07 October 2016

Complaint reference:
14 010 084

Complaint against:
Gravesham Borough Council

Local Government
OMBUDSMAN

The Ombudsman's final decision

Summary: There was fault in the way the Council considered an application for planning permission in 2008 and 2011 and in its subsequent handling of Mr and Mrs X's complaint about loss of residential amenity. This has caused Mr and Mrs X injustice through an unnecessarily protracted complaint process, but the Ombudsman cannot say, if the Council had considered the planning application without fault, it would have refused the application or the development would not have been built.

The complaint

1. The complainants, whom I shall refer to as Mr and Mrs X, complain that:

- The Council was at fault in granting planning permission in 2008 and 2011 for a three storey property next door that adversely affected the amenity of the upstairs flat at their shop.
- The developer at the neighbouring property:
    a. failed to demolish the original building and / or
    b. built on inadequate foundations and / or
    c. built not in accordance with the approved plans and / or
    d. built a dangerous building and / or
    e. blocked a gas flue to the flat above their shop and / or
    f. blocked the only window to the living room upstairs at the flat above their shop and / or
    g. failed to comply with building regulations

  and, the Council failed to take appropriate enforcement action.
- The Council wrongly approved changes to the planning permission at the neighbouring property as a minor material amendment.
- Members of the Council / Council Officers passed the approvals because of personal connections to the developer / bias / threats from the developer.

2. Mr and Mrs X told me the developer's actions have caused them great stress and the only thing that would resolve the situation is if the Council requires the developer to take the building down. Mr and Mrs X have stated that they are not seeking financial 'compensation' from the Council. Mr and Mrs X want the Council to admit:

- That the Council should not have granted planning permission
- That the development building is unsafe
- That the Council granted permission due to bias or threats from the developer.

The Ombudsman's role and powers

3. The Ombudsman investigates complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. She 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 an injustice, she may suggest a remedy. ***(Local Government Act 1974, sections 26(1) and 26A(1))***
4. The Ombudsman cannot investigate late complaints unless she decides there are good reasons. Late complaints are when someone takes more than 12 months to complain to the Ombudsman about something a council has done. ***(Local Government Act 1974, sections 26B and 34D)***
5. 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))***
6. The Ombudsman provides a free service, but must use public money carefully. She may decide not to start or continue with an investigation if she believes:
   - it is unlikely she could add to any previous investigation by the Council, or
   - she cannot achieve the outcome someone wants, or
   - there is another body better placed to consider this complaint.

   (Local Government Act 1974, section 24A(6))

How I considered this complaint

7. I have considered information provided by Mr and Mrs X, and the Council, including:

- Planning history and documents
- Planning Committee minutes
- Complaint correspondence
- Relevant planning law and guidance
- The Ombudsman's Guidance on Jurisdiction and Guidance on Remedies.

8. I have also spoken to Mr and Mrs X by telephone.
9. I have written to Mr and Mrs X and the Council with draft decisions and given them an opportunity to comment.

What I found

Chronology of events

10. Mr and Mrs X own a shop with upstairs premises, which used to be a residential flat, although it has not been used for residential purposes for some time.
11. Next to their shop was an adjoining single storey shop building with unused land to the other side and rear.
12. The buildings are all in a conservation area.
13. In 2003 a developer ('the first developer') applied for permission to demolish the single storey shop building next to Mr and Mrs X's property and erect a two storey

building with four one bedroom flats in the rear yard. The Council refused the planning application.

14. Very late in my investigation the Council told me that the upstairs premises above Mr and Mrs X's shop was removed, at their request, from the Valuation Office list for Council Tax in March 2006. This was on the basis the space was being used as a store room. The upstairs premises have remained absent from the Council Tax list since that time.

15. In response to this new evidence Mr and Mrs X told me they had asked for the upstairs 'flat' to be removed from the Council Tax list in 2006. They said this was because in 2005 a developer put in plans to build against their property, which involved blocking the light to their only window and gas flue. They say while the plans were refused in 2005, they decided to use the flat as a store room until the problem was resolved. Mr and Mrs X told me they expected to reinstate the upstairs to residential use within a matter of months, but because of subsequent events this never happened.

16. The evidence I have seen from the Council's online planning file shows that an application was refused in 2003 for a two floor property to the rear of Mr and Mrs X's shop, but not adjoining it. There was no application in 2005.

17. In November 2007 the first developer applied for planning permission to erect a three storey building with six self contained flats on the site of the single storey building (adjoining Mr and Mrs X's property) and back yard. Permission was refused by the Council (Officer A).

