

PUBLIC SERVICES OMBUDSMAN FOR WALES

Report by the Ombudsman on an investigation into a complaint of maladministration made against Caerphilly County Borough Council

Introduction

1. This report is issued under Section 16 of the Public Services Ombudsman (Wales) Act 2005 (“the Act”). It has been anonymised in accordance with the requirements of the Act. I shall refer to the complainant, therefore, as Mr Y.

The Complaint

2. Mr Y runs a petrol filling station and car sales business. He complained that planning permission had been granted for a residential development of four houses next to his petrol station. The petrol tanks and fill points were situated close to the boundary of this proposed development, and the layout of the houses on the development meant that one of them, referred to as ‘house 4’, was close to the fuel tanks. Mr Y was concerned that this created a safety risk to him and his staff as well as the potential occupants of that property.

3. When Mr Y received notification of the outline planning application, he attended the Council offices and verbally expressed his concerns. He has stated that he was told that the Council would take into account any safety implications of the development. He did not receive the notification of the detailed planning application and therefore did not respond. He felt that the Council failed to take the proximity of the petrol tanks into consideration when they granted planning permission and also did not modify the planning consent when they became aware of the problem. Mr Y was also concerned that should he need to replace the tanks in the future, he would be denied

planning permission due to the proximity of the new development and would therefore have to resite them at considerable expense.

Legal and Administrative Background

Planning Control

4. Planning permission from the local planning authority (the Council in this case) is generally required, in accordance with the Town and Country Planning Act 1990, for any development of land or the making of any material change in the use of land. Applications for planning permission must be determined by the local planning authority in accordance with the development plan unless material considerations indicate otherwise. Material planning considerations relate to the use and development of land and include: size, layout, siting, design and the external appearance of buildings, landscaping and impact on neighbourhood.

Notification of planning applications

5. The Council's obligation to publicise a planning application is set out in Article 8 of the Town and Country Planning (General Development Procedure) Order 1995. The Order requires the Council to publicise all planning applications it receives either by a site notice or by notification to neighbours.

Power to revoke or modify planning permission

6. Section 97 of the Town and Country Planning Act 1990 states that if it appears to the local planning authority that it is expedient to revoke or modify any permission to develop land granted on an application, it may by order revoke or modify the permission to such an extent as they consider expedient. Such orders require the confirmation of the Welsh Assembly Government. If a person interested in the land has incurred expenditure in carrying out work

which is rendered abortive by the revocation or modification or has otherwise sustained loss or damage which is directly attributable to the revocation or modification the local planning authority shall pay that person compensation in respect of that expenditure or damage.

The Council's response

7. In response to the points of this complaint in August 2005, the Council have stated the following:

“Officers of the Council’s legal, planning, environmental health and finance divisions met in mid May to discuss the matter and concluded that the correct course of action was to seek a revocation or modification of the planning permission to prevent the erection of the house nearest the garage, and this opinion was passed to the developer at a meeting on the following day. The Health and Safety Executive was also informed. Authority was sought from the Chairman and Vice-Chairman of the Council’s Planning Committee on 23 May 2005 for such action, although it was made clear that should mitigation measures prove feasible, there would be no need for the modification order. Those Councillors agreed to the modification order on 26 May 2005.

The advice received from the Council’s independent consultant in early July confirmed that it was feasible to mitigate the relationship between the petrol filling tanks and the house, allowing it to be built, and since then that option has been pursued in preference to the modification of the planning permission. Although over a month passed between authority being given for modification and the receipt of that advice, it was reasonable to wait for it because had the Council served a modification order the developer would have had a right to be heard by a

person appointed by the Welsh Assembly Government, and the Council would have had to show that it had considered all options before taking steps to deprive the developer of part of his planning permission.

The Chief Planning Officer has coordinated this investigation with a view to addressing any risks through the Planning and Building Control processes. He also secured the cooperation of the contractors to cease work on the house plot closest to the petrol garage until it could be confirmed that the house could, in fact, be safely completed and occupied.

A review of the environmental health procedures has highlighted that officers are only required to consult the petroleum officer when the development site has, or had at some time, a petrol station situated on it. The procedure has subsequently been amended to include adjacent land to cover such circumstances.

Having received independent advice, officers are of the view that an appropriate fire-resisting wall can be built on the boundary without detriment to the Service Station.

Consequently the developers have been asked to provide the Council with appropriate structural information in support of the design, height and position of the wall. To this end, the developers have appointed a Chartered Civil Structural Engineer. The house builders have been asked to cease construction during petrol deliveries until the said wall has been constructed.”

8. In a further response to the Ombudsman in September 2005, the Council added:

“The officer who dealt with the application has now left the authority, and so it is not possible to determine whether he visited the petrol filling station. However, it is unlikely that he would have gone onto the petrol filling station site because the relationship between the two properties can be assessed easily from the application site and the public highway. There are no objections in principle from a planning point of view to residential development next to a petrol filling station. You comment that the petrol filling station was a significant issue in view of the actions taken in May 2005. The matter that prompted these actions – the proximity of the petrol tanks to the boundary with the application site – was not brought to the local planning authority’s attention by the complainant until after the development had commenced, even though he had been consulted about both the outline and the reserved matters applications. The location of such tanks, unless they are on an application site, has not been considered to be a material planning consideration in the past, although in view of the concerns raised in this case, this local planning authority will attempt to anticipate this issue from now on. Having become aware of the tanks, the local planning authority negotiated with the developer and secured an appropriate fire resistant wall on the boundary.”

