

## **The Ombudsman's final decision**

Summary: Mr X complained about flooding from a nearby development which he said has not been completed in line with the original planning permission. He also complained about delays by the Council in addressing the matter. Mr X and other residents have suffered ongoing flood water damage to their properties. We found there were significant delays before the Council approved changes to the landscaping and drainage on site, causing Mr X frustration and uncertainty. The Council agreed to apologise and make a symbolic payment to Mr X for this. We found no fault in the Council's planning enforcement investigation or decision-making on the changes.

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## **The complaint**

1. Mr X complained about flooding from a nearby development which he said has not been completed in line with the original planning permission. He also complains about delays by the Council in addressing the matter.
2. Mr X said the development is over a metre higher than planned, resulting in a steep slope falling towards existing residents where there should have been a gradual slope. Despite this, Mr X said the Council approved an application to change the original plans.
3. Mr X said the Council recognised residents suffer flooding from the development, and invited the developer to address the drainage issues through a discharge of condition application. However, the only change was to an earth bund. Mr X said the earth bund is ineffective as it only traps some surface water, but residents experience water bubbling up from the ground and the flooding issues have remained.
4. Mr X and other residents have suffered continuing flood water damage to their properties.

## **The Ombudsman's role and powers**

5. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. I refer to this as 'injustice'. If there has been fault which has caused significant injustice, or that could cause injustice to others in the future we may suggest a remedy. (Local Government Act 1974, sections 26(1) and 26A(1), as amended)

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6. If we are satisfied with an organisation's actions or proposed actions, we can complete our investigation and issue a decision statement. (Local Government Act 1974, section 30(1B) and 34H(i), as amended)

## **How I considered this complaint**

7. As part of the investigation, I considered the complaint and the information Mr X provided.
8. I made written enquiries of the Council and considered its response along with relevant law and guidance.
9. Mr X and the Council had an opportunity to comment on my draft decision. I considered any comments received before making a final decision.

## **What I found**

### **Planning permission and conditions**

10. Most development needs planning permission from the local council. When granting permission councils may impose planning conditions to make the development acceptable in planning terms. The Government's National Planning Policy Framework (NPPF) says councils should keep conditions to a minimum. And councils should only impose conditions where they are necessary, relevant to both planning and the development, precise, enforceable, and otherwise reasonable ('the six tests').

### **Land drainage**

11. The impact development might have on land drainage can be a material planning consideration. If land drainage is raised in an objection letter to a planning application, and they are an important planning consideration, we would expect to see evidence to show the Council had taken the issue into account before it made its decision. Without some evidence to show the Council considered the issue, we cannot know whether it has exercised its discretion properly.
12. However, even if we find fault in a failure to consider drainage issues during the planning process, it does not mean we will expect the Council to provide a significant remedy for the consequences. A grant of planning permission does not allow developers to cause damage to neighbouring land. Because of this, we would not expect councils to pay compensation caused by the acts or omissions of private individuals. Remedies for these matters are available in the civil courts and tribunals.

### **Lead Local Flood Authorities**

13. The Lead Local Flood Authority (LLFA) for each area are responsible for developing, maintaining and applying a strategy for local flood risk management in their areas. They also have lead responsibility for managing the risk of flooding from surface water, groundwater and ordinary watercourses.

### **Enforcement**

14. Councils can take enforcement action if they find planning rules have been breached. However, councils should not take enforcement action just because there has been a breach of planning control.
15. Planning enforcement is discretionary and formal action should happen only when it would be a proportionate response to the breach. When deciding whether to enforce, councils should consider the likely impact of harm to the public and

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whether they might grant approval if they were to receive an application for the development or use.

16. As planning enforcement action is discretionary, councils may decide to take informal action or not to act at all. Informal action might include negotiating improvements, seeking an assurance or undertaking, or requesting submission of a planning application so they can formally consider the issues.
17. Government guidance says: “Effective enforcement is important as a means of maintaining public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control.” (National Planning Policy Framework September 2023, paragraph 60)

### **What happened**

18. I have summarised below some key events leading to Mr X’s complaint. This is not intended to be a detailed account of what took place.
19. The Council granted planning permission for a new building to replace an existing one on land near Mr X’s home. The new building has a larger footprint than the previous one. The planning permission included several conditions. Relevant to this complaint, the developer had to give a detailed design of the proposed permanent surface water drainage management system. They also had to give details of a landscaping scheme. The Council first discharged these conditions before the developer completed the build.

