

Report by the Local Government Ombudsman

**Investigation into a complaint against
Northampton Borough Council
(reference number: 14 019 741)**

17 November 2015

The Ombudsman's role

For 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

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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.

Key to names used

Mr B - the complainant

Officer X –a planning officer

Officer Y - a senior conservation officer at the Council

Report summary

Planning & Development

Mr B complains the Council disregarded its conservation officer's advice and took no account of the effect development would have on the setting of a Grade I listed building in a conservation area. He says the Council has a poor record of consultation with Historic England (formerly English Heritage) and in the case of this application from one of its Members it dispensed with validation requirements and failed to record pre-planning advice as well.

The investigation found the Council had failed to identify and apply the correct law and guidance; it had failed to consult with Historic England; it had failed to record pre-planning advice and validated a planning application without the necessary information.

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council should:

- apologise to Mr B for mishandling the planning application and for not treating his complaints about this properly.
- introduce, as a matter of urgency, conservation training for all its planning officers. Training is available from Historic England: training may be available elsewhere. The Council should confirm to us within three months of the date of this report that this has been done.
- undertake an immediate review of its procedures for dealing with planning applications which affect heritage assets. It should put measures in place to ensure, and to monitor, that all applications affecting heritage assets are referred to its conservation officers and, on their advice, to Historic England. It should confirm to us within three months of the date of this report that this has been done.

Introduction

1. A member of the public, whom I shall call Mr B, complains about the Council's decision to grant planning permission for the extension of a cafe in parkland surrounding a Grade I listed building within a conservation area. Mr B says the applicant, an elected Member, was given confidential advice by officers before making his application and he was not required to produce a Heritage Impact Assessment. Despite cogent objections from the public and professional consultees, the application was allowed.
2. Mr B is a regular visitor to the park whose landscape and tranquility are, he says, valued by the local community. He says there is concern within the local community that this and other heritage applications have not been dealt with properly and, unless this changes,

the poor practices will carry on to the detriment of the Borough's heritage and its reputation.

Legal and administrative background

3. The Ombudsman investigates complaints about 'maladministration' and 'service failure'. In this report, we have used the word fault to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (**Local Government Act 1974, sections 26(1) and 26A(1)**)
4. A local planning authority has particular duties when considering planning applications which affect a listed building or a conservation area. The duties are set out in the Planning (Listed Buildings and Conservation Areas) Act 1990. We shall refer to this as the Act. Section 66 is concerned with listed buildings. It says: "*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...*". Section 72 imposes a parallel duty to pay "*special attention...to the desirability of preserving or enhancing the character or appearance*" of a conservation area.
5. The effect of sections 66 and 72 is to give special statutory status to heritage assets. These sections contrast with section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004 which entitle a decision-maker to give whatever weight he thinks fit, or no weight at all, to a material planning consideration. If he is dealing with a heritage asset, he has not that breadth of discretion.
6. The distinction was highlighted in a Court of Appeal judgement in 2014 which found (in respect of a wind farm 1.7km from a listed building) "*in order to give effect to the statutory duty under Section 66(1), a decision-maker should accord considerable importance and weight to the 'desirability of preserving...the setting' when weighing this factor in the balance with other material considerations which have not been given this special statutory status*" (**Barnwell Manor Wind Energy Ltd v E Northants DC, English Heritage, National Trust and SSCLG**).
7. The above principle applies equally to a conservation area. The House of Lords has clarified the special duty: "*There is no dispute that the intention of section (72) is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest.*" "*Preserving means doing no harm*"(**South Lakeland Council v Secretary of State for the Environment [1992]**).
8. In addition to its particular statutory duties, the local planning authority must consult or notify Historic England (formerly English Heritage) about all development affecting the

setting of a Grade I or Grade II* historic building (*Town and Country Planning (Listed Buildings and Conservation Areas) Regulations 1990, regulation 5A(3) as amended.*)

