

Scottish Parliament Region: Highlands and Islands

Case 200600408: The Moray Council

Summary of Investigation

Category

Local government: Planning; objection to planning application by neighbour

Overview

The complainants (Mr and Mrs C) raised a number of concerns about the handling by The Moray Council (the Council) of an application by his neighbours (Mr and Mrs N) to alter and extend their home.

Specific complaints and conclusions

The complaints which have been investigated are that the Council:

- (a) failed to conduct a competent and impartial evaluation and assessment of Mr and Mrs C's objections to Mr and Mrs N's planning application (*partially upheld*);
- (b) negotiated what they perceived to be a solution to the issue of privacy without involving Mr and Mrs C and to the exclusion of other solutions (*not upheld*); and
- (c) did not properly handle their complaint (*not upheld*).

As the investigation progressed, issues arose concerning the implementation of the planning consent. I, therefore, agreed with Mr and Mrs C and informed the Council that we would investigate that the Council:

- (d) did not take appropriate action in respect of deviations by Mr and Mrs N from the approved plans (*partially upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

- (i) apologise for the failing identified under head (a)
- (ii) ensure that action is taken to resolve the issue of the oil storage tank as soon as possible; and
- (iii) review whether and how they should involve affected parties in reaching decisions on issues of privacy.

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

Main Investigation Report

Introduction

1. The complainants (Mr and Mrs C) reside in a detached property in a town in the area of The Moray Council (the Council). Their home has a rear conservatory extension. In 2005 they objected to proposals by their neighbours to the rear (Mr and Mrs N) to alter and extend their home.

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

- (a) failed to conduct a competent and impartial evaluation and assessment of Mr and Mrs C's objections to Mr and Mrs N's planning application;
- (b) negotiated what they perceived to be a solution to the issue of privacy without involving Mr and Mrs C and to the exclusion of other solutions;
- (c) did not properly handle their complaint; and
- (d) did not take appropriate action in respect of deviations by Mr and Mrs N from the approved plans.

Investigation

3. The investigation is based on information supplied by Mr and Mrs C (including photographs) and the Council's responses to my enquiries. I have not included in this report every detail investigated but 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.

4. Mr and Mrs C, live in a town in Moray. Their house occupies a corner site immediately to the north of a property at 20 X Road owned by Mr and Mrs N. Mr and Mrs C constructed a sun lounge on the south elevation of their property in 2001.

(a) The Council failed to conduct a competent and impartial evaluation and assessment of Mr and Mrs C's objections to Mr and Mrs N's planning application

5. Mr and Mrs N submitted applications for planning consent and building warrant to the Council to alter and extend their dwelling house at 20 X Road with a single story pitched roof extension to the rear of their dwelling. Mr and Mrs C received neighbour notification of the planning application on 6 October 2005. They submitted a letter of objection to the Council on 17 October 2005 indicating that, due to the orientation and design of the

properties, the proposal would be located 9 metres from their main living accommodation windows and would invade their privacy. They stated that their property had been built with an integral reverse layout. With reference to the extension, which included windows directly overlooking their south elevation, they maintained that the original developers would not have been permitted to construct a property with windows in such close proximity to a main living area. They considered that the original planning concept should be retained and that the fundamentals of their privacy should be protected. In addition to the issue of invasion of privacy, Mr and Mrs C also stated that in terms of building proportion, the proposal was an overdevelopment of a relatively small plot and would leave little recreation area. Thirdly, they considered an oil storage tank proposed by Mr and Mrs N would contravene the minimum distances from both buildings and boundaries. They attached six photographs illustrating the bases of their objections.

6. Mr and Mrs C's letter was acknowledged on 21 October 2005. They were informed that a copy had been sent to Mr and Mrs N. The Council, following any comment, would then decide whether under their scheme of delegation the application would be decided under delegated powers in consultation with the local councillor, or be put to the Environmental Services Committee.

