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PUBLIC SERVICES OMBUDSMAN FOR WALES

The investigation of a complaint against Flintshire County Council

A report by the
Public Services Ombudsman for Wales
Case: 201802418

Contents

Introduction

This report is issued under s.16 of the Public Services Ombudsman (Wales) Act 2005.

In accordance with the provisions of the Act, the report has been anonymised so that, as far as possible, any details which might cause individuals to be identified have been amended or omitted. The report therefore refers to the complainant as Ms N.

Summary

Ms N complained about the refusal and subsequent grant of a Certificate of Lawfulness of Proposed Use or Development (s192 certificate) by the Council in respect of her next-door neighbour's property. She also complained about the grant of retrospective planning consent for the development which had been built other than in accordance with the s192 certificate, and the subsequent application to vary a condition attached to the consent, restricting its occupation to the current occupant.

The Ombudsman found that the development proposed by the s192 certificate application (an "annexe" containing primary living accommodation to be built in the garden of the next-door property) was not within a class for which planning permission was not required. It was thus not lawful development and the application should therefore not have been granted. When the retrospective application was made to retain the development which had not been built in accordance with the s192 certificate, the planning officer had been influenced by the existence of the s192 certificate; the Ombudsman concluded that, on the balance of probabilities, it was unlikely that permission would have been granted in the absence of the s192 certificate. He concluded there was maladministration, both in the grant of the s192 certificate and in the grant of the retrospective application, and upheld the complaint. Ms N had suffered a loss of privacy which had affected her enjoyment of her home and garden, and diminished the value of her property.

The Ombudsman made the following recommendations:

- That the Council apologise to Ms N for the failings he identified.

- That the Council review whether the conditions attached to the retrospective permission had been complied with.

- That the Council instruct the District Valuer to assess the impact of the development on Ms N's property, and pay her the difference between the value of her property before and after the development.

The Complaint

1. Ms N lives at a property which I shall refer to as 53 Blue Street. Ms N complained about the actions of the planning department of Flintshire County Council ("the Council") as local planning authority ("LPA") in respect of planning applications relating to 55 Blue Street ("Number 55"), the house next door to hers. In particular, she complained about:

a) The refusal and subsequent grant of a s192 certificate (see paragraph 4 below) in respect of development at Number 55.

b) The grant of retrospective planning consent for the development, and the subsequent variation of conditions attached to the consent.

Investigation

2. I obtained comments and copies of relevant documents from the Council and considered those in conjunction with the evidence provided by Ms N. The investigating officer visited Ms N at her home and interviewed relevant officers in the Council's Planning department as well as one of the Council members for the area ("Councillor X"). I have obtained advice from one of the Ombudsman's professional advisers, Allan Archer, a chartered town planner with extensive operational and senior management experience within local government planning departments, who accompanied the investigating officer on her visit to Ms N. I have not included every detail investigated in this report, but I am satisfied that nothing of significance has been overlooked.

3. Both Ms N and the Council were given the opportunity to see and comment on a draft of this report before the final version was issued.

Relevant legislation

4. s192 of the Town and Country Planning Act 1990 provides that an LPA can grant a Certificate of Lawfulness of Proposed Use or Development ("s192 certificate") where it is satisfied that the use or operations described in an application for such a certificate would be lawful if carried out (i.e. they either do not need planning permission or would be within the

limitations of an existing planning permission). If the LPA is satisfied, it must grant the certificate; if it is not satisfied, it must refuse it.

5. Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 ("the GDPO") includes a list of classes of development for which planning permission is not required. Class E relates to "the provision within the curtilage of a dwellinghouse of any building or enclosure … required for a purpose incidental to the enjoyment of the dwellinghouse as such …". There is no definition of "incidental to the enjoyment" but legal judgments[1] have clarified that the proposal must be for a purpose incidental to the enjoyment of the dwellinghouse and not a primary residential use such as living accommodation; additions to the normal, basic, domestic living accommodation of a dwellinghouse, such as bedrooms, which are normally to be expected as part and parcel of any dwelling's normal facilities, are not regarded as being "incidental" to the enjoyment of the dwellinghouse as such for the purposes of Class E, but are an integral part of the ordinary residential use as a dwellinghouse. Criteria apply certain restrictions relating to the size and position of the development in relation to the boundary.

