Report by the Local Government and Social Care Ombudsman

Investigation into a complaint against Warwick District Council (reference number: 18 004 227)

15 June 2020

The Ombudsman's role

For more than 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- apologise
- pay a financial remedy
- improve its procedures so similar problems don't happen again.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names used

Mrs X	The complainant

Report summary

Planning and Development – planning applications

Mrs X complained the Council failed to properly protect bats and require the developer to provide compensation for biodiversity loss when it approved a planning application for a housing estate on land near her home.

Findings

Fault found causing injustice and recommendations made. The Council failed to properly:

- consider the impact the development would have on bats; and
- require the developer to compensate for biodiversity land loss.

Recommendations

To remedy the injustice caused, within three months of this report, the Council should:

- apologise to Mrs X for its failure to properly protect the natural environment near her home;
- provide us with the outcome of its review of its section 106 procedures;
- remind officers and members involved in planning matters:
    - that planning decisions should not be made until they have all the information necessary to make their decisions;
    - that planning case officer reports should include sufficient details about significant material planning considerations, so it is clear from council records that decision-makers are properly informed, and decisions properly made;
    - that when planning officers disagree with the recommendations and advice of statutory consultees or others with relevant expertise, to ensure there is a record of their reasons for disagreement on the planning file. We would normally expect this information to be included in the planning case officer report; and
    - of details of its revised section 106 procedures that should ensure its decisions and intentions are carried out through planning conditions and planning obligations;
- pay £1,000 to Warwickshire Bat Group to enhance or promote the environment for bats; and
- in consultation with the ecology service, provide 8 to 10 suitable hibernation bat boxes on land within its control.

The Council has accepted our recommendations.

The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. ***(Local Government Act 1974, section 31(2), as amended)***

The complaint

1. Mrs X complained the Council failed to properly protect bats and require the developer to provide compensation for biodiversity loss when it approved a planning application for a housing estate on land near her home.
2. Mrs X is concerned that, because of the way the Council dealt with the planning application, bats and their habitat may have been affected. She is concerned about the loss to the natural environment in her area.
3. Mrs X also complained the Council failed to properly consider the impact the new development would have on her privacy.

Legal and Administrative background

The Ombudsman's role

4. We investigate complaints about 'maladministration' and 'service failure'. In this report, we 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. We 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)***

Planning law and guidance

5. Councils should approve planning applications that accord with policies in the local development plan, unless other material planning considerations indicate they should not.
6. Planning considerations include things like:
   - access to the highway;
   - protection of ecological and heritage assets;
   - the impact on neighbouring amenity: and
   - government policy and guidance.
7. 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.
8. Councils may impose planning conditions to make development acceptable in planning terms. Conditions should be necessary, enforceable and reasonable in all other regards.
9. Councils may approve applications, subject to a planning condition requiring the applicant to enter into a separate planning agreement. Council powers and appeal rights relating to these agreements are found in the Town and Country Planning Act 1990. The agreements are usually referred to as 'section 106' agreements. The agreements are in the form of a deed, which is a contract that is legally binding on the parties that sign it.
10. We recognise that councils have discretion to depart from their policy and guidance or not to follow advice from their officers or other professionals. But when councils make their planning decisions, they need to demonstrate they have

exercised their discretion properly. We normally expect to find evidence of consideration of the key material issues in the council's planning case officer's report, which is written to advise the decision-making body or individual.

11. We accept that planning officer's reports do not have to be perfect or cover every possible planning consideration. However, planning case officer reports still need to demonstrate that the core issues have been considered and the reasons for judgements on planning matters should be shown, albeit briefly stated.

12. The purpose of the planning officer's report is not merely to help the council make its decision, but to demonstrate its decisions were properly made and that the proper process was 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.

13. Regulations require councils to maintain a register of planning applications. The register should be available for the public to view at its offices and include applications and decisions, together with plans, drawings and details of planning conditions.

Protected species law and guidance - bats

14. Bats are protected by United Kingdom and European law. It is a criminal offence, amongst other things, to:

- deliberately injure or kill a wild bat;
- intentionally or recklessly disturb a bat in its roost or group of bats;
- damage or destroy a place used by bats for breeding or resting, even if bats are not occupying it; or
- intentionally or recklessly obstruct access to a bat roost.

