

## Scottish Parliament Region: South of Scotland

### Case 200500658: Scottish Borders Council

#### Introduction

1. On 6 June 2005 the Ombudsman received a complaint from a man (Mr C) against Scottish Borders Council (the Council). The complaint concerned the Council's handling of an application for planning permission for the erection of a dwellinghouse within the grounds of a former hotel in the village of X. Mr C's property was adjacent to the site, known as plot 4 (hotel site). Mr C contended that the Council failed to ensure that the development was in accordance with the Council's planning policy and procedure for the village, and that it constituted overdevelopment of the site, which adversely affected the amenity of his property. The complaint was not upheld.

#### The complaint

2. Mr C made a formal complaint to the Council to which they replied on 17 June and 13 July 2005 contending that they had complied properly with the required planning procedure. Mr C subsequently made a request for an external review by the Ombudsman, alleging that there was administrative fault or service failure by the Council as a consequence of which he had been caused injustice.

3. Specifically, Mr C claimed that there was:

- overdevelopment of the site;
- encroachment of his property;
- breach of planning conditions;
- failure to protect existing 'protected' trees;
- failure to ensure enforcement of planning conditions;
- failure to consult properly with the Community Council;

- inadequate screening of the development;
- wrong inclusion of his partner's name on correspondence to the applicant.

### **Investigation and findings of fact**

4. In the course of my investigation I examined documentary evidence supplied by Mr C and one of my colleagues visited Mr C at his home.

5. I also made a written enquiry of the Council. The Council's Director of Planning and Economic Development submitted relevant background documentation which included:

- the relevant correspondence with Mr C;
- the planning report to the Area Committee;
- the site plan showing the variations in plot size and house position referred to in the complaint correspondence.

6. I have set out below my findings and conclusions for this investigation. Although I have not included every detail investigated in this report, I am satisfied that no matter of significance has been overlooked. Mr C and the Council have been given the opportunity to comment on this report. Mr C moved into his property in 2001. At that point he was aware that planning permission had been granted for the erection of a bungalow on plot 4, which he did not believe would adversely affect the outlook or privacy of his home. However, the bungalow proposal was not implemented.

7. In the early part of 2005, Mr C became aware of building activity on plot 4 and that the developer was erecting a larger house than the single storey bungalow originally approved. He made representations to the council about this on 24 May 2005.

8. In reply (17 June 2005) the Council's Head of Development Control (Officer 1) confirmed that a planning application for the erection of a two storey house on

the site was submitted on 22 June 2004 and was registered on 30 June 2004 once the applicant had supplied full details of the proposal. Mr C was notified as a neighbour and submitted detailed representations on 4 July, followed up by further representations (about the need to protect trees at the site) on 28 July 2004.

9. Officer 1 confirmed that the application was presented to the Area Committee on 20 September 2004. He indicated that Mr C's views (and those of other interested parties) were summarised in the planning report, with copies of all the formal representations from objectors and statutory consultations included in the papers submitted to the members of the Area Committee. (My examination of the documentation confirmed this.)

10. With regard to the specific points raised by Mr C, Officer 1 explained that the planning report considered that there was a range of different scales and styles of houses in the locality, and pointed out that Mr C's own property was a very substantial building. The planning view was that, in this context, there were no sustainable reasons to refuse a two-storey development.

11. Turning to the existing setting of Mr C's house; the distance between the two properties; and the existence of mature trees providing 'visual separation' between his property and plot 4, Officer 1 confirmed that the Council's view was that the new building would not adversely affect the character of Mr C's property and, therefore, the refusal of planning permission was not justified.

12. On the matter of the Conservation status of the village, Officer 1 explained that only a small part of the village had Conservation Area status, and that this did not include the application site.

13. Officer 1 commented on the privacy and amenity aspects by confirming that the Council – like most planning authorities in Scotland – applied the normal '18 metre' rule derived from the former building regulations. This required a minimum distance of 18m to be provided between habitable rooms in adjoining properties with facing windows. Where the buildings were angled, the distance could be reduced. (Officer 1 provided an explanatory note on acceptable distances between buildings.) He confirmed that the application showed a distance of approximately

30 metres between Mr C's house and the new building, which he noted was 'comfortably above the minimum privacy standard'.

14. With regard to Mr C's points about the protection of trees (and the diversion of a mill lade), Officer 1 indicated that the Council's Landscape Architect and Flood Prevention Officers were consulted, and that their views on these aspects of the development were reflected in the conditions attached to the planning consent.

15. Officer 1 confirmed that the Community Council were notified of the application and made representations, pointing out the need to protect the trees and the mill lade. (My examination of the documentation confirmed this.) Again, Officer 1 re-affirmed that the planning consent was suitably conditioned to take account of these issues.

16. Officer 1 acknowledged Mr C's disappointment with the Area Committee's decision to award planning permission subject to conditions. However, he contended that there was no evidence that the application was not handled properly; that planning officers did not give proper consideration to all relevant matters; and that members of the Area Committee were not provided with full information. He indicated that appropriate conditions were imposed to address the issues of legitimate concern.

17. Officer 1 referred to the implementation of the approved plans, observing that the developer had failed to comply with some of the terms and conditions of the planning consent; and that there were inaccuracies in the original site plan, which necessitated amendments to the layout. He explained that the Council took action to deal with each alleged breach of development control which was identified, indicating that a substantial amount of time was allocated to this aspect of the development, including at least 10 inspections of the site, and numerous contacts with Mr C by meeting on site/telephone/ e-mail.

