

Scottish Parliament Region: North East Scotland

Case 200502249: Dundee City Council

Summary of Investigation

Category

Local government: Land and property, Policy

Overview

The complaint relates to the installation of a fire wall by Dundee City Council (the Council) in a property which is partly owned by the complainant (Mr C). Mr C was aggrieved that the Council had not obtained his consent prior to installing this fire wall.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the Council instructed works to install a fire division wall without Mr C's consent as owner (*upheld*);
- (b) the Council failed to respond to Mr C's correspondence asking them to explain the legal basis for installing the fire division wall (*partially upheld*); and
- (c) the Council wrongly awarded grant aid to other owners (*no finding*).

Redress and recommendation

The Ombudsman recommends that the Council apologise to Mr C for the failings identified in the report. The Council have accepted the recommendation.

Main Investigation Report

Introduction

1. On 15 November 2005 the Ombudsman received a complaint from the non resident owner (Mr C) of a property in a tenement building that Dundee City Council (the Council) had not carried out correct procedures in commissioning works to the block.
2. The complaints from Mr C which I have investigated are:
 - (a) the Council instructed works to install a fire division wall without Mr C's consent as owner;
 - (b) the Council failed to respond to Mr C's correspondence asking them to explain the legal basis for installing the fire division wall; and
 - (c) the Council wrongly awarded grant aid to other owners.

Investigation

3. The investigation was based on information provided by Mr C and the Council's response to a written enquiry. Mr C had the opportunity to comment on the Council's reply and both the Council and Mr C have had the opportunity to comment on an earlier draft of this report.
4. Mr C is the non-resident owner of a ground floor property at 1 X Street that was formerly owned by the Council.
5. In 1999, the Council as part of their Comfort and Security Programme decided to upgrade properties in their ownership at 1-12 Y Street and 1 and 3 X Street. Part of these works included the installation of a fire division wall in the attic space mutual to 1 and 3 X Street. At the outset, Mr C's share of the common repairs (£15,430) and improvements in the form of the fire walls (£1330) was estimated at £2184 (this included a sum of £155.40 plus VAT for the fire wall). As a non-resident owner Mr C was not himself eligible for grant aid for the works. He also had concerns about the proposed works.
6. A Housing Officer (Officer 1) in the Council's Improvement and Maintenance Unit wrote to Mr C on 15 November 1999 informing him that if he refused to give his consent to the proposals, none of the works would attract grant assistance.

She stated that the written agreement of all owners within the block was required before the installation of the fire division wall could be carried out. The same statement was made at a meeting between the Unit and private owners on 2 December 1999. The minute records a Project Officer (Officer 2) stating that grants were available, that they were dependent on the installation of a fire division wall and that all the owners in the block had to consent to this. A pro forma was sent to Mr C to complete but was not returned. Mr C subsequently raised a number of points with regard to the minute of the meeting in a letter of 18 February 2000 received by the Director of Housing on 9 March 2000.

7. In a further letter of 21 February 2000, Officer 1 informed Mr C that the installation of the fire wall was a work of improvement requiring the written agreement of all owners within the block. Officer 1 also stated that it was a mandatory condition of any offer of grant. If any owner refused to consent to the fire wall being installed, then all offers of grant for the block would require to be withdrawn. Officer 1 informed Mr C that if he were to agree to the installation of the fire wall and the cost of his share was to be met by the consenting owners within the block, then the fire wall could be installed and grant assistance could be reinstated for the other owners towards their own share of the mutual repairs and improvements. A further pro forma was sent to Mr C for him to complete.

8. Mr C responded on 23 February 2000 expressing his concern about legal and financial implications as to whether 1 and 3 X Street could be regarded as a 'one shell building'. He stated that he had raised these concerns at the meeting on 2 December 1999 but still awaited clarification of the future status of the building should the installation of a fire division wall be agreed.

9. In a reply of 6 March 2000, Officer 1 stated that the installation of a fire division wall might well have future financial implications in relation to mutual repairs, however, it would have no bearing on the definition of the 'shell' at 1 and 3 X Street. Officer 1 set a deadline of 10 March 2000 for return of the pro forma and stated that, if the form was not returned by that date, it would be assumed that Mr C did not wish the improvement to go ahead.

10. The Director of Housing wrote to Mr C on 28 March 2000 responding to the points raised in his letter of 18 February 2000. With reference to Mr C's letter of

23 February 2000, the Director stated that the Council's Legal Section had advised that the installation of the fire division wall would not change owners' areas of mutual responsibility. The Director reminded Mr C that the authority awaited Mr C's agreement to the installation of the fire wall and stated that she would welcome an early reply. Mr C did not subsequently return his form confirming whether or not he agreed to the installation of the fire division wall.

