

**The investigation of a complaint by Mr W against Isle of Anglesey
County Council**

A report by the Public Services Ombudsman for Wales

Case: 200901501

Contents

Introduction	-	Page 1
Summary	-	Page 2
The complaint	-	Page 3
Investigation	-	Page 4
Legal & Administrative Note	-	Page 4
Events Leading to the Complaint	-	Page 7
What Mr W's Agent said	-	Page 22
What the Council said	-	Page 27
Professional advice	-	Page 31
Conclusions	-	Page 33
Recommendations	-	Page 40
Plan & Annexes		

Introduction

This report is issued under section 16 of the Public Services Ombudsman (Wales) Act 2005.

In accordance with the provisions of the Act, the report has been anonymised so that, as far as possible, any details which might cause individuals to be identified have been amended or omitted. The report therefore refers to the complainant as Mr W.

Summary

Mr W complained that after he sought planning permission for the use of his site for commercial storage purposes, the Council wrongly granted planning permission for raising the height of a boundary wall on a neighbouring site which detrimentally affected visibility at the access to the trading estate on which both sites were located. He complained further that the Council failed to secure the reduction in the height of the wall. As a consequence, he was unable to implement his own permission which had been granted subject to a condition preventing the use of the site until the height of the wall was reduced. He also suffered financial losses and claimed that his costs of developing the site following the eventual reduction in the height of wall were significantly greater than they would have been had he been able to develop the site following the grant of an unrestricted planning permission in a timely manner.

His complaint was upheld. The plans of the proposed development on the neighbouring site showed some information regarding the proposal to raise the height of the wall, but the Council failed to recognise this and/or failed obtain further information from the applicant. The raised height of the boundary wall adjacent to the access to the trading estate was detrimental to highway safety. The evidence showed that the Council had failed subsequently to address the issue and to respond satisfactorily to correspondence from Mr W's agent. Eventually, and after Mr W complained to me, the Council secured the reduction in the height of the wall some 2 years later.

The Council was recommended to reimburse Mr W's company its financial losses (assessed at £30,626) by means of an initial down payment of £20,000, and the balance within 12 months of the commencement of trading on the site, as adjusted if necessary in the light of any significant new information emerging regarding the precise extent of the assessed losses. The Council was further recommended to pay his Company a sum equivalent to the difference between the estimated costs of developing the site had planning permission been granted in a timely manner in 2008 and the sums actually paid when he does so, and a contribution of £1500 towards Mr W's costs in pursuing the complaint. Finally, the Council was recommended to draw the Ombudsman's report to the attention of the Commissioners (appointed by the Welsh Assembly Government in March 2011 to take over the Council's executive powers).

Please note: Summaries are prepared for all reports issued by the Ombudsman. This summary may be displayed on the Ombudsman's website and may be included in publications issued by the Ombudsman and/or in other media. If you wish to discuss the use of this summary please contact the Ombudsman's Office.

Report under Section 16 of the Public Services Ombudsman (Wales) Act 2005
of an Investigation into a complaint

made against

Isle of Anglesey County Council (“the Council”)

INTRODUCTION

1. This report is issued under Section 16 of the Public Services Ombudsman (Wales) Act 2005 (“the Act”). In accordance with the requirements of the Act the report has been anonymised. Accordingly the complainant is referred to as Mr W.

THE COMPLAINT

2. Mr W is the owner of a site on a trading estate which he wishes to use for commercial storage purposes (referred to in this report as Site A). He complained (through his agent, a planning consultant) that after he sought planning permission for his proposed use of the site in January 2008, the Council wrongly granted planning permission (in March 2008) for raising the height of a boundary wall on a neighbouring site (“Site B”) to a level which detrimentally affected visibility at the access to the trading estate from the public highway. He complained further that despite a report which informed members of its Planning and Orders Committee on 2nd July 2008 that “action would be taken to resolve the visibility of the access and erection of the wall”, the Council failed to secure the reduction in the height of the wall. He claimed that as a consequence he was unable to implement his own planning permission (which was granted subject to a condition preventing the use of the site until the height of the wall was reduced), and has suffered financial losses.

3. Mr W claimed that to put matters right, the Council should take immediate steps to secure a reduction in the height of the wall, and compensate him in respect of his financial losses.

4. A plan is attached to this report showing Site A edged red, Site B hatched black, the wall in blue and the access in green.

THE INVESTIGATION

5. The Council has provided information relating to the complaint. One of my investigating officers has discussed the complaint with the complainant's agent on the telephone and viewed digital images of the raised boundary wall on Site B. I have obtained specialist planning advice from an independent professional adviser. I have also consulted my Financial Adviser about the financial losses claimed by Mr W. I have not included reference to every detail contained in the information provided, but I am confident that nothing of significance has been omitted. A preliminary draft report was disclosed to the Council on 25th August 2010 containing my provisional conclusions that maladministration had occurred and that Mr W's company was likely to have sustained significant financial losses as a consequence. Opportunities were then given to the complainant and the Council to comment on two further drafts of this report (issued on 17th November 2010 and 11th February 2011), and the report has been amended to take account of their comments.

LEGAL AND ADMINISTRATIVE NOTE

6. Under the Town and Country Planning Act 1990, planning permission is generally required from the local planning authority to develop or change the use of land. The local planning authority may require that an application for planning permission must include such particulars as they think necessary. A planning application should also 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 which is the subject of the application.¹ A planning authority in Wales may direct an applicant in writing to supply any further information which is necessary to determine the application².

7. Planning applications must be determined in accordance with the development plan and having regard to any other material considerations. The means of access to a site on which the development is proposed is a material consideration. The local highway authority must be consulted in the case of any

¹ Reg 3 of the Town & Country Planning (Applications) Regulations 1988

² Reg 4 supra

development likely to affect a classified road³. Planning applications must also be publicised by the local planning authority, either by a site notice or by notification to neighbouring occupiers.⁴ As a general rule, applications must be determined within 8 weeks, but the applicant may agree to an extension of that period.⁵

8. Planning permissions may be granted subject to conditions. These may include a “Grampian”⁶ condition which prevents the development from proceeding until a specified event has occurred. Relevant guidance contained in Planning Policy Wales (March 2002) stated (at paragraph 4.6.4) that it is possible for local planning authorities to grant permission subject to a condition that development should not be commenced or occupied until some obstacle to the development has been overcome. (This guidance has been superseded by Planning Policy Wales issued in July 2010, but the new guidance contains similar advice).

9. Planning permissions may be revoked or modified by the local planning authority subject to the payment of compensation in respect of any abortive work and any other loss directly attributable to the revocation or modification. However, the power to revoke or modify may only be exercised up until such time as any permitted operational development is completed⁷.

10. The Council is both the planning and the highway authority. Planning and highways services are administered in the Council’s Environment and Technical Services Directorate.

11. Planning applications are determined by the Council’s Planning and Orders Committee, although it has made arrangements for certain categories of planning applications to be determined by officers under delegated powers. The decisions of officers under the Council’s delegated arrangements are decisions of the Council. A Member may ask for a planning application relating to land in his/her ward which would normally be dealt with by officers under delegated powers to be determined instead by the Planning and Orders Committee.

³ Art 10 of the Town and Country (General Development Procedure) Order 1995.

⁴ Art 8 supra

⁵ Article 20 supra

⁶ Named after the court case in which the validity of such conditions were considered

⁷ Sec 97 of the Town & Country Planning Act 1990

12. An applicant for planning permission may appeal to the Welsh Assembly Government in respect of certain decisions of the local planning authority. These include its decision to refuse a planning application, or grant planning permission subject to conditions, or its failure to determine an application within 8 weeks or such longer period as may have been agreed with the applicant.⁸

13. The Council, as highway authority, may by notice require the owner of land at or near any corner or bend in the highway to remove walls, structures or trees which it considers necessary for the prevention of danger arising from obstruction to the view of persons using the highway⁹. An appeal lies against a requirement of the highway authority and expenses incurred in complying with a notice are recoverable from the highway authority by the recipient.

14. The Council's complaints procedure provides that complaints will be acknowledged within 5 days, and that a full response will be provided, unless there are exceptional circumstances, within 15 working days. If a full response is not provided within 30 working days, the matter will be referred to the Council's Managing Director. A complainant who is dissatisfied with the response may ask for their complaint to be considered by the Member with executive responsibility for the service referred to in the complaint, the relevant Head of Service and the Chair person of the Council's Customer Focus Subcommittee. A complainant who is dissatisfied may refer a complaint to the Ombudsman at any stage of the process.