15. The relevant European Directive states that:

"Member states shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment with regard to their effects."

16. Because of this, councils must consider the impact development will have on bats and their environment when making decisions on development proposals.

17. If a bat survey is considered necessary and has not been submitted by the planning applicant, councils should request one. If the survey shows the development is likely to affect bat foraging areas and/or commuting routes, features such as trees should be retained, and additional planting considered wherever possible.

18. If the bat survey shows that bats and/or their roosts are likely to be affected by the development and planning permission is to be granted, councils should impose a condition requiring the applicant to apply for a European Protected Species Licence (EPSL), which in this country is issued by Natural England.

19. When making their planning decisions in the absence of an EPSL, councils must consider whether there is a reasonable prospect that Natural England would grant a licence. To make this decision, councils must be satisfied the requirements of the three-part test used to consider EPSL's are met. These are:

- The action is necessary for preserving public health, safety or some other overriding public interest;

- There is no satisfactory alternative;
- The action will not be detrimental to maintaining the species at a favourable conservation in its natural range.

20. The government issued guidance in the Office of the Deputy Prime Minister (ODPM) Circular 06/2005. The circular states that it is essential that the presence of protected species and the extent to which they may be affected by the proposed development is established before the planning permission is granted, otherwise all relevant material planning considerations may not have been addressed in making the decision. The need for ecological surveys should therefore only be left to be required under planning conditions in exceptional circumstances, as this will result in surveys for protected species being carried out after planning permission is granted.

Hedgerow Removal Notices

21. A countryside hedgerow is protected if it meets certain criteria set out in the Hedgerow Removal Regulations 1997. A hedgerow can be considered important if, amongst other things, it contains a protected species.

22. Hedgerow removal applications are not necessary if removing the hedge is approved as part of a planning application.

Biodiversity law and guidance

23. The law places a duty on councils to have regard to the purpose of conserving biodiversity in the exercise of their functions.

24. The government has issued guidance on good practice in the National Planning Policy Framework (NPPF).

25. The 2012 version of the NPPF applied when the Council's planning decision was made. At paragraph 9, the NPPF says sustainable development requires moving from a net loss of biodiversity to achieving net gains for nature. It cites a white paper called 'the Natural Choice: Securing the value of nature, 2011', which said:

'We will retain protection and improvement of the environment as core objectives for local planning and development management'.

26. Council development plans and planning decisions have the potential to adversely affect biodiversity. To carry out their duty, when making their decisions, councils should consider:

- the government's policies which aim to regain and retain a healthy, natural and diverse environment;
- the potential effects development will have on habitats or species;
- whether an ecological survey is needed; and
- opportunities, through the planning process, to restore or enhance ecological networks and secure net gains for biodiversity.

27. Advice on planning applications and decisions is found in the government's Planning Practice Guidance. The guidance says potential biodiversity impacts need to inform all stages of the development process, including pre-application advice and the application itself. An ecological survey will be necessary in advance of a planning application, if the type and location of development could have a significant impact on biodiversity. Even where an Environmental Impact Assessment is not needed, it might still be appropriate to require an ecological survey, if protected species may be present or biodiverse habitats may be lost.

28. As a last resort, where despite mitigation there would still be residual harm to the natural environment, councils can require compensation to provide biodiverse land of equivalent or greater value. This is called ‘offsetting’.

29. Planning conditions and agreements may be used to provide for monitoring and compensation for environmental loss through offsetting.

30. The government has provided a way of calculating environment loss and offsetting requirements, in its ‘biodiversity metric’. This is used to determine the losses and gains by assessing a habitat’s:

- distinctiveness - whether it is of high, medium or low value to wildlife;
- condition - whether it is a good example of its type;
- extent - which is the area the habitat occupies.

31. To calculate the biodiversity value of land, a baseline value survey will be necessary at the point the planning application is considered.

