

Case 200502318: North Ayrshire Council

Summary of Investigation

Category

Local government: Building Control: consideration of application for building warrant

Overview

The complainant (Mr C) raised a number of concerns on behalf of his adult daughter (Ms C) relating to the handling by North Ayrshire Council (the Council) of a building warrant application in respect of the conversion of a former hotel into two flats. Following Ms C's purchase of one of the flats, substantial work had been required to eradicate rot and, although a certificate of completion had been issued, a number of matters remained outstanding.

Specific complaints and conclusions

The complaints from Mr C that have been investigated are that:

- (a) the Council mishandled the application for building warrant for the conversion of the former hotel into two flats (*not upheld*);
- (b) the Council issued a certificate of completion in respect of that warrant before works were completed (*not upheld*);
- (c) the Council failed to deal in a timely manner with non compliance by the builder with the approved access dimensions in the planning consent (*partly upheld*); and
- (d) in terms of the listed building consent, the Council allowed new windows to be installed that failed to comply with Historic Scotland's stipulation of like for like replacement (*not upheld*).

Redress and recommendation

The Ombudsman recommended that the Council apologise to Mr C for their failings in respect of (c). The Council accepted the recommendation.

Main Investigation Report

Introduction

1. The complaint was made by Mr C on behalf of his adult daughter (Ms C) who contracted in late 2003 to purchase a flat in a former hotel in the area of North Ayrshire Council (the Council) on which conversion works were then progressing. The complaint concerns aspects of the works undertaken in terms of the building warrant, listed building consent and planning consent which Mr C and Ms C considered to be unsatisfactory. I clarified in a letter to Mr C that any concern he had about the quality of workmanship was a separate matter for them to take up with the development company from whom Ms C purchased her flat.

2. The complaints from Mr C that I have investigated are that:

- (a) the Council mishandled the application for building warrant for the conversion of the former hotel into two flats;
- (b) the Council issued a certificate of completion in respect of that warrant before works were completed;
- (c) the Council failed to deal in a timely manner with non compliance by the builder with the approved access dimensions in the planning consent; and
- (d) in terms of the listed building consent, the Council allowed new windows to be installed that failed to comply with Historic Scotland's stipulation of like for like replacement.

Investigation

3. The investigation is based on information supplied by Mr C and the Council's response to my enquiry. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and the Council were given an opportunity to comment on a draft of this report.

4. An application for building warrant (the Building Warrant) from a development company (the Builder) to alter and change the use of a former hotel in a coastal town to form two flats was registered by North Ayrshire Council (the Council) on 10 July 2003. The former hotel was a listed building. Applications for planning consent and listed building consent were also made to the Council.

5. The Council's records indicate that, following consultation with Historic Scotland, specified conditions were included in a listed building consent which was issued to the Builder together with his planning consent on 28 August 2003. Following a request by the Council on 30 July 2003 for further information, further plans and specifications were submitted by the Builder. The Council's Building Standards Service found the proposals acceptable and the Building Warrant was issued on 29 August 2003. However, an amendment was received by the Council on 8 December 2003. Following an application by the Builder for a Certificate of Completion on 20 January 2004, a final inspection was carried out by an officer of the Council's Building Standard Service on 21 January 2004. Thereafter a second amendment to the Building Warrant was received by the Council on 29 January 2004. The Certificate of Completion was issued on 30 January 2004.

6. Mr C's daughter (Ms C) contracted with the Builder to buy the lower flat in late 2003 with a date of entry of February 2004. Soon after moving in, she noticed that new plaster work in the living room, hall and front bedroom showed signs of dampness. She reported these matters to the Builder.

7. On 19 May 2004, Ms C wrote to the Council's Road Safety Officer saying that she had agreed a location for parking for her car with the Builder in November 2003 and had stated that she planned to build a garage nearby. She had found that before she moved in, the Builder had changed the location of the car parking provision without her permission. This had restricted sightlines when she emerged from her driveway on to the main road. She queried whether the change had been agreed by the Planning and Road Safety Departments. This letter was received by the Roads Department on 21 May 2004.

8. The Council's Head of Roads responded on 31 May 2004 to say that the width of the access to Ms C's double driveway (at 4.3 metres) was not acceptable. The absolute minimum was 5 metres. The Head of Roads recommended that the gap in Ms C's front fence be widened to 7.0 metres, that she raise the issue with the Builder, and request him to adjust the width of the driveway opening. The Head of Roads provided contact details of a Planning Officer (Officer 1) and stated that, as the current width of the opening was contrary to the planning consent, Officer 1 should be able to ensure the Builder provided the correct details. Ms C next raised the matter with the Council in early May 2005.

