Local Government
OMBUDSMAN

Digest of Cases 2008/09

Section K

Planning

LGO 03 (03/08)

Introduction

We have included in this section a number of examples of councils failing to give proper consideration to planning applications. In many of the cases, problems arose because of a lack of attention to detail, failure to ensure compliance with policies, or making assumptions without carrying out basic checks.

In some of these cases, the Ombudsmen concluded that the failures did not significantly affect the outcome, but drew attention to the effect on public trust in councils and their planning procedures when such failures occur.

K1: Planning applications

Application for pitched roof over storage area – failure to take account of neighbour amenity – application fast-tracked for irrelevant reasons

The complaint

Mr L complained about the way a council granted planning permission for a new pitched roof to replace an existing flat roof over a store area at the rear of the corner shop standing at right angles to his house.

The Ombudsman's investigation

For over 40 years Mr L lived in an end-of-terrace house next to a corner shop. For several years the shop owner used the rear yard as a storage area. This was covered by a flat roof of rigid 'plastic' sheeting that took part of its support from Mr L's garden wall, which lay at right angles to the building line of the house and parallel to the kitchen window with about four or five feet separation. This flat roof did not have planning permission.

When the shop owner applied for planning permission for a pitched roofed storage area, the case officer 'fast tracked' it on health and safety grounds. He said he did a site visit but there were no notes; he said he took photographs but there were no photos; he said he properly considered the application but he said he did not see Mr L's letter of objection which, although registered on the council's computer system, had been lost.

Mr L says the structure was so overbearing and shadowed his living room to such an extent that he and his wife became depressed and sold their home.

The Ombudsman's view

The Ombudsman said the council's consideration of the application was "administratively flawed from the outset" and criticised the lack of recording of site visits, the loss of a letter of objection,

the taking into account of food hygiene concerns that were not material planning considerations, and the failure to consider the neighbour's amenity or the provisions of the local plan properly.

The Ombudsman added:

"I conclude that without maladministration this large structure, having considerable impact on [Mr L]'s amenity, would not have received planning permission in its present form."

Outcome

The Ombudsman found maladministration causing injustice in the way planning permission was granted, and recommended the council to:

- obtain an independent valuation of Mr L's property with and without the adjoining store, and pay Mr L any difference;
- pay £500 to Mr L in recognition of the distress, anxiety, inconvenience he was caused, and his time and trouble in pursuing this complaint;
- review the resources allocated to the planning department; and
- review record keeping and, in particular, the procedures for allocating and fast tracking applications and handling correspondence in relation to planning applications, to ensure that the maladministration identified here did not recur.

(Report 06B17141)

K2: Planning applications

Errors in consideration of planning application – neighbour unable to open window – council agreed to pay for replacement window and make payment for loss of value of property

What happened

Mrs W's neighbours made a planning application for an extension to their property. Mrs W objected and repeatedly requested a site visit so that the effect of the proposal could be properly assessed.

There were a number of errors in the way the application was dealt with by the council, including a failure by the case officer and the principal planning officer to recognise that a proper assessment could not be done from the drawings that had been submitted. As a result, the application was approved. When the extension was built Mrs W could not open the window in her ground floor bedroom.

The outcome

The council accepted that there were failures in the process and that if a visit had taken place the application would either have been rejected or an amendment sought.

In recognition of the effect of its failures, the council agreed to:

- pay for the cost of changing the bedroom window to a sash window so that it could be opened;
- compensate Mrs W by paying her the equivalent of the difference in value to her property, which was assessed independently as £10,000; and
- make a payment of £150 to Mrs W for the time and trouble she took in pursuing the complaint.

The council also agreed to change its procedures.

(Case reference confidential)

K3: Planning applications

Council's own application for school extension – failure to apply for listed building and conservation area consents – undermining public trust

The complaint

Five people complained about the way a council handled a planning application to build a single-storey and two-storey extension to a school. The application was submitted by the council itself in its role as local education authority (LEA). The complainants also alleged that the development was larger than indicated by the approved plans.

