

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

Summary: X complained about the Council's failure to take account of relevant case law before it granted permission for an application to vary plans it had already approved. We found fault because there was no evidence to show the Council considered an objection about a key planning issue. The Council agreed to remedy the injustice caused by the fault and to carry out a review that might help avoid the same fault happening again.

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## **The complaint**

1. The person that complained to us will be referred to as X.
2. X complained about the Council's decision to vary a planning application it approved for development on land next to X's home.
3. X said the case officer report for variation application was fundamentally flawed and this called the legality of the Council's decision into question.
4. X also complained that objections from local councillors were not taken into account before a decision was made.

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

5. 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 the future we may suggest a remedy. (Local Government Act 1974, sections 26(1) and 26A(1), as amended)
6. 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**

7. I read the complaint and discussed it with X. I have also discussed the issues raised in the complaint with a planning officer.
8. I read the Council's response to the complaint and considered documents from its planning files, including the plans and the case officer's report.

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9. I read the Court of Appeal case X referred to, which is *Finney v Welsh Ministers* [2019]).
  10. I gave the Council and X an opportunity to comment on an earlier draft of this decision and took account of the comments I received.

## **What I found**

### **Planning law and guidance**

11. Councils should approve planning applications that accord with policies in the local development plan, unless other material planning considerations indicate they should not.
12. Planning considerations include things like:
  - access to the highway;
  - protection of ecological and heritage assets; and
  - the impact on neighbouring amenity.
13. 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.
14. Councils may impose planning conditions to make development acceptable in planning terms. Conditions should be necessary, enforceable and reasonable in all other regards.
15. Most planning approvals relating to development will include a condition requiring compliance with approved plans. If after approval is granted, applicants want to carry out development without complying with planning conditions, they can apply to remove or vary the original condition. The Council will then decide whether to grant permission to change obligations required in the original application.
16. Not all planning decisions are made by council planning committees. Councils may delegate decisions to planning officers to make some decisions, restricted to circumstances set out in delegation schemes. Delegation schemes are found in a council's constitution.
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 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.

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19. I read the Finney case that X (and it would appear one of the councillors) referred to and sought advice on my understanding of the court's findings from the Ombudsman's lawyers.
  20. An application under section 73 of the Town and Country Planning Act 1990 may allow a developer to apply to carry out development without complying with conditions in original the approval. In other words, this section can be used to vary approved plans.
  21. The Finney judgement says that applications to vary planning permissions under section 73 may not be used to obtain a permission that would vary the terms of the 'operative' part of the original permission. The operative part of the permission is the description of the development for which the original permission was granted.

### **What happened**

22. Several years ago, X's neighbour applied for planning permission for development on their land. This proposal included development at the front and rear of the property and created a separate dwelling. The Council refused this application.
23. A few years later, the neighbour applied for planning permission for a similar proposal. The proposal was for development at the rear of the property but did not create a separate dwelling. The Council approved this application.
24. More recently, the neighbour applied to vary approved plans by adding development at the front of the property.
25. The planning application to vary plans was considered by a case officer, who wrote a report which included:
  - a description of the proposal and site;
  - a summary of planning history considered relevant;
  - a summary of comments from neighbours;
  - details of planning policy and guidance considered relevant;
  - an appraisal of the main planning considerations, including design and appearance, impact on residential amenity and policy relating to the specific type of development; and
  - the officer's recommendation to approve the application, subject to planning conditions.
26. The planning file shows objections from the public and several councillors. Most of the issues raised by the councillors are addressed in the report, but the following were not. These are:
  - The proposal in the variation application was put forward as a minor amendment but was in fact a fundamental change and a change to the description of the original application, so a full application should have been made.
  - Case law explicitly prohibits this practice.
27. The application was approved by a senior officer using delegated authority.
28. I checked the Council's records to look for evidence to show that the councillors' objections, particularly those set out in paragraph 26 above, were taken into account.

