

Council – 8 April 2013

Local Government Ombudsman – Report on an investigation into complaints 10 008 980 and 10 012 328 against Walsall Council

Service: Regeneration

Wards: All Wards

1. Summary

- 1.1 The Local Government Ombudsman has issued a report of maladministration following an investigation into two complaints made by local residents concerning matters relating to planning and development in respect of premises close to their homes. The Ombudsman's report is attached, for Members' consideration.
- 1.2 Section 30(3) of the Local Government Act 1974 requires the Ombudsman to issue reports such as this without naming or identifying the complainants or other individuals. Likewise the report does not identify the location of the premises in question. Some Members will know, or may recognise, the location of these premises; however, in considering the present report tonight, they should avoid revealing details which the Ombudsman has anonymised in her report.

2. Recommendations

- 2.1 Council is recommended to consider the content of the Ombudsman report and note the recommendations.

3. Report detail

- 3.1 The council received two complaints from the Ombudsman in December 2010. The Ombudsman summarised the complaint at that point in time as being that the Council had failed to prevent (to date), over-development of a proposed nearby garage business that the complainants' feared would have a negative impact upon access to their homes and the safety of children using an area of open space, given that planning permission has been given for the garage to use a rear access road which crossed that space. The council provided a full response to the Ombudsman's initial enquiries on 19 January 2011
- 3.2 The Ombudsman's investigator visited Walsall in April 2011 to view relevant files, and subsequently he undertook a number of interviews. In the Autumn of 2011 the Ombudsman made further enquiries regarding the development, questioning whether it was a new building. The Ombudsman has subsequently followed developments in relation to the matter, including the considerations by the Planning Committee in March and July 2012, as set out in the attached report.
- 3.3 A draft report, setting out the facts of the case, was provided to the council in October 2012, seeking the council's comments.

- 3.4 The authority responded to the Ombudsman on 22 October. In that response the council acknowledged that the complainants had experienced a prolonged period of uncertainty in relation to activity and proposals for the future of the premises in question; that they had spent considerable amounts of their time and trouble pursuing their concerns about the premises with the council; and that they had been frustrated by the council's response to their concerns. In recognising that, an indication was given that the council would be willing to reach a satisfactory settlement of the complaints.
- 3.5 The Ombudsman issued the final report on 7 March 2013. In that report, the Ombudsman, after setting out the facts of the case, identified maladministration in relation to the initial enforcement investigation (paragraph 77 of the report); in the council's failure to keep the complainants informed in respect of those investigations (paragraph 78); in relation to aspects of the report prepared for the Planning Committee in August 2010 (paragraphs 81-84); and the failure to record the reasons for the Committee's decision to remove a proposed planning condition (paragraph 86-88); and subsequently in relation to the Planning Committee's meetings of March and July 2012 (paragraphs 94-95, and 96-97), and finally in relation to enforcement action to restore an area of the public open space to the rear of the premises (paragraph 98-99).
- 3.7 The Ombudsman has concluded that as a result of maladministration by the council, the complainants have been caused injustice "in the form of uncertainty about whether the outcome might have been different. In addition they will have a justifiable sense of outrage at how the Council handled these matters and were put to unnecessary time and trouble in pursuing their complaints". The Ombudsman has also criticised the council for "unacceptable delay in ... carrying out an enforcement investigation at the site and in seeking restitution of public open space which was developed without permission".
- 3.8 The authority has agreed to the remedy proposed by the Ombudsman. Paragraph 109 of the report notes that the council has:
- a) "taken ... enforcement action ... to ensure the public open space is restored to an acceptable condition;
 - b) reminded the developer of the need to submit a fresh planning application for the proposed use of the building on the site."

In addition the council has agreed to:

- c) "apologise to [the two complainants] for their injustice;
 - d) pay financial compensation of £1500 each;
 - e) consider whether three Councillors should take part in any decision-making for any application for use of the building on site; in order to restore the complainants' confidence in the planning committee's decision making."
- 3.9 I can confirm that letters of apology have been sent to the two complainants, enclosing cheques for the stated sum, and that the three councillors, members of the Planning Committee, to whom reference is made in the report, have been advised to take no part in relation to future proposals for the site, linked to the current situation, and have accepted this advice.

- 3.10 The Ombudsman will be advised that Council has considered the Ombudsman's report and findings following tonight's meeting.

4. Council priorities

- 4.1 Arrangements for considering and responding to complaints about council services, both the council's internal complaints procedures and externally through the Ombudsman, provide a means of reviewing our services, and of learning from complaints.

5. Financial implications

- 5.1 As noted above, financial compensation totalling £3,000 has been paid to the complainants.

6. Legal implications

- 6.1 The Ombudsman service was established by the Local Government Act 1974, to investigate complaints about council services by service users.
- 6.2 When a report is issued, the council concerned must place a notice in the local press advising residents that the report has been published and is available for inspection, and must arrange for the report to be submitted for Member consideration. Notices were placed in the *Walsall Advertiser* and *Walsall Chronicle* on 14 March 2013 indicating that the report would be available to view and read at the First Stop Shop on the ground floor of the Civic Centre, and at Walsall Reference Library for 3 weeks from 15 March. The report will be available until 12 April 2013 in this way. The report is also available on the Ombudsman's web site www.lgo.org.uk. The Ombudsman has been advised that the report would be submitted to this meeting of Council for consideration.
- 6.3 The Monitoring Officer has a personal duty under s5 and 5A of the Local Government and Housing Act 1989 to prepare a report to the relevant committee of the authority, namely council or cabinet depending upon the function where a proposal, decision, or omission by the authority, by any committee, or by any person holding any office or employment under the authority, has given rise to or is likely or would give rise to any such maladministration or failure as is mentioned in Part 3 of the Local Government Act 1974.
- 6.4 Where the Local Ombudsman reports that there has been maladministration in connection with the exercise of the authority's administrative functions, a failure in a service which it was the function of an authority to provide, or a failure to provide such a service. The report shall be laid before the authority concerned and it shall be the duty of that authority to consider the report, and within the period of three months beginning with the date on which they received the report, or such longer period as the Local Ombudsman may agree in writing, to notify the Local Ombudsman of the action which the authority have taken or propose to take.
- 6.5 The Council delegated authority to officers to settle complaints arising from reports of the Ombudsman on 13th September 2010. It is important to effect

speedy resolution of complaints in the interests of both the council and complainants, and this accords with the principles of natural justice and good practice. Ombudsman guidance also advises that the anonymity of the report as issued should be respected by the parties to the complaint.


