28 August 2015

Complaint reference:
14 018 133

Complaint against:
London Borough of Haringey

Local Government
OMBUDSMAN

The Ombudsman's final decision

Summary: The Council was at fault for failing to tell Members of its Planning Committee that a planning application, for which it was recommending approval, was contrary to the Local Development Plan, although officers considered there were reasons to make an exception. It was also at fault for trying to justify its mistake by suggesting, because there was already a building on the site, the policy did not apply. The Council should write to apologise to the complainant and it should formally apologise to Members of its Planning Committee for not having drawn all the material information to their notice. It should do this in public at the beginning of the next available planning meeting and the complainant should be invited to witness this apology.

The complaint

1. Mr B complains about the Council's decision to allow extension of a neighbouring block of flats from 18 to 26 units of accommodation. In particular Mr B says:

- the Council failed to ask the applicant for enough information (such as photo montages & 3D images) to enable an informed decision about the impact the proposal would have on surrounding properties;
- the Council overlooked the fact the applicant's density assessment incorrectly took account of an adjoining site;
- the transport and parking assessments were flawed;
- Committee members were not given enough information about separation distances between the proposed and existing properties; and
- Council policies were ignored.

The Ombudsman's role and powers

2. The Ombudsman investigates complaints of injustice caused by maladministration and service failure. I have used the word fault to refer to these.

3. The Ombudsman cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. She must consider whether there was fault in the way the decision was reached. ***(Local Government Act 1974, section 34(3))***

How I considered this complaint

4. I have read the papers sent to me by Mr B and I have discussed Mr B's complaint with him. I have read all the material information on the Council's public access website and I have discussed the complaint with the Council's senior planning officer. I have also read the relevant parts of the London Plan and I have taken account of planning law and guidance.

What I found

5. The key document in any planning application is the officer's report. This is where the proposal is evaluated to see if it is sustainable, if it accords broadly with the Local Plan and if there are any other material considerations weighing for or against the application. The officer must identify all the material planning considerations and he must address each one. If any material consideration is overlooked, the process will be flawed, possibly fatally. If however the officer has applied his mind to everything that is relevant, the Ombudsman cannot challenge the merits of the decision he has reached.

The Council failed to ask the Authority for enough information to enable an informed decision.

6. Mr B says the Authority did not, when it needed it, have clear enough information. He says photo montages and 3D images would have shown better the impact the proposal was likely to have on surrounding properties.

7. Every planning application must be accompanied by a site location plan (showing the site in relation to its surroundings,) a scale drawing of the proposal and a signed certificate of ownership. To comply with the regulations most applications will also need a Design and Access Statement and some will need an Environmental or Historical Impact Assessment ***(The Town and Country Planning (Development Management Procedure) (England) Order 2015).***

8. Authorities can, if they choose, have a local list of additional information they may need but the government discourages councils from asking for information which is not strictly necessary. What is necessary is a question for the case officer. If he considers more information would help him make his decision, he can ask for it but he must validate the application when, in his judgement, he has enough.

Finding

9. Photo montages and 3D images may be helpful when it comes to illustrating the proposal to members of the planning committee but the absence of these does not amount to fault.

The Council overlooked the fact the applicant's density assessment incorrectly took account of an adjoining site.

10. Mr B, on behalf of a number of residents, objected to the development. He raised a number of issues, including over-development of the site but he did not, at the time, refer to the London Plan.

11. The planning report lists (para 5.4) "*significant over-development*" and "*density*" at the top of a summary of 3rd party objections but does not then specifically identify either of these as one of the "*main planning issues*" or address either specifically in the body of the report. At the end of the report however, there is a table showing how each objection has been addressed. The Council's response to the objection on grounds of overdevelopment is "*The design is not considered to be overdevelopment as set out in para 6.5.6."*

Para. 6.5.6 of the report says: "*It is considered that the building benefits from a spacious setting which enables it to accommodate the increase in height without appearing cramped and dominant and reflect the spacious character of the area. The rear elevation will only be seen in part from close to, indistinctly through mature trees and / or only in private views from neighbouring houses. There are very few windows in the projecting wings, to avoid overlooking, but they are sufficient to give the elevations of these wings some character and scale; bland elevations would be less preferable. The windows and balconies in the recesses between the projections are cleverly designed with screens to avoid overlooking, yet with angled balconies that will ensure these balconies and windows receive sufficient daylight and afternoon sunlight."*