11. The Council held subsequent discussions with the five other owners at 1 and 3 X Street. They agreed to meet Mr C's share of the cost of the fire division wall. The Director of Housing thereafter instructed the installation of the fire wall. The work was completed in the summer of 2000 while Mr C was on holiday.

12. Officer 2 wrote to Mr C on 19 September 2000 informing him that the Director of Housing had made the decision for the following reasons:

- failure to comply with this specific grant condition would 'cost' the five owners sums in the region of £1000 - £2500 in grant assistance; and
- the City Council's desire to protect its own investment by way of reducing risk of the spread of fire.

13. In a response of 29 October 2000, Mr C sought an explanation from the Director of Housing as to why the unanimous written agreement of all the owners (previously stated to be mandatory) was no longer deemed necessary.

14. A Principal Housing Officer in the Improvements and Maintenance Unit (Officer 3) responded to Mr C on 2 November 2000. He stated that the fire wall had been installed at no charge to Mr C. Because it was a condition of grant for all owner occupiers on the block, they had agreed to pay the additional share of the wall in order that they could attract grant assistance to offset up to 50% of their overall bills.

15. Mr C responded to Officer 3 on 12 November 2000 seeking an explanation of what legal authority the Council had to install a fire wall in the mutual roof space without Mr C's written agreement as one of the owners. He also asked whether the unanimous written agreement was an essential requirement of a successful grant application.

16. There was no reply to this letter and Mr C next raised the matter in a telephone call to Officer 3 in October 2001 when he repeated his request for an explanation. When this was not forthcoming he telephoned an officer in the Finance Department on 25 January 2002. After speaking with an officer in Housing, she had said that Mr C would hear from the Council's Legal Department regarding his concerns. Mr C confirmed the content of this telephone call in a letter of the same date sent special delivery to Officer 3. He confirmed that since he had not received the explanation he sought, he had decided to suspend his monthly instalment payments towards his share of the costs of repair works.

17. There was no acknowledgement or reply to this letter and Mr C suspended his instalment payments towards his share of the costs.

18. On 15 November 2004 the Council's Finance Service wrote to Mr C noting that a balance of £2913.58 owing from him remained on the project account. Mr C, on receipt of this letter, spoke to an officer in Finance (Officer 4) and followed this up with a letter of 23 November 2004. Mr C stated that he had been told by Officer 4 that Housing had met his concerns. Mr C maintained that this was not the case and that he still awaited clarification of the Council's behaviour. He confirmed that he had written to Officer 3 on 25 January 2002. Mr C did not enclose a copy of that letter. When Officer 4 phoned to request a copy, Mr C wrote on 26 November 2004 saying Officer 3 should be able to provide this, but should she fail to obtain a copy, Mr C could provide this from his file.

19. On 1 December 2004, a council solicitor (Officer 5) wrote to Mr C to say that the letter of 25 January 2002 had been misplaced and she asked for a copy. Mr C replied on 13 December 2004 stating that the letter of 25 January 2002 had been sent special delivery. He would not send a copy until he saw the Council's file.

20. Officer 5 responded on 23 December 2004 stating that the position had been clarified in the Council's letter of 19 September 2000. She pointed out that an invoice sent to Mr C on 14 September 2000 for £3913.58 had made it clear that Mr C had not been charged for the fire division wall. He had thereafter paid 9 instalments totalling £1000 between 8 November 2000 and 30 October 2001 leaving a balance of £2913.58. Officer 5 stated that, in terms of the title deeds, the Council retained the right to arrange and effect mutual repairs to the property and

the proprietors, whether they consented or not, were bound to pay their respective share of the costs. The solicitor maintained that the Council had acted in conformity with this provision 'in respect of the repairs work for which you have been charged' and that Mr C's concerns over the fire division wall had no bearing on his liability for the cost of the other repairs work. Officer 5 saw no reason for Mr C to continue to withhold payment of the outstanding £2913.58.

21. In a further letter of 14 February 2005, Mr C took up the question of his letter of 25 January 2002 having been 'misplaced'. He stated that the nature of his objections had been ignored and that the Council had not addressed his concerns. In response, Officer 5 again sought a copy of the letter of 25 January 2002 to enable her to reply to specific issues raised therein. She reiterated the Council's position that, notwithstanding Mr C's concerns about the installation of this fire division wall and award of repairs grant to other owners, he was still due to pay his share of mutual repairs and the Council were commencing court proceedings. Mr C replied on 15 March 2005 but did not provide a copy of the 25 January 2002 letter. He stated that his concerns were also set out in his letters of 21 February 2000, 19 September 2000, 29 October 2000, and 12 November 2000.

