given by the applicant.
92. The Licensing Committee also considered information by one of the Council's solicitors regarding the conditions attached to the planning consent limiting the opening hours of the supporters' bar. That solicitor says that he explained that the Council had already taken a position on the use of the stadium and although the Licensing Committee was not prevented from granting a licence the Council had clearly considered that there was a potential for nuisance important enough to attach conditions to the planning consent. Councillor Z says she concluded, having heard all of the advice and objections, that it was up to the Licensing Committee to make its decision on the basis of the information it had.
93. The full licences for the hospitality suites were issued on 29 January 2004. The full licence for the supporters' bar was issued on 16 February 2004. Both licences were due to expire on 4 April 2004.
94. Officer D says he is not aware of any significant problems caused by the existing arrangements sufficient to justify enforcement of the planning condition. The complainants say those using the venue make their way home through the residential streets and they suffer disturbance late at night as a result. Ms Underwood says she has had to clear vomit from around her property after events at the venues.
95. In March 2004 the Council received applications for renewal of all of the licences. These applications give the hours for all 3 venues (the 2 hospitality suites and the bar) as 11 am to 12:30 am on weekdays and 11am to 12 midnight on Sundays – thereby amending the hours for the bar by a further 30 minutes. The licences were renewed on this basis.

Conclusion

Complaint (a)

Capacity and Traffic

96. It is clear that the Council had to deal with a difficult situation with an owner who gave assurances that he did not keep. However, the Council granted conditional planning consent with a planning agreement and gave assurances that it would enforce the consent. The residents had a legitimate expectation that the Council would protect their amenity by ensuring compliance with the planning consent.
97. The Council and local residents had to deal with a constantly changing situation and the decision that it would not be expedient to pursue enforcement action to reduce the seating capacity of the stadium to 10,000 was not an unreasonable one, particularly in the light of the limits set out in the Safety Certificate.
98. While I appreciate the difficulties involved, it was clear to the Council by July 2003 that the club was planning to open the stadium for the new season in August and had not complied with the planning conditions and agreement. Urging the club to fulfil its undertakings was having little effect at that stage. There is no evidence that the Council indicated to the club that it would take formal action to prevent the opening of the stadium if there was a continuing failure to comply.
99. In August 2003 the Council explained to Ms Underwood that it did not consider formal action by way of injunction or stop notice to be realistic options. By permitting the opening of the stadium without a subsidised bus service, a residents' parking scheme, traffic regulation and highways improvements, the Council allowed an unsatisfactory situation to develop.
100. By the end of 2003 there was greater compliance. The improvements along the residential road had been completed and the residents' parking scheme was in place. However, there were so many breaches of the agreement unresolved by the August opening that I consider the failure to seek an injunction to be maladministration. Even taking into account the financial problems and the difficulties of dealing with the owner at that time, the failure to take a more robust approach had the effect of undermining the confidence of residents in the Council's assurances that their amenity would be protected through enforcement of the conditions and the planning agreement.
101. The Council was aware before the stadium opened that the Highways Agency was concerned about the failure to enter into agreements for works to be carried out and

TROs made. This resulted in a situation that the Council and the Highways Agency agree was unsafe. This situation continued beyond the opening of the stadium and even by the end of October 2003 the relevant agreements had not been signed. During 2004 the Highways Agency decided to make the TROs because of the road safety problems on the trunk road. The Council should have ensured the club fulfilled its obligations under the Section 106 agreement to fund these so that they were in place before the stadium was permitted to open.

102. As a result of the failure to prevent the opening until adequate provisions were in place, the residents have suffered avoidable disturbance, inconvenience and traffic problems.

Other Uses for the stadium

103. The reason given in the planning consent for restricting the use of the stadium is to protect the amenity of nearby residential properties. The Council has since permitted uses of the stadium, either through planning consents or decisions not to take enforcement action, on the ground that these uses do not adversely affect the amenity of those living close to the stadium.
104. I appreciate that the Council was entitled to take into account, when the survival of the club was threatened, what would happen to the stadium. It would not be in the residents' interests for the stadium to fall into disuse and disrepair if the club failed. The Council also has to consider each planning application on its merits. That includes the effect of any proposed changes on the amenity of residents. The evidence indicates that the Council has done this and its decisions have not therefore been affected by maladministration.

Complaint (b): Public Entertainment Licences

105. While there is an apparent inconsistency in the Council attaching a condition to the planning consent limiting the hours for the hospitality suites and the supporters' bar but later granting PELs for longer opening hours, I am not critical of the Council for failing to enforce the condition limiting the hours of operation because there is insufficient evidence of significant problems resulting from the extended hours. I am doubtful that such action would succeed in the light of decisions made by the Council's Licensing Committee.
106. It is not maladministration for the Council's Licensing Committee to take a different view on a licensing application from that taken by the Planning Committee on the planning application. There does, however, seem to have been a failure to carry out a proper assessment of the possible effect of extending the hours of the venues within

the stadium. The objections of Mrs Wilkinson and others to the applications considered in June were not presented to the Committee and the Council has apologised for that. Ms Underwood and Mrs Wilkinson were misled about the effect of a decision to grant a provisional licence and understood that their objections could be considered at a later meeting. The Council has apologised and offered Mrs Wilkinson some recompense for that. The recompense seems reasonable as a remedy for that part of the complaint. It should, however also be extended to Ms Underwood.

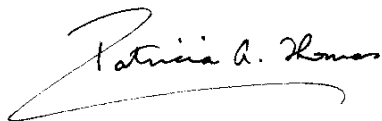
107. The evidence indicates that the Licensing Committee was aware of the petition and the nature of the objections when it approved the provisional licence. I accept that the decision on the application is likely to have been the same if the Committee members had had sight of the petition and objections.
108. The Council cannot be held responsible for the misleading information given by the licensee. If the Licensing Committee considers the liquor licensing hours to be a relevant consideration then this information should be made available to Members as part of the report to the Committee so they are not reliant on information from the applicant or any objector.
109. The evidence so far suggests that the hours have been extended through the renewal process and that the Council has not taken sufficient care to ensure the accuracy of information considered during the licensing process. A combination of this and the misleading information given to the Committee by the licensee has resulted in the hours permitted under the PELs being increased. The complainants report that they suffer disturbance late at night as a result. This is maladministration resulting in injustice to the complainants.

Remedy

110. The introduction of the TROs on the trunk road may have a knock on effect on parking and traffic problems around the area that the Council needs to address to avoid residents suffering further traffic problems around their homes.
111. The Council should work with the club to promote increased use of public transport by home and away supporters with a view to ensuring a reduction in the traffic problems around the stadium.
112. The Council should meet with the Residents' Association to discuss the traffic and parking problems and agree a more robust scheme for implementation and monitoring of the scheme. The Council should consult local residents with a view to

extending the scheme to all matches, not just those shown on the fixture list where attendance of over 5,000 is predicted.

113. The Council should review its procedures to ensure that information on liquor licences is available to the Licensing Committee when it considers entertainment licences for premises that have liquor licences. The Council should also monitor the operation of the licences to ensure that the extended hours do not cause significant problems for residents.
114. The Council should make the payment of £200 already offered to Mrs Wilkinson and extend payment to Ms Underwood who was similarly affected by the failures. The Council should also ensure that the procedural improvements recommended through its own investigation of this matter are implemented to avoid similar complaints in the future.
115. In addition, in recognition of the time and trouble they have taken in pursuing the complaints about planning consents and enforcement, the Council should make a payment of £250 each to Mrs Wilkinson and Ms Underwood.



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25 April 2005