

**Subject:** Local Government Ombudsman  
Investigation

**Status:** For Publication

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**Report to:** The Full Council

**Date:** 30<sup>th</sup> November 2006

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**Report of:** Linda Fisher, Head of Planning and Legal & Democratic Services

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**Portfolio**

**Holder:** Councillor Ormerod

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**Key Decision:** NO

Forward Plan  General Exception  Special Urgency  "X" In  
*Relevant Box*

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**1. PURPOSE OF REPORT**

1.1 To inform Members of the outcome of the Local Government Ombudsman investigation into a complaint of maladministration on the part of the Council

**2. CORPORATE PRIORITIES**

2.1 To be responsive and proactive to meet the needs of customers

**3. RISK ASSESSMENT IMPLICATIONS**

3.1 All the issues raised and the recommendation(s) in this report involve risk considerations as set out below:

- Finding of maladministration by the Local Government Ombudsman

**4. BACKGROUND AND OPTIONS**

4.1 There is an obligation under Section 30 of the Local Government Act 1974, which requires the Council to publicise and give consideration to the findings of the Local Government Ombudsman (LGO), in cases where evidence of maladministration is determined on the part of the Authority.

4.2 The LGO has investigated a complaint about long delays by the Council in completing legal agreements with developers.

- 4.3 The LGO found that the Council's delay constituted maladministration and advised that a payment of £2,500 should be made. They also advised that the Council should introduce a procedure to make sure that planning applications over 8 weeks old are monitored regularly and determined as soon as possible.
- 4.4 The Ombudsman did not consider it reasonable to pay compensation for loss of business revenue and interest caused by the delay. This being due to the fact that the developer could have appealed to the Secretary of State for non-determination.
- 4.5 The Council has subsequently taken several actions to improve its Planning Services including:-
1. The appointment of a Head of Planning and Legal and Democratic Services until September 2007 with responsibility for managing the Team.
  2. The introduction of a system to monitor all planning applications which are currently in the system. This will enable Officers to monitor deadline dates and anticipate applications with Planning Agreements under Section 106 of the Town and Country Planning Act 1990
  3. The Development Control Manager now receives a weekly report on planning applications which require determination that week.
  4. A database of precedent Section 106 Agreements is currently being produced.
  5. A system of pre-application discussions has also been introduced; developers are being asked to agree "Heads of Terms" on Section 106 Agreements on a "without prejudice" basis prior to submission of planning applications. This will allow agreements to be agreed in principle prior to the application being submitted.
  6. An internal protocol on Section 106 Agreements is currently being produced.
  7. A Developers' Forum and a Public Forum are being established to communicate effectively with the Council's customers and to receive feedback on the delivery of the Planning Service.
  8. The approval of a select list of specialist planning support.

4.6 A copy of the full report is attached for information

4.7 Not to accept the findings of the Local Government Ombudsman

## **5. COMMENTS OF THE HEAD OF FINANCIAL SERVICES**

5.1 The Local Government Ombudsman has awarded a payment of £2,500

## **6. COMMENTS OF THE HEAD OF LEGAL AND DEMOCRATIC SERVICES**

6.1 Appropriate action has been taken in response to the Local Government Ombudsman's Report.

## **7. COMMENTS OF THE HEAD OF HUMAN RESOURCES**

7.1 The Council has appointed a Head of Planning and Legal & Democratic Services until September 2007.

## **8. CONCLUSION**

8.1 The Report should be accepted

## **9. RECOMMENDATION(S)**

9.1 That Members note:

1) the implications of the findings of maladministration on the part of the Council and the remedial actions that must be taken,

2) the actions taken by the Head of Planning and Legal & Democratic Services more effectively to monitor and performance manage planning applications and Section 106 Agreements.