9. Ms C's solicitors then subsequently engaged in correspondence with solicitors instructed by the Builder (the Builder's solicitors). Remedial works were agreed to start on 1 March 2005. Ms C vacated her home, moved furniture and carpets out from the lounge and main bedroom, and work started as planned. On 12 April 2005, however, the Builder's contractors stopped work after rotted floor joists had been uncovered.

10. Following an exchange of correspondence, the Builder's solicitors wrote to Ms C's solicitors on 6 May 2005 setting out a programme with a planned restart of works on 9 May 2005 and a completion date of 21 May 2005. They also offered to make payment of compensation to Ms C on completion of the works. This proposed payment would be in full and final settlement of all rights of action against the Builder. The works were not implemented immediately.

11. Ms C contacted the Council in early May and was advised by the Chief Development Control Officer in a letter of 10 May 2005 to contact Officer 1. Officer 1 carried out an inspection on site. In a letter of 20 May 2005 to Ms C he confirmed that, having checked the approved planning permission, there was no breach of planning. He stated that he had also consulted with Building Control who indicated that Ms C's present complaints regarding the Builder did not fall within the remit of their legislation. Ms C was advised to continue to pursue her complaints through her solicitors since it was a legal matter between her and the Builder.

12. A further letter from Ms C of 18 May 2005 was forwarded to Building Control and was responded to by a Senior Building Standard Surveyor (Officer 2) on 3 June 2005. Officer 2 responded to Ms C's points about an electricity meter not attached to a wall. He also stated that the damp patches and rot in safe lintels and joists would not have been inspected routinely by the Building Standards Service. Roof leaks were a matter for her to raise with the Builder. A point regarding a ground floor void raised by Ms C required clarification and he invited Ms C to contact him. Officer 2 concluded by emphasising that the Building Standards service did not carry out a clerk of works service and that their site inspections would have been limited.

13. On 10 June 2005 Mr C wrote to the Council's Chief Executive raising five issues:

- Mr C claimed the building was structurally unsafe due to rotten supporting floor and ceiling joists, rotten timbers and structural oak lintels which had dry rot. Mr C sought clarification on why Building Control had not pointed out fundamental requirements to the Builder;
- Mr C sought clarification of how the central heating system design had met Part L of the Building Regulations (Conservation of Fuel and Power);
- Mr C pointed out that an electricity meter was hanging from a wall and was supported only by the incoming cable. He claimed this was against wiring regulations and asked how the installation could have been passed by Building Control;
- Mr C stated that an operating and maintenance manual had not been provided in contravention of the Construction Design and Management regulations. Mr C asked who was responsible at central or local government to ensure these legally required documents were provided; and
- Mr C pointed out that the driveway at his daughter's home did not meet with the requirements set down by Planning.

14. Mr C stated that some remedial work had begun in his daughter's flat but Ms C had been homeless for 5 months while works got underway and no work had taken place in the past 3 months. Mr C alleged that, had the Council's relevant departments conducted themselves in a proper manner and not allowed major structural problems to be covered up, the problems would have been solved at the outset and he and Ms C would not be in their current position.

15. The Council's Manager – Protective Services (Officer 3) replied to Mr C's letter on 27 June 2005. In respect of the first point he stated that the existing elements of the structure were not inspected by Building Standards staff. As an existing building, the standards only applied to those parts of the application requiring to conform for the change of use (Building Regulation Note 1/2000). The structural members quoted by Mr C were outwith the scope of the Building Warrant and no indication was given to the Building Standards Section of any decay that might have been considered a danger. With regard to the central heating, the proposals satisfied parts J (J3.1) and Part Q (Q3.6) of the Building Standards Regulations. Mr C was asked to indicate how the central heating system did not

comply. Officer 3 stated that the electrical installation had been certified by the installer. The meter was part of the certified works which were not inspected by the Building Standards Section. In respect of the fourth point Officer 3 stated that the enforcement of the Construction, Design and Management regulations for building works lay with the Health & Safety Executive and provided their Glasgow address. Finally, referring to the fifth point, Officer 3 stated that the driveway/parking areas had been inspected by Officer 1 and were in compliance with the approved plans and conditions.

16. Officer 3 stated that the responsibility of the Building Standards service is to ensure that works approved in a building warrant are carried out in conformity to the Building Regulations. He stressed that they were not a clerk of works service who can inspect every stage of the works and construction. Where electrical compliance certificates were issued by the installer, no detailed inspection of that work is carried out by the Council. Officer 3 concluded by expressing his regret that Ms C had experienced problems, but suggested that the matters referred to should be taken up with the Builder and, in this respect, Mr C might wish to consult his legal adviser.

