

Case 200500953: Glasgow City Council

Introduction

1. The complaint was made by Ms C (the complainant) against Glasgow City Council (the Council). The complaint concerned the Council's handling of an application for planning permission for the part-use of a shop for the manufacture of Asian sweets and the erection of a ventilation duct at the rear of the premises. Ms C's property was adjacent to the shop. She contended that the Council, as the local planning authority, wrongly granted consent for this use and subsequently failed to ensure that the ventilation duct was positioned and operated properly. The complaint was not upheld.

The Complaint

2. Ms C made a formal complaint to the Council on 7 July 2005, alleging that the location and operation of the ventilation duct was adversely affecting her property, in that it interfered with the operation of the flue serving her central heating system. She alleged that the Council failed to deal with the original planning application properly and failed to take appropriate enforcement action on being alerted to the problem. The Council replied to this on 5 August 2005, contending that they had complied properly with the required planning procedure; and explaining that they believed the matter was a 'common ownership' problem with regard to the wall on which the equipment was positioned; and that such a dispute required to be resolved through legal proceedings between Ms C and the operator of the shop premises.

3. Ms 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 she was caused injustice.

4. Specifically Ms C raised issues relating to:

- the terms of the planning permission;
- the consideration of representations;

- the outcome of the planning inspection;
- the enforcement of the gas safety regulations;
- the responsibility for the effects of the installation.

The Investigation and Findings of Fact

5. The investigation included examination of documentary evidence supplied by Ms C. A written enquiry was made of the Council, whose Customer Relationship Manager (Chief Executive's Department) provided relevant background information which included:

- the relevant correspondence with Ms C;
- the planning report;
- the representations made by local residents;
- the relevant committee minutes.

6. The Council confirmed that the shop was the subject of a planning application which was granted, subject to conditions, by the Council's Sub-Committee on Development Applications on 25 June 1996. A condition was attached to the planning permission requiring that a ventilation duct be erected to the rear wall of the premises to remove cooking fumes.

7. Given that the wall was in common ownership, all the owners of the property were required to be notified of the application; the list of owners supplied when the application was submitted included Ms C. The notification of neighbours took place in January 1996, as certified by the shop operator's agent on 15 February 1996. In addition, there was a public advert for the proposal placed in the local newspaper on 23 February 1996. The Council received two letters of objection; 13 letters of support from the public and three letters of support from the local councillor. Ms C did not make any representations to the Council. Ms C indicated

that, at that point, she had recently moved into her flat and did not remember receiving the notification.

8. The planning report on the application (which was retrospective) noted the representations which were received; and that the Environmental Services Department (the Department) were consulted on the possibility of noise and smell from the premises. The Department had no objection to the application subject to the imposition of appropriate conditions relating to the installation of a ventilation duct; control of noise; and the restriction of the type of food production to Asian sweets. The Department indicated that complaints about smell were received by two owners of nearby flats (not including Ms C). However, the Department confirmed that no evidence of odours permeating neighbouring properties was found.

9. The planning report noted that the planning issues in question related to:

- (i) whether the proposal was consistent with the approved local plan; and
- (ii) whether there was any material consideration to justify a departure from the development plan.

10. The report indicated that the adopted local plan presumed against increasing the number of hot food shops and restaurants in the area; and that the application was contrary to the terms of the local plan. The report considered that the level of operation (i.e. food preparation) of the premises was not ancillary to the main use of the property as a shop and, in these circumstances, recommended refusal of planning permission, on the grounds that the proposal was contrary to the policy relating to hot food shops in the local plan and was detrimental to residential amenity.

11. However, notwithstanding this recommendation, the members of the Sub-Committee agreed to defer their decision on the matter to allow the Planning Department to investigate the exact nature of the use of the premises, which was not considered to be a 'run-of-the-mill' hot food shop.

12. Further inspection of the premises showed that the use was not primarily a standard hot food shop, which was defined as a shop where the primary use was the retail sale of hot food to the public; a shop primarily selling cold food was in a different use class. The shop was primarily a cold food shop with ancillary sale of hot food and the preparation of both hot and cold food in the back area.

13. The planning report of inspection took the view that the use of the shop did not fall within the local plan policy. Based on the additional information supplied by the Planning Department, the members of the Sub-Committee agreed to approve the application subject to conditions, including the installation of a ventilation duct on the rear wall. This condition was stated as below:

'A ventilation system incorporating an air dilution and/or filtration system shall be installed and operational prior to the commencement of the use and thereafter shall be maintained, all to the satisfaction of the Director of Planning and Development. Details of the ventilation system shall be submitted to and approved by the Director of Planning and Development in writing prior to the commencement of works.'

14. In November 2003 Ms C was proposing to install a new gas boiler for her central heating system; she sought quotes from two suppliers who inspected her property, including the rear wall. Gas engineers from both suppliers pointed out that the ventilation duct from the shop premises was positioned too close to the flue serving Ms C's existing gas boiler (located in her kitchen) and that the operation of Ms C's flue had caused damage to the ventilation duct. Ms C said that they told her that this contravened the gas regulations and, therefore, it was not possible to install a new boiler in the same position. She was told that the new boiler would require to be re-located in another part of the kitchen, which would involve extensive re-modelling of the kitchen layout at considerable expense.

15. Ms C subsequently contacted the shop operator about this, but received no response.

16. Ms C then contacted the Council's Planning Department, who confirmed that planning permission had been granted in 1996, subject to a condition requiring the

installation and operation of the ventilation duct.

17. Thereafter Ms C approached the Council's Department of Building Control and Public Safety, who inspected the rear wall of the property and replied to her on 8 December 2003 in the following terms:

'The gas flue terminating from your property has indeed damaged the ventilation duct of the (shop premises). However since these items may not have required individual building consent this service cannot intervene in the matter.

