

Report

on an investigation into
complaint no 08 004 420 against
Herefordshire Council

29 July 2009

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Appendix 1: Location plan

Appendix 2: Extract from the Council's Development Control Manual

Key to names used

Mr Ash	Complainant
Mrs Birch	Complainant
Officer A	Planning Officer
Officer B	Team Leader
Officer C	Head of Policy

Report summary

Planning applications

Mr Ash and Mrs Birch complain that the Council failed to require the submission of plans that accurately showed the position of a new house next to their listed property, when it determined the planning application for the development. They also say the Council failed to ensure the compliance of the developer with the approved plans after construction began and it has allowed the new dwelling to be built closer to their home, with windows that have caused them a loss of privacy. They consider that the Council gave inadequate consideration to their complaint about the development. They say they are now overlooked where this was not the case before, by a new house that is out of scale and keeping with its surroundings.

Finding

Maladministration causing injustice

Recommended remedy

I recommend that the Council:

- a) pay Mr Ash and Mrs Birch the sum of £1250 for their outrage, lost opportunity and uncertainty;
- b) make them a formal apology for the mistakes identified; and
- c) review its procedures and staff training on amendments to planning applications and planning permissions in the light of the issues highlighted in the complaint.

Introduction

1. Mr Ash and Mrs Birch complain that the Council failed to require the submission of plans that accurately showed the proposed position of a new dwelling within a building plot (Site A) adjacent to their property, when it determined the planning application for the development, reference no DCNE2006/0934/F (see Appendix 1).
2. They also say the Council failed to ensure the compliance of the developer with the approved plans after construction began and it allowed the new dwelling to be built closer to their home than as specified, with west facing windows, at ground and first floor level that have caused them a loss of privacy. They further consider that the Council gave inadequate consideration to their complaint about the development and the regard for their amenity.
3. They say that they are now overlooked, where this was not so before, by a new house that is out of scale with its surroundings and of a design and appearance that does not reflect the character of nearby properties, including their home.
4. An officer of the Commission has visited the complainants, inspected the Council's files and interviewed the officers who dealt with the planning application referred to and their formal complaint.
5. The names used in this report are not the real ones of the people involved, to protect confidentiality¹.

Legal and administrative background

6. Government guidance in Circular 15/92 specifies that an amendment requested to a planning permission should be the subject of a fresh planning application if it is considered to warrant renotification. The Circular highlights factors that need to be taken into account, including: if objections or reservations had been raised at an earlier stage that were substantial and justified further publicity; if the proposed changes were significant; if earlier views covered the matters now under consideration; and if the changes proposed would be likely to be of concern to parties not previously notified.
7. The Courts have affirmed that officers may deal with working amendments to a planning permission where the variations are not considered material and that it is appropriate for officers to decide whether a proposed amendment is minor or material. But it has been held that interested parties should be informed of requested changes that may directly affect them.

¹ Local Government Act 1974, s 30(3)

8. In *Breckland District Council v Secretary of State* 1992, the Court ruled that third parties had a right to be informed of and consulted on any amendment that materially affected them. In *British Telecommunications v Gloucester City Council* 2001, the High Court ruled that it was appropriate for local planning authorities to take a pragmatic approach when considering amendments to a planning application. The question was whether the change was so substantial that, in the interests of fairness, a fresh application should be lodged.
9. In *Welsh Aggregates v Secretary of State* 1983, it was held that what constituted a substantial alteration was a matter within the discretion of the planning authority or a Planning Inspector. A Court would not ordinarily interfere unless the discretion was exercised manifestly unreasonably (c.f. *Wessex Regional Health Authority v Salisbury District Council* 1984). In that instance, the District Council had acted reasonably in approving certain minor changes and in requiring planning applications for more substantive alterations. The question of reconsultation on the minor amendments had not arisen because of the definition of what constituted a minor amendment. The decision to treat some of the changes as minor had been taken by an experienced, qualified planning officer who exercised his professional judgment.
10. The Council's development control manual sets out best practice for dealing with amendments requested to an application or following the grant of planning permission. Factors that should guide officers in deciding whether a new application is required include: whether the basic form, appearance, shape or position of the scheme remains unaltered, namely is the scheme essentially the same as submitted/approved; if the change reintroduces something previously found unacceptable and negotiated away; and whether changes would materially alter the height or appearance of a development or make the position worse for neighbours, by bringing it closer to a boundary or by having windows facing the boundary. The best practice cautions against the acceptance of cumulative amendments as minor and warns that neighbours who may have inspected original plans will be expecting the development to be as shown on the plans. The best practice notes that if an amendment is sought to a planning permission, such that renotification to the Parish Council or neighbours is considered necessary, then the change should probably not be accepted as minor. The full guidance is set out at Appendix 2.
11. Listed buildings are buildings of special architectural or historic interest that have been included on a statutory register by the Department for Culture, Media and Sport because of their heritage significance. Grade I listed buildings are those of exceptional interest. Grade II² listed buildings are particularly important buildings of more than special interest. Grade II listed buildings are of special interest, which warrants every effort to preserve them. Councils must have regard to the