15. The conduct of an investigation by the Ombudsman does not affect any power or duty of the Council to take further action with respect to any matter under investigation¹⁰. The Council may also make a payment to a person aggrieved in respect of any matter which is the subject of a complaint to the Ombudsman¹¹.

Corporate Governance Inspection by the Wales Audit Office

16. The Wales Audit Office undertook a statutory inspection of corporate governance at the Council during April 2009. The Auditor General's report, issued in July 2009, stated that good governance was concerned with making sound decisions

⁸ Sec 78 of the Town and Country Planning Act 1990

⁹ Sec 79 Highways Act 1980

¹⁰ Sec 13(6) of the Public Services Ombudsman (Wales) Act 2005

¹¹ Sec 34 of the Public Services Ombudsman (Wales) Act 2005

and with ensuring their effective implementation. Among the problems identified in the report was the lack of corporate leadership and the need to respond more effectively to complainants. Following a direction to the Council issued on 12th August 2009, the Minister for Social Justice and Local Government at the Welsh Assembly Government appointed a Recovery Board and an interim Managing Director to assist and advise the Council in addressing weaknesses in its corporate management. The Council was required to cooperate with the Recovery Board which was to have remained in place for 2 years. However, on 17th March 2011, following a further report by the Wales Audit Office, the Minister appointed Commissioners to take over the exercise of the Council's executive functions with immediate effect.

EVENTS LEADING TO THE COMPLAINT

Background

17. In December 2004 the Council refused Mr W's application to retain the siting of storage containers on Site A, and his appeal against the decision was dismissed in October 2005. According to information provided by the Council, the main reason for the refusal was the visual impact of the container units from the nearby main road. In 2007 Mr W incurred a fine after court proceedings were brought by the Council for failing to comply with an enforcement notice which required the removal of the container units. The Council said the fine was £7,500.

18. According to Mr W's business website, Mr W's company operates a self storage business at other sites in North Wales, and north- west England. These include another site on Anglesey. The website indicates that small, standard and large containers may be hired. The charge quoted for the standard container is "from £14 per week", and a note on the webpage indicates that the prices may vary on some sites. According to information provided by Mr W's agent in relation to the other site on Anglesey, the charge for a standard container since January 2006 is £23 per week (£100 per month).

Mr W's further application in respect of Site A

19. Mr W's planning application was received by the Council on 3rd January 2008. The Council's information indicates it had been preceded by discussions with Mr W

as to how the proposed use of the land for storage could be acceptably accommodated on the site given the objections in terms of visual impact which had been upheld at the earlier appeal.

20. The planning application proposed the change of use of Site A for the siting of 56 storage containers and construction of a canopy. The site was to be accessed by means of the existing access from the public road adjacent to Site B (shown green on the attached plan). The application was accompanied by the fee, plans and a “certificate A” indicating that Mr W’s company owned the site.

21. On 14th January 2010 the Council sought the comments of the Council’s Highways Service on the application. In his response on the same day, the Highways Officer referred to comments made in respect of a new access which related to the earlier (2004) application in respect of the site. However, his response contained no objections to the new application. There are no notes of the Planning Case Officer’s inspection of the site, but photographs taken by the officer show both the access to the trading estate from the road and the wall on the Site B frontage adjacent to the access. At that time, according to the planning application subsequently submitted in respect of Site B (referred to in paragraph 22 below), the highway boundary wall fronting Site B was 900 mm high.

22. Other consultations and neighbouring notifications were carried out and an objection was received from a neighbouring occupier, who, in addition to objecting on planning grounds, claimed that he owned an interest in part of the site. The Council’s files indicate that a “Certificate B” reflecting the neighbouring occupier’s interest was subsequently served on the neighbouring occupier. Meanwhile, on 29th January 2008, the local ward member asked for the planning application to be determined by the Planning and Orders Committee. Further information regarding the Committee’s consideration of Mr W’s application appears in paragraphs 24-45 below.

The planning application in respect of Site B

23. On 14th January 2008, the Council received a planning application in respect of Site B. The application sought approval for the removal of an existing container and the erection of a new flat roofed store. The proposed development also included

a proposal to “increase height of boundary walls to increase security of site”. According to the accompanying plans, the proposal related to the wall fronting the highway boundary. One plan of the proposed east elevation indicated by means of text “Existing 900mm wall raised to 2000mm and rendered to match”. The plan also showed the increased height of the wall by means of a red line for a length of roughly 21 metres. The application was notified to immediate neighbouring occupiers. Publicity was also given to the application by means of a newspaper notice. The verbal description of the proposed development in the Council’s consultation letters and public notification of the application included the phrase “raising of the height of the boundary wall at [Site B]”. Beyond recommending a condition that no part of the proposed development structure should encroach onto the public highway, no objections to the application were notified by the Highways Service. The application was determined by officers under delegated authority and planning permission was granted on 7th March 2008. Information provided by the Council indicates that work on increasing the height of the wall had commenced by 23rd May 2008. The wall at this height remained in place until October 2010.

The consideration of Mr W’s application by the Planning and Orders Committee

24. Mr W’s application was first considered by the Planning and Orders Committee on 16th May 2008. The Planning Officer’s report indicated that no objection had been received from the Highways Department. It stated that the proposed canopy structure would blend with existing buildings on the estate and provide a permanent screen. It contained the recommendation that the application be approved. However, the Planning and Orders Committee resolved to defer further consideration until after a site visit of members was held.

25. The site visit took place on 23rd May 2008. By this time planning permission had been granted under delegated authority for the development on Site B which included raising the height of boundary wall (paragraph 23 above refers). The Planning Officer’s report of the site visit indicated that Members walked to the access to the main road “where visibility was restricted in the direction of the [main road] and members witnessed building work being carried out on [Site B]; the Planning Officer stated that he would take this matter up with the highway officer”. According to the

Planning Officer's note of the site visit, the local Member expressed concern that "the boundary wall at the main entrance would cause accidents ...", and the Head of Development Control stated "... the wall is an issue and that highways was looking into the matter and that the members should not take this in [sic] consideration when deciding the application."

26. Consideration of the application was further deferred by the Planning and Orders Committee at its meeting on 4th June 2008 "pending consultation on technical issues". (The Council's Highways Service explained that this related to land ownership issues which had been raised by the neighbouring occupier. The Council's Planning Service said that the reference to "technical difficulties" related also to the wall erected adjacent to the access to the trading estate and the effect on highway visibility for vehicles attempting to enter and leave the trading estate.)

27. The application was next considered by the Planning and Orders Committee on 2nd July 2008. By this time, the Council had received the appropriate ownership certificate. The Planning Officer's report contained a reference to the Members' site visit on 23rd May 2008, but the boundary wall on Site B adjacent to the access was not mentioned. The report stated that there were no objections from the Highways Service, and contained the recommendation that the application be approved.

28. On the same day (2nd July 2008), Mr W's agent wrote to the Members of the Planning and Orders Committee. In his letter he referred to concerns regarding visibility raised at the Members' site visit "following the erection of a high boundary wall at [Site B] ..." His letter continued:

"We find it surprising that the Highway Authority approved the erection of a wall in this position but do not feel that it is a matter which should prejudice our client's planning application. We understand that the Highways Officers are currently looking into this matter and if necessary can use their powers to ensure that the height of the wall is reduced to allow adequate visibility at the entrance to the ... Trading Estate. Notably the Highways Officers have raised no objection to the proposal which is before you today and no formal request was made to alter the main entrance to the [trading estate] as part of the current proposal. This is reaffirmed in the case officer's report which states; 'It

would appear that there is no objection to the proposal on highway grounds
....”

29. The wall on Site B is referred to in the minutes of the meeting. The local Member said that the wall which had been recently erected near the main entrance reduced “the already poor visibility”. Another Member said that the wall had been erected after the officer’s report had been completed. The Principal Highways Engineer stated “that the wall had not been erected when they inspected the site, he confirmed that action would be taken to resolve issue of visibility at the access and erection of the wall (sic)”. The minutes indicated that further consideration was deferred “to allow the Highways Department to investigate and report back on the situation”.

30. On 4th July 2008, the Development Control Officer (Highways) sent an email to the Planning Officer. He said that he and the Principal Highways Engineer had visited Site B and “can confirm that the boundary which has been constructed by [the site owner] does obstruct visibility from the access as highlighted by the local Councillor at the Committee”. His email continued:

“We have had another look at the application [in respect of Site B]. From the block plan submitted with the application there are no details of any raising of the height of boundary wall by the access. Having further investigated the plans I acknowledge that in parts of the section elevations shown in small print the raising of a boundary wall (sic) but does not indicate the length or location of the walls to be raised. It appears that due to the lack of clarity on the plans it appears (sic) that nobody (including myself) has noticed the affect (sic) that this wall would have on visibility. I have studied the history of the site on our files and note that in 1997 a memo from the Highway Authority dated 22/05/97 [to the Planning Department] clearly stated that a raising of a wall at this location would have a detrimental effect on road safety....”