18. The Council's planning decision notice states the proposal was refused in part because of an adverse impact on adjoining properties, but it is unclear whether this was a reference to Mr and Mrs X's window or to the scale and quality of the proposed development on neighbours generally.

19. In 2008, the first developer re-applied for:

- planning permission to demolish the single storey building and in its place build a new ground floor retail unit and above it a bedsit at first floor level
- planning permission for a three storey building containing five one bedroom flats on the yard.

20. The Council (Officer B) gave planning permission on 19 September 2008, with development to begin within three years. Mr and Mrs X objected to the application on the basis the development would be built against their property and block up two windows to their property and block their gas flue. The report notes the first developer was in discussion with Mr and Mrs X about blocking their windows and that *'there is a right to light issue... however a condition would not be accepted...that subject to the flats being occupied* [the development] *would be rebuilt'.* The report noted the gas flue encroached onto the development site which was a civil issue.

21. In 2011 the first developer made an application to renew the application, and again this was granted by the Council on 8 June 2011 (Officer B).

22. The planning applications were granted in full knowledge of Mr and Mrs X's objections and that the new development would make the developer's flat and Mr and Mrs X's upstairs space a terraced property at first floor level. The Council later told Mr and Mrs X it assumed a developer would reach agreement with them on party wall and right to light issues.

23. In 2012 the Council told Mr and Mrs X the developer could not proceed with the development without a party wall agreement. The first developer appears to have accepted this advice as Mr and Mrs X's correspondence with the Council (10 June 2015) refers to a letter from the first developer to them confirming he would not build without their consent.

24. Ownership of the site then changed hands and in September 2013 a second developer started work and demolished most, but not all, of the single storey building adjoining Mr and Mrs X's shop. The second developer did not agree a party wall agreement with Mr and Mrs X before works started or address right to light issues.

25. Mr and Mrs X complained to the Council. Planning enforcement officers (and private building inspectors) visited the site in September 2013. They found some differences between what was being built and the planning permission.

26. The second developer told Officers he intended to retain the ground floor shop and refurbish it, not demolish it. The Council advised the second developer to put in a new planning application for his amended scheme. Subsequently the second developer said he would build at ground floor level work only and add a roof to the ground floor (due to disagreement with Mr and Mrs X about party wall and light issues). The Council said the amended ground floor works could be dealt with as a non material minor amendment.

27. The Council advised work should cease until the second developer put in an application for amendment to his planning permission (and also until he agreed party wall issues with Mr and Mrs X). The second developer ceased work but did not put in a new application or reach agreement with Mr and Mrs X.

28. In December 2013 Mr and Mrs X expressed concern the second developer had built part of his extension on top of their boundary wall.

29. In December 2013 the Council told Mr and Mrs X the second developer had implemented the original planning permission by doing works to the ground floor but it was not the developer's intention to proceed with the first floor without resolving the situation with Mr and Mrs X. An Officer (Officer C) explained the second developer had a valid planning permission and could implement it without further recourse to the Council's planning department. Officer C stated *'the Council is unlikely to revoke this permission because it would be likely to be faced with a substantial claim for compensation...it is for this reason that I keep advising you to instigate your own action by way of the Party Wall Act, this is the only sure way that you have to ensure that the works do not progress above ground floor level*'.

30. It can be inferred from this comment Officer C was of the view that building at first floor level would adversely affect Mr and Mrs X's amenity.

31. The Council chased the developer's application for amendments in April 2014. On 15 April 2014 the second developer told the Council he had decided to demolish the shop front to mitigate the need to submit a further application.

32. Work on site resumed in September 2014.

33. In September 2014 Mr and Mrs X complained to the Council they had discovered the new building work had blocked the gas flue to their upstairs flat and builders had removed their water hopper. The second developer told Mr and Mrs X and the Council that their gas flue was encroaching onto the airspace above his property and was a nuisance.

34. The second developer did not obtain a party wall agreement or reach agreement with Mr and Mrs X about moving their gas flue before continuing with the works.

35. The Council issued a temporary stop notice on 19 September 2014 because of concerns:

- There appeared to be no valid planning permission (due to the original building not being demolished in accordance with the original planning permission by June 2014);
- There was a lack of certainty about what was being built;
- The works could be harmful to the conservation area;
- There may be an adverse impact on Mr and Mrs X.

36. The Council advised Mr and Mrs X the missing water hopper and party wall dispute were private civil matters that should be settled independently, not by the Council.

