

Complaint reference:
12 017 527

Complaint against:
London Borough of Merton

The Ombudsman's final decision

Summary: the complaint concerns the grant of planning permission for a large scale development. There was administrative fault in the conduct of a site meeting/presentation to members of the planning committee and in the lack of detail and analysis in some aspects of the report on the application. It is not possible to conclude that the outcome would have been different.

The complaint

1. Ms C complains on behalf of over 50 local residents about the Council's consideration of a planning application for a large development of a site near to their homes. Of particular concern is the assisted living development (ALD) part of the development.

The Ombudsman's role and powers

2. The Ombudsman investigates complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. If there has been fault, the Ombudsman considers whether it has caused an injustice and, if it has, she may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1)*)
3. The Ombudsman has the power to start or discontinue an investigation into a complaint within her jurisdiction. (*Local Government Act 1974, sections 24A(6) and 34B(8)*)
4. The Ombudsman cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. She must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3)*)
5. The Ombudsman provides a free service, but must use public money carefully. She may decide not to start or continue with an investigation if she believes she cannot achieve the outcome someone wants. (*Local Government Act 1974, section 24A(6)*)

How I considered this complaint

6. I considered the complaint and the documents provided by Ms C and spoke to her on the telephone. I wrote to the Council and considered the comments and documents the Council provided. I sent both the Council and Ms C a statement with my provisional view. I interviewed three officers of the Council over the telephone.

What I found

7. The site borders a conservation area. When the planning committee first considered the application it was deferred. Following a site visit the committee considered it again at the next meeting when it granted planning permission.

My assessment of the issues

8. I am looking to see not just whether there has been fault by the Council but what the consequence has been to the complainants as a result. I consider the key issues here are with the ALD building in terms of its size, design and impact on the surrounding area and the assessment the Council gave to those matters.

Consultation with English Heritage and GLAAS

9. English Heritage and the archaeological sub-division, GLAAS, were statutory consultees for the planning application. The Council's records show that it sent letters of consultation to both on 21 February 2012. Neither replied. The report on the application states there was no formal response from either. Ms C reports that neither received the consultation and has expressed doubts as to whether the Council consulted either body.
10. I cannot say what happened here. It is possible the letters were not sent but it is also possible that they were sent and were lost in the post or, for other reasons, not received, or that both bodies simply failed to respond. But I cannot say there was an error by the Council.
11. Ms C has argued that as there is a statutory requirement for English Heritage and GLAAS to respond when the Council did not receive a response it should have chased one. It would have been possible for the Council to pursue the lack of a response but there was no requirement for it to do so and I do not consider a failure to do so was administrative fault.
12. In responses to my provisional view the Council has commented that there are lessons to be learnt from the complaint. On this point the Council could consider whether it should be alert to any failure to respond and to consider whether, in the circumstances of any particular planning application, it should contact the consultee.

The design of the ALD and the impact on the neighbouring conservation area

13. Ms C complained the design review board was not consulted and the Council had not considered properly the design of the ALD building and its impact on the neighbouring conservation area.
14. The Council has commented that consultation with the design review board is not a statutory requirement. The Council says the conservation officer is in a section of the Council called Future Merton and that section had been involved in taking the application forward from the early stages. There was no specific response from Future Merton as their input was so in-depth from the scheme's inception.
15. I have interviewed both the conservation officer and the Head of Future Merton. Both officers are in the same team. The Head of Future Merton took the lead in the preliminary discussions with the applicant. He had drawn up the design brief for the site. The Council would have preferred for two separate applications to be made for the main part of the site and the ALD building but the applicant was not willing to do so. The Council could not compel the applicant to make two applications. The senior officer explained the Council was not satisfied with the initial proposals for the ALD building. He discussed the scheme with the

conservation area officer and then met with the applicants in June 2012. The applicants then submitted a revised scheme. He considered the revised scheme was acceptable. Conditions were imposed on the planning permission which meant the Council could approve materials to be used.

16. The conservation officer confirmed her involvement was in discussion with the Head of Future Merton before the meeting with the applicants. In responding to my enquiries about the complaint she had commented that “the approved building presents an unrelieved, continuous elevation along ..., having a more dominant impact on...”. At interview she agreed that they were unhappy with the elevations of the scheme as it was initially proposed but the applicants revised it. She considered the conditions enabled the Council to have some further control over the finished development. The Head of Future Merton considered the changes to the scheme, along with the imposition of conditions, made it satisfactory and it could be recommended for approval.
17. I consider it would have been possible and desirable for there to have been a specific analysis in the report of the impact of the ALD proposal on the neighbouring conservation area. However I do not consider that this lack of detail has affected the decision. The scale of the development and relationship with surrounding areas was clear and the relevant officers of the Council did consider the design of the development and sought changes to it. On balance the Head of Future Merton considered the revised scheme could be recommended for approval.