31. He suggested a discussion with the Principal Highways Engineer “before the next committee”. He concluded by suggesting also that the Legal Department be contacted “as the Highway Authority has powers under Section 79 of the Highways Act to remove walls if detrimental to road safety”. (The memorandum dated 22nd May 1997 related to a proposal to erect a 2 metre high wall on Site B along the

frontage to the highway. The memorandum stated that a wall exceeding 1 metre in height would have a detrimental effect on road safety as the “standard of visibility for vehicles leaving the site access at the trading estate would not conform with the recognised standards”).

32. Mr W’s application was considered again by the Planning and Orders Committee on 30th July 2008. The report contained a reference to the Members’ request “that the Highways Department review the application and their recommendation in light of recent developments near the access to the trading estate”. The report stated that although officers had revisited the site, no further guidance or recommendation had been received. It contained the recommendation that further consideration be deferred. The minutes stated that the determination of the application was deferred “to action recommendation of meeting held on the 2nd July 2008 owing to resolution of outstanding matters (sic)”.

33. On 26th August 2008, a member of Mr W’s agent’s staff sent an email to the Council’s Highways Department. She referred to the earlier deferrals “due to no response received from the Highways Department”. Her email continued:

“We understand that no formal response has been forwarded to the planning department again this month which is unsatisfactory, it is our opinion that this planning application should have a positive recommendation at this month’s planning committee. We believe that to defer for another month is unnecessary and unsatisfactory and would appreciate any comments from the highways department to be heard at the next planning committee”.

34. According to the Planning Officer’s report prepared for the next meeting of the Committee on 3rd September 2008, no further guidance or comments had been received from the Highways Service. Her report contained the recommendation that the application be deferred.

35. On 2nd September 2008 the Mr W’s agent wrote a further letter to Members of the Planning and Orders Committee. He referred to the recommendation that consideration of the application be again deferred. His letter continued:

“This is extremely disappointing and unsatisfactory given that the application was first deferred at your meeting on the 4th June for a site visit and then

again on the 2nd July to allow your Highways Department to review their recommendation in light of their approval of a high wall which now obscures visibility at the entrance to the Trading Estate. It appears that we are no further forward three months from your initial decision to defer the application on the 4th June 2008”.

36. In his letter, Mr W’s agent referred to Mr W’s proposals for the site, to his own earlier comments regarding the Council’s action in approving the erection of a wall at the entrance to the Trading Estate and his view that Mr W’s application should not be further prejudiced. He also referred to the Council’s indications that Highways Officers were considering the use of powers to ensure that the height of the wall is reduced to allow adequate visibility at the entrance to the trading estate. His letter continued:

“Given that the only matter which seems to be holding back the approval of the application is the Council’s maladministration in approving a wall which your own officers now recognise as a danger to highway safety our client will be seeking compensation for the loss of potential income over a three month period to reflect the delay caused to this application”.

37. In his letter, he urged the Planning and Orders Committee to “approve this application today and instruct your Highways Department to use their statutory powers to reduce the height of the wall to a height which does not obstruct visibility”. He concluded by saying that he had copied his letter to the Council’s former Managing Director from whom he requested a direct response to the complaint. However, no response was received.

38. The application was considered by the Planning and Orders Committee on 3rd September 2008. The minutes referred to the correspondence from Mr W’s agent requesting that the application be determined. The minutes further stated:

“The [Principal Highways Engineer] noted that following negotiations with the company who erected the wall they are now prepared to reduce the height of the wall to the previous level. The Head of Development Control noted that the application could now be dealt with under a Grampian Condition to ensure

that the wall near the entrance is removed to provide better visibility and this could be a condition on the planning permission”.

39. During the debate on the application, one of the Members proposed that the Planning Officer’s report be accepted and the application be approved “subject to the wall near the entrance [being] reduced before the release of the planning consent”. Although the motion was seconded, the minutes state that the Members resolved to “approve the application subject to Grampian condition to restrict the height of the wall at the entrance to the site”.

40. The planning permission was not issued until the application had been considered further by the Planning and Orders Committee on 4th February 2009. According to information provided by the Council, there was “ a misunderstanding regarding the exact requirements of the Committee’s resolution” on 3rd September 2008. It was necessary to listen to the tape recording of the meeting which confirmed that the motion eventually put to the Committee was that permission be granted subject to a condition restricting the use of the site “until the matter of the wall had been resolved. It was further added that the reduced wall should be maintained at the reduced height thereafter”.

41. In the meantime, Mr W’s agent had sent emails to the Council in which he pressed for the planning permission to be issued. In its responses, the Council’s Team Leader, Enforcement, Minerals and Waste indicated his view that the Planning Committee had approved the application subject to the proviso that the height of the wall at the site entrance be reduced to an acceptable level before the planning consent was released, and that no response had been received from the Highways Service regarding the use of statutory powers to secure a reduction in the height of the wall. In his letter dated 19th December 2008, the Team Leader confirmed that the Authority’s Highways Service was in negotiation with the landowner of the site where the wall had been built with a view to securing its removal, be it partial or complete, to a point where highway visibility was restored. His letter continued: “Given the current situation and the resolution of the Planning and Orders Committee, I will not be in a position to release the decision notice until this outstanding issue has been satisfactorily resolved”. In further correspondence to Mr W’s agent dated 7th January 2009 the Team Leader expressed the view it would be

more expeditious to release the planning permission with a Grampian condition which prevented trading until the height of the wall had been reduced.

42. In his responses, Mr W's agent expressed his understanding, (based on his attendance at, and the minutes of, the September meeting) that the grant of planning permission subject to a Grampian condition had been approved which would allow the canopy structure to be built and the containers to be placed on site but not to be used for commercial storage until such time as the wall at the entrance to the trading estate had been reduced in height. He explained that such a consent would allow his client to commence work whilst highways officers sought to negotiate a reduction in the height of the boundary wall which had been "erroneously" approved by the Council. He asked (on two occasions) that the planning permission be issued as a matter of urgency, and sought clarification as to when the wall would be reduced in height. He forwarded copies of his emails to officers in the Highways Service to request an update on the matter. He also referred to his earlier correspondence in which he had indicated his client's intention to seek compensation arising from the Council's maladministration in approving a wall which "your own officers now recognise as a danger to highway safety". Finally he asked for a meeting with relevant officers, saying that he had earlier asked the Council Solicitor for a meeting but had been advised "that the approach should be made via the Planning Department".

43. No meeting took place, but the planning permission was issued on 5th February 2009 following the Planning and Orders Committee's further consideration of the matter on 4th February 2009. On this occasion, the report on the application stated:

"In terms of releasing the decision notice, the main concern for the local planning authority should be that there are sufficient controls in place to ensure the reinstatement of highway visibility at the access to the county highway and to enforce any non-compliance with this requirement. To this extent, the Highway Authority is currently in discussion with the owner of the wall with a view to securing the undertaking of the necessary works to meet the required standard. In this respect the height of the wall should be reduced to a level which approximated its existing height prior to its increase.

The landowner has expressed his agreement to undertaking such work subject to an acceptable arrangement being made in terms of securing his site to the extent that is provided by the wall at its current height. From a planning perspective, it is essential that any condition imposed on the planning permission allow sufficient control to enable their effective enforcement”

44. The report referred to the Committee’s earlier resolution and contained the recommendation that the permission be issued subject to a condition which prevented the permitted use of the site until the boundary wall on Site B was reduced in height, and thereafter maintained at the reduced height. Planning permission was issued on 5th February 2009. Condition 5 provides that:

“The use hereby permitted by this consent shall not be commenced until such time as the highway boundary wall to the north east of the Trading Centre access and indicated in red on the attached plan be reduced in height to 900mm above the adjoining County Highway. The wall shall thereafter be maintained at this height. Reason: To comply with the requirements of the Highway Authority in the interests of road safety”.

(The wall depicted on the plan attached to the planning permission is shown blue on the plan attached to this report).

45. None of the reports to, or the minutes relating to the Planning and Orders Committee’s consideration of Mr W’s application stated that planning permission had been granted in March 2008 for the wall to be increased in height.

46. The wall remained in place until October 2010. According to the Council, negotiations had earlier been entered into with the owners of Site B, but no satisfactory agreement for the reduction of the height of the wall was concluded, and no notice was served under Section 79 of the Highways Act 1980. (Further information about the reduction in the height of the wall is contained in paragraph 61 below).

