

Scottish Parliament Region: North East Scotland

Case 200603594: Aberdeenshire Council

Summary of Investigation

Category

Local government: Building control and planning/policy and administration

Overview

Mr C complained that Aberdeenshire Council (the Council) did not inform the complainant's co-proprietors when issuing a Defective Buildings Notice that, because their property is listed, the work would have to meet listed building requirements. He also complained that the Council failed to provide him with assistance to repair the building. Furthermore, he was dissatisfied with the handling of his formal complaint to the Council.

Specific complaints and conclusions

The complaints which have been investigated are:

- (a) shortcoming in the serving of a Defective Buildings Notice (*partially upheld*);
- (b) failure to provide assistance in the repair of a listed building (*not upheld*); and
- (c) shortcoming in the handling of a formal complaint (*upheld*).

Redress and recommendation

The Ombudsman recommends that the Council:

- (i) review their current recording practices, in respect of keeping a note of discussions from visits;
- (ii) decide what action is required, in respect of the outstanding Defective Buildings Notice; and
- (iii) send an apology to the complainant in recognition of any difficulty he experienced as a result of the lack of clarity in their previous complaints procedure.

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

Main Investigation Report

Introduction

1. The complainant (Mr C) lives in a B listed property above shops. He states that he has experienced problems with roof leaks since 2000. The shop owners, who are co-proprietors, are not directly affected by the leaks. He also states that he has experienced problems over the years in finding firms willing to carry out repairs, using materials which are approved by the Council for use in repair or replacement works to the building.

2. In 2005 Mr C applied to Aberdeenshire Council (the Council) for Listed Building Consent (the Consent) to re-slate the roof and replace the guttering using non-traditional materials. The Council informed Mr C that if they were mindful to approve the application, it would require to be referred to Historic Scotland.

3. In October 2005 the Council issued the Consent to Mr C but this was subject to conditions relating to approved materials which required to be used. Subsequently, Mr C informed the Council that he was unable to find a firm who would be willing to undertake the work and made a complaint when he considered that they had failed to provide him with appropriate assistance.

4. In August 2006 the Council issued a Defective Building Notice (the Notice) to Mr C and his co-proprietors, requiring them to rectify defects in the eaves, guttering and roof of the property. Mr C became concerned when his co-proprietors accepted a cheaper quotation, which would not be using like-for-like materials for the repair and he made his concerns known to the Council.

5. The grounds for his formal complaint are that, in issuing the Notice, the Council failed to stipulate to the proprietors that, because it is a listed building, the materials used for the repair had to be like-for-like and did not write to his co-proprietors with advice of the consequences if they did not adhere to the terms of the Notice. Further, he complained that the Council failed to provide him with assistance in the repair of a listed building: he considered that they should have been more pro-active, particularly given his difficulties in obtaining estimates and the extra cost involved because of the materials it was stipulated had to be used to carry out the repair. Mr C was also dissatisfied with the way the Council handled his formal complaint.

6. The complaints from Mr C which I have investigated are:
- (a) shortcoming in the serving of a Defective Buildings Notice;
 - (b) failure to provide assistance in the repair of a listed building; and
 - (c) shortcoming in the handling of a formal complaint.

Investigation

7. Although the problems with the roof date back a number of years, the complaints which I have investigated relate to events dating from 2005, when Mr C applied for the Consent to undertake repairs to the property. As part of my investigation, I have discussed the complaint with Mr C and the Council and obtained the relevant documents. I made enquiries to the Council and considered the Council's complaints procedure.

8. 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.

Legislative Background

9. The relevant legislation in this complaint is the Building (Scotland) Act 2003 and Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.

10. Section 28 of the Building (Scotland) Act 2003 (the Act) states that a local authority may serve on the owner of a building a notice requiring the owner to rectify such defects in the building as the notice may specify to bring the building into a reasonable state of repair. The Act requires Councils to set up a Building Standards Register and to place a copy of all such notices and any completion certificates relating to those notices in the Building Standards Register. The notice is required to specify a date when the owner must have begun the work and a date by which the work must have been completed. If there is non-compliance with the notice by the dates specified then an offence has been committed. However, the Council may at any time withdraw a defective building notice, waive or relax any requirement of such a notice including substituting a later date. The Act came into force on 1 May 2005.

11. Section 7(1) of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 states that works for the alteration or extension of a listed building are authorised if the planning authority or the Scottish Ministers have granted written consent for the execution of the works and the works are

executed in accordance with the terms of the consent and of any conditions attached to it. Sections 9 and 12 state that applications for listed building consent in general shall be made to and dealt with by the planning authority. However, if a planning authority intends to grant consent they have a duty to notify the Scottish Ministers of the applications, giving particulars of the works for which consent is required.

