

Campaign for Planning Sanity

LOCAL COMMUNITY SUPPORT FOR ADVERSE PLANNING & DEVELOPMENT APPLICATIONS

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PLANNING SANITY BRIEFING 'OMBUDSMAN IN THE PLANNING PROCESS'

The Local Government Ombudsmen investigate complaints of injustice arising from maladministration by local authorities. The objective of the Ombudsmen is to secure, where appropriate, satisfactory redress for complainants and better administration for the authorities. This has a direct relevance to planning practises and decisions of local planning authorities, and has had some significant affects on how local authorities undertake their duties. But in terms of the ability of the Ombudsman to affect decisions already made then that is limited to criticism of the processes, and not the outcome, as there is no power to reverse a planning decision, even if it is manifestly wrong, and contrary to law.

Generally Planning Sanity has little confidence in the Ombudsman to investigate matters to the satisfaction of the majority of complainants, but nevertheless has still made some significant and controversial decisions. Particularly in the area of telecommunication installations, considerable publicity being given to the decision relating to a complaint by 6 local residents in Swindon, which resulted in a settlement amounting to £119,500, we look at this in more detail later in this briefing.

The Ombudsman has an informative WEB site¹ with many summaries of decisions, and will supply on request copies of the whole decision letters free of charge by completing the online form² in most cases you will get your full report within a couple of days.

There are strict rules about what the Ombudsman can and cannot investigate if you are unsure you can call the Ombudsman helpline on 0845 602 1983. Whilst there are a range of authorities that a complaint can be lodge against, in this briefing we are only interested in local planning authorities (*as opposed to local authorities, as local planning authorities can include for instance National Park Authorities*). What the Ombudsman cannot do is investigate the rights and wrongs of the decision, he can only investigate maladministration, in other words something the local planning authority did that was contrary to natural justice or the rule of law, or other regulations or procedures, not simply because you disagree with the decision, and we set out below some examples. The Ombudsman can only investigate complaints within 12 months of the decision or action complained of, so it is important to ensure you act as promptly as possible, he will also not investigate a complaint if there is on going legal action, however, in those circumstances still complain as early as possible other wise you might find your self out of time, but pointing out that legal proceedings are pending.

You should also first complain to the Council in order to give them a chance first to rectify the matter, or to investigate your allegations, normally the Ombudsman will have expected you to have done that before asking him to investigate it (*You should give the LPA at least 28 days to investigate the complaint before contacting the Ombudsman*). From our experience it is rare that a satisfactory investigation is forthcoming from local authorities, a bit like asking the criminal to investigate his

¹ www.lgo.org.uk/index.htm

² www.lgo.org.uk/pubsorder.htm

own crime, and then to set his own punishment. Nevertheless, it is important that you are at least seen to be raising the issue with the Chief Executive of the local authority.

The topic areas that have been considered by the Ombudsman cut right across all aspects of decision making within the planning process. From finding of maladministration where a political group had predetermined how they would vote on a development decision prior to the actual planning committee meeting, through to findings that the procedures in place to determine a just decision were not followed. With awards ranging from minor sums through as in the Swindon case substantial compensation.

Many of the complaints and positive decisions relate to the failure of members of local authorities (*Councillors*) to follow the National Code of Local Government Conduct, which has effectively been superseded by the new Ethical Framework, which requires each local authority to put in place its own code of conduct, based upon a national model code. The end result is the new³ Council Constitutions. The Statutory Instrument that contains the model code for principle authorities is available on the Public Information WEB site⁴.

In the context of the many complaints that relate to elected members the following taken from the Model Code Schedule 1 paragraph 5(a):

(a) must not in his official capacity, or any other circumstance, use his position as a member improperly to confer on or secure for himself or any other person, an advantage or disadvantage; and

And paragraph 8.1:

8. - (1) A member must regard himself as having a personal interest in any matter if the matter relates to an interest in respect of which notification must be given under paragraphs 14 and 15 below, or if a decision upon it might reasonably be regarded as affecting to a greater extent than other council tax payers, ratepayers or inhabitants of the authority's area, the well-being or financial position of himself, a relative or a friend or -

From this it will be seen that say where there is a development, and that development could be sited on one of different sites, and a member who lives close to one of these sites argues strongly against that site and in favour of the other site, and the committee is influenced by those arguments, and then finds in favour of the other site. Then it follows that potentially maladministration and injustice could be caused to those residents living close to the site where permission was granted. The member of course should have declared an interest, and taken no part in the decision making process, other than to the extent of any other resident affected by the development would have been entitled to make. There are many examples of this in the Ombudsman decisions.