7. On 11 November 2005, Mr and Mrs C wrote again quoting Moray Local Plan Policies L/H6 House Alterations and Extensions (LH/6) and L/IMP3 New Building Design (L/IMP3) on privacy and siting and scale of proposals (Annex 3). They assumed that their objections to the proposals could be assessed against these policies. Mr and Mrs C pointed out that their house faces south and the length and height of the roofline of the proposed extension would have a detrimental effect in restricting the available daylight/sunlight particularly during certain periods of the year. They referred to the photographs provided with their earlier letter. Mr and Mrs C also requested that a site visit be arranged to assist in assessing the impact of the proposed extension on their outlook and property.

8. A report on the application was prepared by a planning officer (Officer 1). Officer 1's report set out the relevant policies of the Moray Structure Plan and/or Moray Local Plan 2000. (S/ENVI Approach & the Environment, S/IMP1 Development Siting, Layout and Design; L/H6, L/IMP1 Development in Built-Up Areas and L/IMP3.) The report then set out Mr and Mrs C's objections as set out in their letter of 15 October 2005, the response from Mr and Mrs N, and

Officer 1's observations. The report made no specific reference to issues of daylight or sunlight raised in Mr and Mrs C's letter of 11 November 2005. Officer 1 considered that the applicant's willingness to accept a condition that windows on the north elevation of the proposed extension be fitted with obscure glazing would eliminate any negative impact on Mr and Mrs C's privacy. Officer 1 considered the existing housing development was of 'quite high density' and stated that there was already limited outlook from the rear of the properties. Subject to the recommended conditions, he considered that the proposals were acceptable. Officer 1 declined to speculate on the view of the original developer and stated that the application required to be considered in terms of current policy. The provision of obscure glazing, in Officer 1's opinion, eliminated the potential for loss of privacy to Mr and Mrs C's property. Officer 1 considered the design and finishes to the extension would integrate well within the existing property. The development would not in Officer 1's view have any significant impact on the amenity of the adjoining properties. In those circumstances, Officer 1 considered the proposed development to be acceptable.

9. The application was decided under delegated powers in consultation with the local councillor. The proposal to grant consent was agreed by the local councillor and by the Chairman of the Environmental Services Committee in accordance with the Council's Scheme of delegation. Conditional consent was issued by the Head of Development Services on 9 January 2006. Condition 3 of the consent stated:

'... The en-suite and bedroom windows in the north elevation marked on the approved plan shall be obscure glazed with glass of obscuration level 4 of the range of glass manufactured by Pilkington plc at the date of this permission or an equivalent standard agreed in writing by this Council (as Planning Authority). Glazing of that obscuration level shall be retained in those windows in perpetuity.'

10. This condition was imposed to avoid overlooking of the adjacent property in the interest of residential amenity.

11. Building warrant to alter and extend Mr and Mrs N's home was granted on 17 February 2006.

12. I made enquiries of the Council with regard to Mr C's assertion that the extension amounted to an overdevelopment of Mr and Mrs N's property. The

Chief Executive replied that the Moray Local Plan 2000 does not prescribe the size of house alterations and extensions in relation to site area. He stated that in the assessment of relevant policy L/H6 this is a matter of judgement for each particular site. Compliance with L/H6 is dependent upon the appearance of a proposed development not adversely affecting the existing house and surrounding area and the scale and siting of the extension not significantly affecting the amenity of the adjoining properties. The Chief Executive stated that the preferred approach of the Council was to allow professional judgement to be exercised fairly and impartially by qualified professional planners allowing sympathetic development to take place that balanced the needs of individuals against the character and setting of individual communities and their buildings. In commenting on the draft report, the Council's Corporate Complaints Officer stated that in planning terms the loss of daylight and sunlight to Mr and Mrs C's property would not have justified a recommendation of refusal and that had been explained to Mr C by the Development Control Manager at his visit on 31 January 2006 and subsequently in his letter of 3 March 2006 (paragraphs 18 and 19).

(a) Conclusion

13. Clearly Mr and Mrs C were opposed to Mr and Mrs N's proposals and, as was their entitlement, they objected. Officer 1 had to assess those proposals in terms of the Development Plan, and other material considerations. Government advice in Planning Advice Note 40 (Annex 4) states that Mr and Mrs C's objections should have been taken into account. Generally, that was the case. However, issues of daylight and sunlight raised in Mr and Mrs C's second letter of 11 November 2005 was not specifically mentioned in Officer 1's report. While Mr and Mrs C have taken issue with points of description, I am not of the view that in reaching his decision to grant conditional consent, Officer 1's judgement lacked competence and impartiality. He clearly saw privacy as an issue and, in attaching what he considered a relevant condition, he sought to eliminate the problem. I note the Council's view that the loss of daylight and sunlight associated with the proposed development would not have justified a recommendation for refusal. However, the report lacked specific mention of the issues of daylight/sunlight which are listed as material factors in the Moray Local Plan 2000 policies L/IMP1 and L/H6. To that extent, the report was faulty. I, therefore, partially uphold this complaint.

