



REPORT OF THE LOCAL GOVERNMENT OMBUDSMAN

<p>COUNCIL MEETING DATE</p> <p>20th July 2016</p>	<p>Classification:</p> <p>Open</p> <p>If exempt, the reason will be listed in the main body of this report.</p>
<p>Ward(s) affected</p> <p>All</p>	
<p>Cabinet Member</p> <p>Cllr Guy Nicholson, Cabinet Member for Regeneration</p>	
<p>Group Director</p> <p>Kim Wright , Group Director Neighbourhoods and Housing</p>	

1. CABINET MEMBER'S INTRODUCTION

- 1.1 The Local Government Ombudsman (LGO) has issued a report (Appendix 1) following her investigation of a complaint against the Council. The complaint related to a Planning Enforcement matter spanning a number of years, the details of which are set out in this report. The Ombudsman found that there had been fault on the part of the Council, and this had in their view caused injustice to the complainant.
- 1.2 The LGO report sets out a series of recommendations, of which all but one were already being implemented by the Council of its own accord before it became aware of the LGO report. The Council has therefore taken the action which the Ombudsman regards as providing a satisfactory remedy for the complaint, and provided a comprehensive update to the LGO. This report to full Council sets out those recommendations and the action undertaken by the Council.

2. GROUP DIRECTOR'S INTRODUCTION

- 2.1 The LGO investigation referred to above relates to a planning enforcement case first opened in July 2006 against an unauthorised extension. Following a series of failed planning applications, the Council issued an Enforcement Notice in February 2009, ultimately leading to a successful prosecution in April 2013.
- 2.2 A complaint from a neighbour of the property (referred to as 'Mr Z' in the report) triggered the LGO investigation. As set out in Appendix 1 the LGO has summarised the complaint as being that *'Mr Z complains the Council has not taken direct action to remove an unauthorised extension built by his neighbour in 2006 and subject to an enforcement notice issued in February 2009'*.
- 2.3 The Council has made it clear to the LGO that in its view this complaint relating to direct action does not justify a report. It can be summarised that the findings of fault in the LGO report fall into one of two categories – either failure of the Council to successfully take timely direct action and/or failure to communicate effectively with the complainant ('Mr Z'). It is considered that these two broad categories of fault do not clearly sit together to cumulatively cause injustice to Mr Z to the extent set out in the LGO report.
- 2.4 It has been made clear to the LGO that direct action isn't a 'service request' that residents are entitled to, but is a discretionary power that must be proportionate. Direct action against the unauthorised development in question has now been implemented by the Council at a cost of upwards of £70,000 in contractor fees, over £15,000 in legal fees related to Mr Z's neighbour's latest injunction/court challenge, and many hours of senior Officer time. Although the contractor and court

costs are ultimately recoverable through a land charge it could take many years and serves as a drain on public finances in the interim.

- 2.5 At a time of significant budgetary constraints on local authorities, the Council will not be able to commit to direct action every time it is called upon by a resident. The Council's emerging Enforcement Policy (Appendix 2, and as considered by July Cabinet) and procedure notes will help clarify when it is appropriate to go down the direct action route. The Council accepts that there have previously been shortcomings in communication with Mr Z, but the direct action itself should not be subject of the complaint and LGO report.
- 2.6 It is unfortunate that the LGO report did not clarify that the majority of recommendations were already being implemented by the Council of its own accord long before it become aware of the report. For example the Council has been providing Mr Z with weekly updates for considerable time now, with direct action to remove the unauthorised development now implemented. This report sets out these recommendations in more detail, and explains the Council's approach to open planning enforcement cases more generally.

3. RECOMMENDATIONS

3.1 Council is asked to:

Note the contents of the LGO report (appendix 1) and the Council's response as set out in this report.

4. REASONS FOR DECISION

- 4.1 This report forms part of the Council's obligations under the Local Government Act 1974 to publicise receipt of a Local Government Ombudsman report.

5. DETAILS OF ALTERNATIVE OPTIONS CONSIDERED AND REJECTED

- 5.1 None.

