

Council

Date of Meeting	Tuesday, 25 May 2021
Report Subject	Public Interest Report Issued Under s.16 of the Public Services Ombudsman (Wales) Act 2005
Report Author	Monitoring Officer

EXECUTIVE SUMMARY

During 2016 and 2017 the Council, as local planning authority, considered a number of applications for an annexe in the rear garden of a residential property (“the annexe”). The Council ultimately granted planning permission for the annexe. The next door neighbour complained to the Public Services Ombudsman for Wales (“PSOW”).

On the 11 March 2021 the PSOW issued a public interest report under s.16 of the Public Services Ombudsman (Wales) Act 2005 (the Public Interest Report) over the Council’s handling of those applications. The PSOW upheld the complaint by the next door neighbour. He has made findings that the way the applications were dealt with amounted to maladministration leading to injustice to that complainant. He has also made recommendations for remedying the maladministration.

When a council receives a public interest report then it must:

- 1) advertise the fact that the report has been issued; and
- 2) consider a report from its Monitoring Officer at the full Council on whether to accept the findings and whether to accept the recommended remedies.

Your officers believe that the annexe is substantially in accordance with policy and that, although there is a minor departure, it is not significant enough to justify refusal of planning permission. Therefore, they consider that, had the Council refused permission, then the applicant would very likely to have been successful on appeal. Furthermore, permitted development rights allow for the construction of a visually similar, and larger, building in any event.

Having taken legal advice, officers believe that the Council would have reasonable prospects of success if it were to challenge the findings. Actually challenging the findings would, however, be a costly legal process, consuming time and resource for both the Council and the PSOW. It would also delay resolution for the complainant.

By contrast, the Council has discretion whether to accept the PSOW's recommendations on remedy. It would be a rare step to depart from the PSOW's recommendations and the Council needs good grounds to do so. Given the officers' beliefs on policy and permitted development rights, they feel strongly that there are indeed good grounds to recommend different remedies to those put forward by the PSOW.

The Public Interest Report has been anonymised. Insofar as is possible, any details which might identify individuals have been amended or omitted. This report is likewise anonymised in a similar way.

RECOMMENDATIONS

1	To accept the findings set out in the Public Interest Report for the reasons set out at paragraph 3.03 to 3.06 of this report.
2	<p>To accept the recommendations contained at paragraphs 50, 51 and 53 of the Public Interest Report namely that the Council:</p> <ul style="list-style-type: none"> i. issue an apology to the complainant; ii. reviews whether the conditions attached to the retrospective permission have been complied with. If it concludes that they have not, the Council should consider what action may be expedient to ensure such compliance; and iii. confirms to the PSOW what action it has taken in response to the Public Interest Report. <p>These recommendations to be implemented as soon as possible and no later than 25th June 2021.</p>
3	To reject the recommendation contained at paragraph 52 of the Public Interest Report, namely, that the Council instructs the District Valuer to assess the impact of the development on the complainant's property, and within one month pays her an amount which equates to the difference in value of her property before and after the development.
4	Instead, to make a compensation payment in the sum of £5,000 to Ms N, for the reasons set out at paragraphs 3.10 and 3.11 of this report. The payment to be made no later than 25 th June 2021.

REPORT DETAILS

1.00	<u>Background</u>
1.01	In April 2016 the Council received an application for a Certificate of Lawful Proposed Use or Development ("CLOPUD") for an annexe to be constructed in the garden of Number 55 ("the first CLOPUD application"). Such an

