

Report under Section 16 of the Public Services Ombudsman (Wales) Act (2005) of an investigation into a complaint made against Caerphilly County Borough Council

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Foreword

This report has been prepared under the Public Services Ombudsman (Wales) Act (2005). In accordance with the Act, the report has been anonymised to protect the privacy of the complainant and others. Thus all names in the report are pseudonyms. The complainant is referred to as Ms S.

The report is preceded by a summary of the case.

Summary

Ms S complains on behalf of herself and the owners of seven neighbouring properties that the Council failed to consider properly the effect of a proposed development on their amenity. She alleges, in particular, that the Council failed to seek information about proposed ground levels of the development site before determining the planning application and so the height of the new houses close to their homes is considerably higher than had been envisaged. They also complain that the Council failed to carry out its enforcement responsibilities in relation to the new development

The Ombudsman found that the Council failed to acknowledge the effect potential changes in ground levels would have on a sloping and that this meant that it missed the opportunity to put conditions in place to control any potential adverse effects of overlooking or overshadowing that increasing ground levels would have. The Ombudsman found that the Council's failure to consider and specify the finished slab levels of the proposed development was maladministration. Accordingly the complaint was upheld.

Recommended remedy

The Council should commission an independent valuation of the complainants' properties and compensate them for any loss of value which arises from the new properties having been built at a higher level than previously existing ground levels.

That the Council formally reminds its staff of the importance of ensuring that when they identify that a planning application for a proposed development may result in changes to ground / slab level any relevant further information should be obtained from the applicant and/or appropriate conditions attached to any permission granted.

In addition, the Council should pay Ms S £250 in acknowledgement of the time and trouble to which she has been put in pursuing the complaint.

THE COMPLAINT

1. Ms S and the occupiers of seven other properties in her neighbourhood, on whose behalf she also acted, complained that Caerphilly County Borough Council (the Council) failed to properly consider the effects of a planning application on the amenity of their homes which are located on Orange Street (not its real name). Ms S complained that because the Council did not require the developer to submit details of ground levels, the eventual height of new homes built near to their properties is considerably higher than had been envisaged.

Ms S explained that this has caused overlooking, a loss of privacy and a reduction in the value of their homes. Ms S also complained that the Council had failed to prevent the developer from constructing the new properties at a higher ground level than was envisaged by the planning permission that was applied for.

MY INVESTIGATION

2. Letters setting out the matters under investigation were issued to the Council on 15 July 2005, 10 January 2006 and 20 February 2006. Comments were obtained from the Council and relevant documents were examined. My investigator took oral evidence from three members of staff at the Council; however evidence could not be obtained from the case officer, as he has since passed away. My investigator also visited Ms S at her home and considered the relative positions of Ms S's property and those of her neighbours in relation to the new development.

LEGAL AND ADMINISTRATIVE BACKGROUND

3. Planning permission is required for the carrying out of development, which includes the building of new housing.

4. The Town and Country Planning (Applications) Regulations 1988 specify that an application for planning permission should be accompanied by a plan which identifies the land to which it relates and any other plans, drawings and information necessary to describe the development.

5. Where a council's development plan contains relevant policies, applications for development which are in accordance with the plan shall be determined in accordance with the plan unless material considerations indicate otherwise. Material planning

considerations relate to the use and development of land and include: size, layout, siting, design and the external appearance of buildings, landscaping and impact on neighbourhood.

6. In April 1999 the National Assembly for Wales issued guidance entitled Planning Guidance (Wales): Planning policy, which made reference to Technical Advice Note (Wales) 12 (TAN 12) which the Welsh Office had issued in October 1997. Technical Advice Note 12 stated that:

“This Technical Advice Note (Wales) (TAN) should be read in conjunction with ‘Planning Guidance (Wales): Planning Policy’. Planning Guidance, Technical Advice Notes and circulars should be taken into account by local planning authorities in Wales in the preparation of development plans. They may be material to decisions on individual planning applications and will be taken into account by the Secretary of State and his Inspectors in the determination of called-in planning applications and appeals.”

