

# Report

on an investigation into seven complaints nos  
08 014 449, 08 019 432, 08 019 433,  
08 019 434, 08 019 435, 08 019 436 &  
08 019 437 against  
Medway Council

**10 August 2009**

**Investigation into seven complaints (nos  
08 014 449, 08 019 432, 08 019 433,  
08 019 434, 08 019 435, 08 019 436 &  
08 019 437) against Medway Council**

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## **Report summary**

### **Subject**

Planning & building control.

Seven people complain that the Council failed to deal properly with the development of an all-weather sports pitch at a school situated on the other side of a public footpath which runs along the bottom of their rear gardens. They are concerned about a loss of privacy and outlook, noise from the sports pitch, and the possibility of flood-lighting being installed at a later date.

### **Finding**

Maladministration causing injustice.

The Council was at fault over its handling of the planning application for the sports pitch, as it failed to take into account the relationship between the complainants' homes and the sports pitch and the potential for overlooking and loss of privacy in their gardens from a viewing area running the full length of the sports pitch.

### **Recommended remedy**

To remedy the injustice caused to the complainants the Council should:

- a. Reimburse them for the reasonable costs associated with increasing the heights of their boundaries to protect them from the unanticipated impact from the sports pitch; and
- b. Pay the lead complainant £250 for the time and trouble involved in pursuing the complaints on behalf of the other complainants.

The Council should also take steps to ensure that in future it keeps a more detailed record of Development Control Meetings than a record of the decisions taken.



## Introduction

2. Seven residents complain that the Council failed to deal properly with the development of an all-weather sports pitch at a school situated on the other side of a public footpath which runs along the bottom of their rear gardens. They are concerned about a loss of privacy and outlook, noise from the sports pitch, and the possibility of flood-lighting being installed at a later date.
3. Four of the complainants' properties are directly opposite the sports pitch and the other three are situated beyond the end of the pitch. All of their properties are on land which is at a higher level than both the public footpath and the original level of the school playing field on which the sports pitch has been built. Their rear gardens slope away from the houses towards the boundary, each of which is supported by a 2 metre high retaining wall with fencing of 1.55 metres on top.
4. The complainants' homes at the rear face west onto the development site, to the south of which are the school buildings. The development site slopes upwards away from their properties, both south towards the school and west away from their homes.

## Legal and administrative background

5. Under the terms of the Medway Local Plan 2003, the Council has adopted the *Kent Design Guide 2000* as supplementary planning guidance. With regard to privacy, the *Kent Design Guide 2000* says:

‘It is important ... to ensure that the privacy of existing residents is safeguarded when assessing the impact of new development. As a guide, a distance of 21 metres between the unobstructed windows of habitable rooms in the private rear facades of dwellings has been found to be generally acceptable. This dimension may, however, vary according to the surrounding circumstances’.
6. The *Kent Design Guide* was updated by Kent County Council in 2005/06. The revised *Guide* does not prescribe minimum distances between developments and says ‘a flexible approach’ should be taken over privacy distances. However, the *Guide* says:

‘Where a private rear garden or courtyard is provided adjacent to a new home, normally the area immediately outside the doorway to that space should provide private sitting out space for occupiers. This should not be directly overlooked from adjacent property or public areas.’

## Investigation

7. My Investigator has met two of the complainants when he visited one of their homes. He has visited the Council's offices to consult its records relating to the developments at the school and visited the school to look at the all-weather sports pitch and its relationship with the complainants' properties. He has also interviewed:
  - a. The Case Officer who dealt with the planning application;
  - b. The Principal Planning Officer who signed off the Case Officer's report and presented it to the Development Control Committee ('the Committee');
  - c. The Head of Development Control;
  - d. The Enforcement Officer;
  - e. The Chairman of the Committee;
  - f. The Vice Chairman of the Committee;
  - g. The two minority part Spokesman on the Committee;
  - h. An ex-Ward Councillor who had been a member of the Committee at the time planning permission was granted; and
  - i. The Ward Councillor who spoke against the planning application at the Committee meeting.
8. Both the Council and the complainants have been shown a copy of the key facts of this report in draft. Where appropriate their comments are reflected in the text.