(a) Recommendation

14. The Ombudsman recommends that the Council apologise to Mr and Mrs C for failing to deal specifically in the report with the issues of daylight and sunlight.

(b) The Council negotiated what they perceived to be a solution to the issue of privacy without involving Mr and Mrs C and to the exclusion of other solutions

15. In response to my enquiry on the complaint the Chief Executive detailed the options available to planning officers when looking at privacy issues. These were the removal of overlooking windows altogether and use of a solid wall, screening with a wall, fencing, planting or other means, and obscure glazing. He confirmed that Officer 1 had considered that obscure glazing used in conjunction with an existing boundary fence would protect the privacy of neighbour and applicant. There had been no requirement to carry out further neighbour notification as a result of the condition attached to the planning consent granted and the Council did not have the resources to enter into detailed correspondence and negotiation with all objectors.

(b) Conclusion

16. Mr and Mrs C were not consulted on the proposed solution which, if the application was to be approved, was one of a finite range of possibilities. In the particular circumstances of this application where Officer 1 was mindful to protect the privacy of both Mr and Mrs N and Mr and Mrs C it would have been preferable to have involved Mr and Mrs C or at least to have confirmed to them why obscure glazing was being proposed and why it was preferable to a wall, fence or other form of screening. That would in my view have been good practice but there was no requirement for the Council to do so. On balance, I do not uphold this complaint.

(c) The Council did not properly handle Mr and Mrs C's complaint

17. Mr and Mrs C were unhappy with the decision to grant approval and wrote on 15 January 2006 to the Director of Environmental Services. Mr and Mrs C considered the handling and assessment of the application to be flawed. Mr and Mrs C were aggrieved that their request that a site visit be paid had not materialised, and that the site of the proposal had not been viewed from the point of major impact. They found the condition to install three windows with obscure glazing to be unacceptable. They stated that their sun lounge would be in permanent shadow. The extension, which extended virtually the full length of

their property, would remove all sunlight from their garden for a significant part of the year. In sum, they concluded that their objection had not been given appropriate consideration and that the Council had failed: a) to conduct an assessment of the site from their property; b) to provide a realistic and permanent solution to the privacy issue; and c) to assess fully all aspects of the impact on their property and the effect that the significant loss of sunlight to both their home and their garden would have. They asked that the application be set aside and that they be given the opportunity to lodge an objection against the modified plans.

18. This letter was acknowledged by the Council's Head of Development Services on 20 January 2006. On 31 January 2006, the Council's Development Control Manager (the Manager) met with Mr and Mrs C at their home. After speaking with Officer 1, the Manager replied to Mr and Mrs C on 3 March 2006.

19. The Manager, in his letter of 3 March 2006, stated that Officer 1 had visited the site prior to preparing the delegation report which had been sent to the local member. There had been no response at Mr and Mrs C's home but the application site had been viewed from both sides of their home. The Manager stated that the neighbours' extension was single storey, would have a hipped roof ridge between 4.5 metres and 7.0 metres in height and would be 2.3 metres from the northwest boundary with Mr and Mrs C's property where a 1.8 metre high fence exists. He stated that the side hung sash windows with obscure glazing would protect the privacy of both properties. The Manager did not accept that the development would have a significant impact on the sunlight reaching Mr and Mrs C's property. The conditions attached to the consent met all six relevant tests in Scottish Executive¹ Circular 4/1998 (Annex 4) and the extension fully complied with relevant local authority policies. There had been no requirement to carry out further neighbour notification as a result of the conditions. The Manager confirmed that the impact of the proposed development would not be significantly detrimental to Mr and Mrs C's property and, therefore, would not justify a recommendation from refusal. The proposal complied fully with the Council's Development Plan and in his view there was no requirement to consider setting aside the planning decision.