22. Legal proceedings were raised against Mr C on 23 March 2005. Mr C was out of the country at the time but he left instructions with his solicitors. They wrote to the Council on 12 April 2005 saying they had been given instructions to settle. The Council informed the solicitors on 13 April 2005 that they were seeking expenses of £209.80 and outlays of £50.93. In a further letter of 15 April 2005 the Council confirmed that they would not take decree if everything was paid by 9 May 2005. Mr C obtained and submitted a banker's draft in the sum of £3174.31.

23. On 9 May 2005, Mr C's solicitors wrote to the Council seeking clarification in writing within 21 days of their previous statement that the award of grant was dependent on all owners agreeing to the installation of the fire division wall. They also sought reimbursement of Mr C's court expenses.

24. In her response of 8 June 2005, Officer 5 informed Mr C's solicitors that the installation of the fire division wall was necessary for the grant to be awarded. The other owners had agreed to pay Mr C's share to allow the fire wall to be installed but did not receive any grant in respect of this additional cost to them. Officer 5

accepted that the Council's letter of 21 February 2000 could be interpreted to suggest that consent to the installation of the fire division wall was a necessary criterion for award of grant. However, it was the installation of the fire division wall which was the determining factor in the grant being awarded. Once the fire division wall had been installed, the grant became payable. Officer 5 accepted that the consent of an owner is required for works involving an element of improvement to property. She continued:

'In this case the five owner/occupiers in the tenement block provided their consent to the installation of the fire division wall. They recognised that the fire division wall would enhance the safety of their homes. They were willing to work with the Council with a view to achieving this end. They also recognised that the fire division wall would add to the value of their property. So convinced were they of the benefits of the fire division wall that they agreed to meet your client's share of the installation cost of the same. In all of these circumstances, and allowing for the fact that although an owner of one of the flats in the block, your client did not reside there, the Council took the view that the fire division wall should be installed. In so doing, it is of the view of the Council that it acted in an entirely appropriate and proper manner.

25. In light of the above, the Council does not consider it appropriate to refund to your client the legal expenses incurred in the earlier court action.'

26. Mr C's solicitors responded to the Council that nowhere in the Council's response did they make reference to their justification in law for installing the fire division wall without Mr C's consent and they considered it doubtful that they could persuade Mr C that the council acted *intra vires*.

27. Officer 5 replied on 29 June 2005. She stated that the fire division wall had been installed for the security and safety of residents in the block. The Council's position was that they had acted in an appropriate and proper manner.

28. In a final letter to the Council's Chief Executive, on 7 July 2005 Mr C's solicitors complained that no legal justification had been provided by the Council for installation of the fire division wall and indicated their client intended to pursue the matter with the Ombudsman's office.

29. The Chief Executive in his reply of 12 July 2005 stated that, in his view, the actions taken by the Council to ensure work relating to the fire division wall went ahead and ensured safety of the residents was in line with what he would have wished to happen. He supplied a copy of the Ombudsman's leaflet.

30. Mr C submitted his complaint to the Ombudsman on 13 November 2005.

31. On receipt of the complaint I wrote to Mr C on 18 November 2005, stating that it was not the role of the Ombudsman's office to pronounce on the legality or otherwise of the Council's actions as majority owner or feu superior. Also the question of whether grant aid was wrongly awarded to other owners or constituted an alleged abuse of public funds was more appropriately one for Audit Scotland. In order to clarify the matter I asked Mr C to expand on the legal and financial implications installation of the fire division wall in the attic had had for him as owner.

32. In his response of 9 January 2006, Mr C stated that the Council had regarded the two properties at 1 and 3 X Street as one tenement block sharing the same roof space. Mr C stated that in his view the legal status of the building had changed with the installation of the fire division wall. He continued to have a financial obligation for mutual repairs to both buildings. Mr C said that the Council's illegal action, continued prevarication, and refusal to provide the legal basis for their decision to install the wall had involved him in addition to his costs in time, postage and telephone calls with the following costs:

- installation of fire division wall (exclusive of VAT and fees) £155.40
- payment of the Council's costs of their legal action £261.31
- his own solicitor's fees £335.70

33. I made enquiry of the Council by letter of 9 February 2006, and the Council responded on 9 March 2006.

The council's response

34. The Council stated that in terms of their disposition of the property to Mr C's mother they retained rights as majority owners until all flats owned by them are sold, to instruct works of common or mutual repairs, maintenance, renewal, replacement or decoration and to charge other proprietors their respective shares.

