

Report

on an investigation into complaint nos
07C14968 & 07C17131 against
Kirklees Metropolitan Borough Council

9 February 2010

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Key to names used

Mr and Mrs N - Complainants

Mrs O - 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 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

Planning applications

The Local Government Ombudsman investigated complaints about the way Kirklees Metropolitan Borough Council granted permissions for a listed Victorian Schoolroom to be demolished and for new houses to be built on the site.

The investigation found that there were serious errors and omissions in the report and presentation to the Sub-Committee that granted the permissions. The applicants had argued that demolishing the Schoolroom and selling the site with planning permission would “enable” the associated distinctive, listed Chapel to be repaired and refurbished. The Planning Officer accepted this without applying any of the tests required by English Heritage for such “enabling” development and the Sub-Committee were not told of:

- the law requiring them to have special regard to preserving the listed Schoolroom;
- national planning guidance that there should be a general presumption in favour of preserving listed buildings;
- the specific tests that they should have applied before giving permission for the Schoolroom to be demolished;
- relevant comments from the Council’s own conservation specialists.

32 photographs were shown to the Sub-Committee to illustrate the dilapidated condition of the Schoolroom – 24 of them were of a completely different building.

The Ombudsman considered, on the balance of probability, that the applications would not have been approved if the officers had applied the correct tests and advised the Sub-Committee properly.

Finding

Maladministration causing injustice.

Recommended remedy

The Ombudsman concluded that the Council’s maladministration caused injustice to the people who complained. The injustice was the potential loss of part of their area’s built heritage that contributes to the setting of the distinctive, listed Chapel and the general character of the Conservation Area.

The Ombudsman recommends that the Council should remedy this injustice by seeking to negotiate for the permissions to be relinquished in favour of a new scheme, for which it will meet reasonable design costs and planning application fees. In the event that negotiations fail the Council should consider revoking the permissions after considering a full report on all the relevant issues.

Introduction

1. Mr and Mrs N and Mrs O complain about the way that the Council dealt with applications for listed building consent to demolish a Victorian Sunday Schoolroom and for planning permission to replace it with four dwellings. They complain in particular that:
 - the Planning Sub-Committee was shown photographs showing the condition of the interior of a completely different building;
 - the Planning Sub-Committee was not informed of the Council Conservation Officer's objections to the applications;
 - the planning officers failed properly to consider, and advise the Planning Sub-Committee of: relevant legislation, advice from central government, and policies for listed building and conservation areas;
 - planning officers and the Planning Sub-Committee failed properly to consider representations received about the applications; and
 - the Council unreasonably and inconsistently granted permission for the Schoolroom to be demolished and four new town houses to be built.
2. Mrs O lives nearby and passes the site regularly. She says the community is losing part of its local heritage and a community facility and that the setting of a Grade 2 listed Chapel and graveyard behind will be spoiled. Mrs N ran a community group in the Schoolroom and is particularly concerned about the loss of this potential community facility. She agrees with Mrs O's other points above.

Background

3. The Schoolroom is one of three buildings owned at the time by the Methodist Church. The main building, a large and distinctive chapel, is a Grade 2 listed building. The Schoolroom and an attached caretaker's house are close by it. The site is in a conservation area.
4. The Methodist Church applied for listed building consent and planning permission. Its agents argued, in a report dated 1 November 2006, that:
 - the Schoolroom had fallen into disrepair and disuse because the Church did not have the funds to maintain it; and
 - the only way it could raise sufficient funds to repair and refurbish the Chapel would be by selling the Schoolroom with planning permission for new housing on the site.

The chronology of main events:

Date	Action/Event
2006	
20 Feb	Applications for planning permission to construct four new houses on the site and for listed building consent to demolish the Schoolroom
May	Amended planning application plans – changes to window and omission of garages to provide extra parking spaces
19 May	Application for listed building consent withdrawn when the Council gave incorrect advice that it was not required
13 Jun	Officer report drafted with recommendation to refuse permission
16 Jun	Planning Sub-Committee visited the site. Consideration of planning application then deferred after Council realised it had made a series of serious errors, including wrongly telling the Church that listed building consent application was not required.
09 Nov	New listed building consent application to demolish the Schoolroom, together with a large amount of supporting documentation from the applicants justifying the application.
2007	
04 Jan	Planning Sub-Committee visited the site and then approved the listed building and planning applications.
16 Feb	Decision notices issued with condition on the planning permission that no development should commence until a Section 106 agreement is submitted and agreed which ensures the funds from sale of the site is only used for repair and refurbishment of the Chapel.
2008	
19 Nov	Section 106 agreement finalised.