impact of proposed development on the setting and character of listed buildings, when determining planning applications, and ensure that new development is carefully sited and designed. Councils may designate groups of buildings of special architectural or historic interest and related open spaces as Conservation Areas. Proposals for new development in Conservation Areas must preserve or enhance their character³.

Investigation

Background

12. Mr Ash and Mrs Birch live in a Grade II listed thatched house. Site A was former garden land. Their property and Site A lie within a conservation area and an Area of Outstanding Natural Beauty (AONB). The new house is two storey, detached, modern in style and located immediately to the east of Mr Ash and Mrs Birch's home, in the centre of Site A. The ground level of Site A is 1.5 metres higher than the nearby road. The east side of Mr Ash and Mrs Birch's property is at a similar level to the new development, but the remainder of their land slopes downwards to the south and west. A field access lies between Site A and Mr Ash and Mrs Birch's property.

Events in 2006

13. Planning application reference no DCNE2006/0934/F was submitted on 24 March 2006 for a new house and garage on Site A. On 31 March 2006, the Council notified Mr Ash and Mrs Birch of the application and invited their comments.
14. On 4 April 2006, Officer A, the case officer, visited Site A. He noted that the application site sloped gently towards Mr Ash and Mrs Birch's property, beyond a drive and within the village conservation area and AONB. The land was fairly well screened by mature trees and had been in use mainly as garden and lawn. A site notice was posted the same day.
15. On 6 April 2006, Mr Ash and Mrs Birch objected to the scale, height, appearance and proximity of the new dwelling, its fit within the immediate area and the location of a drive close to their access. They said the proposed new house was of an inappropriate modern design, sandwiched between two older properties; and it would be elevated, dominating and close to their property that was at a lower level. They considered that there would be an adverse impact on the view from their upstairs bedroom windows, with proposed screening inadequate to hide a dwelling of the size proposed. They were not opposed to a smaller, more

3 Planning Policy Guidance Note 15 (PPG15): Planning and the Historic Environment

sympathetic development at the same level as their property, with a drive further away and a design more in keeping.

