

## Scottish Parliament Region: Central Scotland

### Case 200500770: East Ayrshire Council

#### Summary of Investigation

##### **Category**

Local government: Planning and Building Control

##### **Overview**

The complainant (Mr C) raised a number of concerns that the successful operation of his farm has been undermined by the East Ayrshire Council (the Council)'s decision to grant planning consent for a housing development next door to his farm. Additionally, as a result of this development, Mr C has had problems modernising his farm to comply with modern pollution and animal welfare requirements.

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

The complaints which have been investigated are that:

- (a) the Building Control Department are unfairly insisting that new drainage be installed to deal with the roof water from the silage clamp roof (*not upheld*);
- (b) the Planning Department failed to ensure that a planning condition in respect of planting for screening purposes was enforced (*not upheld*);
- (c) the Planning Department failed to ensure that the condition for screen fencing and planting was transferred to the new application (*not upheld*);
- (d) as a result of the failings in (b) and (c) above, Mr C had unfairly to include the provision of screen fencing in his application to construct his silage clamps (*not upheld*);
- (e) Mr C was inappropriately advised to withdraw his application for a cubicle shed by Council officers when he should have been advised to amend the proposals (*not upheld*);
- (f) the Council are putting too much emphasis on the decision of the Reporter rather than considering every application on its merits (*not upheld*);
- (g) the Council should consider Mr C's application as permitted development as the Council did not exercise its right to comment on his proposals within the statutory time scale (*not upheld*); and
- (h) the Council is not working with Mr C to try and resolve these outstanding matters (*not upheld*).

***Redress and recommendations***

The Ombudsman recommends that the Council:

- (i) highlight to staff in the Planning Department the particular issues which can arise when Agricultural Prior Notification is received; and
- (ii) continue to work closely with Mr C in an attempt to find acceptable solutions to both the outstanding building control and planning problems.

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

## **Main Investigation Report**

### **Introduction**

1. On 16 June 2005 the Ombudsman received a complaint from Mr C in connection with the Planning and Building Control Departments of East Ayrshire Council (the Council). At this stage he had not formally raised his concerns with the Chief Executive in line with the Council's formal complaints procedure. He was, therefore, referred back to the Council to attempt further resolution.

2. On 14 October 2005 a letter responding to Mr C's complaints was issued by the Head of Planning, Development and Building Standards, this response was the Council's final position on the complaint and effectively exhausted the Council's formal complaints procedure.

3. Mr C raised a substantial number of complaints which relate to three different but connected areas. The first relates to the granting of planning consent and construction of a housing estate next door to his farm. The housing estate was constructed in two phases and by two separate building firms. Housebuilder 1 built the initial and larger development with consent to develop received in 1997 and Housebuilder 2 was granted consent for a further development of nine houses in 2000 with a tenth house constructed from the previous consent. At the time Mr C raised objections to these developments on the grounds that it would have a negative impact on the operation of his farm. This development was built in close proximity to Mr C's farm and the subsequent complaints received from Mr C are in part as a result of this development. We are precluded from looking at the issue of the housing development itself because of the time which has elapsed since planning permission was granted.

4. The second area of complaint relates to issues arising from Mr C's attempts to apply for planning consent for a cattle shed and roofed midden area; and thirdly, Mr C raised his concerns about the Building Control process in relation to the construction of the neighbouring housing estate and the construction of his own roofed silage clamps.

5. Mr C stated that his plans to construct his new cattle cubicle shed is required to comply with recent animal welfare best practice and the roofing of his silage clamps and midden area to comply with environmental legislation. He believed that the Council are being unreasonable in their application of the

legislation. He was of the view that had the Council taken greater consideration of the objection raised at the time when the application to construct the final stage of the nearby housing development, houses would not have been built in such close proximity to a working farm and he would not have had such problems in developing his farm to maintain it as an efficient agricultural unit.

6. Mr C stated that the action being taken by the Council's planning and building control team were making his business unviable.

