

Scottish Public Services Ombudsman Act 2002

Report by the Scottish Public Services Ombudsman
of an investigation into a complaint against
Falkirk Council

The Complaint

1. The complainant, Mr Q, is the owner/occupier of a semi-detached Edwardian house which has a small extension to the rear of the property. He complained about the Council's handling of a planning application submitted by his neighbour, Mr B, who occupies the other 'half' of the building. The application related to a large two-storey extension to the rear of the house.

2. Mr Q contended that, despite his objections and representations made by his solicitor on his behalf, the Council - as the local planning authority - failed to give proper weight to these representations and determined the application under delegated powers, rather than placing the proposal before the Council's Regulatory Committee. He complained that, as a consequence of administrative shortcoming on the part of the authority, he was effectively denied a full opportunity to alert the members of the Committee to the impact of the development on his property - which he believed had suffered a reduction in amenity and privacy.

3. He also claimed that - in constructing the extension - the neighbour encroached on his property and removed part of a mature hedge along the common boundary.

The Investigation

4. I considered written information supplied by the complainant (and his solicitor) and a background report from the authority on their involvement in this matter. One of my officers visited Mr Q at his home and viewed the site in question (the neighbour's extension was in place); my Officer interviewed the solicitor; he also examined the Council's files and

interviewed the local planning Officer and the member who represents the area.

Administrative Background

5. Under the terms of the Council's Standing Orders the Director of Development Services is authorised - by the Scheme of Delegation - to determine all applications for planning permission and to issue relevant decision notices and to deal with any associated planning functions (ie enforcement of planning control) - unless there are circumstances which make an application 'controversial' and where there is an issue of 'public interest' which requires the matter to be considered by the Regulatory Committee. With regard to the question of objections to any planning application, the Director of Development Services must be satisfied that there is a substantial body of valid objections which cannot be adequately addressed by conditions to the planning consent before determining whether the application is one which requires to be put before the members of the Regulatory Committee.

6. It is understood that the majority of all 'householder type' planning applications (ie some 90%) are dealt with on a delegated basis.

Background of Events

7. On 12 March 2002 the complainant's neighbour submitted - through a building design firm - an application for planning permission to erect an extension to the rear of his property; the complainant was notified properly under the provisions of the statutory neighbour notification procedure and he made objections - through his solicitor - to the planning authority. Objections were also received from another neighbour who had been notified of the proposal. However, following a site visit by the Planning Officer (Officer C) who subsequently indicated to the building design firm that the proposal was considered to be unacceptable by virtue of size, scale and massing, the application was eventually withdrawn at the end of June.

8. A fresh application - which consisted of an amended proposal with design changes to the extension - was lodged with the authority on 2 July 2002; this was the subject of the neighbour notification procedure and, again, Mr Q made representations to the authority through his solicitor and on his own account on 5 July. Mr Q contended that: -

"The sheer size of the proposed extension will make it an eyesore. It is out of all proportion to the size of the existing dwellinghouse. The plan provided to me by the applicant is wrong - the extension includes the area coloured yellow on the plan annexed hereto. The applicant is extending the house from its existing rear wall and not as shown on the block plan provided.

Looking out from the back of my property I will see a solid brick wall approximately 20 feet high instead of the open outlook I presently enjoy. It will block out the light to my bathroom and rear public room.

It will have an adverse effect on my foundations. It will interfere with the roof and rear wall of my own existing small extension.

It will destroy my hedge.

I will not have access to clean my guttering on my own small extension. If his extension is attached to my house it will surely destroy my existing guttering which provides drainage from my roof".

9. At interview Mr Q's solicitor (Miss D) confirmed to my Officer that she had discussed the withdrawal and the new application with Officer C on 30 July, and on 2 August. Officer C indicated that it was his intention to treat the application as a delegated matter - on the basis that it was 'non-controversial' and did not require to be referred to the Regulatory Committee. He intimated that he would recommend approval of the proposed development to the Director of Development Services, on the grounds that it was to an acceptable design and complied generally with the requirements of the Council's planning policy. However, Officer C advised Miss D that if Mr Q wished to pursue the matter further, ie through the Regulatory Committee, an approach would have to be made to the local member - whose name was given as Councillor E. Miss D confirmed that Mr Q **did** wish to pursue the matter further.

10. On contacting Councillor E by telephone, Miss D was told that he was **not** the ward representative for the complainant's area - the local member was actually Councillor F, who was on holiday at that point. Miss D told my Officer that her secretary telephoned Councillor F on her

return from holiday (the call took place on 19 August) suggesting that the application should be put to the members of the Regulatory Committee.