Mr W's complaint to the Council

47. On 17th March 2009 Mr W's agent wrote to the Head of the Council's Highways and Transportation Service. He referred to the Council's earlier letter dated 19th December 2009 which indicated that negotiations were taking place between the Council and the owners of Site B with a view to securing that the wall be removed to a point where highway visibility is restored. He stated that Mr W wished to implement his planning consent, but could not trade until the Council had rectified matters. He continued: "We would be pleased if you could update us as a matter of urgency of the outcome of your negotiations and notify us of when the height of the wall will be reduced. We hope that matters can be resolved at the earliest opportunity for our client to be able to implement the planning consent and begin trading". There was no reply to this letter.

48. On 29th April 2009, and not having received a response (or a response to his earlier letter dated 2nd September 2008 which he had forwarded to the Council's former Managing Director), Mr W's agent wrote to the Council's Monitoring Officer. He said that he had been instructed by Mr W to submit a complaint to me regarding the Council's action in granting planning permission for the increased height of the wall on Site B such that it obscured visibility at the junction of the access to the trading estate, and the Council's failure in "expeditiously rectifying the error". However, prior to submitting such a complaint, he wished to make a final attempt to obtain from the Council satisfactory answers to his earlier correspondence. His letter continued:

"What our client seeks here is an immediate resolution to the issue of reducing the height of the wall approved in error at the entrance to the Trading Estate so that his latest planning consent is implementable in full. In addition our client seeks compensation for lost revenue from this site. We believe that under normal circumstances, planning permission would have been granted without restriction on use as far back as May/June 2008. Due to the Council's error our client still does not have an implementable planning consent, therefore to date our client has been delayed from starting on site for at least 10 months. The income our client can generate from this site was reflected in a fine he received for non compliance with an enforcement notice in 2007.

We propose to apply the same principles in securing compensation for the loss of income suffered as a result of the council's ongoing maladministration".

49. He sought an immediate response to the complaint.

50. On 1st May 2009, the Council's Legal Section replied to Mr W's agent, advising him that his letter had been forwarded to the Complaints Officer in the Planning Service. On the same day, the Legal Officer forwarded Mr W's agent's letter to the Planning Complaints Officer asking that she acknowledge the complaint and advise Mr W's agent of the procedure to be followed.

51. According to an internal briefing note by the Team Leader, Enforcement, Minerals and Waste, dated 12th May 2009, the wall on Site B "had previously been increased in height from around one to two metres following the granting of planning permission relating to extensions and alterations to the adjoining [premises on Site B]." The note stated that the consideration of the application relating to Mr W's site was deferred on 30th July 2008 as there had been "no progress in the Highways Services' reconsideration of its position on advice previously given in response to the consultation". The note indicated that the Planning and Orders Committee then changed its stance at its meeting on 3rd September 2008 in that it approved the application subject to the permission including a Grampian condition which prevented the operator from trading from the approved facility until such time as the wall, being the subject of the Highways Service's concern, was reduced to its former level to allow clear visibility to the north east. In relation to the delay in issuing the planning permission after 3rd September 2008, the briefing note referred to the misunderstanding regarding the exact requirements of the Planning and Orders Committee, and the fact that the relevant planning case officer had left the Council's employment. The note continued (at paragraph 3.4):

"Following discussions with the developer's agent arising from the failure to obtain a decision notice, the matter was reviewed and meetings took place in an attempt to address and resolve the situation. The initial meeting involved Planning and Highways Services officers, at which it was established that the Highways Service could use its powers to resolve the issue and secure the reduction in the offending wall's height and that appropriate officers from the

Highways Service had met with the landowner [of Site B] to discuss the matter. As such, three options were identified as being possible solutions to the problem. These were:

- To reduce the level of the wall to its former height;
- To reduce the level of the wall to its former height and erect a fence on top of the wall so as to provide security measure for the landowner; and
- To reduce the level of the wall to its former height and erect a wall inwards so as to provide the relevant visibility splay as well as provide adequate levels of security for the landowner.

All of the above options would entail the payment of the relevant level of compensation to the landowner. A further meeting with the Legal Services Manager was convened in order to establish how best to progress the matter. Rather than seek to revoke the planning permission permitting the wall and extensions to the [premises on Site B], it was felt that the most appropriate course of action would be to seek a reduction in the wall's height through the provisions of the Highways Act and to this extent, discussions have already been entered into between the landowner and the Highway Service. These have included discussing best fit options with the landowner but have so far been inconclusive".

52. The briefing note then contained a reference to the planning consent which was issued to Mr W on 5th February 2009 and the attached Grampian condition. The note continued (at para 4.2):

"To this date, the wall remains at its increased height and I am advised that there has been no further action on the matter by the Highways Service. I am currently awaiting advice from the appropriate officer as to how matters are to be progressed from the point of view of achieving the wall's reduction in height".

53. Mr W's agent said that the Team Leader sent him a copy of the briefing note by email on 2nd June 2009 in response to a telephone call from him in which he had requested an update. On the same day, the Principal Highways Engineer sent an email to the Team Leader in which he stated that the intention was to reduce the level of the wall to its previous height and to erect a fence behind the wall to secure

the site. He said that officers from the Highways Department had been in touch with the owners of Site B and also with fencing companies “to resolve the situation in the near future”.

54. On 12th June 2009, the Complaints Officer wrote to Mr W’s agent indicating her understanding that the officers had been in discussions with the owner of Site B but that agreement was still required. She said that the relevant highways officer was on leave until 23rd June 2009. She also said she had asked the Council’s Solicitor for advice in relation to Mr W’s claim for compensation “due to the delay in issuing the Planning Decision”. In her memorandum to the Legal Services Manager, the Complaints Officer attached a copy of Mr W’s agent’s letter dated 29th April 2009 and requested “observations on the matter of compensation for the loss of income suffered as a result of the delay in issuing the planning decision.” She continued:

“As I am sure you are aware, planning permission was granted by the Planning and Orders Committee in September 2008 but the decision was not issued until the 5th February 2009. It is felt by the officers that despite this, the applicant could have gone to appeal for ‘non-determination’ if he was that concerned about the delay. He could have sought a remedy to the situation in this manner rather than pursue a claim. I would therefore welcome your comments from a legal point of view with regard to compensation for loss of earnings between the date of permission being given, ie. September 2008 and thereafter the date that the planning decision was issued, i.e. February 2009”.

55. On 17th June 2009, the Legal Services Manager replied. He stated that he agreed “with the view that in so far as the applicant was in a position to appeal for non determination of the application, that was an option they had, but chose not to exercise. In the circumstances, the Council should deny any liability in respect of compensation or damages now being sought by the applicant”.

56. On 29th June 2009 Mr W’s agent replied to the Complaints Officer’s letter dated 12th June 2009. He expressed concern that matters had to wait until the return of an officer from leave, and that the complaint had been referred back to the Council’s Legal Officer some 8 weeks after the Legal Section had declined any

involvement in the matter, forwarding instead his initial letter dated 29th April 2009 (which had been addressed to the Monitoring Officer) to the Planning Department. In his letter, he sought an urgent response.

57. On 30th June 2009 the Principal Highways Engineer wrote to Mr W's agent. He referred to Mr W's agent's letter dated 17th March 2009 (referred to in paragraph 47 above) and apologised for the delay in replying. He also confirmed he had received copies of Mr W's agent's letters dated 29th April and 29th June 2009. He said:

“The latest situation with regards to the new wall [on Site B] is that my officers have been in contact with that company with the view of reducing the height of the wall to that of the original one and erecting a fence either behind the wall or on top of it such that a measure of security is provided. It seems that [the site owners] have had a number of thefts from their yard over the years and that is why they had the height of the wall raised. My officers have also been in contact with fencing companies to obtain information and prices for different types of fencing so as to ensure that an appropriate form of fencing is obtained that will provide the necessary visibility and security that will satisfy the Highway Authority and [the site owners]. I'm looking to complete this process by the end of July but it will entail submitting a planning application for the alteration of works and this may add a further eight weeks to the process. I trust this information will help you in being able to proceed with your development”.

58. The letter indicated that copies were forwarded to the Corporate Director (Environment and Technical Services) and to the Legal Services Manager.

59. On 13th July 2009, the Complaints Officer wrote to Mr W's agent regarding Mr W's compensation claim “in respect of the delay in releasing the notice of decision after the original decision of the Planning committee in September”. She said as it had been open to Mr W to “appeal the delay to the Planning Inspectorate on the basis of non determination.... the Planning Service denies any liability in respect of the delay and the compensation now being sought as there was an alternative avenue open to your client to pursue should he have wished to do so”. She concluded by expressing her understanding that the Head of Highways and

Transportation had written to him “in order to draw the access/wall issue to a conclusion”.