16. On 7 April 2006, the application was advertised in the press. On 17 April 2006, the Council received a response from the Parish Council. Around this time, an undated file note said the authority's conservation officer had concerns about the scale of the dwelling.
17. On 21 April 2006, Officer A wrote to the applicant's agent following his site visit and consultation responses. The Council's conservation officer considered that the plot was of a sufficient proportion to accommodate a single dwelling without an unduly detrimental effect on the conservation area. The style of architecture was suitable for the village. But he was concerned about the scale of the development and recommended that its mass be reduced, to make it more in keeping. The Parish Council and neighbouring residents had also commented that the site was prominent. Officer A added that it appeared that there had been a misunderstanding about proposed finished site levels. He asked the agent to conduct a site survey, showing existing and proposed site levels, and submit amended plans within 21 days.
18. On 4 May 2006, the Council received amended plans showing a reduction in the gable facing Mr Ash and Mrs Birch's property, from 8.0 metres to 7.3 metres, a reduction in the ridge height of approximately 300mm and a lowering of the ground level by 300mm, through intended additional excavation. On 12 May 2006, the Council notified Mr Ash and Mrs Birch of the revised plans.
19. On 24 May 2006, Mr Ash and Mrs Birch reiterated their objections, after viewing the revised plans. The modern design of the new house was out of keeping and inappropriate given its setting next to their listed property. The drive remained too close. The development, while lower, was still far too high and over dominating. Existing screening was only partial along the boundary with their property and limited mainly to the summer months. They questioned the suitability of an 'executive' style house in the conservation area and AONB and the Council's regard for views from the nearby church tower. This had been an issue raised by the Parish Council when it had commented on their planning application to extend their property. Mr Ash and Mrs Birch queried the consistency of the Council's approach and requested that serious consideration be given to the proposal as it would have a tremendous impact on them because of its overpowering size. Finally, they said that if the Council agreed to a large, modern, infill scheme alongside their listed property, this would amount to victimisation and an insult.
20. Following comments of 26 May 2006 from the conservation officer that the development was now acceptable, Officer A prepared a report recommending approval to the revised design. The report was agreed by Officer B and submitted for consideration by the Council's Northern Area Sub-Committee.

21. On 14 June 2006, the Sub-Committee approved the application after Mr Ash and Mrs Birch spoke in support of their objection. Officer A's report noted the setting of the site within the conservation area and AONB and adjacent to their listed building. The report referred to their objection and cited an assessed separation distance of 20 metres between their property and the two storey element of the new house, with an absence of windows in the west elevation, to mitigate any loss of privacy. The conservation officer had no objection and considered the development acceptable within the conservation area and village.
22. Mr Ash and Mrs Birch consider that the case report overstated the separation distance that would result, with the true distance of the main two-storey west elevation from their home being 18 metres. They told my investigator that the distance of the ground floor utility room of the new house from their home is 16 metres and this distance would be reduced to 14 metres if they went ahead with an approved extension to the side of their property next to Site A. They also said the report wrongly advised the Committee that there would be no windows in the west elevation of the new dwelling when the submitted plans showed a ground floor west-facing window serving the utility room. This advice had then been further compromised when officers agreed, subsequent to the grant of planning permission, to an additional upper floor window in the main two-storey elevation facing their home.
23. Also on 14 June 2006, the Sub-Committee approved an application of April 2006 by Mr Ash and Mrs Birch for a single storey side and rear extension of their property on the east flank immediately adjacent to Site A.
24. After issuing conditional planning permission for the development on Site A, an exchange of correspondence took place in July 2006 between Mr Ash and Mrs Birch and the Council about proposals for landscaping and the new drive. The Council said the position of the access had been mentioned in the case report and their oral address. Its location had been approved by the Committee, with a design that accorded with the advice of highways officers.

Events in 2007

25. On 13 February 2007, the applicant's architect wrote to the Council about requested alterations to the approved development. The proposed alterations were stated as minor and included: the enlargement of the window of bedroom one to the north elevation; the reversal of the front door and window; a new upper window serving the master bedroom, intended to be west-facing, but referred to in the architect's letter and shown on the floor plan in the accompanying drawing 5341-1-5 as sited in the east elevation, the enlargement of the chimney breast; a preferred position for a satellite dish; the replacement of the proposed utility room rear door with a stable door; and a slight enlargement of the garage. The architect invited the Council's response.

26. Between March and August 2007, an exchange of correspondence took place between the Council and the architect about the discharge of planning conditions and amendments to the approved development. Also during this period, on 2 April 2007, the Council approved the construction of a conservatory at the rear of the new house under reference NE07/0588/F. On 8 August 2007, the architect commented on the matters he considered outstanding. He sought the discharge of the remaining conditions as the start of development was imminent.
27. Construction began in late 2007. Mr Ash and Mrs Birch told my investigator that it was when work reached an advanced level that they realised that the design of the new house was different from that seen at the outset. It seemed closer, with a window in the ground floor of the utility room and an upper window in the west facing two storey elevation where none had been shown in the original plans.