9. A core principle of the National Planning Policy Framework (NPPF) is the need to “seek to secure a *high-quality of design...*” The NPPF also reinforces the statutory weight which must be given to heritage assets. Authorities should begin by requiring applicants for planning permission affecting heritage assets “... *to describe the significance of any heritage assets affected, including any contribution made by their setting...As a minimum the relevant historic environment record should have been consulted and the heritage assets assessed using appropriate expertise where necessary*” (NPPF, para. 128). Authorities usually do this by requiring applicants to produce a Heritage Impact Assessment.
10. The authority should carry out its own assessment “*taking account of the available evidence and any necessary expertise*” and take both into account “*when considering the impact of a proposal on a heritage asset, to avoid or minimise conflict between the heritage asset’s conservation and any aspect of the proposal*” (NPPF, para 129). “*When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset’s conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting*” (NPPF, para132). “*Harm may be weighed against the public benefits of a proposal where the proposal will lead to less than substantial harm (NPPF, para 134). Where development will lead to substantial harm permission should be refused unless defined circumstances apply*” (NPPF, para 133).
11. Planning Practice Guidance defines the ‘setting’ of a heritage asset as: “*The surroundings in which (it) is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral.*” The Guidance says: “*The extent and importance of setting is often expressed by reference to visual considerations. Although views of or from an asset will play an important part ... buildings that are in close proximity but are not visible from each other may have a historic or aesthetic connection that amplifies the experience of the significance of each.*”
12. The Guidance says: “*heritage assets may be affected by direct physical change or by change in their setting. Being able to properly assess the nature, extent and importance of the significance of a heritage asset, and the contribution of its setting, is very important to understanding the potential impact and acceptability of development proposals. In most cases the assessment of the significance of the heritage asset by the local planning authority is likely to need expert advice...*”
13. English Heritage’s guidance (since revised) issued to all planning authorities at the time of this application, says: “*while consideration of ‘setting’ is necessarily a matter of informed judgement, the guidance emphasises that this should be through a transparent framework and as consistent and clear as possible.*”

14. The Local Government Association and Royal Town Planning Institute have published 10 Commitments for effective pre-planning engagement. The 10th commitment is that all those involved should maintain an agreed record of information submitted, advice given and, where appropriate, agreements reached. It says this *“helps to provide the transparency that is needed to build public trust in the integrity of these discussions...The agreed notes should normally be made available to the public when the subsequent planning application is validated if not earlier.”*

The Council’s policies

15. The Council has published a list of local documents it requires for a valid planning application. A Heritage Impact Assessment is required for all planning applications affecting heritage assets, including those within a conservation area.
16. The Council says on its website that it *“positively encourages pre-application discussions.”* It lists the benefits of these to developers and says it *“maintains a record of the advice provided on file for the avoidance of doubt and to ensure consistency.”*

How we considered this complaint

17. This report has been produced following the examination of relevant documents and interviews with the complainant and relevant employees of the Council.
18. 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.

Investigation

The planning application

19. In October 2014 the developer, an elected councillor, applied to extend his cafe in the grounds of “A” Park. “A” Park is within a conservation area. The cafe is some 60 metres from a Grade I listed building. The land is owned by the Council.
20. Applicants for planning permission must say on their application form if they have received pre-planning advice from the Council. The applicant said on his application that he had taken advice from Council officers before making his application. Mr B says this advice should have been on the record. The Council told us: *“All enquiries for pre-application planning advice received by the Authority are confidential. As such the advice referred to in this instance is not within the public domain.”*
21. A planning officer, whom we refer to as Officer X, publicised the application and some people objected to it. No-one objected to the cafe in principle but its quality of construction, which one objector likened to a cheap industrial building, was considered to let the area down. The *“importance of maintaining the park’s trees”* was described by one as *“well established and right at the very heart of the governance of this town.”*

22. Officer X appraised the application in a report. He did not identify the relevant law but, under a section headed Planning Policy, he said: *“Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires a planning application to be determined in accordance with the Development Plan unless material planning considerations indicate otherwise”* He identified the national and local policies he considered relevant with a sentence summarising the gist of each.
23. Because the proposal was in a conservation area, where trees and buildings enjoy protection, Officer X consulted with the Council’s arboriculture officer and its conservation officer.

Arboriculture consideration

24. The arboricultural issues are not part of the complaint so we shall deal with those briefly. The arboriculture officer recommended refusal of the application principally because it would involve removal of *“a fine young mature specimen with a long useful life expectancy located within a conservation area”*.
25. Officer X considered this but explained in his report that he was not minded to recommend refusal because: *“It is considered, on balance, that the improvements to the facilities within the park and the wider public benefits which this would bring would, in this instance, outweigh the desirability of preserving the tree.”*
26. Officer X was entitled to take a different view from the arboricultural officer providing he explained his reasons, which he did.