6. In a Planning Inspectorate appeal decision involving the Council[2] permission was granted for a triple garage with living accommodation above it, within the curtilage of a property in the countryside, but some 32m away from the main house. The Council had refused the application as it considered it did not meet the requirements of its policy HSG13 Annexe Accommodation. The Inspector recognised that, as the proposed building would not be attached to the existing building, it would not be "fully compliant" with the policy. She considered, nevertheless, that the policy's foremost purpose (which she said, was that of preventing separate dwellings outside of settlement boundaries) would be achieved by the imposition of a condition tying its use to that of the main house and granted permission.

7. S73 of the Town and Country Planning Act 1990 provides for an application to be made for permission to develop land without complying with any conditions which have previously been imposed.

[1] In particular Rambridge v Secretary of State for the Environment and East Hertfordshire District Council (1997) 74 P&CR 126
[2] APP/A6835/D/16/3144068

8. The Welsh Government's Development Management Manual advises (in paragraph 13.3.18) that when issuing a decision notice after a condition has been removed or amended, the LPA should "copy across all the relevant conditions … from the original decision notice".

9. The Council's Constitution makes provision for Council members to request that a planning application affecting their ward be determined by the Planning Committee rather than by officers under delegated powers. This is often referred to as "calling in" an application.

10. My role is to investigate complaints from individuals who claim to have suffered injustice as a consequence of maladministration or service failure. I cannot question the merits of a decision a public body is entitled to make unless there were shortcomings in the administrative process by which the decision was made, or the decision itself was plainly irrational.

The background events

11. In April **2016** the LPA received an application for a s192 certificate in respect of Number 55 ("the first s192 application"). The application described the proposed development as providing "supplementary incidental accommodation to the enjoyment of the dwellinghouse". The Design and Access Statement accompanying the application described the proposal as a "new single storey dwelling" to be constructed in the garden of Number 55. It said that the "new Annex [sic] building" would be "for the specific purpose of ancillary accommodation to the main dwelling". It submitted that the proposed development would not require planning permission. The plans showed the proposed building as comprising 2 bedrooms, a lounge, a shower room and a store. However, the proposed floor plan showed a bed in the "store" and a kitchen and dining table in "bedroom 2". The Planning Officer ("the First Planning Officer") concluded that the proposed unit was a separate self-contained unit, which did not fall within the provisions of Class E. She also concluded that the proposal was not lawful as it did not comply with criterion (f) of Class E of the GDPO as it would be within 2m of the boundary and exceed 2.5m in height. The application was refused on the basis that it did not comply with criterion (f) (not on the basis that it was not Class E development).

12. A further application for a s192 certificate was received in May 2016 ("the second s192 application"). The Design and Access Statement submitted with this application still described the proposed development as a "new single storey dwelling", but also elsewhere as "proposed ancillary accommodation" and an "Annex [sic] building". The location of the new building was shown as 2.1m from the boundary; the proposed floor plan on this occasion showed the "store" as empty, and a bed in "bedroom 2". The First Planning Officer's brief report noted the position and size of the proposed building, that its use was to "remain incidental to the use of the main dwelling" and concluded that the proposed development would be lawful as it complied with "criteria E.1(a) – (i) of the GDPO"; she did not express any reservations about the development being a separate self-contained unit, and the application was granted.