6. BACKGROUND

- 6.1 The Council has a discretion to take planning enforcement action, although this is not a statutory duty. The key issue in the LGO case referred to in this report is whether or not the Council acted reasonably in considering whether or not to take enforcement action.
- 6.2 In considering the enforcement action the Council must have regard to its enforcement policy and Government guidance. The Council did/does have an Enforcement Policy and Practice Guidance as well as

published information on its approach to enforcement and priorities, although it has been updated to take account of more recent Government guidance. The updated policy was considered by Cabinet on 18 July 2016.

6.3 The Council did consider and pursue enforcement action in this case, the details of which are set out below. However, enforcement proceedings are often protracted and there are many steps which can lead to delays. Appendix 3 highlights the long enforcement history on this particular breach of planning control and demonstrates quite clearly the very protracted nature of enforcement activity which can cause frustration for the local planning authority and residents alike.

6.4 The LGO report makes a series recommendations set out below. All but one of the recommendations (relating to a £2,500 compensatory payment to the complainant) were initiated by the Council and underway prior to receipt of the LGO report.

- apologise to Mr Z for the fault causing injustice identified in this report;
- pay Mr Z £2500 in recognition of his injustice (£500 for his uncertainty and time and trouble and a further £2000 to reflect the impact of the unauthorised development);
- agree to provide as a minimum monthly updates to Mr Z (copied to this office) on the progress of its direct action to remove the unauthorised development (or such other action it might take in respect of that unauthorised development) until it has been removed;
- complete the draft of its enforcement strategy and include reference in there to keeping in touch with those who report breaches of planning control (basic good administrative practice would be for the Council to keep in touch monthly or as it should specify on a case-by-case basis);
- introduce a procedure for cases where direct action is appropriate to remedy breaches of planning control; this should include setting out the circumstances where such action is considered appropriate as well as process advice for officers on commissioning contractors; authorising expenditure and so on;
- ensure this report is considered as part of the Council's future budgetary planning for its enforcement service; the Council will consider what staffing level needs to be maintained in the future to prevent another backlog of cases recurring.

7. Enforcement History – Investigation to Prosecution Summary

7.1 The initial enforcement visit to establish a breach took place on 26/05/2006. A case was opened, a subsequent site visit undertaken, and correspondence entered in to try to resolve the breach in

accordance with government guidance. A planning application to regularise the breach was eventually submitted on 20/12/2007.

- 7.2 Unfortunately it was invalid leading to further delays, which coupled with the ill health of the applicant and his use of volunteers at Planning Aid as his consultants, meant that the attempt to regularise the breach took over 14 months and was still not successfully resolved, with the application eventually withdrawn on 23/05/2008.
- 7.3 An Enforcement Notice with a requirement to “permanently and completely remove the unauthorised roof extension from the roof of the property” was authorised on the 26/02/2009 and served on 02/03/2009 with effect from 30/04/2009.
- 7.4 The owner of the property then exercised his right of appeal on both the refusal of planning permission and the Enforcement Notice and this brought inherent delays as it is not appropriate to take enforcement action whilst the appeal process is ongoing. The appeal of the enforcement notice was dismissed on 05/11/2009, planning permission was also refused and the compliance time extended to six months.
- 7.5 The owner of the property proceeded to submit a further planning application in May 2010 which was refused in August 2010 and the Council determined to prosecute against the failure to comply with the Enforcement Notice.
- 7.6 This prosecution was heard but adjourned at the Magistrates’ Court in January 2011, with further adjournments up to September 2011, where the Court considered the medical grounds for non-attendance and the Council secured a warrant for the owner of the property to attend court on 12/10/2011.
- 7.7 The case was heard and committed to Snaresbrook Magistrates’ Court and listed and heard in January 2012. Following yet further adjournments and appeals the owner was convicted on 04/04/2013.
- 7.8 The summary shows that the Council followed all reasonable and necessary steps, including the consideration of planning applications to regularise the breach up to prosecution for failing to regularise the breach, and was faced with protracted appeal and court proceedings which resulted in the significant amount of time to reach the conviction in April 2013.

8. Enforcement History – Post prosecution

- 8.1 Following the prosecution and the failure of the owner to regularise the breach the Council had the option of taking direct action to remove the breach and ensure compliance with the Enforcement Notice.