¹ On 3 September 2007 Scottish Ministers formally adopted the title Scottish Government to replace the term Scottish Executive. The latter term is used in this report as it applied at the time of the events to which the report relates.

20. On 23 March 2006, Mr and Mrs C's solicitors wrote to the Council's Chief Executive stating that they did not accept the letter of 3 March 2006 provided an adequate explanation. The solicitors did not accept that the proposed development would not be significantly detrimental to Mr and Mrs C's property and surrounding properties. By reason of the extension giving rise to increased intensity of development, Mr and Mrs C would suffer financial loss. They argued that good grounds existed for the planning permission to be set aside.

21. On 10 April 2006, in the absence of a reply to their solicitors, Mr and Mrs C spoke to the Council's Corporate Complaints Officer and wrote to him the next day. They took issue again with the terms of Officer 1's report. They were aggrieved that their request for a meeting with the planning officer had not materialised. They did not consider that obscure glazing was a practical or reasonable solution to the privacy issue. In their view the extension would have a significant impact on sunlight reaching their property. They maintained that the alteration to the application (in respect of the obscure glazing) should have been referred to them as objectors. The report, moreover, failed to deal with the issues of the scale of the development and the location of the proposed oil storage tank. They claimed that the extension which would be 12 metres long and 5.5 metres high with three 'toilet windows' a short distance from their property would have a significant detrimental effect. They considered that Officer 1 failed to conduct a competent evaluation of all the valid and relevant factors against the Council's policies and that the nature and content of the report was inadequate and misleading.

22. On 24 April 2006, the Chief Executive replied to Mr and Mrs C. He apologised for the delay in responding to their letter and to their solicitor's letter. He stated that he had had the opportunity to consider their additional comments but felt that the original assessment of their neighbours' proposals had been carried out by an experienced planning officer (Officer 1) and had, thereafter, been fully reviewed by the Manager.

23. For his part, the Chief Executive had also reviewed the matter. He could find no material evidence showing that Officer 1 had failed to consider Mr and Mrs C's objections against relevant policies in the Moray Local Plan 2000. There was, however, a clear difference in judgement between Mr and Mrs C and Officer 1. The Chief Executive was satisfied that the decision, to grant conditional consent, was sound and that planning procedures had been

properly applied. He saw no ground for setting aside the planning decision and was unable to uphold Mr and Mrs C's complaint.

(c) Conclusion

24. I see no administrative shortcoming by the Council in the handling of Mr and Mrs C's complaint. The issue of sunlight, omitted from Officer 1's report was specifically addressed by the Manager. One objective of Mr and Mrs C in pursuit of their complaint was to have the application set aside. This was rejected as inappropriate by the Council. I consider that the Council adequately articulated their position in the context of dealing with Mr and Mrs C's complaint. I do not uphold this complaint.

(d) The Council did not take appropriate action in respect of deviations by Mr and Mrs N from the approved plans

25. On 13 June 2006, Mr C wrote to the Manager saying that one of the two bedroom windows then being installed had been fitted with plain rather than obscure glazing. Mr C also adjudged the ridge height of the new extension next door to be 25cm to 30cm higher than in the approved plans servicing to further restrict sunlight reaching their property.

26. Mr C pursued with the Council deviations in what was being built on site from Mr and Mrs N's approved plans, namely: the extension was closer to the site boundary than approved; Mr and Mrs N had ignored the condition stipulating obscure glazing in their bedroom windows (paragraph 9); the roof was installed higher and apparently at a steeper pitch and the extension had been positioned on site in a differing relationship to the existing building and closer to Mr and Mrs C's property than approved. Mr C also alleged that Mr and Mrs N's oil storage tank contravened building regulations and that this had not been addressed in terms of their previous objection.

27. On 5 July 2006, Mr N submitted a further planning application to amend the existing approved extension design by raising the ridge line by 150mm. The application was validated on 20 July 2006. Mr and Mrs C objected to that application and, in a further email of 23 July 2006, Mr C raised his concerns detailed at paragraph 26. He claimed that the retrospective application to extend the roof understated the actual height of the roof. Mr C considered that, given the number and seriousness of the contraventions, the second application should be withdrawn to enable a thorough investigation. He stressed that throughout the process, he and his wife had suffered from loss of privacy, loss

of sunlight and loss of amenity and these contraventions were having an increasingly detrimental effect on their lifestyle and property.