13. In January **2017** the LPA received a complaint that the annexe which had been built was self-contained and a kitchen had been installed. Inspection by the LPA showed that the storeroom shown on the plans was being used as a bedroom, and one of the bedrooms shown was a kitchen. The LPA concluded that the annexe was no longer an annexe ancillary to the main property and was thus not permitted development. The owner was advised to submit a retrospective planning application for the unauthorised development. In February the LPA received a retrospective application ("the retrospective application") to retain the "annexe to rear of [Number 55]". In accordance with the Council's usual procedure, the local member (Councillor X) was informed of the application. The First Planning Officer's report concluded that, whilst the annexe had the facilities to allow independent living by the occupant, it would not be used as a separate dwelling. The report noted that "the fact that the proposed building would not be physically attached to the main house is a minor conflict with policy HSG13 which is outweighed by overall consistency with that policy's main objective", and that this approach had been "given significant weight" in the Planning Inspectorate decision. In email correspondence with Councillor X, who had been approached by Ms N and who had asked for further information regarding the application, the First Planning Officer explained that if planning permission were to be refused "the applicant could remove the kitchen element from the building and it would revert to being permitted development whereby the Council has no control over planning matters such as privacy". Councillor X subsequently confirmed

that he was content for the application to be determined "under item 1. Officers Delegated Power". The application was granted by the Chief Planning Officer under the Council's scheme of delegation, subject to a series of conditions including the following:

> "5. The occupancy of the annexe hereby permitted shall be restricted to [the current occupant] and upon cessation of the use, the building shall be removed from the site unless a further grant of planning permission is obtained."

The permission indicated that this condition was imposed "in the interest of clarity".

14. Other conditions attached to the permission required obscure glazing of some windows, a scheme of proposed boundary treatments and landscaping.

15. The First Planning Officer dealt with both s192 applications and the retrospective application.

16. In May 2017 the LPA received an application ("the variation application") to vary the occupancy restriction condition to read "The occupancy of the annexe hereby permitted shall be used for purposes incidental to the enjoyment of the dwelling house known as [Number 55] and shall at no time be used as a separate independent dwelling". A letter from planning consultants submitted that the condition did not meet the tests of being necessary, relevant to the development or reasonable. The (Second) Planning Officer's report indicated that the Officer agreed with the rationale behind the imposition of the original condition but concluded that its wording was needlessly restrictive and did not appear to be reasonable. He recommended varying the condition to that requested by the applicant. The application was granted subject to the following conditions:

> "1. Vary condition no 5 [of the previous permission] to read as follows: [the wording which was requested].
>
> 2. This permission does not invalidate all the other conditions of [the previous permission]".

Ms N's evidence

17. Ms N said that the LPA had allowed her neighbours to knowingly use s192 to avoid proper planning regulation. She said that the LPA failed to monitor building work, allowing the illegal building work to continue and failed to take adequate action subsequently. She said that at the time of making her complaint, the inadequate conditions regarding fencing and opaque glass had still not been complied with.

18. Ms N said that she had suffered significant loss of privacy in both her home and garden, and that the large bungalow in the garden next door had affected the character and value of her home. She said that noise is now reflected from the building. She said that her neighbours remained "hostile and abusive" and that the situation had caused her immense stress.

19. Ms N said that the LPA's response to her complaint had failed to address many of the points she had made. She said that she believed her neighbours' intention (to build a self-contained bungalow) was always clear and that the LPA had ignored the concerns she expressed. She said that if officers had visited her property, they would have appreciated the impact of such a large building built so close to her home. Ms N sought the rescinding of the planning permission or, at least, the reinstatement of the original condition.

20. In response to a draft of this report, Ms N disputed that any landscaping or boundary treatment had been carried out, as required by the conditions attached to the retrospective permission.

The Council's (LPA's) evidence

21. In its response to the Ombudsman, the LPA explained that the first s192 application did not comply with criterion (f) of Class E given the height and location of the proposed building; in addition, the plans indicated it would be self-contained, and thus would not be permitted development. It said that any determination had to be based on the information submitted rather than any assumptions. The LPA said that the information submitted with the second s192 application showed the proposed building as being incidental to the use of the main dwelling and not as a separate dwelling.

