

Scottish Public Services Ombudsman Act 2002

Report by the Scottish Public Services Ombudsman of an
Investigation into a complaint against:

West Dunbartonshire Council

Complaint as put by Mrs C

1. On 17 April 2002 my predecessor, the Commissioner for Local Administration in Scotland (the Commissioner) received a complaint from a Mrs C concerning West Dunbartonshire's handling of her representations about unauthorised timber decking erected by her neighbour (Neighbour 1) in the rear garden of their adjoining semi-detached property.

2. Mrs C considered that she had suffered injustice as a result of maladministration in the Council's handling of the unauthorised erection by her neighbour of the timber decking and complained specifically that:

- (a) only one of the four members who attended a site visit on 2 April 2002 observed the decking structure from her property;
- (b) she was not given the opportunity to be fairly represented at the site visit;
- (c) she was not consulted by officers or members prior to a Committee meeting on 3 April 2002 as to the provision of screen fencing which was included in the consent issued;
- (d) she was not advised that she could request that her case be presented to the Committee meeting by her solicitor or alternatively that she could apply to speak;
- (e) less than half of the members who voted on her neighbours' application had visited the previous day and the majority of the six who voted in favour had not had the opportunity to acquaint themselves with the effect on Mrs C's property of the decking structure; and

(f) the minutes of the 3 April 2002 Committee meeting were silent on why members, contrary to the officer's recommendation to refuse, were minded to grant consent.

3. The complainant considered that the Council had not had proper regard for her privacy and amenity in their endeavour to regularise a planning situation created by her neighbours' unauthorised development.

The Investigation

4. My predecessor first made enquiries of the Council on 6 August 2002 and the case was still in progress when the office of the Commissioner for Local Administration in Scotland ceased to exist on 22 October 2002. I therefore assumed responsibility for the complaint under the terms of Paragraph 4 of Schedule 7 to the Scottish Public Services Ombudsman Act 2002.

5. I decided to investigate the complaint on 4 April 2003. The Council and complainant provided further information and one of my Complaints Investigators subsequently interviewed Mrs C and her husband and officers of the Council. Issue of this report has been delayed because of reference by Neighbour 1 of an objection to a discontinuance notice issued by the Council on 24 June 2003 to the Scottish Ministers. A public local inquiry was held in December 2003 and the discontinuance order was confirmed by the Inquiry Reporter on 19 January 2004.

Background

6. Mrs C confirmed that her neighbour, Neighbour 1, had commenced erecting the timber decking in his rear garden around Mother's Day in the spring of 2001. She recalled that he had visited her and advised her of his intentions but in the event the structure which he had built in his spare hours over several weeks with considerable sawing and drilling of timber was much higher than she had been led to expect. Once the decking was constructed, her neighbour had had regular noisy gatherings of up to forty people. This, Mrs C said, had affected her privacy and quiet enjoyment of her home. People on the decking had a clear view into her dining room and living room through the French doors to the rear of her home. She decided to alert the Planning Service to what she saw as unauthorised development.

7. A planning officer (Officer 1), told my officer that when he visited the next door premises he had been “alarmed” at the extent of the decking since the rear gardens of the modern estate did not lend themselves to structures of that magnitude (35 square metres). Following internal discussion within the Planning Service, it was decided that the structure did not constitute “permitted development” mainly because at the north and rear it abutted onto a public road. Accordingly, an application for retrospective consent was sought from Neighbour 1 and his application was submitted on 2 November and registered on 5 November 2001. Neighbour notification took place and representations were submitted by Mrs C and by the neighbour sharing a common boundary (Neighbour 2) on the other side of Neighbour 1’s property. In the course of considering the matter Officer 1 telephoned Mrs C on 22 January 2002 regarding possible screening and she had dismissed this possibility.

8. A planning application report was prepared on 22 February 2002 for submission to the Council’s Regulatory Committee (Planning) on 6 March 2002. That report identified relevant development plan policies in the form of Policy H4 of the Clydebank District Local Plan which stated that within established residential areas new developments will not normally be permitted unless there is no significant loss of amenity to the surrounding properties, the proposed use is ancillary to the existing character of the area, and the proposed use conforms to other policies and proposals in the Local Plan. The report also identified Policy H5 of the finalised Clydebank Local Plan 2001 as material.