The site meeting/presentation

18. There was a meeting between the July planning committee meeting and the September meeting. This was attended by:
 - Members of the planning committee;
 - Senior development control officers;
 - Representatives of the applicant;
 - The architects;
 - Representatives of the applicant;
 - Representatives of the developer of the ALD.
19. The Council has stated the purpose of the meeting was to allow members of the planning committee to view full size drawings of the proposals, to view and walk the site and to ask questions. The event was essentially conducted by the Primary Care Trust (PCT) with representatives from the architects’ practice acting for the PCT and designers for the developer of the ALD.
20. The crux of the complaint on this point is that this went beyond a site visit and was a presentation. This is significant because the Council’s planning protocol provides that when applicants and developers attend presentations then ward councillors, consultees and objectors will be invited. This did not happen.
21. Given all the circumstances here I consider this went beyond a site visit and should have been considered as a presentation and the Council’s planning protocol should have been followed in inviting other interested parties to attend. The Council has commented there was no formal presentation by the applicants but a question and answer session although the applicants’ representatives did assist Councillors in understanding the plans and proposals. Most of the time was spent walking round the site. The Council is concerned that my view challenges

councillors' right to request a site visit and the relatively recent changes to predetermination rules. I do not consider that my view affects this. In carrying out a site visit the Council should ensure that its own procedures are followed so there can be no impression of bias. I am pleased to note the Council has undertaken to revise its procedures to clarify the difference between a presentation and a site visit.

22. Although I consider the site visit went beyond what could have been expected I do not consider this would have made any difference to the eventual outcome. It would have improved the transparency of the process but there are no reasons to conclude the committee would have reached a different decision. However the site visit did provide Members of the committee with more information about the site and the surrounding properties.

Impact on neighbouring properties

23. Ms C complains there is an unacceptable impact from the ALD development on neighbouring properties, and property A in particular, and the Council has not had proper regard to this. The Council has said that officers did consider this point and decided the impact was not unacceptable. There were no specific calculations done as that was not necessary.
24. The report on the application refers to the impact on neighbouring properties and explains why officers considered the impact to be acceptable. The new building is 10m away from the side wall of property A. The report does not refer to the windows in the side wall of the property.
25. The officer who considered the impact the development would have on neighbouring properties has left the Council but I spoke to a senior officer on this point. He explained there will be some tree planting on the part of the boundary between the new building and property A and there is a walkway between the site and the house. He attended the site visit and explained that members walked round the site. The occupier of property A came out and talked to members about the proposals.
26. The Council has a policy which provides that when new housing which is oriented to face directly towards an existing residential area, there should be a spacing of at least 12.5m (for three storey dwellings) between the new dwellings and the site boundary.
27. I can understand why Ms C and the owner of the property would like to have seen the calculations that can be done to assess the impact of buildings on neighbouring properties but it is for the Council to decide whether this is something that needs to be done. However I consider there should have been a more detailed analysis in the report of why the development was considered acceptable in terms of the impact on property A. There was no mention of the windows in the side elevation of property A (or the other nearest property) or reference to the policy I refer to above and why a lesser separation was considered acceptable here. The report concludes that overlooking would not be significantly increased to an extent that would warrant refusal of the scheme. But the new scheme is a storey higher than the building it replaced and there are balconies on this elevation. I consider the failure to explain in detail in the report why the impact was considered acceptable is administrative fault.
28. I have to consider what impact this fault has had. I cannot say whether a fuller analysis in the report would have altered the outcome. There is a possibility it could have made a difference but I cannot say on the balance of probabilities that

it would. The Council has accepted there are lessons to be learnt from the complaint and I consider that one of them is that a large scale development such as this should not mean that an appropriately detailed analysis of the impact on particular properties is not done.

The planning brief

29. The Council approved a planning brief for the site in 2007. This was a material consideration for the Council when considering the planning application. But there did not have to be absolute adherence to the proposals in the brief. The ALD building is considerably larger than the development proposed on that part of the site in the brief. The report on the application refers to the development as being “broadly” in accord with the design brief and other material considerations.
30. I consider it would have been possible for the report to have been clearer on the extent of the change of the size of the ALD development from that proposed in the brief and in respect of other changes. But I do not consider that this has been of any consequence. Members could have been in no doubt as to the scale of the development that was proposed. So while I think greater clarity here would have been possible and desirable I do not consider this lack of clarity has had any impact on the final decision. -

Air quality assessment

31. The Council does not consider that a specific assessment was required. It relied on the advice of its environmental health officers and they raised no issues about air quality. Ms C has referred to the Council’s guidance and believes this must be one of the most polluted roads in the Council’s area. She has also referred to a recent planning application nearby where the Council has imposed a condition requiring the submission of an air quality assessment, including dispersion modelling, to be submitted to the council before development can commence.
32. I am not going to take this point further. It was for the Council to decide if a formal assessment was required in this case. There is no absolute requirement for this to happen. Moreover I do not consider the failure to do so could be the cause of sufficient injustice to warrant further investigation by me.

Trees

33. Ms C has referred to the London Plan and its comments that a tree’s value should be derived in conjunction with a recognised tree valuation method such as CAVAT or i-tree. Again it was for the Council to decide on how it assessed the trees on the site. It was not administrative fault for the Council not to use a different methodology.

Final decision

34. I explain above that I consider there was some administrative fault in some aspects of the consideration of the planning application. There is some uncertainty whether the decision reached would have been different but I cannot conclude it would.

Investigator’s decision on behalf of the Ombudsman.