8. The section of TAN 12 which dealt with Development Control included:

“Applicants for planning permission should as a minimum provide a short written statement setting out the design principles adopted as well as illustrative material in plan and elevation ...”

9. In 2002 the Welsh Assembly Government issued a revised issue of TAN 12: which included a checklist of design information requirements for a planning application. The section on “Elevations” includes:

“ ...

Show every elevation of a new building or extension

...

Show elevations in the context of adjacent buildings where appropriate”

Guidance issued by the Council

10. In September 1999 the Council produced a supplementary planning guidance entitled “The Design of New Housing in urban areas” which according to the Council “emerges from, and support the “Caerphilly County Borough Unitary Development Plan 1996 – 2011”.

The document’s introduction also explains that its main role is to set out detailed advice on the design standard which a new development is expected to meet during the plan period. The document was issued as a consultation draft in September 1999; however no further guidance was issued by the Council until October 2005. The supplementary planning guidance included the following in relation to “Daylight, Sunlight and Privacy”:

“... A separation of 10m between a habitable window and an obstructing building ... should be provided.

... Where there are changes in ground levels, the distance of separation should be increased by 1 metre for each metre rise in the ground when dealing with sloping sites.

...

Priority will be given to securing privacy by separation. A distance of 21 metres will be considered to be the minimum between the windows of habitable rooms ...”

11. In September 1999 the Council also issued a Draft Development Brief in relation to the land adjacent to Ms S and her neighbours’ properties. This land was to be the site for the development about which Ms S and her neighbours are complaining. The introduction to the Brief stated:

“Good design is one of 3 underlying principles of the Unitary Development Plan and should be the aim of all those involved in the development process. The aim of this brief therefore is to provide potential developers with clear guidance in relation to the comprehensive development that would be required by the council on [a named plot adjacent to Ms S and her

neighbours' properties] with a view to encouraging the highest standard of design and layout, provision of public open space and protection ...”

12. The Draft Development Brief also stated:

“Care should be taken to ensure that the layout of the site does not alienate the existing residential properties in the area by virtue of overlooking orientation and overshadowing. ...”

EVENTS LEADING TO THE COMPLAINT

13. In September 1999, the Council issued a Draft Development Brief in relation to the land in question which had been rolled forward for residential land use as a single 5.95 hectare site in the Deposit Unitary Development Plan for Caerphilly which was also due for publication in September 1999.

14. On 25 February 2000, a developer (the developer) submitted a planning application for the “erection of 131 houses including roads, garages fences and all associated engineering works on the site.

Local residents, including Ms S and her neighbours were notified in writing of the planning application and the application was made available for inspection by members of the public. Consultations with statutory and other bodies were carried out. On 3 March 2000 the Case Planning Officer made a note of having visited the site. His note of the site visit included the comment “Site sloping down from West to East...”.

On 3 May 2000, the Planning Committee of the Council considered the application and received a report from the Council’s Chief Planning Officer in relation to the application. The Council resolved that the application be granted subject to the completion of a Section 106 agreement (in relation to highways issues and the replacement of a playground) and conditions which had been contained in the Officer’s report. None of these conditions related to elevations although one condition did make stipulations in relation to the screening of the site.

15. In September 2004 the developer started to construct properties on the land next to Ms S and her neighbours’ properties. Ms S and her neighbours quickly became aware that the developer had raised the ground/slab levels of the new properties and that this would cause her and her neighbours a significant degree of overshadowing

and overlooking with a consequent loss in privacy. The Developer also raised the ground levels of the gardens of the properties being developed and constructed a retaining wall 1.8 metres in height and then constructed a 1.8 metre fence on top of that wall. Ms S and her neighbours felt this to be an unreasonable and dominating feature. The Council sent an Enforcement Officer to inspect the site and to discuss the raised ground levels with both Ms S and the site manager for the developer. As a result of meetings and site visits by both the Enforcement Officer and the Planning Officer – Team Leader (the Team Leader) from the Council’s Planning Department, an exchange of correspondence between the Council and the developer ensued. The Council expressed the view, in a letter dated 30 November 2004 that “formal approval has never been sought for the increase in ground levels, the retaining wall or the fence. It is considered that such approval is required”.

