

APPENDIX 3: Decision Notice

The Ombudsman's final decision

Summary: X complained the Council failed to protect their amenity when it approved a planning application for an extension to their neighbour's home. X said this will lead to a loss of light and an overbearing impact on their home. We found fault in the way the planning decision was made that might happen again. The Council agreed to carry out a review to consider whether changes are needed for its working practices and procedures.

The complaint

1. The person that complained to us will be referred to as X.
1. X complained that the Council failed to protect his amenity when it approved their neighbour's planning application.
2. X said this failure has caused loss of light and overbearing impact to the rear of X's home.

The Ombudsman's role and powers

3. 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 significant injustice, or that could cause injustice to others in future we may suggest a remedy. (Local Government Act 1974, sections 26(1) and 26A(1), as amended)
4. If we are satisfied with an organisation'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

5. I read the complaint and discussed it with X. I read the Council's response to the complaint and considered documents from its planning files, including the plans and the case officer's 'tick-box' report. I discussed the case with one of the Council's planning managers.
6. I gave the Council and X an opportunity to comment on a draft decision and took account of the comments I received.

What I found

Planning law and guidance

7. Councils should approve planning applications that accord with policies in the local development plan, unless other material planning considerations indicate they should not.
8. Planning considerations include things like:
 - access to the highway;
 - protection of ecological and heritage assets; and
 - the impact on neighbouring amenity.
9. Planning considerations do not include things like:
 - views over another's land;
 - the impact of development on property value; and
 - private rights and interests in land.
10. Councils may impose planning conditions to make development acceptable in planning terms. Conditions should be necessary, enforceable and reasonable in all other regards.
11. Some councils issue guidance on how they would normally make their decisions and how they generally apply planning policy. The guidance is issued in supplementary planning documents (SPD) and can be found on council websites.
12. Planning guidance and policy should not be treated as if it creates a binding rule that must be followed. Councils must take account of their policy along with other material planning considerations.
13. Amongst other things, SPD guidance will often set out separation distances between dwellings to protect against overshadowing and loss of privacy.
14. Although SPD can set different limits, typically councils allow 21 metres between directly facing habitable rooms (such as bedrooms, living and dining rooms) or 12 metres between habitable rooms and blank elevations or elevations that contain only non-habitable room windows (such as bathrooms, kitchens and utility rooms). An 'elevation' plan is a plan showing the facing or side view of a building or structure.
15. Planning officers may consider the loss of light or overbearing impact a new development is likely to have on existing buildings. They often use a rule of thumb, known as the '45-degree rule'.
16. To do this, they imagine a 45-degree line from the mid-point of the nearest habitable room window on the neighbour's property and any development above and beyond the line is in breach of the 'rule'. If a large area of the new development is in breach of the 'rule', it is likely to indicate an unacceptable, overbearing impact. Some councils include this test, or versions of it, in their published Supplementary Planning Guidance, which shows how they apply policy to protect amenities.
17. Details of how a council considered an application are usually found in planning case officer reports. The purpose of the case officer's report is not merely to facilitate the decision, but to demonstrate the decisions were properly made and due process followed. Without an adequate report, we cannot know whether the

council took proper account of the key material planning considerations or whether judgements were affected by irrelevant matters.

18. However, the courts have made it clear that case officer reports:
 - do not need to include every possible planning consideration, but just the principal controversial issues;
 - do not need to be perfect, as their intended audience are the parties to the application (the council and the applicant) who are likely to be well versed of the issues; and
 - should not be subject to hypercritical scrutiny, and do not merit challenge unless their overall effect is to significantly mislead the decision maker on the key, material issues.
19. The Openness of Local Government Bodies Regulations 2014 require that certain decisions and their background papers are publicised on council websites, as soon as is practicable after the decision is made.
20. The regulations apply to a decision that has been delegated to an officer, if it:
 - grants a permission or licence;
 - affects the rights of an individual; or
 - awards a contract or incurs an expense that materially affects the council's financial position.
21. The regulations require that any such decision should be made available to the public:
 - at the council's offices;
 - on the council's website, if it has one; and
 - by any other means the council considers appropriate.
22. The written records should include the following information:
 - the date the decision was made;
 - the record of the decision and its reasons;
 - details alternative options, if any considered and rejected; and
 - a record of any relevant conflict of interest.