How we considered this complaint

32. We produced this report after examining the relevant files and documents. We interviewed the complainant and relevant officers of the District Council (the Council) and the County Council’s ecology service. The ecology officers were acting as officers of the Council for the purposes of these matters. We listened to a recording of the Council’s planning committee meeting and visited the site and a bat barn. The bat barn was required to be built at the same time planning approval was granted for the estate where Mrs X lives.

33. We gave the complainant and the Council a confidential draft of this report and invited their comments. The comments we received were taken into account before the report was finalised.

What we found

Background

The bat barn planning decision - 2006

34. Mrs X’s house was built following a planning decision by the Secretary of State in 2006. The application had been made in 2004, and at an early stage, the Council consulted an ecology officer. The ecology officer recommended that a bat survey should be carried out before the Council made its planning decision because there was a substantial possibility that bats would be present on the site. The ecology officer explained that a survey was necessary to determine what species were using the site and how they used it. Bat surveys found that Brown Long Eared bats were roosting, feeding and foraging on the site. The ecology officer recommended a planning condition, requiring a replacement bat roost, a buffer zone and retention of hedgerows.

35. In early summer, 2005, the Council’s committee approved the application, subject to the condition recommended by the ecology officer. As the site conflicted with the Council’s development plan and the new plan process was ongoing, the application was referred to the Secretary of State.

36. A month later, the Secretary of State called the application in for consideration and after a public enquiry, approved the new housing development a year later, subject to a planning condition requiring bat protection and mitigation measures.

The application Mrs X complains about - 2017

37. In early 2017, the fields next to the bat barn were the subject of the application which Mrs X now complains about. The two fields on which the new estate was proposed could only be accessed on land next to the bat barn. The application plans showed the access road next to the barn and a housing layout which involved removing a hedge and a number of mature trees. Some hedges and trees were to be retained and a 2-metre wide buffer zone planted with trees, to allow bats to commute and forage. A hedge that went from the boundary hedge into the middle of the site was to be removed. We will refer to this hedge as the 'middle hedge'.

38. The Council approved the planning application in June 2017 and the decision was issued a few months later.

39. Mrs X lives near the bat barn and has a long-standing interest in bats and their welfare. She assists in local bat conservation surveys. Mrs X says that work to prepare the site for development began before the planning decision was made by removing trees. She said other works continued in the autumn after the planning decision was made and issued, but before the Council approved the final draft of the Environmental Management Plan in February 2018. These works included removal of the middle hedge in October 2017.

40. Mrs X says she has allowed her hedge to grow higher to partly compensate for this loss, even though this reduces light in her home.

41. Mrs X said she reported what was happening to the police who, on one occasion, ordered contractors to leave the site.

42. We visited the site and the ecology company that maintains the bat barn allowed us access inside it. There was a male Brown Long Eared bat roosting in the barn and there were fresh droppings on the floor.

43. Mrs X says her privacy will also be affected by the new development. There are no habitable room windows in Mrs X's home facing towards the front of the nearest new house. The Council's planning case officer's report says the separation distance is 14 metres, but Mrs X says it is 12 metres.

The ecology officer's comments

44. The Council consulted the public and other consultees about the proposed new development including the ecology service, Natural England and the local Wildlife Trust.

45. Natural England's first response was to say it had no comment, but later, after the planning decision was made, it wrote again to say that, as bats appear to be present, a survey should be carried out before determining the application to establish if bats were roosting in the bat barn and to retain hedges for commuting and foraging.

46. The ecology officer recommended refusal of the application, or deferral to require a survey prior to determination, to establish important baseline data, such as bat species type, number, activity and habitat. The ecology officer said the only information provided by the developer was a Preliminary Ecological Assessment (PEA) which was, in their view, inadequate. While the PEA noted the bat barn was *'recorded to support bats'* and listed species of bats that had been found in the area, there was no specific information about the species of bats that were using the site and the barn.

47. The ecology officer recommended protection of the middle hedge, because of the potential impact removal would have on bats.

48. The ecology officer warned that the development would cause a loss of 11.57 biodiversity units, which was contrary to government guidance, the purpose of which was to achieve environmental gain, and at the very least ensure no overall loss. A loss of 11.57 units might result in an 'offset contribution' of land or money to be required from the developer, equivalent to a value of more than £350,000.

