

## **The Ombudsman's final decision**

Summary: The complaint is that the Council referenced the wrong plans to a planning permission. It should have referenced revised plans that included a transfer of land to the complainant. The Ombudsman upholds the complaint. But our view is the Council has offered a suitable remedy for the fault caused.

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## **The complaint**

1. The complainant, whom I shall refer to as Ms U, complains the Council's error in naming the wrong plans on a decision notice has increased the impact of the neighbouring development on her home and garden.

## **The Ombudsman's role and powers**

2. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I 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. I 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), as amended*)
3. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

## **How I considered this complaint**

4. As part of the investigation, I have:
  - considered the complaint and the documents provided by Ms U;
  - made enquiries of the Council and considered its response;
  - considered Ms U's comments on the Council's response;
  - sent my draft decision to Ms U and the Council and considered the responses I received.

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## What I found

### Legal and administrative background

5. The role of local planning authorities is to balance the right of a landowner to do what s/he wishes with his or her land and property against the public and private interests of those who own and enjoy land that may be affected by development.
6. Planning decisions must only have regard to material considerations. Material considerations must be genuine planning considerations, i.e. they must be related to the development and use of land in the public interest.
7. As planning is about the use of land, the identity of the occupier/owner of land is usually irrelevant.
8. A Council must consider whether it would be expedient for it to take enforcement action against breaches of planning permission. Guidance advises any enforcement action must be proportionate to the breach of planning control to which it relates. The guidance says the Council, when considering enforcement action, must consider whether what has been built would be generally acceptable.
9. The process councils follow to publicise planning applications is often referred to as a 'consultation'. However, councils are not under any duty to 'consult' local people. The law says councils must publicise planning applications in the local area to let people know how to make comments. Councils must consider any comments they receive.
10. The Council has an extra stage in its development control process, that allows people to petition the Council. Subject to certain conditions, petitioners can ask to present it to the Council's Development Control Forum (DCF), made up of Councillors, planning officers and the applicant. The Council's website says:

*“ the aim of the forum is to allow early discussion of the planning issues raised by petitioners and to explore the scope for building consensus and resolving concerns.*

*It is an informal meeting and the forum does not determine the application. A formal committee ultimately determines the application.”*
11. The 1996 Party Wall Act provides a framework for preventing and resolving disputes about party walls. Any disputes about matters covered by this act are civil disputes. The Council has no duties or powers for party walls. So, complaints about party walls are outside the jurisdiction of the Ombudsman.
12. If neighbours cannot agree on party wall disputes they will need to appoint surveyor(s) to agree a 'party wall award'. This is a legal document which says:
  - what work should happen;
  - how and when it will be carried out;
  - who will pay for which part and how much will be;
  - ownership.

### What happened

13. Ms U lives in a terraced house. The house has a small courtyard to its rear. A business runs from the house next door. The garden of that property has a range of outbuildings. The neighbour had made an earlier application to develop that property, including a block of flats to replace the outbuildings. A Planning Inspector had dismissed an appeal against non-determination of that application.

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14. In 2014 the Council received a new application for development of the neighbouring property. This included building a block of four flats in the garden of that house. The applicant offered to engage with the immediate neighbours to see if they could achieve a compromise about the overshadowing issues that had been a concern in the earlier application.
  15. In July the Council's DCF considered the application, following submission of a petition. The Forum asked whether the developer would consider providing Ms U's property with some extra land to enlarge the courtyard, to reduce the feeling of enclosure.
  16. In response to the DCF, the developer submitted a revised set of plans. The covering letter advised:
    - "after careful deliberation the applicant is willing to amend the boundary adjacent to the rear courtyard of [Ms U's house], thereby increasing the depth of their courtyard by 2m..."
    - "The land would be transferred to the neighbour's ownership for a nominal price to benefit her. The applicant would expect to deliver the scheme in accordance with the amended plans..."
    - The letter noted land transfer would not affect the Council's assessment of the sense of enclosure from Ms U's house. But it would be beneficial to neighbour's amenity. – "...providing a much more useable open space and enhancing the feeling of space within the courtyard."
    - The developer would write to Ms U, but the offer was not intended as a point of negotiation. If Ms U decided she did not accept the offer, the applicant would submit a revised application.
  17. The Council's planning committee considered the application, first in September 2014 and then in January 2015. The officer's report submitted to the committee noted:
    - The amended plans which showed a two metre change to Ms U's garden.
    - The impact of the proposed building must be compared to the impact of the existing outbuildings.
    - The submitted shadow diagrams showed the proposed building would cast slightly more shadow over the neighbouring gardens than the existing outbuildings, but not significantly more.
    - "I consider that the additional set back to the gable end, removing the bins and bike storage away from the boundary and increasing the size of the garden to [Ms U's house] will allow more light into this garden and open up views from the garden to overcome possible enclosing to [Ms U's house] and has overcome the concern and in my opinion, the impact on the neighbours will not be significantly different from what is currently experienced, and not to a degree that would justify refusal of the application."