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

- (a) the Building Control Department are unfairly insisting that new drainage be installed to deal with the roof water from the silage clamp roof;
- (b) the Planning Department failed to ensure that a planning condition in respect of planting for screening purposes was enforced;
- (c) the Planning Department failed to ensure that the condition for screen fencing and planting was transferred to the new application;
- (d) as a result of the failings in (b) and (c) above, Mr C had unfairly to include the provision of screen fencing in his application to construct his silage clamps;
- (e) Mr C was inappropriately advised to withdraw his application for a cubicle shed by Council officers when he should have been advised to amend the proposals;
- (f) the Council are putting too much emphasis on the decision of the Reporter regarding the cubicle shed rather than considering every application on its merits;
- (g) the Council should consider Mr C's application as permitted development as the Council did not exercise its right to comment on his proposals within the statutory time scale; and
- (h) the Council is not working with Mr C to try and resolve these outstanding matters.

### **Investigation**

8. I have reviewed substantial correspondence from the complainant and the Council. Additionally, I have met with the complainant and visited the site in question. I have obtained documentation from the Council and examined the relevant legislative framework. I have set out, for each of the headings of Mr C's complaint, my findings of fact and conclusions.

9. 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.

**(a) The Building Control Department are unfairly insisting that new drainage be installed to deal with the roof water from the silage clamp roof**

10. With all new buildings, the surface water drainage outfall requires to be disposed of to a suitable outfall as defined in the Building Standards (Scotland) Regulations 1990. The silage clamp structure is a new building in terms of the Building Regulations which requires, under the Building Regulation 24, a suitable drainage system sufficient to ensure hygienic disposal of discharges from the building.

11. This standard enables the applicant to design a suitable surface water outfall which will meet the Building Regulations. In this particular case Mr C, via his agents, proposed to connect the drainage from the building to the existing land drainage which served other parts of the farm and which passed under the neighbouring housing estate.

12. During the Building Warrant process the Scottish Environmental Protection Agency (SEPA) were satisfied with the proposals for drainage. Because of this Mr C's agents were asked to carry out tests to establish that the existing surface water drainage was running satisfactorily through the drains and into a nearby burn. On 10 October 2003 and 6 November 2003 letters were received by the Council from Mr C's agents advising that dye tests had been carried out and that the drains were running freely. On this basis, the Building Warrant was approved.

13. In March 2004 it was identified that there was a problem with the field drainage on the site of the neighbouring houses. As a result of this, completion of the construction of the silage clamps could not go ahead without being in breach of Regulations. This was because, if the roof drainage from the silage clamps was fed into the existing field drains, connection to them would likely lead to further flooding in neighbouring gardens.

14. The Council have been in consultation with Mr C in respect of his proposals to address the outstanding drainage problems.

15. When the houses next door to the farm steading were being constructed, Mr C highlighted his concerns regarding potential damage to field drains caused by the construction process.

16. Mr C subsequently claimed that the field drains which run under the neighbouring houses were damaged by Housebuilder 2. During the construction of these by Housebuilder 2, the Building Control team advised Housebuilder 2 that any live drains which were encountered had to be diverted or protected in accordance with the Building Regulations, in particular Building Regulation G2.4. As part of this process Housebuilder 2 was advised that they would require field drains to be exposed and inspected by an officer from the Department. Housebuilder 2 advised that their structural engineer had inspected a pit excavated to examine whether any field drains were present which would be affected by the development. The engineer advised that there were likely to be no drains in the area. A drain known under plot 35 was thought to be too deep to be affected by the construction.

17. The Building Control Department had made Housebuilder 2 aware of their obligations in respect of meeting the Building Regulations. Housebuilder 2 had confirmed that they had met such obligations and provided appropriate supporting evidence as was necessary to support their case. Based on this information, the Council allowed the developments to go ahead and be occupied. It is the responsibility of a developer and not the Council to ensure that any development complies with the relevant building regulations.