49. We spoke to the ecology officer and her manager. The ecology officer said there had been problems from the outset and that she and her colleagues were *'dumbfounded'* by what had happened. The ecology officer said, since the development had started, they were trying to make the best of it, but it was possible that bats had been affected.

50. The ecology officer said she realised this was ultimately a planning decision, but she would normally expect the planning authority to obtain clear and up-to-date information about:

- the types of species using the site;
- its population size;
- its exact location, whether roosting in trees or the bat barn; and
- this information should be provided before a planning decision was made.

51. The ecology manager said they had recommended refusal, because of the impact on biodiversity loss and the lack of protected species information. They considered there was potential for harm to the bats known to use the site, because of removal of trees and the layout and access point to the development, which was next to the bat barn.

52. The ecology manager said that it was not possible to give meaningful ecological advice without the necessary baseline data, as they would have no idea what type of bats they would need to protect. Some bats needed vegetation for commuting routes, whereas others could navigate using buildings. Some bats were light sensitive, so would need darker, wider flight corridors and buffer zones.

53. There are also some species, which are so rare and nationally significant that, if found on any site, the ecology service would recommend no development at all. This had happened not too far from this site and had led to a major infrastructure project being relocated away from a roost.

54. The ecology officer said that by the time the bat survey work was provided in September 2017, a significant amount of work preparing the site for development had already taken place.

55. The ecology manager pointed out that, despite this, Noctule and Daubenton's bats, were found to be using the site in the 2017 bat survey. He said that if this information had been available before development was approved in June 2017 as they had recommended, it is likely they would have requested a different layout to that which the Council approved. This would have allowed for a wider buffer zone around the barn and remaining hedges, and possibly additional planting along the boundary hedge as well as retention of the middle hedge.

56. The ecology manager said that, if the Council had not approved the planning application in June 2017, the developer might not have been able to remove the middle hedge in the autumn of that year without seeking the Council's approval

under the Hedgerow Removal Notice procedure. By the time the Council approved the final draft of the Construction and Environmental Management Plan (CEMP) in February 2018, the developer had already removed the middle hedge. The ecology manager said that the Council refers Hedgerow Removal applications to his service, so it can provide advice on environmental and ecological matters.

57. The ecology manager said he took an active part in producing the final draft of the CEMP that was agreed in February 2018. He said he felt able to approve it after stringent monitoring was provided to ensure better controls of work on site.

The Council's planning case officer's report and recommendation

58. The planning application was considered by a Council planning case officer, who wrote a report with his recommendations.

59. The planning case officer's report refers to the ecology service's comments. In the summary of the ecology comments, the Council said:

'Objection due to biodiversity loss on site and the potential impact on protected species. Require additional survey works to be carried out'.

60. Further on, in the analysis section of the report, the planning case officer said:

'It is noted the [ecology service] *do not object to the development, which is a strategic allocation within the emerging Local Plan. However, the Ecologists have requested that additional survey are* [sic] *necessary in order to establish an appropriate mitigation survey'.*

61. The planning case officer went on to say that he considers the additional survey work can be secured via a suitably worded planning condition, as the Council had done before on another housing site.

62. The planning case officer's report does not refer to:

- European and domestic law on protected species;
- the government's guidance on protected species and biodiversity;
- the fact that the ecology service recommended refusal or deferral; or
- the fact that the ecology service recommended securing baseline data through a survey, before determination.

63. The planning case officer recommended that biodiversity loss caused by the development could be compensated by offsetting and this could be required in a planning obligation under a section 106 agreement.

64. This did not happen. The section 106 agreement was written and signed but included no requirement for biodiversity compensation or offsetting measures.

65. The Council accepts this was due to an oversight. It has since begun to revise its section 106 processes to ensure this error does not happen again.

The Council's planning committee meeting and planning decision

66. The Council's planning committee met to consider the application. We listened to a recording of the meeting, which is available to the public on the Council's website.

