

**Report under Section 21 of the Public Services Ombudsman (Wales) Act 2005, of an Investigation into a complaint made against  
Caerphilly County Borough Council**

**INTRODUCTION**

1. This report is issued under Section 21 of the Public Services Ombudsman (Wales) Act 2005 ("the Act"). In accordance with the requirements of the Act details which might identify individuals have been omitted so far as that can be done without impairing the effectiveness of the report. The report accordingly refers to the complainant as Mr C.

**THE COMPLAINT**

2. Mr C complained that Caerphilly County Borough Council ("the Council") failed to carry out a further neighbour consultation exercise, prior to approval by the Planning Committee, after plans for the development of a new two storey detached house and garage were amended, without his knowledge. He claimed, therefore, that he was denied the opportunity of commenting on the amended proposal. He said that now that the new property has been built, it has damaged his residential amenity due to a loss of privacy and its overbearing nature in relation to his detached dormer bungalow. He said that it has left him and his wife with the feeling that they do not want to live there anymore. Mr C claimed that their home has been devalued.

**THE INVESTIGATION**

3. Letters starting the investigation were sent on 30<sup>th</sup> March 2007. Papers submitted by Mr C and the Council have been analysed. One of my investigators took oral evidence from Mr C, visited the site, viewed the Council's files in its office and interviewed three officers of the Council. He measured the distance between the development and Mr C's property as approximately 16 metres. He concluded that the ground level of Mr C's home was about five metres lower than the new property. In forming conclusions in this case I had regard to the advice given by my professional adviser. He is a former planning inspector of many years experience. Mr C and the Council have had the opportunity of commenting

on a draft of this report. I have not referred to every item that is in the file. However, I am confident that nothing of significance has been omitted.

## **THE RELEVANT LAW, GUIDANCE AND POLICY AND PROCEDURE OF THE COUNCIL**

### Principles of Administrative law

4. "Administrative law" is the branch of law which governs public bodies in the exercise of their public functions. It is a fundamental requirement of administrative law that decision-making by a public body must be rational. The courts have held that here are three "logical principles" to be followed in making a decision:

- to take into account all relevant considerations
- not to take into account an irrelevant consideration
- not to take a decision which is so unreasonable that no reasonable person properly directing himself could have taken it.

They are called the "*Wednesbury* principles", after the licensing case in which they were formulated.

### Planning applications

5. The Town and Country Planning Act 1990 states that planning permission is generally required for the carrying out of development, which includes the erection of new buildings, alterations to existing buildings and most changes of use of land. Such permission is required from the relevant planning authority (in this case the Council).

6. Planning Policy Wales 2002 ("PPW") acts as the Welsh Assembly Government's guidance to planning authorities in Wales. There are a variety of Technical Advice Notes ("TAN's") that should be read in conjunction with PPW and which provide the guidance on specific aspects of planning. TAN 12 is called

“Design”. In relation to the content of submitted plans for development, the section on “elevations” states that they should:

“...  
...

- Show every elevation of a new building or extension
- Show elevations in the context of adjacent buildings where appropriate”

### The acceptability of proposals

7. PPW states that planning proposals should be considered in terms of their effect on the amenity and existing use of land and buildings in the public interest. Individual interest is regarded as an aspect of public interest. Authorities must take into account any relevant view expressed by neighbouring occupiers. However, authorities must judge each case on its merits.

8. The Council has adopted its own supplementary planning guidance. This is set out in a document called “Building Better Places to Live” adopted in January 2004. It includes the following “standard” in terms of separation between properties.

“21 metres between building faces for 2 storey dwellings. This separation distance should be increased by 1 metre for every 1 metre rise in ground level. This standard will more strictly be applied at the rear rather than the front”.

However, the policy also states that “...careful design rather than a blanket application of numerical standards can often address concerns such as privacy and amenity.” It calls this and other standards “a rough rule of thumb”.

### Publicity for planning proposals

9. Government advice on the interpretation of the publicity requirements and on good practice is given in a Department of the Environment/Welsh Office circular “Publicity for Planning Applications” issued in 1992 (“The Circular”). The Circular states that there is no statutory obligation on authorities to publicise changes to applications once they are accepted as valid. The authority will have discretion to decide on whether to publicise the amended application but should bear in mind various factors. The Circular suggests one issue for the authority to consider is the significance of the changes to the application.

