

Report

on an Investigation into
Complaint No 02/B/08100 against
London Borough of Southwark

12 February 2004

Investigation into Complaint No 02/B/08100 Against London Borough of Southwark

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Key to names used

Ms Francis	-	Complainant
Mr Wilson	-	Complainant
Officer A	-	Planning Officer
Officer B	-	Planning Team Manager
Officer C	-	Interim Manager, Planning & Transportation
Officer D	-	Director of Environment & Regeneration Strategy
Officer E	-	Development & Building Control Manager
Officer F	-	Committee Clerk
Officer G	-	Environmental Health Officer
Officer H	-	Solicitor to the Council
Officer I	-	Planning Officer
Councillor Ash	-	Chair of the Development Control Committee
Councillor Beech	-	Ward Member
Councillor Birch	-	Vice Chair of the Development Control Committee
Councillor Field	-	Ward Member

Report Summary

The complainants, Ms Francis and Mr Wilson, say that the Council failed to notify them of a planning application for new housing on land next to the nightclub they own. They state that they were denied the chance to object to the application; that the Council did not take account of the club when it granted permission for the new houses; and that complaints from occupiers of the new houses about the club will jeopardise its existence. Ms Francis and Mr Wilson also say that the Council took over five years to grant them planning permission for their premises, yet it fast-tracked the housing developer's application.

Finding

Maladministration causing injustice

Recommended remedy

That the Council:

1. make a payment of £1000 to Ms Francis and Mr Wilson;
2. review its procedures for neighbour notification, the conduct and recording of site visits and meetings with developers; and
3. review its record keeping in respect of the processing of planning applications.

Introduction

1. Ms Francis and Mr Wilson complain that the Council failed to inform them of a planning application for residential development on land next to the nightclub they own; that they were denied the opportunity to make representations to the Council about the new housing; that the Council did not have regard to the nightclub in granting planning permission for the development; and that it showed favour to the housing developer, to their detriment as a black owned business serving the black community. Ms Francis and Mr Wilson further state that the Council took over five years to grant them permanent planning consent for their premises; and that it acted inconsistently in considering the developer's proposals and their applications.
2. Ms Francis and Mr Wilson say that the construction of the development has already adversely affected their business as promoters of events are now looking elsewhere; and that once the development is completed, complaints from residents of the new flats about the proximity and operation of the club will put the club out of existence.
3. An officer of the Commission has examined the Council's files, interviewed officers and Members of the Council and visited the complainants.
4. For legal reasons, the names used in this report are not the real names of the people concerned¹.
5. I have noted the concerns that Ms Francis and Mr Wilson have expressed about the Council's delay in the handling of their planning application. I do not consider that there are grounds on which I should exercise my statutory discretion to look into this element of their complaint as they had an alternative remedy in an appeal to the Planning Inspectorate against the Council's non-determination of the application after the statutory eight week period had expired.²

Legal and Administrative Background

6. Councils have a statutory obligation to publicise planning applications.³ Government advice acknowledges that no system for giving publicity to planning applications is foolproof and that a balance needs to be struck between cost, speed of decision making and the provision of a reasonable opportunity for public comment.⁴
7. Councils may determine the most appropriate form of consultation and publicity on most types of planning applications. Methods of publicity may include site notices, press notices and neighbour notifications to occupiers and owners of adjoining

¹ Local Government Act 1974, Section 30(3).

² Local Government Act 1974, Section 26(6)(b)

³ Town and Country Planning Act 1990, Section 65 & General Development Procedure Order 1995

⁴ DoE Circular 15/92, Publicity for Planning Applications

properties. For certain development, such as major new housing schemes or departures from the Local Plan, press notices are mandatory.

8. Planning permission may be granted on a conditional basis.⁵ Conditions attached to a planning permission must relate to the development, be relevant, reasonable, practicable and capable of enforcement.⁶
9. The Council's policy on publicity for planning applications requires that a planning application will normally be publicised by either a site notice or a neighbour notification letter or a combination of both, together with a press notice in the case of major development, development in Conservation Areas and departures from the Local Plan. Adjoining owners and occupiers of properties are notified of planning applications by neighbour notification letters; and a weekly list of planning applications received is published by the Council.
10. Conditional planning permission for the development of 57 flats and 34 parking spaces on the development site, site A (see Appendix), was granted by the Council on 24 October 2001 subject to the conclusion of a Section 106 legal agreement concerning the provision of 15 affordable dwellings on the site, to be handed over to a social housing landlord.
11. Condition 14 of the planning consent states:

“The use hereby permitted for residential purposes shall not be begun until full particulars and details of a scheme to insulate the premises against the transmission of airborne and impact sound has been submitted and approved by the local planning authority and the development shall not be carried out otherwise and in accordance with any approval given.”