22. The LPA emphasised that the permission issued following the application to vary the condition (see paragraph 16) imposed a second condition indicating that it did not invalidate the other conditions imposed on the original consent. It said that although it had received an application to discharge the conditions relating to boundary treatments and landscaping, it considered the information it had received to be inadequate to discharge the conditions and, if the information was not submitted "in due course" it would be a question "if it is expedient to take formal action".

Interviews with officers/Councillor X

23. The First Planning Officer said that what the applicant was trying to achieve had been clear from the first s192 application; the development required planning permission as the proposed building would be self-contained. She was not sure why she had not included this as a reason for the refusal of the application in her recommendation. She said that when considering the second s192 application she had to deal with what was presented – there was no kitchen, meaning the building would be reliant on the main dwelling and therefore was an ancillary building incidental to the use of the dwellinghouse. She said she had always understood that if there was a reliance on the use of the main dwellinghouse it could be considered to be incidental. She was not aware of the Rambridge case (see paragraph 5).

24. The First Planning Officer said that, in determining the application for retrospective consent, she had been aware that, if the kitchen was removed the development would revert to the development for which the s192 certificate was issued. She said that if an application were to be submitted, she would be able to have more control over things like windows, boundary treatments and landscaping; she had assessed the application against the LPA's development plan and planning policies. She said it was an entirely different type of application from the earlier ones, which she had assessed against planning policies. She said she considered condition 5 to be appropriate because she wanted to ensure the new building was not sold on as a separate dwelling; she understood that that was the type of condition the LPA attached to all permissions for annexes (although the Second Planning Officer said that the LPA would

not usually issue what amounted to a personal permission – it would only do so if the building would not be acceptable in any circumstances other than the occupation of that particular person). She said she had tried to achieve the best situation for both parties.

25. The Second Planning Officer said that, although he had not copied across the remaining conditions from the retrospective permission, he believed they were still valid and enforceable. He said that the LPA had amended its procedure so that all remaining conditions are now reproduced in these circumstances. He said that the condition requiring obscure glazing had been complied with, and some landscaping and boundary treatment had been carried out, although there remained a gap in the hedge between the properties. He understood there was some dispute between the owners of number 55 and number 53.

26. The Chief Planning Officer said that although the LPA had made improvements since the time of these events (e.g. the increased use of standard conditions, and an improved enforcement culture), he believed the LPA would have "ended up in the same position"; he did not think the LPA could have done things differently, with "an applicant who was going to do what they were going to do". He said that, apart from the first s192 application, there had been no reason to refuse the applications. He said that the Officers could see what the applicant was doing, and that they had attempted to gain some control over the development where they could.

27. Councillor X provided a large number of emails between himself, Ms N and a number of officers in the planning department. He said that he was notified of the retrospective application as the local member, and that, following enquiries he made with planning officers, he was content for officers to determine the application under delegated authority as long as the kitchen was removed and suitable conditions were attached to the permission. He was adamant that he had understood the kitchen was to be removed; he said that he believed he would have "called in" the application if he had understood the kitchen was to remain.

Professional Advice

The first s192 application

28. The Adviser said that the LPA should have considered whether the proposal comprised "the provision within the curtilage of a dwellinghouse of any building or enclosure … required for a purpose incidental to the enjoyment of the dwellinghouse as such" (the Class E wording). He referred to the Rambridge judgment which held that "required for a purpose incidental to the enjoyment of the dwellinghouse" did not include primary residential use. The Adviser said it was clear that the building was to be erected to provide accommodation which was largely primary living accommodation, and would therefore not be permitted development under Class E. He noted that the First Planning Officer, in her report had reached this conclusion; the Adviser said that this conclusion alone was a sufficient basis for refusing a s192 certificate, and the application should have been refused on this basis. Any further consideration of whether the proposal met the criteria set out in Class E was irrelevant.

29. The Adviser said that the s192 certificate was refused on the basis that the proposed development did not comply with criteria relating to size and position, and that this was an error as it should have been refused on the basis that it did not fall within Class E at all.