Conservation consideration

27. A senior conservation officer at the Council, whom we refer to as Officer Y, began her report: *“The site is a modern single storey cafe block located within (“A” Park). The Grade I listed building...is located close to the application site. Any works to the cafe block will impact upon the setting of this Grade I Listed Building. The application site is also located within the (“A” Park) Conservation area.”* She says the “key issue” for her consideration is the *“impact upon the setting of the Grade I Listed building and upon the character and appearance of the...Conservation Area.”*
28. Officer Y explains why she considers *“the existing cafe block is not an attractive development and its appearance and materials of construction do not positively contribute to the setting of the listed buildings or the character and appearance of the conservation area”* She says it is *“a highly prominent and visible structure”* and *“a more lightweight structure would minimise its visual intrusion on the landscape.”* Officer Y suggests the plans are incomplete and why the proposal needs to be considered carefully.
29. Officer Y then concludes with this recommendation: *“In principle, a small extension could be supported by conservation. Matching the style of the extension to the existing structure will help to minimise the impact, however the existing structure is not attractive and by extending it will increase its visibility within the park. Amendments should be made to the design to improve its appearance and reduce the impact upon the setting of the grade I listed building and upon the (“A Park”) conservation area.”*

30. Officer X, in his report to members, summarises Officer Y's response as follows: "*NBC conservation have no objections to the application in principle and are of the view that matching the extension to the existing structure will minimise the impact. There are some concerns regarding extending an existing unattractive structure.*" Officer X omits Officer Y's last sentence where she repeats that the proposal impacts upon the setting of the Grade I listed building.
31. Finding the impact on the conservation area "neutral" Officer X recommended approval of the application.

The complaint

32. When Mr B complained to the Council about the decision, it told him the cafe was not within the setting of the listed building. Mr B did not agree. The Council's response was reviewed by the Service Director who maintained the cafe was not within the setting of the listed building. Mr B complained to the Ombudsman.
33. We interviewed Officer X. We asked him why, when Officer Y raised the setting as a material planning consideration, he did not refer the application to Historic England (then English Heritage.) Officer X said he disagreed with Officer Y. We asked what informed his decision. Officer X said distance: the cafe was about 60 metres from the listed building. (Officer X also said "*because there was already a building there*" but we reminded him this was not relevant to the question of setting.) Officer X said he could not recall if he discussed the matter with Officer Y. Despite their opposing views, he "*didn't consider*" taking the matter up with Officer Y's line manager, the senior conservation officer, or asking Historic England for a preliminary view.
34. We interviewed Officer Y. Officer Y said if you approach the Park through the entrance opposite the Listed Building, you see the cafe in the foreground and the Listed building about 50-60 paces behind. She said: "*There is no way round it. It is in a conservation area and it is within the setting of a listed building.*"
35. We read the Secretary of State's instruction (now superseded) to local planning authorities (Circular 01/01) and Historic England's then guidance. Because we could not see how application of the guidance could lead to any conclusion other than that the application site was within the setting of the listed building, we contacted Historic England for its view.
36. Historic England says:

"(The Grade I listed building) lies within ("A Park"), designated a conservation area. The Park forms the surroundings in which (the listed building) is experienced. Moving through the parkland towards (the listed building) is a key part of appreciating the significance of (the listed building.) We therefore consider that the Park and any buildings / structures within it (whether they make a positive or negative contribution) form the setting of (the listed building).

“We have recently published Good Practice Advice Note 3: The Setting of Heritage Assets (updating our previous guidance The Setting of Heritage Assets.) The Note advises LPAs attempting to identify whether heritage assets are likely to be affected by a development proposal: ‘if the development is capable of affecting the contribution of a heritage asset’s setting to its significance or the appreciation of its significance, it can be considered as falling within the asset’s setting’ (para.13).

“It is clear to us that the proposed extension of the cafe is capable of affecting the contribution made by (“A Park”) to the significance of (the listed building) and to the appreciation of its significance. The proposals would therefore affect the setting of a Grade I listed building. Consequently Northampton Borough Council should have consulted Historic England (then English Heritage) on the proposals under the relevant provisions.”

37. In the course of this investigation we have seen correspondence from Historic England which shows there is another case where the Council should have consulted it and did not; and another where the Council consulted it after it had taken its decision.

Conclusions

38. There is a difference between the materiality of a planning consideration and its weight. The former is largely a question of law and the latter is largely a matter of planning judgement. This investigation is concerned with proper application of the law. Whether the application would, with proper consideration have been approved, is not the subject of this investigation.

