

# Report

on an investigation into  
complaint no 04/B/16079 against  
the London Borough of Croydon

13 June 2007

# **Investigation into complaint no 04/B/16079 against the London Borough of Croydon**

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## **Key to names used**

|           |   |                             |
|-----------|---|-----------------------------|
| Mr Burns  | - | The complainant's agent     |
| Ms Bailey | - | The complainant             |
| Mr Gordon | - | The complainant's neighbour |
| Officer A | - | Planning officer            |
| Officer B | - | Solicitor to the Council    |

## Report Summary

### Planning

In 2001 a neighbour of Ms Bailey (not her real name) commenced building work at the front of the adjoining property. This included the construction of a wall and a new flight of steps and the undercutting and excavation of the foundations of the driveway and garage of Ms Bailey's property, including a party wall. When the work was reported to the Council, it failed to record accurately details of the site and the works carried out. This failure to ascertain adequate facts in 2001 meant that it incorrectly advised the neighbour that the work did not require planning permission at that time.

In April 2003 Ms Bailey took her own proceedings under the Party Wall etc Act 1996. She would not have considered it necessary to take her own legal proceedings if the Council had dealt promptly and appropriately with the development affecting her home. Two years elapsed between the Council's earlier advice that no permission was needed and its subsequent correct advice which eventually resulted in the submission of a planning application, which the Council refused. The Council accepts that there was a delay in concluding that a breach of planning control had occurred.

### Finding

Maladministration causing injustice.

### Recommended remedy

That the Council make an *ex gratia* payment of £2,000 to Ms Bailey, plus £4,268 which represents a 50% contribution to her un-recovered legal and professional costs.



## Introduction

1. Mr Burns, of James Burns and Associates Limited, complained on behalf of his client, Ms Bailey, that the Council failed to take enforcement action or enforce Building Regulations against unauthorised development at the property next to Ms Bailey's home. In particular, he complained that the Council:
  - i) failed to carry out an instruction given by the Development Control Committee regarding enforcement;
  - ii) wrongly told Ms Bailey that works did not require either planning permission or approval under Building Regulations;
  - iii) failed properly to investigate the circumstances of the case and to reach correct conclusions;
  - iv) failed to reply to letters; and
  - v) broke promises.
2. One of the Commission's officers has made enquiries of the Council. The complainant and the Council were invited to comment on the draft of this report before the conclusions were written. I have taken account of their comments in preparing the final text and reaching my conclusions.
3. For legal reasons the names used in this report are not the real names of the people concerned.<sup>1</sup>

## Legal and Administrative Background

4. Significant development can be carried out without planning permission if it falls within the definition of 'permitted development'.<sup>2</sup> Where development does not fall within that definition planning permission is required.<sup>3</sup> Development which does not constitute permitted development includes the erection or construction on land not adjacent to the highway of any gate, fence, wall or means of enclosure where the height of that construction would exceed two metres above ground level.<sup>4</sup> The carrying out of development without the required planning permission constitutes a breach of planning control.<sup>5</sup>

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1 Local Government Act 1974, Section 30(3)

2 Town and Country Planning (GDPO) Order 1995, Schedule 2

3 Town and Country Planning Act 1990, Sections 55 and 57 (as amended by the Planning and Compensation Act 1991)

4 Town and Country Planning (GDPO) Order 1995, Schedule 2

5 Town and Country Planning Act 1990, Section 172(3) (as amended by the Planning and Compensation Act 1991)

5. If a council considers there has been a breach of planning control and that it is expedient to do so, it may issue an enforcement notice. Such a notice should be served on the owner and occupier of the land concerned, and should set out what the council considers to be a breach of planning control and what the person on whom it is served should do to put matters right.<sup>6</sup> This may include submission of a planning application to regularise the work, as a council may grant planning permission retrospectively even if development has begun. An occupier or other person having an interest in the land may appeal to the Secretary of State against the notice.<sup>7</sup>
6. The council may also consider serving a Stop Notice, usually at the same time or following an Enforcement Notice. This is designed to prohibit activity immediately (or more usually within three days) in the interests of safeguarding amenity or public safety or to prevent serious harm to the environment.
7. If the breach of planning control concerns building, engineering, mining or other operations, enforcement action may not be taken more than four years after the development took place.<sup>8</sup>
8. The Government has issued policy guidance on the enforcement of planning control.<sup>9</sup> This includes the following:
  - the Government's view is that the integrity of the development control process depends on the council's readiness to take effective enforcement action when it is essential;
  - rapid initiation of enforcement action is usually vital to prevent a breach of control from becoming well established and more difficult to remedy;
  - in considering an enforcement action the council should decide whether the breach of control would unacceptably affect public amenity or the use of land and buildings which should be protected in the public interest;
  - action should be commensurate with the breach of planning control to which it relates (for example it is usually inappropriate to take formal enforcement action against a trivial or technical breach of control which causes no harm to amenity in the locality).

