

## Scottish Parliament Region: Mid Scotland and Fife

### Case 200500224: Fife Council

#### Summary

##### *Planning - Complaints by Objectors about development*

The complaint is related to, and follows on from, another complaint being reported on (200400766) about the handling of a planning application for housing on a site to the rear of the complainant's home. In both complaints it was considered that Fife Council (the Council) mishandled aspects of the original planning application and neighbour notification. In this complaint, an allegation of delay in handling correspondence was upheld, but a complaint that the Council had approved a subsequent planning application to the detriment of residents was not upheld. The Council accepted the recommendation in the joint complaint to have an independent valuer assess any possible loss in property value with a view to appropriate payments being made and to changing the wording of their responses to complaints.

#### Introduction

1. On 22 April 2005 the Ombudsman received a complaint from a householder (Mr C) concerning the Council's handling of planning applications for an adjacent housing development, their consideration of the question of enforcement, and the handling of Mr C's complaints and requests for information. My investigation, which was carried out in parallel with another complaint against the same authority to which Mr C was a co-signatory (200400766), found that there were shortcomings. In the light of these findings the Ombudsman recommended that procedures with regard to the Council's complaint handling be reviewed and the Chief Executive responded positively to this recommendation (paragraph 33).

2. The original complaint to which Mr C was a co-complainant was first subject of an enquiry to the Ombudsman's office by a neighbour on 26 July 2004. At that stage a formal complaint had not been made to the authority. It was subsequently made to the Ombudsman on 2 November 2004 on behalf of eleven affected households at X (including Mr C) and was the subject of enquiries of the Council and a separate investigation report. On 22 April 2005, however, Mr C submitted a complaint on his own behalf.

3. The complaints from Mr C that I have investigated [*and my final decisions*] are:
- (a) The Council failed to carry out proper checks on the original planning application for the adjacent site at Y and failed to protect the interests of the X Street residents [*Upheld, see paragraph 27*];
  - (b) the Chief Executive failed to respond to two complaints Mr C submitted on 29 September 2004 and 28 February 2005 within a satisfactory timescale or in a satisfactory manner [*Upheld, see paragraph 28*]; and
  - (c) the Council approved a subsequent planning application for the same development on 12 January 2005 to the detriment of the interests of the X Street residents [*Not upheld, see paragraph 30*].
4. Mr C also complained that the Council failed to comply in the appropriate manner with his request for information made under the Freedom of Information (Scotland) Act 2002 on 3 January 2005. I considered that the fourth aspect of Mr C's complaint was properly a matter for the Scottish Information Commissioner to consider.
5. The Ombudsman recommended that the Council review their published target timescales for dealing with complaints (paragraph 29). The Chief Executive responded that where the Council stipulate a target date for response, they would add a caveat and would include this as a standard feature of their new Customer First Charter.

### **Background**

6. The circumstances of the granting of the original application for the site at Y are reported at length in the report of my investigation of case 200400766 and are, therefore, rehearsed only briefly in this report. Both reports were sent to Mr C and the Council and he and the Council have had the opportunity to comment.

## **Investigation and Findings of Fact**

7. Mr C's house at X was built some six years ago. A prior design brief envisaged that the site incorporating X and the adjoining site at Y would both be developed for private housing. The original developer of X subsequently sold his interest in Y to another developer who in turn made application to the Council on 18 December 2001 for full consent for a development of 30 houses. Residents of X were notified of the submission of the application by the developer. Notwithstanding that the opportunity to view the plans was limited because of office closures over the Festive period, some six X residents viewed the plans, but none made representations to the Council on the proposals. Only the former owner of Y through his solicitors submitted objection to the proposed development. The application was the subject of considerable correspondence before being granted approval by the Area Development Committee on 6 November 2002. The decision notice was issued the following day. There was a further significant delay before site preparation works commenced in early 2004. Subsequent to this, the residents at X Street grew concerned at the height of the foundations and the proximity of the nearest houses. They believed that their privacy would be impaired by overlooking and that their gardens would be overshadowed by the development. Details of the representations made by the residents are provided in the parallel report. The matter had been referred to the Council's Development Service and an enforcement officer of that service had established at a joint visit with the developer's surveyors on 27 July 2004 that the houses then being built were, within a satisfactory degree of tolerance, being constructed at the approved height and in the approved location on plot. It was accepted by senior planning officers that the relative height of the new houses to existing houses were a matter of concern. Window to window distances however did not breach Council guidelines on privacy.