10. The Planning Officers Society in Wales (“POSW”) has produced best practice guidance in a document called “Development Control – A Generic Handbook”. In the section on publicity for planning applications it states that best practice is that authorities will take account of the criteria in the Circular when considering the need for re-notification.

### Site visit notes

11. Further guidance relevant to this case produced by the POSW recommends that site visit notes are made which can be read, understood, reported on and examined later.

### **EVENTS LEADING TO THE COMPLAINT**

12. On **22<sup>nd</sup> February 2006** the Council received an application to build a detached house and detached garage at the rear of Mr C’s home.

13. On **3<sup>rd</sup> March** the Council sent a consultation letter to local residents including Mr C. Later in that month two local occupiers sent letters of objection to the Council. Mr C was not one of them. Concerns raised included the height of the proposed dwelling.

14. In **March/April** (date unknown) the Case Officer carried out a site visit. The site visit notes said the following:

“The proposed dwelling will be high in comparison to [Mr C’s property and another bungalow]. Its siting is at an angle and the distance from the boundary would reduce the impact of the height on ground floor of [Mr C’s] bungalow as there is a fence at the rear the amenity/privacy issue would be somewhat protected. Visually the relationship between the existing property [Mr C’s] and proposal would be poor and result in a dwelling that would tower above the existing property. Spoken to agent regarding this with a view of reducing its height.”

The notes also state that the application site is approximately 1.5 metres above the ground level of Mr C’s home.

15. On **3<sup>rd</sup> May** the Case Officer discussed issues with the developer’s agent. The file note said that the Case Officer discussed “...concerns with the agent – the height of the dwelling in relation to [Mr C’s home]. Advised him to discuss this with client...”

16. In **early June** (date unknown) there was a site meeting attended by the Council’s Development Control Manager (“the Manager”) and the developer.

17. On **7<sup>th</sup> June** the Council received amended plans. The accompanying letter was dated 5<sup>th</sup> June. The plans showed an altered position of the proposed development. It rotated the location of the new dwelling within the site in a clockwise direction. This changed the relationship between the rear of the property and the home of Mr C. (Please see attached a copy of a diagram which the Council helpfully submitted. This illustrates the relationship between the properties and the effect of the amendment).

18. On **19<sup>th</sup> June** the Council received further amended plans. In the accompanying letter, dated 16<sup>th</sup> June, the agent said that the new plans were due to a wish to lengthen the utility room and “reduce the height of the roof”.

19. On **21<sup>st</sup> June** the Planning Committee considered and approved the amended version of the proposal. The Manager prepared the report to the Committee in the absence of the Case Officer. The report recommended approval. An extract from the “analysis” is presented as follows:

“There are no objections in principle to this proposal...The only issues to consider are those raised by local residents. The proposed house is in proportion with the plot, and although it will be at a higher level than the neighbouring properties it will be a sufficient distance away from them not to cause any loss of daylight or privacy, or have an overbearing impact from a planning point of view. In the short term, the property will be a new and prominent feature but one that will be acceptable in planning terms. The rear of the dwelling will face the side of the objector’s property [note – this objector is not Mr C] and there will be no significant side windows in the new dwelling facing those neighbours. A condition concerning levels could be imposed to alert the Local Planning Authority should any significant changes be proposed.”

Condition 7 was attached to the approval which said that finished floor levels had to be submitted to the Council before any building work commenced. The stated reason was to “retain effective control of the development”.

20. On **31<sup>st</sup> October** after prompting from the Council, the developer submitted ground levels as indicated by condition 7.

21. On **9<sup>th</sup> November** Mr C telephoned a planning officer to state his view that the development was not being built according to the plans. The Council told Mr C that it had checked this. It confirmed that the house was being constructed in the correct position.