## The grant of planning permission for the sports pitch

9. The Council granted outline planning permission for a residential development at the school in September 2004 subject to, amongst other things, the school entering into a unilateral agreement to secure various improvements to its facilities, including an all-weather sports pitch.
10. The report to the Committee on the application noted that it had been submitted 'with all matters (siting, means of access, design, external appearance and landscaping) being reserved for future consideration'.
11. The Governors for the school submitted the application for the sports pitch, and other developments at the school, in March 2007.
12. On 4 April 2007 the Committee approved changes to the terms of the unilateral agreement but none of the changes affected the sports pitch.

13. On 15 and 16 May 2007, the Case Officer responsible for dealing with the planning application visited the development site and took a number of photographs. These included pictures of the public footpath which runs alongside the development at the back of the complainants' homes, and also of the backs of their properties.
14. In July 2007 the Case Officer wrote to the agent for the Governors to check, amongst many other things, whether the sports pitch would be built above the existing ground level by approximately 3 metres or whether it was the fencing around the pitch which would be built to that height. When the agent replied he said one of the plans illustrated the cut and fill exercise that needed to be undertaken (because the development site sloped) and that 'currently' the maximum height above the existing ground level was 1.8 metres. He said this was to be confirmed on a detailed structural engineering drawing. The agent said the pitch would be flat and that its average level would be approximately that of the existing ground.
15. In August 2007, the Case Officer wrote again to the agent. With regard to the sports pitch, she asked him to clarify whether it would be 1.8 metres above the existing ground level on site. When the agent replied in November 2007, he provided revised plans and said the average level would be equal to the level of the adjacent footpath. He said the highest level would be about 2.2 metres above the existing ground level (at the corner closest to the complainants' homes) and the lowest level would be 2.2 metres below the existing ground level (at the corner nearest the school). He said the boundary fence would be 7 metres away from the pitch fence. He said the public footpath outside the boundary was 3.5 metres away from the boundary fence and was about 0.9 of a metre below the ground level for the development (at the corner closest to the complainants' homes). Although not stated in the letter, this meant the sports pitch at the point closest to the complainants' homes would be 3.1 metres above the level of the boundary with the public footpath.
16. The Council consulted neighbouring properties about the planning application. This resulted in a significant number of comments, all of them objecting to the all-weather sports pitch. Issues of concern related to noise, outlook, loss of view, privacy and the possibility of floodlighting.
17. In her report on the planning application the Case Officer pointed out that there is no right to a view in planning law. However, in terms of the broader issue of outlook, she said this would be addressed by additional tree planting. The appearance of the sports pitch was described as 'a constant surface with black weld mesh fencing to all sides three metres high and inside of which will be a paved viewing area for the length of the pitch'. The Case Officer said the development would be opposite four of the complainants' properties which were approximately 24 metres away with a tree lined walkway in-between (that is the public footpath). She noted that the properties were set at a higher level than the pedestrian walkway, 'above an approximately 3.5 metre high boundary retaining

wall topped with fencing'. [When interviewed, each of the Councillors confirmed that they understood this to mean that the wall itself was 3.5 metres, although its true height is 2 metres and the fence on top accounts for a further 1.55 metres (see paragraph 3).]

18. In her report the Case Officer said it was not considered that the built form of the sports pitch would cause an unacceptable loss of amenity to neighbours, by reason of loss of light, privacy or overbearing impact. She said the impact of noise from the use of the synthetic turf pitch would be controlled by a condition restricting the hours of use (from 8.30 to 20.30 Mondays to Saturdays, and 10.00 to 18.00 on Sundays).
19. The report on the planning application was presented to the Committee on 23 January 2008 by the Principal Planning Officer with the aid of a PowerPoint presentation. This included plans of the site and the proposed development, as well as photographs of the site, the public footpath and the backs of the complainants' homes. When interviewed the Principal Planning Officer told my Investigator that before doing this he had reviewed the application as though he were the Case Officer and had been satisfied with the report. The Development Control Manager also told my Investigator he had checked the report before it was presented to the Committee. The Council says that, in his presentation, the Principal Planning Officer's fully explained 'the correct height of the development above existing ground levels'.
20. The Committee granted planning permission for the development and the following condition was included:

'The development shall be undertaken in strict accordance with the levels and sections set out [on the approved drawing] or such other drawings as may be approved by the Local Planning Authority'.
21. The permission granted provided for a 3 metre wide viewing area running the full length of the sports pitch on the side adjacent to the public footpath and therefore opposite four of the complainants' homes. However, as constructed, the viewing platform only runs about three-fifths way down the sports pitch and is not opposite any of the complainants' homes.
22. On 18 April 2008 the Council received structural engineering plans setting out proposed changes to the ground levels for the sports pitch. These indicated that the sports pitch would be built a few metres in from the boundary with the public footpath. At the corner closest to the complainants' homes, the sports pitch would be 3.45 metres above the height of the ground at the boundary with the public footpath and 2.59 metres higher than the existing ground level for the development site. The plans also show the viewing area (see paragraph 17) outside the perimeter fencing and extending about three-fifths of the length of the sports pitch.

23. On 15 May 2008 the Case Officer visited the development site to discuss the proposed changes with the agent for the development. Following the meeting the Case Officer sent an e-mail to the agent to confirm that the structural details on the drawings were acceptable. She noted that the sports pitch would in places be raised 1.6 metres above the existing ground levels. She also confirmed that work could commence on site, although not all the relevant conditions had yet been discharged (including the landscaping arrangements).

## **Concerns about the height of the development**

24. In July 2008, concerns were raised by the one of the complainants that the sports pitch was not being built in line with the planning permission, as it appeared to be 2 metres too high.
25. As a result of these concerns, one of the Council's Enforcement Officers visited the site to take measurements and photographs of the development. The Enforcement Officer concluded that the surface of the sports pitch was approximately 2 metres higher than the height shown on the approved plans. These concerns were passed on to the Principal Planning Officer on 24 July 2008, who discussed them with the Development Control Manager. The latter requested the service of a Temporary Stop Notice. However, according to a note on the planning enforcement file, the Council's legal department 'was concerned that we may have scuppered any possible enforcement action as a result of the e-mail' sent on 15 May 2008 (see paragraph 23).
26. On 25 July 2008 the Council wrote to the agent for the development about the 'alleged breaches of planning control'. It said the development appeared to be significantly different from the approved plans. The Council also said there were concerns over the clarity of the plans submitted in April 2008, referring to them as 'flawed and inaccurate', and said the development did not comply with them. The agent was advised to stop work immediately, although the Council said it would hold any formal enforcement action for seven days to provide an opportunity to respond. The Council says its reaction was on the basis of the photographs taken by the Enforcement Officer, which appeared to show the gabions being installed to support the sports pitch at a higher level than approved. It denies that there had been a failure to understand the relationship between the development and the complainants' properties and points out that it acted quickly to clarify the situation.
27. The Council held a meeting with the school, its agent and the Project Manager for the development on 6 August 2008, at which a drawing was handed over to the Council along with a printed copy of an e-mail which addressed the issue of the height of the development above the 'existing' ground level. These indicated that at the corner of the development closest to the complainants' homes the surface of the pitch was 3.37 metres above the level of the ground at the site boundary, 27 cm higher than indicated on the approved plans (see paragraph 14).