## **10. CONSULTATION CARRIED OUT**

10.1 Leader of the Council, the Cabinet, Head of Legal & Democratic Services, Head of Customer Services & E-government.

<b>Contact Officer</b>	
Name	Linda Fisher
Position	Head of Planning and Legal & Democratic Services
Service / Team	Planning
Telephone	01706 252447
Email address	<a href="mailto:lindafisher@rossendalebc.gov.uk">lindafisher@rossendalebc.gov.uk</a>

Background Papers	
Document	Place of Inspection
The Commission for Local Administration in England Report on an investigation into complaint No. 05/C/00542 and 05/C/08792	Kingfisher Business Centre, Futures Park, Bacup.



The Commission for  
Local Administration in England

**Report**  
on an Investigation into  
Complaint Nos 05/C/00542 & 05/C/08792  
against  
Rossendale Borough Council

31 October 2006

Beverley House 17 Shipton Road York YO30 5FZ

**Investigation into Complaint Nos 05/C/00542 & 05/C/08792  
Against Rossendale Borough Council**

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**Key to names used**

Mr Watson	-	complainant
McCallum Construction	-	developer (complaint 05/C/00542)
Milne Ltd	-	developer (complaint 05/C/08792)
Officer A	-	a senior officer in development control
Officer B	-	senior planning officer

## Report Summary

This complaint is about long delays by the Council in completing legal agreements with developers. Although Councillors had agreed that planning permission should be given, formal approvals could not be issued until the legal agreements were completed.

In one case the developer did not begin to seriously pursue the agreement until seven years after the planning committee said the application should be approved. However, the Council then caused unnecessary delay and gave misleading information between February 2004 and June 2005. As a result of changes in regional guidance and the Lancashire Structure Plan, the application was eventually re-considered by the Development Control Committee and refused in July 2006.

In the other case the Development Control Committee agreed that planning permission should be given in February 2005. Although all the issues relating to the legal agreement were resolved by May 2005, the Council did not complete the agreement. This application was also reconsidered and approved in July 2006.

The Ombudsman has found maladministration by the Council in its delay and misleading information in dealing with the legal agreements. She has recommended that the Council pay £2,500 to the developer in the first case in recognition of the additional costs incurred in engaging professional advisors to pursue the matter.

## **Introduction**

1. Mr Watson, a planning consultant who was once employed by the Council as Head of its Development Control Department, complained on behalf of McCallum Construction and Milne Ltd that the Council delayed in finalising details of agreements attached to planning approvals and failed to make formal determinations on planning applications submitted by his clients. He says the Council failed to respond to his correspondence and e-mails on these matters in a timely fashion. As a result of this, Mr Watson says his clients have been unable to commence development of their sites resulting in loss of business revenue and associated interest.
2. For legal reasons, the names used in this report are not the real names of the people and places concerned<sup>1</sup>.
3. An officer of the Commission has visited the complainant, has examined the Council's files and has interviewed officers of the Council.
4. An opportunity has been given for the complainant and the Council to comment on a draft of this report.

## **Legal and Administrative Background**

5. Section 106 of the Town and Country Planning Act 1990 states that a local planning authority may enter into agreements with any person interested in land in their area for the purpose of restricting or regulating the development or use of land, either permanently or during a period as may be prescribed by the agreement.
6. Section 106 also states that any such agreement may contain such incidental and consequential provisions (including financial ones) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement.
7. Such agreements may relate to the introduction of public open space within a development site created by the applicant. The Council can accept responsibility for the maintenance of this public open space subject to a contribution to these maintenance costs from the developer. This financial contribution is usually called "the commuted sum".