22. On **14<sup>th</sup> November** Mr C wrote to the Council setting out his concerns about the new dwelling not being built in compliance with the plans.
23. On **15<sup>th</sup> November** the Council wrote in response to Mr C and confirmed that the development was being erected as indicated in the plans.
24. Mr C replied to the Council's letter on **22<sup>nd</sup> November**. He re-iterated his contention and supplied a drawing to illustrate his points. He argued that the new dwelling was 14 metres from his house and that he could see into the rooms of the new house when he stood in his sitting room.
25. On **5<sup>th</sup> December** there was a meeting in the Council office involving Mr C, two Council Members, the Manager, an enforcement officer and the Head of Planning. The Council's notes from the meeting comprise of a brief list of points that were discussed. It appears that Mr C complained that the new development had windows that were 15m from his windows, that the Council failed to re-consult him when plans were changed and that Mr C has lost privacy.
26. On **8<sup>th</sup> December** a firm of planning consultants employed by Mr C reported to him by letter in relation to a site visit that the firm had carried out. The letter said that Mr C's privacy has "...been substantially prejudiced...and that as such the development is an unacceptable one." It also said in respect of Mr C's home that the new dwelling "...towers over the rear of your property, and has a substantial overbearing affect on your amenities."
27. On **19<sup>th</sup> December** the Manager met with the agent to discuss matters relating to the development and Mr C's concerns. In the Council's words the meeting was to discuss "...remedial measures to reduce the impact on [Mr C's] house."
28. On **17<sup>th</sup> January 2007** the Council wrote to the agent to enquire about progress that has been made in terms of the discussion of 19<sup>th</sup> December.

29. My office received Mr C's complaint on **6<sup>th</sup> March**.

### **WHAT MR C HAD TO SAY**

30. Mr C said that that he did not submit an objection after being consulted on the original proposal. He believed that it was "reasonable". He felt very strongly that he should have been re-consulted after the amendments were made to the proposal in June 2006. He asserted that these amendments had been submitted and approved by the Planning Committee without his knowledge. When in late 2006 he informed the Council that the dwelling was not being built according to the plans he meant the plans which he had seen and to which he had not felt the need to object. He later found out that these plans had been amended.

31. Mr C stated that the changes to the original plans meant that the new dwelling as built has had a severely detrimental effect on his residential amenity. He suggested that this was in terms of loss of privacy and the overbearing nature of the development. He said that the effective cause of these problems was the amendment which rotated the new house within the site. This brought it nearer and changed the relationship between the windows of that property and his home. He maintained that this meant that the new house dominated his dormer bungalow and had patio doors and windows which looked directly into the windows of habitable rooms at the rear of his bungalow and back garden. Mr C put forward the view that occupants of this house would not have to make any effort to see into his property. He said that the new dwelling was erected on ground which was five metres higher than the floor of his home. He claimed the distance between the properties was 15 metres. He thought it was the law that they should be 21 metres apart.

32. Mr C said that at the meeting held on 5<sup>th</sup> December 2005 the Head of Planning had literally put his hands in the air and said "yes it was my fault the building is where it is." Mr C was concerned that the Council was thinking about amelioration. He said that if a fence was erected in the garden of the new dwelling to address the privacy issue it would have to be placed near the



boundary and be at a height which was over seven metres above the ground level of his home. He felt that this might be worse than being overlooked.

33. Mr C stated that the new development, as built, has affected the enjoyment of his home. The main living areas were to the rear of his house. The family spent a lot of time in the rear garden. The family had spent much time, effort and money on the property and they are now uncertain about whether they wanted to continue living there. He also felt that the bungalow had been devalued.

### **WHAT CAERPHILLY COUNTY BOROUGH COUNCIL HAD TO SAY**

#### Written responses

34. The Council said that the Case Officer had “reservations” about the application which were taken up with the developer’s agent. When the amended plans were submitted the Case Officer was on holiday. The Manager dealt with the amended plans, carried out a site visit and prepared a report to Committee. The Council said that there were no notes from the site visit and the exact date was unknown. The Council stated that with the benefit of “hindsight” it should have consulted neighbouring occupiers about the amendment that rotated the development. In not doing so the Manager had borne in mind that Mr C had not objected to the original plans submitted.

35. The Council said that its policy called “Building Better Places to Live” was relevant to this type of case. However, it pointed out that the policy says that a blanket approach is inappropriate and that “careful design” is crucial. It added that the separation distances between the fronts of houses, especially in areas of terraced homes, is “often considerably less than 21 metres”. It claimed that this is normal and can be “replicated on modern housing developments”.