The Ombudsman's investigation

The LEA applied for planning permission at the school in order to accommodate an increase in pupils. The school was located next to a park that was public open space and metropolitan open land (MOL) and both school and park were in a conservation area. Their boundary walls were Grade II listed and there was a Grade I listed house in the park, approximately 550 metres from the school.

The council acknowledged that it failed to apply to the Secretary of State for either listed building consent or conservation area consent, both of which were required. The council also:

- did not take adequate care to ensure that some of the letters notifying residents of the application were correctly addressed, and this contributed to a missed opportunity for the complainants to object to the application;
- failed to identify correctly the status of one complainant's property in the committee report, and this meant he could not be certain that his amenity had been properly considered; and
- failed to keep notes of the site visit to record the officer's contemporaneous assessment of the site or an audit trail of that assessment.

The Ombudsman's view

The Ombudsman said:

"Few things cause more disquiet than when the council appears to have given itself preferential treatment in the planning process. Here it seems to me that such an appearance has arisen more through sloppy administration than through deliberate intent."

He added: "As it was considering its own proposals for development, the council should have ensured that it was meticulous in complying with procedures for considering the application and that it was transparent in doing so. Its failure to do so here undermines the council's ability to earn the trust of the public."

Outcome

Although the Ombudsman was not persuaded that the outcome would have been any different had the maladministration not occurred, he considered that the complainants had a justified sense of outrage.

The Ombudsman found maladministration causing injustice and recommended that the council:

- pay compensation of £1,500 to one complainant and £500 to each of the other four complainants;
- review whether the development was being built in accordance with the plans;
- review its procedures for considering applications for council developments; and
- review its practice in respect of recording and retaining site visit notes by planning case officers.

(Report 06B05262 and four others)

K4: Planning applications

Application for sports stadium redevelopment – some procedural failings – decision not undermined

The complaint

Thirty residents who live close to an established sports stadium complained that there were errors in the way a council dealt with a planning application for its redevelopment and enlargement. They said they would be caused an avoidable loss of amenity and suffer increased levels of disturbance, inconvenience and pollution from increased traffic.

The Ombudsman's investigation

The sports stadium was located in a densely populated residential area and was shared by a football club and a rugby club. The football club submitted a planning application proposing redevelopment of the stadium to provide a new 18,000 seated (18,500 capacity) stadium and ancillary accommodation, together with a hotel, student flats, a restaurant, a convenience store, conference facilities, offices, parking, landscaping and other associated works.

The redevelopment did not fall into the category where an environmental impact assessment (EIA) was mandatory, but the council considered if one was required, and decided that it was not.

The football club made two major changes to the original scheme before the application was determined by the council's development control committee. The council notified residents of the first set of revised plans, but not the second set. The Ombudsman considered that residents should have been consulted and the failure to do so was maladministration. But he was not persuaded that, had they had more time to consider and comment on the changes proposed, they would have had grounds for additional objections likely to alter the planning outcome.

Councillors attended private pre-application briefings by, and meetings with, the football club but, contrary to the council's planning code of conduct, the council's planning officers were not always present and discussions at the meetings were not recorded. That was maladministration. However, there was no evidence that members of the development control committee expressed clear support or opposition to the planning proposal at the briefings or that they otherwise prejudiced their position in advance of the committee meeting. However, this led to legitimate concerns for those who objected to the development under consideration.

The planning application was determined by the development control committee. Eleven councillors attended the meeting, three of whom were substitutes. It was not clear if they had been formally appointed to the committee, and that was maladministration. But they were all properly trained in the planning process and there was no evidence that the planning outcome was affected by the substitutions.

The report to committee failed to adequately describe the traffic that would be generated by the proposed enabling development, and more detailed information about air quality and pollution might have been included. But these omissions would not have affected the officers' recommendation or the members' vote.

The Ombudsman's view

The Ombudsman said:

"In my view, the maladministration I have identified was at the margins of the complex consideration that the council had to give to this development proposal." He added: "In those circumstances, although I recognise the complainants' outrage that the council's failings will have caused, their injustice is insufficient for me to recommend to the council that any compensation payments are due."

