

## **Agenda Item No 5**

### **Planning and Development Board**

**7 October 2019**

### **Planning Applications**

#### **Report of the Head of Development Control**

#### **1 Subject**

- 1.1 Town and Country Planning Act 1990 – applications presented for determination.

#### **2 Purpose of Report**

- 2.1 This report presents for the Board decision, a number of planning, listed building, advertisement, proposals, together with proposals for the works to, or the felling of trees covered by a Preservation Order and other miscellaneous items.
- 2.2 Minerals and Waste applications are determined by the County Council. Developments by Government Bodies and Statutory Undertakers are also determined by others. The recommendations in these cases are consultation responses to those bodies.
- 2.3 The proposals presented for decision are set out in the index at the front of the attached report.
- 2.4 Significant Applications are presented first, followed in succession by General Development Applications; the Council's own development proposals; and finally Minerals and Waste Disposal Applications. .

#### **3 Implications**

- 3.1 Should there be any implications in respect of:

Finance; Crime and Disorder; Sustainability; Human Rights Act; or other relevant legislation, associated with a particular application then that issue will be covered either in the body of the report, or if raised at the meeting, in discussion.

#### **4 Site Visits**

- 4.1 Members are encouraged to view sites in advance of the Board Meeting. Most can be seen from public land. They should however not enter private land. If they would like to see the plans whilst on site, then they should

always contact the Case Officer who will accompany them. Formal site visits can only be agreed by the Board and reasons for the request for such a visit need to be given.

- 4.2 Members are reminded of the “Planning Protocol for Members and Officers dealing with Planning Matters”, in respect of Site Visits, whether they see a site alone, or as part of a Board visit.

## 5 **Availability**

- 5.1 The report is made available to press and public at least five working days before the meeting is held in accordance with statutory requirements. It is also possible to view the papers on the Council’s web site: [www.northwarks.gov.uk](http://www.northwarks.gov.uk).

- 5.2 The next meeting at which planning applications will be considered following this meeting, is due to be held on Monday, 4 November 2019 at 6.30pm in the Council Chamber at the Council House.

## 6 **Public Speaking**

- 6.1 Information relating to public speaking at Planning and Development Board meetings can be found at: [https://www.northwarks.gov.uk/info/20117/meetings\\_and\\_minutes/1275/speaking\\_and\\_questions\\_at\\_meetings/3](https://www.northwarks.gov.uk/info/20117/meetings_and_minutes/1275/speaking_and_questions_at_meetings/3).

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## **General Development Applications**

### **(1) Application No: PAP/2018/0716**

**Land Rear Of 1 To 6, Copeland Close, Warton, B79 0JE**

**Erection of 2 no: detached dwellings and 2 no: detached garages and associated works (regularisation of unauthorised increased finished floor levels by 650mm and variation in ground levels, contrary to reserved matters approval PAP/2017/0237), for**

**Mr Lee Ellis - Cameron Homes**

### **Introduction**

This case was referred to the Board's September meeting which updated Members following an earlier deferral. It was notified of the withdrawal of the application. The Board was therefore left with a decision to make as to whether it was expedient to take enforcement action against the alleged breach of planning control. Members had received Counsel's Advice on the matter, but in view of its receipt on the morning of the Board meeting, it was decided to defer the matter, so that the local residents could also review that Advice.

The previous report is attached at Appendix A together with the Supplementary Report at Appendix B which included that Advice.

### **Responses**

A letter has been received on behalf of Ivycroft Road residents. This is attached at Appendix C.

Additionally one of the occupiers of the affected houses has commissioned a civil engineer to undertake an examination of the levels of the houses as built. He concludes that the heights accord with the engineering plans which were approved in respect of the drainage details.

### **Observations**

There are three main areas to look at.

Firstly is the matter of whether there has been a breach of planning control or not. The developer took his own legal Advice and this concluded that there had not been, based on the plans that have been approved subsequent to the grant of outline planning permission. The Council's own legal Advice based on those same plans is the same. The occupier of one of the properties is saying that based on the technical evidence on site, he considers that there has been no breach. As a consequence there is now technical evidence and legal advice that there is no breach here. The Board is recommended to resolve that based on these matters there has been no breach of planning control.

Secondly there is the matter of whether it is expedient to take enforcement action. If there is no breach, then there is no need to consider this issue. However even if the Board conclude that there has been a breach, officer's advice is that enforcement action would not be expedient. This is given added substantial weight by the conclusions from the two Advice notes.

Thirdly there is the matter of how this situation has arisen. The reasons for that are having plans approved for different reasons showing different details but which look to be inconsistent when read together; the absence of confirmation through technical evidence from the developer as to the actual finished floor levels when the matter was first raised with him, his submission of a retrospective application to retain what was being built was perceived as recognition of an alleged breach by residents and the absence of shading and shadow evidence with that application. The Board deferrals and site visit did add time, but these were entirely reasonable given that Members wanted to have clarity before any decisions were taken. Officers agree that this has not been handled well and thus apologise to the Board and to the residents. The timescales were extended because of the uncertainties outlined above, but both officers and the developer were working under the misapprehension that there had been a breach. That matter could have been resolved earlier. Even so, there was not a need to consider a Stop Notice as overall officers were satisfied that the alleged breach was not material – a matter subsequently supported by the shading and shadowing evidence.

### **Recommendations**

- a) That it is agreed that there has been no breach of planning control and thus it is not expedient in all of the circumstances to take enforcement action.
- b) That the issues arising from this case are acknowledged and that officers review practice as a consequence

## **General Development Applications**

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**Cameron Homes**

### **Introduction**

This case was referred to the July Board meeting but determination was deferred to enable a meeting to be arranged between the applicant and local residents.

The previous report is at Appendix A.

### **Current Position**

The meeting took place on 31 July and a note of this is included at Appendix B.

As can be seen from the note it was concluded that the resident's representative would consult other residents in respect of a proposal to add a trellis to the top of the boundary wooden fence of plot 4 – one of the two new houses. The residents subsequently responded that they could not agree to this as it would not help in reducing the amount of shadowing or overlooking.

At the meeting the applicant repeated his view that there had been no breach of planning control as had been indicated at the July Board meeting. He explained that he had sought legal advice on the issue and that this confirmed his view.

Following the indication from the residents that they could not agree to the suggestion made at the meeting on 31 July and in light of the legal advice obtained, the applicant has withdrawn the application PAP/2018/0716. There is thus no application to determine.

### **Observations**

Following the withdrawal of the application, the Council still has to take a decision on the expediency of enforcement action.

Given that the applicant had sought legal advice on whether there had been a breach of planning control or not, the Council, with the agreement of the Chairman has also taken legal advice. That had not been received at time of publication of this agenda and thus a supplementary report will be circulated to Members prior to the meeting.

(2) Application No: PAP/2018/0716

Land Rear Of 1 To 6, Copeland Close, Warton, B79 0JE

**Erection of 2 no: detached dwellings and 2 no: detached garages and associated works (regularisation of unauthorised increased finished floor levels by 650mm and variation in ground levels, contrary to reserved matters approval PAP/2017/0237), for**

**Mr Lee Ellis - Cameron Homes**

### **Introduction**

The application was reported to the May meeting of the Planning and Development Board. It was deferred to allow members to visit the site and to obtain an assessment of the effect of the development on daylight and in particular on shading from the proposed additional height in the new dwellings.

### **Background**

The report to the May meeting of the Planning and Development Board is attached as Appendix A to this report.

Members will recall that at the Board meeting, a near neighbour spoke in opposition to the application proposal and raised issues with the written report. The speaker has since written on behalf of the residents of nos. 15, 21, 21a, 23 and 23a Ivy Croft Road to detail those issues. A copy of the letter is attached as Appendix B. This report will address the content of the letter.

Members requested the completion and submission of an assessment of the impact of shading from the raised height dwellings. This has been presented in the form of Shading Plans which compare the shading as a consequence of the development as approved to the shading as a consequence of the development as built. Illustrations depict different times of year at different times of day. The full shading assessment is reproduced in Appendix C (with a layout that enables direct comparison) for Member's reference.

Planning Board Members will have received copies in advance of this meeting in order that they can take them to the site.

A note of that visit, which takes place after the publication of this report, will be circulated at the meeting.

### **Observations**

The observations here will be primarily confined to the matters identified by the Board and to the representations received since the report in May.

#### **a) The Representation from Near Neighbours**

Members are invited to read the representation and its associated illustrative photographs in full at Appendix B. The following is a summary and response to the matters raised.

*The impact of mitigating tree planting is understated. The adverse effect will not be restricted to just shading but as the proposed trees are deciduous there would be an issue with falling leaves 'straying' into gardens belonging to Ivy Croft Road residents. It's a concern when we consider that had plots 3 and 4 been built to the correct height then tree planting/screening would not be required. Councillors should be aware that there were inaccuracies in the initial planning statement submitted by Cameron Homes in respect of the off-site planting of trees to mitigate changes in the construction.*

The tree planting was carried out as a measure to mitigate the effects of a change in the form of the dwellings rather than as means to fully address the change. This was in the expectation that the trees would be welcomed by neighbouring residents. As a general rule, tree planting and enhanced landscaping is a welcome measure to improve the visual and ecological quality of development. The negative effects, such as leaf fall is commonly outweighed by the positive effect of 'softening' the effect of new built development. Given that the trees are rear garden trees with no substantial general public benefit, if it proves to be the case that the retention of the trees is not welcomed there would be no strong objection the part of the planning authority for the trees to be removed.