Investigation

Relevant events

12. Ms Francis and Mr Wilson opened their nightclub in August 1996 at their premises at site B (see Appendix 1). The club has a weekend 6am music and dance licence and occupies three railway arches leading back from the main road, with an entrance and exit off the main road and other emergency exits along the side of the railway viaduct, adjacent to an alleyway that runs between the viaduct and site A. The surrounding area is in mixed use and generally run down.

⁵ Town and Country Planning Act 1990, Section 70

⁶ DoE Circular 11/95, The Use of Conditions in Planning Permissions

13. In November 1995, Ms Francis and Mr Wilson submitted a planning application to the Council for a change of use of the railway arches to a nightclub. In August 1996, the Council granted temporary planning permission for one year for the nightclub use.
14. In September 1998, the Council requested Ms Francis and Mr Wilson to submit a planning application to renew the previous temporary permission that had expired. After further reminders from the Council about the expiry of the previous consent, Ms Francis and Mr Wilson applied for continued public entertainment use of the railway arches on 13 April 1999. Ms Francis and Mr Wilson told the Commission's officer that after they submitted their application, the Council did not keep them informed of the action that it was taking, it made unreasonable requests for further information; and it delayed unjustifiably in progressing their application.
15. On 18 June 2001, duplicate planning applications for the development of 57 flats on site A were submitted by the housing developer. The applications proposed the change of use of the site from an employment use as a garage and car showrooms to wholly residential use. The Council's case officer, Officer I, posted three site notices on the boundary of site A on 12 July 2001; and the Council advertised the applications in the local press on 21 June 2001. Concurrently, the Council wrote to 37 occupiers and owners adjoining the development site.
16. Ms Francis and Mr Wilson told the Commission's officer that they did not see the Council's site notices and they did not receive a notification letter from the Council concerning the planning applications. They also said that Railtrack did not inform them of the notification that it had subsequently received; and they have further commented that the Council did not advertise the application as a departure from its Unitary Development Plan (UDP), given the intended change of use of the application site from employment land to wholly residential use. The Council has commented further that the proposed departure from the UDP was appropriately advertised via a Press notice and on site notices, that it notified the Government Office and that the Government Office did not indicate that there was any problem with the Council's determination of the application.
17. On 17 and 19 September 2001, the developer submitted amended plans for the housing scheme. Officer E, the Council's Development and Building Control Manager, told the Commission's officer that at an early stage in the Council's consideration of the proposed development, Officer I brought the scheme to his attention as a senior manager under the Council's internal quality control procedures. Following his review of the developer's plans, he asked Officer I to go back to the developer with suggested improvements to the design and layout of the scheme that he felt were necessary for it to meet the Council's policies and standards. Officer E

said that the amended plans submitted by the developer in September 2001 reflected the changes that the Council had requested to the scheme.

18. On 24 October 2001, one of the duplicate applications was reported to the Council's Development Control Committee with a recommendation from officers that the Committee resolve not to refuse planning permission for the application. The Committee report also recommended that officers be authorised to grant planning permission subject to a legal agreement for the provision of affordable housing, should the Secretary of State decide not to call in the application for his own determination, it being referred to him as a departure from the development plan. The Development Control Committee resolved that conditional planning consent be granted for the housing development subject to the conclusion of the Section 106 legal agreement for affordable housing and the views of the Secretary of State.
19. Officer B, the Council's Planning Team Manager, and Officer E told the Commission's officer that the officers' report to the Development Control Committee had not referred to the nightclub; and that while a letter of objection from a resident had pointed out the presence of the nightclub, this fact had been omitted from the description of the objection in the report. Officers B and E also stated that they did not recall any mention being made of the nightclub either in advice they had given to the Committee or in comments made by Members of the Committee; and that if any mention had been made by Members of the nightclub, they might have asked the Committee to defer the application.
20. Officer G said that the Environmental Health noise team for which he was responsible had been consulted on the housing application and it had been involved in investigations of complaints of noise nuisance that had led to the service by the Council of Noise Abatement Notices on the club on two occasions. The EH noise team had not referred to the club in their comments to planning officers on the noise issues arising from the application and had assessed the developer's proposals for the site and noise arising from the railway viaduct and nearby main road as fixed and immutable sources that had a bearing on the use of the site and the design and layout of the development. Officer G has further commented that the service of noise abatement notices concerning noise nuisance from the club could not have been a planning consideration as the noise should have been contained within the club; and that noise associated with the club was not the major noise source given the nearby railway and main road.
21. Councillors Ash, Beech and Birch told the Commission's officer that officers did not inform them at the Development Control Committee Meeting on 24 October 2001 of the existence of the nightclub adjacent to the housing site; and they did not recall any mention of the nightclub during the Committee's deliberations.