Outcome

The Ombudsman asked the council to put right failings that he said had "needlessly given rise to suspicion". It should review the implementation of its policies and procedures in respect of:

- consultation on planning applications;
- consideration of environmental impact;
- substitution of members at planning committees; and
- its planning code of conduct.

(Report 07B02878 and 29 others)

K5: Planning applications

Application for development in conservation area including partial demolition of listed barn – failure to apply for listed building consent – wrong advice given to planning committee

The complaint

Mr and Mrs B lived in a conservation area on the main street near the centre of a village. They complained that a 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. One listed building, a long barn, was set to be partially demolished.

The Ombudsman's investigation

The Ombudsman's investigation found 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.

The reports on which the planning area committee made its decisions were deficient. In particular, the report which it relied on when deciding to approve demolitions and conversions of the listed buildings failed:

- to correctly identify the buildings that were listed;
- to explain the general presumption in favour of preserving listed buildings;
- 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, that is, first: will the proposed works significantly harm the listed building or its setting?; second: if so, are the works desirable or necessary?;
- to provide the information necessary to apply the second test; and
- to include a highly relevant point from an earlier decision by a planning inspector.

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.

The council subsequently agreed an alternative access and approved an alternative development without the partial demolition of the long barn.

The council's planning committee was not properly advised and therefore not able to take all relevant matters into account when reaching its decisions. The complainants were very upset about the potential loss of the long barn that formed an important part of the character of their village, and the Ombudsman said:

"That loss has now been avoided but only because of their indefatigable efforts."

Outcome

The Ombudsman concluded that the council would not have approved the partial demolition of the long barn if the committee had been properly advised. However, she did not believe that the council would have refused permission for other aspects of the development.

Mr and Mrs B took a great deal of time and trouble in pursuing their complaint with the council and this was the injustice caused to them by the council's maladministration. The council had already offered £500 to Mr and Mrs B in recognition of this, and the Ombudsman confirmed that was an appropriate remedy.

The council said it had restructured and strengthened its planning function and reviewed its practices. The Ombudsman urged it to also ensure that all staff involved in dealing with development control decisions were properly trained in the law and its own policies and procedures relating to listed buildings.

(Report 06C05668)

K6: Planning applications

Application for barn conversions in countryside – failure to require new application when it was found that extensive demolition would be needed – failure to protect neighbour from impact of traffic

The complaint

Miss S lived in the countryside in a former farmhouse. A council gave planning permission to a developer to convert barns close to the farmhouse into three dwellings. The council's planning policy was to allow such conversions if the original buildings were structurally sound and the bulk of the original external fabric would remain.

The Ombudsman's investigation

The council's planning officers said that the impact on Miss S of traffic to and from the three dwellings would be a reason to refuse planning permission. They recommended that this could be overcome by a new access road. Planning permission was granted on the condition that a new road should be approved and built before work began to convert the barns.

Structural problems were found with the barns after work had begun. A planning officer visited the site and wrote to the developer saying "…any demolition and rebuild would invalidate the planning permission…" He went on to say that the council would "…sanction a degree of demolition and rebuild in order to allow the proposed development to proceed..." The planning officer also sent

the developer a marked plan showing what he believed had been agreed, but the plan was ambiguous and there was no other record of the meeting.

The planning condition requiring a new access road did not fulfil the council's intention of protecting Miss S from being disturbed by traffic to the three dwellings. It did not stop people from using the old access and could not prevent people who had rights to use the original road from doing so. The developer had such rights and insisted on using them for construction traffic. Fortuitously, as part of a further planning permission affecting the site, the council was later able to impose a condition requiring all access to the three dwellings to be from the new road.

The Ombudsman's view

The Ombudsman found maladministration by the council because:

- it decided to accept extensive demolition of the barns without requiring a new planning application that it would have dealt with in accordance with its policies; and
- it failed to implement its intention to prevent traffic from using the original access and passing close to Miss S's home effectively.

