

Report

on an investigation into
complaints 07/C/06505, 07/C/06730 and
07/C/15320 against
Easington District Council

12 December 2008

Investigation into complaint no Easington District Council against Easington District Council

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Key to names used

Miss S - the Complainant

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

This report has been produced following the examination of relevant files and documents and interviews with the complainant and relevant employees of the Council.

The complainant and the Council were given a confidential draft of this report and invited to comment. The comments received were taken into account before the report was finalised.

Report summary

Building Control, Enforcement and Building Control

Miss S lives in the countryside in a former farmhouse. The 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 developer submitted structural engineers' reports. A Conservation Officer from the County Council commented that the barns were in poor condition and recommended that the architectural quality did not justify planning permission being given.

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 re-build 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. The plan is ambiguous and there is no other record of the meeting.

The Ombudsman found that the Council acted with maladministration because:

- Councils did not, at the time, have the power to amend a planning permission once it has been granted¹;
- the 'approval' given by the planning officer was contrary to the Council's policy;
- a new planning application should have been submitted to the Committee;
- the records are woefully inadequate.

¹ Section 190 of the Planning Act 2008 allows non-material changes to a planning permission be made in certain circumstances.

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. This was because 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 has now been able to impose a condition requiring all access to the three dwellings to be from the new road.

Finding

Maladministration causing injustice.

Recommended remedy

The Ombudsman found that the Council had acted with maladministration because the planning application could have been refused because of the impact on Miss S of traffic. The Council approved planning permission with a condition designed to restrict traffic on the original road, thereby making the proposed development acceptable. The condition was ineffective because it did not stop the old access from being used. Government circular 11/95 contains a model condition that would have been effective.

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 notes that the Council now appears to have found a way of restricting traffic and recommend that it should pay her £500 in recognition of that disturbance and her time and trouble in pursuing her complaint.

Miss S also complained about drainage and sewerage issues but the Ombudsman found that the Council did not act with maladministration.

The Complaint

1. Miss S lives in the countryside in a former farm house. She does not own the barn buildings that were originally part of the farm. A shared access to the house and the barns runs very close to the house. Her septic tank is on the land that goes with the barns. The Council gave planning permission for development converting the barns to three properties for residential use.
2. Miss S complains that:
 - the development has turned into a new-build scheme rather than a conversion;
 - a new access intended to meet some of her concerns about construction and other traffic for the scheme is not being used;
 - the construction work may have damaged her drains.

Background

3. The Council's policy is to allow buildings in the countryside to be converted for residential use, if:
 - there is no adverse effect on the amenity character and appearance of the area and
 - the character of the building is not damaged or substantially altered;
 - the buildings to be converted are in sound structural condition;
 - the proposals do not require '*...the removal of the bulk of the external fabric of the building such as the roof structure*';
 - there is an expert structural survey with the application for planning permission.

Any application that involves extensive rebuilding will be considered as new building in the countryside and will normally be refused².

4. The Council received a planning application to convert the barns into three dwellings. There was an engineering consultant's report with the application that said that the roofs of the barns would have to be removed but most (though not all) of the external walls could be retained. The Council's Structural Engineer was consulted on the application and said the recommendations in the report were reasonable.

2 Easington District Council Local Plan, Policy 70 and 68 and para 5.43

5. Durham County Council's Conservation Officer was consulted. She said she was impressed with the quality of the proposals but that when she inspected the site the barns were in very poor condition. She recommended that planning permission should be refused because the architectural quality of the barns did not justify conversion.
6. Miss S expressed worries about the effect of the development on her amenity due to the shared access very close to her house. She was concerned about being disturbed and that the drainage system might be damaged, particularly during construction. She also expressed concerns about the septic tank and about possible overlooking. However, she said that her reservations might be overcome by some compromise measures, including the construction of an alternative access, which the developer agreed to provide.
7. Officers recommended the Council's Development Control and Regulatory Panel, to approve the planning application. The report to the Panel said that the proposals were in accordance with relevant policy. Miss S's worries about the drains were said to be essentially private matters and not the concern of town planning. The report acknowledged the development would have an impact on Miss S from increased traffic and this "*would be sufficient to warrant refusal of the application*" but could be overcome if the applicant constructed a new access road. The Panel approved the application subject to a condition that plans for a new access should be submitted and approved and built before work began to convert the barns.
8. The new access road was approved and built but the Developer's construction traffic continued to use the original access road - sporadically at first but more frequently for a time from the end of 2007. Miss S reports that the Developer continues to use the original access, causing her disturbance and distress. The Developer took out and re-routed some of the drains on the site that served both properties. Large sections of the barn walls were taken down and rebuilt in new materials. Two of the barns were completely demolished and rebuilt and the third was substantially rebuilt.