22. Councillor Ash, the Chair of the Committee, said that if Ms Francis and Mr Wilson had put an objection that had been reported to the Committee, it was likely that the Committee would have refused the application. He added that some Members might have wanted to defer the application; but his feeling was that a motion would have been put for its refusal, probably on policy grounds, as the development represented a change of use from employment use.
23. Councillor Beech told the Commission's officer that she was a Ward Member; and that Councillor Field had asked her to attend the Committee in place of the official Member and his substitute, both of whom were unavailable. Councillor Beech said she visited the premises at site B during election time in 1998 with Councillor Field, but she had not remembered the presence of the nightclub during the Committee hearing. She added that Councillor Field was a long standing Ward Member and although he probably knew of the nightclub he had not made any mention of the club during the Committee meeting. Councillor Beech added that if Ms Francis and Mr Wilson had objected to the application, she would have asked for further clarification about noise issues and she might have asked for a deferral of the application so that the impact of the proposed development on the club could have been given further consideration. Ms Francis and Mr Wilson have further stated that they have no record or recollection that Councillor Beech visited them in 1998.
24. Councillor Birch said he was the Vice-Chair of the Development Control Committee at its meeting on 24 October 2001. He had not known of the nightclub's existence at the time and he had not recalled any mention of the nightclub during the Committee meeting. Councillor Birch said to the Commission's officer that if Ms Francis and Mr Wilson had objected or the presence of the nightclub had been mentioned, he would have asked for advice on the proximity of the club to the proposed houses and he may have asked for a deferral of the application.
25. Councillor Field told the Commission's officer that he did not recall having asked Councillor Beech to attend the Committee in place of the regular Member attendee. Neither could he recall having mentioned the existence of the club, or that officers had done so, during the Committee's consideration of the housing application. But he said that as a Ward Member and former Chair of the Council's Licensing Committee he knew of the club and he might have referred to it. Councillor Field has further commented however that he did mention the club at the Committee meeting, that all others present at the meeting would have been aware of the existence of the club following his remarks about the presence of the club, that officers commented at the meeting that the new housing nearest the club would not be affected by its presence and that Councillors Ash, Beech and Birch did not pursue this question having been made aware at the meeting that there was a nightclub next to the development.

26. Officer F told the Commission's officer that she had been the Clerk to the Development Control Committee meeting on 24 October 2001 and she heard Councillor Field refer to the nightclub during the Committee's discussion on the application. She made a note of his comment in her handwritten record of the meeting that stated: "Q's from Councillor Field: issue of nite club (sic) near site/would this not affect the affordable hsg (sic)." Officer F added that when the Committee considered the application, there were few people present in the room other than officers and Members; and it would have been difficult to mishear comments made during the meeting.
27. On 14 November 2001 the Government Office for London notified the Council that it did not wish to call in the application. On 20 February 2002, the Council issued its decision notice on the housing application.
28. On 7 March 2002, Ms Francis and Mr Wilson complained to the Council that they had not been notified of the application. On 12 March 2002, they complained to Councillor Field about the Council's handling of the application. Officer B wrote to Ms Francis and Mr Wilson on 3 May 2002, and apologised for the delay in replying to their complaint. Officer B stated that the case officer, Officer I, had walked along the pavement in the vicinity of Ms Francis and Mr Wilson's premises and the application site; but she had not noticed the nightclub. Officer B added that if Officer I had spotted their premises, the Council would have added them to its consultation list. Officer B also commented that the development had been designed to minimise the exposure of the new houses to noise from the nearby railway viaduct and that the planning consent required the developer to provide sound insulation.
29. On 22 July 2002, the Council's Planning Committee considered the application submitted in 1999 by Ms Francis and Mr Wilson for permanent use as a nightclub of the railway arches they occupied. The Committee granted planning permission for the continued use of the railway arches for public entertainment subject to a condition on the limitation of sound from music systems at the club.