	<p>application is made when an applicant is seeking confirmation that a proposed development does not require planning permission. The first CLOPUD application was refused because the proposed annexe was too high and too close to the neighbour's boundary and thus did not meet the criteria for permitted development. The planning officer did note that the annexe was also not going to be ancillary to the main dwelling and therefore did not qualify as Class E permitted development. This reason was never stated in the refusal.</p>
1.02	<p>A further application for a CLOPUD was received in May 2016 ("the second CLOPUD application"). The planning officer noted the changes in the position and size of the proposed building, that its use was to "remain incidental to the use of the main dwelling" and concluded that the proposed development would be lawful as it was now Class E permitted development and that it complied with the relevant criteria.</p>
1.03	<p>In January 2017, the Council received a complaint that the annexe as built was a self-contained dwelling rather than that permitted by the CLOPUD. The Council inspected the annexe, agreed that the annexe was no longer ancillary to the main dwelling and was thus was not Class E permitted development. The owner was advised to submit a retrospective planning application for the unauthorised development.</p>
1.04	<p>In February 2017 the Council received a retrospective planning application ("the planning application") to retain the "annexe to rear of [Number 55]". The planning officer's report concluded that, whilst the annexe had the facilities to allow independent living by the occupant, it would not be used as a separate dwelling. The report noted that "the fact that the proposed building would not be physically attached to the main house is a minor conflict with policy HSG13 which is outweighed by overall consistency with that policy's main objective". The planning officer also noted that this approach had been "given significant weight" in a recent decision by the Planning Inspectorate in respect of another development in Flintshire. That is to say the planning officer concluded that the annexe was in line with policy and that, if the application were to be refused, a planning inspector would be likely to grant permission.</p> <p>The application was granted under the Council's scheme of delegation, subject to a series of conditions including a condition that the building should be used by the current occupant only and that it should be removed when that occupant stopped using it.</p>
1.05	<p>In May 2017 the LPA received an application to vary the occupancy restriction condition. The planning officer's report indicated that he agreed with the rationale behind the imposition of the original condition but concluded that its wording was needlessly restrictive and did not appear to be reasonable. The application was therefore granted subject to the following conditions:</p> <p>1. Vary condition no 5 to read "The occupancy of the annexe hereby permitted shall be used for purposes incidental to the enjoyment of the dwelling house known as [Number 55] and shall at no time be used as a separate independent dwelling"; and</p>

	2. This permission does not invalidate all the other conditions of [the previous permission]”.
2	<u>The PSOW’s findings</u>
2.01	The Public Interest Report summarises the PSOW’s investigation and the evidence considered and is summarised below.
	<u>The First CLOPUD Application</u>
2.02	The PSOW considers that the failure to include both reasons for refusal of the application was maladministration. Although this did not amount in itself to an injustice to Ms N, he considers it is likely to have had a bearing on the LPA’s subsequent decisions on the second CLOPUD application, the planning application and the application to vary the condition.
2.03	The PSOW considers that the planning officer was wrong to conclude that the application was not for primary residential use. Further, the PSOW thought that she had not applied a relevant High Court case (referred to in the Public Interest Report as the Rambridge case). As such the PSOW considers that the application should have been refused because the proposed development was not permitted development.
	<u>The Second CLOPUD Application</u>
2.04	The PSOW believes that if the first CLOPUD application had been refused because it was for primary residential use, then the Council would have been more likely to have refused the second CLOPUD application. He found that granting the second CLOPUD application amounted to maladministration which caused Ms N the serious injustice of having what was in effect a new house built in the next door garden. The PSOW therefore upheld the complaint about the first and second CLOPUD applications.
	<u>The Planning Application</u>
2.05	The PSOW concluded that consideration of the planning application was influenced by the existence of the CLOPUD and by a desire to “achieve the best situation for both parties”. He found, on the balance of probabilities that, had the CLOPUD not been granted, then it is unlikely that planning permission would have been granted either. He therefore believes that the grant of retrospective permission for the development was flawed.
2.06	The PSOW further found that the planning officer was too heavily influenced by the recent Planning Inspectorate decision in her conclusion that the application represented only a minor conflict with planning policy. The PSOW concluded that the Planning Inspectorate’s decision was different to the planning application and therefore did not set a precedent which had to be followed.
2.07	The PSOW also considered that, had the local member, Councillor X, correctly understood what the planning officer was advising him, then Councillor X would have asked for the planning application to be considered

