

Scottish Parliament Region: Central Scotland

Case 200500129: North Lanarkshire Council

Introduction

1. On 12 April 2005, the Ombudsman received a complaint on behalf of householders (referred to in this report as Mr and Mrs C) against North Lanarkshire Council, regarding the Council's handling of the development of a house on a plot adjoining their own.

2. They claimed that when they had developed their own house the Council, in the interests of amenity, had imposed stringent requirements for screen fencing. They alleged that, in the processing of the applications for the adjacent site, proper safeguards had not been included to protect their privacy and amenity. In essence, they considered the Council should not have permitted a two storey house with ground floor sun lounge extension and timber decking on an elevated site close to their common boundary which directly overlooked their bedroom windows. They maintained that, if the Council insisted in 1998 that they install a two metre high close board fence, a similar condition should have been imposed on their neighbour's plot. The conifer hedge planted by their neighbours had not fully established.

3. After investigation, I have not upheld the complaint. The planning applications for the adjoining site appear to me to have been properly considered and, in the absence of a letter of objection from the complainants, full consent was granted subject to conditions, two of which specifically aimed to protect Mr and Mrs C's amenity. There was, however, a procedural defect by the Council that did not result in injustice to Mr and Mrs C. I suggested that the Council intervene to offer advice to the neighbours to assist the growth of their hedge. The Council have accepted that recommendation (paragraph 29).

Background

4. The Town and Country Planning (General Permitted Development) (Scotland) Order 1992 specifies classes of development which are 'permitted', that is they do not require express planning consent. The site adjacent to Mr and Mrs C's property fell within a rural area in the Local Plan of 1982, outline consent for

housing was granted in 1992 and it was subsequently identified as a housing site in the Council's Southern Area Local Plan Finalised Draft which was modified in June 2001.

Investigation and findings of fact

5. In the course of the investigation, enquiries of the Council were made on two occasions, on 4 May and 22 August 2005. I interviewed Mr and Mrs C in their home on 12 August 2005, together with their agent (Mr A), who had submitted the complaint on their behalf. A copy of my draft report was sent to Mr and Mrs C, Mr A and the Council for comment.

6. Mr and Mrs C stated that when they applied for planning consent for their own house in 1998, they had originally intended to have their bedroom windows on the north side of the building but the Council's planning officers required them to lower the height of their foundations, to erect a two metre high close boarded fence around their home and to re-design the house so that the bedroom windows were situated on the south elevation. The reason given to them was that this would protect the amenity of any house built immediately to the north. Mr and Mrs C acceded to the request in the expectation that the Council would be protective of their amenity in the event of a house being built immediately to the south.

7. The Council have not commented explicitly on these points raised with them. It is recorded that outline and detailed consent for the complainants' application was granted on 27 April 1998 and 14 December 1998 respectively by the then Director of Planning and Environment.

8. When application was made for outline consent for 18 houses on adjacent land in late 2001, which included the next door plot, the application was advertised as contrary to the 1982 Local Plan. Mr and Mrs C and two of their neighbours submitted identical letters of objection. The representation of 3 November 2001 objected to a two storey house on the adjacent plot, maintained that the plots were too small, and raised the question of drainage provision.

9. The outline planning application was continued at the Planning and Environment Committee on 20 February 2002 but permission was granted for 18 houses on 20 March 2002. Condition 4 of the outline consent stipulated that

'the plots that will subsequently be developed as a result of this application shall comply with the Council's residential space standards'. (These specified a minimum six metre front garden depth, a minimum of ten metre rear garden depth and a minimum of four metres between gables of adjacent dwellings.)

10. Subsequently, on 17 April 2002, a second application was submitted for outline planning permission for 17 houses. Mr and Mrs C informed me at interview that they had not received any further neighbour notification at the outline stage. That application was approved subject to similar conditions to the previous outline consent and with an identical condition 4.

11. On 19 August 2002, an application for full planning consent for the erection of a dwelling house with integral double garage on the plot immediately to the south was registered with the Council on behalf of a Mr and Mrs B. Although Mr and Mrs C were notified of the application, they did not view the plans and did not submit a letter of objection. At interview, Mr and Mrs C told me that they had assumed that their earlier objections on loss of privacy would be referred to and that they had expected the Council would have acted consistently in applying the same principles as had been employed in requiring Mr and Mrs C's house to be re-orientated in 1998.