16. The Developer’s solicitors responded to the Council on 14 December 2004. They expressed the view that there had not been a breach of planning control in relation to ground levels and the construction of the retaining walls on the plots in question. The solicitors pointed out that the permission granted by the Council for this site referred specifically to:

“... the erection of 131 houses together with roads, garages, fences and ‘associated engineering works’.

17. The solicitors went on to point out:

“The permission granted was in full not in outline and it is reasonable to assume that the permission covers all such works necessary to implement the permission. The alteration of ground levels and the construction of retaining walls are engineering works and they are necessary to beneficially implement the permission that your council has granted.”

18. A further exchange of correspondence and a meeting took place between Council officials and the developer’s planning consultants. During this meeting the planning consultants provided examples of case law which supported their view that “associated engineering works” covered the raising of ground levels, particularly so in

the absence of any relevant conditions attached to the permissions granted. As a result of this information, the Council sought advice from its Head of Legal Services who expressed the view that “there is a very strong argument that the change in ground levels at this point is permitted by the consent”. Following this advice the Council decided not to take any further measures in relation to enforcement action against the developer.

19. The Council wrote on 15 February 2005 to Ms S and the other residents who had complained to explain the situation. The issue of the 1.8 metre fence built on top of the retaining wall was subject to a further planning application by the developer which was subsequently considered by the Planning Committee of the Council. This subsequent application was subject to a number of objections by local residents and planning consent was initially turned down by the Council although an application for a different style of fencing was later approved. The Planning Committee also requested that Counsel’s opinion be sought on the legal position in relation to the raising of the ground/slab levels. In broad terms the advice received from Counsel confirmed the view expressed by the Council’s Head of Legal Services and “that the raising of ground levels and construction of a retaining wall are encompassed by the grant”. In his report to the Council’s Planning Committee about the application to retain the fence in between the new development and the original properties, the Chief Planning Officer stated that “in light of the experience at this site with regards the changes in ground levels, officers are examining how to deal with this issue when assessing other applications.” Later in this report the Chief Planning Officer stated:

“Whilst appreciating, but not withstanding the views of the residents, it is considered that the visual impact of the fence on top of the retaining wall is acceptable. Whilst acknowledging that the guidance in Development Design Guide 1 ‘Building Better places to live’ states that the use of close boarded fencing is not appropriate for a boundary to a public place, it is considered that the combination of the brick retaining wall and the timber fence on top that from the boundary to the rear lane is acceptable. If the fence was to be removed the buildings within the plots would remain and there would be more open views in both directions. It is considered that the fence provides a

screen that assists in retaining privacy between the new and existing houses.”

DOCUMENTARY EVIDENCE

Plan of the development site submitted with the planning application

20. A plan of the proposed site was provided at the application stage which, whilst indicating the original ground levels of the site and the location of the proposed properties did not indicate either their slab levels or the increase in ground levels overall.

The Council's response to Ms S and her neighbours

21. The Council wrote to Ms S and her neighbours on 15 February 2005 to explain the situation regarding the raised ground levels which the Council had decided was permitted by the planning permission it had granted. The letters included the following:

“...In the light of this advice the Council has to accede to the view that the alteration in ground levels and the construction of the retaining wall are covered by the planning permission and that it can take no action. It is only the erection of the fence that requires an approval.

Turning to the effects of the development that now exist on the site, it has to be acknowledged that the houses and associated garages have been built in the positions approved under the planning permission. The original assessment of the proposed development concluded that the relationship between the new houses and those adjoining the site was satisfactory. In terms of overlooking, the normal guidance used is a distance of 21 metres between facing windows of habitable rooms. This distance, achieved between the new houses in the approved layout and the terrace houses in [Orange Street], is maintained. It is not considered that the new houses, even in their elevated positions, would conflict with guidance on orientation and overshadowing.”

WHAT Ms S HAD TO SAY

22. Ms S complained to this office on 10 March 2005 that the Council had allowed the Developer to raise the ground and slab levels of the properties adjacent to her and her neighbours' properties.