	by the Planning Committee. The PSOW acknowledges that there is no way of knowing whether the Planning Committee would have made the same decision as that made by officers. However, he nevertheless found that it is more likely than not that the Planning Committee would have refused the planning application.
	<u>PSOW's Conclusion</u>
2.08	The PSOW considers that the failings which he has identified mean that the complainant has suffered a loss of privacy which has affected the enjoyment of her home and garden, and that this is a significant injustice to her. In addition, he believes the existence of the building in the garden of the house next door to her property is likely to have diminished the value of her home.
3.00	<u>Advice to Council on the Findings</u>
3.01	The Council discussed with the PSOW his proposed findings and recommendations. Officers raised concerns with the PSOW about both the findings and the recommendations and have taken legal advice from external Counsel in respect of both. Having spoken to Counsel, officers believe that there are reasonable prospects for challenging the findings if the Council wished to do so. Notwithstanding this the PSOW has largely maintained his position in respect of the findings and the recommendations.
3.02	<p>Should the Council wish to challenge the findings then it would have to do so by way of judicial review, which is a special type of action in the High Court. The Council's main grounds of challenge would be that the PSOW erred in law in concluding that:</p> <ol style="list-style-type: none"> (1) The annexe could not, as a matter of law, be regarded as 'incidental' to the enjoyment of the main dwelling because it included 'primary' living accommodation. Rather, this was a question of fact and degree for the Council and the decision that the annexe was 'incidental' was not irrational in the particular circumstances of this case; (2) It was likely that if the decision on the retrospective application had been made without reference to the existence of the certificate of lawfulness, permission would have been refused. The key part of the officer's analysis was that there was only a minor degree of conflict with planning policy (insofar as the annexe is not physically attached to the main dwelling) and the existence of the certificate of lawfulness was irrelevant to this part of the analysis; (3) The PSOW was wrong to conclude that the Council should not have drawn support for its conclusion from the previous appeal decision because of factual differences between the two cases. The Council was entitled to regard the material parts of the decision relating to the interpretation of policy as being relevant notwithstanding those differences; and (4) The PSOW was wrong to recommend that compensation should be paid on the basis of the difference in value in the complainant's property before/after the construction of the annexe without considering (a) whether, if permission had been refused, there could have been a successful appeal and (b) the existence of permitted development rights to construct a similar building (or an extensively larger building) in terms of its external appearance.

	<u>Whether to Accept or Challenge the PSOW's findings</u>
3.03	Having taken advice from counsel, officers believe that the Council would have reasonable prospects of success if it challenged the PSOW's findings on the matters referred to above. However, there is always the risk that the Council might not be successful. Even if the Council were to be successful such a challenge would be the first of its kind in Wales, and would harm the important working relationship with the Ombudsman's office.
3.04	Bringing a case in the High Court is expensive. If the Council were to be successful then it would recover most of its own costs. However, there is also a risk, as there is in all litigation, that the Council will be unsuccessful in such proceedings and in these circumstances it is highly likely that the Council would have to pay a proportion of the PSOW's legal costs as well. Win or lose, a case in the High Court would also be very time consuming for the Council and the PSOW, and would draw resource away from delivering Council priorities.
3.05	There is also a degree of reputational risk in bringing a challenge to the PSOW's findings. Even if the Council were to be successful, it might be difficult to justify the use of public funds and time on such an issue. It might also give rise to the perception that we have lost sight of the impact on the complainant who has made a complaint in good faith.
3.06	For the reasons given above the recommendation to Council is that the findings in the Public Interest Report should not be challenged by way of Judicial Review. The consequence of this is that the findings are binding on the Council.
	<u>Whether to Accept the PSOWs Recommendations on Remedy</u>
3.07	Unlike the findings within the Public Interest Report, the Council has discretion not to follow the recommendations on remedy. That is to say, that the Council does not need to challenge the recommendations in the High Court if it does not wish to be bound by them.
3.08	If the findings are not challenged, then the Council must consider the recommendations as though the findings are actually accepted and that maladministration has occurred. However, it does not follow that the maladministration has caused a serious injustice to the complainant (which is the basis for the PSOW ordering compensation).
3.09	If the findings are accepted then it reasonable that the first two recommendations should be implemented as soon as possible because: <ul style="list-style-type: none"> i. the complainant does now have a building in the adjacent garden and so will perceive a loss of privacy; ii. the complaint has taken a long time to resolve due to the discussions with the PSOW, which will have prolonged the period of upset for the complainant; and iii. the Council does need to ensure that conditions imposed on the planning permission are being followed in order to minimise the inevitable disruption to the complainant.