7. Consultation

7.1 The Ombudsman service, through one of their team of investigators, has liaised closely with officers of the council, and with the complainants, throughout the investigation of this complaint.

As noted above, the council was consulted on the draft report, and given the opportunity to correct any factual errors.

Background papers: Ombudsman's Report 7th March 2013.

Signed:

A handwritten signature in black ink, appearing to read 'Anthony Cox', is centered on the page. The signature is written in a cursive style with a large 'A' and a long tail on the 'y'.

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Date: 26 March 2013

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Report

on an investigation into
complaint nos 10 008 980 & 10 012 328
against Walsall Metropolitan Borough Council

7 March 2013

Investigation into complaints 10 008 980 & 10 012 328 against Walsall Metropolitan Borough Council

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The Local Government Act 1974, section 30(3) generally requires me to report without naming or identifying the complainant or other individuals. The names used in this report are therefore not the real names.

Key to names used

Mr Ash and Ms Birch
 Councillor Q
 Councillor V
 Councillor X

the complainants
 a Member of the Planning Committee
 a Member of the Planning Committee
 a Member of the Planning Committee

Report summary

Subject

Planning and Development

In August 2010, the Council approved the development of a tyre and exhaust centre next to the complainants' homes. It incorrectly treated the application as being for an existing use on the site, as opposed to a new development. This meant it did not consider the application against relevant planning guidance. In 2012 Council members had two opportunities to approve enforcement action against the developer for the unauthorised new development. On both occasions they failed to consider properly the case for enforcement.

As a result of the above the Council decided not to take enforcement action against the developer, subject to the developer entering a legal agreement. It cannot be concluded the outcome would have been different but for the Council's failings. But the complainants were caused injustice in the form of uncertainty about whether the outcome might have been different. In addition they will have a justifiable sense of outrage at how the Council handled these matters and were put to unnecessary time and trouble in pursuing their complaints.

In addition the Ombudsman finds there was unacceptable delay in the Council carrying out an enforcement investigation at the site and in seeking restitution of public open space which was developed without permission.

Finding

Maladministration causing injustice; remedy agreed.

Recommended remedy

To remedy the injustice the Council has:

- a) taken the enforcement action described above to ensure the public open space is restored to an acceptable condition;
- b) reminded the developer of the need to submit a fresh planning application for the proposed use of the building on the site.

In addition it has agreed to:

- c) apologise to Mr Ash and Ms Birch for their injustice;
- d) pay financial compensation of £1500 each;
- e) consider whether Councillors Q, V and X should take part in any decision making for any application for use of the building on site; in order to restore Mr Ash and Ms Birch's confidence in the planning committee's decision making.

Introduction

1. Mr Ash and Ms Birch complain about the Council's handling of various matters associated with the development of a tyre and exhaust centre ('the development'). They complain about the following specific matters:
 - i. *Delay in undertaking a planning enforcement investigation carried out between February 2009 and February 2010.*
 - ii. *That a decision to approve the planning application failed to take all relevant factors into account.* The Council's planning committee approved development in August 2010. The complainants say that this failed to consider:
 - the extent of the building, which was in effect a "new build" and not a refurbishment of an existing building;
 - guidance within its local plan on car parking standards;
 - the impact on safety of allowing cars to exit the garage via the rear of the building;
 - the impact of the development on the amenity of neighbours.
 - iii. *At the removal of a specific planning condition by planning committee.* It deleted a proposed condition that would have required the developer to pay for the upgrade of the rear access to the site.
 - iv. *At the involvement of "Councillor Q".* The complainants noted repeated references on the planning file to 'Councillor Q', a member of the planning committee, having an unspecified interest in the development. They question if his contacts with officers were appropriate and his involvement in relevant committee meetings.
 - v. *The decision of the Council's planning committee not to take planning enforcement action in March and July 2012.* In March 2012 the committee did not follow the advice of Counsel and officers to take enforcement action seeking demolition of the development. In July 2012 the committee was asked to re-consider its decision and again decided not to take enforcement action against the developer.
 - vi. *That the Council has delayed taking enforcement action for unauthorised development on its land.* The developer built on land to the rear of the development site owned by the Council. The Council's Estate Department refused consent for him to do so. It has asked for reinstatement of the land, but delayed in enforcing this request.
 - vii. *That work on the development site has been subject to inadequate checking and supervision by Council Building Control officers.*

viii. *That the Council undertook an enforcement investigation into the use of a building behind Ms Birch's home.* She says this was unnecessary and arose only because she objected to the development next to her home.

2. During the investigation of this complaint, one of the Commission's investigators met with Mr Ash and Ms Birch to view the site and speak with them about their complaint. He also interviewed relevant officers of the Council, 'Councillor Q' and examined relevant files.

Legal and administrative background

3. The Council publishes local planning guidance for officers and members when considering planning applications. The guidance requires the Council to consider the impact of development on neighbours in respect of its visual appearance, the potential for noise (or other) pollution and impact on privacy. The guidance also requires the Council to consider the context of development in the surrounding area. Policies also encourage development with employment uses, especially within 'core employment areas'.
4. A specific policy, 'T13' sets out car parking standards for developments. For "*garages and vehicle repair workshops*", it recommends businesses provide five car parking spaces "*per service bay*".
5. Where a building has a pre-existing use, that 'use' can continue if the building is subject to repairs or changes (although planning permission may still be needed for such repairs or changes). However, case law suggests that where a developer demolishes a building and replaces it, they will need planning permission for both the new building *and* the proposed use. The extent to which a re-development of a building forms a new building will be a question of fact and degree for the Council to decide on a case by case basis¹.
6. It is not a criminal offence to develop land without planning permission. However, a council has discretionary power to take enforcement action through the civil courts, which can include requiring demolition of unauthorised buildings. The first step in this process is to serve an enforcement notice. A developer can appeal such a notice to the Planning Inspectorate which acts on behalf of the Secretary of State.
7. In deciding whether to take enforcement action the government gives advice in Planning Policy Guidance Note 18. This advises the key test the Council must apply is whether the development would unacceptably affect public amenity. A Council can encourage a developer to apply for retrospective planning permission for unauthorised development before serving an enforcement notice.