As you have requested, I shall forward a copy of your original letter to the Environmental Health Service as well as pictures of the offending flue/duct.'

18. Subsequently (10 March 2004) one of the gas suppliers who had visited Ms C's flat wrote to her to confirm that they would be unable to install a new boiler in the existing boiler position. They explained that the flue termination point of the boiler required to be a minimum distance (600mm) from any facing surface and in this context they pointed out that:

'If the ventilation pipe that is blocking your existing flue was installed after your existing boiler installation, the ventilation pipe shall be deemed as contravening regulation 8 (Gas Safety [installations and use] Regulations 1994) and should be adjusted accordingly'

19. Ms C then approached the University of Strathclyde Law Clinic, who made representations to the Council's Planning Department on her behalf.

20. The Director of Development and Regeneration Services replied to the Law Clinic on 16 July 2004, indicating that:

'The description of the above application was for part-use of shop for manufacture of Asian sweets and erection of rear ventilation duct.

From the facts and presentation of your letter I have to assume that you consider Glasgow City Council was wrong to grant the above consent because the ventilation duct would cause a contravention of the Gas Safety Regulations to which you refer.

That being the case, I have to advise that there is no consultation obligation imposed on local authorities regarding gas installations (see Article 15 of the Town and Country Planning (General Development Procedure (Scotland) Order 1992 (as amended)). Accordingly, I view this matter as involving issues outwith the ambit or responsibility of the Planning Authority.

Therefore, I do not believe that the Planning Authority have any obligations or responsibilities regarding [Ms C's] gas boiler or its possible replacement.'

21. Ms C also made representations to her local Councillor, who contacted the gas supplier that had written to her earlier on the matter. The supplier wrote to the Councillor (3 March 2005) in the following terms:

'Unfortunately an installation of a new boiler in the existing position would be against C.O.R.G.I. (Council for Registered Gas Installers) regulations regardless of the flue direction. I had the local C.O.R.G.I. inspector out to the property and, as I suspected, he confirmed this.

I feel the only route left to [Ms C] is to re-position a new boiler elsewhere in the kitchen.'

22. In reply to Ms C's formal complaint to the Council's Chief Executive, the Customer Relationship Manager wrote to her on 5 August 2005, explaining in full the background to the planning consent which was issued for the use of the shop premises.

23. It was confirmed that:

'Glasgow City Council, as the Planning Authority, does not have the responsibility to check if the duct can be erected or if some other owner's interests are being affected. The planning interest lies with dispelling fumes properly from the business. If the duct could not be erected for any particular legal reason, then the applicant could not implement the planning permission issued by the City Council and the use, if operational, could be exposed to enforcement action. This matter actually had to be threatened as, after permission was granted, the applicant did not immediately erect the duct. This matter therefore appears to be a common ownership issue with regard to the rear wall. The implications of this, however, need to be checked by you through your own legal advisor.

I have been informed that a DRS enforcement officer spoke to you by telephone and advised that, owing to the existing planning permission, the matter could not be processed any further by the Department. However I understand that a letter to this effect was not sent out formally detailing our reasons for this. On behalf of Glasgow City Council I apologise for this.

Having examined all the circumstances I have been unable to find any information which changes the substance of the planning reasoning already detailed above. The matter is one which now relates to the ownership of the back wall and is more a dispute between common interests and I regret that it is not an issue with which the Planning Authority can have any involvement. However given the concerns you have expressed the property will be visited to ensure that the conditions attached to the permission are being complied with.'

24. With regard to the visit mentioned above, the Council confirmed that, following an inspection of the premises, the Director of Development and Regeneration Services wrote to the (new) shop operator (25 August 2005) drawing

attention to the terms and conditions of the planning permission issued in 1996, specifically to the conditions relating to the use of the premises for the sole benefit of the applicant; and the preparation and sale of hot food which required to be ancillary to the principal use as a cold food shop. The Director indicated that non-compliance with the conditions of the planning consent would be open to enforcement procedure.

25. The Council indicated that this aspect of the matter was on-going, and they were in correspondence with the current operator of the shop premises to ensure that the premises were in compliance with the original planning permission. The Council subsequently informed me that, in the absence of a proper response from the operator, they were proceeding with formal enforcement proceedings.

Conclusion

26. I consider that the documentary evidence contained within this report showed no evidence of administrative fault or service failure on the part of the Council in their determination of the planning application in question; having considered properly all the relevant planning factors – including the representations received for and against the application – the Council were entitled to exercise their discretion on the merits of the proposal and to award planning permission, subject to conditions, as they saw fit. They also ensured that the planning consent was implemented in accordance with the stipulated conditions, including the provision of a ventilation duct.

27. The difficulty experienced by Ms C in respect of the position and operation of the ventilation duct first arose some seven years after the grant of planning permission, at which point she proposed to replace her gas boiler, and was alerted to the problem. However, in my view, this problem was not a consequence of any fault or failure on the part of the Council, who I consider had acted in accordance with their planning policy and procedure; rather it resulted from the actions of the shop operator in installing the ventilation duct too close to Ms C's existing boiler flue.

28. On being notified of the problem, the planning authority informed correctly Ms C's representative of their position on the planning situation; and they also explained correctly that the problem was one which required to be settled privately

between Ms C and the shop operator as a common ownership matter. It was open to Ms C to pursue such settlement through informal negotiation with the shop operator or through formal legal proceedings.

29. In these circumstances, and in the absence of any evidence of maladministration by the City Council, I do not uphold the complaint.

27 June 2006

Explanation of abbreviations used

Mr C	The complainant
The Council	Glasgow City Council
The Department	Environmental Health Services Department