*At an early stage in the build (at that point the ground floor windows were just about to be put in) residents raised concern with both Cameron Homes and the Planning Department that the houses were being built too high.*

*It is a major concern that NWBC didn't stop the development of these two plots when the deviation from the approved plans was first reported by both 23 and 23a (1<sup>st</sup> August 2018, 13<sup>th</sup> August 2018). A meeting was held between NWBC planning and the residents of nos. 21 and 23 Ivy Croft Road on 24<sup>th</sup> September 2018, followed by a site visit by NWBC on 28<sup>th</sup> September 2018. This culminated in a meeting between NWBC and Cameron Homes on 1<sup>st</sup> October 2018.*

*There is criticism of Cameron Homes in respect of their intention to build in accordance with the approved plans and the failure to notify NWBC of problems which would necessitate applying for permission to vary from the approved scheme.*

It is correct to say that resident's concerns about a potential increase in height of these two plots was drawn to the Council's attention some time before the subsequent submission of the retrospective planning application. Officers worked to establish firstly whether there was a variance from the approved plans. With the co-operation of the applicant it was established that as a consequence of changed ground levels the overall height of the dwellings would be raised.

Members will be aware that it is not unlawful to carry out development in an unauthorised manner. When unauthorised development is established officers use judgement to establish the expediency of formal enforcement action. Where the breach is not deemed a serious breach, a common remedy is to invite the submission of a

retrospective planning application. Where the breach is deemed to cause serious harm consideration can be given to the pursuit of formal enforcement action, including the service of Enforcement Notices and/or Stop Notices. Given that it was established that the increase in height of these dwellings was less than a metre, and for the reasons set out in the May report, this extent of deviation from the approved plans was not considered to be a circumstance warranting the service of an Enforcement Notice or a Stop Notice.

*Residents believe that the statement 'no change has been made to the shape, size or actual height of the two buildings (plots 3 and 4)' to be untrue and point to the overall height being raised by +650mm.*

The report is not incorrect, it fully acknowledges that the building is +650mm higher overall (as a result of an increased ground level) but the building itself is not altered, it is of the same footprint and the same width, depth and height above finished floor level.

*Residents believe the statement 'No objections have been expressly received concerning the elevational changes.' to be incorrect because they drew attention to the effects of increased height.*

Again, the report is not incorrect in this respect, the term 'elevational changes' refers only to the minor changes in the external appearance of the house such as the arrangement of window/door positions and attachment of garages. Indicating that there were no objections in this respect does not suggest a dismissal of concerns about the effects of an increase in height. Issues of the degree to which privacy will be affected by the increased height is addressed in the 20 May report.

*Residents express the concern that photographic images contained in the May report taken from the rear garden of no. 17 Ivy Croft Road are not representative of the effect on nos. 21, 21a, 23 and 23a. 17 Ivy Croft Road is on slightly higher ground than the primarily affected neighbours. The statement 'it is primarily only the roof of the dwellings in view and that the limited fenestration does not cause undue harm from overlooking.' may well apply to no. 17. However, it is completely untrue for nos. 21, 21a, 23 and 23a.*

This is acknowledged to be correct, the relationship of number 17 to the new dwellings does differ to that of its neighbours and it is acknowledged that it is on slightly elevated ground. For completeness, the following image depicts the relationship between numbers 21 and 21A and Plot 4.



It is also acknowledged that the inter-visibility between these dwellings is greater and it is acknowledged to be more visually dominant than that at number 17, however, the properties are side on to each other and there are no principal windows in the new dwelling that have a direct line of sight to windows in the Ivycroft Road properties. Overlooking as a consequence of the elevated height is not considered to be substantially different to the approved scheme.

*The residents take a different view to the views expressed in the officer's report about the impacts from shading and challenged the technical basis upon which the officer's advice was founded.*

Members now have had the benefit of a site visit to see the relationship of new to existing dwellings and have the benefit of a shading effects assessment to inform decision making. The following section addresses the previous absence of a technical analysis and offers commentary on the findings of the assessment.

#### **b) The Shading Assessment**

The shading assessment consists of the production of two sets of drawings that show the difference between the shade of the properties on the 'as approved' and the 'as built' schemes. It has been built using SketchUp to show the neighbouring (off site) properties and those within the Cameron Homes scheme at the approved ground level at and then at the higher, as built, level.

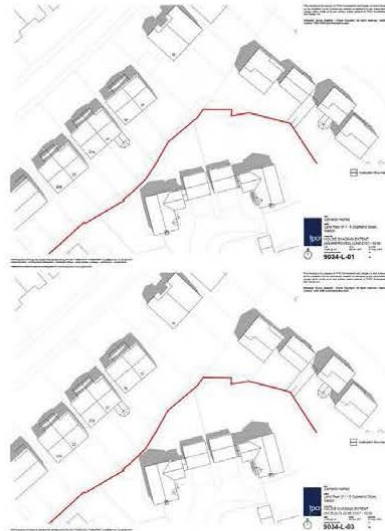
In line with standard methodology it locates the site co-ordinates and shows the shadows cast by the Cameron Homes properties at various times of day at both the summer and winter solstices – essentially the best and worst case scenarios in terms of the amount of shade cast.

The drawings show that some shade will be cast onto the neighbouring properties from the Cameron Homes dwellings as a part of the as approved and as built development. However, the difference in shadow pattern between the built and approved levels does not increase the amount of shade cast on the surrounding buildings significantly or to any material detriment. There are only minor differences in the shadow patterns



between the two different development heights and, where the neighbouring properties are shaded by the development, this was the case originally.

The images below show a snapshot of the seasonal differences and comparative differences (at midday).



(AS APPROVED) JUNE 21ST - 12:00

(AS BUILT) JUNE 21ST - 12:00



(AS APPROVED) DECEMBER 22 AT 12:00

(AS BUILT) DECEMBER 22 AT 12:00

*Note: The images are shown at full size in the report appendix.*

The images illustrate that any shading that results is primarily shading to gardens rather than shading in the neighbouring dwellings.

It is not considered that there would be a defensible reason to resist the increased height on the basis of a concern about shading.



### **c) Conclusions**

The timescales involved in seeking to investigate and address the variation from the approved scheme and the frustrations felt by residents, though thoroughly appreciated and acknowledged to be regrettable, cannot be determining matters in this application. Members will appreciate that the investigation and remedy of breaches of planning control can be time consuming matters. Similarly, concerns about the applicant's intentions, motivations or conduct are not determining matters in this application. The application must be determined on the basis of an assessment of the effects of raising the height of the dwellings by 650mm.

It is considered that the submitted shading assessment evidences that the effect of raising the height is a very minimal detriment. The recommendation of the previous report remains sound in these circumstances.

### **d) Expediency of Enforcement Action**

If, despite the findings set out above, the Board was inclined to consider a refusal of the application, consideration would need to be given to the expediency of remedying the breach of planning control.

A refusal of planning permission would mean that the dwellings as constructed are unauthorised. The only remedy available to the planning authority would be a requirement for the demolition of the properties. A reduction in ground level and the reconstruction of the dwellings, in accordance with the approved development, would follow should the developer choose to do so. The developer could, if he chose, make a new application for dwellings which take a different form at the current ground level.

It has to be considered if such a measure would be proportionate, given the levels of harm caused by the additional 650mm height. The dwellings are occupied by families. The families would be displaced for a considerable period of time. The works to remedy the breach would be time consuming and expensive. Even if action had been taken immediately when the suspected breach had been reported the works would have been substantial and expensive to remedy. It is not considered that it would be proportionate or expedient to take the available enforcement action given the levels of harm caused by the additional 650mm height and the nature of those works. The applicants would have a right of appeal against both the planning application and any Enforcement Notice served. An enforcement appeal can consider whether the requirements of a Notice are excessive and a Planning Inspector would consider the consequences of the required measures balanced against the harm.

### **Recommendation**

That planning permission be **GRANTED** subject to the conditions as set out in the report to Board from May 2019.

## **BACKGROUND PAPERS**

Local Government Act 1972 Section 100D, as substituted by the Local Government Act, 2000 Section 97

Planning Application No: PAP/2018/0716

<b>Background Paper No</b>	<b>Author</b>	<b>Nature of Background Paper</b>	<b>Date</b>
1	The Applicant or Agent	Shading assessment	26/6/19
2	Near Neighbour	Representation	30/5/19

*Note: This list of background papers excludes published documents which may be referred to in the report, such as The Development Plan and Planning Policy Guidance Notes.*

*A background paper will include any item which the Planning Officer has relied upon in preparing the report and formulating his recommendation. This may include correspondence, reports and documents such as Environmental Impact Assessments or Traffic Impact Assessments.*

**General Development Applications**

**Application No: PAP/2018/0716**

**Land Rear Of 1 To 6, Copeland Close, Warton, B79 0JE**

**Erection of 2 no: detached dwellings and 2 no: detached garages and associated works (regularisation of unauthorised increased finished floor levels by 650mm and variation in ground levels, contrary to reserved matters approval PAP/2017/0237), for**

**Mr Lee Ellis - Cameron Homes**

**Introduction**

The application is reported to Board as a consequence of the request of the local member concerned about the impacts of the changes.