17. On 23 August 2005, Mr C wrote to the Chief Executive enclosing a photograph of the electricity supply meter at his daughter's flat which was only attached to the wall by its cables. The meter's reading remained at 00000 and the electricity supplier had written to Ms C stating that there was an unpaid electricity account. Mr C asked for a copy of the Electricity Compliance Certificate in respect of Ms C's property.

18. Ms C, in the meantime, corresponded with Historic Scotland relating to works on the property. Historic Scotland replied that if works which had been granted listing building consent or planning permission were not being carried out in terms with the consents, it would be a matter for the planning authority rather than for Historic Scotland. This correspondence was sent to the Council's Assistant Chief Executive and he responded to Ms C on 21 November 2005.

19. Mr C submitted a file of papers to the Assistant Chief Executive. The Assistant Chief Executive responded to Ms C on 5 December 2005. He asked for clarification of the matters in which the Council had allegedly failed to act under

building standards and planning legislation. He stated that the Council's Building Standards surveyors do not act as clerks of works and do not monitor the standard of workmanship undertaken. In those circumstances, the Assistant Chief Executive suggested Ms C seek legal advice on her options with regard to sub standard work alleged to have been undertaken at her property.

20. Mr C wrote to the Assistant Chief Executive on 20 December 2005, setting out eight points he wished an independent investigation to address. Mr and Ms C met with the Assistant Chief Executive and officers of the Planning and Building Standards Departments on 13 January 2006. On 20 January 2006, the Assistant Chief Executive wrote to Mr C addressing 13 points which had been raised at the meeting. These did not include points raised by Mr C in an appendix to his letter of 20 December 2005, including the car park and the relevance of the Health and Safety at Work Act.

21. In summary, the Assistant Chief Executive stated that the Building Standards Service is a regulatory service operating under the terms of the Building (Scotland) Act 2003. It did not provide an inspection regime akin to a clerk of works. Periodic inspections are carried out during the course of building operations to ensure works were being carried out in an appropriate manner and in accordance to plans submitted. The applicable standards current at the time the application was made were the sixth amendment of the Building Standards (Scotland) Regulations 1990. Whereas the technical standards are the prescriptive standard a building should meet to comply with the regulations that apply to a particular building, account had to be taken of other documents such as building regulation notes to ensure that the aim of the regulation was achieved. While the former hotel building was over a century old, the Regulations applied only to the parts that were new or where the Regulations did not apply previously. The main structure (walls, floors, roof, solum, lintels etc) were not part of a building warrant application except works to the walls/floor for thermal or sound insulation. The existing lintels were not within the scope of the Building Warrant. No inspection of the building was made or was required during the period of the work around the areas in question. The Assistant Chief Executive stated that the Regulations required minimum standards to apply to warrantable work. Issues of workmanship not comprising compliance with a regulation were outwith the authority's control. On a specific point, the Assistant Chief Executive confirmed that no seals would be expected in timber replacement

sash and case windows. Finally, he stated that a certificate of completion can be applied for at any time but would only be issued once the Building Standards surveyor was satisfied that all relevant works had been completed. It was a matter for the applicant or their agent to ensure the statement on the application for the Certificate of Completion is complied with. The Assistant Chief Executive stated that there was nothing within the applications nor the compliance certificates for electrical installation which suggested that any part of the applications was false. On that basis, they were received in good faith and accepted. Mr C was advised that if he remained unhappy he could lodge a further complaint with the Chief Executive.

22. Mr C wrote to the Chief Executive on 3 February 2006. He stated that he had received contradictory statements in letters of 31 May 2004 from the Head of Road Services and in the Assistant Chief Executive's letter regarding the width (4.3 metres) of the entrance to the car park. He also referred to the Building Warrant of 11 July 2003 being deficient in that it failed to recognise that fire regulations required the solum of each flat to be separate. He considered that the warning on the Certificate of Completion (that it was no guarantee of standard of workmanship) was a licence for poor workmanship. He considered that application for a certificate of completion before works were finished was prone to abuse. The Council's Certificate of Completion was in his view not worth the paper it was written on. He considered that seals were necessary to make the windows and doors weather proof.

23. Mr C's letter was acknowledged on 9 February 2006 and the Chief Executive replied on 6 March 2006. He stated that he had reviewed correspondence, received a report from the Assistant Chief Executive, and had discussed matters with two planning officers. He was satisfied that the Council had fulfilled its statutory duties in relation to the granting of the Building Warrant and subsequent issue of a Completion Certificate. He was satisfied also that Mr C's complaint had been dealt with in a professional, courteous and appropriate manner. The Chief Executive considered that Mr C harboured an unrealistic expectation of what is covered by the Planning and Building Standards legislation. In essence Mr C's grievances lay against the Builder and not the Council.