The Council's view

30. Officer B told the Commission's officer that at the time of the Council's consideration of the housing application, he had been the Acting Manager for the West Development Control Team and there had been a number of staffing changes and vacancies. He said that the case officer, Officer I, had been very competent and had worked under minimal supervision; and she had simply omitted to spot the nightclub as it was not easily distinguishable from other unused railway arches.
31. Officer B further stated that he had one telephone conversation with the housing developer when the developer called him at an early stage to discuss the application. But he added that discussions with the developer about the scheme and its amendment had otherwise been conducted by Officer I in the normal manner.

32. Officer C told the Commission's officer that as the Interim Head of Planning and Transportation, he had been asked by Officer D to conduct a brief review of the events surrounding Ms Francis and Mr Wilson's complaint. Officer C said that he had not found evidence of impropriety; and there had been a straightforward mistake in the failure to identify the nightclub. Officer C said that documents had been removed from the Council's case files; but he could not comment on how or why this had happened. Officer D told the Commission's officer that he had not seen anything in the analysis of Officer C that caused him concern about the behaviour of the officers that had dealt with the application, other than the omission to spot the nightclub that seemed to have been a mistake rather than a deliberate act. Officer C has further commented that the developer has offered to enter into a unilateral undertaking to pay a sum of £30,000 towards the soundproofing of Ms Francis and Mr Wilson's premises and that the proposed undertaking is currently the subject of a draft agreement between the Council and the developer. Officer C has added that Ms Francis and Mr Wilson have stated that they do not wish to accept this sum and that the amount offered will be held, if necessary, in an escrow account for two years.
33. Officer E told the Commission's officer that apart from his examination of the housing scheme under the Council's internal quality control arrangements, he had not been involved in the detailed progression of the application and he had not attended any meetings with the developer nor had he spoken to the developer.
34. Officer H, the Council's Borough Solicitor and Secretary, said to the Commission's officer that she had endeavoured to oversee the Council's response to Ms Francis and Mr Wilson's complaint. She commented that the Council had tried to address their concerns; and it had asked them to substantiate their claimed financial loss on their business caused by the Council's decision. But they had not yet done so. Officer H also stated that Ms Francis and Mr Wilson had been given details of alternative premises for the nightclub; but they had not found these premises to be acceptable. Officer H further commented that any decision by the Council's Development Control Committee would have had to take into account all material considerations including housing need; and that the number of planning committee meetings held by the Council and their average length had been factors in the ability of officers and Members to recall the proceedings of the Development Control Committee on 24 October 2001.
35. Councillors Ash, Beech and Birch stated to the Commission's officer that they found it inexplicable that the Council had not informed Ms Francis and Mr Wilson of the application; that the nightclub would have been a material consideration for the Council in the determination of the housing application; and that there was a question mark over the compatibility of the nightclub and the new housing as adjacent uses. Councillor Field further commented that he had not realised that Ms Francis and Mr Wilson had not been consulted on the housing application when the Committee

had considered the application; and that officers should have been aware that their club was situated next to the application site, given the planning history of the area.