67. The planning case officer addressed the meeting, but did not mention:

- European and domestic law on protected species;
- the government's guidance on protected species and biodiversity;

- that the ecology service recommended refusal or deferral; or
- that the ecology service recommended securing baseline data through a survey, before determination.

68. A member of the public raised several issues in a verbal representation and told the committee that the ecology service had recommended a bat survey should be required before a planning decision was made.

69. Members of the Council's planning committee raised several questions, but none of these related to ecological issues. The application was proposed for approval and the committee voted to approve the application, subject to planning conditions.

70. One of the planning conditions required (amongst other things) that before commencement the developer should provide details on:

- a construction management plan;
- tree protection measures; and
- an environmental management plan, including pre-commencement checks/surveys for protected and notable species, mitigation and monitoring.

The Council's response to our enquiries

71. In its response to our enquiries and during our investigation, the Council has maintained that it did consider the ecology service's comments but said it disagreed with them. It says it considered it was acceptable to approve the application and require survey information and mitigation measures using a planning condition, without first requiring and considering a detailed bat survey.

72. Both the Council's planning officer and the manager we interviewed explained that this was one of many planning considerations which had to be weighed against others, including the pressure to provide housing and make decisions in a timely manner.

73. The Council's planning manager said that, while he knew the ecology service wanted detailed bat survey information before a decision was made, the Council did get the information the ecology service wanted eventually. The planning manager pointed out that the ecology service did eventually approve a CEMP in February 2018.

74. In response to this point, the ecology manager acknowledges a CEMP was agreed in February 2018, but says if the Council had followed their advice, the outcome might have been significantly different. The layout might have been different, the middle hedge might have remained, there might have been additional planting and the buffer zone might have been wider.

75. The ecology manager said that, while he understands this was a planning decision for the Council to make, the Council normally follows the advice his service provides. He does not know why the Council did not follow the advice requiring provision of a full bat survey to be produced before it made its decision. The ecology officer and manager do not recall any challenge or disagreement with the ecological advice they provided.

76. There is no evidence to show that planning officers disagreed with the ecology service's advice before the Council made its planning decision. Where there is disagreement we would expect to see the details recorded in the planning case officer's report and for it to be drawn to the decision-maker's attention.

77. The ecology manager pointed out that before the 2004 application (which resulted in the construction of the bat barn) was considered by the Council's planning committee and decided by the Secretary of State, the applicant had provided full bat surveys to show which species were using the site and how they were using it.

The Council's response to an earlier draft of this report

78. In response to an earlier draft of this report, the Council met with the ecology manager to discuss potential resolutions for the loss of biodiverse land.

79. The Council said it has a site it owns that might be equivalent to the 11.57 units lost. It suggested more of this land could be allocated for nature preservation.

80. The ecology manager told us he knows the site and considers it could be suitable for additional ecological provision, though his service would need to see detailed plans first.

81. The ecology manager said the Council asked him how and where it might provide improvements for bats in its area equivalent to what might have been lost on the housing site.

82. The ecology manager said he had identified a woodland where bats are known to live which is in council control and is managed in co-operation with the local Wildlife Trust. The ecology manager says he recommended between 8 to 10 hibernation boxes made from 'woodcrete', which is a durable and well insulated material that can last hundreds of years.

Consideration of neighbouring amenity

83. The planning case officer's report includes a section on the impact the development will have on nearby dwellings.

84. The planning case officer specifically refers to Mrs X's house and the nearest new dwelling and says the separation distance is 14 metres, so her amenity is adequately protected. For these reasons, the planning case officer considered the level of separation was acceptable. Mrs X says the true separation distance is 12 metres.

Conclusions

Consideration of protected species

85. Councils are obliged to keep records of planning applications and decisions on the public planning register. We need evidence in planning records to demonstrate decisions are properly made.

