



TITLE: LOCAL GOVERNMENT OMBUDSMAN INVESTIGATION

TO/ON: COUNCIL 19th OCTOBER 2005

BY: MARK WESTON, HEAD OF LEGAL & DEMOCRATIC SERVICES

LEAD MEMBER : CLLR FARQUHARSON

STATUS: FOR PUBLICATION

1. PURPOSE OF THE REPORT

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

2. RECOMMENDATIONS

- 2.1 That Members note the report
- 2.2 That Members note the implications of findings of maladministration and injustice on the part of the Council and the remedial actions that must be taken.
- 2.3 That Members give additional consideration to actions which may be taken by the relevant departments.

3 REPORT AND REASONS FOR RECOMMENDATIONS

- 3.1 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 and injustice is determined, on the part of the Authority.
- 3.2 The LGO commenced an investigation into a complaint made by Mr & Mrs Churchill in November 2004. The complaint referred to maladministration and injustice in that, by granting planning permission for the development of a property next door to theirs, the Council failed to give proper consideration to material planning consideration and, in particular, failed to take proper account of the effect of the new building on their residential amenity.

3.3 The LGO found that the lack of an up to date Local Plan was maladministration, and that the complainant had suffered a detrimental impact upon their residential amenity. Upon finding evidence of maladministration and injustice, she proposed suitable remedies, to which the Head of Spatial Development and Economic Regeneration agreed. The Development Control team are currently in the process of addressing this with the complainant.

3.4 The Ombudsman made comment on further actions for consideration by the Council in respect of the provision of a current Local Plan, which included additional resources to facilitate the production of the policy document.

3.5 A copy of the full report is attached for information.

4. CORPORATE IMPROVEMENT PRIORITIES

4.1 FINANCE (INCORPORATING PROCUREMENT AND RISK MANAGEMENT)

4.1.1 The Local Government Ombudsman has imposed a limited financial compensatory figure of £250.00 plus the additional costs for the provision of screening.

4.2 MEMBER DEVELOPMENT

4.2.1 All Elected Members are required to undertake training prior to sitting on the Development Control Committee. However, some Members have identified additional training in respect of planning policy as part of their Personal Development Plans (PDP's). A report will be submitted to the next meeting of the Member Development Working Group.

4.3 HUMAN RESOURCES

4.3.1 The Ombudsman requested that consideration be given to the provision of additional capacity in order for the imminent production of a Local Plan.

4.4 ANY OTHER RELEVANT CORPORATE PRIORITIES

4.4.1 Customer Services: The Council has a corporate complaints procedure which provides details on how to complain to the Local Government Ombudsman.

5. RISK

5.1 The lack of a current Local Plan should be considered as a potential risk to the Council, in that the LGO names this as the basis for maladministration in her report, and imposes remedial action accordingly. There may be the potential for future findings against the Council in similar complaints should this issue not be addressed.

6. LEGAL IMPLICATIONS ARISING FROM THE REPORT

- 6.1 The resolutions of the Development Control Committee in respect of planning applications are usually challenged by appeal to the Secretary of State. However, the Local Government Ombudsman has a discretionary ability to impose remedial or compensatory action upon the Council, commensurate to the severity or nature of any maladministration and injustice found as a result of her investigation.

7. EQUALITIES ISSUES ARISING FROM THE REPORT

n/a

8. WARDS AFFECTED

All

9. CONSULTATIONS

Deputy Chief Executive, Head of Spatial Development and Economic Regeneration,
Team Manager Development Control, Urban Vision

Background documents: The Commission for Local Administration in England, Report on an Investigation into complaint No 04C12526 Rossendale Borough Council

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The Commission for
Local Administration in England

Report

on an Investigation into
Complaint No 04C12526 against
Rossendale Borough Council

September 2005

Investigation into Complaint No 04C12526

Against Rossendale Borough Council

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Key to names used

Mr and Mrs Churchill	The complainants
Officer A	A senior planning officer
Officer B	The case planning officer

Report Summary

Planning

The Council granted planning permission for a single dwelling in the belief that the site was within the curtilage of another property. There are indications that this may not be the case, but the Ombudsman found that it was reasonable for the Council to have relied on a definition of 'curtilage' in advice from the Office of the Deputy Prime Minister (PPG3). The investigation revealed concerns about slow progress being made with the revision of the Local Plan.

The Ombudsman found that the Council had failed properly to consider the effect of the new development on the complainant's privacy.

The Council agreed to the Ombudsman's recommendation that it should either arrange suitable screening or compensate the complainants for their loss of privacy in addition to their time and trouble in pursuing the complaint.

Finding

Maladministration and Injustice, remedy agreed.