37. Mr and Mrs X told the Council they could not afford to take legal action against the developer.

38. The Council told the second developer it believed the original planning permission had lapsed because he had not demolished the original building by June 2014, as required. It said it could not now accept an application for a minor material amendment, only a full planning application.

39. The second developer told the Council he had implemented the original planning permission before its expiry date because a substantial part of the building was demolished in August 2013 including the entire roof. The second developer referred to emails from the Council during 2013 to argue the Council accepted works had started and the planning permission implemented at that time.

40. The second developer said he had originally intended to demolish the single storey building in its entirety but ran into difficulties with Mr and Mrs X about retaining their flank wall. The second developer said removal of Mr and Mrs X's flank wall would have damaged their property and so after taking specialist advice, he decided to retain this part. The second developer argued that as he had intended to demolish the building and only altered course due to events 'beyond his control', he had implemented the original permission and then been forced to amend it. He also argued the end result would be identical to the building in the approved planning permission.

41. The second developer said he would appeal the enforcement notice. A Manager (Officer D) became involved and asked Officers to provide views on the case given the Council may need to defend it at appeal, which could prove costly.

42. Officers B and D met the second developer on 24 October 2014 to discuss his concerns. The second developer made it clear during the meeting he did not consider he needed to make a new planning application, only submit amendments and that he did not intend to enter into a party wall agreement with Mr and Mrs X.

43. The second developer then seems to have reconsidered and suggested he might after all make a full planning application and sought advice as to what the Council would consider an acceptable scheme.

44. The Council told the second developer (28 October 2014) that issues regarding the Party Wall Act and right to light were civil issues and would not be material considerations in the future determination of any application.

45. The Council considered the amended scheme proposed by the second developer caused no planning harm and sought to resolve the impasse with the second developer.

46. Mr and Mrs X continued to complain and alleged close links between the first and second developers and various Officers and Members of the Council as reasons why the Council was not taking enforcement action. Mr and Mrs X brought their complaint to the Ombudsman in September 2014, but it was referred back for local resolution as the Council had not yet provided a response to the complaint.

47. Council Members visited the site on 23 February 2015 and were concerned about the gas flue and Mr and Mrs X's blocked window.

48. By this time the position of the second developer was that works had started before expiry of the planning permission and, subject to two minor amendments, work was in accordance with the approved plans. He again decided he did not need to make a fresh planning application, but simply to submit an application for minor amendments. The second developer again told the Council he would not reach a party wall agreement with Mr and Mrs X.

49. The Council concluded the works were lawful, 'on the balance of probabilities'. It is noted on the Council file Officer D considered it would be difficult and expensive to defend the stop notice. As a result, the Council withdrew the stop notice and agreed with the developer he would submit an application for a minor material amendment.

50. Officer B prepared a report on the application for minor amendment which stated:

- The revised proposal for window positions was not substantially different than the original scheme.
- The proposed internal layout changes of the bedsit were an improvement on the original scheme.
- The development involved blocking up the window serving Mr and Mrs X's first floor sitting room. In order to ensure sufficient light is provided to this room the application for minor amendment included a light well to provide natural light to this room. The light well was not adequately designed and would restrict daylight to the adjoining flat, not have adequate security against ingress of leaves, or provision for drainage. In order to ensure that a light well was well constructed a planning condition would be needed stating that prior to occupation / use of any part of the development details of the light well would need to be submitted and approved by the Council.
- The works were commenced in time so the previous planning permission had not expired.
- The retention of part of the original building was acceptable.
- The development blocked the gas flue to Mr and Mrs X's property. While the solution to this was via the Party Wall Act it remained a concern that the building (now nearly complete) blocks a flue in an adjoining flat. This could be dangerous for residents of the existing and proposed flats. While the Council was not the enforcing authority for gas appliances, it was considered essential the issue is

resolved (which could be achieved through a Party Wall Act agreement to move the boiler).

51. Officer B recommended in his report the application for minor amendment be refused on the basis of harm to the neighbouring property because the light well was too small. The report recommended that the Council negotiate revisions to the scheme and accommodation to overcome the harm to potential future occupants arising from the juxtaposition of the first floor flats of the two buildings.

52. The second developer pointed out that if the application was not granted the result would not be a larger light well, but no light well at all, as the original planning permission had made no provision for light to Mr and Mrs X's property.

53. The minor material amendment was to be considered by the Regulatory Board in March 2015.

54. Mr and Mrs X objected to the minor amendment on the basis they did not want a light well and there was no provision for their gas flue.