9. Policy H5 of the Local Plan of 2001 required that any development within existing residential areas should be considered against criteria which included the relationship with the character of the surrounding area in terms of scale, density design and materials and the requirement to avoid over-development which would have an adverse effect on local amenity, access and parking and would be out of scale with surrounding buildings. In a section assessing the application, the Director of Economic, Planning and Environmental Services commented:

‘The rear garden area slopes up from the back of the house towards [X-Road] necessitating an elevation of the decking structure by 0.95 metre at its most southerly point which is approximately 6.0 metres from the back of the semi-detached properties. The decking is bordered on the east by the

wooden dividing fence separating the properties. The result is that the top of the 2 metre fence is only 1 metre above the deck structure and privacy is therefore much reduced.

'The objections received state that the decking is used not just for the family of the house but for invited parties for barbecues. It is alleged that this results in excessive noise, people being able to look into the neighbours' dining room and kitchen area and a problem of car parking congestion to the front of the house.

'The position prior to the erection of the decking structure was that a 2.0 metre high wooden fence had been erected separating the two garden areas providing privacy to both garden areas. The introduction of the elevated decking has provided a platformed area within the garden of [Neighbour 1's house] which effectively means anyone standing on it is able to look into the garden area of [Mrs C's house] and also the dining room and kitchen of that property. A distance of only 6.5 metres separates the nearest point of the decking from the rear windows of [Mrs C's house]. While the relationship to [Neighbour 2's house] is not exactly the same, there is also an issue of overlooking and loss of privacy.

'In terms of Policy H4 of the Local Plan it is considered that the introduction of the new structure has resulted in a significant loss of amenity to the neighbouring properties, particularly through overlooking caused by its use in such a prominent location. It does not therefore comply with Policy H4.

'The possibility of alleviating this situation through the installation of higher fencing or trellising was considered but discounted, as such a structure would be above the level of any other fencing within the area, would not be visually acceptable, would be overbearing and cause overshadowing.'

10. The Director's report further commented that in terms of Policy H5 of the Finalised Clydebank Local Plan, the structure was not in the

character of the residential area and had resulted in an adverse effect on local amenity. It did not therefore comply with Policy H5.

11. Since the decking had caused significant problems of overlooking and lack of privacy, contrary to Policy H4 of the Clydebank District Local Plan and H5 of the Finalised Plan, the Director recommended that permission be refused.

12. At its meeting on 6 March 2002, the Regulatory Committee (Planning) agreed that a site visit should be undertaken by members prior to a decision being made with respect to the application. On 11 March 2002 one of the Council's Administrative Assistants wrote to Mrs C informing her that arrangements had been made for members of the Committee to visit the site on 2 April 2002 at 10.10am. Mrs C was asked to note that the site visit was for the benefit of members only and that no discussion would be entered into as no decision on the application would be made at the site visit. The application would be considered further at a meeting at 10am the following day (3 April 2002) in the Council Chambers in Clydebank. That letter concluded:

'The meeting [on 3 April] is open to the public and therefore you are free to attend and hear the proceedings from the public gallery. It should be noted that it is entirely at the discretion of the Committee whether any further representations with respect to the application are heard at the meeting.'

13. The site meeting on 2 April 2002 was attended by four of the nine Committee members of the Regulatory Committee (Planning) and two officers. Mrs C informed my Complaints Investigator that only one of those councillors (Councillor 1 – who lost his seat at the 1 May 2003 elections) asked to come inside her house to view his colleagues standing on the decking. In their comments on the complaint, however, the Council stated that a planning officer had stood on the decking and the members had all viewed him from Mrs C's property, one from inside the house, the others from outside the patio doors. The planning officer had been asked to stand and sit to help assess the impact. The Council stressed with regard to the site visit that this was to establish "the lie of the land" and not to hear representations and that this had been pointed out in their letter of 11 March 2002 to Mrs C (paragraph 12).

14. Mrs C states that after the site meeting her neighbour, Neighbour 1, approached her husband and offered to put up a large fence, Neighbour 1 being of the view that there was not much chance of planning permission being granted. Mrs C telephoned the Planning Department to advise them of Neighbour 1's offer and was horrified to receive feedback that some of the councillors who had attended the site visit "thought the decking looked nice and it would be a shame to take it down" and that consent would be granted in Committee the following day.

15. Mrs C also contacted the Law Society for Scotland and obtained the telephone number of a solicitor specialising in EEC Privacy Laws whom she telephoned on her way to Pitlochry for an Easter Break. After speaking to the solicitor she telephoned the Council's Solicitor (Officer 2) requesting that he investigate the privacy issue and asked that any decision be postponed "until every avenue was explored". She says that she also indicated that she wished to speak at the Committee meeting the next day and offered to fax a request to that effect. Officer 2 had stated that she was too late to apply to speak at the meeting. According to Mrs C, Officer 2 had indicated that he had to attend three Committee meetings the next day and would not be able to make enquiries regarding the privacy issue in the time available. He had indicated that the Council "had statistics to meet" and had regarded a postponement as "inappropriate".