The Council also provided a copy of the standard letter which was sent out to notify neighbouring properties of the development (dated 17 January 2005) and a list of the neighbours to whom this letter was sent. Mr Y is included on this list.

9. The agreement for construction of the fire-resistant wall was made with the developer under section 106 of the Planning Act 1990. This covers the maintenance of the wall by any subsequent owners of ‘house 4’.

10. The Council's Building Control section confirmed in September 2005 that the structural report/calculations submitted by the developer's chartered engineers for the design and construction of the wall were acceptable to the authority. They also confirmed that this was discussed with Mr Y during a meeting at the Council offices. The Council has stated that, under building control regulations, there is no requirement to inspect the wall, though due to concerns raised by Mr Y in this case, the building control department has said that it has inspected the wall when it felt it was necessary to do so. It has also been stated that the Building Control section will respond as necessary to any complaints that Mr Y makes.

11. In respect of the ongoing monitoring of the wall, the Council has said that:

“There is no statutory regime that would require the regular inspection of this wall. However, the licensing regime for the petrol filling station involves a yearly inspection of those premises, and in view of the relationship of the wall with the petrol station, the Council's petroleum officer will view the wall and pass any concerns to the planning division. The presence of the wall will be taken into account in any risk assessment of the petrol filling station, and the local planning authority would also respond to any concerns the garage owner may have about the integrity of the wall.”

Findings

12. The Council has provided evidence that Mr Y was included in the notification list for neighbours of the development. The fact that Mr Y may not have received the second notification letter of January 2005 does not appear, from the evidence that I have, to be attributable to maladministration on the

part of the Council. I note that he visited the Council offices when outline planning consent was sought and raised the issue of the position of the petrol tanks at that point. However he did not raise his concerns formally in writing as the notification letter invited him to do. Nonetheless, I am of the view that, as his query related to significant safety issues, the Council should have advised him to put his concerns in writing when he raised them verbally. Had he made a formal objection at this point, it seems likely that the subsequent events and this complaint would have been avoided.

13. On the evidence that I have seen, including the plans, I cannot see that the location of the petrol tanks was considered at any stage in this application. A site visit was undertaken but the records are somewhat basic and do not indicate any further consideration of the neighbouring properties. The matter was referred to the Environmental Health Department, but their comments were related to potential land contamination. The petroleum officer was not consulted. Whilst the non-householder report indicates that the Planning Committee would have been aware of the presence of a garage at the northern boundary of the site, there is no further information available about the garage. The submitted plans also appear to indicate that there is some distance between the dwellings and the garage.

14. I believe that the Council's consideration of this application in relation to the proximity of the application site to the petrol storage tanks was wholly inadequate. The policy of only considering the location of such tanks as a material consideration if they are actually on the proposed site is unhelpful. I am pleased to hear that the Council has now amended this policy to reflect the fact that such tanks in close proximity whether on the site itself or bordering it would constitute a material consideration.

15. Whilst I accept that Mr Y had an opportunity to comment formally in writing early on in the process, the planning process should not rely upon objections to identify significant safety considerations. The Council's failure to recognise that the location of the petrol tanks was such a consideration was maladministration.

16. Once the matter was brought more forcibly to the attention of the Council by Mr Y, it appears that they attempted albeit belatedly to remedy the situation. I can see that the Council has considered both modifying the planning consent to include only three houses and making the consent subject to conditions to mitigate the risks. Whilst I appreciate that from Mr Y's point of view decreasing the size of the development would have been the most acceptable solution, the Council are entitled to take the decision to pursue other measures on the basis of the specialist's report. They engaged appropriate specialist advice and took into account the industry guidance in coming to their conclusions.

17. Mr Y has indicated that the situation as it stands is unacceptable. I note that there are two main outstanding concerns which he has raised. In respect of any future planning application for replacement of the tanks, I cannot see that the Council can give a guarantee that permission will be granted, irrespective of the development of this site. Each application would have to be judged on the nature of the proposed work and the industry standards at the time of application.

18. I have also considered his concerns about the construction and ongoing maintenance of the 'blast' wall. I note that the specialist in his report recommended that the petrol tanks should be inspected following the completion of the wall to ensure that no damage has been caused. I recommend that the Council should satisfy itself that such an inspection has

been carried out in order to ensure that Mr Y has suffered no detriment as a result of the construction work. It would also be helpful for an inspection of the completed wall to be arranged and a written assurance given to Mr Y that it is constructed in accordance with the agreed engineer's plans.

19. The section 106 agreement places a permanent obligation on the owner (and any subsequent owners) of 'house 4' to maintain the wall and the Council's Planning Department has a continuing obligation for enforcement of any breach of the planning agreement in respect of maintaining the wall. I accept that the Council have said that inspection of the wall will form part of the yearly inspection of his petrol station by the petroleum officer and that the Planning Department will respond to any concerns that he have about the integrity of the wall. The Council should confirm these arrangements to Mr Y in writing.

Conclusion

20. I am of the opinion that the remedial action, outlined in paragraphs 18 and 19 of this report, is reasonable considering the circumstances of this complaint. I also recommend that the Council should apologise to Mr Y for the shortcomings in the initial planning process and offer him a payment of £1000. This is in recognition of the worry caused to Mr Y about the future viability of his business and the time and trouble he has taken in making his complaint firstly to the Council and then to me

Adam Peat
Public Services Ombudsman for Wales

17 May 2006