Events from 2008

28. Following a telephone conversation on 30 January 2008 with Mr Ash and Mrs Birch about the development and the handling of the planning application, Officer B wrote to them on 1 February 2008. He accepted that the Committee report had been misleading in the reference made to 'no windows in the west elevation' and whether this actually related to the two storey element of the new dwelling. But he added that Members would have seen the submitted plans and noted a window in the west elevation of the single storey element.
29. He also noted that the stated separation distance of 20 metres between the new dwelling and their property was disputed. The applicants' plans had not shown their property. But Officer A had estimated from the plans that their home was about 11 metres from the centre of a hedge on the boundary, with the new dwelling 11 metres from the hedge, within the site. He did not consider the difference in the quoted distance material to the decision to grant planning permission. He also did not consider that the difference in site levels was significant or that the ground floor window in the single storey element could have been a ground for refusal.
30. On 20 February 2008, Mr Ash and Mrs Birch put a formal complaint that the Committee report of 14 June 2006 had wrongly stated that the two storey element of the new dwelling would be 20 metres from their east elevation with no windows in the west elevation. Their measurements showed a separation distance of 18 metres, with a distance of 16 metres from the ground floor window in the single storey element. If they went ahead with their approved extension, this would result in the new dwelling being 14 metres away from their house.
31. On 28 February 2008, the Head of Planning Services stood by the decision to approve the development. The discrepancies in the measured separation distances had not been material to the outcome of the application. He did not believe the Committee would have reached a different decision with corrected

information and could not add to previous comments on the acceptability of the ground floor, west elevation window.

32. On 5 March 2008, Mr Ash and Mrs Birch complained further and said the Council had let them down given the area's status as a conservation area and AONB. On 13 March 2008, the Director of Environment replied to the complaint at Stage 2. He recognised their concerns, but the Council had followed its unitary development plan (UDP) and had dealt with the application on its merits. On 29 March 2008, they said they did not consider that the Director had properly formed his own judgement on the complaint and asked to go to the Council's Stage 3.
33. On 8 April 2008, the Council acknowledged their Stage 3 review request. On 30 April 2008, Mr Ash and Mrs Birch commented on a draft report for the Stage 3 complaints panel. On 9 May 2008, the complaints panel, comprising two party group leaders and the chief executive, noted the discrepancies in the case report, but did not consider that these had a material influence on the decision to grant planning permission. The panel did not uphold the complaint.

The Council's comments

34. In its initial written comments, the Council said the application for the new house had been considered against the relevant local plan policies and with regard to the setting of the site next to Mr Ash and Mrs Birch's listed property, in the context of the village conservation area and the AONB. The revised plans had overcome the concerns identified by the conservation officer about the scale of the new house and its relationship to adjoining properties.
35. The Council did not have set standards for side to side distances between properties. These could be as little as 1 metre, for maintenance and access. The Council normally expected back to back distances between residential properties of around 21 metres, with back to side distances of around 16 metres, but these were working guidelines. Each scheme was assessed on its individual merits, taking account of national planning guidance that encouraged higher densities.
36. Officers had seen no reason not to accept the insertion of the additional west facing first floor bedroom window as a post-decision minor amendment, as requested by the applicant's architect. The site plan had shown a separation distance from this part of the house to the boundary of over 16 metres. The window could have been inserted when the house was occupied, without the need for planning permission, under permitted development rights.
37. The Council did not consider that there would have been any grounds to take formal enforcement action, having regard to the position of the new house and its distance relative to the site boundary and Mr Ash and Mrs Birch's property, if it

had refused to agree to the additional window as a minor amendment and the developer had simply gone ahead with its installation.