8. Mr C first contacted the Council's planning enforcement officer (Officer 1) by telephone in late August 2004. He followed this up in a letter of 3 September 2004 written on his own behalf and on behalf of his immediate neighbour to the west (Mr D). Mr C stated that he understood that the developer had been granted a building warrant which he was either not complying with or, alternatively, the warrant had been wrongly approved. He expressed concern that ground levels had been raised to such an extent in the adjacent development that his living room, which directly looked on to the site, would be deprived of light from the new houses and a

double garage being built at plots 29 and 30. Additionally, the buildings would be detrimental to his privacy. While Mr C stated that he had had no objection to the houses being built, he felt there had been an error. Erection of the kit for plot 30 was due to commence on 8 September 2004.

9. Mr C did not receive a written response or acknowledgement to his letter and sent a formal complaint to the Head of Development Services on 20 September. This letter was acknowledged on 21 September and passed to the Development Manager (Officer 2) for a response (by 18 October).

10. On 29 September 2004, Mr C wrote to the Chief Executive complaining that he had been informed that his complaint had been passed for reply to the department against whom his complaint had been made. Mr C believed that he should not wait for the result of the investigation initiated by the Head of Development Services since he assumed it would find that no faults had been committed by either the Council or the developer. Mr C stated that he was aware that another neighbour had complained. Mr C invited the Chief Executive to visit the site.

11. Officer 2 replied to Mr C on 29 October 2004 apologising for the delay in responding which he stated to be partly due to other residents writing in to request information and clarification. Officer 2 also apologised to Mr C for the fact that his letter of 3 September to the enforcement officer had not received a written reply but noted that both he and a principal planning officer (Officer 3) had spoken to Mr C. Officer 2 explained the Council's actions since April 2004, when concerns had been expressed by residents about ground levels on the adjacent site. Officer 2 confirmed that the floor levels of the houses had been set in accordance with the plans approved at the time the planning permission was granted in November 2002. Officer 2 also stated that the developer had proposed the particular floor levels in order that foul and surface water drainage could drain by gravity to new services installed under the new road fronting those houses within the development site. This drainage scheme formed part of the development approved at the planning stage by the Area Development Committee and had also been considered acceptable by Scottish Water.

12. Officer 2 further explained that, whereas the developer had been requested to stop work on plots 24, 25 and 26 to investigate further the relationship of the height

of these houses to existing houses, the developer had opted to continue construction work. Officer 3 had met with the developer on 12 October 2004 and had prepared a report which went to the Area Development Committee on 27 October 2004. The Area Development Committee had authorised the service of a stop notice if revised plans were not submitted and requisite work carried out.

13. On 9 November 2004, having by then received Officer 2's letter, Mr C wrote to the Chief Executive stating that, although 28 days had passed, he still awaited a response to his letter of 29 September 2004 (paragraph 10). Mr C used this letter to raise three new issues namely, that (a) the enforcement action authorised by the Area Development Committee on 27 October 2004 had not been implemented; (b) that the plans for the foul water/ rainwater drains at plots 28, 29 and 30 had been changed and these services were now being installed to the rear of the proposed houses; and (c) Mr C also maintained that proposed remedial screening works to provide a 2.8 metre screen between X and Y were unacceptable. The Chief Executive responded to Mr C's letter of 9 November 2004 by email stating that he hoped to reply in ten days.

14. At this time (12 November 2004), I visited the neighbour who had submitted the complaint on behalf of the eleven affected residents at X and, at Mr C's request, I also took the opportunity to visit Mr C's home.

15. On 24 November 2004, Mr C and Mr D visited the Council's local office and Officer 3 arranged for them to inspect relevant plans. As a result of that inspection, Mr C and Mr D concluded that spot levels on the adjacent plots 27, 28, 29 and 30 were erroneous. In a further email of 30 November 2004, Mr C asked the Chief Executive to investigate.

16. The Chief Executive responded to Mr C on 1 December 2004. He apologised for the confusion which had arisen over his own reply to Mr C's neighbour and Officer 2's letter of 29 October 2004 to a neighbour. This, he stated, had been an administrative error. With regard to the authorisation of enforcement action and a stop notice, the Chief Executive explained that such action was always seen as a last resort where negotiations fail to resolve breaches of planning control. The Council had met with the developer at his request and this had resulted in action regarding the parking of construction workers' vehicles and in the submission of

two planning applications. The first of these was for engineering operations in respect of the link road between Y and X. The second application was for the re-grading of garden ground and for the erection of walls and fences at plots 24-30 inclusive in the new development.

17. The Chief Executive noted that Mr C had made representations in a letter of 12 November 2004 about the second application, which the Chief Executive then understood was to be reported to the Area Development Committee at its 8 December 2004 meeting. Being unable to prejudge the Committee's decision, the Chief Executive stated that he was unable to comment on Mr C's concerns about the scheme for the wall and fence.