55. In February 2015 the building control surveyor investigated the structural safety of the development, including whether foundations were sufficient and safe. The private building control inspector advised the second developer about blocking the window and gas flue to Mr and Mrs X's property and that he needed to provide fire resistance and sound protection between the two properties. When the second developer did not respond to concerns raised, the private inspector passed the enforcement of building regulations back to the Council's inspector.

56. The Council tried to mediate between Mr and Mrs X and the second developer. This resulted in the second developer making a written offer to relocate their boiler and enlarge their loft window at his own expense. Mr and Mrs X rejected this offer on the basis the structure next door was 'unlawful' and should be removed.

57. In June 2015 the Council's Regulatory Committee rejected the recommendation of Officer B to refuse the application and approved the minor amendment with conditions about the light well and gas flue.

58. The Council in its responses to the complaint and my enquiries said:

- Mr and Mrs X's complaint constantly evolved with them introducing more issues than those set out at paragraph 1 above.
- The existing brickwork wall which the new first floor extension has been built upon had its foundations exposed and inspected on 19 November 2015 and was found to be safe. In the view of the Building Inspector the wall can take the loadings from the new first floor extension.
- The Council did consider whether the building was dangerous and concluded it was not.
- From a planning perspective, the Council is satisfied the works have been carried out in accordance with the approved plans.
- The Council does not agree it should not have granted planning approvals in 2008 and 2011. The matters of the window and gas flue are ones which should be dealt with under the provisions of the Party Wall Act.
- The Council's Regulatory Board made a different decision than Officers about the 2014 application for amendment, which it was entitled to do.

- The Council's understanding is that the habitable room (Mr and Mrs X's flat) referred to has not been in residential use for a number of years (although it could be returned to residential use) and the flue has similarly not been used for a number of years. The Council has very recently confirmed the flat was removed from the Council Tax list by Mr and Mrs X in 2006.
- The window to the upstairs sitting room in Mr and Mrs X's flat was partially obscured by a staircase limiting light to the room in any event.
- The second developer's son is a planning consultant and has professional contact with the Council in relation to applications. The developer's son is not, and has never been, an employee of the Council.
- The second developer's daughter does work part-time for the Council in an unrelated capacity. This was not known to the complaints team at the time they replied to Mr and Mrs X.
- The Council found no personal or social relationships between Councillors and the developers other than Officer C, a planning enforcement officer who is a friend of the second developer and later set up a business with him. The Council removed Officer C from the case as soon as it discovered this fact. Officer C left the Council to go into business with the second developer.
- The Council denies any threats by the second developer affected its decision making.

59. Mr and Mrs X have now followed the Council's advice to take legal action against the second developer by making an online money claim against the second developer for damage to their property. The Council is not a party to these proceedings. The Court has advised both Mr and Mrs X and the second developer to obtain surveyors reports to ascertain the loss. The court action is ongoing with a final hearing scheduled shortly.

Relevant law and guidance

Determining planning applications

60. A planning authority must determine applications in accordance with its development plan unless there are material considerations which indicate otherwise. **(s.70 Town and Country Planning Act 1990)**

61. Many issues are capable of being material considerations, but in broad terms they should relate to the use and development of land. Material considerations include issues such as overlooking, loss of privacy, loss of sunlight, smells and fumes, loss of outlook to the detriment of residential amenity (but not loss of view as such), layout and design.

62. As a general rule the planning system works in the public interest and matters which solely affect private interests are not usually material considerations in planning decisions. Private issues between neighbours, for example boundary disputes, damage to property, rights to light, loss of view or loss of property value are not relevant considerations.

63. It is for the decision maker to decide what weight to give a material consideration in each case.

64. Generally once planning permission is granted development must start within three years.

Revoking or modifying planning permissions

65. Councils have powers to revoke or modify permissions under section 97 of the Town and Country Planning Act. Where a Council revokes or modifies a planning permission it is liable to pay compensation to the person who has implemented the permission for works already done.

66. Whether to revoke or modify permission is a discretionary judgment for the Council as to whether it is 'expedient' to do so. In deciding whether it is expedient, Councils are entitled to take into account the compensation they would have to pay.

Party walls

67. The Party Wall Act 1996 requires owners to notify all adjoining owners if they intend to carry out building work that involves:

- Building a free standing wall or a wall of a building up to or astride the boundary with a neighbouring property
- Work on an existing party wall or structure, or building against such a party wall or structure
- Excavating near a neighbouring building.

68. Gaining planning permission or complying with building regulations does not remove the need to comply with the Act.

69. Adjoining owners have civil legal rights including being compensated for any loss or damage caused by the works.

Right to light

70. A right to light may be acquired by '*anyone who has had uninterrupted use of something over someone else's land for 20 years without consent'* (Prescription Act 1832).