Introduction

1. Mr and Mrs Churchill complain that, in granting planning permission for the construction of a house next door to theirs, the Council failed to give proper consideration to material planning considerations and in particular failed to take proper account of the effect of the new building on their amenity.
2. For legal reasons, the names used in this report are not the real names of the people and places concerned¹.
3. An officer of the Commission has visited Mr and Mrs Churchill, 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 prior to the finalisation of the conclusion.

Legal and Administrative Background

5. In deciding whether to grant planning permission for proposed development, planning authorities must take account of any relevant policy contained in the Development Plan for the area and any other relevant planning consideration. The decision should be in accordance with the Development Plan unless material considerations indicate otherwise.² Development Plans contain policies for the control of development over a number of years and incorporate, for example, County Council Structure Plans and District Council Local Plans. Such Plans should be mutually compatible, with the Local Plan describing acceptable development in a more site specific way.
6. Material planning considerations include advice from the Government in Planning Policy Guidance (PPG) documents. PPG3 deals with housing development. It says that local planning authorities should provide sufficient housing land but give priority to using previously developed land, in preference to the development of greenfield sites. It defines previously developed land as that which is or was occupied by a permanent structure, including its curtilage. The meaning of 'curtilage' is discussed later in this report.

1 Local Government Act 1974, section 30(3)

2 Town and Country Planning Act 1990 sections 54A and 70

Investigation

7. The land adjoining Mr and Mrs Churchill's home slopes down towards their property and is higher than theirs at the back. Until the construction of the dwelling which has prompted this complaint, it was owned by the person who lived in the next house in the street but was overgrown with bushes and trees, some of which were subject to a preservation order. Mr and Mrs Churchill say that the plot on which planning permission has been granted for the new house was never to their knowledge part of the garden of the neighbouring house, nor used for any identifiable purpose by the owner. Planning permission had been granted for the erection of a dwelling on the site in 1991 but had lapsed.
8. Three applications for the erection of a house were made during 2004. The first was returned by the Council because the submitted details were invalid, the second was refused planning permission in May 2004, against the advice of a planning officer, on the grounds that:
 - it would represent a cramped form of development, out of character with the area
 - it would have an unreasonably enclosing impact on neighbouring properties and
 - it would lead to overlooking of neighbouring gardens.

The third application was approved in October 2004.

9. Mr and Mrs Churchill objected to all the sets of proposals (objections were received from two of their neighbours also). The concerns which they put to the Council included:
 - their house and garden would be overlooked and overshadowed;
 - protected trees and wildlife would be lost;
 - an existing problem with water running off the site and across their property would be exacerbated and a retaining wall on the boundary with their property might be damaged; and
 - their TV reception, already poor, would be made worse.

10. The successful application, approved in October 2004, was determined by the Council's Planning Committee consisting of 11 members, only five of whom had attended the meeting which had refused the previous application, following changes in personnel. Officer A, a senior planning officer, recalls that members of the Committee visited the site before determining the application, although there is no record of such a visit. Mrs Churchill voiced her objections to the Committee and the architect for the project spoke in support of it. The issues, including a recommendation to approve the application, subject to conditions, were set out in an 11 page report, sent to the Committee beforehand and made available to the general public.
11. The report referred to a number of relevant planning considerations. These included the number of dwellings to be built in the Council's area in future years. Relevant policies are contained in Lancashire County Council's Structure Plan and in the draft of a proposed new Structure Plan . The County Council, responding to the Borough Council's consultation, had said that the proposed new house was contrary to Structure Plan policy because the number of dwellings for which planning permission had already been granted exceeded the number of dwellings for which the Plan provided.
12. The report to the Planning Committee acknowledged that this was the case but referred to the number of dwellings completed in recent years, which was below Structure Plan expectations. Figures relating to anticipated and actual dwelling constructions were set out. The report concluded that there was "scope for a minimal amount of additional housing".
13. The County Council's reply to the consultation on the application had concluded that the proposed development was not needed to meet the future housing provision in the Council's area envisaged by the Development Plan. Whilst the proposal was small scale the County Council was concerned about the cumulative impact of allowing this and similar proposals. It qualified this by saying that if the Borough Council considered that it was unlikely that existing planning permissions would lead to the completion of sufficient dwellings to meet the Development Plan's expectations, it might be necessary to grant approval in this instance.
14. Officer A and Officer B, who was the case officer, say that their ability to respond to this issue has been hampered because a shortage of staff has meant that production of an updated Local Plan has been significantly delayed.