There is much to be said for local communities studying the decision summaries for similarities of inappropriate action on the part of officers and elected members. And to make it clear that if inappropriate decisions are made that a complaint will be made to the Ombudsman, or if sufficiently serious that an application for leave to apply for judicial review will be made. This pressure may ensure that an otherwise inappropriate development is rightly refused.

An aspect that comes up repeatedly is where a member of the public, or indeed a person seeking planning permission, seeks the advice of a council officer, and then acts upon that advice, which later

³ <http://www.odpm.gov.uk/index.asp?id=1133792>

⁴ <http://www.opsi.gov.uk/si/si2001/20013575.htm>

turns out to be incorrect, and therefore the person suffers financially or has a loss in amenity value, or some other aspect, this is clear maladministration.

Another area where regular maladministration can occur is within planning enforcement and the failure of the local planning authority to investigate complaints of breaches of planning control, and subsequently a failure to take enforcement action. This is one area where there is every justification in making a complaint because far too often local planning authorities refuse to take action, this is due to the LPA effectively having a discretion, as opposed to an obligation, to take enforcement action. Although this is one of the positive provisions in the Planning and Compulsory Purchase Act 2003 to give the local planning authorities greater powers and arguably greater obligations to take enforcement action. The idea being that if the Ombudsman finds that the failure to take enforcement, or to investigate was maladministration, it would be a brave planning department that on a second complaint over the same development failed to act.

Ombudsman decisions do not set precedents that must be followed, nor do they set law, as in a court case. Although the Ombudsman decision would normally be expected to be followed, the local authority do not have to even follow the specific decision, let alone ensure that it is applied to other decisions, though usually a local planning authority will agree to reviewing their policies and procedures in line with recommendations from the Ombudsman, and it would be rare for a public authority to fail to do that which the Ombudsman has specifically recommended in an individual case.

Telecommunication Installations - We set these out separate from the general comments due to the implications from the Swindon decision, which was widely published in the national media. However, many of the implications could be equally applied to other forms of development.

Swindon - Complaint Numbers 01/B/13212 - 01/B/13214 - 02/B/01321 - 02/B/01324 - The case related to a complaint by 6 local residents (4 families) that due to the failure of the local planning authority to determine the prior approval application within the required time limit that the permission was granted by default and that as a consequence the development impacted on their amenity and thereby devalued their homes (*Note this was under the pre Aug 2001 Development Order that had a time limit of 28 days, however the same principle applies to the more robust 56 day procedure that is now in place*).

The process of determining prior approval processes at that time are contained within Part 24 of the Town and Country Planning (General Permitted Development) Order 1995, there were 2 categories of prior approval, those that required determination in 28 days, and those that had to be determined within 42 days, a failure to notify within the time periods, resulted in permission being granted by default, even where there is a delay of only one day, and even where the local planning authority had refused the application. The process was updated in August 2001 by a complete replacement of Part 24 the time period being increased to a standard 56 days, otherwise the process is much the same.

In the Swindon case the council unfortunately registered the application as a 42 day procedure, rather than the shorter 28 days, the Council by delegated powers to one of its officers issued a refusal notice, but outside of the 28 day period, therefore permission was effectively granted by default. The grounds for refusal being:-

"The proposed mast, by virtue of its prominent location, would be seriously detrimental to the visual amenities of nearby residents and the area generally".

The local authority admitted it was at fault to the Ombudsman who found that their failure to follow the correct procedure amounted to maladministration. The Ombudsman also commented that the

LPA who were minded to refuse the application would have done so on sound planning grounds, and that in all probability the operator would not have appealed, and therefore no mast would have been installed. He found that it would be difficult for the local authority to screen the development:

"So the complainants have suffered injustice from having to live close to development that would never have taken place had the maladministration I have identified not occurred".

He went on to say:

"To remedy this injustice I recommend that the Council commissions independent valuations of the complainants houses with and without the telecommunications installations and pay them the difference in valuations, if any.

I recommend that the Council makes ex-gratia payments of £250 to Mr and Mrs Warwick and £150 to Mr & Mrs Windsor, Mrs Hastings and Mr Hythe to reflect their time and trouble in pursuing their complaints with the Council and with me".