Demolition of most of the barn structures

9. A meeting took place on the site between the Builder, the Council's Planning Case Officer (who had recommended approval of the application) and a building control officer (concerned with more technical aspects of construction) to consider a request from the Developer to remove some of the walls of the existing structures.

10. After the meeting, the Case Officer wrote to the Developer on 21 May 2007 saying:

"In principle planning permission has been approved for the conversion of the existing structure and any demolition and re-build would invalidate the planning permission granted. However, in this instance the Local Planning Authority are content to sanction a degree of demolition and rebuild in order to allow the proposed development to proceed in accordance with relevant building regulations and the approved plans"

The Case Officer annotated a plan showing what he believed had been agreed at the meeting and sent it to the Developer. There are no other notes of the meeting.

11. Councils did not, at the time, have any statutory authority to amend a planning permission once a decision notice had been issued³. If changes were needed, a new application was required, either for a new planning permission or to amend or delete a planning condition. The Council says that doing this would have rendered the planning system unworkable and that approved details are commonly altered during construction due to unforeseen contingency. It has given a number of reasons why it believes that the Planning Officer's decision to allow the rebuilding was correct.
12. In considering whether the Council acted with maladministration, I note that:
- a Panel of councillors had been assured that the barns could be converted and had approved planning permission on that basis;
 - at the time it was accepted that the demolition was contrary to what had been approved;
 - new building in the countryside is contrary to the Council's policy and will not normally be approved;
 - there is no record to explain why demolition was needed;
 - there is no contemporaneous justification for the decision;
 - the decision was taken by the Case Officer, without any reference to anyone else.

³ This has now changed with Section 190 of the Planning Act 2008 which allows non-material changes to be made in certain circumstances.

13. The decision was taken with maladministration on these points and there was no lawful authority to amend the planning permission. The Council now accepts that it should have required a new planning application and dealt with it in accordance with its policies.
14. The Developer had a great deal to gain from being allowed to demolish and rebuild the barns. There is no suggestion that the Planning Officer acted improperly or corruptly but has left himself vulnerable to such suspicions by not making clear notes of his action and reasons and by not involving other officers.
15. The way the Planning Officer agreed to allow the demolition and rebuilding caused a further problem. The accompanying annotated plan was ambiguous and enabled the Developer to demolish more of the barn walls than the Officer had intended.
16. More problems affecting the structural stability of the remaining buildings were identified later and the Developer pressed the Council to allow more demolition. Structural engineers were commissioned to produce reports and both the Developer and the Council sought legal advice. In July 2008 the Council told Miss S that it would be seeking a planning application for demolition and re-building work, then taking place on the third barn. However, no such application was received for this work.
17. Did the Council's maladministration in the way that it dealt with the changes cause an injustice to Miss S?
18. Miss S expected the planning permission to result in the barns being restored to what she describes as their 'former glory'. Instead, she now lives close to what are in effect newly built modern houses that she dislikes. She has gone to time and trouble to research planning law in order to confront the Council about its actions. She did not have the opportunity to object to a development of new build property in the countryside.
19. The Council's failure to require a planning application for the changes did deprive Miss S of an opportunity to object. However, the condition and appearance of the barns was poor and replacing them with modern buildings can not be said to damage the amenity of neighbours. Miss S did not need to research planning law to the extent that she did.