**The Site**

The site comprises two dwellings on the residential estate that is currently under construction on land to the south of Copeland Close and Ivycroft Road in Warton – shown below:



**The Proposal**

The application seeks planning permission for the erection of two dwellings. It is, in effect, an application to regularise the unauthorised construction of Plots 3 and 4, as approved under reserved matters approval (PAP/2017/0237), which have been built to a finished floor level 650mm higher than approved under that reserved matters approval.

The differences are as follows:

Plot	Approved Level	As Built Level	Difference
3	83.25m	83.90m	0.65m
4	83.25m	83.90m	0.65m

Additionally, small elevational changes have been made to the dwellings approved under PAP/2017/0237, including the inclusion of patio doors at ground floor and the removal of the covered link between the dwellings and their respective garages.

The two plots in the context of their relationship to existing neighbouring dwellings is shown in the cross sections below in both the original approved form and the as built form that this application seeks to regularise.

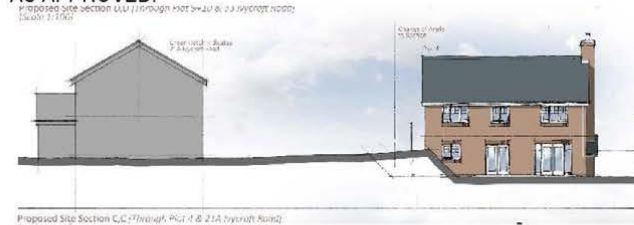
**AS APPROVED:**



**AS BUILT:**



**AS APPROVED:**





## Representations

Representations have been received from seven households raising the following concerns:

- Plot 4 is right at the end of my garden and when I sit in my lounge all I can see is a huge brick wall.
- The applicant has not worked with neighbours to mitigate concerns about vegetation in our property and our fences falling.
- The development causes shadowing in adjacent gardens. The roof height being higher than was originally agreed it has blocked out natural light from the end of a garden and a huge shadow, the shape of a pitched roof across the entire width of my garden and up my garden. Sunlight could previously be guaranteed all day. Loss of light has especially noticeable during the last few months when the sun stays low to the horizon.
- Plants have died.
- Light is lost from bedroom windows.
- Occupiers of existing properties feel that they have to avoid looking out of bedroom windows for fear of looking at occupiers of new dwellings and that they will be overlooked in bedrooms, more than they would have been if the plots had been constructed to the original level.
- There is complaint about the conduct and motivation of the builder.
- There is concern that the developer has not built in accord with the approved plans and a general disapproval at the fact that he should be 'allowed' to address this retrospectively. There is concern about precedent for others following suit.
- The height difference of +650mm is not, slightly higher, as described by the applicant, but significantly high.
- There is concern that the Council did not stop the development when the deviation from the approved plan was first reported.
- Concern about compliance with Building Regulations if the developer has not complied with the planning approval.
- Proposed tree planting will produce an even greater issue with shading and will not have any benefit to the residents of Ivy Croft Road and Copeland Close.
- It is suggested that Councillors should visit the site.
- One occupier of one of the adjacent new dwellings raises a detailed query which attempts to define the adherence to the approved drawings in respect of external works, boundary treatments and engineering layouts, with particular regard to the effect on drainage. He suggests that this application makes no reference to the impacts on plots 5 & 6 that adjoin Plot 4. There are concerns that the increased height is contributing to the excess water drain off that is collecting in the rear garden of Plot 5, potentially plot 6, access driveway and ultimately plots 7 & 8. He considers that further work is required to assess whether or not this is the root cause.
- Two objectors have supplied photographs to illustrate concerns:



Figure 1: 23a Bedroom 2 To Plot 4



Figure 5: 23a Living Room To Plot 4



To illustrate shadow cast on garden.

### Observations

The principle of residential development has been accepted here. The issue with this application is to assess whether the changes made are so materially different from that approved so as to warrant a refusal. If so, then the expediency of enforcement action would be needed to be considered, which could result in the demolition of the two buildings and their re-construction to the approved plans.

In respect of the elevational changes, including the addition of patio doors on ground level and the removal of the internal connection between the main dwelling and garage, then no change has been made to the shape, size or actual height of the two buildings (plots 3 and 4). The scale, massing and external appearance is therefore materially similar to that approved at the reserved matters stage and are not a cause for concern in the determination of the application. No objections have been expressly received concerning the elevational changes.

The key issue for consideration is therefore the impact of the increased finished floor levels (FFLs) on the amenity of neighbours living on Ivycroft Road and Copeland Close. This will be explored in some detail below.

Cross-sections have been submitted to show the relationship between Plot 3 and no.3 Copeland Close and Plot 4 and no.21A Ivycroft Road (reproduced above) and the photographs below also show current relationships.





The above images show the rear garden of the new dwelling (from Plot 3 looking towards Plot 4 and properties on Ivycroft Road) in the context of the relationship with existing dwellings on Ivy Croft Road. The separation distance between the two is relatively generous by modern housing estate standards.



The image above shows the elevation of adjacent properties on Copeland Close above the application premises.





The image above shows the elevation and separation distance of adjacent properties on Copeland Close above the application premises and the length of the rear gardens to the new properties.



The image above shows the relationship of Plot 4 side at a side angle to properties on Ivycroft Road.



These images (taken early on a winter/spring morning in an Ivycroft Road rear garden) show that the sun clears the height of the new dwelling, affording natural sunlight and daylight to the rear of properties on Ivycroft Road. The first image also shows that it is primarily only the roof of the dwellings in view and that the limited fenestration does not causing undue harm from overlooking.



Even with the sun low in the sky the new dwellings have no shade casting effect on the houses themselves (illustrated example above)

Much of the concern expressed in the representations is about the effect of having dwellings where there were formerly none. This should carry no weight as there is a planning permission here for the erection of two houses. The issue as indicated above is to assess the differences between that approved and that constructed in terms of the degree of any adverse impacts.

The separation distance between new and existing dwellings is adequate to ensure no undue dominance or levels of privacy that are beyond the norm. The difference in land levels also assists in ensuring that the new dwellings do not have an unreasonable degree of dominance, overlooking or loss of privacy. The occupiers of adjacent dwellings formerly enjoyed an outlook over an undeveloped field. It is unsurprising that the construction of dwellings is an unwelcome change. However, permission exists for dwellings to be constructed at this location. The issue here is not whether the new houses cause harm because of their very presence but whether the altered, slightly elevated dwellings tip the balance of them having an unacceptable impact. It is considered that they do not. They do not significantly affect light to properties, nor do they have any substantial impact on light to rear gardens sufficient to justify very significant alteration to return them to the original approved height. There is no significant consequence to overlooking as a consequence of the increase of 0.65metres in height.

The harm to amenity from shadowing is judged in terms of degree of harm. Harm caused by shadowing of rooms in dwellings is generally of significant concern or weight. Harm to frequently used parts of gardens immediately adjacent to dwellings (patios) is generally of more moderate weight. However, harm from the shadowing of rear parts of gardens is most commonly held to be of less significant harm, since these parts of gardens are often less well used. In this instance, the degree of shade cast is not great and confined primarily to the rear portions of rear gardens (given separation distances and levels). The additional 0.65metres cannot be held to cause such significant loss of light to neighbouring dwellings as to suggest refusal and enforcement action.

The proposed landscaping scheme is considered an appropriate response to the partial screening and softening of the built form. The trees selected are suitable for small gardens. Any adjacent occupiers would have the rights to remove overhanging branches as the trees mature if the wish. It is also acknowledged that the inclusion of

trees is a desirable measure to lessen impact, it is not considered essential to the acceptability or lack of acceptability of the dwellings in their new form. It is further acknowledged that, given the location of the trees in back gardens, they would not be afforded the protection of a tree preservation order. Thus, it is hoped that, by mutual agreement, if the retention of any of the trees were not desired at any future point, they could be removed as appropriate.

In respect of the levels and surface water drainage matters raised by an occupier of one of the adjacent newly constructed dwellings. There are some consequential changes to land form on the adjacent plot (Plot 5) the change is in the form of a slight elevation to the rear part of the garden (illustrated in the photograph below). Instead of a broadly flat rear garden, the garden now contains a relatively shallow slope towards the house.



