

APPENDIX 1

Committee: Strategic Development Committee	Date: 10 November 2009	Classification: Unrestricted	Report No:	Agenda Item:
Report of: Monitoring Officer Originating officer(s) Isabella Freeman Assistant Chief Executive (Legal Services)		Title: Local Government Ombudsman – Findings Against the Council Wards Affected: Limehouse		

1. **SUMMARY**

- 1.1 To consider the report and findings of the Local Government Ombudsman in respect of Investigation No. 08 002 912 concerning maladministration causing injustice resulting from the grant of Planning Permission by the Council.

2. **RECOMMENDATIONS**

Committee is recommended to:-

- 2.1 Note the report and finding of maladministration against the authority by the Local Government Ombudsman in respect of the investigation attached to this report
- 2.2 Note the assurance from the Service Head Planning and Building Control that action has already been taken by the department to ensure that the problems which led to the maladministration do not occur again

3. **BACKGROUND**

- 3.1 Attached as Appendix A is a copy of the Ombudsman's report on an investigation into Complaint No. 08 002 912 concerning the allegation that the Council failed to properly advertise a planning application it received for a property next to their home, denying them the opportunity to object to the works. It was further complained that the Council did not consider the application properly and granted Planning Permission even though it contravened its adopted policy.
- 3.2 Paragraphs 33 to 43 summarise the findings of the Ombudsman and recommends the remedy for the injustice caused to the complainants.

4. BODY OF REPORT

- 4.1 The complainants live at 24 Narrow Street which is a converted warehouse overlooking the Thames. A planning application was made for the erection of two balconies on the riverside elevation of buildings next to their home. The complainants complain that they were not notified about this Planning Application and did not find out about it until work started on the balconies. They state that had they been informed they would have objected to the Planning Application.
- 4.2 The complainants also claim that the Council did not consider the loss of amenity they would suffer by having their living room overlooked by their neighbours standing on the new balcony. They believe that if the Council had properly considered how they would be overlooked Planning Permission would not have been granted.
- 4.3 The Council received a Planning Application for works to be carried out to adjoining properties in July 2005. The location of the works was described in the Planning Application as Flats 2A and 3A, 18-22 Narrow Street London. On its internal documentation, the Council entered the location of the works as Flat 3A 18 Narrow Street. The site map filed with the Planning Application papers showed the correct address for the works, 18-22 Narrow Street. It would however appear that every document the Council subsequently generated with regard to the Planning Application showed the incorrect address of Flat 3A 18 Narrow Street. This would make it appear that the development was on a different level not adjacent to the complainant.
- 4.4 In accordance with standard practice for Planning Applications the Council notified nearby properties about the proposal. It would appear that because of the error in recording the address of the works neighbours would not have appreciated that they would be affected. A number of local residents have stated that they did not get any notice even though the Council's records indicate they would have been sent to them.
- 4.5 Internal documents produced by the Council in respect of the Planning Application show the incorrect address and this would confirm the fact that notification letters would have had an incorrect address.
- 4.6 When dealing with Planning Applications the Council has adopted in accordance with best practice a procedure called Fast Track for dealing with applications for minor matters. It is normally used when there are no major planning considerations involved. This Planning Application fell within the range of matters covered by this procedure and was used. The report indicated that the application was acceptable because other flats in the block (including the complainant) have balconies. Council policy is to encourage balconies as they

provide additional amenity space for flat dwellers and the borough is short of amenity space.

- 4.7 Planning Permission was granted on 12th September 2005 and was issued with the incorrect address, Flat 3A 18 Narrow Street. Work on the construction of the new balcony did not commence until 2008 and the complainants only discovered matters when they returned from holiday in February 2008.
- 4.8 The complainants contacted the Council and were initially advised that no Planning Permission had been given for works at 22 Narrow Street but subsequently it was confirmed by the Council confirmed that Planning Permission had in fact been given in September 2005. An officer from the Council's Enforcement team visited the premises in July 2008, at which time he was not aware that Planning Permission had been granted and wrongly expressed the view that there was a problem with overlooking. Later the same month the officer advised that no action would be taken as the balcony had been constructed in accordance with the Planning Permission granted.
- 4.9 The Council has accepted that the wrong address details were used when processing the Planning Application and generating notification letters. The planning officers are of the view that the balcony does not cause an unacceptable level of overlooking and had it received objections from the complainants it would still have granted Planning Permission.
- 4.10 In paragraphs 33 to 43 of his report the Ombudsman sets out his conclusions. In summary, he has found that the Council did make a mistake at the outset of the matter by using the wrong address to record the details of the Planning Application. He also concludes that it cannot be conclusively proved that the Council sent out notification letters or that they got to the intended recipients. The Ombudsman has been very harsh in this respect as the officers have confirmed that the system generates the letters so there is no reason to suspect they were not sent and delivered by post. The Council cannot send letters by registered delivery as it inconveniences people if they have to go and collect them.
- 4.11 The Ombudsman goes on to find that there is no evidence to support the Council's claim that a site inspection was carried out notwithstanding that the officer concerned confirmed that she did visit the property. The Ombudsman expresses concern about the content of the report prepared in respect of the Planning Application. He is of the view that greater detail should be contained in the report in respect of the planning issues, which are material to the application. This has since been rectified by the department . See paragraph 5 below.
- 4.12 The Ombudsman concludes that maladministration has occurred due to his perceived failings on the part of the Council.