Legal and administrative background

Listed building consent

5. Section 1 (5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 says:

"... 'listed building' means a building...and for the purposes of this Act—

(a) any object or structure fixed to the building;

(b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948, shall be treated as part of the building."

6. This means that the Schoolroom and the Caretaker's House are listed buildings because they were within the curtilage of the listed Chapel before 1948.
7. Section 7 of the Act says that any proposals for demolition, alteration, or extension of a listed building need 'listed building consent'.

8. Section 16 of the Act says that when dealing with an application for listed building consent, a council must have special regard to the '*...desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses*'.
9. National Planning Policy Guidance 'Planning and the Historic Environment' (PPG15) says:

"Once lost, listed buildings cannot be replaced;... They represent a finite resource and an irreplaceable asset. There should be a general presumption in favour of the preservation of listed buildings, except where a convincing case can be made out, against the criteria set out in this section, for alteration or demolition... This reflects the great importance to society of protecting listed buildings from unnecessary demolition ... and should be the prime consideration for authorities in determining an application for consent."

and

3.5 *The issues that are generally relevant to the consideration of all listed building consent applications are:*

i. the importance of the building, its intrinsic architectural and historic interest and rarity, in both national and local terms...

ii. the particular physical features of the building (which may include its design, plan, materials or location) ...

iii. the building's setting and its contribution to the local scene, which may be very important, ...

iv. the extent to which the proposed works would bring substantial benefits for the community, in particular by contributing to the economic regeneration of the area or the enhancement of its environment (including other listed buildings)...

3.16 *While it is an objective of Government policy to secure the preservation of historic buildings, there will very occasionally be cases where demolition is unavoidable. Listed building controls ensure that proposals for demolition are fully scrutinised before any decision is reached. These controls have been successful in recent years in keeping the number of total demolitions very low...*

3.19 *Where proposed works would result in the total or substantial demolition of the listed building, or any significant part of it, the Secretaries of State would expect the authority ... to address the following considerations:*

i. the condition of the building, the cost of repairing and maintaining it in relation to its importance and to the value derived from its continued use... ;

ii. the adequacy of efforts made to retain the building in use. The Secretaries of State would not expect listed building consent to be granted for demolition unless the authority (or where appropriate the Secretary of State himself) is satisfied that real efforts have been made without success to continue the present use or to find compatible alternative uses for the building. This should include the offer of the unrestricted freehold of the building on the open market at a realistic price reflecting the building's condition...

iii. the merits of alternative proposals for the site... There may very exceptionally be cases where the proposed works would bring substantial benefits for the community which have to be weighed against the arguments in favour of preservation. Even here, it will often be feasible to incorporate listed buildings within new development, and this option should be carefully considered: the challenge presented by retaining listed buildings can be a stimulus to imaginative new design to accommodate them."

10. The Council's Unitary Development Plan (UDP) policy BE4 stated:

"Demolition of listed buildings will not normally be considered acceptable unless:

- i It can be demonstrated that the building has no beneficial use and no potential viable use; and*
- ii The structure of the building cannot be made sound."*

Planning permission

11. The planning application was for four new town houses on the site of the Schoolroom, next to the listed Chapel and the Caretaker's House (and in the conservation area).
12. Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires:

"(1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority ...shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

13. Section 72 of the Act requires:

“(1) In the exercise, with respect to any buildings or other land in a conservation area...special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.”

14. PPG 15 says:

“2.14 The design of new buildings intended to stand alongside historic buildings needs very careful consideration. In general it is better that old buildings are not set apart, but are woven into the fabric of the living and working community. This can be done, provided that the new buildings are carefully designed to respect their setting, follow fundamental architectural principles of scale, height, massing and alignment, and use appropriate materials.”

15. The Council's UDP policies included:

“BE2 – design should be in keeping with any surrounding development in respect of, among other things, design and materials;

BE3 & BE5 which repeat the requirements of Section 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990; and

T10 – new development will not normally be permitted if it will create or materially add to highway safety problems.”