The only plan approved relative to the reserved matters application containing levels information is the proposed cross sections. This drawing does not show specific slab levels but is to scale and shows a datum line from which the levels can be measured. The only plan approved that shows specific slab and garden levels is the RACE Engineering Layout Dwg No. 100 Rev P8 that was submitted and approved for the discharge of conditions 20, 21 and 22. Whilst these conditions are related to drainage it is reasonable to consider that the associated levels shown are also be deemed to be approved. In respect of the garden levels of plot 5, the levels shown on revision P8 of the engineering drawing verses the as built levels and these are identified below:

- Left hand corner (looking at the garden from the patio) – approved level 82.80 – as built level 82.66 – as built level therefore 140mm lower than approved.
- Change of direction at mid point of rear boundary – approved level 83.15 – as built level 83.18 – as built level therefore 30mm higher than approved.
- Right hand corner – approved level 83.30 – as built level 83.37 – as built level therefore 70mm higher than approved.

Though this is of acknowledged concern to the householder because it makes the mowing of the lawn a little more difficult and causes the garden to be a little less useable, the variation in levels is of minimal effect in the context of the development of

the site and in terms of its effect (in planning terms it is considered de-minimis). The change in levels causes no difference to the visual appearance of the area or to the amenity of neighbouring dwellings. The developer is in discussion with the householder about measures to remedy his concerns, including measures to deal with surface water drainage matters and the re-profile the garden. The wetness of the garden is believed, at least in part, to be as a consequence of compacted subsoil during the construction. The developer proposes that within Plot 5 he will remove the existing turf, loosen the sub-soil and prepare and lay new turf to the garden. He further proposes an additional gravel margin adjacent to the paving so that should there be any surface water run-off from the garden this will be intercepted before running onto the patio or path. This is a matter of ongoing dialogue between the developer and the householder but it is not considered to be a matter of substance to be resolved through this planning application. It is not considered that there is any consequence here that would suggest a refusal for the levels as constructed.

The garden boundary fence is shown on the approved drawings as larch lap fencing however the fence erected is close boarded (see image above). This change is also considered to be a de-minimis change. Had permission been sought for this type of fencing in the first instance, permission would not have been denied.

Given the increased overall elevation of the dwellings and the sensitivity of the near neighbours to overlooking and loss of light it would now appropriate to remove permitted development rights for extensions, roof alterations or garden buildings. This would not preclude the prospect of such works but would ensure a continuing level of control over impacts. The condition is also appropriate given the former ground conditions in this part of the site.

Finally, the local residents express 'in principle' concern that the developer should not 'be allowed to get away with' carrying out development in an unauthorised manner and seeking permission retrospectively. Members are reminded that planning legislation allows for retrospective applications and enforcement action is also discretionary. It is not automatically unlawful to carry out unauthorised development. The developer takes a risk of formal enforcement action but the Planning Authority will only proceed to take action if it is deemed expedient to do so. For the reasons set out above, it is not deemed expedient to do so in this case and the retrospective application may be supported.

### **Recommendation**

That planning permission be **GRANTED** subject to the following conditions:

1. The development to which this permission relates must be begun not later than the expiration of three years from the date of this permission.

#### **REASON**

To comply with Section 91 of the Town and Country Planning Act 1990, as amended by Section 51 of the Planning and Compulsory Purchase Act 2004, and to prevent an accumulation of unimplemented planning permissions.

2. The development hereby approved shall not be carried out otherwise than in accordance with the plan numbered 16-075-05E Landscape Proposals received by the Local Planning Authority on 30 November 2018, the 7503\_450D\_As Built Site Sections, As Built Plans and Elevations and BER\_ENG\_100 Rev P10 - As Built Levels received by the Local Planning Authority on 3 December 2018 and the Location Plan received by the Local Planning Authority on 7 December 2018.

REASON

To ensure that the development is carried out strictly in accordance with the approved plans.

3. No development whatsoever within Class A, B, C, D and E of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order with or without modification), shall commence on site without details first having been submitted to and approved by the Local Planning Authority, in writing.

REASON

In the interests of the amenity of occupiers of neighbouring dwellings and in the interests of the amenity of the area and in recognition of the ground conditions in the locality.

4. No additional windows or door openings in all elevations and roof plains shall be made, other than as shown on the plans hereby approved, nor shall any approved windows or doors be altered or modified in any manner.

REASON

In the interests .of the amenity of occupiers of neighbouring dwellings

## BACKGROUND PAPERS

Local Government Act 1972 Section 100D, as substituted by the Local Government Act, 2000 Section 97

Planning Application No: PAP/2018/0716

Background Paper No	Author	Nature of Background Paper	Date
1	The Applicant or Agent	Application Forms, Plans and Statement(s)	Nov & Dec 2018
2	Various	Letters from occupiers of seven adjacent dwellings	Dec 2018 to April 2019

*Note: This list of background papers excludes published documents which may be referred to in the report, such as The Development Plan and Planning Policy Guidance Notes.*

*A background paper will include any item which the Planning Officer has relied upon in preparing the report and formulating his recommendation. This may include correspondence, reports and documents such as Environmental Impact Assessments or Traffic Impact Assessments.*



**APPENDIX B**

Ivy Croft Road  
Warton  
North Warwickshire  
B79 0JJ

30<sup>th</sup> May 2019

**Land to the rear of Copeland Close and Ivy Croft Road, Warton**

Dear Mr Brown,

In response to your letter dated 21<sup>st</sup> May 2019 I am pleased to note the following on behalf of the residents of nos. 15, 21, 21a, 23 and 23a Ivy Croft Road.

**Page 5/13** (of the report for the Planning and Development Board Agenda 20<sup>th</sup> May 2019)

Under 'Representations'

- *'Proposed tree planting will produce an even greater issue with shading and will not have any benefit to the residents of Ivy Croft Road and Copeland Close.'*  
We feel it should have been noted there is not just an issue with shading but as the proposed trees are deciduous there would be an issue with falling leaves 'straying' into gardens belonging to Ivy Croft Road residents. It's a concern when we consider that had plots 3 and 4 been built to the correct height then tree planting/screening would not be required. (Contained within the submission of Jan 2019 by no. 23 Ivy Croft Road)
- We believe the following to be an omission from the representations and feel that Councillors should be made aware of this as it paints a whole different picture of Cameron Homes and their intentions regarding honouring existing planning permissions or notifying NWBC of any possible problems which would necessitate applying for a change in those permissions.

The following is an extract from the submission of Jan 2019 by no. 23 Ivy Croft Road but was echoed by nos. 21 and 23a.

"I would like to point out there are several inaccuracies in Cameron Homes' planning statement submitted with this application. Point 3.10 is one case in point. It states:

*"Since the breach was identified, the Applicant has worked with neighbours to mitigate concerns where possible. This has included off-site planting (at no. 23 Ivy Croft Road) The planting of a tree within the garden of 23 Ivy Croft Road is a civil matter between the two parties and falls outside of planning control. It has nonetheless been planted and its retention is now within the control of the owner/occupier of 23 Ivy Croft Road."*

This is wholly and completely untrue. No tree has been planted in my garden (23 Ivy Croft Road) therefore Cameron Homes have not resolved any civil matter between themselves and myself.

In addition to this, Cameron Homes have not communicated anything to the residents affected since the breach was identified. On 24th July 2018, I invited Lee Ellis, Cameron Homes Technical Director, to visit 23 Ivy Croft Road to look at the height of Plot 4. At that point the ground floor windows were just about to be put in and I was concerned that it was all too high. His response was that it wasn't."

At the request of no. 23, CT Planning sent an amended statement to no. 23 Ivy Croft Road and Erica Levy via email but this amended statement never appeared on NWBC website.

- *'There is concern that the Council did not stop the development when the deviation from the approved plan was first reported.'*  
We feel there isn't enough information for the Councillors in the sentence. It is a major concern to us that NWBC didn't stop the development of these two plots when the deviation from the approved plans was first reported by both 23 and 23a (1<sup>st</sup> August 2018, 13<sup>th</sup> August 2018). A meeting was held between NWBC planning and the residents of nos. 21 and 23 Ivy Croft Road on 24<sup>th</sup> September 2018, followed by a site visit by NWBC on 28<sup>th</sup> September 2018. This culminated in a meeting between NWBC and Cameron Homes on 1<sup>st</sup> October 2018. (Contained within the submissions of 21, 23 and 23a Jan 2019).

**Page 5/14** (of the report for the Planning and Development Board Agenda 20<sup>th</sup> May 2019)

Under 'Observations'

- *'.... then no change has been made to the shape, size or actual height of the two buildings (plots 3 and 4).'*  
We believe this is untrue. Although the physical height of the buildings is the same, the overall height relevant to the original plans has changed by +650mm.
- *'No objections have been expressly received concerning the elevational changes.'*  
We believe this is untrue. Specific objections were submitted as follows in the representations of Jan 2019:  
From no. 21 – 'incorrect height of the two plots has had a significant impact to residents of Ivy Croft Road regarding shading'  
From no. 23 – 'substantial difference in height has led to increased shadowing and our amenity has been compromised with an increased loss of outlook. The physical external space.....is visibly higher'  
From no. 23a – Our main objection to the F.F.L. is regarding loss of privacy'
- *'The separation distance between the two is relatively generous by modern housing estate standards.'*  
We feel this is completely irrelevant as this application is primarily concerned with raised F.F.L.