18. The Chief Executive sought also to explain the change from the original intention to install foul and surface water drains to sewers under the road to the front of plots 28, 29 and 30. A condition had been imposed in the November 2002 consent that the applicant should submit a proposed scheme to deal with surface water from the site. A scheme was submitted and approved by Planning, Building Control and Transportation Services. Detailed matters relating to the installation were matters for Building Control staff to monitor in relation to their routine work in line with the Building Standard (Scotland) Regulations. The changes had been agreed by Building Control without reference to planning staff and did not require neighbour notification as part of the building procedures regulations. The change in the specific drainage layout had only become apparent comparatively recently when Development Services reviewed the approved level details for the rear garden levels of the affected plots at Y.

19. Finally, while the Chief Executive conceded that there was a staffing resource issue within Development Services, he maintained that complaints received had been responded to and addressed. While some of the professional staff had left the Council's employment, other professional staff had investigated the matter. Mr C was informed of his right to refer the matter to the Ombudsman if he remained dissatisfied with the Chief Executive's response.

20. Reports on the two applications (paragraph 16) were submitted to the Area Development Committee on 12 January 2005. The application for planning consent for the erection of a retaining wall and fence; formation of gravel drainage

channel and re-grading of garden ground attracted 14 letters of objection from the X residents and the local community council on grounds of loss of privacy, loss of sunlight, unacceptable visual impact, and the materials being inappropriate and out of character. It had also been suggested that the original planning application should be invalidated. One letter of support was received from a prospective purchaser of a house on one of the affected plots. The report stated that, whereas the finished floor levels of the houses had been checked and found to be in accordance with the levels approved in November 2002, the rear garden ground levels being formed were not authorised. Additionally the height of the new houses at Y relative to the existing houses at X was not what was envisaged by the original planning permission. A combined 2.8 metre high wall and fence in one style providing a consistent boundary treatment was recommended to be appropriate and, together with removal of permitted development rights and reduction in rear patio areas, would reduce the extent of overlooking from windows in the new dwelling houses over the rear garden areas of the properties at X.

21. The Area Development Committee approved both applications at their meeting on 12 January 2005. On 17 January 2005 Mr C supplied me with a copy of the report. He expressed his concern that the report was one-sided in favour of the developer and that, while the X residents and local Community Council had all objected, the meeting of the Committee (which he had attended) saw little discussion and resulted in the unanimous approval of the application.

22. On 28 February 2005 Mr C, frustrated that his requests for information of 2 January and 16 February 2005 under the Freedom of Information (Scotland) Act 2002 had not been met, submitted a second formal complaint to the Chief Executive. He expressed his concern that the objections of all eleven affected X residents and the local community council had been ignored. He referred to a discrepancy in the distance of the wall being built from his boundary fence (800mm), that the height of the wall was 1.8 metres and not 1.0 metres, and that a gravel drain had not been properly installed. Mr C set out the content of three emails he had received on 16, 18 and 21 February 2005 on the height of the wall, distance from the existing boundary fence and the need to install gravel. Mr C expressed the opinion that the planning involvement on the site from day one had been "a fiasco". Receipt of the letter was acknowledged by the Chief Executive on 1 March 2005.

23. While this complaint was being considered by the Chief Executive, a second enquiry had been made by this office on 10 March 2005 in respect of the joint complaint submitted by Mr C's neighbour. The Chief Executive's response on that complaint, dated 1 April, was received on 4 April 2005. Following consideration of that response, I raised further outstanding issues in a letter of 8 April 2005 and these were subsequently discussed at a meeting on 27 April 2005 I had with Officer 3 and his team leader. Mr C's own complaint to the Ombudsman was received on the Friday preceding that meeting.

24. The Chief Executive responded on 11 May 2005 to Mr C's letter of 28 February 2005 (paragraph 22). The Chief Executive apologised for the delay in providing Mr C with a response to his letter within the timescale stated in his acknowledgement. He attributed this to the restructuring of Development Services and to staffing difficulties which had affected all three main Council local offices. With regard to a reported discrepancy in the wall provided under the 12 January 2005 permission and the property boundary, the Chief Executive stated that the Development Service had discretion to take enforcement action where it considered it to be expedient but had not regarded the reported discrepancy to be significant. The taking of enforcement action to secure the removal and rebuilding of the wall to rectify a minor planning breach was not considered to be appropriate.