5. REVISED PLANNING PROCEDURES

- 5.1 When a planning application is received it is registered and validated in accordance with accepted criteria, including verification of the description of development the address of the premises to which the application relates and the public consultation that will occur. When this case was considered, a Fast Track procedure was adopted as was considered appropriate for dealing with proposals which do not raise major planning issues. This was based on a template outlining those issues to which the Planning Case Officer should have regard in considering the planning application.
- 5.2 This procedure has been reviewed following the Ombudsman's investigation and a new, more comprehensive template has been introduced which ties in with the Council's computerised planning application processing system, Acolaid. A copy of the new template is appended to this report. Appendix B. The new template specifically requires the case Officer to consider and report on the nature of the advertising of the application. It is not practicable to change our existing postal consultation procedure, to ensure that proof of delivery of consultation letters is obtained. The volume of consultation letters generated within the department would make such a procedure prohibitive. The template also requires explicit referencing to the date of the posting of the site notice together with a photographic record of that event and the date that the site visit occurred. It is considered that with these changes, the concerns identified by the Ombudsman in his investigation of this case have been overcome.

6. COMMENTS OF THE CHIEF FINANCIAL OFFICER

- 6.1 The costs of the compensation will be met from within the Directorate budget.

7. CONCURRENT REPORT OF THE MONITORING OFFICER (ASSISTANT CHIEF EXECUTIVE (LEGAL))

- 7.1 The powers of the Ombudsman concerning the outcome of investigations he has conducted are contained in sections 30, 31, 31A and 31B Local Government Act 1974(LGA 1974). It should be noted that any recommendation of the Ombudsman is not binding on a local authority. Where the Ombudsman reports that there has been maladministration, a failure in service or a failure to provide a service the report must be laid before the authority. The authority is under a duty to consider the report and within three months (or such longer period as the Ombudsman may agree in writing) to notify the Ombudsman of the action which the authority has taken or proposes to take.
- 7.2 If the Ombudsman does not receive the notification within the period allowed, or is not satisfied with the action taken or proposed, or does not within a further three months (or agreed longer period) receive confirmation that the proposed

action has been taken, he must make a further report setting out those facts and making recommendations. This also has to be considered by the authority.

- 7.3 If there is still no satisfactory response, the Ombudsman may require the authority to arrange for a statement outlining the position to be published in a local newspaper. The statement will consist of details of any action recommended by the Ombudsman in his further report which the authority have not taken, such supporting material as the Ombudsman may require and if the authority require a statement of the reasons for their having taken no action on, or not the action recommended in the report.
- 7.4 On the issue of what power, the Ombudsman had to recommend compensation for loss of value Members are advised that section 31(2B) LGA 1974 states that the Ombudsman may make recommendations, which in his opinion should be taken to remedy any injustice sustained by a person in consequence of maladministration. It would seem the Ombudsman has a wide discretion as to what he views are ways of remedying injustice. However, the authority does not have to agree all the recommendations. In this regard the Monitoring Officer does not consider that the authority should agree to the recommendation for loss of value to the property to be assessed for the overlooking. This would set a precedent that is unacceptable as it overturns planning policy and case law which does not hold planning officers responsible for mistakes in the procedure. The Council has responded to the Ombudsman in respect of compensation – see letter at Appendix C.
- 7.5 English law does not contain any express legal right that a person is entitled not to have their land overlooked by a neighbour. Under the Human Rights legislation there are a series of rights bundled together which have been given the common term 'rights relating to privacy'.
- 7.6 These 'rights' are more accurately described as a person's right to respect for their private life and family life, their home and their correspondence. The protection afforded is that there should be no interference by a public authority with these rights except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, or for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.
- 7.7 Confusion has arisen in public circles with the reference to respect for home. Put simply this right is a right to occupy and not to be expelled or evicted and peaceful enjoyment of a home. You will note it does not talk about not being overlooked.
- 7.8 In the Planning field a number of issues are taken into account when considering an application and one of those is the amenity of an individual. It is in this regard