15. Officer A says that an up to date Local Plan would enable the Council to give detailed consideration at a senior level to questions affecting the issue outlined in the County Council's letter. This would include how much reliance could be placed on the prospect that sites with long standing but unimplemented planning permissions will result in actual dwelling construction, or whether such permissions should be renewed on application. In the absence of an up to date Local Plan, officers have to rely on advice from the County Council. The advice from the County Council referred to in paragraph 13 above was standard at the time. The County Council has since advised the Borough Council that it does not wish to be consulted about applications for the development of four dwellings or fewer.
16. The report also referred to a policy in the Council's own Local Plan which indicates that planning permission would not be granted for proposed dwellings located within the grounds of existing dwellings where such development would alter the character, appearance or amenity of the area. Commenting on this policy, the report said that it had been superseded by PPG3 which encouraged the development of brownfield (i.e. previously developed) sites, which included the curtilage of existing dwellings.
17. The report referred to the views of other planning officers within the Borough Council. They had said that, as the site had been identified as being within an existing curtilage, it was considered to be brownfield and the application was not therefore contrary to PPG3, "which seeks to ensure that land is used efficiently". These officers had also said that the application was in accordance with draft policy changes in the Structure Plan, which sought to give priority to the use of previously developed land.
18. PPG3 defines 'curtilage' as "the area of land attached to a building." It says that all land within the curtilage should thus be regarded as previously developed but that this does not mean that the whole area of the curtilage should therefore be redeveloped:

"The local planning authority should make a judgement ... bearing in mind other planning considerations."

9. In reply to an enquiry from an officer of the Commission in relation to this complaint, the Office of the Deputy Prime Minister (the government department responsible for PPG 3) says:

“The definition of ‘previously-developed land’ in Annex C of PPG3 is used for the purposes of applying the planning for housing policies set out in that guidance. Any guidance (or legislation for that matter) is open to differing interpretations and where issues arise (as they have done occasionally) concerning the definition, we are very careful not to provide what could be interpreted as definitive advice, as it is often the case that matters of interpretation can only be tested through the courts.”

20. The issue of what constitutes curtilage has been considered by the courts, whose findings are noted in an Encyclopaedia of Planning.³ The Encyclopaedia records a case in which the court held that:

“an area of rough grass, largely neglected, which lay beyond the well cut lawns near a dwelling house, did not form part of its curtilage. Although it was in the same occupation, the land did not serve the dwelling house in some necessary or useful manner”⁴

21. The Encyclopaedia reports that in another case⁵ the court had identified three relevant characteristics of curtilage including

“an intimate association with land which was undoubtedly within the curtilage was required in order to make the land under consideration part and parcel of that undoubted curtilage land”.

22. Mr and Mrs Churchill say that, to their knowledge, no such useful or intimate association has ever existed between the development site and the adjoining property. Officer B, the case officer, says that she based her view of the status of the development site using the definition of ‘curtilage’ which is set out in PPG3. She had not been aware of the qualifications on the meaning of the term in the court judgements. In its response to inquiries by the Commission’s officer, the Council has accepted that its inquiries into the issue should have been more rigorous. It doubts, however, that the issue was of critical importance as, in current planning terms, the proposal represents appropriately sustainable development.

Sweet and Maxwell, *Encyclopaedia of Planning Law and Practice* 3B-2055, September 1995.

Collins v the Secretary of State for the Environment [1991] E.G.C.S. 15.

McAlpine v the Secretary of State for the Environment [1994] E.C.G.S. 189

23. That view is supported by Officer A, who scrutinised the Committee report and attended the Committee meeting. However, Officer B, who produced the report initially, says that her belief that the site was curtilage played a central part in her view that planning permission should be granted.
24. The development land is at a higher level than the land on which Mr and Mrs Churchill's home is built. The effect of this is that the rear garden of the new property will overlook Mr and Mrs Churchill's garden from a height of about three metres above theirs. The new house extends about three metres beyond the rear of Mr and Mrs Churchill's house. In a letter of objection, Mr and Mrs Churchill commented that the new development would overlook their home and block their view; they would not be able to sit in their garden without being overlooked.
25. The report addressed the issue of neighbours' privacy and the differences between the proposals under consideration and those which had been refused five months earlier. It noted that the side wall of the proposed dwelling, which would face the side of Mr and Mrs Churchill's home at a distance of four metres, contained no windows, although there were two small windows in the side wall of Mr and Mrs Churchill's property. Mr and Mrs Churchill say their loss of privacy has been exacerbated by the construction of a staircase leading from the garden to ground level which enables users to look into their lounge and bedroom windows. No reference was made to the relationship between the gardens of the two properties and no recommendation was made for the imposition of any condition requiring a fence on the boundary of the proposed development or any boundary treatment.
26. Officers acknowledge that garden privacy is a material consideration, although Officer B says that it is not normally accorded the same priority as, for example, the overlooking of windows to a habitable room.
27. The report said that, following an inspection, building control officers had advised that if the new house were built with a proper level of foundations, there should be no adverse impact on the retaining wall between the properties. The report did not refer to Mr and Mrs Churchill's concerns about the possibility that land drainage problems would be exacerbated although the planning permission was made subject to a condition that plans for a satisfactory surface water drainage scheme should be submitted to the Council for approval. After some delay on the part of the applicant, such plans have now been approved.
28. Mr and Mrs Churchill say that their fears have been realised and that, following construction of the new house, water runs off the next door property, through their retaining wall and onto their garden. The wall has become damp and discoloured. They wrote to the Council about these and other issues to do with the construction of

the new house in February, March and May 2005, but have not had what they consider to be a satisfactory response to their concern about the drainage issue.