25. The Chief Executive informed Mr C that the height of the wall and the formation of the gravel drain were at that time being monitored by Officer 3 and his Team Leader. With regard to Mr C's concerns about the report prepared for the 12 January 2005 Area Development Committee the Chief Executive stated:

'I am of the view that it was a balanced report taking into account the objections received from the ... community council and residents. I can assure you that the concerns raised were not ignored. There was a considerable debate by the Committee Members at the meeting and a decision was reached following a full and detailed presentation of the relevant planning considerations. The reference within the report to the combined wall and fence located adjacent to the existing boundary fence not being an ideal situation is not disputed. Had the ground levels on the site been carried out as per the approved levels on the drawings, the ground level at the bottom of the



new gardens where they meet existing boundary fences would have been level with the top of these fences. This was the only unauthorised aspect of the levels on the development site since the finished floor levels of the new houses were checked and found to be in accordance with the planning permission. Since the house floor levels were authorised, enforcement action could not be taken by Fife Council against [the developer] for this aspect of their development. The affected residents in X were involved in discussions about a suitable scheme with [the developer] and Development Services. An option to replace the existing boundary fence with a retaining wall and fence on top was not one, which was able to be progressed due to opposition by the [X] residents.

Consequently, the only option available to Development Services was to negotiate with [the developer] a practical solution to form a suitable boundary feature to retain the garden grounds of the new dwelling houses...'

26. Although the Chief Executive also referred to Mr C's entitlement to complain to the Scottish Public Services Ombudsman, Mr C had by that date already done so. On 18 May 2005, Mr C wrote to this office taking issue with remarks made by the Chief Executive. In particular, Mr C maintained that the construction of the wall, fence and gravel drain had not been monitored until the wall had been constructed above 1.8 metres in height and had not at that date been completed in accordance with the approved drawings. Additionally, 27 metal bolts and plates had been inserted in the wall supposedly as a minor modification. Mr C took issue that there had been a full and detailed presentation made to the committee on 12 January 2005 and stated that he had attended that meeting. He observed only one councillor checking drawings pinned on a wall and said only three councillors spoke. Mr C stated that no resident of X had been approached with regard to replacing their existing fence with a retaining wall and fence on top. Mr C also stated that the Chair of the Area Development Committee and the local councillor had attended a meeting with three X residents. The proposal to erect a retaining wall and fence had been rejected by the residents who attended. Nevertheless, it was subsequently incorporated in the planning application which received approval on 12 January 2005.

## **Conclusions**

### *Complaint at paragraph 3(a)*

27. The complaint from Mr C followed on from the joint complaint made by his neighbour to which he was a co-signatory. I upheld two of the four heads of the joint complaint. The Council had inadequate information on which properly to assess the proposals submitted by the developer and failed to require re-notification of neighbours. I consider that the unanticipated differential in finished floor levels of the Y houses from the adjacent properties at X could have been avoided. In line with my finding in the joint complaint, I uphold Mr C's first head of complaint. The Ombudsman's recommendation that the Council arrange for an independent valuer to assess any possible loss in property value and suggest appropriate payments has been accepted by the Chief Executive.

### *The complaint at paragraph 3(b)*

28. When an authority publishes targets for responses to correspondence, it should strive to meet those targets. If circumstances within the organisation render the targets not practically achievable, the delay should be managed or the targets altered. In neither of the two formal complaints of 29 September 2004 or 28 February 2005 was the response sent within the stated timescale, I uphold this aspect of complaint.

## **Recommendation**

29. The Ombudsman recommended that the Council, in considering the report, review their published targets for dealing with complaints. The Council's Chief Executive responded that he was taking this further with Development Services. In stipulating a target date for a response, the Council intended to include a caveat that 'unless otherwise notified in writing that the deadline cannot be met'. This would be included as a standard feature of the new Customer First Charter currently in draft form.

### *The complaint at paragraph 3(c)*

30. With regard to the third head of complaint, I consider that the Council's options in the autumn of 2004 were limited. The positioning and the finished floor levels of the houses being built at Y were authorised by the consent issued on 7 November 2002 and did not breach minimum window to window distance guidelines. Accordingly, the Council could not reasonably have revoked the consent they

issued two years earlier. The developer's proposals, which included re-grading of gardens at Y, could not fully address the problem but in my view they ameliorated an unfortunate situation. I do not, therefore, uphold Mr C's third head of complaint.

27 June 2006

## Annex 1

### Explanation of abbreviations used

Mr C	The complainant
Mr D	The complainant's neighbour to the west
Officer 1	The Council's Planning Enforcement Officer
Officer 2	The Development Officer
Officer 3	A Principal Planning Officer
The Council	Fife Council