Traffic and access

20. A planning condition will be unlawful⁴ unless it fairly and reasonably relates to the development to be permitted. The Council intended to prevent traffic associated with the new development from using the access road close to Miss S's home. It attached a condition to the planning permission to try to achieve this aim i.e. that an alternative access must be constructed before work on the development began.
21. Circular 11/95 sets out Government guidance on use of planning conditions. In the context of conditions for outline planning permission and access to highways, the Circular says "*...if it is desired...that access must be taken from a particular road, a condition to that effect should be imposed....*" The Circular also contains a model condition "*Means of vehicular access to the permitted building shall be from.....Road only*".
22. The Developer has rights to use the original access and, the Council says that others enjoy the same rights. The Developer's solicitor argues that, his clients, their successors and other parties retain the rights they had before the condition for a new access was imposed and that such rights cannot be extinguished by a planning condition.
23. In its comments on a draft of this report, the Council makes a distinction between traffic generated by the new development, which it has tried to restrict from using the original access, and other traffic which cannot be prevented from using private rights that existed before the development. It points out that Miss S bought her property in the knowledge that such rights existed.
24. Miss S has not been protected from disturbance because the planning permission did not include a condition that the new development should only be accessed from the new road.
25. The Council says that at the time of the application, there was no indication that Miss S would be disturbed by construction traffic or people using existing access rights. It suggests that problems arose following a breakdown in relations between Miss S and the Developer. However, the Council did not consider whether access to the development should only be allowed from the new road. It failed to consider an effective way of protecting Miss S from the impact of traffic, which its officer judged would have been sufficient reason to

⁴ See, for example DoE Circular 11/95 The Use of Conditions in Planning Permissions, eg paras 24-25

refuse the planning application. Whilst the Council could not prevent the developer from exercising his right to use the existing road, it could have prevented him from doing so in order to get to and from the new development. This would have stopped construction and other traffic from passing very close to Miss S's home.

26. The Developer's representatives and the Council corresponded about access throughout 2008. The Developer applied for planning permission to extend one of the dwellings and to provide additional garaging. The Council took this as an opportunity to try to resolve the matter. In October 2008 it approved the application subject to a legal agreement⁵ designed to prevent the original access road being used by anyone to get to and from the entire new development. The agreement is currently being prepared.
27. Miss S is not happy with this approach because the legal agreement will not extinguish existing private access rights and it could be modified, after five years, by an application to the Council or an appeal to the Secretary of State. However, any planning condition could be amended in the same way at any time. The use of a Section 106 agreement introduces a five year delay.

Drainage

28. Miss S's drains run across the development site into a septic tank on land that is part of the development site. One of her initial concerns was that the drains would be damaged by traffic using the original access and by the developer re-laying and re-routing some of the drains. Miss S was also concerned that this work might not meet building regulation requirements. The Developer began work on the drains before applying for building regulation consent. After Miss S contacted the Council, its Building Inspectors inspected the work and gave a completion certificate indicating that the work complies with the regulations, as far as the Building Control Authority is able to tell. By this point, Miss S's relationship with the Council had deteriorated.

⁵ under Section 106 of the Town and Country Planning Act

29. Miss S has two specific concerns: an inspection chamber cover which has been damaged, apparently by traffic, and what she sees as an unsatisfactory connection between the septic tank and newly laid pipework. The Council's Building Inspector says that the connection is satisfactory. Construction work on the site is not yet completed and the Developer proposes to replace the septic tank.
30. If the drainage arrangements were to fail and make the premises '*...prejudicial to health or a nuisance...*' the Council could use its enforcement powers under the Environmental Protection Act 1990. Miss S could make a further complaint to me if the possible need for enforcement powers arises and she is not satisfied with the Council's response.

Findings and remedy

31. The Council acted with maladministration in:
 - its decision to accept extensive demolition of the barns and new building without requiring a new planning application which it would have dealt with in accordance with its policies;
 - failing to effectively implement its intention to prevent traffic from using the original access and passing close to Miss S's home.
32. This maladministration caused Miss S the injustice of: lost opportunity to object to a development that was contrary to the Council's planning policies; disturbance from traffic passing very close to her home, particularly construction traffic for the new development; and fear of further disturbance in the future.
33. The Council did not act with maladministration in the way it dealt with the drainage and sewerage issues.
34. The Council has now sought to resolve the issue of access by making a new, further planning permission subject to a legal agreement preventing anyone from using the original road to access the new residential development. This is a satisfactory attempt to remedy the injustice of the disturbance caused to Miss S by its maladministration. The principal cause of the disturbance to Miss S has been the developer's decision, on occasion, to ignore the new alternative access and use his existing rights over the original access.

35. I recommend that the Council should also:

- send a copy of the completed legal agreement to me as part of its response to this report;
- pay Miss S £500 in recognition of the time and trouble she has had in pursuing her complaint;
- produce guidance and train officers to assess technical documents such as the consultant's report on the structure of the barns that was submitted with the planning application.



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