- 8.2 In July 2013 officers resolved to take direct action to remedy the breach and obtained a quote for the works. The officers also, quite rightly, sought legal advice on the implications of the direct action given that it was a family home and that at least one resident was under 16, and that it was essential that the works left the property in a habitable state.
- 8.3 A date of 13/01/2014 was agreed for the works and the owner was informed. Direct action was commenced on 13/01/2014 in that scaffolding was erected and it would appear that several attempts were made by the contractor to remove the extension only to be obstructed by the owner. On the 31/01/2014 records show that the site was attended by the Enforcement Manager, the contractor and the Police who informed the owner that he should not obstruct the works.
- 8.4 Despite this it is clear that the contractors were obstructed from undertaking the works, and equality impact issues arose which the contractor was unable to deal with.
- 8.5 Following on from this aborted direct action a Temporary Stop Notice was served in May 2014 at a site meeting following which the owner instructed an architect to discharge planning conditions on a 2012 approved scheme so that he could implement that consent and rectify the long outstanding breach.
- 8.6 Having allowed time for this to happen the Council sought to take out a Mandatory Injunction in October 2014 as the case needed to be expedited given the length of time given the public interest and the harm to the adjacent occupier. Again quite rightly, albeit delayed, the Council sought legal advice before taking this action and in February 2015 were advised that given recent case law it would be very unlikely that a judge would be sympathetic to an injunction against a disabled and elderly man where the penalty for non-compliance is prison, a fine or the seizure of assets. As such the advice was that an application for an injunction would be unsuccessful and that it would be disproportionate.
- 8.7 Following on from this advice, and given the personal circumstances of the owner of the property, it was determined that the only option left for the Council was to pursue Direct Action again. This was authorised and a specialist contractor who would be able to deal with the particular circumstances and the equality implications was procured on the 15th November 2015.
- 8.8 Following initial surveys carried out by the contractor in January and February 2016, the Council obtained a warrant to undertake a thorough structural survey to clarify the structural safety of the building and to accurately assess the true costs of the work to restore the roof to a

habitable condition. Following completion of this surveying work, direct action commenced on 25 April 2016.

- 8.9 Whilst far from satisfactory in terms of timescales the Council has continued to try to resolve this enforcement issue using all the powers at its disposal, including discretionary direct action based upon legal advice. The process is inevitably lengthy and in this case has been particularly protracted with numerous planning applications, use of all the available appeal processes, court proceedings and attempted direct action and injunctions.
- 8.10 Whilst the delay is regrettable the chronology shows that the Council has persistently attempted to resolve this case despite the many constraints and hurdles put in its way.

9. Communication with complainant

- 9.1 There has been regular communication with the complainant (referred to in the LGO report as 'Mr Z') from his initial contact with the Council after he purchased his property in 2010 until prosecution of the contravener in April 2013.
- 9.2 Mr Z purchased his home in April 2010, aware of the enforcement notice with the understanding that the Council *could* take direct action to the extent that he was not concerned about the unauthorised works. However rather than make further enquiries with the Council to understand more about the timescales and process for this discretionary power, Mr Z waited until after he had purchased the home, and approached the Council in May 2010. It is clear that from this point Mr Z had an expectation that the extension would be taken down, even though the unauthorised works would later be subject to a myriad of prosecutions, planning applications, and high court hearings – as well as an ultimate decision by the Council on whether direct action would be proportionate.
- 9.3 However from April 2013 until mid-2015, whilst activity was taking place, albeit not as speedily as it could have, there was an unacceptable level of communication with Mr Z for which the Council has apologised unreservedly.
- 9.4 The Council has no hesitation in agreeing with the LGO recommendation and has paid Mr Z the £2500 compensation immediately in recognition of the prolonged impact of the unauthorised development.
- 9.5 However Paragraph 2 of the LGO report states that Mr Z could not proceed with 'planned changes' to his own property, which the report proceeds to link to a finding of injustice. The Council had previously contested this assertion, and questions the LGO's definition of

'planned'. Mr Z has at no point sought pre-application planning advice from the Council and has no planning permission of his own to carry out any works to his home. In their professional opinion, Council surveyors consider that it has yet to be proven that Mr Z could not implement his own proposals (if in place), and that even if this was the case injustice would only have been caused if Mr Z had an extant planning consent that he was unable to implement.