18. Residents in the new development reported water collecting in the gardens of some of their houses. Because of these reports the surface water drain was exposed and inspected. On the basis of this investigation, the Building Control Department reported, in a letter to Housebuilder 2 dated 19 July 2006, that the site investigation carried out by Housebuilder 2 and their consultants in respect of the field drainage at the development site was unsatisfactory and in breach of their obligations under the Building (Scotland) Act. They have provided Housebuilder 2 with three options for acceptable resolution of the drainage problems. Unless Housebuilder 2 provides an appropriate alternative, they are expected to implement one of the three options.

*(a) Conclusion*

19. The Council have carried out investigations of this matter and are currently in discussion with Housebuilder 2 about resolving this problem. Based on the above, I do not believe that I have evidence to show that the Council have acted unfairly in respect of drainage issues affecting both developments. Housebuilder 2 did not ensure that his development complied with Building Regulations. When it became clear that this was the case, the Council approached Housebuilder 2 and their insurers in an attempt to address outstanding problems with field drains. Until they do so Mr C's development cannot comply with building regulations. I consider that in this case, the Council has acted correctly. I do not uphold this aspect of the complaint.

*(a) Recommendation*

20. The Ombudsman makes no recommendations on this issue.

**(b) The Planning Department failed to ensure that a planning condition in respect of planting for screening purposes was enforced**

21. The original planning application to construct homes on this site was made by Housebuilder 1 in 1997. Included in the conditions for this application was a requirement for 'additional tree planting and screen fencing along the western boundary'. This condition was to be complied with prior to the occupation of the first house.

22. Subsequently discussion took place between officers and Housebuilder 1 in respect of the tree planting aspect of the condition relating to screening. After consideration of the specific type of fencing it was agreed by officers under their delegated authority to make such decisions, that they would not take enforcement action to ensure tree planting took place.

*(b) Conclusion*

23. Planning officers made the discretionary decision to accept alternative proposals for this condition on the development. They are entitled to make such decisions. In the absence of maladministration in reaching their decision the Ombudsman cannot challenge such a decision. I do not uphold this aspect of the complaint.

*(b) Recommendation*

24. The Ombudsman makes no recommendation on this point.

**(c) The Planning Department failed to ensure that the condition for screen fencing and planting was transferred to the new application**

25. When Housebuilder 2 applied for full planning consent, officers considered the application on its merits and did not believe that screen fencing and tree planting was necessary. As such, consent was granted without this condition.

*(c) Conclusion*

26. Officers decided that at the time, the proposals by Housebuilder 2 were satisfactory. They did not believe that there was a requirement, given the circumstances at the time, for additional screening. As there is no evidence of maladministration, I do not uphold this aspect of the complaint.

*(c) Recommendation*

27. The Ombudsman makes no recommendation on this point.

**(d) As a result of the failings in (b) and (c) above, Mr C had unfairly to include the provision of screen fencing in his application to construct his silage clamps**

28. Mr C's application to construct a roof over his silage clamp introduced a new and sizeable change to his farm. Planning consents for the developments by Housebuilders 1 and 2 were granted prior to the construction of the silage clamp and were, therefore, based on size and impact of the farm buildings at that time. The silage clamp proposals had to be assessed on their merits including their impact on the development by Housebuilder 2. As part of this assessment, planning officers considered that screen planting was necessary. This decision was made to address the relationship between the nearby housing and the proposed silage clamp roof.

*(d) Conclusion*

29. The decision by officers to alter the conditions on screen fencing in the earlier applications by Housebuilder 1 has clearly had an indirect effect on Mr C's subsequent application. However, officers must consider each application on their merits and based on the information available at the time. This was a discretionary decision for officers to make and there is no evidence of maladministration. I do not uphold this aspect of the complaint.

*(d) Recommendation*

30. The Ombudsman makes no recommendation on this point.

**(e) Mr C was inappropriately advised to withdraw his application for a cubicle shed by Council officers when he should have been advised to amend his proposals**

31. In response to an application for consent to construct a cubicle shed, planning officers prepared a draft report for presentation to Committee. This draft recommended approval of the plans. When the Committee plan was being prepared to append to the report, it was noticed that Mr C's plans for the shed encroached into neighbouring land by 5 metres. As a result, without permission from the owners of the land, these plans were unachievable. Following discussions, Mr C's agents confirmed in writing that the application would be withdrawn.