The setting of the listed building

39. When Officer Y said the application affected the setting of a listed building, she raised a material planning consideration. The Council had a duty to consider it. If Officer X disagreed, he had a duty to explain, with reference to the law and government guidance, why that was the case. In the event his post-decision rationalisation, that the listed building and application site were 60 metres apart, has no foundation in law or guidance whatsoever. We accept there will be circumstances where the relationship between distance and scale may make the question of setting a borderline judgement, but the circumstances here could not be more straightforward. The setting of this listed building is the park which surrounds it. The Council’s failure to have regard to a material planning consideration was fault.

Impact on setting

40. The next question was whether the development affected the setting. In other words, did it have any impact? This was an extension to a cafe described by Officer Y as a “*highly prominent and visible structure*” and for which a mature tree had to be felled. The application affected the setting. The Council’s failure to consult with Historic England (then English Heritage) was fault.

Harm to setting and to conservation area

41. The final question, whether the development caused unacceptable harm, is largely a matter of planning judgement. But the law affords heritage assets special protection. In exercising that planning judgement, account must be taken (in the case of the setting of a listed building) of section 66 and (in the case of a conservation area) section 70 of the Listed Buildings Act. The Council did not identify the correct legislation; this was fault. Having decided the application was outside the setting, it never considered harm to the setting; this was fault. The application was also in a conservation area. It did not discuss the special characteristics of the conservation area and it did not show how, in deciding the impact was “neutral,” it had given the proper statutory weight to those special characteristics and the desirability of preserving them. This was fault.

Heritage Impact Assessment

42. There are good reasons, explained in the National Planning Policy Framework, why a heritage impact assessment in one form or another should accompany a planning application for development affecting a heritage asset. The Council should, according to its own validation requirements, have required a heritage impact assessment before validating the application. Validation of the planning application, contrary to the Council’s policy, was fault.

Pre-planning Advice

43. The applicant was given pre-planning advice from officers. We are told this advice was “*confidential*” and “*not within the public domain*”. The Council’s policy is to maintain a record on file of pre-planning advice. Unless there are exceptional reasons, pre-planning advice should always be on the record and available to the public for inspection. Failure to maintain a record of the pre-planning advice was fault.

Injustice

44. Mr B visits “A” Park regularly. He does not object to the café, or to its extension. He objects to the Council’s disregard of material planning considerations and its failure to consult with Historic England. He says the café will now be even more prominent and unsightly and a heritage asset harmed.
45. Mr B drew his concerns to the Council’s attention before planning permission was granted. The Council went ahead. Mr B complained. The Council introduced reasons why the application site was not within the setting of the listed building. Mr B was unconvinced so he escalated his complaint. The Council said Historic England knew about the application and raised no concerns.
46. Mr B does not seek compensation but he says it has taken him hours of his time pursuing the complaint. It is important that the public has full confidence in the decisions taken by the Council based on a transparent administrative process. Publication of this report will

go some way towards restoring that trust. All planning applicants, including elected Members, should be treated equally and fairly. This did not happen in this case and has caused injustice to the complainant in terms of outrage and uncertainty that the decision might have been different if due process had been followed.

Decision

47. The Council failed to identify and apply the correct guidance when deciding if the planning application affected the setting of a listed building; and it failed to identify and apply the correct law when deciding the question of harm. These were faults, more particularly described in paragraphs 39, 40 and 41 above. The Council was at fault for dispensing with the need for a Heritage Impact Assessment; and it was at fault for not keeping a record of pre-planning advice. Both were contrary to national and local policy.

Recommendations

48. The Council should apologise to Mr B for mishandling the planning application and for not treating his reasonable complaints about this properly.
49. The Council should introduce, as a matter of urgency, conservation training for all its planning officers. Training is available from Historic England: training may be available elsewhere. The Council should confirm to us within three months of the date of this report that this has been done.
50. The Council should undertake an immediate review of its procedures for dealing with planning applications which affect heritage assets. It should put measures in place to ensure, and to monitor, that all applications affecting heritage assets are referred to its conservation officers and, on their advice, to Historic England. It should confirm to us within three months of the date of this report that this has been done.
51. The Council should maintain a record of all pre-planning advice. The record should be made available to the public when any subsequent planning application is validated. If it considers the advice confidential, a record of the reason for that decision should be placed on the public file.