

## Scottish Parliament Region: South of Scotland

### Case 200502460: East Lothian Council

#### Summary of Investigation

##### **Category**

Local government: Policy/administration

##### **Overview**

The complainants (Mr and Mrs C) raised a number of concerns about East Lothian Council (the Council)'s actions in relation to works which they were carrying out to their house. In particular it is alleged that amongst other things, the Council stopped works, failed to reply to correspondence, published their correspondence on a website and interfered in the sale of the property.

##### **Specific complaints and conclusions**

The complaints which have been investigated are that:

- (a) the Council delayed in dealing with their application for a building warrant (*not upheld*);
- (b) the Council stopped works on site (*upheld*);
- (c) despite a reminder, the Council failed to respond to a letter of 27 April 2005 (*upheld*);
- (d) the Council published their correspondence on the Council's planning website (*not upheld*);
- (e) the Council interfered with the sale of their house (*upheld*); and
- (f) the Council delayed in issuing a completion certificate (*not upheld*).

##### **Redress and recommendations**

The Ombudsman recommends that the Council:

- (i) apologise for the stoppage of work in March 2005 and for the Planning Enforcement Officer calling the complainant's solicitor;
- (ii) emphasise to staff the importance of timely responses to correspondence;
- (iii) emphasise to planning officers when it is appropriate for them to discuss aspects of a planning application with third parties; and
- (iv) apologise for the delay in issuing a completion certificate and give consideration to advising applicants of the likely timescales when a delay is likely.

The Council have accepted the recommendations and will act on them accordingly.

## **Main Investigation Report**

### **Introduction**

1. On 5 December 2005, the Ombudsman received a complaint from Mr and Mrs C about East Lothian Council (the Council)'s actions in relation to works which they were carrying out to their house. In particular, it is alleged that amongst other things, the Council stopped works, failed to reply to correspondence, published their correspondence on a website and interfered in the sale of the property.

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

- (a) the Council delayed in dealing with their application for a building warrant;
- (b) the Council stopped works on site;
- (c) despite a reminder, the Council failed to respond to a letter of 27 April 2005;
- (d) the Council published their correspondence on the Council's planning website;
- (e) the Council interfered with the sale of their house; and
- (f) the Council delayed in issuing a completion certificate.

### **Investigation**

3. The investigation of this complaint involved obtaining and reading all the relevant documentation, including correspondence between Mr and Mrs C and the Council. I have also had sight of a letter dated 9 January 2006 from the complainants' solicitor to the Council. On 4 October 2006 I made a formal written enquiry of the Council and their response was received on 20 October 2006.

4. While, I have not included in this report every detail investigated, I am satisfied that no matter of significance has been overlooked. Mr and Mrs C and the Council were given an opportunity to comment on a draft of this report.

#### **(a) The Council delayed in dealing with their application for a building warrant**

5. On 30 March 2004, Mr and Mrs C submitted a planning application to the Council for permission to extend the property at 9, X Street. Permission was granted on 20 May 2004. Mr and Mrs C said they also submitted a building warrant application on 30 June 2004 which, they complained, was not granted until 7 October 2004.

6. In their response to me dated 20 October 2006, the Council said that Mr and Mrs C's application for building warrant had been received on 7 July 2004. After receipt, a letter was sent to Mr and Mrs C on 18 August 2004 listing matters that required action or alteration and the complainants' subsequent reply was received by the Council on 21 September 2006. Building warrant was then issued on 7 October 2004.

*(a) Conclusion*

7. Mr and Mrs C take the view that the Council took too long to determine their application for building warrant and, whilst this may have been the case if further information had not been required, given the sequence of events provided by the Council (in paragraph 6), I do not agree. In the circumstances, I do not uphold this aspect of the complaint.