The second s192 application

30. The Adviser noted that the position of the proposed building was slightly different from that shown in the first s192 application, the proposed floor plan had been amended and the LPA concluded that the proposal complied with the criteria of Class E. He also noted that the First Planning Officer's report stated that the use of the proposed building was to remain incidental to the use of the main dwelling.

31. The Adviser said that the LPA's response to the Ombudsman appeared to show that it considered the second application to be materially different from the first. However, he considered the differences in the floor plans to be "relatively minor" and that both proposals comprised substantially what was described in the Rambridge case as "primary living accommodation". The

Adviser said that neither application should have been considered to fall within Class E as they both proposed accommodation, including bedrooms, lounge and shower room, which would be regarded as primary living accommodation. He did not see how any reasonable decision maker could conclude otherwise than that the s192 proposals were not permitted development and should not have been granted. He concluded that the LPA was wrong to have issued the s192 certificate.

The retrospective application

32. The Adviser said that the First Planning Officer's report mentioned the grant of the s192 certificate and noted that the size of the building fell within the limits of Class E; he said that the implication was that a building of that size in that position could lawfully be built as Class E permitted development. He said it seemed that the existence of the building constructed with the benefit of the LPA's decision as to its lawfulness was regarded as an important factor in the determination of the application. He said this seemed clear from correspondence which showed the LPA believed that if the applicant removed the kitchen from the building it would revert to being permitted development and the Council would not be able to impose conditions. He said that since he did not believe that the building as proposed in the s192 application was lawful development within Class E, he considered that the LPA's decision on the retrospective application was wrongly influenced and could be "questionable".

33. The Adviser said that this was not the only consideration, and the report also indicated that the Council had considered its policy on annex accommodation (HSG13). He noted that it considered the proposed development to be only a minor conflict with the policy, that was considered to be outweighed by overall consistency with that policy's overall objective, and that the report referred to the appeal decision (see paragraph 6). The Adviser referred to a series of legal cases[3] which established that it would be wrong to suggest like cases must be decided alike, and that a decision maker must exercise his own judgement; to state that like cases must be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. He said that in the appeal case

[3] Including North Wiltshire DC v Secretary of State for the Environment [1992] 65 P&CR 137 and R v Secretary of State for the Environment ex p David Baber [1996] JPL 1032

the Planning Inspector seemed to have been influenced by the existence of a fall-back position (a recent permission for a similar-sized building in the same location); such a fall-back position did not exist in this case, and the 2 cases were therefore not alike to such a degree that the Council had to determine the application in the same way. The Adviser did not believe that it was likely that, without the backstop position of the s192 certificate, the application would be determined in the same way.

34. The Adviser said that the First Planning Officer's report considered Ms N's objections to the application and recognised the adverse impacts on her amenity. He said that controls (in the form of conditions attached to the permission) to reduce the impacts were identified, but noted that this was in the mistaken belief that by removing the kitchen the building would revert to permitted development to which such controls could not be applied.

35. The Adviser said that the condition restricting occupancy to the current occupant was in effect a personal permission, which is advised in only exceptional circumstances. He noted that the clause requiring removal of the building effectively created a temporary permission without specifying its duration, which he considered to be "somewhat unsatisfactory".

The variation application

36. The Adviser noted that in addition to varying the condition restricting occupancy, the permission imposed an additional condition indicating that it did not invalidate the other conditions of the previous permission. The Adviser referred to an Appeal Court judgment[4] which indicated that when issuing a fresh planning permission it was "highly desirable" that all the conditions to which the fresh permission would be subject should be restated in the new permission. He said that a permission granted on an application to vary a condition is a separate permission, and if the LPA wanted to impose the other conditions on the new permission it would have been good practice to have included them. He concluded that the LPA might find that enforcement of conditions could be more complicated if it became necessary.