**Page 5/16** (of the report for the Planning and Development Board Agenda 20<sup>th</sup> May 2019)



- The second image on this page is taken from the rear garden of no. 17 Ivy Croft Road. This dwelling is on slightly higher ground than the primarily affected nos. 21, 21a, 23 and 23a. The statement *'it is primarily only the roof of the dwellings in view and that the limited fenestration does not causing undue harm from overlooking.'* may well apply to no. 17. However, as evidenced by the images on page 5/13 – figures 1 and 5 it is completely untrue for nos. 21, 21a, 23 and 23a.
- The last image on this page is of the rear of 17 Ivy Croft Road. There may be *'no shade casting effect'* on this dwelling, which isn't actually surprising as the garages of plots 3 and 4 are at the bottom of this garden. However, as evidenced by the image at the top of page 5/14 and the images below (taken from no. 21 Ivy Croft Road), it is very obviously not the case for all the dwellings.



Fig. 1



Fig. 2



Fig. 3



Fig. 4

**Page 5/17** (of the report for the Planning and Development Board Agenda 20<sup>th</sup> May 2019)

- *'Much of the concern expressed in the representations is about the effect of having dwellings where there were formerly none.'*  
 We believe this isn't true. Residents have accepted that the development is there but have concerns about the F.F.L. of plots 3 and 4.
- *'The difference in land levels also assists in ensuring that the new dwellings do not have an unreasonable degree of dominance, overlooking or loss of privacy'*  
 Cameron Homes built up the land level when building commenced on plots 3 and 4. This does mean that there is a difference in land levels – these plots are now higher than the affected properties in Ivy Croft Road. Prior to this, the land level behind nos. 21, 21a, 23 and 23a Ivy Croft Road was considerably lower than it is now!
- *'The occupiers of adjacent dwellings formerly enjoyed an outlook over an undeveloped field. It is unsurprising that the construction of dwellings is an unwelcome change'*  
 In our opinion this is an extremely patronising statement. Furthermore, it implies that the residents of Ivy Croft Road have some sort of vendetta against Cameron Homes. As this is not the case, we feel this statement isn't representative of our concerns over the increased F.F.L. of plots 3 and 4.

- *'They do not significantly affect light to properties, nor do they have any substantial impact on light to rear gardens sufficient to justify very significant alteration to return them to the original approved height.'*  
Who has decided this? To the best of our knowledge an independent specialist has not carried out an appropriate light survey. We believe it is worth noting that a light survey was carried out further down the site behind no. 31 Ivy Croft Road which found that the light level there was inadequate. Consequently, the two storey dwelling there was amended to a bungalow. Houses nos. 15 through to 31 Ivy Croft Road are all in a straight line and at the same angle to the development site so, if it was deemed necessary to undertake a light survey behind no. 31, surely it is just as necessary to carry one out behind nos. 15 – 23a.
- Following on from this is the observation *'The additional 0.65 metres cannot be held to cause such significant loss of light to neighbouring dwellings as to suggest refusal and enforcement action'*  
Surely this must be an estimated opinion as a light survey has not been carried out?

**Page 5/19** (of the report for the Planning and Development Board Agenda 20<sup>th</sup> May 2019)

- *'Given the increased overall elevation of the dwellings and the sensitivity of the near neighbours to overlooking and loss of light it would now appropriate to remove permitted development rights for extensions, roof alterations or garden buildings.'*  
This statement in the report seems to imply to us that there is an acceptance by NWBC that loss of light is actually an issue.

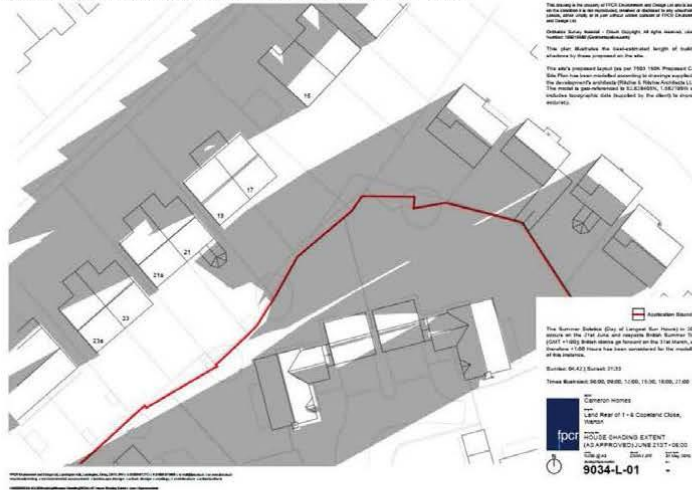
In conclusion, we strongly recommend that the members of the Planning Committee take time to review the history of this retrospective planning permission from Cameron Homes by reading all the initial objections raised by the residents of Ivy Croft Road in January 2019. This will help to build a picture of the timescales involved since the initial concerns were highlighted to Erica Levy and the NWBC Planning Team and will also enable them to appreciate the associated frustrations that have come with it.

I hope that this document is of use to you in revising your report for the Councillors. Please don't hesitate to contact me if anything needs clarifying or if I can be of any further assistance.

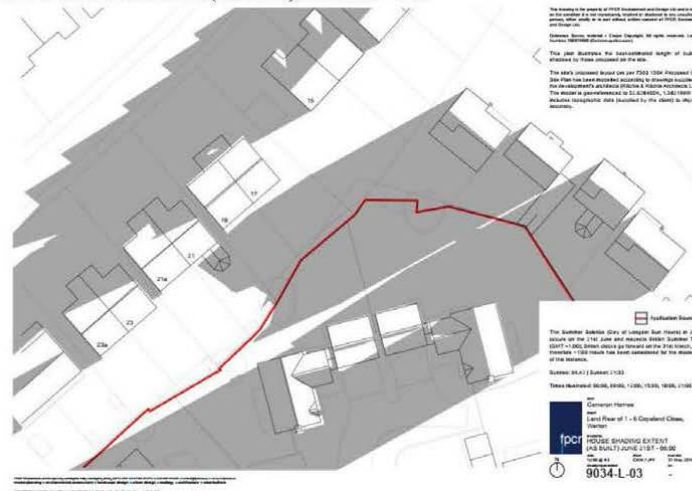
Yours sincerely,

APPENDIX C

**JUNE**  
HOUSE SHADING EXTENT (AS APPROVED) JUNE 21ST - 06:00



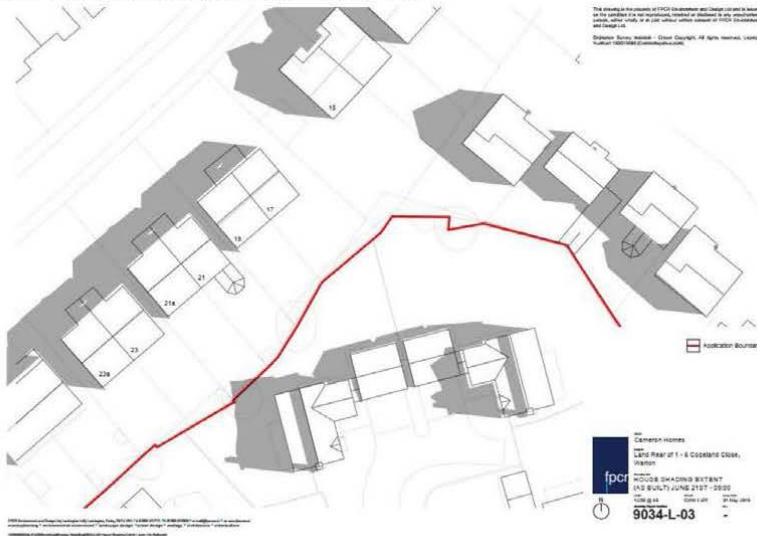
HOUSE SHADING EXTENT (AS BUILT) JUNE 21ST - 06:00



