

**Case 200601372, 200601373 & 200602604: The City of Edinburgh Council**

**Summary of Investigation**

***Category***

Local government: Planning

***Overview***

Three complainants (Mr A, Mr B and Mrs C) were concerned that they did not receive any notification of a neighbour's planning application to build two extensions to his property.

***Specific complaint and conclusion***

The complaint which has been investigated is that the Council failed to take appropriate action once they were alerted by the complainants that they had not been notified of their neighbour's planning application (*not upheld*).

***Redress and recommendation***

The Ombudsman has no recommendations to make.

## **Main Investigation Report**

### **Introduction**

1. On 9 August 2006, the Ombudsman received a complaint from a woman, referred to in this report as Mrs C, which stated that she and her neighbours had not received notification of a neighbour's planning application and that, although The City of Edinburgh Council (the Council) were alarmed that none of the neighbours had been notified, they had taken no action against the applicant. Mrs C was concerned that the applicant had flouted planning regulations and been allowed to get away with it.

2. On 10 August 2006, the Ombudsman received a complaint from a man, referred to in this report as Mr B, who expressed similar concerns about the same planning application.

3. On 14 November 2006, the Ombudsman received a complaint from a man, referred to in this report as Mr A, who was similarly concerned about an alleged lack of notification relating to the same planning application. He was also concerned that, in his particular case, his property had not been listed on the neighbour notification certificate submitted to the Council by the applicant.

4. Given that three very similar complaints were received about the same planning application, I carried out a single investigation into the complaints.

5. The complaint from Mr A, Mr B and Mrs C which I have investigated is that the Council failed to take appropriate action once they were alerted by the complainants that they had not been notified of their neighbour's planning application.

6. There were some issues raised by the complainants that I did not investigate. In a letter dated 8 December 2006, I informed the complainants that my investigation would not consider the alleged failure to carry out neighbour notification in itself. I confirmed to the complainants that the responsibility for neighbour notification lay with the applicant and that my investigation would restrict itself to considering the actions of the Council.

7. I also confirmed to the complainants that there would be no investigation with regard to Mr A's additional concern that his property was not listed on the neighbour notification certificate. I noted that, in correspondence with the

complainants (see paragraphs 14 and 15 below), the Council acknowledged that an error on the neighbour notification certificate was not picked up when it was originally checked and apologised for that oversight. Given that the error was acknowledged by the Council and that a suitable apology was issued there would have been no value for the complainants, the Council or the public at large in my pursuing the issue.

### **Investigation**

8. The investigation of this complaint involved obtaining and reading the correspondence between the complainants and the Council. In addition, I obtained copies of: the Development Quality Sub-Committee Delegated Application Report relating to the application; a neighbour notification certificate; three sections of the Council's City Development Planning Development Quality Handbook entitled '*A Guide to Getting Your Planning Application Validated*', '*House Extensions and Alterations*', and '*Daylighting, Sunlight and Privacy*'; Section 34 of the Town and Country Planning (Scotland) Act 1997 (the Act); The Town and Country Planning (General Development Procedure) (Scotland) Order 1992 (the Order); and Scottish Executive Circular 6/1992.

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

### *Legislative and Policy Context*

10. Section 34 of the Act states that a planning authority should not entertain any planning application unless, amongst other things, a certificate purporting to comply with the requirements of the Act has been supplied. That includes neighbour notification certificates. Section 34 states that if a person knowingly or recklessly supplies a certificate which contains a false statement or is misleading in a material particular, that person is guilty of an offence.

11. Article 3 (iv) of the Order requires that a neighbour notification certificate and location plan shall accompany a planning application submitted to the planning authority. Article 9 (1) of the Order requires that an applicant for planning permission shall notify persons holding an interest in neighbouring land by sending them a notice.

12. The Scottish Executive Circular 6/1992, which provides guidance on policy implementation relating to the Order, states at paragraph seven:

'A location plan should also be included with the planning application showing the site of the proposed development and the neighbouring properties notified. This will be an additional safeguard, allowing the planning authority to spot any property which has not been notified, although it should be stressed that the authority are under no duty to check that certificates are valid. Applicants are reminded that false certification is an offence and subject to a fine [...]'.

**Complaint: The Council failed to take appropriate action once they were alerted by the complainants that they had not been notified of their neighbour's planning application**

13. On 11 July 2006, Mrs C's husband wrote to the Council on behalf of seven of his neighbours (including Mr A and Mr B). The letter stated that no notification had been sent to any of the neighbours and that they, therefore, had not been given an opportunity to comment on the proposals. The letter asked for the Council's comments.