60. Mr W’s complaint was submitted to me on 29th October 2009. In submitting the complaint Mr W’s agent said that he had earlier that day spoken to the Principal Highways Engineer who “revealed that matters had not progressed any further”.

61. On 9th July 2010, Mr W’s agent wrote a further letter addressed personally to the Corporate Director (Environment and Technical Services). He referred to earlier correspondence and to the complaint which had been submitted to me. He sought an “update as to where the Council have got to in trying to resolve this problem”. He received a reply dated 30th July 2010 from the Principal Highways Engineer who stated that he did not “wish to make any comments at this stage as the Ombudsman’s investigations are still ongoing.”

62. On 27th October 2010, the Council informed me (having seen a preliminary draft of this report) that works had been completed at the entrance of the trading estate to reduce the height of the wall and erect a “visi-rail” inside the boundary of Site B. The Council confirmed that the Grampian condition was, therefore, discharged. However, Mr W’s agent informed my investigating officer (on 11th November 2010) that he had not been notified by the Council that the Grampian condition had been discharged. Nevertheless, his client had met his contractor on site to discuss the works necessary to implement the planning permission.

WHAT THE COMPLAINANT’S AGENT SAID

63. Mr W’s agent said that the Council had sterilised his client’s site by approving, through the grant of planning consent, the construction of a dangerous wall at the entrance to the trading estate on land outside Mr W’s ownership. He said that Mr W was not notified of the planning application, and that the Council had failed to consider the planning application in respect of Site B diligently. He said that the Council subsequently accepted that approving the wall at the access was an error but despite numerous reminders, had failed to resolve the matter in a diligent way. As a result, Mr W had a commercially unimplementable planning permission, and (as at the date of the complaint) had suffered financial losses in that had the Council not

approved the increased height of the wall, his site could have been operational for commercial storage use for at least 18 months.

64. Mr W's agent explained further that Mr W did not appeal against the non determination of the planning application as the Council's Planning Officers had indicated a favourable view of the application and had recommended approval without the restrictive Grampian condition which was, in the event, imposed. Nevertheless, the imposition of a Grampian condition seemed to be a reasonable way forward as it appeared at the time that the Council was also keen to see the height of the wall reduced as a matter of urgency. There were also indications that the Council's Highways Officers were in contact with the owners of Site B and that agreement to reduce the height of the wall had been reached. Mr W's agent also considered that an appeal against the imposition of the Grampian condition was unlikely to have succeeded, as in his view, having visited the site, the wall at its increased height was unsatisfactory in highway terms in that it restricted visibility to the left so that motorists could not exit the trading estate safely. For this reason, he did not advise his client to apply to the Council for the condition to be discharged.

65. He said that Mr W considered the possibility of commencing the construction of the canopy on the site as authorised by the planning permission, in the hope that by the time this was completed, the Council's negotiations with the owner of Site B would have been concluded and the wall reduced to an acceptable height. However, Mr W's lender declined to release funds for the purpose until Mr W had a planning permission which he could implement in terms of actual trading. He said that Mr W has also tried to sell the site, but a potential purchaser withdrew on being notified of the "wall problem" which is preventing the planning permission from being implemented. In this connection, he was informed by one of the Council's Highways Officers that the Council had been contacted by a potential purchaser of the site to whom he (the Highways Officer) had provided information about the wall and the restriction on the planning permission. The site remained on the market until the Grampian condition was discharged. He said that as the site was completely sterilised in terms of potential alternative uses due to the access problem, Mr W did not actively seek alternative uses. However, he allowed a contractor who was laying fibre optic cables in the area to use the site as a compound for which he charged £500 per month. However, he only received one payment of £500.

66. Mr W's agent said that the injustice claimed by Mr W stems from the Council's erroneous decision to grant planning for the increased height of the wall on Site B rather than from delays in determining Mr W's planning application. He said that he had inspected the planning application in respect of Site B and considered that the proposal to increase the height of the wall up to a point immediately adjacent to the access was clear both in the verbal description of the proposal and on the submitted plans. Given the history and previous objection to raising the wall at this point (as mentioned in the memorandum dated 22nd May 1997 from the Highways Department to the Planning Department), he would have expected the Highways Department, when consulted on the application, to have asked for clarification if there was any doubt. He said the problem came to light when the Members inspected Mr W's site in May 2008 and noticed the wall which, by then, had been increased in height.

67. He said that despite raising the matter direct with the Corporate Director (Environmental and Technical Services) both informally prior to referring a complaint to the Monitoring Officer in April 2009, and by means of his letter dated 9th July 2010, he did not receive a considered response from the Director. As far as he is aware, there was no consideration of the matter, for example by the Council's Executive.

68. Mr W's agent said that Mr W was fined between £7000 and £8000 for using the site for the storage of containers in breach of the enforcement notice for a period of about 4 months. The fine was based on what the Court felt Mr W had made from the site during that period in terms of income and profits. He said the figures provided by Mr W at that time reflected the fact that during that period the business had been scaled down significantly and no new lettings were taken. Furthermore, a number of containers had been emptied or removed from the site. He submitted that the nature of the business then being run cannot be compared with a business which is being actively promoted and being run in conformity with planning controls.

69. Mr W has estimated that were it not for the Council's maladministration, he could have commenced trading on the site in August 2008. Mr W's agent said that works to erect the canopy and fencing would have taken 3 weeks, and a further week would have been required to import the containers. Any approvals under the Building Regulations, if required, would have been dealt with by the building

contractor and would not have delayed the development. Furthermore, Mr W's eagerness to implement the planning permission at the earliest opportunity was evident not only from the efforts used in resolving planning issues at the pre-application stage, but subsequently. He said that in response to Mr W's eagerness to get on site and start trading he, (as his agent)) was "constantly chasing the Council for a decision over a period of several months". He said such was Mr W's eagerness to commence trading again that he had considered implementing the planning permission prior to the discharge of the Grampian condition in the hope that the Council would resolve the access issue expeditiously. However, Mr W was cautioned against that course.

70. Mr W's planning consent authorises the siting of 56 standard sized units on Site A. Mr W's agent said that during the first year of trading, Mr W would have achieved a net trading profit of £30,000. This allowed for the fact that occupancy of the storage units would have had to have been built up over time to an occupancy level of 90%. From August 2009, Mr W would have secured a net trading profit of £4,200 a month from the site. By July 2010, he estimated his losses from August 2008 to be £76,200, increasing by £4,200 for every month that the matter remained unresolved. Mr W is also seeking an additional £5000 to cover his agent's professional costs in having to pursue the matter with the Council since May 2008 when the problem came to light and then in pursuing a complaint to me.

71. In response to the investigator's further enquiries, Mr W's agent provided Mr W's business accounts for the year ended 30th April 2008. (He said the accounts for 2009 had not been finalised). The 2008 accounts indicate a gross income of £179,465, administrative expenses of £112,823 (63% of the gross income), and an operating profit of £66,642. Comparative figures were given for 2007 indicating that the administrative expenses amounted to 52% of the gross income. The administrative costs included items such as wages, rent, rates, insurance, light, heat and power, office costs, professional fees, repairs and renewals, cleaning, bank charges and depreciation. The accounts did not differentiate between the various sites in the business which are used for self storage. However, Mr W's agent provided a breakdown of income and expenditure relating to the other self storage site on Anglesey which has 85 containers comprising a mix of small, standard and large sizes. The breakdown indicated that the site was 90% occupied, that it

generated a monthly income of £7,743, and had overheads of £890, leaving a net monthly profit of £6,853. He claimed that these figures provided a good indication of the income which could be achieved on Site A, namely £4,200 per month. This is based on 90% occupancy (50 containers) at £100 per month (£5000), less overheads, including rates, insurance and administration of £800 (which he estimated to be slightly less than those in respect of the other site on Anglesey). Moreover, Site A is in a better location. He said it was reasonable to assume occupancy levels of 90% given the demand for storage units locally. Mr W has a waiting list for the units at the other Anglesey site, and has expressed frustration at having to turn away potential customers from that site (on 11th November 2010) when he is unable to trade on Site A. Mr W's agent submitted that other sites within the Company do not trade as well as the site on Anglesey due to greater competition in the larger towns in North East Wales, and that the accounts do not provide a clear picture of the loss of earnings suffered through the sterilisation of Site A.