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<sup>1</sup> Local Government Act 1974, section 30(3)

8. Section 26 of the Local Government Act 1974 states that the Ombudsman should not normally investigate a complaint where the complainant has a remedy available to him/her by way of appeal to a government minister. Planning applicants have a right of appeal to the Planning Inspectorate if their planning application is not determined by the Council. This right of appeal is limited to the six months after the planning decision should have been made ie, 8 or 13 weeks after the application was received by the Council or some later date that has been agreed by the Council and the applicant.
9. If the right of appeal expires, an applicant can submit a new planning application which, if undetermined within the prescribed timescale, would re-activate his/her right of appeal for non determination.
10. If an appeal were made to the Planning Inspectorate, a unilateral undertaking under Section 106 could be completed and submitted before the end of the appeal.
11. Should the Planning Inspectorate grant planning permission on appeal, the applicant could commence development and it would then be a matter for the Council to finalise the Section 106 agreement.
12. This investigation was not about the length of time taken by the Council to make formal decisions on these applications as the applicants had/have a right of appeal. The investigation has been about administrative delays in the Council finalising the Section 106 agreements on these applications and the injustice caused to the complainants as a result of these delays.

#### **The Council's Procedure**

13. Officer A, a senior officer with the Council's Development Control Team, explained the Council's procedure for processing Section 106 agreements. He states that once the need for a Section 106 agreement is identified, the Council's Legal Department is contacted to make the necessary legal checks (which might include confirming ownership of the land) and to draft the agreement document. The draft document is issued to the applicant who, if it is acceptable, will pass it back to the Council. The Council then seals the agreement and obtains consent from the Mayor. When this procedure has been completed, the Development Control Team is informed and the formal decision notice on the application can be issued.
14. Officer A says that this procedure can be completed within a matter of weeks on straight forward cases. For more complex Section 106 agreements, he says a timescale of two months is not unreasonable.



15. Officer B, a senior planning officer, confirms the procedure as described by Officer A. He also states that applicants can draw up their own draft agreements and this can speed up the process. However, he accepts that no such draft documents can be drawn up, or agreed by both parties, until the Council provide details of the commuted sum to the applicant, where such a sum is appropriate.
16. Officer A says there is no formal procedure in place for him to monitor the workload of his officers. However, he says he does have a system which allows him to see what cases are being dealt with by each member of staff and to identify applications which have not been determined within the targeted 8 weeks of receipt. Officer A says there is no procedure in place to make sure that applications which have missed this target are progressed in a timely manner.
17. Officer B confirms that there is no formal procedure to deal with undetermined applications which have missed the 8 week target. He accepts that the Council is re-active, rather than pro-active, in dealing with these applications as the emphasis is usually on the developer to progress matters such as Section 106 agreements. However, he accepts this cannot be achieved without the commuted sum being provided by the Council.

## **Investigation (05/C/00542)**

### **The Planning Application**

18. The Council received a planning application from McCallum Construction on 9 April 1997. The application was for the erection of 31 dwelling houses, including public open space. The space being a requirement of the Council.
19. This application was reported to a meeting of the Council's Engineering and Planning Committee on 8 September 1997.
20. The minutes of this meeting show that:

*"the Committee are minded to grant consent to the application subject to the conditions set out below but desire the Council to enter into an agreement with the developer under Section 106 of the Town and Country Planning Act 1990 in respect of the provision and maintenance of an area of public space within the development, the completion of which shall be delegated to the Borough Solicitor."*

21. The minutes also show that the Committee determined:

*"that on completion of such Section 106 agreement the Borough Engineer and Planning Officer be authorised to approve the said application subject to the standard time period condition."*