36. The Council had not carried out a survey of the difference in levels between Mr C’s home and the development. It said that a “visual estimation” suggested that there was a difference of about 3.5 metres. The Council claimed that the distance between the properties was 17 metres.

37. The Council stated that, although there is no firm guidance on the matter, it is “prudent” to include distance measurements in a report to the Committee where the Council’s guidance is “not being met”. However, the report did not go into any great detail about the relationship between Mr C’s home and the development because he had not objected originally; and because the views from the rear of the new property were said to be across Mr C’s side garden rather than into his rear windows.

38. The Council provided an analysis of the new property in relation to Mr C’s home. With regard to privacy the Council said that it understood Mr C’s concerns. Nevertheless in the Council’s opinion the development is at an angle to Mr C’s bungalow and the occupiers would have to “make an effort” to look into his windows and that in any case this could be “mitigated” by fencing and landscaping. The Council stated that discussions were ongoing with the developer about this. In terms of the overbearing effect, the Council maintained that there was no significant difference between the original and amended plans. In relation to Mr C’s claim of a loss of amenity the Council stated the following.

“Whilst the Council understands those concerns, it must be noted that the main areas of garden for the complainant’s property are to the side and front of the house, rather than to the rear. Also, whilst rear windows at his house are affected by the new dwelling, the main aspect of the existing house faces southwards and away from the development.”

The Council concluded that the decision to recommend approval in this case was “reasonable”.

#### Interview with the Case Officer

39. The Case Officer said that in this case she conducted a site visit. This included viewing the proposal from the home of Mr C and from the side of the development site from a lane adjoining Mr C’s dwelling to assess the levels. She

took photographs which are in the Council file and made notes. She saw that the new house would be “much higher” than Mr C’s bungalow.

40. The Case Officer said that she was “not happy” with the proposal as set out in the first set of plans. The site visit confirmed the reservations that she already had about the dominance of the proposed development in the locality generally. She said that she thought it was too large for the site. She said that her judgement about how it affected Mr C’s home had been recorded regardless of the fact that Mr C did not choose to object after being consulted about the first set of plans. Her site notes referred to an “existing property” and she confirmed that this meant the home of Mr C.

41. The Case Officer stated that she contacted the developer’s agent very soon after the site visit and relayed her concerns. These concerns included the height and size of the proposed development compared to Mr C’s home. She asked the agent for plans of levels which would compare the proposal with “off-site points”. A crucial off-site point was Mr C’s bungalow.

42. The Case Officer said that the developer’s wife had contacted her by telephone to discuss the application. The Case Officer suggested that the developer’s wife “did not take kindly” to comments about the potential overbearing nature of the proposal.

43. The Case Officer said that she again discussed matters with the agent. It was agreed that reducing the height might be possible but the applicant was apparently not willing to reduce the size of the house. She understood that the information about the levels previously requested would be submitted in due course. The Case Officer expressed the view that the possible amendments discussed “would not make much difference”.

44. The Case Officer stated that the developer went “over her head” to request that her boss, the Manager, look at the proposal, to obtain a different professional view.

45. The Case Officer said that the Manager discussed the proposal with her and said he thought it was now acceptable as suitable amendments were being suggested.

46. The Case Officer stated that she was not invited to the June site meeting involving the Manager and the developer.

47. The Case Officer said that the agent wanted to bring the outstanding application to a conclusion and when the amended plans came in she ensured that they went straight to the Manager who was preparing a report for the Committee. She acknowledged that it was normally the Case Officer who prepared the report for Committee. On this occasion she was going on annual leave.

48. The Case Officer said that she did not measure the distance from Mr C’s home to the development site. It was scaled off the drawing only. She felt that the “Building Better Places to Live” policy did not really apply because the properties in question were at an angle to each other.

49. The Case Officer said that if the amendments had come directly to her, and the Manager had not been involved at that time, she would have involved him anyway because of her reservations. If it was her decision she “would” have insisted on levels for comparison on this application before she addressed this concern and completed her report for Committee. [Please note that the Case Officer requested that the word “may” was substituted for the word “would” after reading the interview note] She pointed out condition 7 which requires that these levels would have to be submitted before any work commenced. It is a pre-start condition.

50. The Case Officer put forward the view that the change in the plan, which had prompted Mr C's objection, made the situation a little better with regard to his amenity in relation to height. In that sense she was surprised that he did not object to the original submission.

