
REPORT OF OMBUDSMAN ON COMPLAINT REGARDING A PLANNING MATTER

Responsible Cabinet Member(s) - Councillor John Williams, Leader

Responsible Director(s) - Paul Wildsmith, Director of Corporate Services
Richard Alty , Assistant Chief Executive (Regeneration)

SUMMARY REPORT

Purpose of Report

1. To consider action to be taken by the Council in response to a report from the Local Ombudsman on complaints number 03/C11999 and 03/C1337 against the Council in relation to a planning matter.

Summary

2. Under the Local Government Act 1974 the Council is required to consider any report from the Ombudsman in which maladministration causing injustice has been found in response to a complaint made to the Ombudsman. Complaints were made that the Council :-
 - (a) Failed initially to request a Listed Building Consent application
 - (b) Failed to consult English Heritage about the planning application;
 - (c) Unreasonably and inconsistently required widening of the existing access to the rear of the site;
 - (d) Unreasonably granted planning permission for the development and Conservation Area Consent for the demolition of some of the buildings
 - (e) Prevented its own Conservation Officer from commenting freely on a subsequent Listed Building Consent application; and
 - (f) Failed properly to consider objections to the Listed Building Consent application and unreasonably granted such consent.
3. The Ombudsman concluded that :-

‘the Council would not have approved the partial demolition of the long barn if it had approached the issues properly i.e. consulted English Heritage about the planning application; correctly interpreted the listing; applied the legal definition of a “listed building”; applied the tests set out in the national planning guidance and thereby, critically examined the highway “requirement” that underlay the proposed partial demolition.’
4. A copy of the Ombudsman’s report is attached as an **Appendix** to this report.

Recommendation

5. Council are requested to :-

- (a) Accept the report of the Ombudsman and appropriate action be taken to remedy the injustice as follows:
 - (i) Make a payment of £500 to Mr and Mrs B in recognition of the time and trouble in pursuing their complaint.
 - (ii) To ensure that all staff involved in dealing with the development control decisions are properly trained in the law and its own policies and procedures relating to listed buildings.
- (b) Note the strengthening of the planning function and the review of practices that has already been implemented to deal with matters arising from this complaint.

Reasons

6. The recommendations are supported by the following reason :-

The findings of the Ombudsman should be accepted in the absence of any fundamental flaw in the report and appropriate action should be taken to remedy any injustice.

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Assistant Chief Executive (Regeneration)

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Background Papers

Report of Ombudsman and covering letter of 11th December 2008.

S17 Crime and Disorder	This decision will have no impact on crime and disorder.
Health and Well Being	The decision does not impact upon health and wellbeing
Sustainability	There are no sustainability issues in relation to this decision
Diversity	This decision has not particular diversity issues
Wards Affected	This decision relates to all wards equally
Groups Affected	This report does not affect any particular group
Budget and Policy Framework	This report does not impact upon the Council's budget or policy framework
Key Decision	This is not an executive decision
Urgent Decision	This is not a decision which can be called in
One Darlington: Perfectly Placed	This decision has no particular impact on the Council's Community Strategy. The council has a

	legal obligation to consider this report.
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MAIN REPORT

Information and Analysis

7. The nature of the complaints have been set out in the summary. The report has been issued by the Ombudsman in accordance with legal requirements without referring to the real names of individuals concerned. That confidentiality must be respected and no reference should be made to the real names of individuals nor to factors which might help to identify individual complainants.
8. The investigation process involved the Ombudsman considering detailed comments submitted on behalf of the Council and carrying out interviews with complainants, Members and officers of the Council. As a result of the investigation, in accordance with normal practice, the Ombudsman issued a draft report inviting comments on factual matters contained in the report and any other issues. At that stage, the outcome of the investigation was not determined but an indication that no further remedy would be sought than that previously offered by the Council. A conversation with the Ombudsman and some comments were made in response to the draft report. Subsequently the final report was issued dated 11th December 2008. The recommendations regarding the way in which the Council ought to react to the report need to be considered by the authority.

The Complaint

9. Mr and Mrs B live in a conservation area on the main street near the centre of a village. They complained that the Council failed to deal properly with applications for a development next door to them that involved converting some listed agricultural buildings into homes, demolishing others and building new houses.
10. The Ombudsman has concluded that *“Council officers did not seem to understand the description of the buildings in the listing; did not apply the legal definition of a listed building and so did not require an application for listed building consent; did not address themselves to the appropriate national planning policies and guidance; and did not notify English Heritage and the National Amenity Societies.”*
11. The Council accepted at an early stage that it should have required Listed Building Consent for the proposed development and in 2006 referred the matter to the Planning Committee for listed building consent and the matter went to the committee four times before consent was granted.
12. There has been significant weight placed on the Council’s failure to consult English Heritage about the planning application. Planning permission was granted before it became apparent that LBC was required, and by then views sought from English Heritage were retrospective. Although one planning officer wrote to English Heritage requesting their views on the planning application, English Heritage spoke to another planning officer who said views were only required on the LBC application. English Heritage state that their views on the planning application would have been broader. It appears however that English Heritage were reluctant to provide views retrospectively and this lead to the confusion between the letter from the planning officer, and the view provided over the

telephone. However the process that was followed and the lack of views from English Heritage contributed to the Ombudsman's views, as follows :-