Outcome

As a result of the council's maladministration, Miss S was deprived of an opportunity to object to planning permission being given for a development that was contrary to the council's policy, and was subject to noise and other disturbance, principally from construction traffic. The Ombudsman recommended that the council should pay Miss S £500 in recognition of that disturbance and her time and trouble in pursuing her complaint.

(Report 07C06505, 06730 and 15320)

K7: Planning applications

Failure to consult residents about plans for multi-use games area – failure to take account of relevant guidance

What happened

Mr L lived near an open area that the district council decided to occupy under licence from the county council and develop it as a multi-use games area. The development was the subject of a planning application made by the district council's leisure services department to its planning department. Mr L complained that the council failed to:

- consult local residents when it decided to relocate the play area;

- notify them of the planning application; and
- take into account the effect on them of the proposed development.

The Ombudsman's findings

There were some failures by the planning department in the notification procedure. But the issues that residents raised after the planning committee meeting had been referred to in the report to the committee. So the failures had no significant adverse effect.

However, there were criticisms of the leisure services department for:

- failing to have regard to its own policies, which required consultation with local residents;
- incorrectly informing the Ombudsman that the facility was not a multi-use games area, despite it being described as such in internal documents; and
- failing to respond to residents' concerns about disturbance and parking problems.

The outcome

The council accepted that it had not properly consulted residents or the local police before commissioning the facility. The council agreed to:

- consult local residents and consider available guidance to agree improvements to the site, such as moving equipment away from houses, providing additional planting and improving security measures;
- ensure the site was locked every night;
- discuss with the county council (the highway authority) any measures that might resolve the parking problems around the site; and
- make a payment to Mr L of £250 for the time and trouble he had taken in pursing the matter.

Mr L said he was not seeking financial recompense and rejected the payment.

(Case reference confidential)

K8: Planning applications

Failure to properly consider an application for a wind turbine

Summary

The council dismissed concerns about the effects of ‘shadow flicker’ from a nearby wind turbine without any investigation. It said it was not possible for it to occur at that location. However, it had misunderstood what planning guidance about ‘shadow flicker’ said, and had failed to carry out elementary calculations that would have shown that the complaint was valid.

Background

Shadow flicker is a strobe-like phenomenon which occurs when sunlight passes through the blades of a rotating wind turbine. The relevant guidance for the council when dealing with an application for a turbine is Planning Policy Statement 22 (PPS22). This says that in the UK shadow flicker can only affect properties within 130 degrees either side of north of a turbine. Any council considering an application for a wind turbine should be mindful of PPS22 and what it says.

The complaint

Mr K complained to the council about a neighbour’s wind turbine which was erected near his property in 2006. He had raised concerns about shadow flicker during the application process but the council did not carry out any formal assessment in line with PPS22 and the application was approved.

After the turbine was installed, Mr K complained to the council about shadow flicker and said that it affected several rooms in his house, including two bedrooms and a dining room, and made them uninhabitable during several months of the year at the times when the sun was low and shone through the rotating blades.

The council said this was impossible. It quoted the relevant part of PPS22 that “only properties within 130 degrees either side of north could be affected”. It said that Mr K’s property was south east of the turbine and therefore could not be affected.

Mr K continued to maintain that there was a problem and asked the council to go out and look for itself. He also offered the council a video he had made of the problem but the council continued to respond that it was not possible to experience shadow flicker at his property and took no steps to investigate.

Mr K then employed a solicitor to pursue his complaint, but despite the council initially saying it would have the matter investigated by the environmental health department, once again the council took no action. Mr K then brought his complaint to the Ombudsman.

The investigation

A map of the location was obtained and the compass points were marked on it radiating from the turbine. Two lines were marked on the map to show where 130 degrees either side of north were. It was clear that Mr K's property fell within this 130 degree area.

PPS22 is clear and there is no room for misinterpretation. The council made a mistake in thinking that because Mr K's property was to the south-east of the turbine it could not be included in area 130 degrees either side of north.

The outcome

Once the error was pointed out to the council it agreed to take the following action:

- pay Mr K's legal costs plus £250 time and trouble;
- arrange for the production of a consultant's report and take action based on the recommendations; and
- review its procedures to ensure the error was not repeated.