38. At interview, Officer A acknowledged that his case report had misstated the separation distance of the development from Mr Ash and Mrs Birch's property. But he had been aware of the setting of their property and its proximity when he had visited Site A. He had not felt it necessary to view the site from their land. He had been satisfied that the revised plans had overcome the original concerns about the scheme as first submitted. He had seen no reason not to treat the requested post-decision changes as minor amendments. They had not materially altered the appearance of the development or its impact on the surrounding area and nearby properties. The requested changes had been countersigned and approved by a team leader other than Officer B, due to a restructuring. He and the other team leader had exercised their judgement when deciding that the amendments did not require a fresh application.
39. Officer B could not recall his detailed involvement with the application. But he said he would have checked the case report and been at the Sub-Committee when the application was heard. He did not recall any significant Member interest and there had not been a request for a Committee site visit. The post-decision changes had been agreed as minor amendments by another team leader. Officer B said he had become involved again after Mr Ash and Mrs Birch complained about the building work on site. He agreed there were discrepancies in the separation distances quoted in the case report. But he had not seen the discrepancies as materially different from the actual situation 'on the ground'.
40. Officer B added that a post-decision amendment needed to be significant to warrant renotification. Such an assessment would normally trigger a request for a fresh application. He did not consider that the additional first floor window could have been resisted on grounds of loss of privacy given the separation distance of the window from Mr Ash and Mrs Birch's property. The finished design of the new house was slightly different with, for example, the intended front porch having not been built. But the Council had no power to require the developer to build a particular feature even if shown in the approved plans.
41. Officer C had been development control manager at the time of the application for the new house. He recalled that Members had shown little interest in the proposal and felt that Mr Ash may, in part, have become upset because the Council had insisted on changes to his application to extend his property. That application had been recommended for refusal and was withdrawn and resubmitted to take better account of the view from the Parish Church. When the planning application for the new house had been determined, the Council had removed permitted development rights for outbuildings and the extension of the new house, but it had not been considered necessary to limit the insertion of extra windows in the new dwelling.

42. Officer C added that if the extra upper floor window had been shown in the submitted plans at the outset, he would have recommended approval to the new house with that design, given the distance of over 20 metres of the elevation in which the window was situated from the site boundary and the permitted development rights that would have applied once the new house was occupied. The Council's procedure required that if a requested change to an approved development was considered to warrant renotification, then a fresh application needed to be submitted. Officer C further commented that he had undertaken informal notification in marginal cases, but this had been at his discretion. In retrospect, the Council could have asked Mr Ash and Mrs Birch for their views before it had agreed to the extra upper floor window as a minor amendment, but this might have unduly raised their expectations.
43. In a further written response, the Council has confirmed that drawing 5341-1-5, as submitted by the applicant's architect in February 2007 and as copied to my investigator, was inaccurate and wrongly referred to a proposed new window in the master bedroom east elevation instead of in the intended west elevation. My investigator also noted that the ground and first floor plans appeared to have been transposed, with the north point wrongly oriented, facing south. The Council has added that despite the mislabelling of the plans, it had been apparent from them where the window was proposed and its orientation, it was not unusual for plans to be mislabelled in terms of compass points and what was important was the orientation of the proposed (sic) compared to its neighbours.
44. The Council has further commented, in response to an enquiry by my investigator on precisely when the extra window was approved, that there had been no formal written acceptance of the additional window as a minor amendment. The Council added that subsequent letters from Planning Services had dealt with conditions but there appeared to have been an oversight in responding formally to the amendment requested.

Conclusions

45. The Council met its statutory obligations in the publicity given to the application for the new house at Site A. Mr Ash and Mrs Birch were notified and exercised their right to submit an objection. The Council took appropriate action when it renotified them after the applicant submitted amended plans prior to the determination of the application. They restated their objection that was then considered by the case officer and taken into account by Members when the Council's Sub-Committee heard the application.
46. The case officer's report referred to their objection and Members were aware of their concerns about the proximity of the new house and its scale and appearance, from their written submissions and oral address. The report assessed the impact of the development on the conservation area, the AONB, their privacy and the listed property and noted district local plan policies on

settlement boundaries, residential standards, the AONB, areas of great landscape value and new development in conservation areas; and the policies in the UDP on settlement boundaries, the AONB, the setting of settlements and new development within conservation areas. The report also referred to the village design statement and national planning guidance on housing.