72. In his comments on the draft report issued on 17th November 2010, the Complainant's agent produced a copy of a licence agreement dated 29th January 2006 indicating the payment of £100 per month for a standard sized storage container at the other Anglesey site. He also provided trading accounts for the year ended 2009, and draft accounts for the year ended April 2010 together with a statement from Mr W's accountant. In the statement, the accountant explained that the non trade debt shown in the accounts is a debt due to an associate company and was mainly occasioned by Mr W's inability to obtain an implementable planning permission from the Council in respect of Site A in a timely manner. Mr W's accountant also explained that the bank loan (which is shown in the accounts as being greater than the company's net assets) is secured against Mr W's personal property portfolio. The accountant also indicated that Mr W's company was not registered for VAT, and pointed to another company operating a similar operation which was not registered for VAT. Mr W's agent said that Mr W's company had been investigated by Her Majesty's Revenue & Customs and no queries were raised about its VAT status and no penalties were imposed. A schedule containing relevant information about administrative expenses taken from Mr W's company's accounts is attached as Annex 1.

73. Finally Mr W's agent submitted that Mr W's costs of developing the site in order to commence trading at this stage would be significantly greater than the costs he would have incurred had he been able to implement the planning permission in 2008. This was due to rising steel and delivery costs in respect of the purchase of containers for the site, and increases in the costs of fencing and tarmacing the site. He submitted that as these increases were far in excess of inflation, they could not reasonably be passed on to customers. In support of his submissions he provided evidence regarding the prices paid for the purchase and delivery of new standard sized containers for another site in September 2008, and for site preparation. He explained that these containers, although described as "new" by Mr W's usual supplier, had been used once only for the transportation of goods, and were in very good condition. Containers described as "second hand" had normally been used several times and were generally in much poorer condition. He explained that it was his client's policy to purchase "new" (namely used once only) containers because they are in good condition and may be used by his private and commercial clients for the storage of important and expensive items such as furniture, whole house contents, paper documents and files and "even vintage cars". The containers are painted and "dry sealed" prior to being offered for hire. This treatment is only effective if the containers are in good condition when purchased. He said that Mr W sees no reason for departing from his standard business practice in buying anything other than "new" (namely used once only) containers for Site A. A schedule of the estimated difference in costs between September 2008 and October 2010 (which together with VAT amount to £69,841.00) is attached at Annex 2.

WHAT THE COUNCIL HAS SAID

74. The Council, in its initial comments on the complaint dated 15th February 2010, said that when the plans relating to the planning application in respect of Site B were inspected by its highways officers, it was not obvious from the plan that the wall at the access would be raised as the access was not included on the plan. It continued:

"When the matter of the newly constructed high wall was brought to the [highway authority's] attention at the Planning and Orders Committee meeting of 02/07/08 [the] Development Control staff re-looked at the original plans.

The plan of the site was found to be incomplete and misleading in that only part of the boundary wall was shown, the rear wall of the site was not shown and the access out of the trading estate also was not shown. The plan showed cavity wall construction where a new building was being formed using the boundary wall. There was no construction detail on the site plan to indicate that the remaining boundary wall was to be altered. However there were elevations showing that the boundary wall was being raised, and a note in very small print indicating this, but it was unclear as to its extent, as again the access was not shown”.

75. The Council also referred to meetings with the owners of Site B. The site owners had stated initially that they were not happy to reduce the height of the wall as it had been raised to prevent people seeing into their yard, “jumping” over the wall and helping themselves to the company’s property. They also stated that their application had been legitimately approved. However, the Council proposed a compromise, whereby the wall could be reduced to its previous height to provide the necessary visibility, and erecting a fence up to 2 meters high behind the wall so as to provide some security for the site. The owners of Site B did not object to the proposal, and the Council made enquiries with fencing companies to obtain prices. The Council then proposed a “Visi rail” type fencing which would allow visibility at acute angles. It said that such fencing is commonly used at pedestrian crossings, roundabouts and junctions. It submitted a design of the proposed wall and fence to the owners of Site B. However, the site owners informed the Council that they wanted an industrial gate provided at the rear of the yard which would provide additional security to the property as compensation for having the wall reduced. The Council said that it was not prepared to provide a gate, and the owners of Site B have withdrawn their agreement to have the wall reduced in height. The Council said “this, therefore, means that that the [highway authority] will have to serve notice on the company to have the wall reduced to its original height”.

76. In its response dated 23rd March 2010 to the investigator’s further enquiries, the Council said that it had not felt the need to proceed with the service of a notice under Section 79 of the Highways Act 1980 earlier as the owners of Site B had appeared to accept the option of reducing the height of the wall with a 2 metre high fence erected behind it. It said “it was some time later that [the site owners] asked

[the Council] to provide a security gate as well as the fence”. The Council added that it had again contacted the owners of Site B but they had reaffirmed their decision not to reduce the height of the wall unless the Council provided them with a security gate. The Council indicated that it was “gathering information, such as Land Registry searches in order to prepare a Section 79 notice to serve on [the owners of Site B]”.

77. The Council, on seeing a preliminary draft of this report (sent on 25th August 2010), said it accepted that greater vigilance should have taken place regarding the way in which it dealt both with the application at Site B and the implications on the permission granted to Mr W, that correspondence was not responded to and that there was a delay in resolving the highway boundary issue. It did not dispute the assumption that planning permission would have been granted to Mr W in early July 2008 without the restriction imposed by the Grampian condition were it not for the planning permission granted in respect of Site B which authorised the boundary wall to be raised. It said that its Highways Officers had renewed contact with the owners of Site B and reached agreement on works to reduce the height of the wall and other measures to provide visibility and ongoing security at the site. It said it had also commenced a review of its planning procedures to establish that applications are closely scrutinised to ensure that the correct and relevant information is provided by applicants. Planning and Highways Officers have also been reminded to carefully assess and check application details when carrying out inspections on sites where highway matters are concerned.

78. However, the Council raised a number of queries relating to the financial losses claimed by Mr W. It stated that insufficient information was given to justify the losses being claimed. It referred to the fine imposed in 2007 when Mr W was convicted of using the site in breach of the enforcement notice. The Council said it had submitted to the Court that the rental of the containers, of which there were 76 on site at the time of the offence, had the potential to accrue a significant income for Mr W. On the basis of a press advertisement publicising the availability of the containers from £15 per week, it had calculated that 76 units would accrue a minimum of £1140 per week based on all units being rented. Over the period of the offence, around 15 weeks, a gross income of at least £17,000 could have been achieved if all units were rented. However, Mr W had disputed the assumption, and

claimed that outgoings, in terms of overheads and site preparation, were responsible for negating any income accrued from the site over the period of the offence, and that profits were negligible.

79. The Council also claimed that Mr W had an obligation to mitigate his losses by seeking alternative sources of income from the site, and that any rental income from the use of the site by a contractor in connection with the fibre optic project between October 2009 and April 2010 should be set against the claimed losses. (As to what other lawful uses would have been acceptable on Site A in planning terms during this period and the extent to which the raised height of the wall on Site B might have prevented any other such uses, the Council said there was no other defined planning consent on Site A, that no planning consent was issued in respect of the contractor's use of the site, but that if planning permission had been required, the scale was such that enforcement action was unlikely to have been considered expedient.)

80. The Council also expressed doubts over whether the development of Mr W's site would have been commenced immediately had planning permission been granted in July 2008, given the possible need, for example, to comply with loan requirements imposed by his lender, and to obtain approval under the Building Regulations. In this connection, the Council said that most Building Regulation approval applications are determined within 8 weeks.

81. In its comments on the revised draft report (issued on 17th November 2010), the Council submitted that an appropriate level of redress would be £11,134 if Mr W's company was registered for VAT and £20,241 if not. The Council produced reports by a firm of chartered accountants in support of its submissions. In these reports, the accountants claimed that Mr W's company should be registered for VAT (referring to other companies carrying on a similar business who were so registered). The accountants also submitted that based on the accounts, Mr W's company appeared to be insolvent, and that the revenue losses should be calculated on the basis of rental charges of £14 per week (as stated on the company's website), a higher proportion of administrative charges as expressed as a percentage based on 2 years accounts, and, given the current economic climate, occupancy levels of 75%, indicating that they have clients who achieve such levels. In their further

submissions, the Council's accountants claimed that the increase in the price of containers and delivery charges would be affected by depreciation, and would have no effect on the calculation of lost profits.

82. In its comments on the draft final report (issued on 11th February 2011), the Council said it was prepared to refer the final report to its Recovery Board and to reimburse Mr W £1500 in respect of the costs of pursuing his complaint with the Council and with me. The Council also accepted that Mr W had suffered economic losses as a result of its maladministration. However, it submitted that a recommendation which quantified such losses was inappropriate, and that Mr W should be required to prove his losses within certain defined categories to the Council's satisfaction which the Council would not unreasonably be able to refuse, but if such losses had not been agreed within a stated timescale, Mr W could pursue the matter further with me. In relation to Mr W's claimed additional costs in respect of setting up Site A, the Council queried whether the cost of standard container units in September 2008 related to new or used containers and claimed that "nearly new" containers and delivery costs could be obtained at lower prices than the estimates provided by Mr W. It also said, in response to a query from the investigator, that it was not aware of any road traffic accidents occurring at the access to the trading estate in which reduced visibility caused by the raised height of the wall was a factor.