- 9.4 The Council strongly contests the claim in paragraph 63 that Mr Z was still not kept informed of the timetable for beginning the now implemented direct action in 2015/16. The Council's Head of Planning has had frequent (normally weekly) telephone conversations with Mr Z during the procurement of suitably qualified contractors from September 2015 onwards. Although the timescales for such an appointment took longer than anticipated as acknowledged in the LGO report, Mr Z was kept informed throughout. Mr Z was disappointed with the delays, but was fully aware.
- 9.5 The Council's new Planning Enforcement policy includes a section relating to updating customers with progress on the enforcement cases and also managing expectation, and automatic notifications are being put in place to provide updates for those periods where there has been no significant change in circumstances, for example whilst a retrospective application is being considered, or during the appeal timetable.
- 9.6 The Enforcement Policy will be followed by a series of Standard Operating Procedure Notes for consistent enforcement activity including a decision tree, the most appropriate and expedient enforcement action at the respective stages in the enforcement process including direct action where appropriate.
- 9.7 To reduce delays in the procurement of contractors for Direct Action the Council has also been working towards the establishment of a framework arrangement with suitable contractors, which is being implemented this year.

10. Senior management & political oversight of enforcement cases

- 10.1 The LGO report references a planning enforcement backlog and a lack of resources attributed to comments from previous and current officers. It concludes that the case under investigation has occurred in the context of a service apparently under-resourced and by implication lacking in senior management and political oversight.
- 10.2 The information provided to the LGO by previous Council Officers does not reflect the information that was provided to Senior Managers and Members over this extended period.

10.3 The Cabinet Member, Corporate Director and Assistant Director all had oversight of planning enforcement cases, as did the Chief Executive, Corporate Director of Finance and Resources and the Assistant Director of Finance .

10.4 A review of historical information shows that:

- Significant resources were allocated a dedicated planning enforcement 'backlog team' in 2009/10 when it was expected that the initial backlog would be addressed
- In March 2012 the service had a backlog of 580 investigations with a proposal in place to clear these by 31/03/2013, with two additional full time posts provided to the enforcement team to ensure that this happened. A report to senior managers in September 2012 stated that the situation was under control and that a significant new backlog was not being created
- Former Council Officers reported Enforcement performance on a monthly basis to the Assistant Director, Director and Cabinet Member, reporting in April 2013 that the former backlog had been cleared
- In May 2013 having received detailed reports from Officers the Corporate Director reported to the Chief Executive and the Director of Finance that thanks to their additional resources the backlog had been cleared
- In June 2013 the Director of Finance allocated an additional £100k to the Enforcement Team to prevent the build-up of a further backlog and help to manage the workload. Two extra posts have continued to be funded from that point.

10.5 Whilst there have been recruitment difficulties in the enforcement service the impression that has been given to the LGO of a chronically under-resourced enforcement service does not tally with the additional resources which have been continually provided to the planning enforcement team over this period, albeit with issues on how those resources have been deployed.

10.6 Given the information set out above, 2015/16 monitoring statistics of open enforcement cases demonstrated that this had not previously been accurately reported. Further investigation has shown that previous reporting by former Officers did not reflect the true position on the enforcement caseload. Having carried out an in-depth review, current senior officers have established that previously a case was being recorded as closed, and hence no longer in the backlog, when the case had been progressed to Formal Enforcement Action rather than being complied with.

10.7 Former Officers' definition of Formal Enforcement Action included:

- the serving of an Enforcement Notice
- the issuing of a Planning Contravention Notice (PCN)

- the authorisation of a Stop Notice
- 10.8 This goes some way to explaining why a large number of open cases was reported in 2015/16 and since it included some of the cases 'closed' in a previous backlog, was new information to senior management who could not have been expected to drill down into that level of operational detail as they were being informed by two former senior operational managers.
- 10.9 The approach to the current open enforcement cases was reviewed throughout 2015/16 and a case is only now considered to be closed if:
- there is no breach
 - the breach is minor and it is not expedient to enforce
 - the breach has been resolved
 - the appeal has been upheld
 - planning permission has been granted
 - the breach is now immune from enforcement action
- 10.10 The existing cases have been separated into an annual breakdown and are being systematically addressed with the priority being to review those cases reported in 2012 (closest to immunity) and where no enforcement notice has been served and the oldest cases namely 2001-05 where compliance checking is taking place. Once these cases have been reviewed, the planned approach will then move on to 2013 and 2006, and so on, approaching open cases from both ends.
- 10.11 There are two dedicated staff assigned to this work on top of the seven established enforcement team members, and three weekly reporting meetings internally on the detailed cases and a monthly report to the Director of Public Realm and Cabinet Member. This is a more accurate and more transparent reflection of the existing enforcement caseload than has previously been available to senior management. This revised approach to the work will take place in the context of the new enforcement policy, including the revised notifications for complainants, which will be integrated into the new Standard Operating Procedures.