86. In this case, the planning case officer's report does not include several significant, material planning matters. These are:

- it referred to parts of the ecology service's response, but not all of it. It did not refer to the fact that the ecology officer had recommended refusal or deferral of the application, nor did it make it clear that the ecology officer recommended bat survey data should be provided before the application was decided;
- there was no reference to the law and guidance on protected species in the report. Because of this, we cannot know whether the Council's planning committee was aware of the full legal and policy context of the decision it made;

- the government's guidance on protected species applications says it is essential that survey data is required *before* a planning decision is made, unless there are exceptional circumstances. This did not happen, and the Council has not explained, either in its planning case officer's report or in its responses to our enquiries, what the exceptional circumstances might be;
- there was no baseline data on bats, their numbers, types, locations and use of the bat barn and land around it before a decision was made. There were works carried out before permission was granted and before condition details on the environmental management plan were approved. At no point during the whole process, either before or after the planning decision was made, was any survey work carried out inside the bat barn;
- the Council said that it disagreed with the advice given by the ecology officer, but there is no reference to any disagreement in the planning case officer's report and the planning case officer made no mention of any difference of opinion in their verbal representations to the Council's planning committee. When considering complaints, if there is a conflict of evidence, we make findings based on the balance of probabilities. This means that we will weigh up the available relevant evidence and base our findings on what we think was more likely to have happened;
- when making a planning decision before Natural England grants a European Protected Species Licence (EPSL) to carry out works that will affect a protected species, councils must decide whether there is a reasonable prospect a licence would be required. To make such a decision, councils should apply the EPSL test set out in paragraph 19 above. To consider the third part of the test requires specific information about the species and how it will be affected by the development. This did not happen.

87. These omissions had the potential to mislead the Council's planning committee about the true nature and the full extent of the Council's legal obligations and its role in safeguarding protected species. The absence of consideration of significant material planning matters during the committee meeting and in the planning case officer's report is fault.

88. The Council says its planning committee had a good appreciation of the legal and policy context and was aware of the main point of difference between its planning officers and the ecology service.

89. There is no evidence to show this. An explanation of what happened that is given after the events, either in a complaint response or during our investigations, may provide useful information, but it will not necessarily prove the Council acted without fault. In this case, we need evidence that shows the Council exercised its discretion properly at the time its decision was made, and we expect to see evidence recorded in the planning reports, minutes and other documents.

90. The Council says that the fault we have found made no difference to the outcome of its planning decision, because it was aware of the ecology service's recommendations, but did not consider it necessary to follow them. It says that in any event, it eventually provided the ecology service with the information that was needed to protect the bats.

91. We do not agree with the Council when it says the fault we have found made no difference to the outcome. We consider it is more likely than not that if the planning committee had a clear understanding of relevant government guidance and ecology officer's recommendations it would have followed her advice, and our reasons are as follows:

- The Council has not provided any evidence of exceptional circumstances to justify not following government guidance and acting as it has. If there were exceptional circumstances, we expect them to be set out in the planning case officer's report and drawn to the attention of the planning committee, but this did not happen. We cannot see any reason why the Council would not have followed government guidance in this case.
- If there were significant disagreements between planning officers and expert advisors, we would expect them to be set out in the planning case officer's report and drawn to the attention of committee members, but this did not happen. We have not seen any reason why the Council would not have followed the ecology officer's advice.
- At the time the Council was making its decision, Natural England had not issued an EPSL. This meant that, in making its planning decision, the Council had to decide how the development would affect the protected species and whether its population could be maintained within natural ranges. When it approved the planning application, the Council did not have species specific information that would enable it to make such a judgement. We cannot see any reason why, if asked to consider the EPSL questions set out in paragraph 19 above, the Council would not have sought the information it needed and the ecology service had recommended.
- When the Council considered the 2004 planning application for the same site, it had a full bat survey that was provided before it made its planning decision. Its approval of the planning application included the condition recommended by the ecology officer following this bat survey. The 2017 application was for the neighbouring site, which was known to be significant for bats. The Council has not offered a convincing explanation of why its approach was different in 2017.

92. The Council made its planning decision without information required by a European Directive, recommended by the ecology service and government guidance or by asking or answering questions required by law, and this is fault.