16. At interview, Officer 2 recalled that he had a discussion with Mrs C on 2 April 2002 regarding Article 8 and Article 6 of the European Convention on Human Rights. Mrs C had referred to a newspaper article on a "tree house" as being seen to be an invasion of rights of privacy (Article 8) and it was on that basis she had wished a continuation. He stated that Mrs C had not stressed a desire to be heard at the meeting the next day (Article 6). Applications to be heard at a Committee required to be made timeously and he said that he had indicated to Mrs C that it was difficult to see how a request to be heard by Committee the day before the second meeting at which the application was to be considered could be regarded as "timeous". His understanding had been that Mrs C could not attend the following day (3 April). Had she wished to attend and be heard she could have sent a fax on the afternoon of 2 April and that could have been put to the Chair of the Committee for him to decide whether to defer the matter and allow a hearing. Officer 2 denied that he had used the phrase that "the Council had statistics to meet". His recollection was that Mrs C had indicated to him that another Council

officer to whom she had spoken had used the phrase. Officer 2 had also commented that he had been unable despite research to find the "tree house" case before the meeting on 3 April but he believed that while the Planner's report to Committee did not mention Article 8 it nevertheless identified privacy as a material factor and recommended that consent be refused.

17. My Complaints Investigator also put it to the Section Head, for Planning and Building Control, at interview that the report of 22 February 2002 posited that the development for which retrospective consent was being sought was in effect "contrary to local plan policies". The Section Head confirmed that there had been no advertisement of the application being a departure and sought to draw a distinction between a proposed development being contrary to development plan (where the guidelines [PAN 41] allowed objectors the opportunity to be heard) and proposals which did not comply with design criteria contained within policies aimed at protecting amenity. He did not consider that the application for retrospective consent was the type of application where departure procedures were appropriate. The proposal was not a use "contrary to the development plan" but nevertheless merited a recommendation to refuse on the grounds stated.

18. Mrs C was not in Clydebank on 3 April and did not attend the meeting of the Regulatory Committee (Planning). That Committee was attended by the full complement of nine members. Prior to considering further Neighbour 1's application, the Committee resumed consideration of a proposal for 24 houses on a former school site which had at the previous meeting on 6 March 2002 been deemed to be a departure from the Clydebank Local Plan. Objectors had been given the opportunity to request a hearing but had not responded. The Committee agreed to resume consideration and to grant conditional planning permission with the application being referred to the Scottish Executive. One of the councillors (Councillor 2) having failed to find a seconder for a proposed amendment (to refuse) asked that her dissent be recorded.

19. Subsequently, the Committee considered Neighbour 1's application for retrospective consent. The minute records:

'Reference was made to the site visit which had been undertaken in respect of this application. After discussion and having heard the Section Head of Planning and Building

Control in answer to Members' questions [Councillor 2] seconded by [Councillor 3] moved:

'That the application be approved, contrary to the recommendation of the Director, subject to a condition being attached concerning the provision of an appropriate form of screening to prevent the overlooking of [Mrs C's property], the detail of which condition to be specified by the Director.

'As an amendment [Councillor 4] seconded by [Councillor 5] moved:

'That the application be refused for the reason detailed in the Director's report.

'On a vote being taken, three members voted for the amendment and six members voted for the motion. The motion was accordingly declared carried.'

20. Mrs C was telephoned on Wednesday 3 April 2002 and informed of the decision. On 6 April she wrote a five page letter to the Director of Economic, Planning and Environmental Services raising the following major issues:

- The Committee had granted conditional approval to the retrospective application subject to suitable screening which would require either to be a trellis erected on the existing fence or a ten foot new fence, neither of which were "legally viable";
- She was not fairly represented during the site visit;
- She was not fairly represented at the Committee meeting;
- She was not advised she could apply to speak at the Committee meeting. Mrs C also questioned whether the Council had the ability to give permission for a screen fence about which she had not been consulted;
- How councillors who did not attend the site visit managed to vote as they did.

21. Mrs C also approached the former Provost who had attended the Committee on 3 April 2002 and had voted to grant consent and he wrote to the Council's Legal Manager on her behalf on 9 April 2002.