(Case reference confidential)

K9: Planning enforcement

Complaints about odour from maggot farm – council's response inadequate

The complaint

Mr X and his neighbours had made a number of complaints to the council about odour coming from a nearby maggot farm. Mr X complained to the Ombudsman that the council had failed to deal with the complaints and failed to monitor compliance with the permit conditions properly or to take appropriate enforcement action.

Legal background

The operation of maggot farms is governed by the Pollution Prevention and Control Act 1999 and accompanying regulations. The operators of maggot farms are required to hold a permit and local councils have a duty to ensure compliance with the conditions of the permit. Government guidance states that "local authorities will need to investigate incidents where offensive odour escapes across the site boundary to establish whether there has been a breach of any odour conditions."

The Ombudsman's investigation

The information provided by the council showed that it had received 156 complaints in a year. The council appeared to discount the importance of these complaints by emphasising that Mr X was the principal complainer, having made 43 of these complaints. It also stated that in August of that year, 41 service requests were made from "just 10 individuals". In the Ombudsman's view the fact that 10 individuals had made separate complaints was significant evidence that there was a potential problem in a localised area. The council responded to many of the complaints when the smell was reported to be particularly bad by visiting the maggot farm. However, there were few recorded visits to the area where the people who were reporting the smells lived.

The council commissioned an independent consultant to inspect the maggot farm. The consultant made recommendations for improvements to the management of the farm to reduce the risk of odours. It was unclear from the council's records whether it took action to ensure that the recommended improvements (some of which related to conditions attached to the permit) were implemented.

The outcome

The Ombudsman found that, although there had been some response to the problems described by Mr X and his neighbours, the council had:

- failed to fully investigate the reports of odour coming from the maggot farm;
- failed to properly consider and act upon the findings of an independent consultant's assessment; and
- failed to monitor compliance with the permit effectively.

The council agreed to put in place an action plan for monitoring and dealing with reported odour from the farm in time for the subsequent breeding season. It also made a payment of £250 to Mr X in recognition of the time and trouble he had taken in pursuing the complaint.

(Case reference confidential)

K10: Planning enforcement

Use of school premises outside normal hours – caused disturbance – unco-ordinated response from different departments – delay in resolving problems

Background

Mr and Mrs D lived adjacent to school grounds and they complained that after school use of the site was too extensive and too noisy. The premises were used throughout the week and at weekends for private sports clubs for children and adults, wedding receptions, private parties and car boot sales. The continuous use of the premises created an ongoing disturbance and some of the noise was early in the morning and late at night.

The council's environmental health team initially wrote to the school but failed to follow up and carry out an assessment of the noise. The planning department considered whether the use of the premises amounted to a change of use and wrote to the school on a number of occasions, but it later ceased its investigation when the education department became involved. Eventually the education department held a meeting with representatives of the school to discuss its lettings policy. Although it agreed actions, including a review of the lettings policy and consultation with neighbours, no-one followed up to ensure that this action was taken.

The Ombudsman's investigation

The Ombudsman found that the council failed to identify a department to take the lead and co-ordinate the investigation into the complaint. The environmental health department's response was inadequate and although the planning department visited Mr and Mrs D and contacted the school on numerous occasions, it failed to properly explain to Mr and Mrs D why it ceased its investigation when the education department became involved. The education department should have used its influence to resolve the complaint and should have ensured that the agreed actions were implemented appropriately.

Communication with Mr and Mrs D concerning their complaint was poor and they felt that the council was ignoring their concerns. The Ombudsman found that, had it not been for the council's unco-ordinated approach, matters could have been resolved much sooner than was the case.

The outcome

The Ombudsman found maladministration causing injustice and recommended that the council should:

- write to Mr and Mrs D to apologise and send them a cheque for £1,000;

- carry out a review of the lettings policy for the school and consult Mr and Mrs D concerning the contents;
- provide Mr and Mrs D with details of a named council officer in the education department who they can approach should new problems arise.

He also recommended that the council update its advice to schools regarding the use of their premises and review its procedures for dealing with future complaints of this nature.

(Report 07B08363)