47. I see no reason to question the Council's conclusion that the proposed new house could co-exist with existing development without creating an undue adverse effect on local amenity. The assessment of the acceptability of the proposed development was a matter for the judgment of the authority's officers and Members, having taken account of the Council's policies and national planning guidance.
48. But the Council has previously accepted that there were discrepancies in the report in the reference made to the separation distance of the development and in the description of the design of the west elevation and lack of reference to the window in the single storey element. I have noted the Council's further measurement of the separation distances, as shown in Appendix 1. The authority says its remeasurements generally support the original assessment of the case officer. These show a distance of 22.4 metres, from the plot boundary, of the elevation of the new house in which the additional upper floor window is situated, and distances of 19.2 metres and 20.7 metres of the furthest west elevation of the main two storey part of the new dwelling from Mr Ash and Mrs Birch's property.
49. But there is a disputed record of what the Council knew about the position and setting of the development when it determined the application. And Mr Ash and Mrs Birch remain of the view that the Council had a mistaken understanding of the position of their property relative to the development. There was a lack of completeness and precision in the case report about the separation distances that would result and the report failed to mention the proposed ground floor window in the utility room. This was maladministration.
50. These discrepancies undermined Mr Ash and Mrs Birch's confidence as to whether their situation had been properly considered by the Council. I do not consider that the grant of planning permission was fundamentally flawed by significant, material inaccuracies in the report or in the understanding of the case officer of the proposed development, given the factors he took into account and the information available to him from his site visit about the setting of the site and nearby properties. But Mr Ash and Mrs Birch have been caused justifiable outrage by the lack of clarity over the description of the development.
51. I have no reason to question the consideration given by the Council to site levels. It was aware that the ground level was higher relative to the surrounding land and attached a condition requiring the submission and approval, before the commencement of development, of details showing the levels of the existing site, proposed slab levels and a datum point outside the site.

52. But the Council then failed to have proper regard to Mr Ash and Mrs Birch's situation when it received the developer's request for amendments to the planning permission, including the extra first-floor window. Officers had already been alerted to their considerable concern about the impact of the development from their original written objections and oral address to the Committee.
53. I have noted the Council's view that the window could have been inserted at a later date, under permitted development rights and that, if it had been included in the original submitted plans or applied for separately, it would have been acceptable in planning terms, given the separation distance from Mr Ash and Mrs Birch's property. But they were potentially adversely affected by its upper floor position, facing towards their home and garden. The window significantly altered the form and appearance of the new house when seen from their property. The failure to inform them of the proposal for the additional window, having regard to the grounds of their original objection and the authority's own guidance as set out in Appendix 2, and given the reliance on the absence of windows in the west-facing elevation in approving the application, was maladministration.
54. The failure to notify Mr Ash and Mrs Birch of the requested extra window meant they lost the opportunity to influence the Council's decision making on a change to the design of the new house that went to the heart of their objection and concern about the impact of the development on their amenity. It must now be conjecture whether there would have been a different outcome if they had been notified and they had put a fresh objection. But they have been left with uncertainty as to whether the Council might have reached a different decision on the requested amendment
55. It is also a matter of considerable concern that, at a late stage, and following the Council's written response to my enquiries and the comments of officers at interview, it became evident that a plan provided by the applicant and relied on by the authority when it considered the request for the additional window was fundamentally incorrect, as outlined in paragraph 43. The Council has also now said that the extra window was never formally agreed in writing. This was further maladministration that has additionally undermined the complainants' confidence in the Council's consideration of their situation.

Findings

56. For the reasons given in paragraphs 48-49, 52-53 & 55, I find maladministration that has caused Mr Ash and Mrs Birch injustice as set out in paragraphs 50 & 54.
57. I therefore recommend that the Council:
 - a) pay Mr Ash and Mrs Birch the sum of £1,250 for their outrage, lost opportunity and uncertainty;

- b) make them a formal apology for the mistakes identified; and

- c) review its procedures and staff training on amendments to planning applications and planning permissions in the light of the issues highlighted in the complaint.

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29 July 2009