22. Mrs C also wrote to the former Commissioner on 6 April but that letter raised the additional issue that Councillor 2 had voted inconsistently by opposing approval of the 24 houses allegedly to protect the amenity of her friend but had moved approval of Neighbour 1's application which would seriously affect Mrs C's privacy and amenity and the value of her home. Mrs C's letter was received and acknowledged on 17 April 2002. She was advised by reply of 22 April that her complaint should first be addressed to the Council and that they should be given adequate opportunity to investigate and reply.

23. In the meantime, the Director wrote to Mrs C on 15 April 2002 in reply to her letter of 6 April 2002 (paragraph 20). He confirmed that conditional retrospective planning consent had been granted (on 9 April 2002); that the additional screening would require a building warrant because of its height; and that if there was to be an issue over ownership then the screening would require to be erected solely within Neighbour 1's property. He also confirmed that the condition proposed by members was "legitimate"; that the works could be implemented and that the Council's solicitor had no need, therefore, to intervene and to advise members otherwise. The Director further stated that there was no fundamental right to address Committee meetings; nor was there a requirement to hold hearings in the particular type of case. He noted that Mrs C's objections had been summarised in his Committee report and a site visit was held; and that issues relating to property values were not valid planning considerations.

24. Mrs C met with the Director, Planning Manager and Head of Legal and Administrative Services (Officer 3) on 18 April 2002 and wrote further to the Director on 23 April with a series of points relating to alleged breaches of the Councillor's Code of Conduct for Planning Committees. She stated that she had been made aware by officials on 2 April how members would vote the following day; alleged that members had received inadequate training on The Human Rights Act 1998; and that there was no detailed minute available to explain the material considerations affecting, and rationale behind, the decision to vote against the officer's recommendation. Mrs C also alleged that Councillor 2 had failed to declare an interest in the application concerning the former

school site and she questioned whether the members of the Committee should have been made aware that her neighbour (Neighbour 1) was a registered supplier/sub-contractor for the Council. Mrs C copied this letter to my office but was informed by the Complaints Investigator on 26 April 2002 that she was raising new issues and that it would be appropriate to give the Council adequate opportunity to respond.

25. Also, on that date the Council's Head of Legal and Administrative Services responded to Mrs C confirming that he considered the condition imposed by members to be legally competent. With regard to Mrs C's desire to lodge a complaint against Councillor 2, Officer 3 asked Mrs C to confirm that she would have no objection to her letter being copied to Councillor 2. Mrs C informed the former Commissioner by letter of 30 April 2002 that she considered that would be inappropriate. Her local member also wrote to the former Commissioner's office on 1 May 2002. The Complaints Investigator replied to the local councillor and to Mrs C on 15 May 2002 that Councillor 2 should first be made aware of the matters of the complaint and given the opportunity to respond. Thereafter Mrs C would need to demonstrate a particular injustice to herself arising from Councillor 2's alleged failure to abide by the Councillor's Code of Conduct. This aspect was not subsequently pursued by Mrs C.

26. The retrospective consent issued on 9 April 2002 to Neighbour 1 for the erection of decking was conditional on the following:

Condition 1 – 'Details of a suitable form of screening/fencing of a sufficient height to prevent overlooking of the neighbour (Mrs C's) property shall be submitted to the Director of Economic, Planning and Environmental Services for his approval within 4 weeks of the date of this consent. The approved screening/fencing shall be erected within 8 weeks of the date of this consent.'

27. The condition was reasoned as being in the "interests of privacy and amenity". A footnote specified that any screening/fencing structure over 2.0 metres in height would require the submission of a building warrant application.

28. After receiving Mrs C's confirmation by letter of 29 July 2002 that she wished her complaint to be pursued omitting reference to the complaint against Councillor 2, enquiry was made of the Council on

6 August 2002 on the six heads of complaint identified at paragraph 2 above.

The Council's Response to the Complaint

29. The Council's Chief Executive responded to the complaint on 21 August 2002 in the following terms:

- (a) The site visit was attended by four Councillors and two Officers (one Planner, one Administrator). The Members viewed the decking in Neighbour 1's garden and considered views from the decking. The Members then viewed the decking from Mrs C's property, one from inside her house, the others from outside her patio doors. It is up to Members how they view a development. In this case the Members in Mrs C's property asked the Planning Officer to remain on the decking and to both stand and sit in order to help assess the impact of the decking on Mrs C's privacy.
- (b) The Council's policy on site visits is that they are undertaken only by Members and Officers in order to establish the "lie of the land". They are not held in order to hear representations. When access is likely to be required to private property then applicants/objectors are informed as a courtesy, not in order for them to be heard. (This had been detailed in the letter of 11 March 2002 – paragraph 12.)
- (c) The Committee report included a recommendation for refusal. Whilst Members usually determine applications in line with the recommendation this does not always happen. In this case Members continued the application in March to allow the site visit so that they could familiarise themselves with the details of the development. The site visit was the day before the April Committee, in line with normal procedure. Following consideration and debate it was agreed, on a vote, to grant consent with a condition which would ensure adequate screening between the decking and Mrs C's property. However, neither Officers nor Members are required to discuss such screening with neighbours prior to determining an application of this sort. It is not unusual to grant consent for a development with conditions attached, the purpose of which is to ensure that the development fits appropriately into its location. There is no requirement to discuss the nature and extent of such conditions with all affected parties; to do so would greatly delay the planning process.