13. *“The reports on which the Planning Committee made its decisions were deficient. In particular, the report on which it decided to approve demolitions and conversions of the listed buildings failed :-*
 - (a) to correctly identify the buildings that were listed;*
 - (b) to explain the general presumption in favour of preserving listed buildings;*
 - (c) to clearly explain the proper tests for the committee to apply as set out in national Planning Policy Guidance 15 and confirmed by case law, i.e. first: will the proposed works significantly harm the listed building or its setting; second: if so, are the works desirable or necessary?;*
 - (d) to provide the information necessary to apply the second test;*
 - (e) to include a highly relevant point from an earlier decision by a Planning Inspector.*
14. *These failings were eclipsed by an earlier and fundamental flaw of not properly considering the applicant's justification for the demolition of part of a listed long barn. In an earlier decision, a Planning Inspector had judged the long barn to be an important component part of a group of buildings that ‘... possess, in my assessment, considerable group value, both in terms of the appearance and history of the village. They belong to a group...this group provides an important focal point within the village with the appearance of each building reflecting its origin and function...’*
15. *Having initially failed to require a justification, the planning officers then resisted English Heritage's recommendation to obtain one, and did not properly examine and consider the justification that was eventually obtained.”*
16. The Ombudsman also criticises the reliance on the view from the Highway Officer about the width of the access road which required the demolition of part of the long barn.
17. *“The justification for the partial demolition was to comply with the Council's requirements as Highway Authority about the width of the access road. This was based on an, unchallenged, ‘requirement’ originally specified by a Council Highways Officer that had not been required in other cases.’*
18. *The Highway's officer said that guidance had changed between the original view and the subsequent compromise. There were also differences between the ‘other cases’ and the particular case that was the subject of this complaint. Nevertheless the Ombudsman acknowledges that*
19. *“The Council has subsequently agreed an alternative access and approved an alternative development without the partial demolition of the long barn.”*
20. She goes on to acknowledge that :-

“Evidence shows the Council was willing to investigate matters thoroughly; admit that

errors have been made; and do its best to rectify these errors. The Chief Executive became personally involved and her approach was an exemplar of good practice and professionalism.”

21. The alternative access required a return to planning committee, and significant negotiation between the developer, the landowners and Mr and Mrs B, and eventually a solution was arrived at which saved the Long Barn. It has not therefore been necessary for the developer to demolish the building which was the subject of the errors outlined.
22. Mr and Mrs B however remain opposed to the whole development which is adjacent to their own property and continue to challenge the Council.

The Council's Response

23. The Council has taken significant steps to address the issues highlighted by the complaint during the complaints process including :-
 - (a) accepting and apologising for making a mistake in not requesting a Listed Building Consent application;
 - (b) requesting that application and bringing it to Planning Applications Committee (PAC) for decision;
 - (c) negotiating with the developer to bring forward an alternative solution which avoided the demolition of the long barn, persuading the developer to submit an application for that alternative, and PAC granting permission for the alternative solution in a way which modified and removed the previous permission to demolish part of the long barn
 - (d) apologising to the complainants and offering a payment for their time and trouble;
 - (e) responding to the complainants on the details of the scheme to a degree far greater than would normally be the case for an objector to a development.
24. The Council has also taken significant steps to avoid similar problems recurring including:
 - (a) strengthening the management capacity for planning services: in 2007 the Planning Services Manager post was effectively split in two, with a new manager appointed just for the development management parts of planning;
 - (b) appointing an independent organisation with national expertise in planning practice and procedure, Trevor Roberts Associates, to carry out a fundamental review of the Council's development control processes and introduce new procedures;
 - (c) Key individuals have all now changed since 2005: the development control team leader, the service manager and conservation officer are all different;
 - (d) independent training on Listed Building law, policy and procedure, now recommended by the Ombudsman, is being organised.
25. In summary the Council has accepted that there were errors made at an early stage in the planning process. These errors were acknowledged by the Council as early as 2006 and apologies by the Chief Executive in person, accompanied by other senior officers at the home of Mr and Mrs B failed to reach resolution. Neither the apologies the offer of recompense for time and trouble, or the saving of the long barn which was the focus of their original complaint have satisfied the complainants, who continue to be dissatisfied to the present.