32. Planning Offices considered that the degree of relocation required by the plans amounted to a change of substance and this in turn would require new neighbour notification. The application was withdrawn and resubmitted in accordance with the guidance in Planning Advice Note 40 'Development Control', paragraph 71; which states that: 'where the substance of a proposal has been altered, the application should be withdrawn and a revised application submitted'.

*(e) Conclusion*

33. As a result of the above, I consider that the Council officers acted appropriately. Accordingly, I do not uphold this aspect of the complaint.

*(e) Recommendation*

34. The Ombudsman makes no recommendation on this point.

**(f) The Council are putting too much emphasis on the decision of the Reporter regarding the cubicle shed rather than considering every application on its merits**

35. When a decision on the original application for the cubicle shed was not made within the appropriate time, Mr C availed himself of his right to ask the Scottish Executive Inquiry Reporter (the Reporter) for consideration on the grounds of non-determination of the application by the Council.

36. The Reporter considered whether the proposal was consistent with the relevant provisions of the development plan and, if not, whether an exception to these provisions was justified by other material considerations. In making his decision the Reporter considered that the development was of a scale and in such a proximity to local housing, which ensured it did not comply with policy ENV13 of the East Ayrshire Local Plan.

37. Since his application, Mr C has requested that the shed be considered as permitted development (and, therefore, not requiring planning consent) and has made an Agricultural Prior Notification application. The Council have stated that the Reporter's decision on the previous application in respect of the cubicle shed was a material consideration in the determination of the later Agricultural Prior Notification application.

*(f) Conclusion*

38. Having considered the evidence I agree that the Reporter's previous decision was material to the application for Agricultural Prior Notification. The Reporter's decision was not the sole factor taken into consideration by the Planning Department. From my review of the information available, I see no evidence of failure on the part of the Council in respect of this issue. As such I do not uphold this aspect of the complaint.

*(f) Recommendation*

39. The Ombudsman makes no recommendation on this point.

**(g) The Council should consider Mr C's application as permitted development as the Council did not exercise its right to comment on his proposals within the statutory time scale**

40. Mr C submitted an Agricultural Prior Notification application on his intention to construct the cubicle shed under the Town and Country Planning (General Permitted Development)(Scotland) Order 1992. In Schedule 1, Part 6 Section 4 (a)(iii) of the order it states: 'the development shall not be begun before the occurrence of one of the following:

(cc) the expiry of 28 days following the date on which the application was received by the planning authority without the planning authority making any determination as to whether such approval is required or notifying the applicant of their determination;'

41. Mr C's application was received on 7 November 2005. On 16 November 2005 the Head of Planning requested further information regarding the application. This was received by the Council from Mr C's agents on 1 December 2005.

42. On 2 December 2005 the Head of Planning wrote to Mr C's agents advising that; 'the two month period available to the Council in which to determine the application extends until 29/12/2005. If no decision has been made in respect of the application by this date and you have not agreed to an extension to the period for determination, you may appeal to the Scottish Ministers'. I believe, however, that this was not the correct letter to issue in this case as it referred to a standard planning application. The letter should have detailed that the Council had a period of 1 month (28 days) to consider the application. Additionally, there is no right of appeal to Scottish Ministers in the case of Agricultural Prior Notification non-determination. If no response is received from the Council within 28 days, the development can go ahead. A letter advising that the previous correspondence of 2 December 2005 was incorrect was issued on 22 December 2005.

43. On 16 December 2005 the Council wrote to Mr C to advise that the Planning Department was exercising its right to require the prior approval for the positioning, design, and external appearance of the proposed agricultural shed.