- (d) The Council's policy is that hearings are only held when requested in writing from applicants and/or objectors for good planning reasons. In this case, none of the parties (the applicant and two objectors) asked to be heard. The nature of the objections was summarised, as usual, in the Committee report. Mrs C refers to a telephone conversation which she had with the Council's Principal Solicitor, Officer 2, on the eve of the Planning Committee. Mrs C did ask that the Committee meeting be cancelled because she could not attend the meeting. Officer 2 indicated to her that the planning application had already been outstanding for quite some time and the fact that an objector was unable to attend a meeting when no written request to be heard had been received was considered to be insufficient reason for further delaying the planning application.
- (e) Not all Members are able to attend site visits because of other commitments. In all cases Members have to determine applications on the basis of the Committee report and any other relevant considerations. There was considerable debate on the application which allowed Members to take an informed view of the development. In reaching their decision, Members attempted, quite appropriately, to achieve a compromise which allowed the retention of the decking whilst ameliorating the adverse effect on neighbouring property through the imposition of an appropriate planning condition. Mrs C had subsequently made clear that she is not prepared to allow the height of the mutual fence to be increased. The screening solution will therefore have to be erected entirely within Neighbour 1's property. Members do not have to attend site visits prior to determining planning applications. Only a small minority of applications are subject to such visits and the Council's standing orders do not require only those who attend site visits to be able to vote on planning applications. Members can form their own views, discuss detailed concerns with Officers and visit sites in their own time as they see fit before voting.
- (f) It has been explained to Mrs C that a verbatim minute is not taken of Council meetings. The minute does not explicitly detail why Members determined the application contrary to officer recommendation but the wording of the motion makes clear that the intention was to grant planning permission having taken

account of the neighbours' concerns through the imposition of an appropriately worded condition.

30. The Council's Chief Executive also advised that as at 21 August 2002, Neighbour 1 had not complied with the planning condition. Following communication and negotiation with the applicant the Council had detailed a form of screening with which they would be satisfied. Neighbour 1 had not submitted proposals which the Council could accept. The Chief Executive understood that Neighbour 1 intended to appeal the condition to the Scottish Ministers.

31. After receiving a further letter of 9 September 2002 from Mrs C in which she referred to the possibility of a discontinuance order, the former Commissioner replied to Mrs C on 17 September providing her with a copy of the Council's comments. It was pointed out to her that she would need to approach members directly for them to revisit their decision of 3 April 2002; that that course of action might, in terms of the Council's standing orders require six months to have elapsed from the decision but that Neighbour 1 had six months from the decision notice of 9 April 2002 (that is to 9 October 2002) to submit an appeal. Unfortunately, Mrs C did not receive the original of the letter of 17 September 2002. A copy was sent on 3 October 2002 but she did not respond prior to the office of the Commissioner for Local Administration in Scotland ceasing to exist on 22 October 2002.

32. Mrs C responded by fax on 4 November 2002. By that time she had approached her local councillor with a view to his pressing on her behalf for a discontinuance order. However, Neighbour 1 had in the meantime, on 29 August 2002, submitted an appeal to the Scottish Ministers seeking the deletion of the condition requiring the erection of the fence. Mrs C for her part had written to the Director of Economic, Planning and Environmental Services on 28 October 2002 indicating that, notwithstanding Neighbour 1's appeal, she felt the Council could still issue a discontinuance order. She had consulted solicitors and they were of the view that since retrospective planning consent had been given, compensation (to Neighbour 1) should not be an issue. Mrs C was advised by letter of 8 November by the Director that members had been informed of her request but had agreed to take no action pending the outcome of Neighbour 1's appeal.

33. Mrs C informed my office that the appeal was under consideration by the Inquiry Reporter's Unit who were expected to determine the appeal by mid February 2003. My Complaints Investigator advised Mrs C by letter of 12 December 2002 that we would await the outcome. In the meantime, the Council were supplied, on 22 January 2003, with a copy of Mrs C's comments on the Council's response of 21 August 2002.