Ms S complained that the raising of the ground and slab levels have caused a total lack of privacy and as a result of these changes in levels, she and the other residents adjacent to the site are "overlooked, over-powered and dominated". She further complained that as a result of the increase in levels there was a "substantial loss of direct sunlight from the direction of the site". Ms S was concerned that the Council had failed to prevent the ground levels from being varied. Ms S believes that the planning permission which the Council had allowed enabled the Developer to exploit a legal "loophole" which allowed them to make any variations in ground/slab levels which they deemed necessary. In particular, Ms S complained that the Council failed to attach a condition to the planning permission to require further information/consultation concerning ground/slab levels.

23. At interview, Ms S told one of my investigators that there were two main aspects to the residents' complaints. In the first instance, there had been no mention in the original planning application that the ground levels on the site would be increased and that as a result the new houses would be built at a much higher level than was indicated on the application plans. Secondly, that the Council had failed to enforce the planning permission when the residents brought the issue of ground level changes to its attention.

24. Ms S confirmed that the residents had obtained a copy of the consultation draft about the development of the site dated September 1999 and that they had been reassured by the statement that "care should be taken to ensure that the layout of the site does not alienate the existing residential properties in the area by virtue of overlooking, orientation and overshadowing". Ms S explained that she and the other residents accepted that there was a need for new housing. They accepted the Council's reassurance however that any developer would have to take care to ensure that there was no overlooking or overshadowing.

25. Ms S said that when residents were informed of the planning application, they had gone to view the plans, and had seen that the proposed siting of the new houses in relation to their properties had been reasonable. There was no indication on the plan that the ground or slab levels of the houses were going to be raised by 2 metres or more. There was an indication on the plan that there would be a 5 foot boundary fence. There was no indication on the plan made available to the residents during the consultation phase that in fact the developer would erect a 1.8 metre wall, then raise the ground level to the top of the wall by backfilling and then erect 1.8 metre fence on top of the wall.

26. Ms S said that the residents had not objected to the planning application because they had accepted on the basis of the plans that the new houses were to be built on the existing ground levels and that there would only have been a 5 foot fence at the rear of their properties. Ms S told the investigator that she and the other residents would certainly have objected to the application if they had been made aware that the developer intended to raise the ground levels and the slab level of the new houses.

27. Ms S also provided a series of photographs to demonstrate the effect of the new development on her and her neighbours. Three of these are reproduced at appendix A (Photographs 1-3). A photograph (photograph 4) was also taken by the investigator during a visit to Ms S's home and this is also reproduced at Appendix A.

WHAT THE COUNCIL HAD TO SAY

28. The Council responded to the complaint at the start of my investigation with comments which included the following:

“... Due to the sloping nature of the site, and the need to provide satisfactory road gradients across the site, that part of the development adjacent to the complainant's property has been raised out of the ground, resulting in the need for retaining walls and a fence along the boundary of the site with the adjacent rear lane. However, the relationship between the existing dwellings

and the new ones is satisfactory from a planning point of view, and typical of the relationship between existing houses in this area.

...

The planning permission ... is for 'Erect 131 houses including roads, garages, fences and associated engineering works'. The developers have argued that the phrase 'associated engineering works' has allowed them to change ground levels and build retaining walls, and the local planning authority's officers have agreed with this interpretation. It is inevitable on a site of this size, bearing in mind the original topography, that levels would have to be changed, especially to ensure that road gradients are satisfactory, as is the relationship of the houses to these roads.

...

The local planning authority did not consider that a condition concerning levels was necessary at the time the application was determined. If such a condition had been imposed, it is likely that the same levels and retaining structures would have been agreed since they have come about as a result of technical requirements.

Condition 9 of the planning permission required details of screening to be agreed with the local planning authority. That screening ensures a satisfactory standard of privacy between the existing and proposed dwellings. Therefore the local planning authority was aware of potential repercussions for residents of the development of this site, and took steps to mitigate those repercussions. A planning application to retain the existing fence was submitted by [the Developer], but the Council's Planning Committee resolved to refuse permission because of the poor visual appearance of the fence. The Committee instructed Officers to discuss a more acceptable alternative design with the Company. [The Developer] has submitted a further application seeking permission for an alternative design of fence ...

...