18. Officer 1 confirmed that the Landscape Architect inspected the trees on the site and ensured that the developer erected suitable protective fencing. In this context he indicated that, while Mr C anticipated a distance of 11 metres, this was not actually specified in the condition.

19. In connection with the issue of the trees, Officer 1 referred to Mr C's contention that a local councillor had supplied the name of Mr C's partner to the developer without her consent. Officer 1 indicated that he raised this with the councillor who denied having such contact with the developer (whom she had never met).

20. With regard to the condition relating to the mill lade, Officer 1 confirmed that the developer required to comply with this before the development was complete (and in the meantime required to meet his 'civil obligations' in terms of land drainage).

21. On the inaccuracy in the original plan submitted by the developer, Officer 1 noted that this resulted in building work being significantly closer to Mr C's boundary fence than anticipated. He confirmed that this was drawn to the attention of the developer who ceased building, and thereafter, following discussion with the Council, submitted a revised plan showing the building to be approximately 300mm closer to the boundary and also involved it being rotated (anti-clockwise) by some 5 degrees.

22. Officer 1 informed Mr C that, under the terms of section 64 of the Town and Country Planning Act 1997, it was open to the Council to vary the planning permission if they considered that the amendment was not material. In this case the Council determined that the amendment was non-material, in that the distance between the two buildings was satisfactory and this was augmented by the existence of boundary fencing and trees.

23. With regard to Mr C's concern about 'overlooking', Officer 1 explained that the Council arranged for a new survey of the site to ascertain whether the house was being constructed in compliance with the approved floor level. In this context he confirmed that the survey showed that there was no material deviation between the approved level and the 'as-built' floor level. Notwithstanding this, Officer 1 commented that, in view of Mr C's expressed concern on this issue, he believed that there was 'some opportunity for additional screen fencing or planting along the mutual boundary which would be of benefit to both parties'. However, he stressed that the distance between the two buildings met the required standard and the new house was constructed at the correct level. He indicated that, although there was

no basis to instruct the developer to carry out additional work, he could raise the possibility of screen fencing or planting with the developer on a voluntary basis.

24. Officer 1 concluded that there was no evidence that the Council failed to carry out their proper duties when processing the application. He explained that the Area Committee were entitled to approve the application in exercise of their discretion, and that the members had done so on the basis of 'sound planning reasons' and with 'all relevant information' to hand. He recognised that Mr C held a strong sense of frustration about the breaches of development control which had occurred, but confirmed that the planning authority acted properly and promptly in responding to the unauthorised actions of the developer, and that the amendments to the plan were permitted at the discretion of the planning authority after full consideration of all relevant factors, including Mr C's representations.

25. Mr C subsequently made further representations to the Council, to which the Acting Chief Executive (Officer 2) replied on 13 July 2005, making reference to Officer 1's earlier reply on (i) the procedural background (ii) the privacy standards (iii) the relevant planning factors and (iv) the steps taken on the breaches of development control.

26. Officer 2 indicated that:

'while you are entitled to hold the view that more generous standards should be applied, these are matters of professional judgement and are not indicators that the application was mishandled by the Department.'

27. Officer 2 confirmed that proper notification of all parties (including the Community Council) was carried out, and that the Community Council had a full opportunity to make representations.

28. With regard to Mr C's concern about the divulging of his partner's name, Officer 2 re-affirmed that the councillor did not have any contact with the developer. However, he noted that the planning officer had revealed the name of Mr C's partner on a copy letter which he provided to the councillor as a matter of courtesy

to keep her advised of the action the Council were taking. Officer 2 apologised for any embarrassment this caused, indicating that the 'courtesy action' was done with the best of intentions.

29. On the question of the plan inaccuracy, Officer 2 explained that the onus lay with the applicant to provide correct plans. Significant inaccuracies were normally picked up at site inspection prior to the preparation of the planning report, but more minor errors would not necessarily be identified. He explained that it was not normal practice for the planning authority to undertake detailed site surveys prior to determining planning applications.

30. In the written response to the Ombudsman's Office, the Head of Planning and Building Standards concluded that:

'full and proper consideration was given by officers and members to all representations received. There remains some disagreement over whether the Community Council were kept apprised of the progress of the planning application but I would stress that the Community Council were properly consulted on the application and their views were taken into consideration in the determination of the application.

We have attempted to broker an agreement between the developer and the complainant regarding boundary planting and fencing that goes beyond what is required by the terms of the planning consent. Unfortunately the relationship between the parties and opportunity for co-operation is such that I would now question whether further progress could be made on this matter.'

### **Conclusion**

31. I am satisfied that the application in question was processed properly in accordance with the statutory notification procedure and the Council's planning policy and procedure; and that all relevant planning factors – including Mr C's representations and those made by other interested parties and consultees – were taken into account by the Council before they made the award of planning

permission. This discretionary decision, taken without maladministration or service failure, is not open to challenge by the Ombudsman.

32. My investigation also established that the Council took proper action to regularise the unauthorised actions of the developer in accordance with their approved planning procedure. Again, there was no administrative basis on which to challenge their position on this aspect of the complaint. In these circumstances the complaint of maladministration is not upheld.

27 June 2006



**Explanation of abbreviations used**

Mr C	The complainant
Officer 1	The Council's Head of Development Control
Officer 2	The Councils Acting Chief Executive
The Council	Scottish Borders Council