**(b) The Council stopped works on site**

8. Mr and Mrs C said that on 31 January 2005 their contractor started work on site, but, that on 21 March 2005, a Building Control Officer told the builder to cease work because he believed that building was taking place on what was claimed to be Council land. Mr C said that the next day he met the Building Control Officer concerned at the site and was told that the works had been stopped at the behest of the Council's Estates Department, because, it was claimed, Mr and Mrs C had demolished a wall which was in Council ownership. Mr C said that the Building Control Officer inspected the site at his invitation and in doing so confirmed that construction was in compliance with the building warrant and the building regulations. Mr and Mrs C said that no formal notice was ever issued and, that if the wall belonged to the Council (which it did not), there would have been an alternative and more proper way to pursue such an allegation (by taking legal action).

9. In reply to my formal enquiry (paragraph 3) the Council said that they were unable to provide a satisfactory explanation for the Building Control Officer's actions. They said that their Building Standards Manager confirmed that the only basis under the Building Act for instructing work to stop was when the work did not comply with an approved building warrant; ownership of the site or building was not relevant to this assessment. The Council said that they had no evidence to suggest that at that time works on site were not progressing in accordance with the relevant warrant and, as the person concerned no longer worked for the Council, they were unable to add more.

*(b) Conclusion*

10. Mr and Mrs C said that their contractor stopped work on site on being told to do so by the Building Control Officer. Mr C met with the Officer concerned and he said that he did not deny this (see paragraph 8). The Council's response (paragraph 9) was unable to shed further light on the matter other than to say that there would have appeared to have been no relevant grounds upon which to stop the work. I have considered this matter carefully and on balance, I consider it more than probable that the Building Control Officer did instruct the complainants' builder to stop work. I find it difficult to envisage another explanation why work stopped. This being the case, I uphold this part of the complaint.

*(b) Recommendation*

11. The Ombudsman recommends that the Council offer an apology to Mr and Mrs C for the situation which arose and also to reaffirm to Building Control Officers the grounds upon which they can instruct works to cease.

**(c) Despite a reminder, the Council failed to respond to a letter of 27 April 2005**

12. Mr and Mrs C said that they received a call from their contractor on 27 April 2005 saying that a Council Officer had been to the site and told him that the building was being built incorrectly. Mr C said that he telephoned the Officer to confirm the situation and was advised that the building, as constructed, was projecting too far east and that a new planning application would be required. Mr C suggested that, as this was a minor alteration, it could be dealt with as a non-material variation to the existing consent and he wrote confirming his opinion (on 27 April 2005). At the same time, he submitted revised drawings.

13. The next day (28 April 2005), Mr and Mrs C said that they received a letter from the Planning Enforcement Officer which, he said, had 'obviously crossed with my submission of revised drawings'. The Planning Enforcement Officer's letter said that the extension appeared to be being built in accordance with the planning permission apart from the building line to the east. In the circumstances he said that to regularise the situation, a retrospective planning application would be required.

14. As Mr and Mrs C failed to receive a response to their letter of 27 April 2005 which they felt offered a reasonable solution to the situation, on

12 May 2005 they confirmed to the Planning Enforcement Officer that they had written to the Planning Officer on 27 April 2005 but, again, they heard nothing further. They said that it was not until 1 December 2005 that the Planning Officer confirmed that the drawings submitted on 27 April 2005 showed only slight changes but, nevertheless, a fresh planning application was needed. This information was repeated on 12 December 2005.

15. In responding to this aspect of Mr and Mrs C's complaint, the Council's reply of 20 October 2006 referred me to a letter dated 21 December 2005 from the Director of the Environment to Mr C. The Director said that he understood Mr C's dissatisfaction about the failure to respond to the letter of 27 April 2005 and he apologised on behalf of the Council but pointed out that a significant increase in applications had led to delays in dealing with correspondence. However, he noted that the Planning Enforcement Officer's letter of 28 April 2005 had contained an explicit warning if the alleged breach of planning control was not remedied. He also noted that other than a telephone call with the Planning Officer to whom Mr C had written, there did not appear to be any other contact from him enquiring about the progress in dealing with the matter.