Whilst there may have been a change in the level of privacy that the complainant and other local residents consider they enjoy, it remains satisfactory from a planning point of view.

... The relationship between the existing development and the new development is satisfactory from a planning point of view, and is typical of many similar developments in the South Wales valleys. It is accepted that there has been a change in the surroundings enjoyed by existing residents, but the resulting environment is satisfactory from a planning point of view.

Again, the complainant may be able to point to specific losses arising from the development, but in planning terms, the level of sunlight and daylight enjoyed by her property remains satisfactory.

Although the original plans did not show the finished floor levels of the development, the permission allowed changes in levels and retaining structures. The relationship between the existing dwellings and the new ones was safeguarded by the condition concerning screening.”

29. At interview the Leader of the Planning Team (the Team Leader), an experienced Planning Officer, emphasised that it would be a matter for the professional judgment of a particular officer to decide whether to seek further information from the applicant about slab levels if the site to be developed was sloping. He felt that such a decision would not necessarily have needed to be evidence based. The Team Leader felt that this professional judgement would be based on a physical appreciation of the site, both by looking at the plans and with the benefit of a site visit. Officers said that as an experienced Team Leader, the case officer would have been aware that there would need to be a change in the slab levels of the new houses in relation to the pre-existing ground levels, in order to ensure that other requirements such as drainage and highways were met. The Development Control Manager commented that it would have been difficult to anticipate at the early stage of a planning application such as this, what effect compliance with highway and drainage requirements would have on the slab levels of the properties.

30. The Development Control Manager explained that he would expect a case officer to use his or her professional judgement to determine whether there were any areas of a site that would cause what he termed a “pinch point” and that if there were any indications of problems with sloping sites and any indication that there were any likely problems with elevations then these could be raised/discussed with the applicant at an early stage of the application process. If necessary such concerns could be addressed by attaching conditions.

31. It was put to the Team Leader that there was nothing in the plans made available to the public during public consultation to indicate that there would be a 2 metre change in the slab levels of the proposed new houses. The Team Leader agreed that it would have been helpful to have provided such information. The Chief Planning Officer felt that it was obvious to any member of the public looking at the plans in conjunction with an appreciation of the physical characteristics of the site that a “cut and fill” approach would have to be used. He felt that any residents that were unsure about this could have asked. He accepted however that if a clear indication of the increase in slab levels of up to 2 metres had been indicated on the planning application it would have been more likely that members of the public would have objected and that this would in all likelihood have resulted in the Planning Committee undertaking a site visit.

32. The Team Leader expressed the view that information about likely changes in ground levels, if significant, might be something that the Planning Committee should be made aware of. He explained that in the case of a significant increase in elevations, a recommendation could be made in the report to the Planning Committee to impose appropriate conditions.

33. The Development Control Manager confirmed that the use of the term “associated engineering works” had been considered following the issues raised by this case and the problems the council had experienced in ensuring that the planning permissions were discharged appropriately.

He confirmed that the council had looked at the issue with a view to rectifying the situation. The Development Control Manager confirmed that officers would take this experience into account in future when dealing with applications which included a

reference to associated engineering works. The Development Control Manager confirmed that he had met with his team leaders with a view to disseminating the information about this potential problem area to Planning Officers.

34. The Development Control Manager agreed it would also be possible to include this information in the Department's Development Control Manual. He also confirmed that in addition to utilising a new site visit notes form based on a generic form produced by Planning Officers Society for Wales, the department was looking to introduce a further site plan proforma for completion by case officers using a new computerised IT system the Department intended to introduce.

35. The Chief Planning Officer was aware of the complaint from Ms S and others and told the investigator that case officers were now recommending conditions in applications such as the one in question. He also commented that a "huddle" system now operated whereby the Development Control Manager and his team leaders met every afternoon to briefly assess the "information needs" for each received application. The purpose in doing so was to ensure that planning applications were dealt with in a consistent manner across the Department and to ensure all relevant information was obtained in each case.