(a) Shortcoming in the serving of a Defective Buildings Notice

12. Mr C had no quarrel with the Council's actions in serving the Notice. His complaint was that the Council were at fault in not informing his co-proprietors that, because it was a listed property, the work had to be undertaken on a like-for-like basis.

13. The Notice was issued on 18 August 2006 to all three proprietors informing them individually of their responsibility to attend to specified defects:

'Broken & insecure eaves guttering and essential roof repairs to prevent the ingress of moisture into the building.

The following steps must be taken to secure compliance with this notice –

Repair or replace as found necessary.'

14. The works were required to be undertaken and completed within 28 days. There was no reference in the Notice to the property being a listed building.

15. Notes accompanying the Notice come with the warning to the recipient that it is an offence if the works specified are not carried out. Additionally that the local authority may carry out the work itself and claim from the owner as a debt any expenses reasonably incurred by it in doing so.

16. The Council commented to me that there was no requirement under the Building Standards legislation for the Notice to stipulate that the works had to be undertaken on a like-for-like basis. However, there was an expectation because it is a listed building that any works undertaken would be carried out on this basis.

17. In commenting on his involvement, the Team Leader in Building Standards (Officer 1), who served the Notice, informed me that the proprietors made him aware that it was a Listed Building before the Notice was served but that there

was no requirement for this to be stipulated in the Notice or advice to be given of the type of materials which had to be used. However, Officer 1 confirmed that he had made it clear to all three proprietors individually, when he visited them prior to issuing the Notice that, as the building was listed, listed building requirements would have to be met.

18. In explanation for his actions in issuing the Notice, Officer 1 commented that he was responding to the advice contained in Mr C's letter of 24 July 2006 to the Area Planning Officer (Officer 2) (see paragraph 29) where he reported his concern that his roof was in a 'dangerous and dilapidated condition'. He carried out an immediate visual site inspection (see paragraph 17) treating the report which, if his visit confirmed that urgent action was necessary, may have required the Council to carry out work to remove or reduce the danger and recover the costs of any expenses from the proprietors. However, his inspection revealed that action had been taken by the proprietors to avert the potential danger (a broken eaves gutter). He decided that the problem was best dealt with in the issue of a Notice under the Defective Building Legislation and he informed the proprietors of his intentions (see paragraph 17). The day after the Notice was issued, he visited the site and witnessed workmen carrying out preparatory works – including the removal of the remaining sections of loose cast iron guttering. Although Officer 1 noted that there was no progress in respect of repair and/or replacement covered in the Notice, as the absence of works did not pose a danger to the public and 'at worst were an inconvenience rather than a safety issue to the proprietors', he decided to delay any further action by the Council.

19. During my discussion with Officer 1, he stated that there was no requirement for him to contact proprietors before issuing the Notice but it was his usual practice to call because, in his experience, this often resulted in there being no need to serve the Notice. In this case, the proprietors appeared to be willing to carry out the repair. Officer 1 informed me that it was not his practice to keep a record of his visits on file.

20. Officer 1 confirmed that the Notice is still in force as the works have not been completed but he has taken no action to follow it up. He acknowledged that, strictly speaking, he should have done so; however, he reasoned that a dangerous situation requiring the Council to intervene did not exist and the onus rested with the proprietors to tell the Council when work is completed. He was

aware that grant monies have now become available and it was open to the proprietors to apply for financial assistance for the cost of the work.

21. I explored with the Council whether they would be able to enforce the Notice if non-traditional materials were used (given that there was a lack of information for the recipients of the Notice about listed building requirements). The Council informed me that if the works are not undertaken using traditional materials the Council, as Buildings Standards Authority, would not be in a position to take any action as no breach of the Notice would have occurred. However, if a breach of the Consent occurred then, as Planning Authority, the Council would be obliged to investigate and, if appropriate, enforce any breaches.

22. As a result of further discussion with the Council they agreed that, with hindsight, reference should have been made in the Notice to the fact that the building was a Listed Building and that there may be other implications with specific respect to this listing. The Council advised me that instructions have been issued to staff to ensure that, where such notices are served, all appropriate information is given to the public in a comprehensive manner and that, in the light of Mr C's complaint, they have taken appropriate retrospective action in respect of the Notices issued to him and his co-proprietors.

(a) Conclusion

23. My investigation considered whether the Council explained their role clearly to the complainant and whether they acted properly and consistently in terms of the approvals and notices which were issued relating to the repair of the building.

24. I have noted that the Notice was issued by the Council in response to Mr C's reported concerns about the state of his property and in recognition that work was required to be undertaken to ensure that it did not become a danger to the public. The Council were pro-active in visiting the proprietors before issuing the Notice, which is good practice, but were remiss in not keeping a record of the discussion which took place. This may have been an isolated instance but record-keeping is an important administrative practice, albeit that what was being referred to here was an ad hoc arrangement and was followed up, in this instance, by the service of a Notice. Nevertheless, the Council should consider whether there may be benefit from a review of current recording practices.