¹ See *Jennings Motors v Secretary of State for Environment* [1982] QB541

8. Section 106 of the Town and Country Planning Act 1990 allows a Council to enter into a legally binding agreement or planning obligation with a landowner in association with granting planning permission (a Section 106 Agreement). These agreements are a way of delivering or addressing matters that are necessary to make a development acceptable in planning terms.
9. At the beginning of events covered by this complaint the conduct of elected Councillors was overseen by a regulatory body, 'Standards for England'. This body oversaw a 'standards regime' whereby complaints that Councillors breached a national code of conduct were considered by a standards committee with the power to suspend members. Standards for England and the 'standards regime' were abolished in April 2012 and the members' code of conduct revoked. However, Councillors are still expected to declare any personal interest in business coming before them. Local authorities are also free to set their own codes of conduct and continue to operate standards committees if they choose.

Investigation

General background

10. Mr Ash and Ms Birch live on a main road that runs through the Council's area. Mr Ash lives two doors to the south of the development at the centre of the complaint and Ms Birch lives immediately to the north. Another resident who lives between Mr Ash and the development site supports the complaint, although they have not complained in their own right.
11. To the rear of the main road is an area of public green space. An un-surfaced driveway cuts across this, which gives access to the rear of some houses that front onto the main road. Mr Ash and others use the driveway. All of this land is in the ownership of the Council. So anyone wishing to use the driveway or build on the land must obtain a license to do so from the Council's Estates Department as well as any necessary planning permission.
12. Until 2006 a garage business traded from the development site. The garage ran from a single storey workshop building at the rear of the plot. In front of the workshop was a house dating from the turn of the century. The house was used separately as a television repair business, which closed around 2007. In front of the house was a small paved area with car access to the side for the workshop. This was the only access to the garage. To the rear of the house and in front of the workshop was also a single storey building with a pitched roof. In 2007 the plot was sold and the sales details described this as a studio flat.

The enforcement investigation February 2009 to February 2010

13. In February 2009 Mr Ash contacted the Council to advise that work was taking place on the development site, which began in August 2008. He told the Council

the developer was carrying out the following works:

- a partial demolition of the house to the front of the plot;
- building a higher roof on the workshop to the rear;
- fitting a roller-shutter door to the rear of the workshop;
- laying out hard standing to the rear of the plot after fencing off an area of the public open space and removing planting (i.e. on the Council owned land).

14. The Council began an investigation and in March 2009 it wrote to the developer. It said he needed planning permission for the works he was undertaking. It considered the roof works went beyond a 'repair' as they increased the height of the workshop; the roller shutters and hard-standing area to the rear required planning permission and that authorisation under the Building Act was needed for the partial demolition of the front building. The Council also said the whole of the site needed planning permission (as the garage usage took place only in the rear workshop previously).

15. The developer initially disputed the Council's position. They argued planning permission was not needed for what they described as minor changes to an established use of the site. But the Council reiterated its position in a letter to the developer's agent dated July 2009. Its Area Planning Manager said "*the whole building must be regarded as a new structure, because the remaining elements of the old building are insufficient to qualify the work as repair, or maintenance ...planning permission is required*".

16. The next significant action on the case was not until December 2009 when the developer appointed a new agent. The agent contacted the Council, which reiterated its previous advice. A planning application followed in February 2010 (see below).

17. While the enforcement investigation was continuing the Council did not contact either Mr Ash or Ms Birch regularly (Ms Birch contacted the Council in April 2009 about the development). However, it did provide updates for Mr Ash when he contacted it for information.

The planning application

18. In February 2010 the developer made a part-retrospective planning application. This only sought planning permission for:

"re-roofing, repair and alterations to rear element of current garage building; minor extensions to front of the building; formation of car parking area fronting [the main road] and formation of hard standing and access to the rear".

19. The developer's agent, in a letter accompanying the application described the plans as follows. The re-roofing was "*designed to follow the profile of the existing roof albeit taking the opportunity to regulate the shape of the original piecemeal roof profile*". Walls would be "*supported and where necessary replaced*". The letter said the "*vast majority of the building has been retained and repaired*". The letter explained the front of the garage building would also be "*projected forward*" by 2.5 metres. A drawing showed the proposed height of the development. This did not provide a comparison with the height of the original workshop.
20. The development proposed two service bays. The plans showed three car parking spaces. But the application form accompanying the plans stated there would be six to eight spaces.
21. A letter accompanying the planning application also suggested that cars using the site would access from the main road to the front of the development, and could exit from the rear on to the driveway behind. However, neither the statement nor the plans suggested the rear access would be only for exit.

Consultation on the planning application

22. The Council consulted Mr Ash and Ms Birch about the planning application and they made objections. They expressed concern at the extent of work carried out without planning permission by the developer; the impact of the plans on the driveway and the impact on amenity from noise and the increased height of the workshop. Ms Birch expressed concern in particular at how the new building would look from her house and garden. She gave a photograph to the Council showing this impact by way of drawing the outline of the finished building on the existing view.
23. The Council also consulted with various other Council Departments and outside organisations. The Council's Transportation Department raised no objections to the plans. It considered the proposed rear exit from the site would be an improvement on cars reversing on to the main road to the front of the site. Although the Department would not have objected if this arrangement was not proposed, "*as the site would operate as it does at present*". The response referred to there being eight car parking spaces noting the 'maximum requirement' of policy T13 as being for a provision of 10 spaces.
24. The Council's Estates Team raised no objection to the proposed rear access/exit as other properties along the road benefitted from access to the driveway. The Estates Team suggested it could grant a license for rear access/exit from the site.
25. West Midlands Police expressed some concerns about the proposed use of the driveway. It said this would be "*unsuitable for commercial vehicles as this would encroach on the safety of other users*".

26. After some enquiries, the Council's pollution control team confirmed it had no objection to the planning application, subject to a satisfactory condition to prevent noise pollution.