Enabling development

16. In 2001 English Heritage issued a Policy Statement and Practical Guide 'Enabling Development and the Conservation of Heritage Assets'. The introduction says:

“English Heritage has become increasingly concerned by the damage caused by developments contrary to established planning policy, put forward primarily as a way of benefiting heritage assets, but which destroy more than they save.

Our experience has led us to conclude that there should be a clearly stated presumption against such 'enabling development'. Permission should only be granted if the asset is not materially harmed, and the applicant convincingly demonstrates that on balance, the benefits clearly outweigh any disbenefits, not only to the historic asset or its setting, but to any other relevant planning interests.”

17. It defines enabling development as:

“...development that is contrary to established planning policy – national or local – but which is occasionally permitted because it brings public benefits that have been demonstrated clearly to outweigh the harm that would be caused. ... Its defining characteristics are that it is contrary to established planning policy, and that the gain from contravening policy subsidises a public benefit that could not otherwise be achieved. Thus, unlike most planning applications, financial issues are central to determining proposals for enabling development.”

18. The Policy Statement and Practical Guide goes on to give detailed advice on how planning applications for enabling development should be handled, including:

“... enabling development should be subject to the same degree of financial scrutiny, transparency and accountability as cash grants from public funds, or indeed all financial and quasi-financial decisions made by public authorities. The exercise of due diligence is essential...”

Financial information

...Thus the local planning authority should ensure that it has sufficient information to make an informed decision upon the application...

The information supplied should cover all financial aspects of the proposed enabling development, at a sufficient degree of detail to enable scrutiny and validation by the local authority and its professional advisers. This applies both to the definition of need – the condition of the asset and the means and cost of addressing its problems – and the definition of the scale of development necessary to meet that need. It must also be demonstrated that sufficient funds are not realistically available from any other source, particularly grant aid...

The cost of critical assessment

It is important that the financial justification submitted, and the assessment of the needs of the asset which underlies it, are subject to a proper critical assessment by an appropriate professional team. If a local planning authority does not have the full range of expertise in house, it will clearly be necessary to involve external consultants. The principle is exactly analogous to the common use of consultant engineers to check structural calculations submitted in support of applications for Building Regulation approval.

Critical assessment inevitably involves some expense....”

Investigation

How the applications were considered

19. The officer report in June 2006 recommended the Planning Sub-Committee should refuse the planning application on the grounds of highways safety and listed buildings policy.
20. The Highways Service had recommended refusal on the grounds that the proposed parking provision would lead to on-street parking close to a bend and could not be supported on grounds of highway safety.
21. One of the Council's Conservation Officers had recommended refusal because, in his view, the proposed development:
 - did not preserve the setting of the listed Chapel because it required demolition of a curtilage building;
 - neither preserved nor enhanced the conservation area, which could instead be done by repairing the curtilage building to high quality and, if appropriate, modifying it to accommodate new use; and
 - was tall and rivalled the height of the chapel, had an uninteresting roofscape and domestic scale windows – in distinct contrast to the squat and wide schoolroom which was subservient to the chapel, its interesting roofscape of differing mass and height adding interest to the setting and its large, institutional scale windows in harmony with the chapel.

Changes between June 2006 and January 2007

22. Between the officer report in June 2006 and the ones to the 04 January 2007 Planning Sub-Committee meeting, the Church re-submitted the listed building application together with a large bundle of documents produced by its agents to support the applications, and:
 - A more senior officer in the Conservation Section took over responsibility for the case from the Conservation Officer. The reason for this is not recorded. The senior officer in the Conservation Section says it happened because a Church official was not willing to speak to the Conservation Officer because of his opposition to the Church's plans.
 - A planning manager transferred responsibility for the case from the Planning Officer to himself and then to a middle manager a few weeks before the Sub-Committee meeting in January 2007.
 - The Planning middle manager says she finalised two reports to the Planning Sub-Committee that were already drafted.