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6 Town and Country Planning Act 1990, Sections 172 and 173 (as amended by the Planning and Compensation Act 1991)

7 Town and Country Planning Act 1990, Section 174 (as amended by the Planning and Compensation Act 1991)

8 Town and Country Planning Act 1990, Section 172(4) (as amended by the Planning and Compensation Act 1991)

9 PPG 18 'Enforcing Planning Control', December 1991

9. The Building Regulations<sup>10</sup> exist to ensure the health and safety of people in and around all types of buildings. The definition of 'Building work' in the Regulations<sup>11</sup> includes alteration projects which temporarily or permanently affect the ongoing compliance of the building with requirements relating to structure or use of buildings. It also includes the underpinning of the foundations of a building. In order to enable the council to ensure that building work is carried out in accordance with the relevant regulations, a person who intends to carry out such work must either serve a notice on the local authority or deposit full plans with the authority.<sup>12</sup> Complying with the Building Regulations is a separate matter from obtaining planning permission. The Building Act 1984 is the enabling Act under which the Building Regulations have been made, and powers to enforce the Building Regulations, including powers to deal with dangerous structures, are contained in that Act.<sup>13</sup>
10. The Party Wall etc Act 1996 provides a framework for preventing and resolving disputes in relation to party walls, boundary walls and excavations near neighbouring buildings. The Act describes a wall as a party wall if it stands astride the boundary of land belonging to two (or more) different owners. This legislation allows for private action between individuals and does not involve the council in its role as planning authority or enforcer.
11. This Council operates a two-stage complaints procedure. At Stage 1 complainants receive a written response from the manager of the section responsible for the service about which the complaint has arisen. At Stage 2 a review of the Stage 1 investigation and response is carried out under the supervision of the director of that department and re-investigated if appropriate. The final response will tell the customer how to complain to me.

## Investigation

12. Ms Bailey lives in a three-bedroomed, two-storey, semi-detached property. Prior to any alterations being carried out, Ms Bailey's property was a mirror image of its adjoining neighbour, each being elevated from the public highway, with a projecting front garage with inclined driveway and a flight of stairs giving access from the highway to the dwelling. In 2001 building work commenced at the adjoining property. The works comprised excavation of the garden and steps; construction of a new flight of steps; excavation of the driveway to form a level surface for a new large projecting front garage; the construction of a wall to the front face of the existing garage; and the undercutting and excavation of the foundations of the driveway and garage of Ms Bailey's property including the party wall.

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10 Building Regulations 2000

11 Building Regulations 2000, Regulation 3

12 Building Regulations 2000, Regulation 12

13 The Building Act 1984, Section 77

13. The Council received an anonymous complaint about this building work on 11 June 2001. Officer A, a Planning Officer, visited on 14 June 2001. His notes of that visit record that construction work was taking place and a breeze block wall was being constructed over two metres in height. The owner of the property, Mr Gordon, was not at home and a return visit was made on 21 June 2001. Officer A's notes from that date state that a retaining wall was being erected which was "at most" two metres above ground level. He took some photographs. Officer A then discussed the works with Officer B, the Council's Legal Officer, and noted in the file that they agreed the works being undertaken did not constitute development requiring planning permission.
14. Ms Bailey made enquiries of the Council by telephone in January 2002 about excavation at the front of the property. The Council visited but found no changed circumstances from its previous visit. The Council advised Ms Bailey that there was no breach of planning control. It told her that this was a private civil matter between herself and her neighbour and that she should take action under the Party Wall etc Act 1996. In April 2003 the Council received a structural report commissioned by Ms Bailey on the works being undertaken next door and their effect on her property. Ms Bailey also appointed a solicitor who in turn appointed chartered surveyors to advise whether prior notice should have been given to her by her neighbour under the Party Wall etc Act 1996. The surveyor said the works were notifiable under the Act and expressed concern about building control issues: the extent of foundations on or near the party wall and their adequacy; the extent of any underpinning beneath the party wall between the garages and the method by which it had been carried out; and whether it was intended to use the garage as a habitable room. On 2 April 2003 Building Control Officers identified that some of the works which had been carried out required Building Regulations approval, namely the partial underpinning of the garage to Mr Gordon's property. Mr Gordon was advised to submit a Building Regulations application. From discussions with Mr Gordon the Council established that the underpinning had been done and further work was planned which would also need approval, namely the conversion of the garage to a habitable room. The Council was satisfied that none of the works carried out to this point constituted a dangerous structure under the Building Act 1984.<sup>14</sup>
15. In April 2003 Ms Bailey took legal action against her neighbour under the Party Wall etc Act 1996 and the Court granted a restraining order preventing further works. Ms Bailey's surveyor informed the Council that development was taking place without permission. A site visit was undertaken on 29 April 2003 and a further photograph was taken. New steps had been constructed behind the retaining wall on the south side of the hardstanding and the temporary stairs had been removed. On 2 May 2003 Officer A again spoke to Officer B. On this occasion Officer B said that in order to evaluate the matter properly she needed to know what the site was like before any works had been carried out. The Council then obtained from Ms

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14 The Building Act 1984, Section 78

Bailey the estate agent's details for her property from the year 2000, which showed the relevant part of the adjoining property.