### **Enforcement investigations**

20. When building commenced, Mr X and other residents noticed excess water entering their gardens and pooling, causing damage.
21. Mr X reported the problem to the Council, and its planning enforcement team investigated in September 2020. The Council closed its investigation after the developer dug a long soakaway at the bottom of the site and created an earth bund to stop run-off of water. Engineers working for the developer said this would stop the flooding. They said the flooding was caused by heavy rainfall and the fact there was no drainage in place on the large building or in the ground.
22. Mr X contacted the Council in March 2021. He said the landscaping at the development does not look like the approved plans, as it was too high and too steep, and the top of the bank looked 2.5 metres higher. Mr X said this made him wonder if the building itself is a similar amount too high. He asked the Council what enforcement action it would take.
23. A Council officer visited the site and found level plans suggesting the ground floor finished level was 59 metres, compared with the provisional 58 metres on the original plans.
24. The Council said it was expecting a revised landscaping application shortly. It said it visited the site and while the developer installed gabions and more drainage, which was different from the plans, it did not consider the build was higher than it approved. It said the original plans show about only a metre high difference from the entrance right across the floor plate of the building.
25. Mr X and residents obtained an architect’s survey comparing the height of the site with the plans. The architect considered the ground and floor levels were 1 metre to 1.5 metres higher than approved.
26. In April 2021, the Council acknowledged the architect’s survey suggests the building is higher than shown on approved plans. It said it discussed this with the

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architect the residents employed, and they accept the survey is not 100% accurate. However, they were insistent the height is different to the approved plans.

27. The Council said the approved plans envisaged keeping the Finished Floor Level (FFL) of the previous building on the development. It said the approved plans show an 'Indicative Provisional Finished Level' of 58 metres. After visiting the site and viewing the construction plans, they show a floor level of 59 metres. This is the height the Council assessed the developer built the building to. It also said the approved application included earlier plans for the previous building, showing the floor level of the original building was slightly more than 59 metres. The Council said this meant the new building has a floor level the same as the previous building. The Council decided the developer built the new building to within acceptable limits of the FFL that existed with the previous building. It said it did not intend to pursue the alleged incorrect levels further, as it found no definite evidence of a material difference to what it approved. It said it would consider the outstanding issue with landscaping changes through the normal planning process.
28. Mr X asked the Council if it looked at the landscaping at the other end of the site. He considered the bank was significantly higher and steeper than shown on approved plans.
29. The Council confirmed it walked round the entire site. It said, from approved plans, construction plans, and topological surveys it was confident the developer built the building at the same ground level as the previous building, 59 metres. While it may appear higher from Mr X's perspective, the Council considered this was because the new building extends further into the grounds than previously, and the developer adjusted the landscaping. The Council confirmed it was considering new landscaping plans which it would then consult on.

#### **Landscaping condition**

30. The developer put in plans to vary the planning condition on landscaping in 2021. The plans also included details of changes the developer made to drainage.
31. The Council consulted the County Council's Flood Risk Officer (FRO), as the County Council is the LLFA.
32. The FRO objected to the plans in May 2021, noting the drainage drawing differed from the one previously approved. They wanted more information, including drawings or calculations on changes to drainage design, the earth bund, and replacement of the rain garden with a buried pipe.
33. The Council also consulted its landscape and green infrastructure officer, who responded in August 2021. They said the FFL of the building has increased by a metre from that suggested on approved drawings. This aggravated level differences between the building and the site boundaries, needing construction of a gabion wall not anticipated in the approved scheme. They referred to complaints from residents about surface water run-off and suggested a drainage report to assess the problem.
34. The developer sent a technical note and drainage design for the FRO to assess in October 2021. It also gave the Council information about heights on site. The developer referred to the original planning process and said it had to raise the FFL to meet the needs of the Council's tree officer. This was so as not to damage any retained trees and keep the existing heights on site. This was also a requirement of the LLFA, to allow connection into the existing system. The