[4] Reid v Secretary of State for Transport [2002] EWHC 2174. This case was later referred to by the Supreme Court in London Borough of Lambeth v Secretary of State for Housing, Communities and Local Government and others [2019] UKSC 33

The Council's response to the draft report

37. The Council disagreed with my interpretation of the Rambridge case (see paragraph 5). It maintained that whether the proposal in the second s192 application was "incidental" to the main dwellinghouse was one of fact and degree for the Case Officer exercising her own judgement, and that it should only be supplanted where it was clearly flawed which, it submitted, was not the case.

38. The Council said that it would only have been proper to refuse the retrospective application if it was either not in accordance with the development plan or there were other material considerations which outweighed compliance with the development plan. It said that its policy HSG13 made clear that "annex [sic] accommodation" was, in principle, acceptable provided it was ancillary to an existing dwellinghouse rather than being self-contained. It emphasised that the Planning Officer had concluded that, despite the fact that the proposed development did not fully comply with the policy, it was still acceptable overall in planning policy terms and in accordance with the Planning Inspectorate appeal decision. It submitted that the maladministration identified made no material difference to the decision to grant permission.

39. The Council said there was no duty, or need, to expressly incorporate all the conditions from the original permission when granting the retrospective application, and that a failure to follow "best practice" was not necessarily maladministration.

Analysis and conclusions

40. In reaching my conclusions I have taken account of the advice which I have received, which I accept in its entirety. The conclusions, however, are mine alone.

41. On the face of it, any errors in the way in which the LPA handled the first s192 application did not cause Ms N an injustice, as the application was refused. The reason given for the refusal was that the proposal did not comply with the criteria in Class E in relation to the size and location of the building. However, the nature of the proposed development (its use as

primary living accommodation) meant that it would not be permitted development under Class E, irrespective of its location and size, and the application should have been refused on this basis. I do not understand why the First Planning Officer, having reached this conclusion, nevertheless only recommended refusal of the application because it did not comply with criteria, without also recommending refusal because it would not be permitted development in any event. The First Planning Officer herself could not explain the reason for this. The failure to include both reasons for refusal was maladministration which, although not amounting in itself to an injustice to Ms N, is likely to have had a bearing on the LPA's subsequent decisions. I will say more about this in the following paragraph.

42. The second s192 application was similar to the first, with the location of the building being adjusted slightly and the proposed floor plan amended. On this occasion, the First Planning Officer considered that the amendments to the proposed floor plan meant that the building would be reliant on the main dwelling and therefore was an ancillary building incidental to the use of the dwellinghouse. The Adviser considered, and I agree with his advice, that this is not a correct interpretation of the decision in the Rambridge case, in that the development was still for primary residential use. I was concerned that the First Planning Officer was not aware of the principles established by this case. The application should have been refused because the proposed development would not be permitted development. I believe that if this had been given as an additional reason for refusing the first application, the First Planning Officer would have been more likely to have addressed her mind to both reasons for refusing the first application and, thus, been likely to have refused the second application. The fact that it was granted amounted to maladministration which caused Ms N serious injustice - of having what was in effect a new house built in the garden of the house next door. I therefore **uphold** the complaint about the s192 applications.

43. I turn now to the way in which the LPA handled the retrospective application and the variation application. The LPA identified that the development had not been carried out in accordance with the plans approved by the s192 certificate it had issued and was thus not permitted development, and encouraged the applicant to submit a retrospective application. The First Planning Officer said at interview that it had been

clear what the applicant was trying to achieve from the first s192 application, and the Chief Planning Officer said that the Officers could see what the applicant was doing. The retrospective application was considered on the basis that the kitchen which had been installed could be removed and the development would revert to being permitted development, to which the LPA would not be able to attach conditions. Although the First Planning Officer said that this retrospective application was an entirely different type of application which meant it was considered against different criteria, I have no doubt, from what she said both at interview and in email correspondence with Councillor X, that her consideration of the application was influenced by the existence of the s192 certificate and by her (understandable) desire to "achieve the best situation for both parties" by the imposition of conditions which could only be attached to a planning permission. Nevertheless, the retrospective application should have been determined in isolation, that is, on the basis that the s192 certificate did not exist. I can only conclude that, on the balance of probabilities, it is unlikely that permission would have been granted in the absence of the s192 certificate. Since I have already concluded that the s192 certificate should not have been issued, it follows that the grant of retrospective permission for the development was flawed.