11. Councillor F recalled this telephone conversation - because in her (seven year) experience as a member of the Council she had never had such an approach from an objector - and that she had informed Miss D's secretary that the application was not on the agenda for the forthcoming meeting of the Regulatory Committee (21 August), and that the next meeting of the Committee was not scheduled until 26 September. Miss D indicated that - given the procedure for objections - she found it 'strange' that Councillor F had not been approached before.

12. Councillor F confirmed to my Officer that she had not received any direct contact from Mr Q or Miss D about the application; as a member of the Regulatory Committee she did not wish to give any impression during the telephone call of whether she was 'for or against' the proposal. In this context she told my Officer that the applicant had previously called at her home to discuss his proposal to extend his house, however she had indicated to him at that point that the application would be dealt with by the Area Planning Officer on a delegated basis - which she believed was the normal procedure for such householder applications.

13. Miss D told my Officer that she had expected Councillor F to contact Mr Q on her return from holiday; Miss D was under the impression that making the approach to the Councillor was a 'procedural formality' to ensure a full Committee hearing. Councillor F had not confirmed that she did not intend to refer the matter to the Committee; against this, Miss D believed that she would arrange for referral. Regardless of Councillor F's view of the proposal, Miss D said that 'we simply wanted the matter to be heard by the Committee'.

14. Councillor F confirmed to my Officer that, in line with the authority's practice, she received a 'weekly list' of incoming planning applications and had an opportunity to request further information on any proposal. It was open to her - or indeed any other member of the Council - to request the Director of Development Services to refer an application to the Regulatory Committee if it was in the public interest to do so. She did not think this was appropriate in this case.

15. In the absence of any further contact with the objectors (or any member), Officer C prepared a report on the application for the Director of Development Services; this was signed by Officer C on 19 August with a recommendation for approval - subject to a 'standard condition' that the development should be started within five years of the date of permission.

16. Officer C's report recounted the planning history of the site (ie the withdrawal of the earlier application) and drew attention to the objections received from Mr Q and another neighbour. With particular reference to Mr Q's submission, he listed the objections in the same order given by Mr Q and his solicitor. Officer C referred to the Council's Development Plan, in particular the specific Local Plan policy on the alteration of residential property - with which the application complied in general terms. Officer C viewed the proposal as acceptable - although he pointed out that issues relating to access for maintenance purposes were for the applicant to resolve with any affected parties. He viewed the loss of light to the complainant's house as 'minimal', and considered that the effect on his property (ie foundations, guttering and the loss of part of the boundary hedge) was the responsibility of the applicant. Officer C concluded that: -

"It is considered that the overall design and materials are acceptable and that planning permission should be granted subject to conditions".

17. Although the report was approved by the Director of Development Services under the delegated procedure on 19 August and thereafter passed to the administrative section for processing and formal issue to the applicant's agent, the decision notice was not actually **issued** until 2 September. This timescale was due to internal administrative delay, ie not related to any planning reasons.

18. In the meantime, Mr Q approached his MSP about the matter; she wrote to the Council's Chief Executive on his behalf on 14 August. The MSP asked for: -

"... a full investigation into this proposed extension before submission to the Planning Committee".

19. The MSP's letter was passed to the Director of Development Services for reply; copies were also sent to the Convener of the Regulatory Committee and Councillor F.

20. The Convener wrote to Mr Q on 30 August indicating that:-

"... a planning consent does not give anyone the power to interfere with your legal rights as a householder ...".

21. Notwithstanding this, the Convener confirmed that he had asked the Development Control Manager to check the plans and reply direct to Mr Q. On the same date the Convener wrote to the Development Control Manager and the Chief Executive. He asked for a 'comprehensive response' to be prepared in respect of the adequacy of the plans submitted for the proposal, indicating that he wished any question of a 'flawed assessment' of the application to be answered fully.

22. In his letter to the Chief Executive the Convener indicated (among other things) that:-

"... There is no question that the granting of a planning consent does not confer any powers on the developer to carry out his proposals on another person's land or property without that person's consent. Similarly a planning consent does not confer a right on a developer to use someone else's garden for the storage of materials - nor a right of access to undertake construction work unless again the owner's consent has been obtained.

The above matters are not ones which the Regulatory Committee can consider in determining the application. In the event that a planning consent is granted then it would be open to (Mr Q) to take legal action to prevent any interference with his property. All other issues relevant to the application will be considered with due regard to planning guidelines at the time of the application determination. However, I note from the MSP's letter that there is a suggestion that the plans as submitted are in part inaccurate and that does require to be clarified ...".