*(c) Conclusion*

16. Mr and Mrs C's letter of 27 April 2005 crossed in the post with a letter received from the Council on 28 April 2005 (see paragraphs 12 and 13). The letter of 27 April 2005 was Mr and Mrs C's attempt to regularise a situation which had been brought to their attention and which was confirmed by the Council in the letter received on 28 April 2005. While the Council have apologised for their non-response to Mr and Mrs Cs' correspondence, they appear to suggest that Mr and Mrs C were at fault because they had only telephoned once to enquire what was happening. This cannot be correct. There is a duty on the Council to respond to items of correspondence sent to them by members of the public. If, as in this case, the Council were experiencing delays in dealing with correspondence, Mr and Mrs C should have been advised. In Mr and Mrs C's case they failed to do so and, although I note the Director of Environment's apology given in his letter of 21 December 2005, Mr and Mrs C thought they were offering a solution to a problem which had been identified to them, but, it was not until more than seven months later that they received a response. If they were incorrect in their assumption, they should have been advised. Taking all the circumstances into account, I uphold the complaint.

*(c) Recommendation*

17. The Ombudsman recommends that the Council emphasise to its staff the importance of sending timely replies to correspondence.

**(d) The Council published their correspondence on the Council's planning website**

18. Mr and Mrs C complain that throughout the period covered by this complaint, the Council published their correspondence on the Council website. In particular they mention their letters of 27 April 2005 (paragraph 12) and 12 May 2005 (paragraph 14). Mr and Mrs C felt that this was unhelpful as the works at their house caused conflict with a neighbour. It is their view that the website should exist to inform the public about applications and allow application drawings to be viewed. They felt that the Council's approach to publish all correspondence actually dissuaded applicants from entering into a discourse with the Council.

19. In their formal response of 20 October 2006, the Council said that the Council was the first planning authority in Scotland to provide an online planning service. As a consequence, they said that, there was no advice from the Scottish Executive about what information should be made available. In the circumstances, they followed the practice of the few authorities in England with an online service who made the same information available online as could be obtained from inspecting the application file at the Council offices, or via a request under the Freedom of Information Act. However, they said that more advice has become available since the period of time in question and the advice at present is that correspondence with professional agents can be displayed. They pointed out that Mr C (who is an architect), acted as agent for his own application.

*(d) Conclusion*

20. Mr and Mrs C are unhappy that much of their correspondence with the Council appeared to be published on the Council's website. However, the Council said that their website operated in accordance with the best advice available to them (paragraph 19). They have also confirmed that they were not putting any information on their website which could not be obtained by members of the public through other means. Nevertheless, I understand Mr and Mrs C's concern and the fact that they felt inhibited by the information appearing on the Council's website. However, in all the circumstances, I do not uphold this aspect of their complaint.

**(e) The Council interfered with the sale of their house**

21. As indicated above (paragraph 18), Mr and Mrs C's neighbour was unhappy with the changes occurring and this led to a dispute. Mr and Mrs C, therefore, concluded that it would be difficult for them to continue to live in the property. As a result, they put it up for sale. However, Mr and Mrs C alleged that on 30 November 2005, an officer from the Council called the selling agents advising that the property could not be sold as it was shortly to be subject to enforcement action (as a result of the situation detailed in the Council's letter of 28 April 2005, see paragraph 15) and that a Planning Contravention Notice was about to be served. Following this call, the solicitor withdrew the property from sale. Mr and Mrs C were greatly annoyed by what they claimed was the Council acting 'vexatiously and unlawfully'. They said that no Enforcement Notice or Planning Contravention Notice had ever been served on them.

22. I have had sight of a copy of a letter between Mr and Mrs C's solicitor and the Council dated 9 January 2006. Amongst other things it stated that, '... the sole subject of the conversation was whether we were aware that there were problems with the planning permission for 9 X Street. (The Planning Enforcement Officer) then advised that he would be serving a Planning Contravention Notice. I then attempted to follow up this conversation to find out more detail and left several messages at the Council but did not receive a reply'.