36. The Development Control Manager felt that in some circumstances it may be reasonable, if it was felt that an application appeared to fall outside a design brief or a draft consultation but was in the officer's opinion still satisfactory, for that to have been set out/justified in the report to Council. However he felt it would be a matter for the officer's professional judgement although in this particular case he believed that there was no identifiable problem. The Development Control Manager explained that in this case, when this issue came to light the Council did what they could to rectify the situation but were unable to do so.

37. The Chief Planning Officer confirmed that he had visited the site in person and that his personal view was that no significant overlooking or overshadowing had resulted. The Chief Planning Officer expressed the view that whilst the residents had been subject to a degree of overshadowing and overlooking, this was acceptable from

a planning point of view and that therefore the design brief had been met by the developer.

38. In terms of the site layout itself, the Team Leader provided a plan which he had prepared which he had drawn up based on a combination of plans provided by the applicant in 2004 and information he obtained about the complainants' properties. An amended version of this plan is attached at Appendix B. The plans he prepared indicated that the distance between the windows of habitable rooms of the existing and new properties was 21 metres. It should also be noted that the plan provided by the Council did not show a further house to the left hand side of the terrace of houses in question. That house belongs to another complainant house referred to in paragraph 2 upon whose behalf Ms S is also complaining. I can confirm therefore the terrace itself comprises of 8 houses (one of which is marked in white on the plan as the owners were not party to this complaint. The houses belonging to the residents Ms S represents are marked in orange. The Team Leader also explained that the developer had also sent him a sectional diagram showing the ground levels of the site and the subsequent increase in slab levels. A sectional diagram based on the diagram provided by the Team Leader is attached at Appendix C. Neither of the diagrams attached to this report are to scale although they are based on a reproduction of the plans and sectional diagrams provided.

CONCLUSIONS

39. When the application in question was considered by officers in the Council's Planning Department and subsequently by the Council's Planning Committee, no requirement was made, or conditions attached for the developer to submit details of proposed ground/slab levels for the development. However, on sloping ground, such as was the case here, it seems to me that the Council could not properly assess the impact of the proposed development on the complainants' properties without this information. I appreciate that Officers have commented that the case officer would have been aware of the possible need to alter ground/slab levels in the vicinity of the complainants' properties. However, I am also mindful of the comment by the Development Control Manager that it would have been difficult to anticipate at the

early stage of the planning application, what effect that compliance with highway and drainage requirements would have on the slab levels of the new properties. The report presented to the Planning Committee and indeed also the information made available to the public about the application gave no indication whatsoever that the properties adjacent to the complainants' properties would be raised by up to 2 metres and the ground levels of the boundary by a similar amount.

40. The draft design brief which the Council published in relation to this development clearly stated that care should be taken to ensure that "the layout of the site does not alienate the existing properties in the area, by virtue of overlooking, orientation and overshadowing". Ms S and her fellow neighbours quite reasonably in my view took this to mean that the Council would seek to ensure that their properties would not be overlooked or overshadowed as a result of the development. However, the Chief Planning Officer has acknowledged that the residents had been subject to a degree of overshadowing and overlooking. Furthermore, the Council's Draft Development and Design Guide which was issued before this application was determined makes it clear that a minimum distance of separation of 21 metres should be maintained between the windows of habitable rooms. This guidance also makes it clear that for every 1 metre increase in height the distance of separation should be increased by 1 metre. The plan provided by the Council has shown, and it has been acknowledged by the Team Leader that the distance of separation between habitable windows is approximately 21 metres in some cases. The plans provided by the Council also indicate that the properties which have been constructed are between 3 and 4 metres above that of the lane adjacent to the complainants' properties. This indicates to me that if the Council's own draft guidance were to be adhered to, the minimum separation in this case would therefore need to be at least 24 metres. Council Officers have stated that the decision not to require proposed ground/slab levels at the application stage would have been down to the professional judgement of the case officer. However it concerns me that the Council's Officers appear to be content to accept that a development which potentially does not accord with the Council's own guidelines as a direct result of changes in ground levels does not need to be brought to the attention of the Planning Committee or to members of the public.

This failure to acknowledge the effect of potential changes in ground levels on a sloping site meant that the Council missed the opportunity to put conditions in place to control any potential adverse effects of overlooking or overshadowing that increasing ground levels because of “associated engineering works” would have had. I find that the Council’s failure to consider and specify the finished slab levels of the proposed development was maladministration. I uphold the complaint.