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- developer also said a planning enforcement officer visited the site during construction and confirmed the levels reflect the approved design.
35. The FRO kept their objection to the landscaping changes in September 2022. The FRO wanted more information to show the developer considered all aspects of the proposed surface water drainage management system. The FRO considered the landscaping changes affected the drainage design. They noted that while the developer was trying to show the changes to drainage design, the amendments deviate from the previously approved drainage strategy.
  36. The Council told the developer about the comments from its landscape architect and the County Council's FRO. The Council also said neighbouring properties experienced problems with surface water run-off from the site due to the landscaping changes. It asked the developer to address this and provide necessary information for suitable drainage to correct current problems.
  37. The developer said the approved drawings show the FFL to the main building is 59 metres. This was in line with what they built and proven by topographical survey. They said they avoided the agreed flood exceedance route by creating the earth bund and pipe to relieve surface water run-off to the West boundary. The current application sought to incorporate the earth bund into the landscaping. The developer said they installed an extra land drain to capture surface water run-off during construction and help prevent water entering bordering properties. This drain was redundant when construction was complete, but the developer kept it to prevent future surface water run-off leaving the site.
  38. There followed a spell of no significant movement on the application.
  39. The Council emailed Mr X in March 2023 confirming a meeting on site with the developer and their civil engineer.
  40. Mr X sent the Council photographs and videos of the flooding.
  41. The Council contacted the developer in May 2023 asking for an update on the drainage.
  42. The developer said it commissioned a ground penetrating radar survey and survey of the drains, and some new bore hole tests. This was to find the source of the water and provide a solution.
  43. In June 2023, the developer told the Council it placed some ground water monitoring wells along the boundary to get a fuller picture. They asked if the water was always present for residents, straight after rain, or if it took time for it to appear.
  44. The developer then told the Council, following inspections and water monitoring, it was looking to change the earth bund on site, and it would send details. They also said research by their civil engineers showed water entering gardens was historical dating back to when the original building on the site was still in use.
  45. The Council contacted Mr X in August to tell him about the developer's suggested amendments, including extending the earth bund, and changing some of its fill material.
  46. Mr X told the Council residents met to discuss the developer's findings and proposals. He said water entering gardens was not historic, it only started when construction of the new building began. Mr X said residents would welcome proposals to address the problems, in consultation with the County Council's FRO.
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47. In October 2023, the Council asked the County Council's FRO to attend a meeting on site with the developer's drainage consultant to resolve any outstanding issues.
  48. The developer told the FRO its engineers developed proposals to prevent surface water run-off following meetings earlier in the year.
  49. The developer asked the Council to confirm it would approve the planning condition details following the FRO's agreement.
  50. In April 2024, the Council's landscape architect confirmed, after reviewing the amended landscape details, the developer's proposals were acceptable.
  51. The Council approved the application to vary the condition on landscaping on 21 May 2024.
  52. The planning officer's report on the application refers to the problems residents suffered with surface water run-off, and concerns from the County Council's FRO. They said this led to a site meeting to resolve the issues, and a new landscaping scheme and detailed drainage strategy followed.
  53. The planning officer explained there were various changes to the previous scheme. They included extending and altering the earth bund's position and composition. This was to avoid impact on the root protection areas of trees. The changes to the construction of the earth bund were to provide more drainage channels within them. The developer also planted more trees.
  54. The planning officer said these changes were agreed by its landscape architect and the County Council FRO. They resulted in an amended landscape proposal which was considered acceptable from a drainage perspective, and will ensure the amended drainage arrangements will resolve surface water issues faced by neighbouring residents.
  55. The landscaping approval included a condition whereby the developer had to again give details of the permanent surface water drainage management system to the Council for approval, so the original drainage condition could be changed. This would again be in consultation with the County Council's FRO.