HOUSE SHADING EXTENT (AS APPROVED) JUNE 21ST - 09:00



HOUSE SHADING EXTENT (AS BUILT) JUNE 21ST - 09:00



HOUSE SHADING EXTENT (AS APPROVED) JUNE 21ST - 12:00



HOUSE SHADING EXTENT (AS BUILT) JUNE 21ST - 12:00







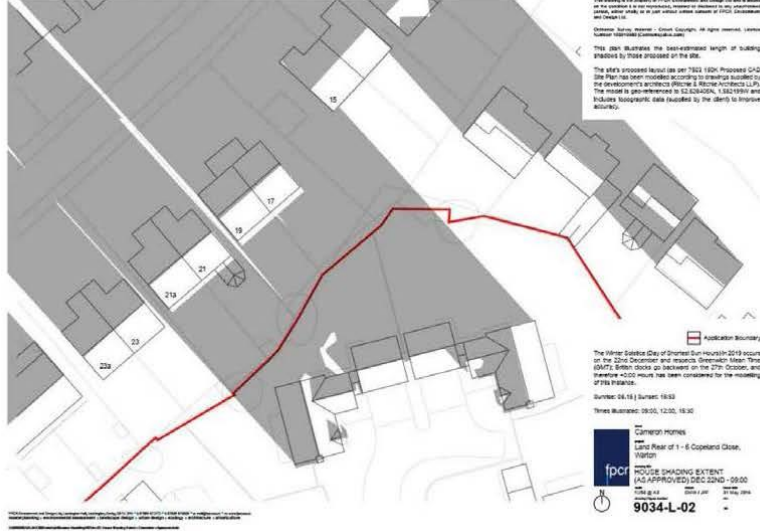




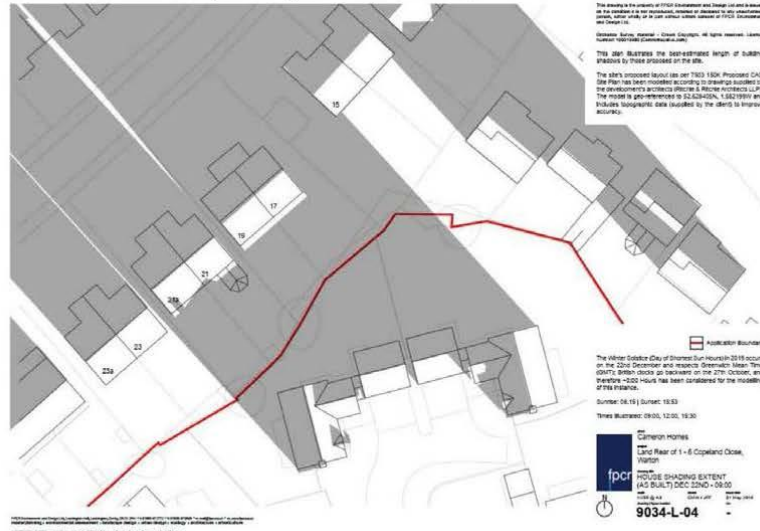


**DECEMBER**

**HOUSE SHADING EXTENT (AS APPROVED) DECEMBER 22 AT 09:00**



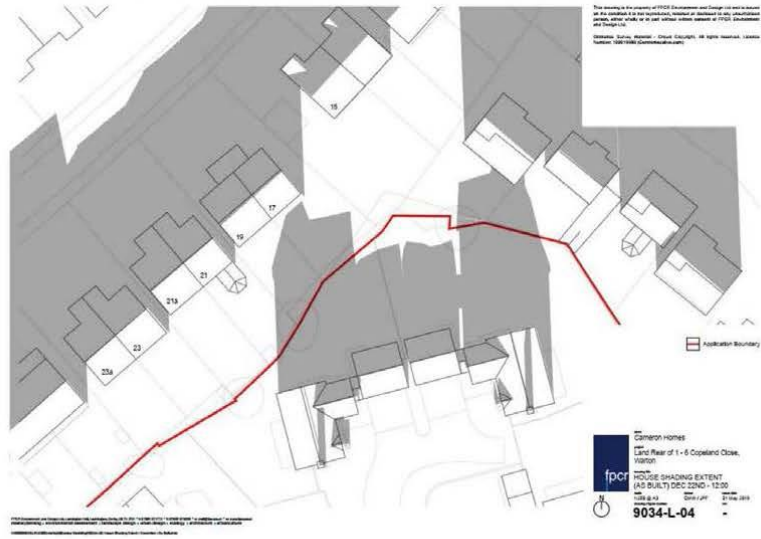
**HOUSE SHADING EXTENT (AS BUILT) DECEMBER 22 AT 09:00**



**HOUSE SHADING EXTENT (AS APPROVED) DECEMBER 22 AT 12:00**



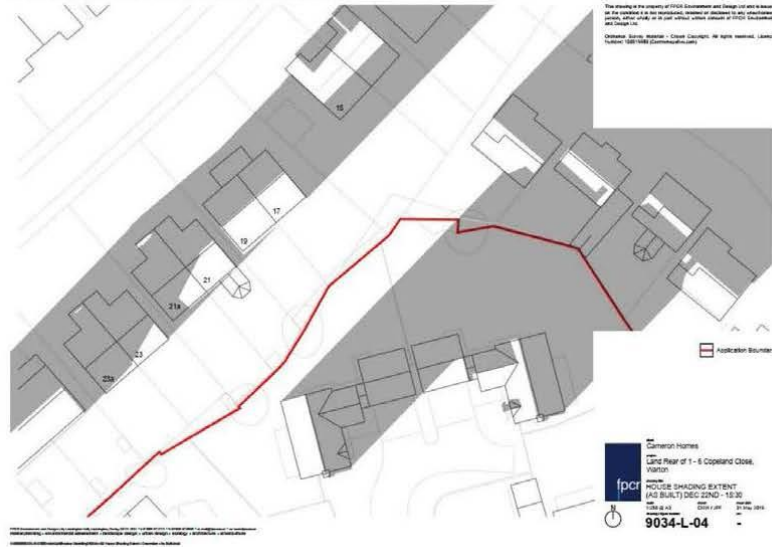
HOUSE SHADING EXTENT (AS BUILT) DECEMBER 22 AT 12:00



HOUSE SHADING EXTENT (AS APPROVED) DECEMBER 22 AT 15:30



HOUSE SHADING EXTENT (AS BUILT) DECEMBER 22 AT 15:30



PAP/2018/

The Hills/Ivycroft Road, Warton

Meeting – 31 July 2019 at 1700 held at the NWBC offices

Present:

Councillors D and M Humphries and Simpson; W Brearley (WB), L Ellis and P Downey (PD) on behalf of Cameron Homes, Mrs Talbot (JT) on behalf of Ivycroft Road residents and J Brown (JB)

1. Cllr Simpson opened the meeting referring to the Board deferral of this case at its July meeting
2. WB wanted to know what Cameron Homes could do to assist the Ivycroft Road residents, particularly as an offer of additional tree planting had not been accepted.
3. JT explained that she was representing the occupiers of numbers 15, 21, 21a, 23 and 23a and that their issues were with overshadowing and overlooking. The two new houses were particularly overbearing. The issue had been raised with the Council and Cameron Homes last year, yet still construction had continued. Additionally there was an issue with ownership boundaries and the impact of the new development, including its boundary fence affecting existing established fences.
4. WB explained that Cameron Homes were of the view that there had been no breach of planning control. Even if there was then in his view, there was no significant harm arising as had been shown on the diagrams submitted to the Board. Additionally, it was not possible to demolish the two houses and rebuild or indeed alter them as they were now privately owned and such works were not in Cameron Home's gift. As a consequence Cameron Homes could only offer mitigation measures – either landscaping or boundary treatments.
5. JT said that residents would be uncomfortable with tree planting in their rear gardens or in the new plots, due to extra shadowing and that in winter the houses would still be seen.
6. Cllr Simpson asked what might satisfy the residents as a "middle way". In other words what measures would make the situation better but accepting that they still had concerns.
7. JT felt that there were none.
8. Cllr Simpson asked Cameron Homes to outline their account of the situation.
9. PD reiterated that they did not agree that there had been a breach. Levels plans had been agreed before commencement. He acknowledged that the difficulties started because of cross section plans that had been produced which did give rise to some uncertainty. As construction continued enforcement officers investigated and suggested that some planting in the house gardens would help in reducing any impacts. Cameron Homes considered that the speediest way to resolve the issue was the submission of the application to retain what had been built. However that was eight months ago. They were unclear about a remedy.
10. There was an exchange about land ownerships with Cameron Homes and residents having different views.
11. Cllr Simpson asked whether the issue for the residents was one of overlooking or one of overshadowing.
12. JT said that numbers 23 and 23a had an overlooking problem but for numbers 21 and 21a, it was overshadowing.

13. Cllr Simpson asked whether raising the height of the boundary fence would help the four occupiers in alleviating their different concerns, but with one solution.
14. JT indicated that around an extra two feet would be helpful.
15. PD indicated that he would ask the occupier of plot four if he would agree to a trellis being added to his fence. If so, Cameron's would provide this.
16. JT agreed to contact the other residents to see if they would feel more comfortable with the trellis added.
17. JB pointed out that the trellis would be in breach of planning control, but that the prime consideration here was to see if the residents agreed to the work. In those circumstances he could not recommend any action.
18. It was agreed that PD would approach the occupier of Plot 4 and that JT would contact other residents. PD and JT would then liaise and let JB know the outcome.
19. The meeting concluded at 1800.



**PAP/2018/0716**

**Land to the Rear of 1 to 6 Copeland Close, Warton**

**SUPPLEMENTARY REPORT**

**Introduction**

Members will be aware for the report on tonight's agenda, that we were waiting for the receipt of legal Advice and that an additional report would be circulated once this was received. This Advice was received on Monday morning – the 2<sup>nd</sup> September.

**The Advice**

This is attached in full at Appendix A.

It can be clearly seen from Paragraph 9 that the advice is very strongly that it would not be expedient to take enforcement action.