Conclusions

36. That the Council should have notified Ms Francis and Mr Wilson of the planning application for the land next to their club is not in dispute. The Council's procedures required that, as adjoining occupiers, they should have been sent a letter informing them of the application and giving them the opportunity to make representations to the Council before it reached its decision on the application. This did not happen. And the failure by the Council's officers at the time of the initial processing of the application to identify Ms Francis and Mr Wilson's premises and to include them on its consultation list was compounded when the case officer did not notice during her site visit the entrance and exit doors to the club that adjoin the application site. These failures were maladministration.
37. The Council then added to its initial flawed handling of the application when it did not act on the comments of the resident who objected to the application in July 2001 and mentioned the existence of the club as a potential issue in the suitability of the site for housing development. The Council could have rectified its failure to notify Ms Francis and Mr Wilson at this point before it reached its decision on the application. But it did not do so. This was further maladministration.
38. The Council's technical assessment and consideration of the application was defective because of its lack of regard for the presence of the club. The officers' report to the Development Control Committee did not mention the club, despite making reference to the objection letter that had pointed out the existence of Ms Francis and Mr Wilson's premises; and neither did the developer's consultant's assessment of noise levels in the vicinity of the application site. The presence of the club premises as one of the land uses immediately adjacent to the application site would, I believe, have been a relevant factor for the Council to have had regard to in considering the principle of the proposed housing development and its design and layout. These failures were also maladministration.
39. I have also considered whether the Council had a further chance to rectify its omission when the application was considered by Committee. The evidence here is inconsistent. The Council's planning officers stated in interview that had they been aware of and noted any mention of the club at the Committee meeting they would have given further advice to Members on the application; and they might have suggested its deferral pending consideration of the issues raised by the proximity of the club to the intended housing. They added that they did not hear any mention made of Ms Francis and Mr Wilson's premises at the meeting.
40. But this evidence is contradicted by that of Councillor Field who first stated at interview that he may have mentioned the club at the Committee meeting but could

not recall having done so; and has since commented that he did refer to the club at the Committee meeting and that he was advised by officers that the housing development would not be affected by its proximity. And the oral and written record of Officer F, the Committee Clerk, is that Councillor Field remarked on the existence of the club; and that it had not been difficult for her to minute the meeting or for Members or officers to follow the proceedings. Other information has also become available during my investigation that indicates that at least one of the officers present at the Committee, Officer B, would have known about the presence of the club given the planning applications submitted by Ms Francis and Mr Wilson and the planning history of their premises, the application site and the surrounding area.

41. On balance, I do not consider that it can be said with any degree of certainty that full consideration was given by the Council to all of the material planning considerations arising from the presence of the nightclub when it determined the application. This was further maladministration by the Council.
42. I have also considered the way in which the Council responded to Ms Francis and Mr Wilson's complaints. The Council took two months to reply to their complaint of March 2002 after they became aware that the Council had granted planning permission for the new housing. The Council's delay in responding to their complaint was maladministration.
43. Ms Francis and Mr Wilson's anxiety about the Council's failures was compounded when they established that the Council's file records concerning the housing application were incomplete. The Council has acknowledged that its file records are incomplete and its failures here were further maladministration.
44. I have noted the concerns that Ms Francis and Mr Wilson have expressed about the way in which the Council dealt with their planning applications and, in particular, the application that they submitted in 1999 for the continued use of their premises. But I have not exercised my discretion to consider this element of their complaint as they had the remedy of an appeal to the Planning Inspectorate for the Council's non-determination of their application. I see no reason for them not to have used the route specifically provided by the law if they were aggrieved by the Council's delay at the time.
45. I have also considered the view that Ms Francis and Mr Wilson have put to me that the Council's actions in the handling of the housing application and their applications may have been racially motivated; and that the Council has been engaged in a wider process of area renewal that has directly disadvantaged them and other mainly black-owned businesses through actual or threatened displacement by redevelopment proposals. But I have not seen any evidence that leads me to conclude that there has been racial discrimination by the Council in the events that I have examined.

46. So what injustice has arisen to Ms Francis and Mr Wilson? They were denied the opportunity to put their views on the housing application to the Council before it reached its decision and that they have suffered some frustration and worry by not knowing what might have happened had they done so. The Council also took far too long to reply to their complaint of 2002. Their outrage was compounded by the records missing from the Council's files.
47. I do not believe however that the Council's actions have caused the wider financial loss that they claim to their business. I say this because, on balance, I believe that notwithstanding their objections, the housing development was likely to have been given planning permission either by the Council or on appeal. This was a significant scheme in a run-down district where investment and development was of importance to the developer, the needs of local people and the Council. In addition, there will be many reasons why a business suffers from financial difficulties even leaving to one side the development uncertainties of this particular site. I am not satisfied that the maladministration I have identified links directly to adverse financial circumstances for the complainants.

Finding

48. For the reasons given in paragraphs 36, 37, 38, 41, 42 and 43, I have found maladministration that has caused injustice to Ms Francis and Mr Wilson as described in paragraph 46.
49. To remedy that injustice, I recommend that the Council should:
1. make a payment of £1000 to Ms Francis and Mr Wilson;
 2. review its procedures for neighbour notification, the conduct and recording of site visits and meetings with developers; and
 3. review its record keeping in respect of the processing of planning applications.

12 February 2004

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