24. The Chief Executive considered one matter remained outstanding, namely the alleged breach of planning consent. He stated that the width of Ms C's driveway is 5 metres and as such accorded with the planning approval. The boundary fence which had been erected encroached on the driveway and reduced the entrance to 4.37 metres. The Chief Executive stated that the matter had been drawn to the attention of the Builder.

25. Mr C forwarded the Chief Executive's letter to the Ombudsman with a letter of 9 March 2006. He stressed that the windows in Ms C's flat had been installed in late 2003 without seals and that sash weights had been attached to ropes instead of chains. This was against Historic Scotland's insistence on like-for-like replacement. Mr C claimed that the order book of the firm who installed the windows could verify that the order was placed after the Certificate of Completion had been applied for.

26. In his response of 25 July 2006 to my enquiry of 15 June 2006, the Chief Executive stated that with regard to the access, while the Council had the option to seek compliance with the planning conditions, they had not done so because the non-compliance was minor and the Builder, when approached in March 2006, had confirmed his intention to do the work. (The works were in fact completed shortly before the Chief Executive wrote.) The Chief Executive also stated that in the application for Listed Building Consent for the property no specific reference was made to replacement windows. The replacement of windows in a like-for-like manner would be in terms of appearance only and would not necessarily require being the subject of Listed Building consent. The Chief Executive maintained that lack of draught proofing (seals) and the operating mechanism (whether the sash weights were attached to ropes or chains) would not be taken into account when dealing with an application for Listed Building Consent.

(a) Conclusion

27. I fully recognise that Ms C's enjoyment of moving into her flat in the former hotel has been severely impaired by her experiences of dampness, dry rot eradication works and other building related works. Both she and her father in my view had an unrealistic expectation that all the matters causing them concern should have been the subject of regulation by the Council in terms of the Building Standards Regulations and their powers of Development Control and responsibility

for Listed Building Consent. The Council's responses to the matters raised, dispel the notion that the finger of blame should always be pointed at them when things go wrong. They are factually correct in stating that they are not a clerk of works service and are, therefore, not the arbiter of whether the standard of workmanship in implementation of works associated with, but not a part of, a building warrant application are acceptable. In purchasing a new or newly converted property, a prudent purchaser should not simply rely on the display of a certificate of completion but should commission a full survey and use this to negotiate with the seller/developer to attend to any defects uncovered as part of the missives of sale.

28. Against this background, I see no concrete evidence that the Council mishandled the application for building warrant. If they had not been satisfied that the Builder's proposals met the Building Standards Regulations then they could have with-held the issue of the Building Warrant. I do not uphold this complaint.

(b) Conclusion

29. The certificate of completion was applied for by the Builder on 20 January 2004; an inspection was undertaken on 21 January 2004; an amendment to warrant was received on 29 January 2004 and the following day the Council issued the Certificate of Completion, being satisfied that there were no outstanding matters relating to the Building Warrant. It is possible to obtain a Certificate of Completion before works associated but not part of the Building Warrant, for example windows, pass doors or sanitary fittings, are installed. I do not uphold this complaint.

(c) Conclusion

30. It is unfortunate that it took over two years after the Head of Roads identified the width of the access to the driveway to be unacceptably narrow, for the matter to be rectified. While the Council would have had the power to take enforcement action, ironically, an enforcement notice in respect of a breach of development control would require to be issued on the person currently having ownership of the land to which the breach of control relates. After February 2004 that would have been Ms C rather than the Builder. I do not think this has been made clear to Mr C or Ms C. I note that the Builder altered the fence in July 2006. Because the Council have at times clearly contradicted themselves on the matter, I partly uphold the complaint.

(c) Recommendation

31. The responsibility for providing the driveway with sufficient width of access lay in the first instance with the Builder. The Ombudsman considers that the Council should apologise to Mr C for the contradictory information given to him. The Council accepted that recommendation.

(d) Conclusion

32. The Chief Executive has stated that in the application for Listed Building Consent, no mention was made of replacement windows. The windows which were installed, apparently towards the end of the conversion works, were hung with sash ropes rather than chains, and, according to Mr C were poorly fitting, and lacked draught proofing seals. Since these windows were not part of the Building Warrant, planning consent or Listed Building Consent, I consider this is not properly a matter for the Council. I do not uphold this complaint.

27 February 2007

Explanation of abbreviations used

Mr C	The complainant
Ms C	Mr C's daughter, the aggrieved
The Council	North Ayrshire Council
The Builder	The development company who converted the former hotel to two flats
The Building Warrant	The Building Warrant for the works issued by the Council on 30 August 2003
Officer 1	A Council Planning Officer
Officer 2	The Council's Senior Building Standard Surveyor.
Officer 3	The Council's Manager - Protective Services
The Regulations	Building Standards (Scotland) Regulations 1990