

Case 200600946: The City of Edinburgh Council

Summary of Investigation

Category

Local government: Planning; Alterations to a Listed Building

Overview

The complainant Ms C raised a number of concerns about how the City of Edinburgh Council (the Council) dealt with her reports to them about the removal of an original fireplace from a listed building.

Specific complaint and conclusion

The complaint which has been investigated is that the Council failed to deal with Ms C's concerns about the fireplace appropriately (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

- (i) within three months, follow up the evidence disclosed in this report and consider whether there are grounds to review their decision to take no further enforcement action;
- (ii) emphasise to Enforcement Officers the importance of obtaining entry and making proper enquiries; and
- (iii) apologise to Ms C for failing to deal with her concerns appropriately.

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

Main Investigation Report

Introduction

1. Ms C noticed that alterations were taking place to a nearby listed building and informed the City of Edinburgh Council (the Council). Ms C said that the most important of these was the removal of the original Georgian fireplace from what would have been the original dining room of the property. Although the Council arranged for other alterations to be rectified, the Council did not take action with regard to the fireplace and on 29 June 2005 told Ms C that they did not intend to do so.
2. Ms C complained to the Council but was dissatisfied with their response. On 13 June 2006 Ms C complained to the Ombudsman.
3. The complaint from Ms C which I have investigated is that the Council failed to deal with Ms C's concerns about the fireplace appropriately.

Investigation

4. In order to investigate this complaint I have had access to the Council's Planning file for the listed building and the correspondence in relation to Ms C's complaint. I have corresponded with Ms C and the Council. I have spoken to the previous owner of the building and have corresponded with and obtained information from the solicitors who sold the building. I have also spoken to the builder who did the alterations.
5. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Ms C and the Council were given an opportunity to comment on a draft of this report.

Complaint: The Council failed to deal with Ms C's concerns about the fireplace appropriately

6. Ms C first wrote to the Council's Enforcement Strategy Section on 29 October 2004 drawing their attention to alterations to a nearby listed building which she said were apparently proceeding without planning permission or listed building consent. Two of the changes were to the exterior of the building but Ms C also said that the original Georgian fireplace had been removed from what would have been the dining room of the original house. She considered this to be the most significant alteration.

7. The Council's Enforcement Officer replied to Ms C on 4 November 2004. He said that he had made an initial site visit and noted the external changes but had been unable to gain access to the interior of the building. He would advise Ms C about the planning position when his enquiries were complete.

8. On 13 May 2005 the Enforcement Officer wrote to Ms C again. He said that he had arranged for the external changes to the building to be rectified. He had also managed to gain access to the interior but the current owners had told him that only a gas fire with a tiled surround had been removed. The Enforcement Officer said that permission had been granted in October 1966 for the fireplace to be adapted to allow a gas fire to be installed. He had asked the current owners of the building to provide evidence of the fireplace that was removed during the recent alterations but he considered that it was probable that the original fireplace was compromised prior to the recent works.

9. On 29 June 2005 the Enforcement Officer wrote to Ms C. He said that he did not intend to take any further action.

10. Ms C wrote to the Enforcement Officer on 13 July 2005. She said that she was very disappointed that he intended to take no further action over the removal of the fireplace. Ms C asked to see the relevant documents.

11. Among the documents was a letter to the Enforcement Officer from the current owner of the building enclosing a letter from the builder who had carried out the work at the property. The builder said that the fireplace which he removed was a 1930s gas fire that was no longer in safe working order. He had also removed the surround which was a contemporary black tile one from the same period.

12. Ms C said that she did not begin to recognise the description of the fireplace and neither did other people who had recently been in the house including the previous owner. Ms C subsequently complained to the Council about their lack of enforcement action.

13. The Principal Planner wrote to Ms C. He said that the Council's discretion to take enforcement action was not unfettered. Any person on whom a listed building enforcement notice was served may appeal to Scottish Ministers. One of the grounds of appeal is that the matters alleged to constitute the contravention have not occurred. In this case there was no firm evidence that

the original fireplace had been removed during the recent alterations and the response from the owner's builder directly conflicted with the information in Ms C's complaint.