#### Interview with the Manager

51. The Manager said that all applications and reports from the team are referred to him. At the time this application was being processed he was effectively the direct line manager for the Case Officer.

52. The Manager understood that Mr C's complaint was that he had seen the original proposal and did not object. However, the amended plan turned the development to face his home more directly and thereby reduced his privacy, although the two properties were still at an angle to each other.

53. The Manager said he met the developer on site after the latter had expressed concerns that there were delays in determining the application and that the Case Officer had put reservations forward. The Manager stated that in his view the proposal was acceptable and the submission of amendments did not alter this opinion. He said that the rotation of the development plan was apparently to improve views over the valley.

54. The Manager confirmed that there was no plan submitted or drawn up which showed the difference in levels between Mr C's home and the new development. The Manager said that this did not worry him too much because he was not overly concerned about the difference in ground levels in this case. He said that it was not always the case that the Council requested comparative elevations if the officer's judgement was that there was no need. In this case, if there had been a concern about the existing ground level then the developer would have been approached about reducing them before the application was determined.

55. The Manager stated that it was helpful if developers showed differences in ground levels but the main point of condition 7 was to ensure that the pre-existing levels were not increased further by building up. He said that when the levels were submitted they were acceptable as little building up was in evidence but the drawings did not show Mr C's property in comparison.

56. The Manager said that he could recall noting that Mr C had not objected to the original proposal, which is probably why he did not re-consult Mr C on the amended plans. The amendments turned the dwelling away from the neighbours [who had originally objected] but did not appear to substantially change its relationship with Mr C's property.

57. The Manager said that he did not discuss the proposal with other officers.

58. The Manager suggested that the "Building Better Places to Live" policy was relevant to this case. He confirmed that the extract sent was adequate and was not out of context. He said that the fact that the respective properties were at an angle to one another in this case made a difference. He maintained that considering all issues there was not a significant loss of privacy to Mr C. He noted that the policy can be breached and yet the development proposal be acceptable if the circumstances overall make it so. He made the point that the original application technically breached the policy and Mr C was content with it.

59. The Manager said that he had visited the site recently and had concluded that an effort would have to be made to look from the windows of one property to the other. He suggested that an occupier would have to "peer in" to see into the other property. The Manager stated that the Committee would not have had any other information other than his report and to his recollection no questions were raised.

60. The Manager said that at the meeting in December 2006 officers could not promise Mr C anything but it was admitted by the Head of Planning that he should have been re-consulted.

61. The Manager can see “where Mr C is coming from”. He said that he was in contact with the developer with regard to screening and the Council, as a gesture of goodwill, would consider funding it if it was a problem for the developer. Any action would involve Mr C.

#### Interview with Head of Planning

62. The Head of Planning said that “Building Better Places to Live” policy is “our guidance and “ground rules”. He stated that officers need to consider if there are good reasons to depart from it. However, he said that the Council has lost planning appeals where they have refused applications based on applying the 21 metre rule.

63. The Head of Planning maintained that the Council should and does require comparisons of differences in ground levels such as cross-sections particularly in the light of a critical Ombudsman’s report issued last year. He regarded this as “good practice”. He noted that there were none submitted in this case.

64. The Head of Planning said that although he would have read the Committee report and attended the Committee meeting that approved the application, the first time he inspected the file or visited the site was after the complaint was submitted by Mr C.

65. The Head of Planning stated that he had visited the site before the meeting of 5<sup>th</sup> December 2006. He believed that the amendment did not significantly change the relationship between the properties.

66. The Head of Planning confirmed that at the meeting with Mr C of 5<sup>th</sup> December, he took responsibility for the Council not re-consulting Mr C after the amendment was submitted.

67. The Head of Planning expressed surprise that Mr C did not object after being consulted about the original plans given that the relationship between the properties was very similar.

### **CONCLUSIONS**

68. I have carefully considered the evidence that my investigator has gathered. The investigator has discussed and agreed my conclusions with the professional adviser. I have concluded that the decision to approve the amended proposal in June 2006 was tainted by maladministration. The maladministration that I have identified appears to have contributed significantly to the making of that decision. I will explain my conclusion below.