41. The officers of the Planning Department who were interviewed considered that the position and elevation of the new development was acceptable from a planning point of view. Ms S and her neighbours are strongly of the view that the new development has caused them to be “overlooked, over-powered and dominated” and that they have lost direct sunlight as a result. The extent to which Ms S and her neighbours’ amenity has been affected is a matter upon which they and the Council clearly disagree. The Council accepts that there has been a change in the level of privacy and sunlight enjoyed by Ms S and her neighbours but that these are satisfactory from a planning point of view. Furthermore, the Council has said that the relationship between the existing dwellings and the new ones was safeguarded by the condition concerning screening. However I note that the Chief Planning Officer in a report to Planning Committee stated that the fence that has been approved to provide screening was not in keeping with national guidance. In my view the new development has resulted in a significantly greater effect on Ms S and her neighbours’ amenities than could have originally been anticipated by either the complainants or indeed that Council at the planning application stage. Irrespective of the fact that the complainants made no representations at the application stage, the complainants amenity was a material consideration that should have been considered and appropriate steps should have been taken to protect it. I accept that the current fence approved by the Council has mitigated overlooking at ground floor level, the fence itself as can be seen from Photograph 4 is an overbearing structure and it can do nothing to prevent overlooking from first floor bedroom windows. This represents an injustice suffered by Ms S and her neighbours who have also been put to time and trouble pursuing their complaints with the Council and with the Ombudsman.

42. I turn now to the second aspect of Ms S's complaint namely that the Council failed to prevent the construction of the new properties at a level higher than those envisaged by the original planning permission.

The Council engaged in discussions with the developer as soon as they were made aware of increase in ground levels. As a result of site visits and discussions with the developer the Council advised the developer that in its view the raising of the ground level was not permitted by the planning permission. The developer disputed this maintaining that the raising of the ground level was granted in line with "associated engineering works".

The developer provided legal precedent to support this assertion which was considered by the Council's Head of Legal Services who considered that there was considerable force in the developer's argument. In light of this advice the Council did not proceed with enforcement action against the developer. The Council's decision in this regard was further vindicated by advice from legal counsel who also considered that the raising of the ground levels was permitted under "associated engineering works". I find no maladministration in the manner in which the Council dealt with the developer once it became aware of the raised ground levels. The Council's ability to pursue the issue of the increase in ground levels had been fettered by its earlier failure to secure any information about ground slab levels and to attach relevant conditions to the planning permissions.

43. In summary, I find that there has been a clear-cut failure by the Planning Department of the Council to secure a development which was acceptable in terms of its impact on existing dwellings near by.

44. I find that the maladministration identified in paragraph 40 has led to the injustice to the complainants described in paragraph 41. To remedy the injustice I recommend that the Council should commission the District Valuer to undertake a valuation of the complainants' properties to establish, in the light of my report, any loss of value which arises from the way in which the new properties have been built compared with what would have been the case had the Council secured development in accordance with its own supplementary planning guidance and development brief. I

further recommend that the Council should compensate the complainants for any loss that is identified. In addition I recommend that the Council pays £250 to Ms S for the time and trouble to which she has been put in pursuing this complaint on behalf of herself and her neighbours. Finally I have seen that the Chief Planning Officer has told the Planning Committee that officers are examining how to deal with the issue of changes in height when assessing future applications. Accordingly I recommend that the Council formally reminds relevant staff of the importance of ensuring that when they identify that a planning application for a proposed development may result in changes to ground / slab level any relevant further information should be obtained from the applicant and/or appropriate conditions attached to any permission granted. Applications for “associated engineering works” should be treated with particular vigilance and awareness of the potential need for conditions to be attached, as the planning permission given might otherwise be wider in its effect than the Council would have wished. I now look to the Council to apologise to Ms S and her neighbours for the shortcomings I have identified and to implement my recommendations as outlined above.