**Observations**

As reported, the application has now been withdrawn and thus there is no planning application to determine. The Council has to decide whether it is expedient or not to pursue enforcement action in respect of the alleged breach of planning control. Officer advice is that is not and the Advice now received from Counsel is also that it would not be expedient to do so. This Advice has been received from a different Chambers than that sought by the applicant, in order to receive a wholly independent view. It is of substantial weight that neither of the Opinions received support enforcement action. The recommendation below thus follows the advice.

The application was withdrawn because the Advice the applicant received, concluded that there had been no breach of planning control. The same issue was referred to Counsel for the Council. The Advice is that there is no breach - para 16. The issue was that there are two approved plans relating to levels. As a consequence, building out of either of those approved would be lawful. Common sense suggests that the more detailed plan should be the one that is followed and that is what has happened here. The Advice at para 22.4, says that as a consequence, there was no error on the part of the Council.

Notwithstanding the recommendation below, Members will be aware that the Advice has been received at very short notice and that as such the local residents will not have had the opportunity to review its content. As such the Board may wish to defer the matter and receive the residents' comments at its next meeting.

**Recommendation**

That it is not considered expedient to commence enforcement action in this case for the reasons set out in Appendix A.



**Re: Copeland Close, Warton.**

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**OPINION**

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*Background*

1. I am instructed by North Warwickshire Borough Council (“the Council”) to advise about a potential enforcement issue relating to plot 4 on a residential estate at land rear of 1 to 6 Copeland Close, Warton (“the Site”).
2. From the planning history of the site, the following is relevant to this advice:
  - 2.1. 29 April 2015 – outline permission granted for residential development at the site (“the OP”). All matters were reserved apart from access.

Condition 20 provides:

*Prior to the commencement of development a scheme for the disposal of foul and surface waters shall be submitted to and approved in writing by the Local Planning Authority. The scheme shall address and achieve the following matters:*

*(d) A fully labelled network drawing showing all dimensions of all elements of the proposed drainage system including an on/offline control devices*

*Reason*

*To prevent pollution of the water environment and to minimize the risk of flooding on or off the site and to ensure*

*that an integrated design solution addresses the water environment.*

Condition 26 states:

*The approval of reserved matters referred to in condition 1 shall include drawings to show existing and proposed levels, incorporating finished floor levels, eaves and ridge heights for both the proposed development site and on neighbouring land for comparison.*

*Reason*

*In the interests of the amenities of the area.*

2.2. 26 March 2018 – reserved matters are approved.

With regard to plot 4, plans and elevations were approved (7503\_253C). This plan does not show finished floor levels. However, they do show 4800 mm to the eaves from first floor level (“FFL”), and 8000mm from FFL to ridge, so a relatively accurate approximation could be made. Strictly speaking, this plan does not meet the requirement of condition 26. Nonetheless, it has been approved by the Council.

Approved site sections plan (7503\_450C) shows that plot 4 includes an AOD of 81m. This plan is scaled and so shows a FFL for plot 4 as 2.2 metres, giving a FFL of 83.2m above AOD.

The same plan shows the height to ridge is 8m, a total height of 91.2m AOD.

2.3. 27 March 2018 – condition 20 is discharged (DOC/2017/0042). The Approved Engineering Plans (ENG\_100 P8) show a FFL AOD as 83.90m. If the 8m FFL to ridge is added, then this is a total height of plot 4 of 91.9m AOD.

3. Plot 4 is now constructed, and the developer in their advice from their counsel, says is occupied. It has been constructed in accordance with the Approved Engineering Plans and so sits at 91.9m AOD.
4. It is worth noting at this level, as it is in the Board Report on the withdrawn retrospective planning application (PAP/2018/0716), that the cause of the increase in overall height is not because the buildings are larger, but because the ground levels have increased.
5. I am instructed to advise upon whether the finished floor levels approved through the discharge of the pre-commencement conditions attached to the outline consent, take precedence over the plans approved under the reserved matters approval.

*Discussion*

*Expediency*

6. In this instance it is worth examining this case at the potential remedy before examining the detail. Assuming, therefore, that the approved plan in the RMA takes precedence over the plan in the discharge of condition. That being the case, the ground level of 83.90m (as built) is in breach of the approved AOD (83.2m). This would amount to a breach of planning control. If this is correct, would it be expedient to take enforcement action?
7. Section 172(1) TCPA states (my emphasis):



*(1) The local planning authority may issue a notice (in this Act referred to as an “enforcement notice”) where it appears to them—*

*(a) that there has been a breach of planning control; and*

*(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.*

8. Clearly this is a discretionary power (the LPA *may*...) to issue an enforcement notice. The LPA must consider whether it would be expedient to issue the EN. The expediency test is taken as meaning the balancing of the advantages and disadvantages of the course of action (*R. (Ardagh Glass Ltd) v Chester CC* [2009] Env. L.R. 34 at [47]). The LPA must also have regard to the provisions of the development plan and other material considerations. The consideration of material considerations would be any planning harms that the breach of planning control causes. Plainly the simple breach of planning control, i.e. a technical breach, is not necessarily always going to result in the issuing of an EN because to do so would only clear the first hurdle in s.172. The LPA must go on to consider the planning harm.
9. It is my very strong view, that in these circumstances it would not be expedient to issue an EN. There does not appear to be any planning harm from the breach of planning control, beyond the technical breach assuming it exists. The shading plans show no material change in the impact. This is not a case where the as permitted plans result in no shading of a neighbouring dwelling and the as built shows a principal elevation in shade for significant periods of time.
10. This view is shared by the officer who wrote the Board Report for the withdrawn retrospective planning application. If those instructing me disagree and believe that the as built position does result in planning harm, then plainly the officer who wrote the officer report on the withdrawn application could not write the officer report. The assessment would need to be conducted by a different officer.
11. I stress, that if there is to be a reassessment of the planning harm, then it must be done in accordance with that officer’s professional obligations. Given the

shading plans available, an argument that a conclusion of planning harm on the basis of shading is unreasonable, would have a reasonable prospect of success.

12. If an EN is issued, assuming that there has been a breach of planning control which I will address in due course, then the LPA is at risk of legal challenge on the expediency of issuing the EN - *R. (Gazelle Properties Ltd) v Bath and North East Somerset Council* [2011] J.P.L. 702).
13. It is my strong advice, on the evidence I have seen, that assuming there has been a breach of planning control, then it would not be expedient to enforce since there is no material planning harm.

*Which plan takes precedence?*

14. The issue of which plan takes precedence– the RMA AOD level or the discharge of condition 20 plan – will determine whether there has been a breach of planning control. If it is the former, then there has been a breach. If it is the latter, then there has not.
15. In any event, the answer to this question is entirely academic in light of my advice above.
16. I have seen the advice of Ms Pindham for the developer. On the question of whether there has been a breach of planning control, I reach the same conclusion for slightly different reasons. It is my view that there has been no breach of planning control.
17. The assessment of which plan takes precedence will be based upon three considerations:

- 17.1. Is there a hierarchy of permissions/approvals between a grant of planning permission, a reserved matters approval and a discharge of condition?
- 17.2. Does the sequence in which plans were approved matter?
- 17.3. Should a practical or common-sense approach apply?
18. In response to the first, the simple answer is that they all have a part to play. As seen in the recent judgment of the CoA in *Fulford PC v York Council* [2019] EWCA Civ 1359 at [40]:
- If a developer were to ask: what development is permitted by the outline permission, the only possible answer is that the permitted development is to be found in the package consisting of the outline permission, any approval of reserved matters, and any subsequent non-material changes.*
19. The outline permission sets the principle for the development with the detail to be agreed as part of the reserve matters approval. Whether plans are approved as part of a reserved matters approval or a discharge of condition is not in itself determinative, provided that they both stay within the boundaries set out in the outline planning permission. Because the approval of reserved matters and the discharge of the condition derive from the grant of outline planning permission, there is no statutory hierarchy between the two.
20. It strikes me that the judgment would be that the Council consider both plans to be acceptable otherwise they would not have consented them. The order in which they were approved is not determinative in this conclusion.
21. As observed by Ms Pindham, the overwhelming direction of travel in the recent judgments of the Supreme Court is to seek to inject a degree of commonsense into the interpretation of planning permissions. This would include the suite of documents that form the permitted development, as set out

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above – see *Lambeth LBC v Secretary of State for Communities and Local Government* [2019] UKSC 33 and *Trump International Golf Club Ltd v Scottish Ministers* [2015] UKSC 74.

22. I consider it highly likely that a court would consider that the Council has consented to the amended ground level:

22.1. The discharge of condition plan is a more clear technical drawing than the cross sections.

22.2. It is the later of the consented plans.

22.3. There is no material planning harm in the increased height and so there does not appear a coherent planning reason not to consent to the increased height.

22.4. There is nothing to suggest that this was an error on the part of the LPA.

23. Finally, in light of the above, I strongly advise against the making of a breach of condition notice under s.187A TCPA. Whilst there is no expediency test, the decision to serve a BCN is a decision of a public body and therefore open to judicial review. In my opinion the court would very likely find that the issuing of a BCN was unreasonable, in addition to the arguments above:

23.1. Whilst it is in breach of the RMA condition 1, the LPA subsequently consented to the breach of condition plan. Plainly the LPA accepted the change in levels or it would not have approved those plans.

