

**TO: EXECUTIVE  
10 FEBRUARY 2015**

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**SUSTAINABLE HOMES ASSESSMENT – OMBUDSMAN DECISION  
Monitoring Officer/Head of Paid Service**

**1 PURPOSE OF REPORT**

- 1.1 This report is to appraise the Executive of a decision by the Local Government Ombudsman (“the Ombudsman”) that there was maladministration in the provision of a consultancy service provided by the Council in connection with a Sustainable Homes Assessment.

**2 RECOMMENDATION**

- 2.1 **That the report of the Executive to be prepared pursuant to Section 5A of the Local Government and Housing Act 1989 specify:-**
- (a) that no action has been taken or is proposed to be taken in response to this report, and
  - (b) that no action has been or is required to be taken as the pilot consultancy service which was the subject of the Ombudsman’s decision has been discontinued.
- 2.2 **That the draft report of the Executive attached as Annex A to this report be approved.**

**3. REASONS FOR RECOMMENDATIONS**

- 3.1 As apparent from Section 5 of this report.

**4 ALTERNATIVE OPTIONS CONSIDERED**

- 4.1 None.

**5 SUPPORTING INFORMATION**

The Statutory Framework

- 5.1 The Ombudsman Service was established by the Local Government Act 1974. Any person who feels aggrieved in the delivery of a local authority service which is not covered by other statutory complaints processes may complain to the Ombudsman. The Ombudsman will almost invariably expect the complainant to exhaust the Council’s own complaints process before considering the complaint. If the Ombudsman does decide to investigate a complaint he/she will determine whether, in their opinion, the local authority has been guilty of “maladministration” and if so whether the complainant has sustained “injustice” in consequence.

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- 5.2 Section 5A of the Local Government and Housing Act 1989 imposes a duty upon the Monitoring Officer to prepare a report to the Executive if at any time it appears to him/her that there has been maladministration in the exercise of Executive functions. The duty does not arise unless the Ombudsman has conducted an investigation. The report is required to be copied to each Member of the Council.
- 5.3 As soon as practicable after the Executive has considered the Monitoring Officer's report it must prepare a report which specifies:-
- (a) what action (if any) the Executive has taken in response to the Monitoring Officer's report,
  - (b) what action (if any) the Executive proposes to take in response to the report, and
  - (c) the reasons for taking the action or for taking no action.
- 5.4 The Council has received a decision from the Ombudsman that there was maladministration in the delivery of a consultancy service for a Code for Sustainable Homes Assessment. A copy of the decision is appended as Annex B to this report.

### Overview of Facts

- 5.5 The Code for Sustainable Homes (CSH) is an environmental assessment method for rating and certifying the performance of new homes based upon the Building Research Establishments ("BRE") Global Eco Homes Scheme. The Council's policy is to impose a condition on planning permission for any new residential development that dwellings should achieve Level 3 CSH. The determination as to the CSH level to be awarded to a dwelling is that of the BRE. However, to secure such a determination it is necessary to engage an "Assessor". The Assessor's role in principle is restricted to explaining the compliance requirements of CSH levels and to providing a design and assessment service which is then submitted to BRE. A Senior Surveyor within the Council's Building Control Service ("Officer X") has been trained as an Assessor. During the latter part of 2011/2012 the Council piloted the provision of an Assessor service to developers/owners seeking to secure CSH Level 3.
- 5.6 There are two phases to the CSH assessment process, namely:-
1. "Design Stage Assessment" – the report and design of the dwelling specifying how it will meet CSH Level 3. The onus is on the architect/designer to produce this and the Assessor is required to check the information and input it to the BRE who, if compliance is shown, will issue a Design Stage Certificate (this stage was never achieved in the instant case), and
  2. Post-Construction Stage Assessment – a report collated by the building developer to demonstrate that the guidance set out in the Design Stage Assessment has been followed. That is submitted to the Assessor to check and input to the BRE for a Level 3 CSH Certificate to be issued.
- 5.7 In January 2012 the Council agreed with Mr "Y" to provide the Assessor service for the construction of a single dwelling. Between April and October 2012 various correspondence and discussions ensued between Mr "Y", his architects/consultants and the Assessor, with the Assessor advising on steps to be taken to achieve CSH

Level 3. Between November 2012 and March 2013 Officer "X" was absent from the office on sick leave.

- 5.8 In March 2013 it became apparent that there were hydrology issues which could prevent Level 3 CSH being secured. By that stage construction on the property had been completed. Officer "X" requested a report from the client's hydrologist. The report was not accepted by the BRE. Eventually, BRE certified the dwelling to have 55 "credits". A minimum of 57 "credits" is required to achieve CSH Level 3 and consequently the dwelling only achieved CSH Level 2. Subsequently, the Council approved a variation to the condition imposed on the planning permission that CSH Level 3 should be achieved such as to permit the dwelling to only achieve CSH Level 2.
- 5.9 Mr and Mrs "Y" lodged a complaint with the Council under the Council's Corporate Complaints Procedure. The complaint, which in due course was referred to the Chief Executive, was not upheld. Subsequently, Mr and Mrs "Y" complained to the Ombudsman; their grounds of complaint are set out in the first section of the Ombudsman's report ("The complaint").