The planning officer's report

27. A planning officer prepared a report for the Council's planning committee, for consideration at a meeting in August 2010. The report noted the developer had undertaken work on the site. It said *"the rear two thirds of the workshop has been partially reconstructed, the height raised and a new roof put on, which matches the height and profile of the front third of the building"*. The report noted the plans included building a "small" two storey extension to the front of the rear building. The report noted the consultation responses and neighbours' objections. The Council has since commented the report should have noted "substantial" reconstruction of the workshop and not used the word "partial".
28. In the report, the case officer said that *"it is difficult to judge the overall height increase and changed roof profile"*. The report said historic photos showed a *"recognisable increase in height"* but that this would not have *"any additional adverse impact upon the amenities of adjoining residents"*. Addressing specifically the front extension, the officer said that *"this would be adjacent to [Ms Birch's house] and partially in line with the side gable of the house, [but] it would be no higher than the workshop building and would have no adverse impact upon the occupiers of [Ms Birch's house]."* When interviewed the case officer has expanded on their reasoning here. They explained that they judged the development would not be significantly larger than the original workshop and buildings on the site. So the impact of the development would not be significantly greater.
29. The report recommended the Council attach a condition to the planning permission requiring the upgrade of the un-surfaced access driveway to the rear *"to ensure a suitable surface"* for *"the increased use from a commercial activity"* and to *"define the vehicular route making it more visible to pedestrians and other users of the open space"*. The planning officer has explained that this was because of the objections by the police.
30. The report did not comment on car parking or the proposed building materials. It noted that a garage was a non-conforming use within the residential area, but was *"a use established over a number of years"*. And that *"whilst it is recognised that such a use may be better suited to an industrial area the use of the site has been established over a long period of time"*. The planning officer has said that at the time she viewed the site the development was incomplete and it was difficult to judge the extent of the building work carried out by the developer. She understood that new block-work walls would form only the 'inner skin' of walls that would have brick facing. And in addition some portions of the existing walls were still standing at that point, that were later demolished. The Council took the view that so long as the development was a renovation, then the site could continue to benefit from its

previous use as a garage. So the 'fall-back position' was the developer did not need to provide additional car parking or improved access/exit arrangements compared with the previous garage.

31. The report did not propose imposing a planning condition to enforce the proposed 'one-way' system referred to by the developer in the planning application. This was because the officer considered such a condition would not have been enforceable. In turn this was because Highways Officers would not have objected to the sole access point to the site as this was the pre-existing position on the site.

The committee meeting

32. The minutes of the committee meeting record that both complainants spoke in turn, objecting to the planning application. The developer's agent spoke next. The complainants have stated that this order of speaking went against the usual Council process; but other planning committee meetings have heard speakers in this order. The Council says it is up to the Chair of committee to decide in what order speakers appear. But usually objectors speak first so applicants have a chance to address their concerns in presentations.
33. Ms Birch wanted to show the committee the photograph showing how the roofline of the new workshop would appear from her garden. The committee did not allow this. The presenting officer at committee has said that this is because the Council does not allow photographs from developers and/or objectors that may be 'partial'; i.e. may be taken only from angles that are favourable to their case. The officer and the Head of Planning who were at committee have said that Ms Birch still highlighted her concerns about the height and increased length of the new workshop in her presentation. The presenting officer also said that he pointed members' attention to this issue. So members were therefore fully aware of the importance of this issue to her. Officers say the debate focused mainly on the impact the workshop would have on neighbours' amenities, although members also discussed car parking and policy T13.
34. The minutes of the committee meeting record that Councillor Q referred to the history of the site. He proposed "*that the application should be supported with proposed conditions limiting hours and days of operation.*" Councillor Q also motioned for the removal of the condition specifying the need for the developer to re-surface the access road to the rear. There was no recording of the reasons for this decision. But planning officers at the meeting and Councillor Q have since told the Commission's investigator it was because other residents used the driveway. So members considered it unfair to ask one potential user to have to pay for all the upkeep. Councillor Q also said that he considered such a condition would be vulnerable to removal at appeal, but that he felt the Estates Department could still condition any approval of the necessary license.

35. During the meeting, Councillor Q also raised a question about an outbuilding built to the rear of Ms Birch's home. He asked if it was used for commercial purposes. Photographs taken by the Council showing the development also showed this outbuilding. They showed a pile of tyres and two scrap cars outside the outbuilding. After the meeting the Council received an allegation that Ms Birch was using this as a commercial building without planning permission. The Council began a planning enforcement investigation into the allegation (see paragraphs 75 and 102).
36. The committee approved the planning application. Among conditions attached to the permission were conditions limiting the hours of operation as being 08.00 to 18.00 hours to exclude Sundays and Bank Holidays and one stating that *"noise from fixed plant machinery associated with this development shall not give rise to a rating level exceeding 5dB as determined in accordance with the methodologies contained in British Standard BS 4142:1997"*.

The involvement of Councillor Q

37. On 26 February 2009, in an internal council email, the enforcement officer considering complaints about unauthorised development on the site received an email from a colleague at Estates and Asset Management asking *"to keep Councillor Q informed from your point please"*.
38. In June 2009 Councillor Q presented a bundle of evidence from the developer, about the historic uses of land on the development site (Mr Ash and Ms Birch question some of this 'evidence' which is inconsistent with their recollection of living next to the development site).
39. An internal email dated 2 March 2010 refers to a conversation the Council had with Mr Ash updating him on its consideration of the development. One of its officers refers to *"Councillor Q's involvement"* in the case.
40. On 9 June 2010 the case officer sent an internal email seeking comments on the planning application which referred to *"interest from [Councillor Q]"*.
41. Before the planning committee the complainants saw Councillor Q speaking to the planning applicant and agent in first name terms, implying familiarity.
42. Ms Birch complained about the conduct of Councillor Q to the Council's Standards Committee. The Council's Standards (initial assessment of complaints) sub-committee met to consider her complaint in November 2010. It determined there was not enough evidence of a breach of standards by Councillor Q to refer the matter to full committee.
43. Ms Birch unsuccessfully appealed that decision in January 2011. The appeal committee also considered there was not enough evidence of a breach of standards by Councillor Q.