12. The Council informed me that the original plan submitted with the detailed application on behalf of Mr and Mrs B showed the sun lounge on the west side of the proposed house but the proposed house was closer to the boundary with Mr and Mrs C's house. Amended plans were submitted on behalf of Mr and Mrs B on 9 October 2002. Mr and Mrs C are adamant that they did not receive notification of these amended plans. The amended plans showed the sun lounge on the rear (north) side of the proposed house with an area of timber decking (1.6m x 2.4m) also shown.

13. A preview recommendation report was prepared by the case officer on 29 October 2002. His report stated:

'The application site is part of a 17 plot development on a housing allocated site in the (Southern Area Local Plan), for which outline consent has already been granted. There are no strategic issues raised and there have been no

objections. The drawings and siting have been amended from those originally submitted to address amenity concerns and neighbours have been renotified. I recommend approval subject to conditions.'

14. Full consent was issued on 1 November 2002 for a house with a sun lounge on the north side extending to 4.88 metres from the north boundary. The outline consent was subject to four conditions, the third of which stated:

'3. That before the development hereby permitted starts, full details of the design and location of all fences and walls to be erected on the site shall be submitted to, and approved in writing by, the Planning Authority, including any modifications as may be required.'

15. The details requested through condition 3 were not submitted prior to the work on site commencing in early 2003. Mr and Mrs C were concerned at the proximity of the foundations for the sun lounge to their boundary. They approached Mr A and he wrote on their behalf on 17 February 2003 to the Director of Planning and Environment.

16. The case officer thereafter spoke to the neighbours' agent regarding landscaping proposals. The agent responded by letter of 17 March 2003:

'In response to concerns expressed by the owners of the site immediately behind the above site about possible overlooking, my clients, acting as good neighbours, have agreed to plant a row of conifers along the top of the sloping embankment at the foot of their garden along the line shown on the enclosed site plan. They do not wish to build a fence, as previously suggested by the Planning Department, as it would, effectively, render a strip of their garden as being inaccessible, once the fence is built. They have told me that they will take advice from tree nurseries regarding appropriate species to plant, what height of species to plant and also about when to plant. They are aware that they are under no obligation to carry out this work, which will involve them in considerable expense.

As previously discussed under reserved matters, my clients propose to build a small retaining wall, of 1200mm maximum height, at the base of the

sloping embankment referred to, and details will be provided once the project reaches that stage.'

17. Meanwhile in a further letter of 17 March 2003 to the Council Mr A suggested that a fence be constructed at the Council's expense to protect Mr and Mrs C's privacy.

18. Mr and Mrs C were not happy with the Council's response (of 21 March 2003) and placed the matter in the hands of solicitors who wrote to the Council on their behalf on 13 June and 22 July 2003, seeking clarification among other points about the positioning of the sun lounge and the erection of timber decking (both with direct visual access to Mr and Mrs C's south facing bedroom windows). The solicitors requested that if the decking had been erected without planning consent, then enforcement action be taken and that a discontinuance order be served under section 71 of the Town and Country Planning (Scotland) Act 1997. They regarded the large north facing picture window on the sun lounge to be injurious to Mr and Mrs C's amenity and in breach of their human rights. Not happy with the Director of Planning and Environment's responses of 11 July and 28 August 2003, the solicitors wrote to the Chief Executive on 4 September and 5 November 2003. A reply was sent by the Director on 21 November 2003, indicating that he had little to add. He noted that a cypress hedge had been planted and stated that he would be willing to approach Mr and Mrs B, to see whether they would put in place a regular pruning regime on a voluntary basis.

19. The Council at this time noted that the approved plans of 1 November 2002 had shown an area of decking 1.6 metres by 2.4 metres but that the decking as built measured 4.2 metres by 3.8 metres and varied from 90cm to 1.15 metres in height. They considered that the larger decking still fell within class 1 of the 1992 GDO (paragraph 2 above) and, therefore, did not in itself require express planning permission.

20. Mr C wrote to the Director on 26 April 2004 querying whether the timber decking had received retrospective consent and stating that he was suffering drainage run-off problems from two adjoining plots. The Director in a reply of 14 May 2004, advised that the decking constituted permitted development and that drainage issues were a matter for building control.