69. The maladministration in this case has two aspects. First, the Council did not consult Mr C after the applicant submitted amended plans. Had they done so I have no doubt that Mr C would have submitted a strong objection. Mr C's actions after he found out that the Council had accepted and approved amended plans illustrate this point. The Committee would have had to consider his objection.

70. Secondly, the Manager did not handle the amended application according to the provisions of PPW, the Council's own supplementary planning guidance or the advice of the POSW. The Council did not take into consideration all the relevant matters and as a result acted maladministratively. I will explain this in more depth.

71. PPW indicates that the Council should have asked the applicant to provide comparative elevations. The Case Officer made such a request. I interpret her evidence at interview, and the fact that she had major reservations about the



development, as suggesting that she would have insisted that the applicant complied with the request if the case had remained with her. My interpretation of PPW (TAN 12) is that there was a necessity for comparative elevations in this case. The Head of Planning agrees according to the evidence presented at interview.

72. The Council's supplementary planning guidance sets out its "standard" in terms of distances. I accept the Council's general point that it should not follow the policy blindly. However, this development has breached the distances guidelines by a very considerable extent. The policy indicates that a distance between dwellings of about 26 metres is appropriate in a case such as this. Mr C's home is about 16 metres from the new development. There is a divergence from the guidelines of over 60%. I have a number of misgivings about this:

- the scale of the divergence
- the failure to gather accurate information about the distances involved
- the lack of evidence of suggestions made by the Council, about how the "careful design" mentioned in the distances policy could have helped overcome the problem in this case
- the Manager's comment at interview that the difference in levels "did not worry him too much"
- the absence of any site visit notes in relation to the visit on in early June 2006
- the failure to refer details of the distances issue to the Committee.

In short, the Council approved a proposal, which very significantly breached its own policy without any formal justification for doing so.

73. I have concluded that a strong objection from Mr C, and a proper analysis of the comparative elevations and distances involved in the proposal, would, on the balance of probability, have led the Committee to have rejected the amended

proposal. This leads me to the issue of the injustice that Mr C has suffered because of this misguided planning decision.

74. Firstly, Mr C has found himself and his family living in close proximity to a house that towers over his bungalow in an over bearing manner. He was prepared to live with this to an extent as shown by his decision not to object to the original proposal. However, the rotation of the plans led to a reduction in his privacy. It is demonstrably easy to see into his property from windows in the new house. His garden is now overlooked to a far greater extent than in the original proposal. He now faces a choice between an unacceptable loss of privacy or the addition of fencing, or other barriers, which would increase the dominating effect of the development. In that regard I note the Council's offer to pay for screening work and to liaise with Mr C about the issue. I conclude that Mr C's residential amenity has been damaged. His home may have lost monetary value.

Secondly, Mr C did not have the opportunity to object to the amended proposal. Thirdly, Mr C has had to expend effort and time in pursuing this complaint. I note that Mr C had to engage in a frustrating process of trying to prove to the Council that he was right that the development was not progressing as indicated in the original plans during the autumn of 2006. He did not know that the proposal had since been amended. The Council should have realised that he meant the original plan.

### **RECOMMENDATIONS**

75. To compensate Mr C for the lost opportunity to object to the amended proposal and for the stress and effort associated with his pursuit of the complaint I recommend that the Council pays him the sum of £500.

76. As redress for the loss of amenity, and potential loss of value, I recommend that the Council should commission the District Valuer to undertake a valuation of Mr C's home. This will be to establish, in the light of my report, any loss of value which has arisen as a result of the approval of the amended proposal as

compared to the situation which would have applied if the original plans had been implemented, and compensate Mr C accordingly.

77. The Ombudsman has had to deal with another case in 2006 (reference number B2004/0893) relating to this Council where elevations were at issue and he concluded that residential amenity had been lost in that case. I will not repeat the recommendation set out in that report, which was aimed at reminding planning officers of the need to be careful regarding site levels and how this can affect residential amenity. However, I recommend that within two months of the date of this report, the Head of Planning submits this report to the Council's Planning Committee, together with a report on the action he has taken or proposes to take to ensure that the weaknesses I have described in paragraphs 69-72 do not recur in respect of future planning applications.

78. The Council has agreed to implement the recommendations in paragraphs 75-77.

Adam Peat  
Ombudsman

4<sup>th</sup> April 2008

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