25. During the investigation, the Council have re-assessed their position on the formal information issued and that which is included in the Notices they serve and have decided that, although they are satisfied that there is no requirement on them to stipulate the necessity for repair and/or replacement work to be carried out on a like-for-like basis, as they expect proprietors to do so, future Notices will contain this advice. I commend the Council for taking action to address this issue.

26. However, I have remaining concern that, although the Notice provided a deadline for action, it has been allowed to pass without any follow up action by the Council (see paragraph 20). The decision on whether further action is appropriate is a matter for the Council's discretion but leaving it open-ended is not one of the options. If it has been decided to extend the deadline, notification should have been given to the proprietors. This is a matter which the Council are now required to address and the failure to act justifies some criticism. While the Council have now taken steps to ensure where a Defective Buildings Notice applies to a listed building this is clarified at the time of serving the Notice, as there is evidence of fault in administering it, I consider that there is justification in a partial uphold of this head of complaint.

(a) Recommendation

27. The Ombudsman recommends that the Council review their current recording practices, in respect of keeping a note of discussions from visits, and decide what action is required, in respect of the outstanding Defective Buildings Notice.

(b) Failure to provide assistance in the repair of a listed building

28. Mr C said that the reason he approached the Council in 2005 for assistance was because of the difficulties he was experiencing in getting the agreement of his co-proprietors to his proposals to have the property repaired using materials approved by the Council and in sourcing firms who would be willing to undertake the work. He stated that he was advised by the Council that if he wished to use non-traditional materials, he would have to apply for listed building consent. He had submitted an application to carry out the repairs with non-traditional materials and, although the Council were minded to approve it, Historic Scotland overruled the Council and specified that the repairs required to be undertaken using approved materials. The Consent was granted in October 2005.

29. From May 2006 to July 2006, Mr C stated that he corresponded with Officer 2, complaining about the lack of action by the Council to assist him in having the repairs carried out and trying to ascertain if the Council intended to take any action to ensure the repair of the building. When this achieved nothing, he wrote to the Area Manager on 24 July 2006 complaining of the Council's inaction and pointing out that the roof was in a dangerous condition, as several slates and a section of rhone were missing (the Notice requiring repair or replacement of defects in the eaves, guttering and roof was served on all the proprietors on 18 August 2006 (see paragraph 13)). Notwithstanding the serving of the Notice, Mr C remained dissatisfied with the Council's involvement because of the extra costs involved which he considered were a direct result of the conditions of the Consent which stipulated that the works had to be carried out using approved materials. If Mr C wished the conditions of the Consent relaxed he would have had to submit an appeal to Scottish Ministers.

30. I noted from the correspondence that when Mr C wrote to Officer 2 in May 2006 about his continuing difficulties, he complained that if his original requests for assistance from the Council had not been repeatedly refused - and they had taken some action to ensure the repair of the building when he first approached them - many of the current difficulties would be avoided. He had asked Officer 2 for confirmation that no financial assistance was available for the repairs; that the Council would only act if the building was dangerous or under a compulsory purchase order; and for clarification on the Council's responsibility for ensuring that the repairs are undertaken properly, in accordance with the Consent.

31. In response, Officer 2 sympathised with Mr C over the difficulties he was experiencing. He confirmed that there was currently no Council funding available to contribute towards the cost of the works but advised him to keep in contact with a colleague for updates on the position. He clarified that if the proprietors were not prepared to undertake 'any essential works which could render the building unsafe, or beyond repair' the Council could serve a listed buildings Repair Notice, however, this was not a route which he would go down lightly and was reserved for exceptional circumstances. Council advice had been consistent and they would offer any assistance they could. He clarified that the planning authority are unable to determine a proposal for a B listed building without prior clearance from Historic Scotland and, whilst his proposals

to use non-traditional material had support from elected members, Historic Scotland took the view that the Consent should be subject to conditions.

32. In subsequent correspondence, Mr C informed the Council that he was not complaining about the planning process and was willing to conform to the regulations but he had applied for the Consent because of his difficulty in getting a firm to do the job 'to prove to the other proprietors that I had attempted to obtain the cheapest option'. He considered that he was being put in a position that he wanted to maintain his property but the conditions of Consent made it difficult for him to do so. He stated that the roof was in a dangerous and dilapidated condition – he wanted to repair it and was happy to comply with planning regulations but was unable to get agreement from other proprietors to proceed – and sought help from the Council.

33. The Area Manager responded with clarification that the obligation to undertake and pay for repairs to their property rested with the proprietors and he noted that difficulty could arise if they were not in full agreement. The Council had discretion to issue a Repairs Notice but 'there has been no suggestion that from the Council's point of view compulsory purchase would be desirable or necessary'.