34. After carrying out an accompanied inspection of the appeal site and the surrounding area on 14 January 2003, the Inquiry Reporter wrote to Neighbour 1 on 17 February 2003 indicating that he found that the installation of "screening/fencing" as required by the condition on the 9 April 2002 consent would, due to the required height and location, result in a significant loss to the amenity of Mr and Mrs C's property and therefore would be contrary to the terms of both the extant and emerging development plans. Since the Inquiry Reporter was determining an appeal under Section 47 and Schedule 4 of the Town and Country Planning (Scotland) Act 1997, he could under Section 48 deal with the application as if it had been made to him in the first instance. In the particular case he was concerned that residential amenity had been materially and adversely affected by the decking, and would remain so in the absence of appropriate screening. However, the physical characteristics of the decking, combined with those of the adjacent properties, would require screening of a height and in a position which would, in the Reporter's view, unacceptably impact on residential amenity (particularly for Mr and Mrs C's property). The Inquiry Reporter found the erection of the decking itself to be unacceptable; that the imposition of the condition would not satisfactorily remedy the injury to amenity caused; and he advised Neighbour 1 that if his appeal remained in place he was minded to refuse planning permission for the decking itself.

35. On 1 March 2003 Neighbour 1 faxed the Inquiry Reporter's Unit intimating that he did not wish to proceed with his appeal. The Inquiry Reporter's Unit confirmed to Neighbour 1 by letter of 4 March 2003 that the withdrawal of the appeal had been accepted and that no further action would be taken on it by the Reporter. The Council were informed of this development in a letter of 4 March which was received by them on 5 March.

36. The Chief Executive wrote to my office on 7 March 2003 commenting further on the heads of complaint and providing a copy of the Director's response to Mrs C's letter of 28 October 2002 with regard

to head (c) of the complaint at paragraph 2. The Chief Executive stated that it would not have been possible for anyone to have been able to predict in advance whether or not planning consent would be granted. With reference to head (d) the Chief Executive commented that the Council had approved procedures for dealing with any requests to be heard at Committee. Any request requires to be made in writing and the request can be submitted by both applicants and objectors. Where such a request is received and approved, the application will be continued to the following meeting of the Committee to afford all parties the opportunity to address the Committee. With reference to Mrs C's statement about councillors having no training in planning matters (paragraph 24), the Chief Executive maintained that the Committee members had lengthy experience of planning. Over the years, a broad range of issues had been raised and appropriate questions had been asked both at Committee and prior to Committee meetings. Members had also been briefed on Local Plan issues, had carried out tours of the area and seminars had also been held to add to Members' knowledge and understanding.

37. Mrs C contacted my office by fax on 1 April 2003 indicating that she was now also concerned about the Inquiry Reporter voluntarily informing Neighbour 1 of his intentions and enabling him to "withdraw" his appeal. Her case was supported by a letter of 1 April from her Member of Parliament. I decided that the circumstances of the complaint merited investigation of the actions of the Council and informed the Council and complainant in letters of 4 April 2003.

38. In responding to my decision to investigate, the Chief Executive intimated that the Council had agreed on 2 April 2003 to commence discontinuance procedures. The Council sought confirmation as to whether, in light of this development, Mrs C still wished investigation of her complaint to proceed. Mrs C confirmed to me by fax of 21 May 2003 that she did not want to drop her complaint against the Council.

39. Mrs C was informed that before my office could look into a complaint against the Scottish Executive Inquiry Reporter's Unit (SEIRU) a complaint of injustice arising from maladministration or service failure would first need to be made to that body. If Mrs C was thereafter not satisfied with their response a complaint could be made to my office. Mrs C subsequently intimated on 21 April 2004 that she again wished to complain about SEIRU, but was advised by letter of 4 June 2004 that she

should confirm that all aspects of her complaint had been taken up with that body.

40. The Council, contrary to the recommendation of their Director of Economic, Planning and Environmental Services authorised the service of a discontinuance order on Neighbour 1 under Section 71 of the Town and Country Planning (Scotland) Act 1997. Following the service of a preliminary notice seeking ownership details, the order was served on 24 June 2003. Neighbour 1 subsequently decided to make representations against the proposed order to the Scottish Ministers. A different Inquiry Reporter was nominated who held a public local inquiry in Clydebank on 9 December 2003. The Reporter recommended to the Scottish Ministers that they confirm the Section 71 order. The order which was confirmed on 19 January 2004 instructed Neighbour 1 to remove the decking, steps, supporting structures and foundations within four weeks of the order being confirmed that is, by 16 February 2004. Neighbour 1 however had six weeks in which to refer the matter to the Court of Session. At a meeting on 3 March 2004 the Council were informed that Neighbour 1 had not complied with the order. According to Mrs C the Committee then decided to allow Neighbour 1 a further 28 days to remove the entire structure.