Relevant Statutory Provisions

26. As this is only the third report finding maladministration causing injustice made by the Ombudsman against this Council, it may be useful to remind Members of the legal provisions relating to the consideration of the report. Section 31 of the Local Government Act 1974 provides that where the Ombudsman reports that injustice has been caused to a person in consequence of maladministration, that report must be laid before the Council concerned and it is the duty of the Council to consider the report and within the period of three months beginning with the date on which they received the report, or such longer period as the Ombudsman may agree in writing, to notify the Ombudsman of the action which the Authority have taken or propose to take. Additionally, the Ombudsman requires the publication of the report to be advertised in two newspapers circulating in the locality within a period of two weeks from issue of the report, indicating that a copy of the report is available for inspection for a period of three weeks from a date specified in the advertisement. That advertisement has been placed in the Northern Echo and the Darlington and Stockton Times.
27. Section 31 goes on to indicate that if the Ombudsman does not receive notification from the Local Authority of the action which the Authority has taken or proposes to take on the report within that three month period or is not satisfied with the action which the Authority concerned has taken or proposes to take or does not within a period three months beginning with the end of the initial period of three months, or any longer period agreed by the Ombudsman, receive confirmation from the Local Authority concerned that they have taken action proposed to the satisfaction of the Ombudsman, the Ombudsman will make a further report setting out those facts and making recommendations. Those recommendations are those which the Ombudsman thinks fit to make with respect to action which in her opinion the Authority concerned should take to remedy the injustice and prevent similar injustice being caused in the future. Again, that report has to be advertised in at least two local newspapers, at the expense of the Local Authority, and the Local Authority has a further period of three months in which to consider the further report.
28. If no satisfactory action is taken, in the opinion of the Ombudsman, in response to the further report or if the Ombudsman does not receive confirmation that the Authority have taken action as proposed to the satisfaction of the Ombudsman, the Ombudsman can serve a notice on the Local Authority requiring them to arrange for a statement to be published in the local press. That statement will be in an agreed format but will consist of details of any action recommended by the Ombudsman in her further report which the Authority have not taken, such supporting material as the Ombudsman may require and, if the Local Authority so require, a statement of the reasons for their having taken no action on, or not the action recommended in, the report.
29. That statement must be published in any two editions within a fortnight of a newspaper circulating in the locality as agreed with the Ombudsman and that publication has to be in the first of those editions on the earliest practicable date. If agreement cannot be reached between the Authority and the Ombudsman, the Ombudsman has power to arrange for a statement to be published, the cost of that to be reimbursed by the Local Authority.

Remedies

30. It is usual for the Ombudsman to suggest remedies which the Council ought to consider to put right the injustice arising from the maladministration and that she has done on page 18 of her report. For convenience, paragraph 68 setting out her findings are replicated below:-

The Council acted with maladministration in reaching its July 2005 decisions to approve the applications for planning permission and conservation area consent, because:

- *the officers did not appreciate that all the buildings (apart from one) were listed;*
- *applications for listed building consent were not required and so were not considered in accordance with national planning policy;*
- *the Council did not fulfil its statutory obligation to consult English Heritage, the Victorian Society and the Georgian Society and could not take into account any comments made.*

31. At the draft report stage at which the proposed outcome was indicated in the report, a conversation took place with the Ombudsman herself, during which the point was made that the Council had acknowledged errors in the handling of this matter and in the handling of the complaint, had offered to pay the complainants the £500 for time and trouble suggested by the Ombudsman and to review its own procedures. On that basis it is difficult to see why the Ombudsman has concluded that this case warranted a maladministration report rather than local settlement. At this stage this report would usually be prepared to gauge the authorities response to the proposed remedy and provide a response to the Ombudsman. The Council has already indicated a willingness to accept all the recommendations as part of the earlier complaints process. The report of the Ombudsman also makes it clear that the Council corporately, has been willing to investigate matters thoroughly; admit, where appropriate, that errors have been made; and do its best to rectify these errors. ‘The Chief Executive’s approach to their complaint seems to me to be an exemplar of good practice and professionalism’. The Ombudsman has also said that the complainants pursued a number of matters that were not upheld, and that the complainants continue to press these points with her. Despite this the Ombudsman has stuck by the view that this case warranted a maladministration report rather than local settlement. The Ombudsman did indicate that the Council had not had a maladministration report for some years and the Council should not be surprised to receive one every few years.
32. The finding must have two elements there must not only be maladministration, but that maladministration must lead to injustice. In this case it is very difficult to see what injustice has resulted because the long barn which is the building for which listed building consent and planning permission was granted for the demolition, was never demolished. The planning officers negotiated over an extended period between the adjacent landowner, the developer and the complainants to achieve an alternative outcome which prevented the demolition of the long barn, so the possible injustice never materialised. Nevertheless at the draft report stage the Ombudsman indicated that the injustice was the time and trouble which Mr and Mrs B were put to in pursuing their complaint. Time and trouble would not usually be seen as an injustice leading from the maladministration. The Ombudsman has taken a different view. The Stage 3 investigation report prepared as early as October 2006 by the Council’s investigating officer concluded that ‘When the complaint is determined by

the Local Government Ombudsman it is my view that the Council will be found guilty of maladministration' and this report was made available to the complainants. This may have placed the Ombudsman in a difficult position when reaching an alternative view.

Outcome of Consultation

33. No consultation has been considered necessary in relation to this report.