The investigation of a complaint against Flintshire County Council

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

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:

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-

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

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

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

The Coun cil'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

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 s1 (al)0.8 (w) (w) (,i 2.8 (r3 (us

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.

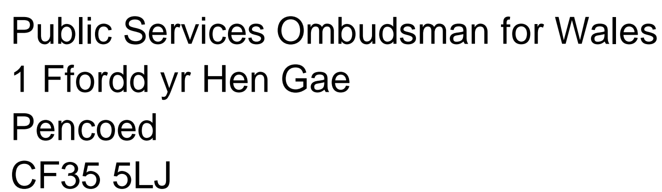
48. The LPA had the power to consider/grant an application to amend the conditions which had been attached to the retrospective consent. In doing so, it concluded that the condition it was being asked to amend was needlessly restrictive and did not meet the test for reasonableness. It imposed an alternative 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 g(o c)4.1(ospec)3 (e)48 (ch m)2.4 (eant)5.4ao(t)1 ( )]TJ -8yo cin288 Td [(

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 apologis(on)6.1buoBnec in the



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