11. Conclusions

- 11.1 In summary, the Council has carried out the following actions:
- A comprehensive review of open enforcement cases, with a new management structure in place to deploy available resources, and close cases effectively.
 - A new and updated Enforcement Policy has been considered by Cabinet, including clarity on procedures for communication with residents and stakeholders. This is being supported by a Standard Operating Procedures and a new correspondence monitoring system

(including between internal Council departments), signed off by the Head of Planning.

- A £2,500 compensatory payment has been given to Mr Z.
- A Framework is being established in 2016/17 to enable the swift appointment of suitably qualified contractors for direct action.
- Two additional posts in the Planning Enforcement team have been further extended with funding secured.
- Direct Action works have been completed to remove the unauthorised works that were the subject of the LGO complaint.

12. Equality Impact Assessment

12.1 The direct action process at the property that is subject of the LGO report required careful consideration of equality issues. Although not referenced in the LGO report it is clear in reviewing this case that the owner of the property has health and disability issues which have contributed to the delay and compromised the Council's actions.

12.2 The owner has frequently cited ill health as a reason for delay and the Council took equality impacts into account before taking any direct action. The Council has a responsibility to balance any action against the Human Rights of the individual affected. In this particular case the unauthorised development was partly constructed and therefore did not form a habitable space within the wider family home.

13. Sustainability

13.1 The implementation of timely enforcement action will help deliver the Council's adopted planning policies and secure sustainable development across the borough.

14. Consultations

14.1 Section 30 of the 1974 Local Government Act requires the Council to make a public notice in more than one newspaper within two weeks of receiving the LGO report, and to make the report available at one or more of the Council's offices for three weeks. These actions have been undertaken.

15. Risk Assessment

15.1 The Council's specialist contractors completed a full risk assessment prior to commencing the direct action works, including a thorough structural survey of the property.

16 COMMENTS OF THE GROUP DIRECTOR OF FINANCE AND CORPORATE RESOURCES

This report seeks the Council to note the contents of the Local Government Ombudsman (LGO) report (appendix 1) and the Council's response as set out in this report.

The LGO report includes a recommendation to make a £2,500 compensatory payment to a complainant (See 6.4). This will be funded from the Planning Service Revenue budget in 2016/17.

Paragraph 2.4 to this report notes that the cost of direct action against an unauthorised development has been implemented by the Council at an estimated cost of £70,000 in contractor fees plus £15,000 estimated for legal fees.

These costs will be met from a reserve established for Direct Action enforcement cases. This reserve bridges the interim funding gap where the Council intends to recover costs from the property owner in future years.

A reserve has also been allocated for additional posts in the Enforcement Team to prevent the build-up of workload backlogs.

17. COMMENTS OF THE DIRECTOR OF LEGAL

- 17.1** The Local Government Ombudsman investigates complaints about maladministration and service failure. If there has been fault and an injustice has been caused, the Ombudsman may suggest a remedy – the Local Government Act 1974, section 26(1) and 26A(1).
- 17.2** Paragraph 6.4 of the Report outlines the LGO's recommendations and the actions taken by the Council as remedial action. The LGO considers that the proposed action provides a satisfactory remedy for the complaint.
- 17.3** The Council is obliged to make available to the public, the Ombudsman's report at the Council's offices and give public notice by an advertisement in a local newspaper as prescribed and within the timescales specified under the Act (or such other times agreed with the Ombudsman) - section 30.

APPENDICES

Appendix 1 – LGO Report, May 2016

Appendix 2 – Enforcement Policy 2016

Appendix 3 – Planning chronology

Background Paper

None

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