23. Notwithstanding this, the Planning Officer wrote to Mr Q's solicitor on 5 September confirming the decision to approve the application and indicating that the decision notice was available for inspection at his

office. The solicitor contacted Mr Q on 11 September informing him of this, and confirming that she had taken the matter up formally with the Convener. Miss D's letter to the Convener (11 September) stated:-

"... We are extremely surprised to say the least to receive this letter particularly since we were told that the first meeting of the Planning Committee may not be until 25 September. We should be pleased if you would investigate and advise".

24. On 3 October the Director of Development Services wrote to the MSP, apologising for the delay in replying to her enquiry in August. The Director recounted the planning history of the site and that objections had been made by the neighbours, including Mr Q. She indicated that the application was not considered to be 'controversial' in terms of the Council's Standing Orders and had therefore been determined under delegated powers. She stated (wrongly) that the decision notice had been issued on 19 August.

25. In response to the specific issues raised by Mr Q the Director commented as follows:-

- "i) The approval of planning permission does not confer the right to access property or land outwith the applicant's control. The removal of the hedge, any alterations to the roof of the adjoining property and access are matters determined by property law and are not material considerations in dealing with the planning application.
- ii) The reduction in sunlight or daylight to the adjoining neighbour's ground was not considered sufficient to merit the refusal of the planning application.
- iii) I believe your constituent refers to the neighbour notification plans as containing very little detail. The existing structure and proposed alterations were assessed on two separate occasions by means of site visits. The case Officer (Officer C) met your constituent and explained that the neighbour notification plans were merely indicative and that reference should be made to the submitted application plans. On site (Officer C) endeavoured to explain the

submitted proposal and interpret the planning application drawings. I believe that on this basis Mr Q founded his objection to the proposal.”

“In conclusion, the application site was visited and assessed not only from the applicant’s ground but also from the garden ground of your constituent (Mr Q). The points raised by neighbouring proprietors were reflected in the subsequent report (copy enclosed) and properly taken into account before a decision was made ...”.

26. A copy of this letter was sent to the Convener of the Regulatory Committee.

27. The MSP wrote further to the Chief Executive on 11 October, expressing disappointment at the delay by the authority in replying to her on the matter. In particular she noted the correspondence involving the Convener, although she pointed out that his letter of 30 August requesting clarification on various aspects of the application was issued **after** the planning application had been approved by delegated powers, some days beforehand. She expressed concern over the handling of the case, and while noting the authority’s “excellent work in calming neighbourhood disputes” she contended that the authority’s actions in this particular case had merely ‘fuelled’ the difficulty between Mr Q and his neighbour.

28. Shortly afterwards (14 October) Mr Q’s solicitor wrote to the Director of Development Services recounting the background to the representations made by Mr Q and Miss D and that contact had been made with Councillor F and the MSP. Reference was made to the involvement of the Convener of the Regulatory Committee, although no reply had been received on the matter. Their letter concluded:-

“We have recently taken the opportunity to view the plans and note that they were actually passed on 19 August. We should be obliged if you would fully investigate this matter and advise why the plans were not put before the full Committee as promised to us and why (Mr Q’s) views have not been taken into account”.

29. The Director replied to the solicitor on 25 October in the following terms:-

"In response to a telephone enquiry from yourselves (Officer C) advised that the undetermined planning application had been considered and that it was likely that approval subject to condition would be recommended by himself as the case officer.

While such applications would normally be dealt with by means of powers delegated to myself, your client was at liberty to approach the local councillor to support a request to have the application heard at the next available Regulatory Committee.

In such circumstances the local member would approach me via the Planning Convener in order to determine whether there were issues of a contentious nature which would take it from my remit and merit referral to the Regulatory Committee.

In this instance no representation was made by the local member and I did not consider it to be a matter which fell to be considered by members in terms of the Council's Scheme of Delegation.

In normal circumstances members will notify the case Officer via telephone, e-mail, or letter within a relatively short timescale if they intend to seek a referral to Committee to ensure that their interest is noted and the application not progressed via delegated powers until the matter has been examined more closely. As stated, no such approach was made.

Notwithstanding this, your client's representations were fully expressed in the report accompanying the recommendation as indicated in previous correspondence".

30. On 18 November the solicitor wrote again to the Director, referring to her reply.

"Our client had approached his local member to make representations regarding this matter. We note that you state that the local member did not make any representation to you in respect of this particular application and our client will now take this up with his councillor. In the meantime, however, we must advise that at the weekend on 16/17 November the applicant (Mr B) removed earth without our client's permission within his boundary and has improperly removed a boundary hedge. It very

much appears that the foundations are to be laid within our client's property in breach of the permission granted by your Council.