21. Mr A first wrote to the Ombudsman on behalf of Mr and Mrs C on 1 July 2004. He stated that the ongoing situation had adversely affected Mrs C's health. He was advised that before this office could be involved, North Lanarkshire Council's complaints procedure should be completed. Mr A wrote to the Chief Executive on 15 July 2004. As a result of that contact, a Senior Planning Officer met with Mr A in September and visited the site with him in October 2004. Mr and Mrs C remained dissatisfied and Mr A wrote again to the Chief Executive on 20 January 2005. In his reply of 10 March 2005, the Chief Executive stated that he had discussed the matter with the Director of Planning and Environment, who was of the view that the Council could not justify paying for fencing when the hedging existed. Mr and Mrs C then asked Mr A to submit their complaint to the Ombudsman, which he did on 11 April 2005.

The Council's position

22. The Council commented on Mr and Mrs C's contention of inconsistency in their replies of 20 June 2005 and 4 October 2005 to my enquiries of 4 May 2005 and 22 August 2005 respectively. The Council's earlier response of 20 June 2005 stated:

'The first outline permission (of 20 March 2002) included a condition requiring a minimum of 10 metre rear garden and the second outline permission included a condition requiring the plots to be developed in accordance with the Council's residential space standards. (This includes a 10m rear garden.)

The application for full planning permission was submitted on 19 August 2002. Whilst these plans were different to those submitted with the outline application, it should be noted that the drawings submitted with the outline application which showed the position of the buildings was indicative only, as would be normal at outline stage. These were not approved as part of the outline permission, the siting and design being reserved by condition.

During the processing of the full application, the Council took account of the garden size and privacy and amenity of surrounding properties. In response to the plans submitted, the case officer wrote to the agent expressing

concern about 'the impact of the proposal on the residential amenity of the adjoining dwelling to the north in terms of a significant loss of light', the impact of the bulk of the dwelling which was 9m high and the failure to comply with the Council's open space standards. It was suggested that the house be reduced in height and repositioned to provide a deeper back garden.

The drawings were amended and a letter from the agent confirmed that the neighbours were re-notified on 9 October 2002.

In considering these revised plans, it was noted that the majority of the rear garden was 8.6 metres and furthermore there was a large side garden which compensated for the rear garden being 1.4 metres shorter than the usual 10 metres. The 10 metre standard has been conceded in other cases where side gardens are large, particularly on corner plots such as this. The Council's open space guidelines do allow for minor variations to these standards.

In terms of privacy, the distances between Mr and Mrs B's sun lounge window and the bedrooms of Mr and Mrs C's house were shown on the plans as 19.35m and 20.40m. The minimum standard for directly facing windows is 18m and so this was not breached and moreover the windows were at an oblique angle to each other.

Planning permission was issued on 1 November 2002.

On receipt of Mr A's letter of 17 March 2003 (sic), the case officer contacted the agent suggesting the erection of a 1.8m high fence at the top of the banking which slopes down to the boundary with the complainants' property. The agent offered a hedge in the same position and at a height of 6ft as an alternative as his client was concerned that a fence in this position would leave a strip of their garden inaccessible. The hedge was considered to be an acceptable alternative to a fence in that it would provide effective screening.

The Council maintain that the application for plot 4 was considered properly

and in accordance with normal procedure. The effect of the development on the amenity and privacy of Mr and Mrs C's house was properly and thoroughly taken into account as previously shown.

In terms of consistency, every planning application requires to be considered on its merits and design solutions can be variable depending on each situation. Mr and Mrs B's plot is a corner plot which backs onto the side of its neighbour. It would not have been appropriate to impose a condition to require only toilet and utility room windows on a main elevation of a house. The house on Mr and Mrs B's plot is orientated north-south with the main elevations in these directions, whereas Mr and Mrs C's house faces east-west and so the restriction was on the gable of that house. (This restriction was imposed by the outline permission which covered several parallel plots including ... Mr and Mrs C and their neighbours.) Mr and Mrs B's sun lounge window was at an oblique angle to the bedroom windows in Mr and Mrs C's house and the distances exceed the minimum for direct overlooking.'