23.2. The approvals of the LPA place the developer in an invidious position since there is no hierarchy in the approved plans. If they build it as approved in the RMA plans, they are in breach of the discharge of condition plans, and vice versa.



24. In my strong opinion there has been no breach of planning control and therefore enforcement action should not be considered.

**PHILIP ROBSON**

Kings Chambers

Manchester/Leeds/Birmingham

1 September 2019

16<sup>th</sup> September 2019

Dear Mr Brown,

The following is submitted on behalf of the residents of numbers 15, 21, 21a, 23 and 23a Ivy Croft Road, Warton. We would be grateful if the Planning Committee could be made aware of the following prior to the meeting on 7<sup>th</sup> October.

**RE: Development PAP/2017/0237 & Retrospective Planning PAP/2018/0716.**

**Notes in response to Kings Chambers Opinion Document (Dated 01-09-2019) & NWBC Supplementary Report (no date).**

These notes specifically relate to the above referenced documents, which are relevant to the recent development carried out by Cameron Homes on land adjacent to Copeland Close, Warton. This development was subject to initial Planning Permission **PAP/2017/0237** and a later Retrospective Planning Application **PAP/2018/0716 (withdrawn on 07-08-19 as a Valid Application)**.

#### **Background**

Before we go into our detailed response we feel that it's pertinent and relevant that we reiterate the background and timeline involved in getting to this point.

At the point when the foundation slabs for Plots 3 & 4 were installed, no effort was made on the part of the developer or NWBC to inform the local residents of any future impact this would have on them. It was in fact only by accident, as the construction of the building shell continued, that we noticed there may be an issue with the height. NWBC were made aware of this situation in July 2018 and letters and emails of concern were subsequently sent to Erica Levy in August 2018.

After these letters were received by NWBC the following sequence of events occurred:

- Monday 24<sup>th</sup> September 2018 – meeting between NWBC Planning & residents of 23 & 21 Ivy Croft Road.
- Wednesday 26<sup>th</sup> September 2018 – two representatives of NWBC Planning (Gavin Treen & Sheila Faulkner) spent time with residents of 21, 23 & 23a Ivy Croft Road reviewing the raised issues on site.
- Monday 1<sup>st</sup> October 2018 – meeting between NWBC Planning and Cameron Homes.

(Please note that at no point during the events above was there any indication by Cameron Homes or NWBC that Planning Permission for the error in height already existed at that time).

As a result of the 1<sup>st</sup> October meeting an email was received from Gavin Treen (NWBC) which indicated how this and other issues raised by the local residents of Ivy Croft Road were going to be resolved by the developer moving forward.

As stated in these minutes, the developer was supposed to have made a retrospective application within 10 days. What is also worth noting is that the developer had made a conscious decision to change the F.F.L based purely on cost savings which benefited them – **they did not want to install a retaining wall**. There was no mention of any Geotechnical reason that the foundation slab could not be installed at the original approved level.

**We must also state that at no time since the residents' concerns were raised did NWBC issue a "stop notice" on the two plots in question. Due to this fact, the developer subsequently 'raced' to get the plots finished and both have now been occupied by their respective residents for some time. The developer never made any effort to correspond with the local residents during this period.**

With reference back to the Retrospective Planning Application, the submittal to NWBC did not occur until the end of December 2018 (nearly 3 months after the aforementioned meeting).

The Retrospective Planning Application was then not put on the Planning Committee agenda until May 2019, which, following reports being produced by NWBC, a detailed response to the inaccuracies of this report by the residents, and a site visit by members of the Committee and subsequent deferrals the Application was withdrawn as a Valid Application in August 2019.

**This process has taken 13 months to get to a point where miraculously, at the eleventh hour, Planning Permission for the change in height is now alleged to already be in existence.**

The documents referenced at the head of these notes have been produced to try and give credence to this situation.

#### **Detailed Response**

In our opinion, the two off drawings which bear the most relevance to our response are mentioned in the **Kings Chambers Opinion Document** (Dated 01-09-2019), and are listed below:

- 7503\_450: Proposed Site Sections (Shows F.F.L.s - Plot 4).
- ENG\_100: Engineering Layout (1 to 500).

#### **Note!**

Individual drawing revisions are referenced below as appropriate;

F.F.L = Finished Floor Level.

For ease of reading we have related our comments on the two reports to each of these drawings with cross referencing as required:

#### **7503\_450: Proposed Site Sections (Shows F.F.L.s - Plot 4).**

- The initial drawing submitted as a sectional elevation through the site by Ritchie & Ritchie Architects - Drawing Number 7503\_450 Rev B, dated 04/05/2017 (Section C-C), indicates the height of the Finished Floor Level (F.F.L) as +83.25m.
- This was resubmitted to NWBC as Rev C (dated 12/03/2018). The modification box on the drawing states that there have been General Amendments. On closer inspection of the



drawing it is apparent that the F.F.Ls for all of the Plots have been removed. However, there is no actual change to the stated section in terms of relevant heights of Plot 4 to the existing gardens and houses in Ivy Croft Road. This drawing revision has been approved by NWBC.

The main argument in the **Kings Chambers Opinion Document** relates to the 'acceptability of scaling' of drawings to obtain Planning Permission.

**ENG\_100: Engineering Layout (1 to 500).**

- This drawing was, and is still, not available at any revision on the NWBC Public Planning Access Link for the original Planning Permission for the development **PAP/2017/0237**.
- The actual Revision referred to in the **Kings Chambers Opinion Document** is P8 (dated 15/03/2018) where the revision states; '*Plots 1-4 FFL's and externals amended at client instruction*'. This shows the F.F.L. as +83.90m.
- The revisions of this drawing submitted with the Retrospective Planning **PAP/2018/0716** are P7 (dated 11/01/2018) which shows the F.F.L. as +83.25m, and P10 (dated 01/10/2018) which shows the F.F.L. as +83.90m.

The main argument in the **NWBC Supplementary Report** is that:

*'The issue was that there are two approved plans relating to levels. As a consequence, building out of either of those would be lawful. Common sense suggests that the more detailed plan should be the one that is followed and that is what has happened here. The advice at para 22.4 (**Kings Chambers Opinion Document**) says that as a consequence, there was no error on the part of the Council.'*

**Conclusions**

We find it hard to believe that NWBC can now state that they have already approved the change in F.F.L.s for the two plots in question because:

- It is not technically acceptable, and goes against all best practices demonstrated in every field of Engineering to scale from a drawing. In fact the drawings by Ritchie & Ritchie Architects all have the note in the top right which states: '*Do not scale off this drawing, work to figured dimensions only*'. As the increased levels do not even exist on Drawing Number 7503\_450 Rev C, **in our opinion makes this make this argument invalid.**
- The preference of using Drawing Number ENG\_100 with spot height changes over any other drawing also goes against best practices demonstrated in every field of Engineering. You cannot realistically assess and approve a plan drawing without understanding the impact that any changes may have in a sectional elevation especially when relating to levels. **Please note:** the only time the true impact of the level change can be seen on the residents of Ivy Croft Road is on 7503\_450 Rev D (dated 05/10/2018), submitted as part of the Retrospective Planning **PAP/2018/0716** – this shows Plot 4 at its actual constructed F.F.L. of +83.90m (all other levels have also been added back on to the drawing). **Therefore in our opinion this makes this argument invalid.**
- From the above we must seriously question the experience and competence of the person or persons who have reviewed and approved these drawings on behalf of NWBC.

This then also raises some questions which we feel still need to be considered and answered by NWBC:

- Do NWBC still genuinely believe that a robust argument exists that Planning Permission was already granted and has done for a considerable amount of time?
- If this was so clear cut then why did NWBC instruct Cameron Homes to apply for Retrospective Planning in October 2018 and why did Cameron Homes follow this through?
- Also why has it taken so long for this to come to light? Again, if Planning Permission already existed there has been ample opportunity for NWBC and Cameron Homes to present this to the Planning Committee.
- If this change in levels was all approved in March 2018 (assumed from the dates stated on the revisions of the drawings quoted in the **Kings Chambers Opinion Document**) why was there no consultation with the affected residents of Ivy Croft Road at that point? It relied on local residents spotting that something was wrong when the shell of the building was being erected.
- If NWBC rules that the increased levels are correct then the problems of privacy and overlooking still exist.
- Regarding the potential impact of an enforcement notice on the residents of Plots 3 and 4, we are aware that Plot 3 has already taken legal action against Cameron Homes regarding this issue.

Looking back at the amount of time that has passed and the way in which the Planning Department at NWBC has conducted itself during this process we feel that whatever the outcome it will be necessary to take this further; firstly with NWBC Internal Complaints Department, then escalating up to the Local Government Ombudsman as necessary.

Yours faithfully,

A solid black rectangular box used to redact the signature of the sender.