71. If a new building limits the amount of light coming in through a window and the level of light inside falls below the accepted level, this constitutes an obstruction for which the owner is entitled to take legal action against their neighbour. The Court can award compensation, cut back the offending part of the development, or in extreme cases may issue an injunction. A Court is unlikely to grant an injunction in cases where a small financial payment can be made as compensation – especially for minor matters or late applications. Injunctive proceedings can be very expensive. (Source: Royal Institute of Chartered Surveyors Consumer Guide to Right to Light).

Planning enforcement

72. Planning authorities may take enforcement action where there has:

    a) been a breach of planning control; and

    b) it is considered by the authority expedient to do so.

73. A breach of planning control is defined in s.171A of the Town and Country Planning Act 1990, as amended, as:

- The carrying out of development without the required planning permission; or
- Failing to comply with any condition or limitation subject to which planning permission has been granted.

Hazards

74. Local authorities have powers under The Housing Act 2004, which came into force in 2006, to inspect properties for potential risks to health and safety from any defects in dwellings. This can include lack of natural lighting to living areas during daylight hours to enable normal domestic tasks to be carried out and inadequate central heating or ventilation.

Analysis of fault

Time frame of investigation

75. Mr and Mrs X's alleged injustice is continuing as the window and gas flue to their upstairs space is completely blocked by the brick wall of the neighbouring development. While works started in 2013, it was only in 2014/15 that it became apparent the second developer intended to build at first floor level without securing a party wall agreement with Mr and Mrs X.

76. I have exercised discretion to consider the Council's actions from 2008 to date. ***(Local Government Act 1974, sections 26B and 34D)*** because:

- A total loss of light to a residential property would be a very significant injustice;
- In order to investigate the alleged injustice it is necessary to consider the planning history of the site back to 2008.
- The Council did not properly engage with Mr and Mrs X's complaints about the Council's role in the impact to their amenity. The Council told Mr and Mrs X loss of light and a blocked gas flue could only be remedied via civil action against the developer and did not explain the circumstances in which these could be material planning considerations. The Council failed to provide an explanation about how it had considered Mr and Mrs X's objections to the development or what weight it had given them.
- As the Council did not accept Mr and Mrs X's complaint about its own role was one it was required to answer, it failed to direct Mr and Mrs X to the Ombudsman earlier.

Residential or storage use

77. On 7 March 2006 the Valuation Office removed Mr and Mrs X's upstairs premises from the list for Council Tax on the basis it was being used purely for storage and no longer for residential purposes.

78. I find that Mr and Mrs X's recollection about the events of 2006 is mistaken. At that time there had been no planning application to build against their property, only (in 2003) an application to remove the adjoining single storey building to provide access to a new development on the yard behind their property. The first application to build against their property and block their window was received by the Council in November 2007.

79. Mr and Mrs X told me it was always their intention to return the space to residential use, but Councils may determine applications on the basis of the situation at the relevant time. At the relevant time the space was listed as storage.

Grant of planning permission in 2008 and 2011

80. When the Council considered the planning applications of 2008 and 2011 it was required to consider the impact on Mr and Mrs X's amenity before granting planning permission. Blocking the only window to a habitable room (a sitting room) clearly affects residential amenity and would have been a material planning consideration. Blocking the only window and gas flue were also potential hazards.

81. While it may not have been immediately apparent that a side window to a room above a shop with a staircase partially across it was a habitable room, Mr and Mrs X objected to the applications and made the Council aware this was the only source of light to this room, which they stated was residential.

82. The Council has very recently discovered (August 2016) the upstairs of Mr and Mrs X's property was removed from the Council Tax list in 2006. It told me in response to my draft decision (22 August 2016) the planning officer who made the decisions in 2008 and 2011 (Officer B), to the best of his recollection, formed the view the premises were no longer in residential use and being used for storage and this is why he gave little weight to the objection. I am not persuaded by this late evidence because:

- I would have expected the Officer to have set out his reasoning in the reports in 2008 and 2011 and specifically addressed the objection raised by Mr and Mrs X.
- There is no evidence the Officer visited Mr and Mrs X's property and discussed the use of the room with them (or checked the Council Tax list) before determining the use was storage.
- Blocking light, even to a storage area, would create some loss of amenity and I would expect a Council to try and negotiate amendments to a planning application or measures to offset the loss of amenity (such as a developer paying for the neighbour to install a new light source); there is no evidence this happened here.
- The Officer who made the decisions in 2008 and 2011 has been involved in the correspondence and planning matters relating to Mr and Mrs X throughout and has never offered this explanation before now.
- Officer C referred to the Council being unlikely to revoke the permission in 2013, suggesting doubt among some planning officers whether the Council's original decision was sound.
- Officer B's report to the Regulatory Board on 11 March 2015 accepted there had been planning harm to Mr and Mrs X's 'flat':