12. Mr B says that on 27 October, after the committee meeting but before the decision had been issued, he wrote to the Council pointing out that the developer, by including the adjacent site in his density assessment, had given the Council misleading information. Mr B says the applicant told the Council on his application form that the site was 0.33 hectares when it was in fact only 0.20 hectares. The effect of the error was to suggest 26 flats on a 0.20 hectare site amounted to a density of 88 dwellings per hectare (dph) when in truth the density was 94 dph. Assessing the density of the flats alone gave an even greater density of 130 dph. Mr B said this was "far in excess of the maximum" (35 – 75) recommended in the London Plan. Mr B said, despite residents' concerns of overdevelopment, no density assessment was included in the planning officer's report.

13. Permission for the development was granted before the Council responded to Mr B's concern about this.

14. Responding to Mr B on 10 November, the Council said: "*The proposals relate to works to extend and alter an existing building. This was not therefore an application where a new build development was proposed, or where the application was in "outline." Instead the proposals were to extend and alter an existing building... The acceptability (or otherwise) of a proposal cannot however be derived from a density figure. There are circumstances where developments above or below a stated 'standard' density may be acceptable or unacceptable...."*

15. Mr B did not agree. He said: "*Your response implies that density is of little significance in the decision on whether to approve or refuse an application. While I accept that there are other considerations to be taken into account, the London Plan has clear guidelines on density which surely must be respected, if not strictly adhered to..."* The Council reviewed Mr B's complaint. It maintained "*It is not*

*appropriate, as previously advised, for the density matrix to be considered when extensions to an existing building." (*sic)

16. I put it to the Council that the London Plan did not exclude extensions. The Council said:

"*What I had meant to convey to (Mr B) was not that density was not a material consideration per se but that in this case given that the proposal was for an additional floor and extensions to an existing block that the primary material consideration in this case would be the impact of the extensions and additional floor to the block.*

The London Plan density matrix is a guideline and is not absolute and other matters such as impact on amenity of neighbours need to be considered in applying it.

The site has a PTAL level of 1 and is considered to be a location that has characteristics of both a suburban and urban location and this particular block type is more characteristic of an urban location. The relevant density range set out in the London Plan would therefore be the upper end of suburban and the lower end of urban ie around 200 habitable rooms per hectare.

I have calculated the density of the existing block as 232 habitable rooms per hectare taking a site area of 0.23 hectares. I have calculated the density of the proposal as 318 habitable rooms per hectare. Both of these densities are above the range set out in the London Plan guidelines set out in Table 3.2 of the London Plan. The London Plan is clear that these guidelines are not to be applied mechanistically.

When considering developments that are above London Plan density levels it is relevant to consider the impact on neighbouring residential amenity and residential quality of the units proposed. This was done in this case and was considered to be acceptable and it is this to which I refer when I said that these are the primary material considerations."

17. In a later e-mail the Council said: "*The legal position is that planning decisions should be made in accordance with the statutory Development Plan unless other material considerations indicate otherwise. It is clear that the London Plan forms part of the statutory Development Plan. Whilst the issue of density and the London Plan are relevant there is no requirement for each element thereof to be explicitly referred to in the committee report. The legal requirement is simply that the decision maker (in this case the planning Sub-Committee) gives proper consideration to the material issues. The issue of overdevelopment in the specific context of density was dealt with in the report and at length at committee and a planning judgement exercised by the Members in respect thereof there being no other material considerations outside the Development Plan indicating that the application should not be so determined."*

18. Responding to a draft of this decision, Mr B says the area is wholly suburban in character and he disputes the Council's calculations. He says the application site is not 0.23 hectares but 0.19. (The overall site, according to the applicant's own calculation in the application, is 0.33 hectares and his current application to develop the rest of the site describes that area as 0.14 hectares.) The existing block therefore has a density of 284 habitable rooms per hectare; the proposed development represents 390 habitable rooms per hectare. This, Mr B says, is far in excess of London Plan guidelines of 150 – 200 habitable rooms per hectare for a suburban site with a PTAL of 1.

Finding

19. There is a difference between the materiality of a planning consideration and its weight. The former is largely a question of law and the latter is largely a matter of planning judgement. The Ombudsman is concerned with proper application of the law.

20. The London Plan is part of the Council's Development Plan. As such it is a material planning consideration which carries some weight. As the Council has itself pointed out, its decisions must accord with the London Plan unless there are other considerations which outweigh it.