28. Following a further visit to the site to check the level of the development in relation to the level of the ground, the Council wrote to the agent on 8 August 2008 to confirm the outcome. In broad terms, the Council concurred with the figures which had been put to it at the meeting on 6 August 2008, although it said the pitch was 3.45 metres above the ground level at the site boundary. It said that it was 0.35 metres above the height specified in the agent's letter of November 2007 (see paragraph 15) and concluded that this was within 'acceptable tolerances to be dealt with as a minor amendment' which could be 'discharged through condition'. The Council gave formal approval to the levels detailed in the structural engineering plans submitted in April 2008 (see paragraph 22).
29. In its letter, the Council also noted that additional planting had been offered on the site adjacent to the public footpath, 'in an attempt to ameliorate the concerns of neighbouring occupiers'. The Council invited the agent to submit plans incorporating details of the additional planting, with a view to formally discharging the condition relating to landscaping. When this condition was discharged on 30 September 2008 five additional trees and a hedge had been added along the boundary with the public footpath. When interviewed, the Case Officer told my investigator two of the trees would grow to a height of 4-5 metres and the others would eventually be much larger.
30. On 19 August 2008 the Council sent a copy of its letter to the agent to one of the complainants.

## **The complaints to me**

31. In October 2008 I received a complaint from one of the complainants who had been acting on behalf of the other complainants when dealing with the Council. The other six subsequently confirmed that they also wanted to complain to me. Their concerns relate to a loss of privacy as a result of overlooking from the sports pitch, the visual intrusion of the sports pitch and problems from additional noise. They say the sports pitch has been built two metres higher than should have been the case and believe that this is because the spoil which should have been removed from the site was instead used to increase the height of the pitch.
32. When interviewed by my Investigator, the Case Officer said she did not know it was possible to see into the complainants' properties from the sports pitch. She said that, as a result of her discussions with the agent before planning permission had been granted, she had understood that it would only be possible to look across on to the fence at the bottom of the complainants' gardens and had not expected the sports pitch to be so high that it would be possible to see into their gardens from the pitch.

33. The Principal Planning Officer told my Investigator he had been aware that the pitch would be on a level with the complainants' gardens. He said the issue of overlooking had been considered and recalled explaining, in response to questions at the Committee meeting, that the height of the sports pitch at the northern end of the site would be 2.2 metres. The Council has subsequently said that the Committee debated the merits of the planning application at some length and indeed concentrated to a large degree on the impact on privacy. The Council's minutes of Committee meetings simply record the decisions, rather than the debate. The Council says any more detailed record of the meeting was destroyed when it moved to new offices. It points out that there is no statutory requirement to keep a record of the debates which take place at the Committee's meetings.
34. When interviewed, 15 months after the event, most of the Councillors could not recall the details of the discussion at the Committee meeting. Others had different recollections of what was discussed. The Ward Councillor who spoke against the planning application at the Committee meeting said he had had the impression that the level of the sports pitch would be lower than the complainants' properties. He said the residents' concerns, which he presented to the Committee, had related to the visual impact of the development and, in particular, the height of the fence surrounding the sports pitch, rather than the possibility of looking into their properties from the sports pitch. However, the Chairman of the Committee recalled the issue of privacy being addressed and said she had understood that it would be possible to look across into the complainants' properties from the sports pitch but not to look down on them (which is what it is possible to do). She recalled having asked to look again at the photographs of the rear of the complainant's properties in the PowerPoint presentation.
35. The Council points out that the sports pitch is not a playground but a facility to be used by children and others partaking in sport, who will not wish to stand around and look into gardens some 27 metres away. The Council also points out that this distance exceeds the 21 metres which the *Kent Design Guide 2000* (see paragraph 5) says there should be between facing properties. It says consideration was given to the Kent Design Guide 2000 when reaching a judgement on whether the sports pitch would result in a loss of privacy for the complainants' properties.
36. The Council has indicated its willingness to resolve these complaints by compensating the complainants for the reasonable cost of increasing their boundaries to protect them from the impact of the sports pitch, and by paying the lead complainant £250 for the time and trouble involved in pursuing the complaints on behalf of the other complainants.