16. The Council conducted a further site visit on 17 June 2003. More photographs were taken and these were referred back to Officer B with the evidence submitted by Ms Bailey's surveyor. Officer B then reached the view that what had taken place was an "engineering operation" and that planning permission was needed for the development. The Council then invited Mr Gordon to submit a planning application to regularise the work being carried out.
17. An application for planning permission for the construction of a new garage with associated landscaping was submitted by Mr Gordon on 3 September 2003 and amended to correct some inaccuracies on 6 October 2003. Ms Bailey was notified and she objected. The application was dealt with by officers under delegated powers in November 2003 and it was refused on grounds of hazard to pedestrian safety because of inadequate visibility splays. There was no decision to take enforcement action against the works already undertaken. A revised application was submitted on 16 January 2004. This differed from the previous proposal in that the garage was set back a further metre from the footway, which was to be achieved by digging deeper into the bank at the rear.
18. In February 2004 Ms Bailey had noticed cracks appearing in her garage wall and she complained in writing to the Council on 17 February 2004 that this was the result of the building works next door. She requested enforcement action be taken. She received no reply. She wrote again on 13 April 2004 and received only an acknowledgement. She wrote again on 17 May 2004 and on 21 May 2004 the Council responded, saying that it had treated her earlier letters as a Stage II complaint under its corporate complaints procedure. The Council advised Ms Bailey that a second application had been received to regularise the works carried out to date and seek permission for the proposed works. The response Ms Bailey received stated:

"I can see from the files that our initial view was that planning permission was not required for the works carried out and I am sorry that as a result you have been subject to a lengthy period of uncertainty and concern. With the benefit of better knowledge of how the land was before any works started, a planning application could have been requested sooner."

The application was referred to the Development Control Committee with a recommendation for approval. The Committee conducted a site visit on 17 July 2004. The application came back to Committee for determination on 22 July 2004 when it was refused on the grounds that it was out of keeping with the pattern of development and detrimental to the visual amenity of the street scene. The Committee recommended that officers look at the question of reinstatement of the site through enforcement action. Mr Gordon appealed against the decision to refuse planning permission.

19. In October 2004 Ms Bailey contacted the Council to ask if a Stop Notice had been served as works were continuing at the neighbouring property. The Council visited and found no evidence that any work was being carried out, but agreed that an Enforcement Notice should be served to prevent development becoming lawful after four years. Preparation began in January 2005 and the first Notice (requiring the owner to reinstate the drive, walls and garden) was served on 8 March 2005 with nine months for compliance. This timescale was to reflect the time which might pass before the planning appeal would be decided. The planning appeal was dismissed by letter dated 31 March 2005.
20. The Enforcement Notice served was inaccurate, as the map extract showed the wrong property. A corrected Notice was issued on 8 April 2005. The alleged breach of planning control was “development without permission involving engineering works, changes to land levels and the erection of a walled enclosure over three metres high”. The Notice required Mr Gordon to reinstate the slope on the drive in front of the garage to the same height as Ms Bailey’s drive; to reinstate the retaining walls and steps to that which existed prior to the commencement of the development; to return the soil to reinstate the natural slope to the right hand side of the garage; and to complete the development in materials to match the existing.
21. Mr Gordon appealed against the Enforcement Notice. On 20 January 2006 the Inspector appointed by the Secretary of State to determine the appeal found that development requiring planning permission had taken place and that the works were out of keeping with the character and appearance of the surrounding area. The Inspector dismissed the appeal and upheld the Enforcement Notice.

**Complaint to me**

22. Ms Bailey was dissatisfied with the Council's response to her complaints and so instructed her agent, Mr Burns, to complain to me.
23. Ms Bailey stated that the Council's failure to deal promptly and appropriately with the development at the neighbouring property meant that she needed to take her own independent planning and legal advice (and subsequently legal proceedings). Professional costs incurred by Ms Bailey since 20 June 2003 amount to £8535.25, made up as follows:

|   |          |
|---|----------|
| First firm of solicitors                      | £4204.75 |
| Second firm of solicitors                     | £705.00  |
| Planning consultant                           | £2303.00 |
|   | -----    |
| Sub total                                     | £7212.75 |
|   | -----    |
| Plus costs not recovered in legal proceedings | £1322.50 |
|   | -----    |
| Grand total                                   | £8535.25 |
|   | -----    |

A detailed breakdown of these costs has been provided to the Council. In addition to legal and professional costs, Ms Bailey suffered distress and anxiety caused by uncertainty about how and when the matter might finally be resolved and her confidence in the safety of her home restored.