44. Mr C believed that the Council should have made their determination on whether to comment on the prior notification within 28 days of his original application of 7 November 2005. As the Council requested further information on 16 November, it is clear they did not believe at that time that they had sufficient information to determine what action to take on the notification. I believe that the 28 day period the Council had to consider the application would commence on the day the Council received an application which they consider appropriate for the purpose. This did not, in this case, happen until 1 December 2005. The Council then gave their decision on 16 December 2005. This was within the 28 day period.

45. Subsequent to the consideration of the Agricultural Prior Notification application from Mr C and the Council's decision of 16 December 2005, the Council reviewed the background to this case and decided that the application could not be considered under Agricultural Prior Notification and must be considered as a full planning application. The reasons given were that the

Town and Country Planning (General Permitted Development)(Scotland)Order 1992 details that to be considered permitted development, the proposed construction must not exceeded 465 square metres, this must, however, also include any construction which has taken place within 90 metres of the site within the previous 2 years. In this case, the Council consider that construction of the silage clamps took place less than 2 years ago and adding their dimensions to that of the cubical shed excludes this development from being considered as permitted development.

*(g) Conclusion*

46. The Council have admitted that they issued a letter which contained inaccuracies, but I do not believe that this had any effect on the consideration of the prior notification application. The Council did not consider that they had all appropriate information for the agricultural prior notification until 1 December 2005, and as they provided their response on 16 December 2005, I consider that they acted in accordance with their responsibilities under Part 6 of the Town and Country (General Permitted Development) (Scotland) Order 1992. As such, I do not uphold this aspect of the complaint.

*(g) Recommendation*

47. The Council has apologised to Mr C for their confusion over their application of the regulations. The Ombudsman recommends that the Council highlight to staff in the Planning Department the particular issues which can arise when an Agricultural Prior Notification is received and the need for clear and accurate communication.

**(h) The Council is not working with Mr C to try and resolve these outstanding matters**

48. There has been substantial correspondence over the last few years on Mr C's concerns regarding his planning applications and building control problems. Mr C believes that the Council have not been assisting in addressing the problems which have arisen.

49. I have reviewed a substantial amount of correspondence regarding these issues. The Council have advised that they will take enforcement action to ensure that Mr C complies with the requirements of the Building Warrant in respect of the silage clamps. Mr C, however, cannot easily do so because of the problem with the field drains. To date the Council have not progressed to the enforcement stage as they have been in discussion with Mr C and his

representatives over possible solutions. There are also on-going discussions with Mr C regarding his planning applications.

*(h) Conclusion*

50. From my review of the correspondence I see no evidence to indicate that the Council have not been trying to assist Mr C resolve his outstanding concerns. I do not uphold this aspect of the complaint.

*(h) Recommendation*

The Ombudsman makes no recommendation on this point.

*Further Comments*

51. During the course of my investigations it has become clear that the nearby housing development built by Homebuilder 2 has had a major impact on the effective operation of Mr C's farm. Had this development of 10 houses not taken place, it is likely that Mr C would have had far fewer problems complying with the building control and, possibly, planning requirements.

52. When considering an appeal against a decision by the Council to refuse consent for the roofing of the midden area at the farm, the Scottish Executive Inquiry Reporter stated that:

'The relationship of the steading complex and the closest houses is already most unsatisfactory. The main rear wall of House 1 comes within 9m of the site boundary (its conservatory much less). I am somewhat puzzled how modern housing development was allowed, relatively recently, to encroach so remarkably close.'

53. I have not investigated the application process for the original housing developments and, therefore, cannot make comment on this issue. However, I do consider that this situation highlights an area where planning guidelines and regulations fail to provide realistic assistance to Councils. Under these circumstances, the Ombudsman would recommend that the Council continues to work with Mr C very actively, in an attempt to find workable and affordable solutions to his outstanding concerns.

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

20 June 2007

**Explanation of abbreviations used**

Mr C	The complainant
The Council	East Ayrshire Council
Housebuilder 1	Developer of initial house development
Housebuilder 2	Developer of second housing development
SEPA	Scottish Environmental Protection Agency
The Reporter	A reporter from the Scottish Executive Inquiry Reporters Unit