- Representations in support of the applications increased from 18 to 58 plus a petition of 35, and representations objecting to the applications increased from 3 to 20 plus a petition of 235.
23. The supporting documents submitted for the Church on 09 November 2006 included:
- A building condition survey report based on a visual inspection that concluded the Schoolroom had had barely the minimum of maintenance for many years and works estimated to cost £186,000 were required to bring it back into a condition suitable for beneficial use. Reference to this as evidence of the cost of repairing and maintaining the Schoolroom in relation to its importance and the value of its continued use (as required by PPG 15 paragraph 3.19).
 - Acceptance that there may well be viable other uses for the Schoolroom, such as residential or childcare uses, but the market value with such permission was only £72,500 and would not fund the cost of refurbishing the Chapel of about £318,300.
 - That £350,000 would be raised – by selling the Schoolroom site with the benefit of planning permission for £280,000 and by selling the Caretaker's house for £70,000
 - Evidence of the severe problems facing another Church – the Church of England – in maintaining the many listed buildings it owns.
 - An assertion that the proposed development would bring substantial benefits to the community (as required by PPG 15 para 3.19) by securing the future of the Church and ensuring the Chapel's continued use for baptisms, funerals and weddings as well as coffee mornings and use by several societies.
24. The senior officer in the Conservation Section assessed the documents submitted by the Church's agents and gave his comments to the Planning middle manager. However, he says he never intended his comments to supersede those of the Conservation Officer. He says he thought he only needed to discuss the extra documents provided by the Church, rather than review the whole issue. The Council did not involve other officers with financial, building or valuation expertise in assessing the documents.
25. The comments made earlier in the year by the Conservation Officer and the Highways Service Department were on the file. The Highways Service repeated its objections on grounds of highway safety in response to the new listed building consent application.

26. The Planning middle manager finalised separate reports on the two applications. She recommended that both the listed building consent and planning applications should be approved subject to conditions including that there should be a legally binding agreement for the funds from the sale of the Schoolroom site to be used to repair/refurbish the Chapel.
27. The Sub-Committee approved both applications, by votes of 6-3 in favour. It is accepted that the photographs shown to the Committee to illustrate the condition of the Schoolroom were of an entirely different and very dilapidated building. The Section 106 agreement was completed during 2009.

Information gained by interviewing the officers involved

28. The Planning middle manager who finalised the two officer reports says that she did not understand that the Council had to consider for the Schoolroom the '*...desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses*'. She only applied that test to the effect on the listed Chapel of demolishing the Schoolroom. She also says:
 - The comments of the Senior officer in the Conservation Section influenced her finely-balanced decision to recommend that the applications should be approved.
 - She saw the proposed development as providing a visual buffer between the caretaker's house and new housing on the opposite side of the schoolroom site.
29. The senior officer in the Conservation Section says:
 - the development does not comply with UDP policies;
 - his comments on the supporting documentation were not finally interpreted as he had intended;
 - he wishes he had made clearer recommendations that the applications should be refused;
 - the new town houses were not appropriate in terms of design, or appearance;
 - the applicant had not demonstrated substantial community benefit to justify demolition of the Schoolroom as an exception to the presumption against demolishing listed buildings;
 - it was debatable whether the condition of the Schoolroom was so bad that the cost of repair and maintenance meant that retention could not be justified;

- adequate efforts had not been made to retain the Schoolroom building in its present or an alternative use; and
 - he did not see the Officer Report and was not able to explain his view to the Sub-Committee, so he was not able to ensure his Section's views were clearly put.
30. The key issue for the senior officer in the Conservation Section was, as he had stated in his comments, *"...if there is any doubt as to the granting of permission for the redevelopment as it stands the application for listed building consent should not be granted."*
31. The Conservation Officer (who has retired) says that:
- in his view the Church's building survey report did not make a case for demolition;
 - he inspected the Schoolroom twice in 2006 – it was repairable and its condition did not justify demolition;
 - there was insufficient information to conclude that adequate efforts had been made to retain the Schoolroom in use or find a compatible alternative use – it could be converted into dwellings; and
 - the proposed development did not comply with UDP policies.

Conclusion

32. There were significant errors and omissions in the report and presentation to the Planning Sub-Committee about the listed building consent application:
- the Sub-Committee were not advised of the general presumption in favour of preserving listed buildings;
 - the report does not address the statutory requirement to consider *'...desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses'* for either the Schoolroom or the Chapel or set out the relevant considerations contained in PPG 15;
 - the report does not explain whether the Church had made efforts to retain the Schoolroom in its present or an alternative use, or that an open market offer had not been made as required by PPG 15;

- the report does not fully explain UDP policy BE4: (only a partial summary of i. below was included)

“Demolition of listed buildings will not normally be considered acceptable unless:

i It can be demonstrated that the building has no beneficial use and no potential viable use; and

ii The structure of the building cannot be made sound.”

or advise that the application did not comply with that policy.