The committee granted permission.
  18. By 2016 the developer had not started building the approved buildings. S/he sought non-material amendments to the approved plans. This application included the plans without the land transfer. The Council approved the amendments.
  19. Ms U says that in March they received a set of plans attached to a Party Wall Notice. The plans did not show the transferred land. She says they questioned

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this with the developer's surveyor, who then sent a set of plans showing the transferred lands. She said this led them to believe the developer would follow those plans.

20. In July 2016 Ms U says they received the party wall award. This attached the plans that did not show the land transfer. They wrote to the developer about this. S/he replied saying s/he intended to still discuss a transfer of land.
21. In March 2017 the developer needed to amend the application because of a need to include a meter cupboard and because of an "alteration of boundary to facilitate transfer of land to [Ms U's house]".
22. Ms U objected to the new application. She noted the wrong plans were attached to the planning permission. And the developer was now only offering to transfer 1.5 metres of land. Ms U also complained.
23. The Council's complaint response advised:
  - The officer's report noted the extension of the garden, which "*...indicates that the Committee made their decision with the amended plans in mind and the Case Officer...refers to the beneficial impact that the revisions make in terms of the set back of part of the building...*"
  - the Decision Notice wrongly referenced the original plans. The later amendment again did not reference the revised plans.
  - "*I appreciate that to have this space as enclosed garden land would be beneficial to you and that this was the expectation of the Committee however there was no mechanism through planning to require transfer of this land to you in this case.*"
  - "*We will make the Committee aware of the error in terms of the approved plans but this in itself cannot influence their decision which has to be made on planning issues only.*"
24. In July the Council's planning committee considered the new application. The officer's report noted:
  - the errors with the referencing of the plans;
  - a Councillor objected to the application because the meter cupboard would take up land the developer had earlier agreed to transfer;
  - there were no reasonable planning grounds for linking the development to the provision on the extra land.The Committee approved the new application.
25. Ms U complained to the Ombudsman. In response to our enquires, the Council advised:
  - "*...when drafting the decision notice, the case officer did not follow the correct procedure in referencing and selecting the correct plans and applying the approved plans condition.*"
  - "*Whilst the plan referencing error was acknowledged and formal apology issued, the additional land was not considered to be a significant material factor in officers supporting the original planning application. Officers did not consider, with or without the additional land, the proposal development would have a significantly adverse impact on the residential amenity of the occupiers [Ms U's house]*".

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- It offered £500 to address the time and trouble Ms U had taken in making complain. But it did not offer any compensation in terms for loss of property value.
26. I sent the Council's response to Ms U. She provided the following comments:
- They were only aware of the wrong plans after the party wall issue was finished and the foundations laid.
  - They had still not had a response from the developer's surveyor in response to their correspondence about the land transfer.
  - *"Our issue is that the Planning Department have failed to follow the decisions and wishes of the East Area Committee who made the planning decision. We have spoken to members of the Committee who confirm that the offer of increased area of land was a significant reason for the final granting of planning permission."*
  - *"We strongly believe that if the original plans had been linked the committee would NOT have approved the [application for amendments] and would have solid grounds to do so. Since the wrong plans had been linked councillors' hands were tied."*

### **Analysis**

27. The Council has accepted fault in the way it referenced the wrong plans in its decision notices on the development next to Ms U. I agree the Committee likely granted permission with reference to the amended plans, showing the intended two metres transfer of land to Ms U's home.
28. But the question remains of the injustice this led to. Ms U says she has spoken to members of the Committee who told her the transfer of land was a factor in their decision making. That may be so. But that does not mean that, without the transfer of land, the Committee would not have granted permission. Indeed, in planning terms (given that ownership of land is not a material consideration), it should have played little part in the decision-making process.
29. Ms U notes that if the Council had referenced the correct plans, the developer would have been in breach of planning permission by not building according to those plans. But enforcement action needs to be proportionate to the breach. And (again), as ownership of the land is not a material consideration, it is, in my view, likely the Council would not have found it expedient to take enforcement action.
30. I recognise Ms U's strong feeling of injustice because of the Council's actions, and that referencing the wrong plans is a significant administrative fault. But it seems to me I can only find injustice in the time and trouble to Ms U.
31. The Council has offered a remedy of £500 to recognise Ms U's time and trouble. My view is that that remedy is in line with the Ombudsman's remedies guidance. So my view further investigation by the Ombudsman is not warranted or could achieve any more for the complainant than this.

### **Final decision**

32. I uphold the complaint because of fault by the Council. The Council has offered a suitable remedy for the injustice identified. So I have completed my investigation.

### **Investigator's decision on behalf of the Ombudsman**