  'Blocking the side widow of the flat at [Mr and Mrs X's property] *whilst the method of resolving this matter is normally by party wall agreement (not a material planning consideration) the actual issue of causing harm to the future occupiers of the flat plainly is [*a material planning consideration]*...blocking the flue to the gas boiler... causing harm to the future occupiers of the flat plainly is* [a material planning consideration]*'.*

- The Council 's actions including:

  a) the issue of the stop notice,

  b) the report to the Regulatory Board, and

  c) seeking to negotiate amendments with the second developer

  all show the Council was working on the basis there had been an adverse impact on residential amenity to a flat.

83. Evidence on the Council's file shows a lack of understanding among planning officers that blocking a window to a residential property and a gas flue could be material planning considerations. It was only in March 2015, in the Report to the Regulatory Board, that this view was corrected.

84. On the balance of probabilities I find the Officer in 2008 and 2011 did not properly satisfy himself that Mr and Mrs X's upstairs space was not in residential use,

before granting planning permission. This was a failure to consider a possible material planning consideration and was fault.

85. I find it was only in August 2016 that the Council obtained evidence to confirm non residential use from 2006 to date.

86. I do agree that the fact the property was not in residential use from 2006 to date is relevant to

- assessing whether fault by the Council caused injustice to Mr and Mrs X, and
- the level of injustice (because loss of amenity to a storage area is less than would be the case for residential use).

Complaint handling

87. When Mr and Mrs X complained to the Council, the Council told them the issue could only be a private / party wall matter between themselves and the developer. This is fault.

88. The Council should have been aware and acknowledged that an adverse impact on residential amenity, for example form lack of sunlight, can be a material consideration and investigated whether the Officer had properly taken amenity into account. Instead the Council complaint responses simply told Mr and Mrs X it had taken their objection and loss of amenity into account in 2008 and 2011, but did not provide any explanation about how it had exercised its judgment or reasons why their objection did not carry more weight. This was fault.

89. Throughout 2013 to 2015 the Council's actions show it accepted Mr and Mrs X's residential amenity had been adversely affected, but it continued to deny this had anything to do with the Council. Mr and Mrs X not surprisingly disagreed with this position and believed the Council was covering up fault in granting the permission originally.

90. It is unacceptable that the Council has put forward a fresh account of the events of 2008-11 as late as August 2016. A thorough complaint investigation should have happened much earlier on, avoiding a protracted complaint process and associated time and trouble to Mr and Mrs X.

Enforcement action

91. If planning permission had not been given the Council would have been able to take enforcement action against the second developer for blocking Mr and Mrs X's window. As it is, the Council cannot require the removal of the first floor development (the outcome Mr and Mrs X are seeking) because the planning permission it gave is valid, has been implemented and remains in force. As things stand the second developer is entitled to rely on it. The Ombudsman has no power to reverse a planning permission.

92. There was uncertainty among council officers whether the second developer had implemented the original planning permission before it expired. The Council decided, after considering advice, that on the balance of probabilities the permission was implemented in time. This was a judgment the Council was entitled to reach. The Ombudsman has no power to intervene in the merits of Council decisions. There was evidence supporting both viewpoints and the decision was among the range of conclusions that could have been reached on the basis of the evidence presented.

93. While this decision was favourable to the second developer, I found no evidence of bias or threats. Officer C (who had a social, and later business, relationship

with the second developer) was not involved in the enforcement decisions. Several Council officers had given advice in 2013 which allowed the second developer to argue the planning permission had been implemented. Officer C's interactions with the second developer in 2013 were not a deciding factor in the Council's decision it was not expedient to defend the stop notice at appeal. It was comments made by other officers in 2013 which made it difficult for the Council to later argue the permission had not been implemented.

94. It was a consideration for the Council that a successful appeal against the stop notice would incur public funds.

95. Having decided the planning permission had been implemented in 2013, the Council could not use enforcement powers to stop the developer building as he had a valid planning permission.

The 2015 minor amendment

96. Having decided the works were lawful, the Council had no basis to demand a further full planning permission. While Officer B advised the Regulatory Board to refuse the application for amendment, the Board did not follow this advice.