## Conclusion

37. I am grateful to the Council for its willingness to resolve these complaints. I am nevertheless reporting on the complaints as they raise important issues about how a planning application such as this, which raised some complex issues, is assessed and reported to Committee.
38. The development of an all weather sports pitch and its relationship to the complainants' homes was undoubtedly a complicated matter, given the different land levels of the development site, of the complainants' properties and of the area in between. However, that relationship was misrepresented in the report on the planning application, as it indicated that the boundary at the bottom of the complainants' gardens was significantly taller than it in fact is and made no reference to the height of the sports pitch.
39. If the relationship of the development to the complainants' properties had been understood and the issue of privacy fully explored, then the Case Officer's report should have been amended before it was submitted to the Committee. However, there is only one reference to privacy in the report and no explanation of why it would not be an issue.
40. The Council says the position was fully explained to the Committee. However, even if the Committee was advised that the sports pitch would be 2.2 metres high at the corner nearest to the complainants' homes, it is difficult to understand how anyone could have been expected to realise that it would be possible to see over a 3.5 metre high boundary wall topped with fencing.
41. Unfortunately, there is no record of what went on at the Committee meeting, other than the decision to grant planning permission. The recollections of the Members interviewed by my Investigator are not sufficiently consistent to show with certainty what happened. The lesson here is that the Council should keep a more detailed record of such meetings. In the absence of such evidence I cannot be satisfied that the possibility of overlooking the complainants' gardens was taken into account at the time, or, despite what the Council says, that consideration was given to the contents of the Kent Design Guide 2000 on the issue of privacy. It seems to me that the failure to accurately reflect or consider the relationship between the sports pitch and the complainants' properties resulted in the Council failing to address the potential for overlooking when granting planning permission for the development.
42. The Council was also at fault over the fact that approval was given for the changes set out in the structural engineering plans (see paragraph 23) based on a misrepresentation of the height of the development, which was 2.59 metres higher than the original ground level, rather than 1.6 metres.

43. This prevented the Council from issuing a Temporary Stop Notice. But the fact that the Council wanted to issue a Temporary Stop Notice in July 2008, when the sports pitch was not significantly higher than what had been approved, reinforces my view that the Council had not fully understood the scale of the development. The Council denies that this is the case and says the action it took was based on the appearance of the development from the Enforcement Officer's photographs. However, this ignores the fact that the Enforcement Officer had also taken measurements of the development. These photographs should have indicated, at least to those officers who were familiar with the planning application, that there was no significant variation from what had been approved and that it was not 2 metres higher than approved.
44. Would it have made any difference if the relationship between the sports pitch and the complainants' properties had been understood and the issue of privacy fully explored at the time? The Council points to the distance between their homes and the sports pitch, which exceeds the 21 metres referred to in the Kent Design Guide 2000. It also points out that the sports pitch is used by people participating in active sport, rather than standing still. However, this ignores the fact that the Council has given planning permission for a viewing area extending the full length of the sports pitch and, therefore, opposite the homes of four of the complainants. Although the viewing area does not currently extend the full length of the pitch, there is nothing to prevent the school from extending it in line with the planning permission. It seems to me that, notwithstanding the Kent Design Guide 2000, this represents a very significant potential intrusion which should have required mitigation.
45. The failings I have identified amount to maladministration, which has caused injustice to the complainants. In order to remedy that injustice the Council should:
  - a. Reimburse the complainants for the reasonable costs associated with increasing the heights of their boundaries to protect them from the unanticipated impact from the sports pitch. The Council and the complainants need to discuss the scope of the works which might reasonably be required in order to do this. It may not be the case that the same works are required to each property, given that they have different relationships with the sports pitch. The Council should initiate discussions with a view to agreeing the scope of the works and the most cost effective way of carrying them out.
  - b. Pay the lead complainant £250 for the time and trouble involved in pursuing the complaints on behalf of the other complainants.

46. The Council should also take steps to ensure that in future it keeps a more detailed record of Development Control Meetings than a record of the decisions taken. The fact that there is no statutory requirement for this does not alter the fact that it would be good practice to do so. This does not necessarily mean that the formal minutes should be any more detailed than those which are currently taken. However, they should at least be supported by a more detailed record of what went on. Whether that takes the form of manuscript notes, or an audio or visual recording, is for the Council to decide.

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