44. During this investigation the Commission's investigator interviewed Councillor Q. Councillor Q says that he met the developer several years ago. He also recalled the developer presenting an earlier planning application.
45. Councillor Q said he learnt of the demolition of buildings at the development site through a telephone call from someone who lives near the development site (not the complainants). He says residents in the Borough often contact him with concerns. He says that it was because of this contact that he first spoke to a Council Enforcement Officer encouraging an investigation.
46. Councillor Q said the developer later contacted him and expressed a view that he did not need planning permission. Councillor Q says that he agreed to pass on a bundle of evidence gathered by the developer to Council Enforcement Officers claiming to show the history of the site. Afterwards he says the developer rang him to express frustration at delay with the planning application and Councillor Q asked planning officers for an update. Councillor Q has said that he was keen to get the application in front of committee to consider the merits. But that he did not express a view on the planning merits of the application before committee. Planning officers involved in the events support this, saying Councillor Q never expressed a view on the merits of the application before committee. The planning case officer has said that because of the objections to the application they would have asked planning committee to consider the planning application in any event.
47. Councillor Q admits speaking to the developer and his agent before the committee meeting. He said this took place in a public waiting area in front of 20 to 30 witnesses. He said there was a handshake and that he made a joking reference to the circumstances where he had met the developer some years previously.

The licensing application

48. As noted above, to continue to use the driveway to the rear of the development site, the developer needs a licence from the Council to cross its land. The Estates and Asset Management Team which manages this land has been checking the site since March 2009 when it wrote to the developer asking him to "*vacate the land and reinstate the ground*" he fenced in. While the developer removed the fencing, the hard-standing initially remained and he did not replace uprooted bushes.
49. When considering the planning application, in March 2010 an officer from that department also commented that he considered the hard standing had a "*considerable negative effect upon the visual amenity and use of open space*". So the department would not support a licence application granting car access over the land. However, in April 2010 the officer changed his opinion. He considered a precedent had been set as other neighbouring properties had access over the land. Instead, the officer proposed the use of the exit route should be monitored and that its use should not be to the harm of the open space.

50. After the August 2010 planning decision the Estates Department negotiated with the developer over his plans for the access driveway. Mr Ash told it of instances where the developer's vehicles crossed over the open space without permission. Photographs appear to show deterioration in the condition of the driveway, which Mr Ash attributed to construction vehicles. In July 2011 the department resolved not to grant a licence after all to the developer due to "*concerns over the proposed intensification of use*". It later asked the developer on several occasions to remove the hard-standing built to the rear of the workshop and reinstate the land to its former condition. In September 2012 the Council initiated civil court proceedings to seek a mandatory injunction requiring the developer to restore the land to its previous condition.
51. Further to Court proceedings commencing the developer has taken steps to restore the land. The block paving was removed and turf relayed. Mr Ash and Ms Birch have raised concern about the quality of the work. They also note the developer has not built the land up to the previous level as required by the proposed injunction. Nor did the developer re-plant uprooted bushes (which the proposed injunction did not require). The Council has inspected the work and finds it satisfactory. It therefore withdrew from a court hearing and did not pursue the injunction. It considers restoring the land to its previous level might adversely affect the damp course on the new workshop. It also considers it is up to the developer if he wishes to re-plant hedging which was initially planted to deter balls being kicked against the rear of buildings backing on to the green space. The Council says "it will not hesitate" to take enforcement action again if the developer makes any further attempt to use the public open space.

Further consideration of planning enforcement action November 2011 onwards

Developments between November 2011 and March 2012

52. During this investigation both complainants expressed concerns the building materials used for building the development were not in accord with the approved plans. The developer's planning application had stated he would use 'brick and tiles' in construction of the development while the accompanying letter referred to a 'modern insulated roofing system'. The approved plans for development showed 'brick facing' walls and an area of 'block work'. The approved plans did not specify roofing materials.
53. By November 2011 the Council considered the development had not been built in accord with these plans. In particular the development was larger than on the approved plans and the development used unapproved metal cladding. The Council prepared a report for committee asking it to approve enforcement action in respect of these matters.
54. Mr Ash and Ms Birch also queried if the extent of the development meant that it was a new building needing planning permission as opposed to a renovation of an

existing building. When interviewed Council planning officers told the Commission's investigator that a judgement on what formed a new build had to consider evidence and the test was to consider how much of the pre-existing building remained. There were photographs on the Council's files that showed the 'old' workshop on the development site as well as the development while it was under construction. These photographs showed the developer kept only a small portion of the original workshop (a portion of one wall).

55. The Commission's investigator also queried therefore if the development was a new building. The Council withdrew the report due to go to committee in November 2011 so it could take advice from Counsel. He gave his advice to the Council in January 2012.
56. The opinion concluded the extent of the building work undertaken by the developer amounted to a new building on the site. Counsel noted that planning officers said the August 2010 report should have referred to there being "substantial" reconstruction of the rear building. And *"the view of both senior planning officers that there is little doubt that the building on the site is a new building"*. Counsel noted the development *"has a visual appearance externally generally very similar to the building as shown in the planning permission"*. But this was not because of repair and alteration of an existing building. The opinion also noted that some of the materials used in construction were not in accord with the approved plans, specifically the metal sheet roofing (as opposed to tiles) and construction of walls from breeze blocks (not bricks).
57. The opinion went on to say that as a result the building was unauthorised and that conditions applied to control the use of the land could no longer apply. Counsel considered the developer created a *"new planning chapter"* in the history of the site when they demolished the house to the front and replaced the workshop. He recognised this was *"an area of law fraught with controversy"* and quoted relevant cases giving opposing views before saying that he took the view that *"as a matter of fact and degree I do not consider that the use of the land for use as a garage for the repair and servicing of motor vehicles would survive such radical changes to building and the planning unit as have occurred"*.
58. The opinion considered next the potential expediency of enforcement action. It said that because the applicant had *"no fall back situation"* to rely on pre-existing lawful development rights *"this is likely to have entirely different policy considerations to the situation that would have prevailed in consideration of an application for repair and alteration of an existing building"*. In interviews with the Commission's investigator, Council officers have made similar statements and agreed their advice on the August 2010 application would have been different had they considered it as a new development. So while the Council could consider the history of the site and employment uses as material considerations when weighing the merits of a planning application, it would also have to consider the *"non-conforming"*

development in a residential area". The opinion suggested the Council invite the developer to make a retrospective application to cover the development on site or else the Council should seek enforcement requiring demolition. This would be justified as otherwise the development might run without planning conditions, as any conditions would only apply to the land next to the garage (a car parking area) and this use would be *"dependent on lawful uses that attach to a building that no longer exists"*.