WHAT MY PLANNING ADVISER SAID

83. My Planning Adviser was asked to advise on the grant of planning permission for the new store and an increase in the height of a boundary wall on Site B. He was sent copies of the planning application, supporting plans and photographs which had been obtained from the Council. He also viewed photographic images of the wall on the internet.

84. He said, that the description of the proposed development on the application form is "Remove existing container and build flat roofed store in that area. Increase height of boundary walls to increase security of site". He noted that that "boundary walls" not "boundary wall" were the subject of the application. He said that the application drawings showed existing and proposed East Elevations with the note "Existing 900mm wall raised to 2000mm and rendered to match". The drawing showing the existing and proposed South Elevation had no notes but appeared to

show a boundary wall that was to be increased in height. He said this may explain the reason for the reference to “boundary walls”. He said that the existing and proposed plans of the site are less clear in their depiction of proposed changes to the boundary walls. The plans do not extend to show the triangular corner of the site adjacent to the trading estate entrance. The boundary walls are shown as two parallel lines and one would expect to see short lines drawn between these to denote changes in the height of the wall. No short lines are shown.

85. He said that despite the absence of clear information on changes to the boundary wall on the submitted plans, he considered that the submitted elevations are clear about the changes to the southern boundary wall adjacent to the highway. Moreover, the planning application is referred to throughout its consideration by the local planning authority as including ‘raising the height of the boundary wall’. Therefore it should have been apparent to the Council that the planning application sought permission to increase the height of the boundary wall.

86. He said further that a site visit before the application was determined should have alerted the planning officer or highway engineer of the highway safety implications of an increase in wall height mentioned in the application papers and on the elevation drawings. The photographs submitted by the Council clearly show the low southern boundary wall that did not obstruct driver visibility when using the site entrance to the trading estate. The application to raise this wall should have been picked up and mentioned in any site visit report or in the highway authority’s observations. In the event, the highway authority’s observation was ‘no part of the proposed development structure to encroach onto the public highway’. No mention is made of the impact of raising the wall. The planning officer’s report on the application only considers design, setting and residential amenity and does not address highway safety. In addition to the need for the Council to have understood that the planning application included permission to increase the height of the boundary wall, it should have also recognized that highway safety considerations should have figured in its assessment of the application.

87. My Adviser said that the Highway Authority appeared to accept that the raised wall reduced the available visibility at the entrance to the trading estate to the point where highway safety was compromised. Therefore, an appeal against non-

determination would probably have been refused on highway safety grounds, or, if a solution was proposed that was workable, permission may have been granted subject to a Grampian type condition. Similarly, an appeal against the imposed Grampian condition was unlikely to have been successful unless a workable solution was presented at the appeal. He concluded by stating that he did not believe that using the available options to appeal would have assisted the Complainant.

CONCLUSIONS

88. In March 2008 the Council granted planning permission for development on Site B which included raising the height of the boundary wall such that it obstructed visibility at the access to the trading estate. There were no objections to the application on highway grounds, and the Council later claimed that the increased wall height component of the development was not clearly shown on the plans. As a direct consequence of the grant of planning permission in respect of the wall, the Council, in granting planning permission for the Complainant's development on Site A, imposed a condition which prevented Mr W from commencing the use of his own site until the height of the wall was reduced. The Council's negotiations with the owners of Site B had foundered, and whilst the Council was aware of its powers to serve a notice under Section 79 of the Highways Act 1980 to require the removal of the obstruction to visibility, it did not do so.

89. In my view, the key issues are whether the Council adequately assessed the planning application in respect of Site B, and having granted planning permission for Site B, whether it took sufficient steps to secure the reduction in the height of the wall, so enabling Mr W to implement his planning permission, and to restore highway safety at the junction.

Was the Council's assessment of the planning application in respect of Site B adequate and reasonable?

90. My Planning Adviser says that sufficient information was contained in the planning application to indicate that the proposed development included increasing the height of the wall adjacent to the road to 2 metres. From the Council's standpoint, the application should have been accompanied by such information as the Council considered necessary. The Council also had powers to request

additional information if necessary (paragraph 6 above refers). In my view, and given the proximity of Site B to the access to the trading estate, any doubt about what was proposed or the impact on visibility at the junction of the access with the road should have been resolved before planning permission was granted. If necessary, the Council should have obtained further details from the applicant, and unless the matter was resolved satisfactorily, refused permission having regard to the impact on highway safety.

91 I therefore find that the Council's failure to check that it had sufficient information in order to assess the impact of the proposed development on the access to the trading estate and its decision to grant planning permission for development which was detrimental to highway safety is maladministration. Apart from the direct effect on Mr W, it is of particular concern that the Council's action in approving the raised height of the wall increased the danger at the entrance of the trading estate for the drivers of vehicles using the access. I am, therefore, relieved to learn that no recorded accidents have occurred at this location in which reduced visibility caused by the raised height of the wall was likely to have been a factor.

Did the Council take sufficient steps to secure the reduction in the height of the wall?

92. The application in relation to the raised wall was being considered at the same time as Mr W's application relating to another site on the same estate, and served by the same access. Mr W's application was, therefore, prejudiced by the Council's maladministration in relation to the planning permission issued in respect of Site B.

93. It appears that the raised height of the wall, and its effect on highway safety first became apparent in May 2008 when Members of the Planning and Orders Committee inspected the site in connection with Mr W's planning application. Further consideration of the application was deferred pending advice from the Highways Service whose officers indicated, by means of an email dated 4th July 2008, that there was a problem with visibility and that consideration be given to the use of powers under Section 79 of the Highways Act 1980 to secure the removal of the wall on highway safety grounds. Legal advice confirmed the availability of these powers, and there were attempts to negotiate an appropriate settlement with the owners of

Site B. Meanwhile, planning permission was issued to Mr W subject to a Grampian condition which prevented his use of the site until the height of the wall had been reduced. For the Council to have taken this approach at that stage was probably understandable in the circumstances. However, whilst I am not persuaded that the delay in issuing the planning permission between September 2008 and February 2009 was reasonable or justified, I do not consider that this, by itself, for the reasons explained below, was the cause of any significant injustice to Mr W.

94. Subsequently however, and despite correspondence from Mr W's agent in which he pressed for progress in relation to the wall and drew attention to his client's ongoing trading losses, there seemed to be no great priority given to the matter by the Council. This was so even after Mr W's agent had submitted a formal complaint. The Council's negotiations with the owners of Site B appeared to have foundered after June 2009, and there had been no further progress by October 2009 (paragraph 60 refers). It was only after the commencement of my investigation that the Council indicated its intention (in March 2010) to proceed with the issue of a notice under Section 79 of the Highways Act (paragraph 76 above refers). However, the Council's reluctance in July 2010 to update Mr W's agent with progress suggested that no such notice was served, some two years after the problem came to light. The Council should be aware that the conduct of an investigation does not affect any power or duty of the Council to take further action with respect to any matter under investigation. Nevertheless, I am pleased to note, that having seen a preliminary draft of this report, the Council has taken action to secure the reduction of the wall to an acceptable height. The Grampian condition has been discharged, and Mr W is free to implement his planning permission.

95. In my view, the Council's failure to address the matter more vigorously amounted to maladministration. Moreover, the maladministration was compounded by the Council's failure to respond adequately to correspondence from Mr W's agent in which he had drawn the matter to the Council's attention, and referred to the ongoing financial losses being sustained by Mr W. This included a failure by the Council's former Managing Director to respond to his letter dated 2nd September 2008 and the Council's failure to respond to his further letter dated 17th March 2009 to the Head of Highways and Transportation Department. Finally, even when Mr W's agent submitted a formal complaint, the Council still failed in my view to tackle

the matter in a substantive way, by, for example, indicating that it would proceed with the issue of a Section 79 notice if negotiations were not concluded satisfactorily by a stated date. There appears to have been no meaningful engagement in the matter at Corporate level.