In terms of the Disposition, there is no specific provision relating to instruction of works of improvement to the common property of the tenement block. The Council stated to Mr C that the consent of all owners was required to enable the installation of the fire division wall to take place. This was their general practice and was not a misrepresentation. In the event they had sent a form giving him the option to agree or not to agree. Mr C did not give his written consent but also did not return the form nor did he advise the Council in writing that he did not agree to the installation. The Director of Housing had confirmed with the Council's Legal section that if the wall was installed the owners' legal obligations to maintain the mutual roof void at 1 and 3 X Street would remain the same. While all owners of flats were advised when works were about to commence, the Council's files do not record that Mr C was specifically advised prior to the fire division wall being installed.

35. The Council maintained that Mr C had sought to link his liability for his share of the mutual repairs with the fire division wall (for which no charge was made to him). They maintained that it was Mr C's delay in meeting his share of the costs of the common repair that resulted in the legal action being taken against him. In their view, after taking legal advice, Mr C appeared to accept his liability for the amount due. To minimise his expenses, the Council accepted that payment would be made without requiring Mr C to lodge a Notice of Intention to defend the action in the required timescale. This reduced the expenses to the undefended rate (£260.73) rather than the higher defended action rate of £1034.39.

36. The Council pointed that each of the other owners who resided in the property accepted that the fire wall would enhance both the safety and value of their respective properties, were anxious to proceed, and were willing to meet Mr C's share in order that they could meet the condition for award of grant. In these circumstances, the Council considered it appropriate and proper to instruct the installation of the fire division wall. The Council stated that the charge of £155.40 mentioned by Mr C was not made. The expenses were properly due to the Council. They noted that Mr C's solicitor's expenses arising from their court action against Mr C were higher than their own, but presumed that they were properly charged. The Council did not consider Mr C to have suffered any injustice as a result of the Council's actions.

The complainant's comments

37. Mr C considered that the Disposition in fact gave the Council near monopoly powers and gave their officers a mentality that they were under no obligation to meet his concerns. The Council had failed when asked to provide legal justification for their actions. In his view, without the installation of the fire wall (and implicitly his agreement) there should not, according to the Council's earlier correspondence, have been any access to public funds or grant. He pointed out that Officer 1 in writing to him on 6 March 2000 had informed him that if he did not respond by 10 March, then it would be assumed that he was withholding his agreement. He was concerned that, even after the installation of the fire wall he continued to have legal and financial obligations for both buildings at 1 and 3 X Street. Mr C stated that he made 9 payments totalling £1000 between 8 November 2000 and 30 October 2001 but had suspended further payments until his concerns were addressed. Mr C accepted that he had not been charged for the fire wall installation but stated that the original estimate of works had risen from £15430 (with his share being £2184) to £30540 (with his share £3913.58).

(a) Conclusion

38. I believe that in early 2000, prior to the installation of the fire wall in the attic, the Council responded to Mr C's stated concern about the consequence for 1 and 3 X Street by stating that it would still be regarded as a single shell (paragraph 10). Mr C did not pursue any legal argument why that should not be the case.

39. The Council were motivated to act with the best of intentions to secure the repair of the property, to enhance its safety, and to secure grant aid assistance for eligible owners. However, they instructed the works of improvement not only without Mr C's agreement but also after stating to him that a non-response would be taken to be a withholding of agreement. I regard that as poor practice amounting to maladministration and I uphold the complaint.

(b) Conclusion

40. The complainant knew that he had not given consent as an owner for the installation of the fire wall division. If he thought the Council had acted illegally, then he could have sought the advice of a solicitor and pursued such action as they advised. I believe the Council fully justified in correspondence why the fire

wall was both desirable and necessary. They avoided Mr C's question on their authority for commissioning the works without his express consent. For his part, Mr C linked the Council's failure to reply on this point, with a decision to default on his obligations to continue his instalment payments for the repairs (paragraphs 16 and 20). It is unfortunate that it took the Council two years to realise Mr C was in default and to initiate recovery action. Mr C gained financially by having use of those funds for that period. I partially uphold the complaint to the extent that the Council did not answer Mr C's specific question. I believe that Mr C's action to withhold obligatory payments to repay the costs incurred by the Council in carrying out mutual repairs was not justified and that he was, therefore, liable for the court costs and fees.

(c) Conclusion

41. I informed Mr C by letter of 18 November 2005, that a complaint that the Council wrongly awarded grant aid is a matter for the Council's auditors and for Audit Scotland. I have not investigated this complaint and, therefore, make no finding.

Recommendation

42. The Ombudsman recommends that the Council apologise to Mr C for the failings identified in the report. The Council have accepted the recommendation.

27 February 2007

Explanation of abbreviations used

Mr C	The complainant
The Council	Dundee City Council
Officer 1	A housing officer
Officer 2	A project officer
Officer 3	A principal housing officer
Officer 4	A finance officer
Officer 5	A Council solicitor
X Street	The street where Mr C owned a ground floor flat and where the council upgraded some properties
Y Street	A street where the council upgraded some properties