59. Council officers were due to report this advice to planning committee in January 2012. They invited the developer to submit a retrospective planning application for the 'new' development. The developer declined and provided a letter from his agent which contested Counsel's advice. Among other things this referred to the *"long standing existence of a vehicle inspection pit"* in the development. Mr Ash and Ms Birch had reported extensive drilling at the site in February 2012 and photographs on the Council's file pre-dating this time show the developer filled in a pit before digging one out again.
60. The Council invited further legal advice. Counsel provided further advice explaining why their position remained unchanged. Officers gave this supplementary advice to planning committee on 29 March 2012 as well as Counsel's original advice. They asked the committee to authorise service of an enforcement notice that would require demolition of the development.

The March 2012 planning committee meeting

61. The Commission's investigator has listened to a sound recording of the meeting and considered the contemporaneous notes of the committee clerk and Council solicitor, as well as the official minutes. Members discussed the item for around an hour. The meeting began with officers summarising the legal advice. Members questioned them for around 30 minutes. Members asked several questions about the extent of the previous garage building still standing which officers said was *"insignificant"*. The solicitor advised that *"whether a building became a new building was a matter of fact and degree"*. Members also asked about potential costs should the developer appeal any enforcement notice.
62. Members then discussed the *"current development compared with what they approved in 2010"*. At least three commented the development appeared the same as what was approved in August 2010. One Councillor moved that *"there had been no significant changes in the fabric of the building in relation to height, width or massing"*. He proposed that it was not expedient for the Council to take enforcement action if the developer agreed to enter a Section 106 legal agreement to abide by the planning conditions imposed by the original permission. There was no discussion about the materials used in construction of the development.
63. Subsequent to the above meeting the Commission's investigator contacted the Council expressing some concerns. Specifically, he was concerned that members

of the planning committee did not appear to have considered the implications of Counsel's advice with regard to how a new building on the site might be considered under the Council's planning guidance; that there had been no discussion of the materials used in development and comments made during the meeting by Councillor Q. In response the Council obtained further advice from Counsel.

64. That advice was received in early July 2012. Counsel recommended the planning committee further re-consider the decision reached in March, *"so that there can be no doubt as to the basis of their decision and both the reasons for their decision and the effect of their decision"*. The advice said members were not obliged to come to a different decision. But that they should be clear that a new building with *"a distinctly industrial character"* would be contrary to local planning guidance. So it should not be permitted unless material planning considerations indicated otherwise. Counsel suggested some possible material considerations members could consider, to include:

"(i) The long history of employment use on the site and the benefits of retaining potential employment generating development on the site;

(ii) that there was an industrial building on the site of similar scale and bulk previously that has been replaced by the new building;

(iii) that the Council had previously granted planning permission for a scheme comprising alterations and repairs that would have created a building that was considered acceptable in terms of scale and bulk;

(iv) that the owner is prepared to give undertakings that would ensure a degree of protection of residential amenity, in the form of a section 106 obligation;

(v) that the building currently has a nil use and therefore any future business or industrial use, including use for the repair and maintenance of motor vehicles would require planning permission which could be considered on its merits, and granted, if acceptable, subject to condition."

65. The advice also explained that even if the planning committee decided not to take enforcement action against the building, the use of the building would still need to be subject to a separate planning application.

The July 2012 planning committee meeting

66. This advice was reported to the planning committee for its meeting on 26 July 2012. Members were recommended to re-consider the decision they reached in March 2012.
67. The Commission's investigator has listened to a sound recording of the meeting and considered the notes of the committee clerk, as well as the official minutes. The item was discussed for one hour forty minutes. The Council's Head of Development read through the report to the committee which reminded members of

the history of the development and quoted from the further advice received from Counsel. Members then received a presentation from a Council enforcement officer which included photographs showing 'before and after' pictures of the development site from a variety of angles, video clips and plans. Members then heard presentations from a local Ward Councillor who supported enforcement action, Ms Birch, the developer and his agent. Members then asked questions of the speakers, during which the Council's Head of Planning emphasised the view that the development was a new build and not, as understood in 2010, a renovation of an existing building.

68. There followed around 20 minutes of debate. Four members spoke during the debate. A member, Councillor V, proposed that the Council stand by its decision of 29 March 2012. In proposing the motion the Councillor said that he saw "*no significant changes*" from the building approved in 2010 and that "*it is a garage and has always been a garage*". He said that "*officers did not know what the criteria are*" when referring to what constituted a new build and the development was "*a reasonable continuation of a long-standing use*". Members resolved by seven votes to six to approve a motion that they:

"stand by the decision as recorded in the minute of the meeting of 29th March 2012 that there should be no enforcement action as Members felt there had been no significant changes to the fabric of the building in relation to height, width or massing, subject to the applicant entering into a Section 106 Agreement as substantially in the form of the draft attached in the report."

69. Another member of the committee, Councillor X has forwarded notes he made for the meeting. These say that he supported the motion not to take enforcement action in March 2012, and would do so again in July 2012, "to protect the good name" of members who approved development in August 2010.
70. The effect of the planning committee's decision is that subject to a Section 106 agreement being signed no enforcement action can be taken against the building. However, the Section 106 agreement will not authorise any particular use for the building (whether as a garage or anything else). So this will need to be subject to a further separate planning application.

Building Control matters

71. The Council's building control inspectors were first made aware of the development around the time the Council began investigating the planning issues (i.e. around February 2009). In April 2009 the developer submitted a demolition notice for the shop at the front of the site (already partially demolished). In June 2009 the Council told neighbours and the Health and Safety Executive of the notice received. But Mr Ash has questioned if the Council checked the demolition for safety.
72. The developer made an application in May 2011 for building regulation approval for the 'front extension' of the tyre and exhaust centre. The Council has said that it did

not investigate the building work on the rear portion of the site at this time. This was because the building “*appeared to have been there following works for some time beyond the scope of enforcement under the Regulations*”.

73. The developer submitted building regulation approval for the work at the rear of the site in June 2012. This followed a series of meetings in April and May 2012 where Council building control officers met with the developer and agents to discuss what application and information was needed. Among other things the Council has sought a structural engineer’s opinion on the fitness of the foundations of the development.
74. Between April 2009 and April 2012 the Council has a record of at least three complaints made by members of the public (from Mr Ash and others) expressing concern at the safety of building works undertaken. The Council has not yet decided if the development complies with building regulations, awaiting the results of the continuing investigation referred to above.