96. As a direct consequence of the Council's failures, Mr W was not able to develop his site for its permitted use, and suffered financial losses. Now that he is in a position to develop his site, he will also incur set up costs which are greater than would have been the case had an implementable planning permission been granted in a timely manner. In this connection, I am satisfied that his losses (and likely increased costs) flow from the grant of planning permission which authorised the raised height of the wall on Site B and the Council's subsequent failure to secure the reduction in the height of the wall, rather than from the delay in granting the planning permission in respect of Mr W's site. The cause of his losses was evident from Mr W's agent's correspondence from the outset, and it seems to me that the Complaints Officer failed to recognise this when she sought legal advice on the basis that Mr W's claim related to the delay in issuing the planning permission. In any event, and having regard to the advice of my Planning Adviser, I am not persuaded that Mr W would have been able to have commenced trading sooner had planning permission been issued sooner, or had he, for example, appealed in respect of the non determination of his planning application. By the time of any such appeal, the height of the wall had been raised following the grant of planning permission in March 2008. Even if an appeal had resulted in planning permission being issued earlier than was in fact the case, given the generally accepted view that the increased height of the wall was detrimental to highway safety, it is unlikely that permission would have been granted, except possibly with a condition which reflected a workable solution given the indications at the time, as noted in the reports to the Planning and Orders Committee, that the owners of Site B had agreed to reduce the height of the wall. Mr W's position would not, therefore, have been improved by such a course.

97. As to the extent of the financial losses and likely increased costs claimed by Mr W, I have considered all that has been said on this matter very carefully. The purpose of any remedy is, as far as possible, to put the complainant in the position he would have been in had no maladministration occurred. The Council has not disputed that Mr W suffered financial losses or that he is likely to incur increased

costs in setting up Site A as a result of its maladministration. I have noted the Council's submission that Mr W's losses should not be quantified in this report, but that he should instead prove his losses to the Council's reasonable satisfaction. However, Mr W was unable to develop his site for an unreasonable period of time due to the Council's maladministration, and I consider that the Council's approach, which is unlikely to result in an immediate payment to Mr W could, in the circumstances, operate harshly. In my view, Mr W is entitled to a degree of certainty at this stage as to what he can expect from the Council by way of redress, and when. Moreover, Mr W should be able to develop the site in accordance with the planning permission and in accordance with his normal business practice, but it would not be unreasonable for him to try to mitigate the estimated start up costs by exploring the possibility that he may be able to obtain more competitive prices elsewhere. Accordingly, in order to arrive at an award which is fair and reasonable, and reflects the information which is to hand, I have (following discussion with my Financial Adviser) made the following assumptions:

- Period during which losses sustained: If planning permission for the increased height of the wall had not been granted, there seems to be no reason why Mr W's planning application would not have been approved by the Planning and Orders Committee in early July 2008 without the restriction imposed by Grampian condition. It was recommended for approval on this basis by the Officers. Had this been the case, then taking account of Mr W's eagerness to start work, and allowing time to prepare the site, construct the canopy and fencing, it seems reasonable to assume that his site could have been operational by 1st September 2008. The Council has said that the Grampian condition had been discharged by 29th October 2010. The period concerned is, therefore, 26 months.
- Mitigation of losses: During this period, Mr W tried to sell the site, but was frustrated in his efforts by the existence of the restriction on his planning permission. Nevertheless, he let the site for use as a compound by a local contractor for 7 months at £500 per month. Although he only received one payment of £500, it is reasonable to take into account the amount he was entitled to receive (£3,500). It also seems unlikely that he could have used the site for any other lawful planning purpose, given the absence of any other

relevant extant planning permission and the difficulties posed by the raised height of the wall at the entrance to the Trading Estate.

- Occupancy levels: 56 standard sized units are authorised by the planning permission. Based on the information regarding occupancy levels provided by Mr W's agent during the first and subsequent years, and in relation to the other site on Anglesey, I am assuming occupancy levels of 45% during the first year, and 90% thereafter. (In this connection, I have taken account of the information submitted by Mr W's agent regarding the demand for storage units in the area – paragraph 71 refers).
- Rental income: Based on the evidence provided by Mr W's agent regarding rates actually paid for standard sized containers at the other site on Anglesey (paragraph 72 refers), I am assuming a rental income of £100 per month per unit.
- Administrative costs as a percentage of total revenue from the site: Mr W estimates his administrative costs to be in the order of £800 per month, but according to the Council, he claimed they were such as to negate any profit during the period in 2007 he was trading in breach of the enforcement notice. Mr W's accounts from that period to 2010 indicated that administrative costs indeed formed a significant percentage of the gross income, and I do not think Mr W can have it both ways. Accordingly and based on the information contained in Mr W's business accounts (as summarised in Annex 1) I am assuming that his administrative costs amount to an average of 74% of gross income.
- VAT status of Mr C's trading company: I am advised by my Financial Adviser that whether Mr W's trading company should be registered for VAT is not free from doubt. However, this is not a matter which I can determine, and in any event, it is Mr W's responsibility (or that of his company) to comply with VAT regulations as appropriate. In the circumstances, and based on the statement regarding VAT by Mr W's accountant (paragraph 72), I am assuming that Mr W's company is not registered for VAT. As a consequence, VAT is not being charged on the rental of the storage containers and Mr W's company cannot recover any input tax, so that any VAT paid by his company, for example on

start up expenses and the purchase of additional containers for Site A, will be an additional cost.

- Increased costs in implementing the planning permission on Site A: The Council has not disputed that Mr W's costs in developing Site A at this stage in accordance with the planning permission will be greater than those he would have incurred had he been able to develop the site in September 2008. Whilst noting what the Council has said about depreciation, I take the view that the increased costs are of a capital nature, and that it is reasonable to assume that the Complainant would treat any payment by the Council in respect of this particular component of the claim as a capital receipt. Had Mr W been in a position to develop the site in September 2008 and incurred the capital expenditure at that time, then any capital allowances, for example, in respect of the containers, would have been based on September 2008 prices. I am assuming, therefore, that the costs of developing the site at September 2008 prices would have been £113,247 (comprising £82,250 in respect of the purchase of new (namely used once only) containers, £10,528 in respect of delivery prices and £20,469 for fencing and tarmac, all inclusive of VAT).

98. Based on these assumptions, I consider that Mr W is likely to have sustained business losses amounting to £30626 calculated as follows:

Income:	Year 1 from 1 st September 08 :	£30,240
	Year 2 from 1 st September 09 :	£60,480
	Year 3 from 1 st September 10:	£10,080

		£100,800
	Less licence income:	£ 3,500

		£97,300
	Less administrative costs (Average 74%)	£66,674

	Operating profit:	<u>£30,626</u>

99. I am also satisfied that Mr W's company will incur significant increased costs in developing the site in accordance with the planning permission. However, the actual extent of the increased costs will not be established until Mr W has developed the site and reasonably incurred the expenditure in question.

RECOMMENDATIONS

100. As a result of action now taken by the Council, Mr W can commence the use of his site. What remains, therefore, is his claim for the reimbursement of his company's losses, reflecting the net trading income he could reasonably have expected had his company been able to commence the use of the site by 1st September 2008, and reimbursement of his increased set up costs.

101. I recommend:

- that the Council should, within 28 days of the date of this report, pay to Mr W's company the sum of £20,000 on account of his company's estimated business losses from 1st September 2008 to end of October 2010. It should pay Mr W's company, the balance (£10,626) within 12 months of the date of commencement of trading on Site A provided no new significant evidence is produced during the first year's trading which alters the assumptions referred to in paragraph 97 above. However, if significant evidence emerges during the first year's trading to indicate that the assumptions are inaccurate in that the losses incurred by Mr W's company as a result of the Council's maladministration are greater or lesser than those estimated, then the balance which the Council shall pay to Mr W's company shall be such as is required to settle his company's business losses based on the corrected assumptions.
- that the Council should reimburse Mr W's company an amount equivalent to the difference between the estimated set up costs the company would have paid as mentioned in paragraph 97 above and the sums actually paid for containers, delivery, fencing and tarmac on the basis of invoices paid by Mr W's company, which should then be submitted to the Council as proof of the

expenditure incurred. The Council should reimburse Mr W's company these amounts within 28 days of proof of payment being submitted.

- that the Council should also within 28 days pay a further sum of £1500 to Mr W in respect of his costs in pursuing the matter with the Council and with me.

102. In view of the steps being taken by the Council to review its procedures, I see no need to make specific recommendations in relation to the failures which led to the grant of planning permission for the raised wall on Site B. However, and in view of the concerns expressed in paragraphs 94 and 95 of this report I recommend that this report should, within 3 months, be considered by the Commissioners (referred to in paragraph 16) so that they have the opportunity of considering whether any other appropriate courses of action are necessary.

103. The permitted period for the purpose of Section 19 of the Public Services Ombudsman (Wales) Act 2005 is 3 months.

Peter Tyndall

Date: 25th March 2011

Ombudsman

Report Reference Number: 200901501