### **Drainage condition**

56. The developer sent the Council comments from their structural engineers in June 2024. They said the run-off to the sewer comes from roofs and paved surfaces. And any water on soft landscaped areas drained naturally into the ground.
57. In August 2024, the developer sent the Council its updated surface water management plan. It said this reflected the updated information including the earth bund details. The Council referred the information to the County Council FRO.
58. The County Council's FRO asked the developer to check the proposed earth bund height and other drainage network.
59. The developer sent documents showing the earth bund in detail and in line with the updated surface water management plan. They said the County Council FRO approved this revision as part of the landscaping changes, and the only change was in the planting scheme. The surface water management plan shows the earth bund as a minimum depth of 300 millimetres, but it has been installed at 500 millimetres for more protection.

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60. Mr X contacted the Council in September 2024 asking if the developer had sent details of their permanent surface water management system, needed for the Council to discharge the drainage condition.
  61. The Council confirmed the developer had sent the details and the County Council's FRO was considering them.
  62. In December 2024, the Council told Mr X the County Council's FRO was satisfied the details in the surface water management plan are sufficient to discharge the condition.

### **Formal complaint**

63. Mr X complained to the Council about a lack of enforcement action on 1 May 2024. He said the developer did not build the development to plan, and the Council had still not decided the application to change the landscaping condition after three years.
64. Included in his complaint, Mr X sent a report into the flooding from a chartered surveyor. The surveyor considered garden water levels were not normal, suggesting the raised ground levels at the development as a possible cause. They recommended the developer or Council design a suitable replacement rainwater drainage solution to overcome the issue.
65. The Council responded to Mr X's complaint in June 2024. It referred to officer shortages and delays by the developer contributing to overall delays deciding the application on changes to the landscaping condition. It also said there were several amendments to the plans.
66. The Council said it worked with the developer to understand water discharge issues and design solutions. However, it said property damage is a private matter, its responsibility is to ensure the development is acceptable in planning terms.
67. Mr X asked to escalate his complaint. He said residents experience not just surface water, but water coming up from the ground. He considered the developer had not built the development to the correct height. He said floodwater damage resulted from the Council's failure to ensure the developer built the development to plan, or to act to address planning harm.
68. The Council sent its final complaint response in July 2024. It said it needed to understand the source of the water and what caused it to discharge on Mr X's land before deciding if it was within the Council's control and what action it could take. It negotiated with the developer to install a soakaway and an earth bund to address the situation. The Council said it is not responsible for any damage; this is a private matter.
69. The Council said it investigated Mr X's complaint the new building was too high in 2021. However, it did not find that was the case. It said it addressed any departures from plans which it considered significant through the following applications made by the developer.

### **My investigation**

70. Mr X told me there is a steep drop in the grounds of the development, compared to what looked a gradual drop on the plans. Mr X believes water is coming that way and has found its way underground. He said it did not happen before the development was built.
71. Mr X said the developer sent new drainage plans to the Council following his formal complaint. However, the only change he is aware of is an earth bund,

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constructed in June 2024. Mr X said he has not noticed any difference since its construction.

72. The Council told me the new building is about the same FFL as the previous building on the site, but it extends further south and west, closer to neighbouring properties. This, in combination with forming a level garden has led to a steepening of the rest of the grounds towards neighbouring properties. This gives the impression of it being taller from neighbours' perspective, but the Council is satisfied it is in accordance with plans.
73. The Council recognised residents complained of increased surface water run-off into their gardens. It invited the developer to address this. The proposed solution was to install an earth bund to redirect water flow. The bund seeks to prevent water running onto adjoining land by capturing it in a gully between the bund and bank of the garden.
74. The earth bund seeks to contain surface water running off the garden area. Water running off hard surfaces and the building itself run into a tank discharging to the sewer.
75. The Council said it accepted this solution on the advice of the LLFA, the County Council. The developer gave an updated surface water management plan reflecting the development and surface water arrangements, including the earth bund. This was considered acceptable by the County Council's FRO.
76. The Council recognised Mr X and others continued to complain about floodwater. However, the developer has discharged all relevant conditions, and completed the approved drainage scheme in line with plans. The Council said there is therefore no further action it can take.