21. The London Plan includes a policy (3.4) which is designed to optimise housing density according to whether development is central, urban or suburban and taking account of the character of the area and its accessibility to public transport. As with any policy, there may be legitimate exceptions. The Council accepts the proposal was contrary to the London Plan.

22. The Council had a duty to tell the decision-making body (a) which policies applied; and (b) that the proposal was contrary to adopted policy. Its failure to do so was fault. The Council is entitled to depart from policy but it must have a material planning reason for doing so and it must show it has weighed the policy with the reasons for making an exception. It must not conflate materiality and weight.

23. Nothing in the London Plan suggests its density matrix does not apply to extensions. It would be illogical were it to do so. The Council was at fault for telling Mr B the reason it failed to address the density policy in the London Plan was because it did not apply. The policy in the London Plan applied; the proposal did not comply with policy. The decision-makers had a right to be told. If officers considered an exception to policy was justified, they had a duty to explain explicitly to the decision-makers how the "design" of the building in this case outweighed policy. The decision-makers could then make their decision with the benefit of all the facts.

The transport and parking assessments were flawed

24. There is extensive correspondence between Mr B, the Council and the Council's professional transport consultee which I shall not attempt to repeat or even summarise. Both parties have their own records. Mr B challenged the consultee's evaluation of the proposal. The Council asked the consultee to check. The consultee checked and confirmed the original assessment. Mr B disagrees.

25. There may be merit in Mr B's argument but, so far as the planning process is concerned, there is no fault in the Council's decision to accept the advice of its professional consultee.

Committee members were not given enough information about separation distances between the proposed and existing properties

26. This again is discussed at some length in the paperwork and there is no need for me to repeat what both parties already know. Mr B does not say Members were given inaccurate information but that the information they were given was not enough.

27. It is significant that Members undertook a site visit. They saw what was already on the site and they would have had the benefit of the plans. There is no reason to suppose Members did not know what they were voting to approve.

The Council ignored its policies.

28. Mr B says the Council disregarded its Local Plan Policy SP12, paras 6.2.18 and 6.2.19 (dominant and incongruous development) ; SPG1a (overbearing on neighbourhood properties); SPD, para 8.21 (Housing amenity) and SPG 3c (Backlands development.) In his complaint letter to the Council, Mr B says he would like policies to be "strictly adhered to."

29. The law does not say development must comply with the Local Plan but it does say, in essence, if development does comply, there is a presumption it will be approved and if it does not, the presumption is it will be refused, unless other material planning considerations indicate otherwise *(Planning and Compulsory Purchase Act 2004, Section 38(6)).*

30. The public expects policies to be adhered to but the law says something different. The law expects policies (and guidance) to be followed unless there is good reason to make an exception and it expects councils to consider the circumstances of every particular case. Policies must not be applied rigidly – although if there is no clear reason to make an exception, they must apply.

31. The Local Plan is not however a single policy but a collection of policies which pull in different directions. The courts have taken a view on this. Sullivan J, for example, says in City of Edinburgh Council v Secretary of State for Scotland*: "I regard it as untenable to say that if there is a breach of any one policy in a development plan a proposed development cannot be said to be 'in accordance with the plan.' Given the numerous conflicting interests that development plans seek to reconcile...it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan*." And in R v Rochdate MBS ex parte Milne [2000] (Sullivan J again) "*The Local authority has to make a judgement bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach."*

Final Decision

32. The decision to recommend approval of the development comes at the end of a largely well-reasoned report. There was however a fault in the report. It failed to identify a relevant policy in the Local Plan, to note the proposal was contrary to that policy and to reason why, on balance, the development should nevertheless be allowed. Officers then tried to justify the oversight with an explanation which was factually wrong and illogical.

33. It is not for me to say whether, but for the error, the application should have been allowed anyway although, following the officer's line of reasoning, I consider it more likely than not that it would have been.

Recommended action

34. The Council should write to Mr B to apologise for having failed to take his legitimate concerns into account and for having put him to unnecessary time and trouble arguing his complaint through the Council and then bringing it to the Ombudsman.

35. The Council should formally apologise to Members of the Planning Committee for not having drawn all the material information to their notice. It should do this in public at the beginning of the next available planning meeting and Mr B should be invited to witness this apology.

Investigator's decision on behalf of the Ombudsman