3.10	<p>However, Council is advised that the third recommendation should not be implemented. Officers do not consider that the Council's actions caused serious injustice for the following reasons:</p> <ul style="list-style-type: none"> i. It does not follow that, but for the maladministration, the building would have been removed, nor that it would not been built in the first place. The applicant would have been entitled to appeal to the Planning Inspectorate against refusal of planning permission. Planning permission is very likely to have been granted on appeal leaving the complainant in exactly the same position. As noted above, the PSOW's decision does not address what would have happened in that event. Hence, there is no finding which binds the Council in relation to it; ii. Even if the building (as it is now) was removed the applicant would still be entitled to construct a building of similar size and appearance (or larger, subject to satisfying certain conditions) under permitted development rights. It is the external appearance of the building (as opposed to what use the rooms are put to within it) that has an impact on the value of the neighbouring property. Therefore payment of compensation based on the diminution in value of the complainant's property, assessed on the basis of no building being present next door at all, is not considered to be justified; and iii. In order to properly consider the implications of the third recommendation above the DV has been engaged to carry out a valuation, as without this Council would not be in a position to properly consider all of the implications of this recommendation and in particular the financial impact on the Council of implementing this recommendation. The DV has valued the difference in the value of Ms N's property before and after the development as £20,000. This is a significant sum given the comments in paragraphs i and ii above.
3.11	<p>This case has been ongoing for some time (see the chronology in Appendix 2). As well as the time and effort required to complain, the uncertainty will no doubt have caused the complainant distress. Officers recommend that she is paid £5000 for the time, trouble and distress associated with her complaint. It should be noted than the delay in resolving the case is attributable to both the PSOW and the Council.</p>

2.00	RESOURCE IMPLICATIONS
2.01	<p>An actions for judicial review proceeds in stages, the first of which is to seek permission from the High Court to bring a case at all. The Council would need to employ counsel and its own costs in seeking permission would be in the region of £10,000 – 20,000. If the Council were to be granted permission then the costs of the following hearing would be in the region of (an additional) £50,000.</p> <p>These costs would be recovered from the PSOW if the Council were to be successful. If the Council were to lose it would have to pay equivalent costs for the PSOW in addition to its own costs.</p>

2.02	Litigating a case by way of judicial review is time consuming even when using external counsel. The Council's own lawyers would need to prepare papers, correspond with the other party and, perhaps most significantly, help planning officers to prepare witness statements. The case would likewise draw internal resource away from the primary functions of the PSOW's officers.
2.03	If approved by Council the payment to the complainant of £5,000 would be an additional budget requirement and would need to be allocated from unearmarked reserves.

3.00	CONSULTATIONS REQUIRED / CARRIED OUT
3.01	Planning Strategy Group considered the Public Interest Report at its meeting on 13th May and noted the officers' comments on the case, the planning issues and timelines involved.

4.00	RISK MANAGEMENT
4.01	The PSOW has taken his own external legal advice and so is confident that his decision is correct. The Council's legal advice clearly differs. There is always a risk in litigation that the Court will find against the Council with the consequences set out in the body of the report.
4.02	Should the Council not accept the PSOW's recommendations then he has the power to issue a special report to the Senedd highlighting our actions. Whilst it is a rare step for officers to suggest rejection of the recommendations, they believe that there are sufficient grounds to recommend this exceptional course of action.

5.00	APPENDICES
5.01	Appendix 1 - The Public Interest Report Appendix 2 - Chronology

6.00	LIST OF ACCESSIBLE BACKGROUND DOCUMENTS
8.01	Contact Officer: Gareth Owens, Monitoring Officer Telephone: 01352 702330 E-mail : gareth.legal@flintshire.gov.uk

7.00	GLOSSARY OF TERMS
7.01	<p>PSOW - the Public Services Ombudsman for Wales whose duty it is to investigate complaints made by members of the public in relation to the actions and decision making of public bodies in Wales.</p> <p>Primary residential use – use of a building as a separate dwelling in its own right, rather than as additional or overflow accommodation for another dwelling.</p>