### **The Section 106 Agreement Process**

22. Mr Watson says he did not begin to represent McCallum Construction on this matter until late 2003 or early 2004. He states that, as far as he is aware, between 1997 and late 2003 the Council and McCallum Construction were in negotiations about the layout of the public open space but that neither party were pushing to resolve the matter. He says that it was not until early 2004 that he began to push the Council for completion of the Section 106 agreement on this development.
23. Documents provided by Mr Watson, and others extracted from the Council's files, show that Mr Watson approached the Council in early February 2004 with a proposal that, in order to resolve this matter, McCallum Construction lodge a cheque with the Council for an agreed amount to cover the commuted sum. Officer A e-mailed a response to Mr Watson asking that he submit the proposal in writing which would receive his *"urgent consideration"*.
24. Mr Watson submitted the proposal in writing on 11 February 2004. He received no immediate response from the Council so he sent reminders by e-mail on 27 February, 11, 15 and 24 March as well as 1, 6 and 13 April.
25. On 14 April 2004, Officer A sent an e-mail to Mr Watson confirming that the Council accepted his proposal of 11 February and that he would contact him again with details of the procedural arrangement *"within the next 7 days"*.
26. Despite sending chaser e-mails on 28 April and 7 May, Mr Watson received no response from the Council or details of the procedural arrangements for lodging a cheque with the Council. As a result of this, on 3 June 2004 Mr Watson submitted a formal complaint, on behalf of McCallum Construction, to the Council requesting the resolution of the Section 106 agreement.
27. The Council acknowledged receipt of this complaint in a holding letter dated 18 June 2004 and said the complainant would receive its substantive response by 2 July. No response was in fact sent. Officer A later wrote to McCallum Construction on 1 September 2004 and apologised for the continuing delay. He also stated he would write to the complainant again by week commencing 20 September with an explanation of the process and timescale for resolution of this matter.

28. McCallum Construction did not receive a further response until 15 November 2004 when Officer A wrote to explain that the matter had been passed to the Council's Legal Department.
29. On 18 November 2004, the Council, through its Legal Department, wrote to McCallum Construction and stated that the Section 106 agreement could not be drafted as the certificates provided with the application in 1997 were invalid. This letter requested that McCallum Construction submit the correct certificates in order to expedite the procedure.
30. After several e-mail and letter exchanges during December 2004 and January 2005, Mr Watson wrote to the Council on 26 January 2005 with an amended site plan and the correct certificates. He also stated that, although a draft Section 106 agreement had been provided by the Council in December 2004, it did not provide a figure for the commuted sum and therefore could not be agreed by his client.
31. Although he sent several reminders by e-mail, the Council did not inform Mr Watson that the commuted sum required for the Section 106 agreement was £14,090 until 22 June 2005. He responded by e-mail the same day that his client accepted this amount. However, to date the Council has failed to provide a draft Section 106 agreement with this commuted sum included.
32. Officer A says that, at the time, he believed that all the problems relating to the development site had been resolved before Mr Watson became involved in this matter in early 2004. He also accepts that he received requests to resolve this matter and issue a draft Section 106 agreement from Mr Watson during February and March 2004.
33. Officer A initially told my investigator that he had not responded sooner to these requests as he had sought advice from the Council's Legal Department. However, when asked to provide evidence from the Council's files that this advice had been sought, Officer A accepted that no such evidence exists.
34. Officer A accepts that there was an unreasonable delay in responding to Mr Watson's request to resolve this matter between February and November 2004. He can provide no explanation for this delay other than the pressures of his workload.
35. Officer A accepts that the issues of certification had been resolved by January 2005. He states the Council did not provide a further response to Mr Watson until June 2005 because he was waiting for the calculation of the commuted sum from the Council's Leisure Department. However, when my investigator asked Officer A to provide evidence from the file that the Leisure Department had been contacted for

this calculation, he could not identify such evidence. Officer A accepts that there is no documentary evidence to confirm if or when the Leisure Department was approached for this calculation.

36. Officer A can provide no explanation for the delay in responding to Mr Watson between January and June 2005 other than the pressures of his workload.
37. Officer A says the issue of the Section 106 agreement has not been progressed since June 2005 because it is the Council's view that this application should be returned to committee for a decision under the new Lancashire Structure Plan. In August 2005 the Head of Economic Regeneration and Spatial Development, who has since left his employment with the Council, raised concerns about the delivery of services by development control. He identified problems with performance on major planning applications, performance on complaints handling, communication with applicants, performance management and recruitment and retention of planning staff. One of his recommendations was that a number of older, undetermined planning applications should be handed over to an outside body for re-assessment and then passed back to the Planning Committee for decisions.
38. These recommendations were accepted by the Development Control Executive during a meeting on 17 August 2005.
39. The application was passed to a consultancy for consideration under the new Lancashire Structure Plan. The Development Control Committee met on 10 July 2006 when it considered this application and decided to refuse planning permission on it. McCallum Construction now has a right of appeal against this decision.