#### The Ombudsman's Decision and Subsequent Consideration

- 5.10 The Ombudsman's provisional view was sent to the Council on 1 August 2014. In this report he concluded:

*"My view is there were some faults by the Council. But these faults did not significantly cause the main injustices the complainants complain about.*

The Council responded on some elements of factual accuracy in August. When the Ombudsman subsequently released his final decision on 9 October, the view of the investigation was that:-

- (a) there had been maladministration on the part of the Council, and
- (b) Mr and Mrs "Y" had suffered injustice as a result of that maladministration

As to the basis for finding maladministration, the investigator found:

- (a) the advice provided by the assessor was adequate,
- (b) although there had been some initial confusion as to the role of the assessor, that had promptly been clarified,
- (c) but that the Council did not make any written record that the assessor service was being provided on a pilot basis,

Importantly, the investigator:

- (d) did **not** conclude that "there was fault by the Council in the consultative role it provided".

- 5.11 Despite finding 'injustice' the Ombudsman's final decision specifically stated:

*"There was some fault: in the lack of an assessor for four months, in assurances the Council gave the complainants and a lack of a written record. But the Council has*

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*offered a remedy. And these faults did not significantly lead to the complainants' claimed injustices".*

- 5.12 Following receipt of this final report from the Ombudsman's office the Council made strenuous representations that the conclusions of maladministration and injustice were simply not supported by evidence. The investigator subsequently issued a second "final" decision report with a finding of maladministration but no injustice caused in consequence. The final report is attached as Annex A. The wording on the final decision paragraph remains identical to the initial "final" report quoted in paragraph 5.11 above.
- 5.13 Officers remained dissatisfied with the Ombudsman's investigation and final report. The Chief Executive wrote to the Ombudsman requesting a review. The letter to the Ombudsman's office made the points (inter alia) that:-
- there was no evidence that Officer "X"'s four month absence had led to maladministration; during that period of absence nothing was sent to the Council for assessment, and
  - Council officers maintained that the complainants had been advised that the assessor service was being provided on a pilot basis and in any event there was no evidence that the complainants had been disadvantaged by the service being so provided.
- 5.14 An Assistant Ombudsman conducted a review of the investigation and accepted that the decision was finely balanced, but decided to uphold the investigator's findings of maladministration but no injustice. On the point as to Officer "X"'s absence, the Assistant Ombudsman responded:
- "There was no other Officer within the Council suitably qualified to have provided this cover, and the complainants have explained, despite the efforts of other Officers within the Council to assist in [Officer "X"'s] absence, the managers they spoke to did not have the knowledge they needed".*
- That assertion does not feature in the investigator's report.
- 5.15 As to no note being made of the complainants being advised that the assessor service was being run on a pilot basis, the Assistant Ombudsman commented:
- "I agree that it would not be possible for the Council to keep a record of every conversation its officers have but this was an entirely new scheme and in order to properly manage expectations and safeguard all parties from any potential misunderstanding I agree with [the investigator] that a formal note should have (sic) made which clearly set out what was being offered and confirming that the scheme was a pilot".*
- 5.16 The Council has had an enviable record of a very low level of complaints with no finding of maladministration having been made against the Council since 2000. It is particularly disappointing that such a record should now be tarnished. However, whilst the Council undoubtedly failed to meet its aspirations for high levels of service, there is a wide difference between that and maladministration.
- 5.17 Having used the Ombudsman complaints process, the only way for the Council to further challenge the decision would be through a judicial review. There is, however, no obvious benefit to the public in committing significant sums of money (both for the Council and the Ombudsman) to pursue this course of action. The Council has

historically had a very good relationship with the Ombudsman, based largely on our track record of effective and open liaison with them. Despite this particular judgement it is important to maintain our traditional approach with the Ombudsman in future. On this basis the Executive is invited to agree its response as outlined in Annex B.

- 5.18 In terms of that local response, there are always lessons to be learned whenever a service offered or provided fails to meet our aspirations. In this case, a key point is that services which have the potential to generate significant income can only be developed with properly reserved capacity. This represents an important point as financial reserves are reduced in future years. Partly because of this, the Assessor service has been discontinued. It is not considered, therefore, that there are any further specific actions which need to be taken in response to the Ombudsman's findings and this is reflected in the proposed response.

## **6 ADVICE RECEIVED FROM STATUTORY AND OTHER OFFICERS**

### Borough Solicitor

- 6.1 The Borough Solicitor is the co-author of this report.

### Borough Treasurer

- 6.2 There are no financial implications directly arising from this report.

### Equalities Impact Assessment

- 6.3 Not required.

### Strategic Risk Management Issues

- 6.4 None.

## **7 CONSULTATION**

### Principal Groups Consulted

- 7.1 Not applicable.

### Method of Consultation

- 7.2 Not applicable.

### Representations Received

- 7.3 Not applicable.

### Background Papers

Correspondence with Ombudsman (exempt)

### Contact for further information

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Alex Jack, Borough Solicitor, 01344 355607

[Alex.jack@bracknell-forest.gov.uk](mailto:Alex.jack@bracknell-forest.gov.uk)

Timothy Wheadon, Chief Executive, 01344 355601

[Timothy.Wheadon@bracknell-forest.gov.uk](mailto:Timothy.Wheadon@bracknell-forest.gov.uk)

Doc Ref

AJ/f/Reports/Executive – Sustainable Homes Assessment – 10 February 2015 \_