23. In their subsequent reply of 4 October 2005, the Council stated:

'The Director of Planning and Environment has advised that with regard to the requirements of the planning permission for the four plots at... in respect of materials and boundary treatment it is noted that Mr C expected the development at Mr and Mrs B's plot to be consistent being a neighbouring development. Materials and boundary treatments are always taken into account when considering such applications but there are many types of external finishing materials and several options for boundary treatment. There is no general planning requirement that materials must be the same in neighbouring residential properties: whether a proposal is sympathetic to or in keeping with the surrounding area is a judgement for the planning officer to make. Similarly, with boundary treatments, as previously stated, walls, fences and hedges are all acceptable and the type of boundary treatment often varies from house to house and there are many types of examples of this.

In respect of condition 3 of the consent which was issued on 1 November

2002 these details were not submitted prior to the work commencing and this was raised with the applicant in March 2003 when the discussions over the hedging took place. The applicant's agreement to provide the hedge was in effect the signing off of the condition. Due to the difference in heights between the two properties it was considered by the Case Officer that a standard 1.8m fence on the boundary wall would provide little screening for Mr and Mrs C's property and that a screening at the top of the banking would be more effective.

The applicant did not want to be left with an inadequate step between this fence and the boundary and suggested a hedge. This was considered to be an accepted alternative. It is noted that hedges often provide better screening than fences through time.'

24. At my visit to the complainants' home on 12 August 2005, I observed that the cypresses planted some two years earlier ranged in height to over two metres and appeared relatively healthy. However, their lateral growth had not been sufficient to form an effective screen between Mr and Mrs B's sun lounge and decking and Mr and Mrs C's property.

Conclusions and recommendations

25. The complainants regard their privacy as having been impaired as a result of the development of the plot to the south of their own property and consider that there was maladministration by the Council. Having considered the evidence obtained in the course of the investigation I see no evidence of maladministration by the Council in the determination of the three applications. Had there been no deficiencies in neighbour notification and had the complainants fully exercised their opportunity to comment on the second outline consent and in respect of the detailed consent, then the issue would have simply boiled down to what type of boundary treatment for Mr and Mrs B's plot best protected Mr and Mrs C's privacy.

26. Notwithstanding the absence of any objection to the application for full consent, the Council nevertheless imposed conditions on the full consent of 1 November 2002 (paragraph 14), two of which were expressly designed to safeguard the residential amenity of the area. One of these (condition 3) required the applicants to submit details and locations of fences and walls in advance of

work starting. That did not happen and the applicants were in breach of the condition. In my view the Council should have responded to Mr A's letter of 17 February 2003 (paragraph 15) by requesting a detailed submission from Mr and B's agents. They should then have considered that submission, and, if they were so minded, should have granted written consent.

27. The terms of the agent's letter of 17 March 2003 (paragraph 16) are inaccurate. Mr and Mrs B were in fact required by the terms of the planning consent to satisfy the planning authority and were obliged to obtain the planning authority's approval for a satisfactory boundary treatment to safeguard the residential amenity of the area. In the event the planning authority appear to have accepted that hedging was more appropriate than a 1.8 metre fence, however they have not stated that this was confirmed to the developer's agent in writing. Given Mr A's letter of 17 February 2003, the discharge of condition 3 should have been formalised. I am persuaded that, in the circumstances, the lack of that formal step constitutes a procedural shortcoming. Nevertheless, the matter of the boundary treatment was reserved solely to the Council as planning authority to determine. Had Mr and Mrs B's agent applied for written consent to discharge the condition prior to works on site, Mr and Mrs C would not have been notified.

28. My own observation from my visit on 12 August 2005 is that the hedging, despite having been planted over two years ago, only partially provides the intended screen to protect the complainants' privacy and this is clearly to Mr and Mrs C's detriment. If the hedge were to continue to thrive with corresponding lateral growth it may very well in future serve its purpose better than a 1.8 metre fence. I would recommend that in the circumstances the Council now intervene and offer to provide Mr and Mrs B with advice on how to enhance growth of the cypresses to fulfil the purpose for which they were planted.

29. The Council, in responding to the proposed report, accepted this recommendation.

25 April 2006

Explanation of abbreviations used

Mr and Mrs C	the complainants
Mr A	the complainants' agent
Mr and Mrs B	the complainants' neighbours