29. The report on the planning application referred to the loss of protected trees which would result from the development. It reported the Council's Tree Officer as having advised that the trees to be felled at the front of the property were poor specimens and that there would be no objection to their removal, provided that they were replaced. The better quality trees at the rear of the site should be protected. The report recommended that conditions should be attached to the planning permission to require a plan of the trees to be retained, which were to be protected by fencing. This was then done, although not until after the start of the building work following representations from Mr and Mrs Churchill.
30. The report referred to Government advice that large scale development might interfere with TV and other telecommunications services. The report said that, as the development now proposed was of a small scale, any interference would be marginal.
31. The proposal received the unanimous approval of the Committee and planning permission was granted. Mr and Mrs Churchill say that the resulting building has an overbearing effect on them, they are worried about possible damage arising from land drainage problems and they feel unable to make use of their garden as it is overlooked from above by land at the rear of the next door property which to date is unfenced. The planning permission does not contain any requirement for a fence or any form of boundary treatment.
32. A draft of this report was sent to the Council, with a suggestion that the Council should either arrange for some screening or compensate Mr and Mrs Churchill for their loss of privacy resulting from the new development (see paragraph 38). I am pleased to report that the Council has agreed to this suggestion.

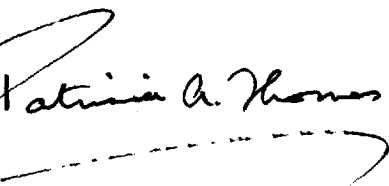
Conclusion

33. The new house next door to Mr and Mrs Churchill's home has been the subject of very considerable consideration, which includes three separate applications. The concerns of neighbours, including Mr and Mrs Churchill, were made known and there was a lengthy report to the Committee. The investigation nevertheless has highlighted a number of areas of concern.
34. First, in the absence of an up to date Local Plan, officers were obliged to consider the issue of a possible superfluity of planning permissions in an ad hoc manner, having regard to information about existing permissions which may be no longer reliable. The situation is unsatisfactory. In view of the importance of the Development Plan

within the planning system, I regard the absence of progress with a revised Local Plan as maladministration. That is not a criticism of the approach to the issue taken by the officers in considering the application. Nor can I say that a different decision would have resulted if an up to date Plan had been in place, but I do urge the Council to do whatever is required, including making available additional resources if needed, to make progress with this centrally important policy document.

35. The Council's consideration was seriously flawed by its too-ready acceptance of the status of the development site as 'curtilage'. The site was probably not curtilage and, notwithstanding the view put forward by Officer A (paragraph 23), I believe that there was a possibility that planning permission would have been refused had it not been so identified. However, I cannot say that the flaw is the result of maladministration on the Council's part as its officers were entitled to rely on the definition put forward in PPG3, a definition which appears to be inadequate and misleading in the light of the court decisions.
36. I do not consider that there was much the Council could have done to anticipate or prevent drainage problems which Mr and Mrs Churchill have experienced, notwithstanding the concerns which they expressed. This is principally a private issue which Mr and Mrs Churchill will have to resolve with their new neighbour. Likewise I do not criticise the Council's handling of the issue of the trees on the site or the effect on TV reception. The nub of the matter is simply that the Council did not attach as much weight to these issues as did Mr and Mrs Churchill.
37. However, in view of the respective heights of the two properties, the issue of garden privacy was an important consideration, which appears to have been largely overlooked. At the least, I would have expected the Council to have required some boundary treatment for screening. There was maladministration in the way in which this aspect was dealt with and the Council needs to take some action to remedy the resulting injustice to Mr and Mrs Churchill.
38. If necessary, and if the owner is willing, it should pay for suitable screening (e.g. a fence on the boundary). The agreement would need to include a requirement that the screening be permanently maintained. Otherwise the Council should provide some suitable monetary compensation for the loss of privacy which Mr and Mrs Churchill

have sustained. In any event, it should, in addition, pay them £250 for the time and trouble they have encountered in making this complaint. I commend the Council for its willingness to take the recommended action.



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29 September 2005