The enforcement investigation into the building behind Ms Birch’s home

75. In January 2011 Ms Birch met with Council officers following the allegation made that a business ran from the outbuilding to the rear of her property (the same matter raised during the planning committee meeting in August 2010). During the meeting Ms Birch explained that she felt victimised because of making objections to the development at the crux of this complaint. The Council’s enforcement officers explained their interest in the photographs showing damaged cars and car parts. Ms Birch provided an explanation for these and subsequently allowed inspection of the garage. In the light of this inspection, investigation into its use was discontinued.

Conclusions

The initial planning enforcement investigation

76. I recognise that from February 2009 onwards the Council made efforts to engage with the developer to establish the work taking place on the development. It reasonably came to the view the developer needed to make a planning application. It then had to engage with the developer to persuade them to co-operate in making such an application. It met resistance there outside its control. But its general approach was reasonable and in accord with government guidance.
77. However, the Council is open to criticism for the pace at which it conducted its initial planning enforcement investigation. It was not pro-active in pursuing a resolution with the developer between July and December 2009. The investigation into the development drifted for a time therefore. This was maladministration.
78. In addition, the Council also failed to keep in regular contact with the complainants. I consider this poor administrative practice. This too was maladministration.

The decision to approve planning permission in August 2010

79. The response of the Council's Highways Department to the planning application was unsatisfactory. Its response suggested there would be eight car parking spaces to serve the development. This was what the planning application and accompanying letter said. But the plans showed something different. So there was inattention to detail by that Department. The Council's Planning Department should have pointed this out and asked for further comments.
80. I note the police and neighbours objected to the proposed rear access to the garage. However, I could not say the Council was obliged to give a greater weight to those views than others. Nor would I criticise the Environmental Health Department's recommendation that a planning condition should address any concerns about noise arising from the decision.
81. However, I do criticise some of the content of the planning officer's report. First, as the Council recognises, the report understated the extent of the development. The Council should have considered if the developer's description of works matched the facts on the ground. In August 2010, the building work was clearly greater than the developer claimed. The photographs on the Council's files showed that by August 2010 the workshop had a new metal frame, a new higher roof and largely new walls. All of this had led the Council to advise the developer previously, in July 2009, the development was a new building. Following submission of the planning application, it could have sought further legal advice if there was any doubt about that. I recognise the Council now accepts members of the committee should have been told the changes to the site were substantial and not a 'partial' reconstruction of an existing building. But I do not think even this advice would have been enough. Officers should have told members the building was a new building and advised accordingly.
82. Second, the report did not comment on the planning policy 'T13'. There were clear discrepancies between the number of car parking spaces the developer claimed they would provide on the application form and the plans. Officers have explained their view about why, at the time, they considered there was no policy requirement for the development to provide ten car parking spaces. I understand this. But the report should have explained this also.
83. Third, there was also no comment on building materials. I consider the plans provided by the developer were inadequate here as there were potential discrepancies between what the developer said on the application form, in the covering letter and in the plans. The report failed to point this out to the committee.
84. The conclusions in paragraphs 79 and 81 to 83 lead me to decide the Council acted with maladministration when considering the August 2010 application.

85. I also noted the report recognised the 'new' workshop was higher than before and projected further forward. Ms Birch's amenity or enjoyment of her home and garden was likely to be affected by this. I questioned therefore the planning officer's view that the workshop would not have "any" extra impact upon her amenity. However, I was satisfied the officer took into account the Council's local planning guidance summarised in paragraph 3 of this report. Their professional judgment was that the impact of the 'new' workshop was insufficient to justify a recommendation of refusal when measured against that guidance. That was not unreasonable. So while I consider the officer could have better expressed their view on amenity, their consideration on this point would not justify a finding of maladministration.

The conduct of the planning committee meeting in August 2010 and removal of a planning condition

86. I have found no evidence to suggest the August 2010 planning committee failed to follow usual Council procedure for hearing speakers or presenting photographs. However, it would have been helpful for the committee to have seen Ms Birch's picture showing the 'in-fill' of the workshop roof across her garden. The Council will legitimately have concerns about the partiality of photographs presented by developers or objectors. But a fairer way for the Council to address this would be on a case by case basis, so that the Council only prevents the display of those photographs it finds to be partial.

87. I do not consider the removal of the planning condition was of itself administratively flawed. The issues about the fitness of the driveway for use by a business and payment for its upkeep could also be considered when considering a licensing application to cross the land. So it was not unreasonable for the Council to delete the condition to await a licensing application.

88. But there was no record made of the reasons for this decision. This was an important part of the audit trail. The failure to keep such a record was maladministration.

The involvement of Councillor Q

89. Turning to the specific involvement of Councillor Q in this application I understand why Mr Ash and Ms Birch have asked questions about his involvement. The record shows that he was a supporter of the planning application at committee and there are four references on the Council's planning file to Councillor Q having had an 'interest' in the case. It was legitimate for the complainants to bring these concerns to my attention.

90. But there is no evidence that shows Councillor Q has or has had any relationship with the developer that was inappropriate. Both Councillor Q and the officers we have interviewed were clear in their recollections that at no point did Councillor Q

express any view about the merits of the application before committee. There is no evidence to contradict this.

91. But the Council could still learn lessons here. It will be part of day to day business at the Council that elected members will seek information on planning matters from officers. It would be helpful for officers to briefly record the nature of such representations on the file. It may also be unwise for members of the planning committee to become involved in relaying messages for applicants or objectors on decisions that will come before them, or to appear on friendly terms with a developer or agent. These actions may give an appearance of bias. But the current regulatory regime does not prevent members having such contacts. So it is a decision for individual members and I can make no finding of maladministration in respect of Councillor Q's actions therefore.

The decision of the Council's planning committee not to take planning enforcement action in March 2012

92. Leaving aside the question of building materials, I accept that in March 2012 the development may have appeared similar to what members expected when they approved the planning application in August 2010. But what members had approved in August 2010 were changes to an existing building. They did not approve a new building.
93. Members were therefore aware that officers based their advice in August 2010 on a wrong understanding of the facts. Crucially officers took the view that a garage could operate on the site in any event under the previous use. So they did not consider the use of the building or give advice on that. If officers had correctly applied themselves to the facts in August 2010 their advice and that of consultees would have been different. They would have been looking at the development in a different policy context as the garage is a 'non-conforming use' in a residential area. They would have been obliged to re-consider their advice on the impact on amenity, highway safety and car parking. They would probably have recommended refusal.
94. It was not enough therefore for members just to rely on the resemblance of the visual appearance of the building to that approved in August 2010 to justify not taking enforcement action. It is a matter of clear public interest whether a new build development of this type is suitable in its current location. By not applying themselves to the implications of the development being a new development, the planning committee acted with maladministration.
95. I also find members failed to consider the building materials used in the development when considering the case for enforcement. In the report to committee, drawing on Counsel's advice, officers explained the differences between the building as built and how it appeared on the plans. Overall the effect was a building with a far more 'industrial' appearance than envisaged on the plans.