23. From the letter of 21 December 2005 (see paragraph 15), I understand that the Planning Enforcement Officer was advised of Mr and Mrs C's house being for sale by the local councillor. She showed him a newspaper article featuring the property and identifying the selling solicitor. Apparently, the Planning Enforcement Officer then checked his records to see whether the application he recommended in his letter of 28 April 2005 (paragraph 12) had been submitted and approved and he discovered that no application had been submitted. The Council said that as the Planning Enforcement Officer had cause to contact the solicitor on another matter, he took the opportunity to advise them of a possible breach of planning control at 9 X Street and left his contact details should they require further advice. The Council stated that the Planning Enforcement Officer did not say that the house could not be sold or that it should not be advertised. They said that the Planning Enforcement Officer's calls responding to the solicitor were never returned.

24. In their formal response, the Council said that the Planning Enforcement Officer was adamant that he did not call the solicitor solely to discuss the complainants' property and that he did no more than inform the agents that there was an alleged breach of planning control. They said that it was important to note that a Planning Contravention Notice is served to obtain information about an alleged breach of control and that does not imply judgement as to whether a breach has occurred.

*(e) Conclusion*

25. It appears that immediately after the Planning Enforcement Officer's call to the solicitor, Mr and Mrs C's property was withdrawn from sale. While this was a matter for the solicitor's discretion, it appears to me that this action related directly to the call. The Council maintained that the Planning Enforcement Officer was calling the solicitor on another matter and took the opportunity to advise her about the Council's likely action in relation to the property. While this is at odds with the solicitor's recollection of events, I am unable to determine from the information available to me, what was actually said. However, I cannot see that a solicitor would remove a property from sale without believing there was good reason. I am also puzzled by the Planning Enforcement Officer's reasons for speaking to the solicitor about this matter in the first place. If he had any concerns about the property being marketed surely he should have raised these directly with Mr and Mrs C and not their selling agents. After considering the matter carefully, in all the circumstances, I uphold this aspect of the complaint.

*(e) Recommendation*

26. The Ombudsman recommends that the Council emphasise to planning staff that in circumstances such as those outlined above (paragraphs 21 to 24), concerns relating to possible enforcement or other similar action are raised only with the applicant or his or her agent. It is clear that the solicitor in this case was not acting as Mr and Mrs C's agent with regard to their planning application. The Council should also write apologising to Mr and Mrs C for their action.

**(f) The Council delayed in issuing a completion certificate.**

27. Mr and Mrs C said that although in October 2005 they applied for a Completion Certificate for the works carried out, it took five months for the Council to determine their request. They said that in March 2006 they learned

that the original Building Control Officer was no longer employed by the Council and that, 'nobody seems prepared to action our request'.

28. The Council's response to this aspect of the complaint in their letter to me of 20 October 2006 makes it clear that the delay (which they acknowledge) was due to insufficient staff available to undertake this work. The said that Mr and Mrs C's application was one of many similarly affected and that, 'the acute demands placed on the staff available means that it has not been possible to keep applicants informed of progress'.

*(f) Conclusion*

29. I accept the difficulties faced by Councils in the light of staff shortages and that priorities have to be balanced between doing the necessary work and updating applicants. Nevertheless, given the passage of time involved (five months) which the Council do not appear to dispute, it would have been appropriate to accompany the Completion Certificate, when it was issued, with an apology for the delay. I would also draw the Council's attention to my comments at paragraph 16 on advising applicants of any delay in processing their application/correspondence. This does not appear to have happened and, while I am critical of them for this oversight, given the mitigating circumstances, I do not uphold the complaint.

*(f) Recommendation*

30. The Ombudsman recommends that the Council apologise for the delay and give consideration to advising applicants of the likely timescales when a delay is likely.

31. The Ombudsman asks that the Council notify her when the recommendations referred to above have been implemented.

27 March 2007

**Explanation of abbreviations used**

Mr and Mrs C

The complainants

The Council

East Lothian Council