44. It is also clear that the First Planning Officer was influenced by the recent Planning Inspectorate decision in her conclusion that the application represented only a minor conflict with the Council's policy HSG13. I agree with the Adviser's interpretation of this decision – that it seemed to have been influenced by the existence of a fall-back position; such a fall-back position did not exist in this case, and meant that the Planning Inspectorate decision should not have been considered to set a precedent which had to be followed in this case.

45. I also have to consider the involvement of Councillor X in the application. Councillor X expressed his concerns about the application and was considering calling in the application for determination by the Planning Committee, but, following email correspondence with the First Planning Officer, decided to allow it to be determined by officers. At interview, he explained that this was because he understood the kitchen was to be removed. I have carefully considered the emails provided by Councillor X, and it is clear that this was not what the First Planning Officer advised him. The only reason for the retrospective application was to

retain the kitchen, and I do not understand how Councillor X could have believed that the application could be granted and yet the kitchen be removed. Councillor X's misunderstanding of this is another example of maladministration on the part of the Council, as acts of Members of a Council, acting in such capacity, are acts of the Council itself. If Councillor X had correctly understood what the First Planning Officer was telling him, relying on the information he provided at interview, it is likely that he would have called in the application. There is no way of knowing whether the Planning Committee would have made the same decision as that subsequently made by officers.

46. The instances of maladministration throughout the life of the permitted development and retrospective application permissions outlined above mean that I must determine, on the balance of probabilities, what is likely to have happened in any case had the maladministration not occurred. Had the officers and/or the Planning Committee considered the matter properly without any of the decisions taken maladministratively influencing those decisions, for the reasons outlined above, I consider that, on balance, it is more likely than not that the retrospective permission would not have been granted.

47. For all these reasons, I consider that there was maladministration in the grant of the retrospective application, and I therefore **uphold** the complaint about the way in which this application was handled.

48. The LPA had the power to consider/grant an application to amend the conditions which had been attached to the retrospective consent. In doing so, it concluded that the condition it was being asked to amend was needlessly restrictive and did not meet the test for reasonableness. It imposed an alternative condition, which meant that the building could remain permanently, as long as it continued to be used for purposes incidental to the enjoyment of the dwellinghouse. Whilst the amendment of the condition may, in itself, have been reasonable, it would have been good practice to repeat the remainder of the conditions attached to the retrospective permission. I note, however, that no issue has been made about their enforceability, that on the whole they have been complied with (although this is disputed by Ms N), and that the LPA has acknowledged the error and amended its process. However, I would urge the LPA to be

mindful in future about the desirability of repeating the conditions from a previous permission on any fresh permission.

49. Taken as a whole, the failings which I have identified mean that Ms N has suffered a loss of privacy which has affected the enjoyment of her home and garden. This is a significant injustice to Ms N; in addition, the existence of what is in effect a new house built in the garden of the house next door to her property is likely to have diminished the value of her home.

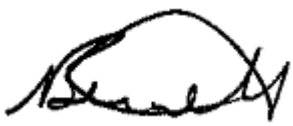
Recommendations

50. I **recommend** that, within **1 month,** the Council apologises to Ms N for the failings I have identified.

51. I further **recommend** that, within **2 months,** the Council reviews whether the conditions attached to the retrospective permission, particularly in respect of the landscaping/boundary treatment have been complied with. If it concludes that they have not, the Council should consider what action may be expedient to ensure such compliance.

52. I further **recommend** that, within **3 months**, the Council instructs the District Valuer to assess the impact of the development on Ms N's property and, within **a month** of receiving the District Valuer's report, pays her an amount which equates to the difference in value of her property before and after the development.

53. I direct that, within **2 months**, the Council confirms to me what action it has taken or proposes to take in response to the report.



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