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29. There was no mention in the case officer report of the Finney case, or the comment on the councillor's suggestion that the variation application conflicted with its findings.
30. The description for the original development on land next to X's home, included a proposal for a single opening, which plans showed was at the rear of the building. The variation application added an additional opening at the front of the building. The additional opening to the building was not part of the original application or included within the description of that development.

### **X's complaint and the Council's response**

31. X complained to the Council about its decision to approve the variation application. X said:
- the case officer's report contained a fundamental error, because it said the original approval had granted development at the front of the property, when it had granted development at the rear;
  - the variation decision was unlawful because it changed the nature of the development, by adding a feature that was not included in the original approval and had been refused several years ago. In making their complaint, X referred to a case decided by the Court of Appeal, *Finney v Welsh Ministers* [2019];
  - the Council did not take into account objections made by local councillors before it made its decision to approve the application.
32. In response to X's complaint the Council:
- accepted there was an error in the case officer report. When describing the original approval, the case officer referred to development that had been approved at the front of the property, when in fact it was the rear. The proposal to vary the plans related to development at the front;
  - disagreed with X's interpretation of its powers to vary or remove planning conditions and the application of the Court of Appeal's judgment in the *Finney* case.
33. I discussed what had happened with a planning officer, who told me:
- In the officer's view, there was no conflict with the findings in the *Finney* case, because the description for the original application referred to an opening, but it did not say whether it was at the front or rear of the building.
  - There was no evidence to show the law relating to variation of applications as explained in the *Finney* case was considered before a decision was made.
  - In the Council's view, its approval for the variation application has lapsed, so the development cannot proceed without a further application. The officer went on to say that the developer did not agree their approval had lapsed but had agreed to submit a further application.
34. Since my conversation with the planning officer, the neighbour did submit a new planning application for the proposed development. I looked at the application on the Council's planning portal. The description for this application includes openings at the front and the rear of the building. The Council has not yet decided this application.

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## **My findings**

35. We are not a planning appeal body. Our role is to review the process by which planning decisions are made. We look for evidence of fault causing a significant injustice to the individual complainant.
36. Before a decision was made, a councillor made an important and specific objection to the Council about the variation application. The councillor suggested a variation application was not appropriate because:
- this was not a minor amendment; and
  - there was case law on this issue and the application conflicted with it.
37. In my view it is clear that this objection was about principle and controversial issues, and so I would expect the case officer report to refer to the objection and provide some analysis of how it affected their judgement and recommendation. This did not happen and the absence of evidence of consideration of a key planning matter is fault.
38. Where we find fault, we must consider whether it caused an injustice we should remedy.
39. The development has not gone ahead and a decision on the new planning application has not been made. Because of this, I cannot say the Council's decision to approve the variation application will have any direct impact on X. However, the way the Council dealt with the case and X's complaint about what has happened will have caused them frustration, disappointment and unnecessary time and trouble in bringing their complaint to our attention. I will recommend an apology for the injustice caused to X by the fault I found.
40. The fault I found could happen again, and the consequences could be costly to the parties, and disruptive to both the planning service and other individuals who could be affected.
41. Because of this, I recommended a remedy to address the injustice caused by the fault I found and to avoid recurrence of similar fault in future. The Council agreed to accept my recommendations. It also said it would seek legal advice before completing the review.

## **Agreed action**

42. To remedy the injustice caused by the fault I have found and to avoid recurrence, the Council has agreed to the following remedy:
- a) It will apologise to X for the frustration, disappointment and unnecessary time and trouble it has caused. This will happen within one month of this decision.
  - b) It will review what has happened and decide whether any changes to practice and procedure or additional training are necessary. The review will include consideration of the Finney case and its application to variation applications. This will happen within three months of this decision.
  - c) It will report the findings of this review to its relevant oversight and scrutiny committee. This will happen within one month from date the Council completes the service review agreed in the above paragraph.
43. The Council will provide us with evidence it has complied with the above actions.

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## **Final decision**

44. I found fault that caused an injustice and might happen again. I have completed my investigation because the Council accepted my recommendations.

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