97. The Board made the decision in full knowledge of the facts. The Ombudsman has no power to intervene in the merits of this decision. ***(Local Government Act 1974, section 34(3))***

98. The second developer was correct to say he was not required to put in a light well at all and therefore the Council had no basis to insist on a particular scheme to offset the adverse impact to Mr and Mrs X. On this basis it is understandable the Board came to the view it did. The scheme does mitigate some of the loss to Mr and Mrs X.

Revoking or modifying planning permission

99. When a Council recognises it was at fault in granting the original planning permission, it can consider revoking or modifying the permission, but in doing so would become liable to the developer for compensation.

100. Officer C advised Mr and Mrs X about revocation in December 2013, shortly before he left the Council. Officer C therefore clearly appreciated the potential flaws in the planning process. If this was apparent to Officer C it should have been equally apparent to other planning officers.

101. As I have found planning officers in 2013/14 believed the upstairs premises to be residential, then they should have considered revocation or modification of the permission when the build was still at an early stage.

102. When a development is nearly complete (as this one now is) it is unlikely a Council would consider it expedient to revoke permission. The compensation the Council would be liable to pay to the second developer would be substantial.

103. Given what we now know about the upstairs premises being used for storage since 2006, it is unlikely the Council would have considered revocation or modification proportionate, as the loss of amenity is less serious and could be remedied through other means.

Bias or undue influence

104. I have found no evidence the Council's decisions were influenced by personal relationships between the developers and Council Officers or Members.

105. The Council has investigated Mr and Mrs X's allegations about threats and bias thoroughly and I find the Council has been transparent in its complaint responses on this point.

106. It was unfortunate that Officer C did not disclose his link to the second developer however his involvement in the case was short, he has now left the Council, and the Council took appropriate action when it discovered the link. I have seen no evidence Officer C was involved in or influenced any of the planning permissions.

107. With regard to decisions not to pursue enforcement, it is clear from the Council's files a number of officers were involved in these decisions and Officer C was not involved after 2013.

108. I have found no evidence the Council's decision to remove the stop notice, accept the original permission had been implemented in time, or accept an application for amendment was affected by any bias or threats.

109. I find the second developer has argued his case forcefully stating he would appeal the stop notice and claim compensation from the Council. Councils will be used to developers defending their position in this way.

110. The second developer has behaved in a similar forceful way in his dealings with Mr and Mrs X.

111. The Council was liable for compensation to the second developer if it subsequently revoked or modified the permission. Similarly pursuing enforcement action would have led to expensive court action if unsuccessful.

112. The Council was entitled to consider the cost to the public purse in deciding what measure it was expedient to take against the second developer. This is not fault.

113. I find that it was the financial consequences and evidential difficulties in proving the planning permission was not implemented in 2013 that led to the decisions the Council made. The decisions were not the result of bias or threats.

Dangerous building

114. Mr and Mrs X complained to the Council the development is potentially unsafe, being built over inadequate foundations. The Council correctly issued a stop notice while it investigated.

115. The Council has obtained specialist advice that the building is safe.

116. The Ombudsman does not have access to specialist advice and cannot question the merits of the Council's judgment about the safety of the building.

117. Mr and Mrs D have issued court proceedings about the alleged damage to their building and raised their concerns about the safety of the development. I consider the Court, which does have access to specialist advice, is a more appropriate body to resolve this issue and I will not investigate it further.

Hazards

118. The Council in its response to my draft decision agrees use of Mr and Mrs X's premises in future for residential use would be a hazard and it would need to deal with this situation through its duties under the Housing Act 2004.

Private legal rights

119. The Council was correct to tell Mr and Mrs X they could protect their property rights through civil court action. There is an expectation that property owners will assert their rights and protect their own interests.

120. Mr and Mrs X were reluctant to incur legal costs they could not afford. This meant they delayed bringing private action until they felt they had exhausted their complaint against the Council. Mr and Mrs X were determined to get the Council to admit it did have a role and should not have granted the planning permission. The Council's failure to understand and acknowledge its own role or to properly answer the complaint severely delayed this process.

121. Mr and Mrs X did apply to the court for a money claim against the developer just before my investigation started and these proceedings have been accepted by the court and are continuing. Mr and Mrs X have used the money claim process because it is a much cheaper than alternative civil routes such as judicial review which were prohibitively expensive.

Analysis of Injustice

Link between fault and injustice

122. The Ombudsman investigates fault causing injustice. This means there must be:

- Evidence of fault
- Evidence of a significant injustice
- A direct causal link between the two, that is that 'but for' the fault, the injustice would not have happened.