ADAM PEAT
Ombudsman

4 September 2006

Report Reference Number: B2004/0893

Appendix A



Photograph 1
View from Ms S's Lounge



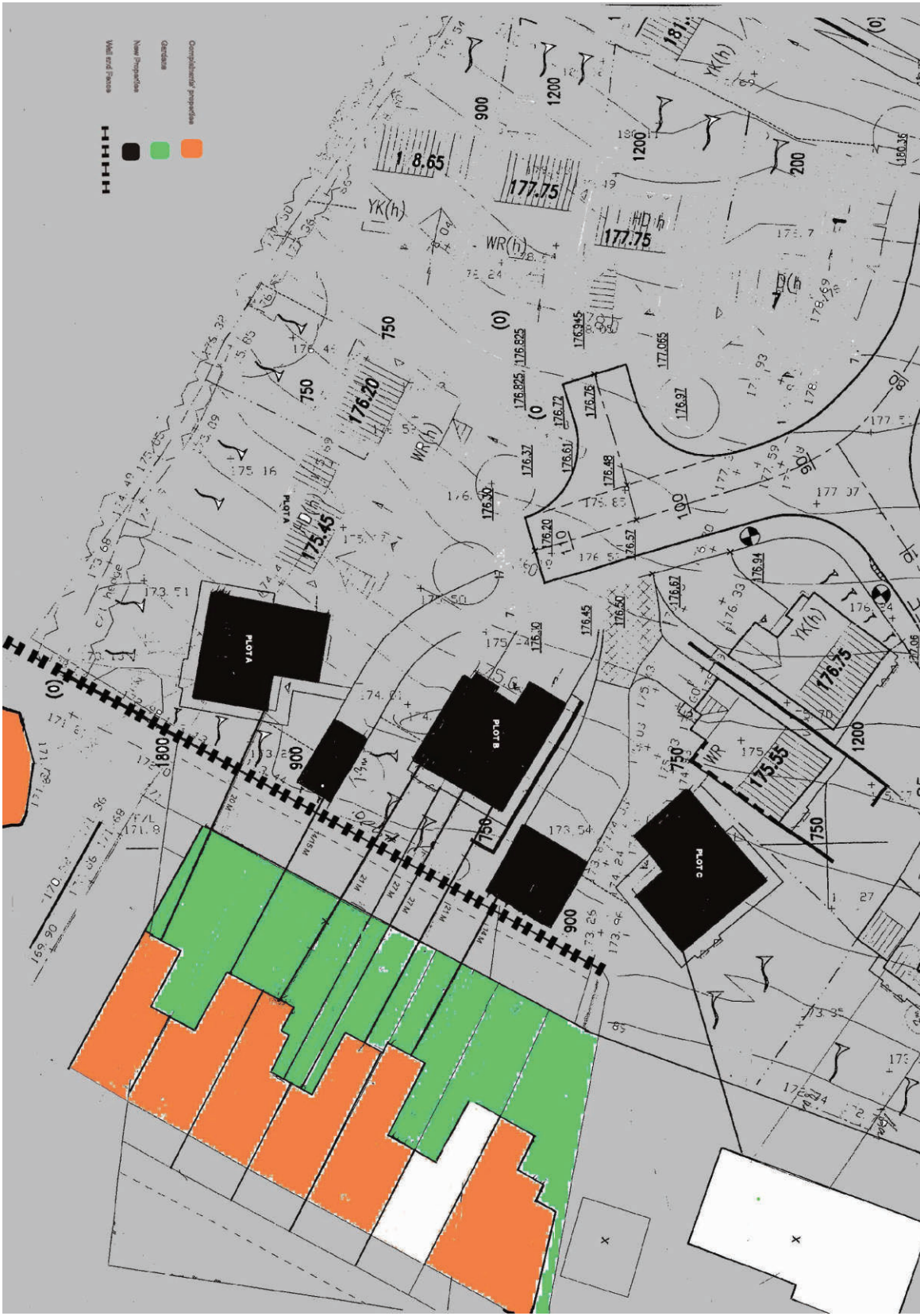
Photograph 2
View from one of Ms S's Neighbour's property



3
Side view of the wall and fences
adjacent to complainants' properties



Photograph 4
View of the wall and fence
behind the complainants' properties



Appendix C