41. In commenting on a draft of my report without conclusions, Mrs C informed me that pursuit of action to protect her privacy had led to a breakdown in her family's relations with her neighbour. She had suffered personally from depression and stress and had lost her job. She and her husband decided to sell their home and moved in December 2003.

Building Control Matters

42. Neighbour 1 submitted proposals to comply with the condition of the planning consent on 23 April 2002 together with an application for a building warrant. In relation to the building warrant, Neighbour 1 was advised that, as the decking had already been constructed and given that retrospective warrants cannot be issued, he would need to progress the matter by way of a "letter of comfort". Neighbour 1 was advised at that time that the application for warrant that he had submitted could remain open to allow him to deal with the construction of the fencing or screening required by virtue of the condition.

Findings

43. The decision by Neighbour 1 to erect raised timber decking in his rear garden without the benefit of the necessary planning consent was to have a profound effect on Mrs C and her family. The complaint, made to my predecessor, which I inherited when I took up office, centred on the events surrounding the Council's decision on 3 April 2002 to grant retrospective conditional consent. It was those events which I considered merited investigation and I now turn to examining each head of complaint in turn.

(a) Members not viewing the decking from inside Mrs C's home

Planning legislation does not require that members of a relevant Committee pay a site visit prior to determining an application. In the case of Neighbour 1's application for retrospective consent, the Committee decided to defer consideration until after they had paid a site visit. Mrs C was aware of the procedure beforehand and was alerted by letter of 11 March 2002 to the proposed date and time of the site visit on 2 April 2002 and was informed then that the Committee would resume consideration of the application the following day.

In the event, only four of the nine members of the Committee attended the site meeting. All four are said to have entered Mrs C's property to observe the planning officer on the decking next door. Only one, however, the then Chairman, viewed the officer from within Mrs C's home. He was one of the three members who subsequently voted against granting retrospective consent. In a situation where attendance was not mandatory, it fell to be a matter of discretion for each member as to whether they needed to view the effect of someone on the decking from within Mrs C's house. In my view, it would have been preferable if all of the members who had taken the time to attend the site meeting had also taken advantage of the opportunity to view the decking from inside Mrs C's home. This would have allowed them to see at first hand the full impact on Mrs C's property and her privacy and amenity. However, as I have stated, site visits themselves are not a requirement. I am, therefore, not able to uphold this aspect of Mrs C's complaint.

(b) Representation at the site visit

The letter of 11 March 2002 is crucial. It alerted Mrs C to the purpose of the site visit which was not specifically to hear arguments about the merits of whether or not retrospective consent should be granted. In sum then, neither she nor her neighbours required to be "represented" at the site visit. I do not uphold this head of complaint.

(c) Consultation regarding screen fencing

There is evidence that prior to the report being prepared on the application for retrospective consent, Mrs C was asked for her view about screening. She dismissed the possibility (paragraph 7). Mrs C's views were endorsed in the final paragraph of the Director's assessment (paragraph 9).

It is the case, however, that members were only prepared to grant consent on condition that Neighbour 1 provide within 4 weeks details of a suitable form of screening/fencing of sufficient height to prevent overlooking of Mrs C's property, with the screening/fencing being erected within 8 weeks of 9 April 2002. Neighbour 1 provided details, but these were not deemed suitable, no screening was erected, and Neighbour 1 subsequently appealed to Scottish Ministers against the condition. It is clear that Mrs C's strong views about denying owner's consent for heightening the existing fence were made known to the Planning Service before and after the decision.

The award of planning consent is only permissive in terms of the legislation; it does not usurp rights or entitlement which arise from ownership. When Neighbour 1 was unable to meet the terms of the conditional retrospective consent he appealed the condition. I do not consider that Mrs C sustained injustice as a result of maladministration on this head of complaint.