Members did not discuss this point as a separate issue. They should have done. Their failure to do so was further maladministration.

The decision of the planning committee in July 2012 to stand by its decision of March 2012

96. I find that despite being asked to reconsider the approach taken above members of the planning committee again failed to grasp the implication of the building being a new building when they considered this matter in July 2012. Councillor V who proposed the committee stand by its previous decision paraphrased the legal advice given to the Council over whether the development was a new building with the comment that “*officers do not know what the criteria are*”; i.e. a reference to there being absolute criteria on what constitutes a ‘new build’ as opposed to this being a matter of fact and degree. I find officers were clear in explaining why the building should be considered a new build and the Councillor’s statement suggests an out of hand dismissal of that advice. That was maladministration.
97. As there were not detailed contributions from the majority of members supporting the proposal, I cannot speculate what their reasons were for that support. But I note the contributions of Councillor V who proposed the motion and the content of the Councillor X’s notes referred to at paragraph 69 above. As the legal advice made clear it was open to the planning committee to stand by its earlier decision not to take enforcement action against the development. But it had to be clear there were sound material planning considerations to do so. However the argument put forward by the member who proposed the motion was muddled. He made remarks that clearly suggest he saw no distinction between the building and the use of the site despite the advice given to members that a clear distinction needed to be drawn between the two. It was not a valid planning reason to support the motion on the basis of protecting the “good name” of the planning committee. This consideration was irrelevant. These contributions are sufficient for me to find that when for a second time the committee approached the question of enforcement it again acted with maladministration.

The complaint the Council failed to take enforcement action in respect of unauthorised development on its land

98. The Council waited nearly three years before taking formal enforcement action against the developer for fencing off its land and proceeding to uproot planting and lay an area of hard-standing without any permission to do so. This was also over 12 months since it refused the developer a licence to use the land for access to the garage.
99. In these circumstances Mr Ash and Ms Birch were right to question why the Council had not done more to protect the public open space behind their home. The Council’s failure to act more quickly here was maladministration.

100. However, I am satisfied the land has now been restored to an acceptable condition. I accept it has not been restored exactly how it was before as the developer did not restore the level of the returned land or re-plant bushes. But I accept this would not be necessary to restore the appearance of the land as a public open space. So it was not unreasonable for the Council to vacate the injunction proceedings.

The complaint that works on the development site were subject to inadequate monitoring and supervision by Council Building Control officers

101. I consider the Council may want to reflect on whether it could have done more, sooner, to ensure any building work from the developer met required standards. However, I am satisfied the Council eventually ensured the developer made the proper applications and it continues to scrutinise the building work. So I will not further investigate or criticise the Council's performance in this regard.

The complaint about the enforcement investigation into the building behind Ms Birch's home

102. I understand why Ms Birch regarded the use of the building behind her home to be irrelevant in terms of the decision in front of the committee in August 2010. It may be the committee meeting was not the best place to raise questions about this. But the photographs seen by committee showed a possible commercial use. While this may have been of limited relevance to the matter under discussion, I could not say it was irrelevant. And given the evidence of the photographs I cannot criticise the Council for launching a subsequent enforcement investigation into the use of the building behind her home. So these are not matters I can pursue.

Injustice arising from maladministration

103. I consider because of the maladministration identified in paragraph 77 and 78 above the complainants were put to unnecessary time and trouble in chasing the Council to reply to their enquiries about the unauthorised development between April 2009 and February 2010.

104. I consider because of the maladministration set out in paragraphs 79, 82 and 83 the complainants will have some justified outrage the Council did not handle the planning application better. But paragraph 81 identifies the major flaw. Because officers did not give members correct advice that the development was a 'new build' all the advice they received on the merits of the planning application was based on a mistaken presumption. But for this presumption officer's advice would have been different. Members would have most probably been recommended to refuse planning permission given the residential setting. However, on balance I consider it unlikely members would have followed that advice. Nonetheless the complainants have been caused uncertainty.

105. That uncertainty has then been compounded by the failings of the planning committee set out in paragraphs 94 to 97 above. Opportunities were missed to ensure the merits of the development could be considered in the proper policy context. Members were not obliged to approve enforcement action by officers at the March 2012 or July 2012 committee meetings. But by not authorising enforcement action, members prevented consultation with the public and statutory bodies and/or failed to conduct a proper analysis of the advantages and disadvantages of development against the correct local planning guidance. Because only as a consequence of authorising enforcement action would that take place; either as a result of the developer submitting a retrospective application or by the developer appealing enforcement to the Planning Inspectorate. Had they applied themselves correctly to the issues it must be considered more likely than not that enforcement action would have followed. This leaves open a variety of possibilities. The development may have been demolished. Or it may have been approved with conditions mirroring the proposed Section 106 agreement. Or approved with a different appearance or more restrictive conditions.
106. The complainants will have been caused further outrage by the Council's failure set out at paragraph 99 to act more quickly to protect the public land behind their homes.
107. No significant injustice arises from the fault identified in paragraph 88 as I consider the Council was entitled to delete the relevant planning condition.

Finding

108. Maladministration causing injustice remedy agreed.

Recommended Remedy

109. To remedy the injustice the Council has:
- a) taken the enforcement action described above to ensure the public open space is restored to an acceptable condition;
 - b) reminded the developer of the need to submit a fresh planning application for the proposed use of the building on the site.

In addition it has agreed to:

- c) apologise to Mr Ash and Ms Birch for their injustice;
- d) pay financial compensation of £1500 each;
- e) consider whether Councillors Q, V and X should take part in any decision making for any application for use of the building on site; in order to restore

Mr Ash and Ms Birch's confidence in the planning committee's decision making.

110. I have asked the Council to confirm to me within two months of the date of this report that these remaining actions have been completed.

A handwritten signature in black ink, appearing to read 'J Martin', with a horizontal line underneath.

**Dr Jane Martin
Local Government Ombudsman
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7 March 2013