- relevant comments made by the senior officer in the Conservation Section to the Planning middle manager are not included, particularly:
 - *“No consideration appears to have been given as to whether a reduced scheme of refurbishment [to the Chapel] could give some of the same benefits as the desired scheme”;*
 - *“It seems clear that [the Schoolroom] has a potential viable use”;*
 - a scheme that was suitable for the site might mean that the Church would get less for the land, and change the balance of advantage between converting the Schoolroom and demolishing it to build a new building; and
 - *“..if there is any doubt as to the granting of permission for the redevelopment as it stands the [LBC application] should not be granted.”*
- 24 of the 32 photographs shown to the Sub-Committee were of another building in a very dilapidated condition.

33. The report to the Planning Sub-Committee about the planning application also has significant errors and omissions, as it:

- did not include the senior officer in the Conservation Section’s comment, that:

“...the scheme provides buildings substantially higher than the existing buildings and higher than the caretaker’s house....(despite attempts at mitigation). The new development nevertheless remains large in relation to the chapel and the caretaker’s house and not a simple design such as would relate well to the caretaker’s house.”

- did not include the views of the Conservation Officer and senior officer in the Conservation Section that the proposed development did not or may not comply with the Council’s UDP policies BE3, and BE5 which repeat the requirements of Section 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990; and

- did not advise the Sub-Committee that the development did not comply with UDP policy T10 – new development will not normally be permitted if it will create or materially add to highway safety problems but did include that the Highways Service recommended refusal.

Findings

34. There were serious flaws in the way that the Council dealt with and decided these important applications for consent to demolish a listed building and permission to build four new town houses affecting other listed buildings and in a conservation area. These flaws eclipse any issues about the way that the Council dealt with the representations it received on the applications.
35. For a variety of reasons the Conservation Section's overall view on the applications was not clearly reported to the Sub-Committee. The written comments of the Conservation manager to the Planning middle manager are, at best, oblique in his criticism of the applications. The failure to give clear, comprehensible professional views and assessments of the two applications was maladministration.
36. The Planning middle manager decided that demolishing the Schoolroom and selling the site with planning permission for four new houses was 'enabling development' for the repair and refurbishment of the listed Chapel. The Committee accepted her recommendations to approve the applications for listed building consent and planning permission on that basis. The Council did not apply the guidance in the English Heritage Policy Statement or make a proper, critical assessment of the documents submitted in support of the applications. This was maladministration.
37. The errors and omissions in the reports to the Planning Sub-Committee mean that its decisions to approve the demolition of the Schoolroom and the development of four town houses on the site were made without taking account of the relevant considerations of: the law; national guidance; the Council's own planning policies; the listed status of the Schoolroom; and the views of its specialist staff. This was maladministration.
38. If the Planning Sub-Committee had been properly advised and directed to the proper considerations for these applications, I believe that it would not have approved the applications.
39. The Council's maladministration has caused injustice to Mrs O and Mr & Mrs N and others in the neighbourhood of the potential loss of part of the area's built heritage that contributes to the setting of the very distinctive listed Chapel and the character of the Conservation Area. The Schoolroom is in the private ownership of the Methodist Church which is under no obligation to make its property available for wider community use.

Recommendations

40. The Decision Notices approving the applications were issued subject to a Section 106 agreement that has now been signed. This means that the only effective remedy for the injustice caused by the Council's maladministration is to take steps to try to avoid the Schoolroom being demolished and the four new town houses being built on the site. I understand that a new planning application is under consideration and should be determined in the near future.
41. If the new planning application is not approved, the Council should:
- seek to negotiate agreement with the landowners whereby a further new scheme is designed to either convert the Schoolroom or, subject to the Council being satisfied about the considerations in PPG1, to demolish and re-build on the site in a way that enhances the Conservation area and the setting of the Chapel.
 - facilitate such a scheme by meeting the reasonable costs of design and a planning application and, in return, securing the owner's agreement to relinquish the approvals issued in February 2007;
 - receive a report within 20 weeks of this report about progress with the negotiations; and
 - if the prospects of success appear poor, consider revoking the approvals issued in February 2007. Such consideration to be based on a full report outlining: the history of maladministration; advice from its Conservation officers and Sub-Committee about the 'merits' of the original applications based on a full and proper consideration of the listed building, 'enabling', and conservation issues; and the financial implications for the Council.

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

9 February 2010