14. On 31 July 2006, the Council wrote to Mrs C and her husband explaining that it was the responsibility of the applicant to notify relevant neighbours, rather than the Council's. They stated that an examination of the neighbour notification certificate submitted with the application revealed that the certificate did not list Mr A's property and acknowledged that the omission should have been detected and apologised for the oversight. They went on to state that they were 'alarmed by the fact that not one of the neighbours entitled to receive notification has received a notice as nearly every property affected by the proposals is listed on the neighbour notification certificate (the exception being, of course, [Mr A's property])'. The Council explained that if the complainants were unhappy with the explanation they could complain to the Ombudsman or seek legal advice regarding the possibility of taking legal action against the applicant.

15. On 5 October 2006, Mr A wrote to the Council with his complaint. On 8 November 2006, the Council responded in similar terms to those described at paragraph 14 above.

16. Having read the letter from the Council described at paragraph 14, I initially had some concerns that, despite expressing 'alarm' that all of the neighbours listed on the neighbour notification certificate claimed not to have been notified, the Council appeared to have taken no action to determine

whether notification had occurred or not. I noted that false certification was an offence and I considered that in this case, with all eight neighbours with a notifiable interest claiming not to have been notified, there appeared to be some cause for concern regarding the accuracy of the certificate.

17. I, therefore, wrote to the Council on 12 October 2006 to ask, amongst other things, what investigation had taken place to find out whether there had been false certification in this case and whether the Council had considered taking any action against the applicant (such as referral to the Procurator Fiscal). I also asked whether the Council had approached neighbours to find out what their objections would have been had they had an opportunity to make their objections. In addition, I sent the Council copies of comments I had received from Mrs C and Mr B which detailed what their planning objections were and asked the Council to assess them and determine whether they would have made any difference to the outcome.

18. The Council responded on 14 November 2006. They stated that their normal practice, if they were alerted to possible inaccuracies in the implementation of neighbour notification during the course of considering a planning application, would be to seek evidence from the applicant and, if appropriate, suspend the processing of an application until accurate notification had been carried out. They said that it was rare for such issues to arise after a planning application had been determined, but that in such cases it was their practice to consider issues raised by neighbours relative to the planning case officer's original report and to assess whether any additional planning considerations had arisen that could have affected the recommendations. If the recommendations would not have been affected, the Council said they considered that referral to the Procurator Fiscal on the technical completion of certificates was a civil matter for third parties to consider. The Council said the complainants were advised that civil action was an option in the letter described at paragraph 14.

19. The Council explained that for them to consider making a referral to the Procurator Fiscal they would need to have strong evidence from each of the parties with a notifiable interest that neighbour notification had not been received and an admission from the applicant that notification was not carried out. The Council said that, in their general experience (though not in specific response to this case), neighbours claimed to have not been notified to overcome procedural restrictions on submitting late representations or because

they did not appreciate the nature of a development until it commenced. The Council also said that applicants could claim that notification documents were posted but that there was a failure in the postal service. The Council said that for those reasons it would only be in the most exceptional circumstances that referral to the Procurator Fiscal would be contemplated.

20. In terms of investigating the complaints received from the complainants, the Council said they considered the documentation on the planning file to verify the details submitted by the applicant. They said that it was at this point that they realised Mr A's property had not been notified (see paragraphs 7 and 14 above). They said that the letter from Mrs C's husband (see paragraph 13) did not raise any planning concerns and that, as the application had already been determined, they did not request any such comments from neighbours. The Council said that, in their view, asking for such comments would raise expectations that objections after the application had been determined would result in a different decision.

21. The Council said that they had considered the comments from Mrs C and Mr B which I had forwarded to them. They said that the concerns raised were assessed against the case officer's report approving the application and the Council's guidance on *'House Extensions and Alterations'* and *'Daylighting, Sunlight and Privacy'*. The Council pointed out that the section of the case officer's report entitled 'officer's observations' showed that the relevant planning issues were assessed and judged to be in conformity to guidelines. They said that, accordingly, had the grounds of objection been available at the time the case officer's recommendation would have been the same.

22. The Council's comments satisfied some of my concerns, however, I considered that some issues remained outstanding and I, therefore, wrote to the Council again on 8 December 2006. In that letter, I noted that the Council had told me its normal practice when considering claims that notification had not occurred was to assess issues raised by neighbours relative to the planning case officer's original report and to assess whether any additional planning considerations had arisen that could affect the recommendations. I noted that, in this case, the letter from Mrs C's husband (on behalf of seven neighbours) did not mention specific planning objections. I, therefore, asked the Council whether they had gone back to the neighbours to ask what their objections would have been. I could not see how the Council could have followed the

practice they had described to me if they did not make efforts to find out what objections neighbours had.

23. I also noted that the Council had told me they would only consider making a referral to the Procurator Fiscal if they determined that comments that would have been raised by neighbours had they been notified would have resulted in a different decision being taken on the planning application. Again, I could not see how the Council could have made such a judgement in this case without knowing what neighbours' objections were.