We must advise that we are now taking the necessary steps by way of interdict to protect our client's legal position as regards his own heritable property.

Unless the Council take the necessary steps to ensure that their permission is carried out in accordance with that granted by way of an Enforcement Notice we shall have no alternative but to raise the necessary action of Judicial Review in respect of this decision.

We shall be pleased to hear from you by return that the appropriate inspection and enforcement will now be carried out relating to this inspection".

31. In response to this and following an inspection of the site by the Council's Planning Enforcement Officer, the authority wrote to the solicitor on 20 November confirming that: -

"A site inspection has been carried out and I can advise that, whilst no external walls have as yet been constructed, the foundations which are now in place are entirely consistent with the dimensions of the extension and appear to be within the application site as shown on the approved plans (photograph enclosed).

Consequently I cannot identify any current breach of planning control to justify enforcement action.

An area west of the foundations has certainly been excavated to allow the work to take place, however, the ownership of this strip of land is a private rather than a planning issue. Likewise, the removal of the hedge between the two properties is not a planning matter, but one which should be resolved by the two parties involved".

32. The solicitor subsequently went back to Mr Q on the matter, explaining the background to the planning authority's stance - and contending that the application had been simply "rubber stamped" on 19 August without reference to the full Committee. Mr Q was advised to make a formal complaint to my office.

33. In responding to my enquiry of the Council, the Chief Executive reiterated the authority's position, in that the material considerations raised with the second application did not persuade the Planning Officer that the proposal was in any way contentious; and his judgement was that the case was clearly one which could be dealt with satisfactorily under the delegated procedure, in accordance with the normal planning practice for householder applications.

34. He accepted, however, that initially the complainant had been given the name of another councillor when he should have been told that his local member was, in fact, Councillor F. The Chief Executive expressed regret for this and apologised on behalf of the authority - although he noted that it was rectified shortly afterwards and that ultimately contact had been made with Councillor F. The Chief Executive also acknowledged that there was administrative delay in issuing the formal planning consent to the applicant's agent; however, he contended that the extended timescale offered Councillor F a further opportunity to request that the case be referred to the Regulatory Committee - if she believed it was appropriate to do so.

35. In fact, there had been no such approach by Councillor F. The Chief Executive argued that the decision by Councillor F - not to refer the matter to the Committee - was not flawed and was consistent with the information she had given earlier to the applicant, ie that the application would be considered under the normal delegated procedure. With regard to the correspondence involving the MSP and the Convener, the Chief Executive acknowledged that this had taken place against the background that the planning report and recommendation had already been approved as a delegated matter. The Chief Executive contended that, despite the complainant's perception that his representations had not been assessed properly, his objections (and those made by another neighbour) had been given full consideration under the Council's planning policy.

Conclusions

36. I have some sympathy for the complainant, whose situation in respect of his outlook and garden was subject to significant change as a consequence of the extension of his neighbour's property, and I can understand his perception that the application should have been placed before the Regulatory Committee.

37. I believe that there was confusion about whether there was a need to refer the matter to the Regulatory Committee; and in this respect I think that it would have been better if Councillor F had clarified her position at the outset, ie she should have told the complainant or his solicitor that she did **not** intend to refer the application to the Committee because she did not think it was 'controversial' nor that there was an issue of 'public interest'. Given that Councillor F had previously informed the applicant that the application would be dealt with under the normal delegated procedure, I think that it would have been reasonable to expect her to have treated the complainant on the same basis.

38. However, while the confusion was unfortunate, I do not believe that it constitutes maladministration. It is evident to me that the proposal - which had been amended to comply with the planning requirements and which had been subject to objections - was considered properly under the terms of the Council's delegated arrangements, and the decision to award planning permission was reached on the basis that the design and scale of the extension was acceptable and would not reduce the amenity of the complainant's property in any material way. This was something on which the planning authority were entitled to exercise their judgement.

39. The authority indicated that the question of encroachment and the effect of the construction of the extension on the complainant's property was a civil matter between the complainant and his neighbour. I concur with this view; and it would be open to the complainant to pursue this aspect of his complaint through appropriate legal proceedings.

40. The delay in dealing with the representations made by the MSP and the involvement of the Convenor of the Regulatory Committee after the approval of the planning report was regrettable and, again, I believe that the confusion over the processing of the application could have been avoided if the process had been fully explained at the outset.

41. Notwithstanding these shortcomings, I have concluded that I would not be justified in upholding the complaint. I have reached this conclusion on the basis of my belief that the complainant's objections to the proposal were taken into account before the application was approved, and that the planning authority were satisfied that the development would meet the required standard.

Professor Alice Brown
Scottish Public Services Ombudsman

10 September 2003