Complaint handling

123. Fault in the way the Council handled the complaint caused additional time and trouble to Mr and Mrs X and led them down an unnecessarily protracted complaint and litigation route. This is an injustice.

Planning permission

124. I am not persuaded the Officer who granted planning permission in 2008 satisfied himself the upstairs premises were not in residential use. This was fault. Granting planning permission for a development which would block the only light source to a habitable room, and the gas flue to a residential boiler, would have been fault.

125. We now know this was not the actual situation and the upstairs had been removed from residential use in 2006, twenty months before the planning application was decided in 2008.

126. The question I need to ask is 'but for' the fault would a planning officer have refused planning permission.

127. Loss of amenity to a storage area will have less weight than loss of amenity to a residential space. The space was served by borrowed light from a side window with light also partially obstructed by a staircase. I cannot say a planning officer in full knowledge of the facts would have refused the planning permission in 2008 and 2011. The development was considered an improvement on the street scene in a conservation area. The planning officer would have balanced the benefits of the development against the objection by Mr and Mrs X of loss of amenity. That Mr and Mrs X may have intended to use the premises for residential use in future should have been taken into consideration by the Council's planning officers in 2008 and 2011, and specifically addressed in the report, but this would not have carried as much weight as a property in current residential use, particularly as it had been removed from the Council tax list in 2006.

128. I consider it would have been within the range of decisions a planning officer could reasonably have made to have granted permission for the development,

particularly if the impact on Mr and Mrs X could have been offset (for example by the developer agreeing to fund moving the boiler and a new light source to the storage area). The Council would also have found it more difficult to defend an appeal about a refusal of planning permission on loss of amenity to a store room alone.

129. I also consider it unlikely a Council would decide to revoke or modify a planning permission and incur substantial compensation where the loss of amenity was to a storage area.

130. While I find fault in the way the planning decisions in 2008 and 2011 were reached, I am not persuaded that had the decision been made without fault, the outcome would have been that development would have been refused.

131. I do consider that, on the balance of probabilities, if the Council had handled the application properly it would have been able to negotiate with the developer to offset the impact to Mr and Mrs X before their window and gas flue were blocked, in the same way it did in negotiating the later amendment.

Loss of amenity

132. Mr and Mrs X say they have been left with a sitting room in their flat where the only window has been blocked and the gas flue has been blocked. They say this will adversely affect the value, amenity and safe use of the flat.

133. I find that the premises were not being used as a flat from 2006, twenty months before the first planning application to block the window and gas flue. That it was removed from the Council Tax list means Mr and Mrs X must have told the Valuation Office it was no longer being used for residential purposes and would be unlikely to return to such use. It was still not in residential use in 2013 (when the development blocked the window at first floor level).

134. I agree with the Council the loss of amenity to a store room is a lesser injustice than loss of amenity to a habitable room which was in current residential use. While Mr and Mrs X say they always intended to return the space to residential use the Council would have been entitled to assess the planning permission on the situation as it was in 2008 or 2011.

135. Mr and Mrs X are now pursuing legal action against the second developer for the same loss of amenity / injustice they allege the Council has caused. They have also told me they do not wish to seek a financial remedy from the Council. I therefore do not need to consider the matter of any outstanding injustice further.

Agreed action

136. Within four weeks of my final decision I recommend:

- the Council apologise to Mrs and Mrs X for the faults in the planning application and complaint process I have identified above;
- the Council pay Mr and Mrs X £300 to reflect the unnecessary additional time and trouble experienced by them during the protracted complaint process.

137. Within eight weeks of my final decision the Council will review the lessons to be learnt from this complaint. The Council should consider whether officers require further training or guidance material to ensure a similar error does not occur in future. The Council has told me it has already started this process of improvement.

Final decision

138. There was fault in the way the Council considered an application for planning permission in 2008 and 2011 and in its subsequent handling of Mr and Mrs X's complaint about loss of residential amenity.

139. This caused Mr and Mrs X injustice through an unnecessarily protracted complaint process but I cannot say, on the balance of probabilities, if the Council had considered the planning application without fault, it would have refused the application or the development would not have been built. I do consider it likely that a scheme which offset the impact to Mr and Mrs X would have been negotiated. While it was fault that the Council did not address Mr and Mrs X's amenity at the outset, it has tried to achieve a remedy for Mr and Mrs X subsequently through conditions added to an amendment to the planning permission. Mr and Mrs X declined to engage with the solutions offered or mitigate their loss.

Investigator's decision on behalf of the Ombudsman