34. In their comments on this head of complaint, the Council stated that they had responded to Mr C when he complained that he was experiencing problems in obtaining quotations from local firms. While not permitted to make a specific recommendation or state a preference for a firm, they do have a list of recommended firms and Mr C was invited to contact them if he wished further information. Advice had been given also by the Council that they could not offer Mr C financial assistance as there was no grant aid available (although they have recently informed him that such assistance may be available in the imminent future). However, although they had offered such advice, at the end of the day the responsibility for the repair and replacement of defects rests with the proprietors of a listed building.

(b) Conclusion

35. It is unfortunate that Mr C has experienced such difficulty in trying to organise the repair of his property but I have not seen evidence that this was compounded by the Council's involvement. I am satisfied that the Council explained to Mr C why they were not in a position to provide financial assistance

at an earlier date and a decision to issue a Repairs Notice is a matter for their discretion.

36. Building Control and Planning regulations can seem complex to a lay person. However, I am satisfied that the Council have provided consistent, well thought-out advice to Mr C throughout their correspondence with him and, despite his frustrations over the requirements of the repairs, they have tried to help. They also invited Mr C to call at their offices to discuss the matter and, with the prospect that financial assistance may be available to undertake the work, this offer may for Mr C be a positive way forward to resolution.

37. I do not uphold this head of complaint.

(c) Shortcoming in the handling of a formal complaint

38. Mr C utilised the Council's complaints procedure and experienced problems when he wished to proceed to Step 3 (complaining to the Chief Executive). He had corresponded at Step 2 with Officer 2 and, as he remained dissatisfied, took his complaint to the next stage. However, the response he received at Step 3 was again from Officer 2 and not the Chief Executive. He complained about the efficacy of the Council's complaints procedure, when he received a response from the person against whom his complaint was made.

39. In informal comments on the Council's handling of the matter, the Area Manager confirmed that, although the response was from Officer 2, he had investigated and Mr C was told that if he remained dissatisfied he could appeal to the Chief Executive. However, he also confirmed that Mr C's appeal was returned from the Chief Executive's office to him for attention but commented that he had referred it back to the Chief Executive's office and did not know the current position. Following my enquiries to the Chief Executive's office, I was informed that the Chief Executive had written to Mr C informing him that he had reviewed the correspondence with the Area Manager and Officer 2 and that he fully supported their statements, was entirely satisfied that the matter had been discharged in 'full accordance with the listed building procedures' and that he would be taking no further action.

40. I asked the Council to comment on the problems which had been experienced in using their Complaints Procedure and whether it was under review. In response, the Council informed me that it appeared that there was some lack of clarity in relation to the stage the complaint had reached before

Mr C's approach to the Ombudsman. However, the Council's Complaints Procedure was reviewed earlier this year and the new procedure was launched in July 2007 (see Annex 2). A new leaflet has been produced which contains a step by step guide of the various stages in the handling of a complaint and what to do at any stage. Additionally, the Council stated that their responses will include a standard paragraph with advice of the next step in the process if a customer is not satisfied with the Council's response.

(c) Conclusion

41. Although Mr C experienced problems in completing the Council's complaints procedure, I am satisfied that the Council's new leaflet clearly sets out the various steps in their Complaints Procedure and details who to contact at each step. I uphold this complaint.

(c) Recommendation

42. As the Council had the matter in hand prior to my investigation and have taken action which should ensure that the problems which Mr C experienced will not be repeated, the Ombudsman has no recommendation to make in respect of the complaints procedure. However, in recognition that there was confusion in their handling of Mr C's complaint, the Ombudsman recommends that the Council write to him apologising for any difficulty he experienced as a result of the lack of clarity in their previous complaints procedure.

43. 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.

19 December 2007

Explanation of abbreviations used

Mr C	The complainant
The Council	Aberdeenshire Council
The Consent	Listed Building Consent
The Notice	Defective Building Notice
The Act	Building (Scotland) Act 2003
Officer 1	Team Leader in Building Standards
Officer 2	Area Planning Officer

Making a Complaint – A Step by Step Guide of Aberdeenshire Council's complaints procedure

Are You Satisfied?

Step 1

Complain to the person providing the service or their manager (informal complaint) No? Go to Step 2

Step 2

Choose one of 4 easy ways to make a formal complaint: No? Go to Step 3

- (i) complete the online form
- (ii) write a letter or send an e-mail
- (iii) ask someone to write it for you
- (iv) telephone

Step 3

Appeal to the Chief Executive No? Go to Step 4

Step 4

Contact the Scottish Public Services Ombudsman

List of legislation and policies considered

Building (Scotland) Act 2003

Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

Have Your Say – published by Aberdeenshire Council