(d) Mrs C was not specifically advised she could apply to speak at the 3 April 2002 meeting

I find here that the Council's letter of 11 March 2002 was less than clear. It was apparently a "standard letter" and said nothing about whether an objector could apply to be heard. Despite the absence of such a reference, the final sentence quoted at paragraph 12 implies that some persons might wish to be heard as to their representations, but that it will remain at the discretion of the

Committee to allow that hearing. I believe that in the specifics of this case, particularly where the officers were recommending that the proposal was contrary to policies contained within the Local Plan, it was wrong not to inform Mrs C explicitly that she could apply to be heard on 3 April 2003 when the Committee resumed consideration of the application. Had she been invited and been heard and had the decision been identical then there would have been no ground for pursuit of a complaint of injustice arising from maladministration on this head. I uphold this aspect of the complaint. I consider that the Council should review the content of their standard letter and specify the circumstances where an objector may have the opportunity to be heard.

- (e) The voting by members who did not attend the site meeting and
- (f) Alleged lack of minuted reasons for the decision of 3 April 2003

I am of the view that these issues should be considered together. The Committee members decided on 6 March 2002 that they would make a site visit prior to determining the application. Attendance at the site visit was not mandatory and in general terms the Council's standing orders do not apparently debar a councillor who has not attended a site visit from participating, and indeed voting, in the further consideration of a planning application at a subsequent Committee meeting.

The specifics of this case are, however, unusual. The decking had already been in place for the best part of a year before the case came to the Committee, and the planning officer who had visited the site recommended refusal. In his report the Director of Economic, Planning and Environmental Services had indicated that the development was contrary to policies incorporated in the local plan. Further, he discounted the possibility of screening to protect the complainant's privacy as a possible way of allowing the decking to remain.

The majority of members who voted on 3 April 2002 had not attended the site visit the previous day. Four out of the five members who had been absent at the site visit voted in favour of the retrospective application. I can understand why Mrs C believes that the Committee would not have voted, contrary to the officer's recommendation, to grant retrospective consent had they all visited

the site, had they viewed the decking from within her home, and had she been able to address them as to her concerns about her loss of privacy and amenity. While it is not possible for me to determine how members would have voted had they all had the benefit of attending the site visit, I do consider that there can be an appearance of injustice when members who do not attend a site visit later vote on the issue, especially if, as in this case, they did so against a recommendation and contrary to planning policy. In my view these circumstances do not help instil public confidence in planning decisions.

I am particularly concerned, especially given the specifics of this case, that reasons for the decision were not recorded appropriately, although the reason for the imposition of the condition regarding the screening is minuted. It is extremely important that public confidence in the planning system is maintained and that full reasons for a decision are minuted. This may have helped the complainant understand why the Committee reached the decision that it did. In circumstances where the decision was reached against the advice of the Director and contrary to policies in the local plan, it is even more important that reasons should be carefully minuted. I note also that almost one year later the same Committee had second thoughts when they agreed to commence discontinuance action. That discontinuance was subsequently confirmed by the Inquiry Reporter.

Having considered all the circumstances of this case, I find that there was serious maladministration by the Council in failing to record fully the reasons for the decision to grant consent and that Mrs C has suffered injustice as a result.

Recommendations

45 I consider that Mrs C has suffered injustice as a result of the failings I have identified. She was not specifically advised that she could apply to speak at the Committee meeting on 3 April 2002 when the decision on the planning application was being considered; and I have found maladministration in the failure to record fully the reasons for the decision reached at that meeting. Taken as a whole I am of the view that the circumstances of this case do not represent good practice and that on this occasion the planning system failed Mrs C. Such failings need to be addressed in order that faith in the planning system can be restored.

46 As I have indicated the matter has had a considerable impact on Mrs C and her family, so much so that they made the decision to move house before the appeal and the outcome of this investigation was known. In addition to the costs involved, Mrs C has gone to considerable time and trouble in pursuing her complaint and protecting her family's interests. There is no doubt that this has been a stressful experience.

47 In all the circumstances, I **recommend** that Mrs C should receive an unreserved apology from the Council for their actions and further redress in the sum of £2,500 in recognition of her time and trouble in pursuing the complaint.

48 I **recommend** also that the Council should review the content of their standard letter and specify the circumstances where an objector may have the opportunity to be heard at a meeting of the Committee.

Professor Alice Brown
Scottish Public Services Ombudsman

12 August 2004

Glossary

Mrs C	The Complainant
Neighbour 1	The neighbours who erected the timber decking
Neighbour 2	The neighbour sharing a common boundary
Officer 1	Council's Planning Officer
Officer 2	Council's Solicitor
Officer 3	Council's Head of Legal and Administrative Services
Councillor 1	Councillor who viewed the decking from Mrs C's house
Councillor 2	Councillor who asked that her dissent be recorded
Councillor 3	Referred to in Committee Minutes
Councillor 4	Referred to in Committee Minutes
Councillor 5	Referred to in Committee Minutes