24. The Council responded on 10 January 2007. They stated that the letter from Mrs C's husband had only raised a procedural issue and did not mention grounds of objection to the planning application. They said that as such the letter prompted a procedural inquiry and not a review of the planning application. The Council said that they advised the complainants that any action against the applicant would have to be a civil matter between the aggrieved parties and the applicant. The Council said there was legal precedent for this and submitted an article from the *Journal of Scottish Planning and Environmental Law* which summarised a relevant case.

25. The Council said that the implication that they should have actively sought the views of potential objectors was not correct. They clarified that the practice they had described in their letter dated 14 November 2006 was in response to my request for comments on the hypothetical scenario of a referral to the Procurator Fiscal.

26. The Council stated that it was not their practice to refer cases of alleged failure to notify neighbours to the Procurator Fiscal. They said that was based on a widely held understanding that evidencing alleged failures to notify neighbours was very difficult and should be the responsibility of the aggrieved party and not the planning authority.

27. The Council said that the suggestion that they should have actively sought comments from neighbours and reviewed their grounds for objection in a post-decision stage of a planning application would raise a fundamental question about the role of the planning authority. They said it was generally accepted that a planning authority should not elicit representations from all those with a notifiable interest. They said that views were only actively sought by the Council from recognised consultee bodies. They said that the implication that

the Council should elicit representations from all those with a notifiable interest would lead to a situation where the planning authority's role in neighbour notification was significantly different. They said the planning authority only had a duty to assess material planning issues raised in representations received, not to assess whether there could be representations which had not been received.

### *Conclusion*

28. Having carefully considered the Council's response to my enquiries, I am satisfied that the concerns I expressed during the course of my investigation are now resolved. Those concerns related to whether the Council had followed the practice they had described to me in response to my enquiries and whether they should have done more to investigate the alleged failure in neighbour notification and considered making a referral to the Procurator Fiscal.

29. My concerns were largely based on the fact that the Council had told the complainants they were 'alarmed' at the alleged failure in neighbour notification. Given that alarm, I felt that questions should be asked to establish what duties the Council had to take action and whether any duties were fulfilled in this case. Having completed my enquiries, I am satisfied that the Council had no duty to take action in this instance. I detail my reasoning in paragraphs 30 and 31 below.

30. I note the Council's position that seeking evidence to support allegations that neighbour notification did not occur and making referrals to the Procurator Fiscal on the grounds of technical completion of certificates are matters for aggrieved parties to pursue, rather than the Council. I note the Council's view that, due to the difficulty in proving whether neighbour notification occurred or not, only in the most exceptional circumstances would they consider taking any action against an applicant. I note that there is precedent to support the Council's position that legal action is a matter for third parties.

31. I note that while the Town and Country Planning (Scotland) Act 1997 states that false certification is an offence, it does not place a duty on planning authorities to take action against applicants when allegations are made regarding failures in neighbour notification. Therefore, having considered the relevant legislation and policy guidance (see paragraphs 10 to 12 above) I conclude that the Council had no duty to take action when they were alerted to an alleged failure in notification by the complainants.



32. The decision to take any action, whether to carry out investigations with a view to obtaining evidence or to make a referral to the Procurator Fiscal, was a discretionary decision for the Council to take. In the absence of maladministration, I cannot question such a decision. Consequently, I do not uphold the complaint.

33. Although I do not uphold the complaint, I consider that the Council could have provided the complainants with a better explanation of the reasons the Council would not be taking any action. The Council could have done more than simply stating that neighbour notification was the applicant's responsibility and could have provided more details regarding why the Council had adopted their position and why they had decided not to take any action (for example, the difficulty in obtaining evidence). I also consider that it may have been helpful for the Council to be more explicit in explaining the remedy open to the complainants. Rather than simply stating that they may wish to consider seeking legal advice, they could have been more explicit and told the complainants that false certification was an offence. I consider that, especially in a case when the Council described its reaction to a claim of failure in neighbour notification as one of alarm, there would have been value in providing a fuller explanation of the Council's position and of the remedy available to the complainants. I have drawn these issues to the Council's attention.

34. As a postscript, I note that the new Planning etc (Scotland) Act 2006 has set out new duties for planning authorities with regard to neighbour notification. Once those duties come into force, it will be the responsibility of planning authorities to notify neighbours with a notifiable interest and, consequently, planning authorities will be responsible for any failure in neighbour notification.

18 July 2007

**Explanation of abbreviations used**

Mrs C, Mr B and Mr A	The complainants
The Council	The City of Edinburgh Council
The Act	The Town and Country Planning (Scotland) Act 1997
The Order	The Town and Country Planning (General Development Procedure) (Scotland) Order 1992

**List of legislation and policies considered**

The Town and Country Planning (Scotland) Act 1997

The Planning etc (Scotland) Act 2006

The Town and Country Planning (General Development Procedure) (Scotland) Order 1992

Scottish Executive Circular 6/1992