14. The Director of City Development wrote to Ms C's Councillor on 22 December 2005. He said that his Enforcement Officer had visited the building on 3 November 2004 in response to Ms C's complaint but access to the property had been denied by the current owner's wife on the basis that there was no prior appointment with her husband. On the following day two separate telephone messages had been left for the owner. When the owner returned these calls on 5 November 2004 he said that he was abroad. The Enforcement Officer finally gained access to the property on 11 May 2005 when it was noted that the original fireplace had been removed. The owner had said, however, that only a gas fire with a tiled surround had been in place as opposed to any Georgian fireplace. The Director said that he accepted that there had been a delay in gaining access but the delay was as a result of the actions of the owner rather than his staff. That said, in hindsight, it might have been prudent to use warrant powers to gain access despite issues surrounding proportionality. The use of such powers would not have proved one way or the other, however, whether or not the original fireplace had been removed. The Director said that removal of the fireplace without permission was a criminal offence and the level of evidence required to secure a prosecution would have to satisfy the 'beyond reasonable doubt' test. He didn't consider that Ms C had provided such evidence and in any case the Council was now time barred from proceeding as the alleged offence had taken place more than six months previously.

15. In her complaint to the Ombudsman Ms C said that the Council's response to her report about the fireplace had been tardy and ineffectual in the extreme.

16. I spoke to the previous owner of the property who confirmed that she had owned it until December 2003 when she sold it to the current owner. She believed that the fireplace which was in the house at the time of the sale was the original one. She described it as being of black slate with an insert and with the original tiles down the sides containing a plain gas fire with black coals. The previous owner sent me a copy of the details of the property which were recorded by the solicitors instructed to sell it (the solicitors) during a visit to the house. The dining room is recorded as having a:

'Black slate fireplace with horseshoe inset, tiled hearth and living flame gas fire.'

17. I obtained a Schedule of Particulars from the solicitors. The Dining Room fireplace is described in similar terms. The solicitors have confirmed that the fireplace was not excluded from the sale.

18. I spoke to the builder who carried out the building works. He said that he still had the fireplace although he could not guarantee that it was not broken. It was in storage in a container at his yard. He was willing to let someone see it.

Conclusion

19. There is clear evidence from the previous owner of the building and her solicitors that a black slate fireplace was present in December 2003 when the building was sold to the current owner. Despite being informed of the sale by Ms C, the Enforcement Officer failed to make any enquiries of the former owner or the solicitors which would have established that fact.

20. Ms C reported that a fireplace had been removed in October 2004 and this was eventually confirmed by the Enforcement Officer when he gained access to the premises in May 2005. It is not clear to me why the Enforcement Officer accepted the excuse from the current owner's wife (that no appointment had been made with her husband) to deny him access to the house for a period in excess of six months, by which time, according to the Director of City Development, the Council were time barred from seeking to raise criminal proceedings. The Director conceded in his letter to Ms C's Councillor that the Council should have used warrant powers to gain access.

21. The Director said that would not prove whether the original fireplace had been removed in October 2004. I agree that it would not, but earlier confirmation that the fireplace was not present would have narrowed down the time during which it could have been removed. The Enforcement Officer did not ask the builder what he did with the fireplace. If he had he would have discovered that the builder still had it.

22. The Enforcement Officer appears to have simply accepted what the current owner of the property told him without making any further enquiries. He also allowed himself to be prevented from entering the building for a period of six months. For these reasons I uphold this complaint that the Council failed to deal with Ms C's concerns about the fireplace appropriately.

Recommendation

23. The Ombudsman recommends that the Council:

- (i) within three months, follow up the evidence disclosed in this report and consider whether there are grounds to review their decision to take no further enforcement action;
- (ii) emphasise to Enforcement Officers the importance of obtaining entry and making proper enquiries; and
- (iii) apologise to Ms C for failing to deal with her concerns appropriately.

24. The Council have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Council notify her when the recommendations have been implemented.

18 July 2007

Explanation of abbreviations used

Ms C

The complainant

The Council

City of Edinburgh Council

The solicitors

The solicitors instructed by the previous owner to sell the listed building