93. A detailed survey was provided after the Council made its decision, and after site preparation work had taken place. This means we know what bat species were found on the site and how they were using it at that later date and after site clearance had begun. We also know what the ecology service would have wanted to achieve if they had this information earlier. That is a different layout, a wider buffer zone and retention of the middle hedge. This is a large site, and though access to it is restricted, we consider it is likely that other layouts would have been agreed in consultation with the ecology service.

94. We cannot know the extent of harm actually caused to bats because of the fault we have found. The Council's approach, to approve permission before the survey of protected species began, has denied us this opportunity.

95. It is reassuring that during our site visit, we found a bat occupying the barn. This might suggest the extent of harm is limited, but as the Council has no baseline information from surveys carried out before its decision was made, we will never know for sure. However, the additional measures the ecology service says it

would have recommended if it had the bat survey information it wanted sooner were intended to benefit the bats and their environment, and the absence of these measures is a loss caused by the fault we have found.

96. In its response to an earlier draft of this report, the Council questioned whether we could lawfully find that Mrs X had been caused an injustice by any fault we might find in how it protected her environment. The Council suggested that we are attempting to remedy an injustice to the environment, rather than an individual, and so have exceeded our powers as set out in section 26 of the Local Government Act 1974.

97. Where the Council's actions affect the wider public, but an individual complainant can demonstrate a personal commitment to the relevant issue, we can find they are also caused an injustice. This commitment might be shown by existing and active membership of a group or their individual actions, such as voluntary or charitable work.

98. In this case, Mrs X has demonstrated a significant level of interest and engagement in relation to the environment and bat protection in her area. Because of this, we will recommend a remedy involving improvements to bat protection measures in recognition of the injustice caused to Mrs X by the fault we have found.

Biodiversity loss

99. The Council accepts it had intended to require the developer to provide compensation and/or offsetting for biodiversity loss using a section 106 agreement, but this did not happen due to an error. This is fault.

100. Because of the fault, the natural environment of the area near Mrs X's home was harmed, and the compensation or offsetting to retain or enhance a healthy ecological environment, was not provided.

101. The Council has already begun discussing how it might use land within its control to offset the loss of biodiverse land resulting from the fault. We welcome the fact that the Council is taking significant steps to put things right.

Consideration of impact on privacy

102. Mrs X complained the Council failed to properly protect her privacy. She says the planning case officer's report incorrectly stated there was a 14-metre gap between the side of her home and the nearest new house, but the gap is only 12 metres.

103. There is no digital measuring tool on the Council's website and no scale bar on the approved layout plan, so it is difficult to tell with certainty the exact separation distance. However, there are some measurements marked on the plans, such as road widths. Using these as an indication of scale, we consider the Council's measurement is likely to be correct.

104. Most councils expect at least 11 metres between habitable room windows and blank elevations or elevations with non-habitable rooms. In these circumstances, even if Mrs X's calculation is correct, she would still have more separation distance than is normally considered satisfactory. There was no fault in the way the Council considered this matter.

Agreed actions

105. The Council must consider the report and confirm within three months the actions it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. ***(Local Government Act 1974, section 31(2), as amended)***

106. In addition to the requirements set out above, to remedy the injustice caused the Council has agreed to take the following actions within three months of this report:

- apologise to Mrs X for its failure to properly protect the natural environment near her home;
- provide us with the outcome of its review of its section 106 procedures;
- remind officers and members involved in planning matters:
    - that planning decisions should not be made until they have all the information necessary to make their decisions;
    - that planning case officer reports should include sufficient details about significant material planning considerations, so it is clear from council records that decision-makers are properly informed, and decisions properly made;
    - that when planning officers disagree with the recommendations and advice of statutory consultees or others with relevant expertise, to ensure there is a record of their reasons for disagreement on the planning file. We would normally expect this information to be included in the planning case officer report; and
    - of details of its revised section 106 procedures that should ensure its decisions and intentions are carried out through planning conditions and planning obligations;
- pay £1,000 to Warwickshire Bat Group to enhance or promote the environment for bats; and
- in consultation with the ecology service, provide 8 to 10 suitable hibernation bat boxes on land within its control.

Decision

107. We have completed our investigation into this complaint. We found fault causing injustice to the complainant, which the Council should act to remedy.