The significance of this is that where a local authority allows a development by default through the failure of the council to take the correct action, and resulting from that neglect compensation could be payable should homes of complainants be reduced in value. That in our view is the extent of the Ombudsman decision, it is not a decision that allows for general compensation to be paid for the loss in value of a home by the lawful grant of permission, where no maladministration has occurred.

It should be noted that in *Nunn, R (on the application of) v First Secretary of State & Ors [2005] & Ors [2005] EWCA Civ 101*⁵ the Court of Appeal found that the failure was as a direct result of the councils inactions and that there could be no challenge to the default planning permission, but that instead residents who had their homes devalued as a consequence of such a failure on the part of the local planning authority the residents could either make a complaint to the Ombudsman or alternatively seek compensation in a claim to the County Court under Section 6 of the Human Rights Act.

But it does significantly add to the wealth of other planning decisions by the Ombudsman which has resulted in many areas of local authority policy on planning having to be tightened up, and compensation paid to the complainants, although not always as large a sum that was eventually paid out in this case, which was £119.500 in total.

It should be clearly said that this was not the first such finding of maladministration that resulted from the failure of the local planning authority within the required period, and therefore it is reasonable to assume that any such complaint, especially where the local planning authority were minded to refuse would result in a finding of injustice, if therefore more people complained then more councils would act more promptly and these cases would soon become a thing of the past instead of what is one of the largest areas of complaint received by Planning Sanity.

You can download the form⁶ to make a complaint from the Ombudsman WEB site, then once completed it should be returned to the appropriate address for your region found at Appendix 'A'. Before completing the form you should read the official guide 'Complaint About the Council'⁷, you can also request a copy by post from the Ombudsman. If you complete the form online then you

⁵ <http://www.bailii.org/ew/cases/EWCA/Civ/2005/101.html>

⁶ http://www.lgo.org.uk/complaint_form.htm

⁷ www.lgo.org.uk/pdf/howcompcouncil.pdf

cannot attach any supporting documents, therefore you would still need to post these. It is therefore less likely to create problems if all your documents are sent by post at the same time.

This is an area where Planning Sanity can help local communities with drafting of complaints and assessing the potential outcome, although that can never be certain, however the chances are increased if those complaining tackle the complaint as if it was an objection to a planning application. By ensuring that all the facts are set out, that a section contains information on the personal effects, the stress, the trauma and financial consequences caused by the maladministration. This should be done in a methodical way, by attaching copies (*never send originals*) of all documents, reports, as well as references to legislation, the local authority code of conduct, and anything else that you consider is relevant. Also ensure that as many others affected as possible also lodge complaints, or even band together in a single joint complaint. In the Swindon Case there were only 4 households complaining, that resulted in a payment of £119.500, now had that been 20 or 30 households the repercussions would still be ringing now. It should be emphasised though that such large payouts are rare from the Ombudsman, therefore whilst the risk is lower than the courts, you might only get a few hundred pounds, rather than the true loss of the value of your home.

Useful contacts

LGO Watch - Campaign group for a more independent Ombudsman

<http://www.ombudsmanwatch.org>

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APPENDIX 'A' - ADDRESSES OF LOCAL OMBUDSMAN OFFICES

For complaints about London boroughs north of the river Thames (including Richmond but not Harrow or Tower Hamlets), Essex, Kent, East Sussex, West Sussex, Surrey, Berkshire, Buckinghamshire, Hertfordshire, Suffolk and Coventry City.

Tony Redmond

Local Government Ombudsman
Millbank Tower
Millbank
London SW1P 4QP
Phone: 020 7217 4620
Fax: 020 7217 4621

For complaints about the London Borough of Tower Hamlets, Birmingham City, Cheshire, Derbyshire, Nottinghamshire, Lincolnshire and the north of England (except the cities of York and Lancaster).

Patricia Thomas

Local Government Ombudsman
Beverley House
17 Shipton Road
York YO30 5FZ
Phone: 01904 380200
Fax: 01904 380269

For complaints about London boroughs south of the river Thames (except Richmond) and Harrow; the cities of York and Lancaster; and the rest of England not included in the areas of Mr Redmond and Mrs Thomas.

Jerry White

Local Government Ombudsman
The Oaks No 2
Westwood Way
Westwood Business Park
Coventry CV4 8JB
Phone: 024 7682 0000
Fax: 024 7682 0001