that the Planning system talks about issues such as privacy and overlooking. What the Planning system accepts is that houses, flats and gardens tend to be all shapes and sizes, at different distances from, and in a unique orientation to, any neighbouring buildings. Due to these constraints, it has not been possible to devise any practical, reasonable and enforceable design guides, which would allow the full use of land whilst guaranteeing privacy for every householder.

- 7.9 In paragraph 39 of his report, the Ombudsman uses the sentence 'I do not accept that a neighbour has no right to privacy.' He goes on to quote a planning application the Council refused based on policy DEV2, causing loss of privacy to the neighbouring property. What the policy in question does is to try to indicate that new developments should be designed in such a way as to reduce inter visibility to an acceptable degree; it does not seek to prevent it completely.
- 7.10 Thus, there is no legal right to privacy in the context of not having one's property overlooked. The Planning system does try to minimise the impact of overlooking via the adoption of guidelines but does not prevent it. As stated above officers have confirmed that if the complainant's objection had been received the planning consent would still have been granted on the basis of amenity.
- 7.11 It is suggested that any concerns about privacy can be remedied through special treatment to be applied to the window which precludes looking in but allows clear views out.

8. HUMAN RIGHTS IMPLICATIONS

- 8.1. Section 6 of the Human Rights Act 1998 prohibits public authorities from acting in a way that is incompatible with the European Convention on Human Rights. Various convention rights are likely to be relevant to the Order, including:
- **Entitlement to a fair and public hearing** in the determination of a person's civil and political rights (Convention Article 6). This includes property rights and can include opportunities to be heard in the consultation process.
 - **Peaceful enjoyment of possessions** (First Protocol Article 1). This right includes the right to peaceful enjoyment of property and is subject to the State's right to enforce such laws, as it deems necessary to control the use of property in accordance with the general interest.
 - **Right to life**, in respect of which the likely health impacts of the proposals, will need to be taken into account in evaluating the scheme (Convention Article 2).

8.2 The European Court has recognised that "*regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole*". Both public and private interests are to be taken into account in the exercise of the Council's powers and duties as a local planning authority. Any interference with a Convention right must be necessary and proportionate.

8.3 The Council is therefore required to consider whether its actions would infringe the human rights of anyone affected by the granting of Planning Permission. The Council must carefully consider the balance to be struck between individual rights and the wider public interest.

9. ONE TOWER HAMLETS CONSIDERATIONS

9.1 The consideration of this matter will contribute to One Tower Hamlets objectives. The three objectives are to reduce inequalities; ensure community cohesion; and, strengthen community leadership.

9.2 By having regard to the Ombudsman's report, the Council is demonstrating that it seeks to treat all citizens equally, that it wishes to ensure that any decisions it makes do not lead to disharmony and that it wishes to demonstrate effective leadership of the community.

10. SUSTAINABLE ACTION FOR A GREENER ENVIRONMENT

10.1 There are no sustainability issues arising from this to this report.

11. RISK MANAGEMENT IMPLICATIONS

11.1 The report from the Ombudsman highlights that unless the Council has in place high quality systems for managing the processing of Planning Applications errors can arise which give rise to adverse publicity and public perception of the ability of the Council to process such matters.

11.2 A further adverse impact is the financial implications arising from errors. As highlighted, in this case the Council can be recommended to pay compensation.

12. EFFICIENCY STATEMENT

12.1 No efficiency issues arise from this report.

Brief description of “back ground papers”	Name and telephone number of holder and address where open to inspection
Report of Local Government Ombudsman in to complaint No. 08 00 912 dated 14 th August 2009-10-29	Isabella Freeman London Borough of Tower Hamlets Town Hall Mulberry Place 5 Clove Crescent London E14 2BG 0207 364 4810

11. **APPENDICES**

Appendix A - Report of Local Government Ombudsman in to complaint No. 08 002 912 dated 14th August 2009

Appendix B -New Template for Fast Track Planning Reports

Appendix C - Council letter to Ombudsman in respect of compensation dated 30 October 2009.