### **Analysis**

77. The Ombudsman is not an appeal body. This means we do not take a second look at a Council decision to decide if it was wrong. Instead, we look at the processes the Council followed to make its decision. If we consider it followed those processes correctly, we cannot question whether the decision was right or wrong, regardless of whether a complainant disagrees with it.
78. I carefully considered all relevant information provided by Mr X and the Council. However, as a publicly funded body we must be careful how we use our resources. We conduct proportionate investigations; completing them when we consider we have enough evidence to make a sound decision. This means we do not try to answer every question a complainant may have about what the Council did. My investigation focused on whether there was evidence of fault having potential to cause significant injustice in the Council's enforcement decision making and approval of changes to landscaping and drainage conditions.
79. Mr X and residents reported flooding from the development, which they said the developer did not build to the correct height.
80. I found there was a change to the provisional floor levels as part of the original planning process. That was after feedback from the Council's tree officer and the LLFA. So, the Council approved changes as part of the correct process, and with suitable consultee input.
81. The Council investigated the height of the development as a possible breach of planning control.
82. It is for the Council to decide whether a breach of planning control has occurred, and then any subsequent enforcement action is at the Council's discretion. We

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- would not criticise the Council for investigating and trying to negotiate improvements with an applicant, particularly in a case where the breach, or the impact of the alleged breach, is not clear.
83. The Council accepted the original plans had an 'indicative provisional' level of 58 metres, but the actual FFL is 59 metres. However, the Council said the approved plans envisaged keeping the FFL of the previous building, which was just over 59 metres. The Council considered this was acceptable and there was not enough evidence of a material difference to the approved FFL.
  84. I appreciate Mr X's frustration at this decision, as there is some uncertainty about the actual FFL compared to what was planned and approved. However, enforcement action is discretionary, and I have not seen evidence of fault in the Council's consideration of the complaint. The Council visited the site and checked the application and construction plans. It also considered a report from a surveyor employed by residents.
  85. During its enforcement investigation, the Council found the developer had made landscaping changes they did not have approval for. The Council therefore asked the developer to apply to have these changes approved. The developer also agreed to make drainage changes to try to prevent the water run-off experienced by residents.
  86. The Council approved the developer's application to change the landscaping, which included revised drainage plans, in May 2024. That was three years after the developer made the application, which is a significant delay.
  87. In part, this delay was down to consultees requesting more information and strategies, and then the developer providing this information and carrying out surveys. However, the Council also accepts it was short staffed, which contributed to the delay. This resulted in periods of inactivity where the Council allowed the matter to drift. That was fault. This caused Mr X frustration and uncertainty.
  88. The landscaping changes also affected the drainage scheme, and the Council therefore considered the developer's drainage changes at the same time.
  89. I found the Council properly considered the landscaping and drainage changes, including input and numerous comments from consultees such as its landscape officer and the County Council's FRO.
  90. The developer carried out surveys of the ground and drains before proposing changes to the design and fill material of the earth bund. The County Council's FRO also met the developer's drainage consultant on site to discuss the proposals. They were ultimately satisfied the developer's landscaping, and surface water and drainage plans, were acceptable from a flood risk view point.
  91. Mr X considers the developer's surface water management plans are still not fit for purpose.
  92. I found the Council followed the correct process in discharging the planning conditions by consulting the LLFA and its landscaping architect. The developer provided more information and changed plans before the consultees were eventually satisfied. I therefore cannot criticise the Council in those circumstances.
  93. I did not find the Council at fault for approving landscaping and drainage plans in circumstances where the relevant consultees, including the LLFA, agreed.

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94. Flood damage resulting from development is not the fault of the Council, nor is it responsible for compensating people for the impact. It is a private matter between Mr X and residents, and the developer.

### **Agreed Action**

95. Within four weeks of my final decision, the Council will:
- Apologise to Mr X for the significant delay approving changes to the landscaping and drainage at the development.
  - Pay Mr X £250 in recognition of the avoidable frustration, uncertainty and delay reaching a point where the Council was satisfied with landscaping and drainage arrangements on site.
  - Review staffing numbers in its planning department to ensure it is providing suitable service levels.
96. The Council should provide us with evidence it has complied with the above actions.

### **Final Decision**

97. I found there were significant delays before the Council approved changes to the landscaping and drainage on site, causing Mr X frustration and uncertainty. The Council agreed to apologise and make a symbolic payment to Mr X for this. I found no fault in the Council's planning enforcement investigation or decision-making on the changes.

### **Investigator's decision on behalf of the Ombudsman**