24. In responding to my investigator's enquiries, the Council acknowledged that the level of the hard-standing was unchanged between June 2001, when it concluded that the works did not constitute development, and June 2003, when it concluded that the works did constitute development and that planning permission was required.
25. The Council's records show that on 17 June 2003 Officer B stated that the photographs taken by Officer A clearly showed that what had taken place was an engineering operation. Officer B stated that when she was consulted in 2001 the extent of the excavation was not identified as an issue and she was not asked to advise on it by Officer A. However, when the matter was referred again in 2003 the focus of attention was on changes to the land levels.
26. Ms Bailey says that at the time the Council first visited the site work was not as advanced as the Council subsequently claimed. She says that the excavation to the front of the neighbouring property had been undertaken but that excavation affecting the foundations and her driveway had not yet begun. On the other hand, the Council says that the work on site had progressed to a stage of substantial completion. The Council has produced photographs purporting to evidence this but these are undated and there is no evidence of when they were taken. Ms Bailey on the other hand says that she has a clear recollection of the position and has put forward the names of two neighbours to verify it. My investigator made enquiries with them but they were unable to pinpoint clearly, so long after the event, exactly when the work began and how substantively completed it was by 14 June 2001.
27. In commenting on the draft of this report, the Council said that it accepted that there was a delay in concluding that a breach of planning control had occurred. But the Council did not accept the outcome of this delay was that Ms Bailey had to consider her own legal proceedings under the Party Wall etc Act 1996.

## **Conclusions**

28. The Council needed to consider whether the works on site included any development which fell outside the definition of 'permitted development' and therefore needed planning permission. Relevant factors in determining the need for planning permission included the height of any new walls above ground level, the extent of any engineering works, and any changes to land levels. If any new wall exceeded two metres above ground level, it would require planning permission.
29. When the Council's planning officer first visited the site on 14 June 2001 he recorded that the wall which was being constructed was over two metres in height. When he returned on 21 June 2001 he recorded that the wall was "at most" two metres in height. The file records of those visits do not show that any measurements were taken or indicate how the officer reached his views on the

height of the wall. Given the significance of the information, that was maladministration. The failure accurately to record details of the site and the works at each visit led to uncertainty about the facts of the case.

30. When the Council's legal officer was first consulted in 2001 she was shown a photograph of the site and decided that planning permission was not required. She did not seek any additional information at that time about what the site had been like prior to the commencement of any works. But when the case was referred to her again in 2003 she said that in order to evaluate the matter correctly she needed to know what the site was like before any works had been carried out. The Council accepts that there was no change in the level of hard-standing on the site from June 2001 to June 2003, and has referred to its earlier opinion as having been incorrect. The Council has provided no evidence that it sought to obtain from Mr Gordon information about the intended scope of the works when it first came to its attention in 2001: it does not appear to have done so until 2003. The Council's failure to assess work at the site in 2001 was maladministration. It meant that it incorrectly advised Ms Bailey that the work did not require planning permission.
31. On receipt of this incorrect advice Ms Bailey instigated her own legal proceedings under the Party Wall etc Act 1996. The evidence as to how far work had progressed at the time of the Council's visit in June 2001 is inconclusive. It may have been the case that Ms Bailey's private action was essential to protect her interests at that stage. But she may not have taken this action if she had been told the true position by the Council and if the Council had dealt promptly and appropriately with the development affecting her home. Even if she had taken proceedings to protect her interests the parties involved may have been able to reach a conclusion in respect of an award of costs, given the Council's action against the developer. And it is quite possible that the proceedings would have been shorter and less costly. So it seems reasonable to conclude that some of her irrecoverable costs against the developer could have been avoided. Two years elapsed between the Council's earlier advice that no permission was needed and its subsequent correct advice which eventually resulted in the submission of a planning application which the Council refused. Over this period it seems to me that Ms Bailey suffered avoidable distress and anxiety from believing that the Council was not in a position to assist her; and the Council's enforcement action was also delayed by two years.

## **Finding**

32. I find maladministration by the Council for the reasons given in paragraphs 29 and 30, causing the injustice I identified in paragraph 31. I recommend that the Council make an ex gratia payment of £2,000 to Ms Bailey, plus £4,268 which represents a 50% contribution to her un-recovered legal and professional costs.

**J R White  
Local Government Ombudsman  
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**13 June 2007**