What happened

23. X's neighbour applied for planning permission for a rear extension above an existing ground floor rear extension. The original plans also included a loft conversion and changes to the shape of the roof.
24. Amended plans removing works to the roof were submitted before the application was decided.
25. X has a conservatory at the rear of their home, which is not as deep as their neighbour's existing ground floor extension. X has a living room with French doors on the original rear building line of their home which open up into the conservatory.
26. The Council has a design guide published as a supplementary planning document on its website. The design guide includes details of how the Council apply the 45-degree rule in different circumstances. It says:

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- for two storey extensions, the 45-degree line is drawn from the $\frac{1}{4}$ point of the nearest ground floor habitable room window in the adjoining property, towards the proposed development;
 - the 45-degree line is taken from the original face of the adjoining property;
 - where a neighbour already has an extension that does not comply with the 45-degree rule, an applicant will normally be allowed to build an extension to the same depth as the neighbour. The guidance does not specify whether the two extensions should also be of similar height.
27. The plans for the proposed rear first floor extension show a 45-degree line drawn from the edge of the corner of the proposed extension, back towards the middle of the French doors in X's home.
28. If the 45-degree line from the neighbour's storey extension had been drawn from the $\frac{1}{4}$ point, as required by the Council's guidance, about a metre of the proposed extension would be in breach of the rule.
29. The Council uses 'tick-box' site visit forms for simpler 'householder' proposals. The form includes:
- the application reference number;
 - address and date the application was valid;
 - case officer initials and site visit date;
 - publicity arrangements;
 - questions about planning considerations, which the officer answers by inserting either 'Y' or 'N'.
30. The questions on the form are as follows:
- Not Heritage Asset;
 - Green Belt;
 - Not Flood Zone;
 - No trees of amenity value affected;
 - Minor extension with limited visual and spatial impact which appears in keeping with the character and appearance of the streetscene complies with Residential Design Guide SPD and complies with NP, LP and NPPF;
 - Complies with Vehicle Parking Standards;
 - No material harm to living conditions of neighbouring properties;
 - Objections received on material planning considerations suitably overcome through amendments;
 - Ecology notes required.
31. I discussed the case with a planning manager and asked why the assessment form said the proposal complied with the design guidance, when the 45-degree line was drawn from the middle of X's French doors, instead of the $\frac{1}{4}$ point as required in the guidance.
32. The planning manager told me:
- the Council's usual practice in these situations is to take the 45-degree line from the window most affected. In this case the most affected window is X's

conservatory window, and so the line was not drawn from the original building line as stated in the design guidance;

- that a two-storey extension which is in breach of the 45-degree rule would normally be allowed in situations like this, as X already has an extension (their conservatory) in breach of the 45-degree rule when measured from the nearest window on the original building line of the applicant's house.

My findings

33. The Council did not produce a case officer report to record consideration of the planning issues but instead it relied on a 'tick-box' assessment form. Tick-box forms can include enough information to show that the material planning considerations have been taken into account, before a decision is made. But in this case, I am not satisfied there is sufficient evidence to show the decision was made properly.
34. I consider there is fault here, because:
 - The Council's 45-degree guidance shows the line should be taken from the $\frac{1}{4}$ point of the ground floor window on the original building line, but this did not happen here. If the Council had a reason not to follow its guidance, there should be a record that explains why this was appropriate, but there is none.
 - The planning manager told me that in situations like this, Council practice is to measure the 45-degree line from the window affected, in this case the rear window in X's conservatory. If this is Council practice, it should be set out in the design guidance, but it is not
 - The planning manager said, the design guidance allows development like this proposal, because X already has a conservatory which is in breach of the 45-degree guidance. If this was indeed the reason the case officer found the proposal acceptable, we would expect a record explaining how this conclusion was reached, but there is none.
35. When we find fault, we have to decide whether it caused an injustice to the complainant that should be remedied.
36. X has provided photographs taken from inside their home and I have considered these along with approved plans. While there will be some overbearing impact from the new extension, I cannot say that it is so significant that any reasonable authority, who considered the plans alongside the Council's design guidance, would have refused this application.
37. However, I am concerned that in other circumstances, the fault I have found might have resulted in injustice, so I recommended the Council reviews its practices and procedures. The Council has agreed to my recommendations.

Agreed action

38. To avoid recurrence of the faults I have found, the Council will:
 - a) review its working practices and procedures against its published design guidance. It should make any necessary changes to ensure a clear and consistent approach to 45-degree rule matters and that it keeps good evidence in its records of reasons and analysis of its consideration of planning issues; and
 - b) report the outcome of its review to the Ombudsman within three months from the date of this decision.

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39. The Council will provide us with evidence it has complied with the above actions.

Final decision

40. I found fault that might recur and cause significant injustice. I completed my investigation because the Council accepted my recommendations.

Investigator's decision on behalf of the Ombudsman