## **Investigation (05/C/08792)**

### **The Planning Application**

40. The Council received a planning application from Milne Ltd on 13 July 2004 for the extension, alteration and conversion of a mill to form 25 residential apartments.
41. The application was passed to the Council's Development Control Committee on 13 February 2005 which resolved to grant permission subject to a Section 106 agreement requiring a contribution towards the improvement of local community facilities.
42. As the granting of planning permission for this development would be a departure from Policy 43 of the Lancashire Structure Plan 1991-2006, the application was referred to the Government Office for the North West (GONW) on 21 February 2005.

43. While the Council's file does not include a copy of the GONW's response to this matter, Mr Watson has provided me with a copy of a response from them to him dated 24 May 2005. This response states that after careful consideration it was decided that the Secretary of State should not become involved in this application which should be determined by the local council.

#### **The Section 106 Agreement Process**

44. Officer A accepts that all the problems relating to the Section 106 agreement on this application had been resolved by May 2005. He can provide no explanation for the delays in completing the Section 106 agreement procedure in this application other than the pressures of his workload.
45. Officer A states the finalising of this Section 106 agreement has been postponed by the Council's decision to have this application handed over to a consultancy for re-assessment and have it returned to the Council's Planning Committee for determination.
46. This application was passed to the consultancy for further consideration under the new Lancashire Structure Plan. On 10 July 2006 the Development Control Committee decided to grant planning permission on this application.

#### **Conclusion**

47. Mr Watson approached the Council in February 2004 on behalf of McCallum Construction, the Council was unable to provide him with details of the required commuted sum until June 2005. This unnecessary delay is maladministration.
48. Problems on the application submitted by Milne Ltd had been resolved by May 2005 at the latest. There is no reason why the Section 106 agreement could not have been drafted by the Council at that time and the delay in doing so is also maladministration.
49. Between February and December 2004, the Council provided Mr Watson, and McCallum Construction, with misleading advice and information. The Council said it would deal with the matter urgently and finalise the Section 106 agreement in line with a proposal put forward by Mr Watson. This did not occur and the actual reasons for the delay in finalising the Section 106 agreement were not conveyed to Mr Watson, or his client, in an open and timely manner. This is maladministration.
50. There is no procedure to monitor and progress planning applications not determined within the target of 8 weeks.

## Remedy

51. In his complaint to me, Mr Watson has suggested that McCallum Construction should be compensated for the loss of business revenue and interest which has been caused by the delay in commencing development as a result of the Council's actions. I do not recommend such compensation. A remedy to such claimed injustice has been available to McCallum Construction through its right of appeal to the Secretary of State on the Council's non determination of the application since 1997. McCallum Construction, with Mr Watson's advice, could have used such a right of appeal at any time since 1997, even if it involved submitting a new planning application, and I do not consider it unreasonable to expect them to have done so in these circumstances to minimise the loss of business revenue and interest.
52. However, I recommend that the Council pay McCallum Construction £2,500 in recognition of the costs incurred in engaging Mr Watson's professional time in pursuing the Council to finalise the Section 106 agreement since February 2004.
53. I also considered whether compensation should be paid to Milne Ltd. However, given the timescale involved in this matter, I do not consider such compensation is appropriate.
54. The Council should introduce a procedure to make sure that planning applications over 8 weeks old are monitored regularly and determined as soon as possible. This procedure should ensure that such applications are given the same level of priority as new applications and that the Council is pro-active in resolving any issues that are preventing formal determination of any application.



Anne Seex  
Local Government Ombudsman  
Beverley House  
17 Shipton Road  
York  
YO30 5FZ

31 October 2006