28. The application for retrospective consent for raising the roof ridge by 150mm was subsequently withdrawn by the applicant. A third application seeking retrospective consent to raise the roof ridge by 220mm was submitted on 7 September 2006. Mr and Mrs C submitted a letter of objection to this application on 17 September 2006. Following consultation with the local councillor, a decision was taken on 26 October 2006 under the Council's Scheme of Delegation that the development was permitted. The planning consent, issued that day, included a similar condition 3 as the original consent but by relating this to the accompanying plans, referred only to a requirement for obscure glass in the en-suite window. The Council subsequently confirmed that there was a revised set-back of the extension of 200mm.

29. In the meantime, Mr C had written to the Council's Convener complaining of the Council's failure satisfactorily to respond to Mr and Mrs C's intimation of planning contraventions, and in particular the height of the roof ridge of the extension, the use of clear rather than obscure glass in bedroom windows, details of the roof intersections, and the location of the extension on site. That letter was passed to the Council's Corporate Complaints Officer and he responded by letter of 27 October 2006. The Corporate Complaints Officer's letter set out in detail the Council's response to the deviations. It confirmed that while Mr C was reluctant to accept that formal enforcement action will only take place after the application(s) for retrospective consent were determined, staff in Development Control had confirmed that the Council would initially seek to rectify any breaches in planning through negotiation. Specifically, Mr N had confirmed to the Council that he intended to put obscure glazing in the en-suite and bedroom windows of the extension. Mr N had informed the Council that his delay in so doing was because he did not wish to risk expensive obscure glazing being damaged during construction work. Mr N subsequently installed a second bedroom window glazed with clear glass. Prior to occupying the extension, Mr N had boarded over the bedroom windows in the extension but according to Mr C the covers subsequently came loose.

30. In response to my further enquiry, the Council's Chief Executive informed me by letter of 15 January 2007 that the approved plans for Mr and Mrs N's extension showed the oil storage tank as existing with no changes proposed. The Council subsequently clarified by letter of 7 January 2008 that the plans

approved for purposes of building warrant indicated an existing oil storage tank in the same location. The Council understood that the existing oil storage tank had been replaced with a modern bunded tank. Mr N had been asked to confirm that the oil storage tank had been replaced and if so, whether the tank fulfils the requirements of the Building Regulations. The Chief Executive confirmed that the Council's Building Standards Section will take appropriate action to ensure compliance with the Building Standards Regulations before a completion certificate is issued.

31. In commenting on the draft report the Council stated that the applicant was informed and accepted that he was required to install obscure glass on all three windows on the north elevation of his extension. The Council stated that they had a letter from Mr and Mrs N's agent to the Planning Enforcement Officer confirming that all conditions applicable to obscure glazing would be complied with by the time the extension was ready for occupation. Mr C informed me that on 20 December 2007, some months after Mr and Mrs N's occupation of the extension commenced, obscure glass panels were installed in the three side windows.

(d) Conclusion

32. At the time the complaint was made to the Ombudsman's office, development was underway and Mr C had alerted the Council that work on site deviated from the plans approved on 9 January 2006. Two applications were submitted on behalf of Mr and Mrs N to seek retrospective consent for the increased height of their extension. It is common practice for a Council to invite a retrospective planning application to cover the full extent of deviations before formally considering whether to take enforcement action. The process was protracted and it needed a second retrospective application to regularise what was then being built. The Council obtained written confirmation from Mr and Mrs N's agent that obscure glazing would be installed when internal works were complete and agreed that boarding would suffice as an interim measure. Unfortunately, it took until 20 December 2007 for all three windows to be fitted with the obscure glazing deemed necessary by the Council to avoid overlooking and to protect the privacy of both Mr and Mrs C and Mr and Mrs N. The Council should bear some, but not full, responsibility for the delay. I note the Council's current position with regard to the oil storage tank. I partially uphold this complaint.

(d) Recommendation

33. The Ombudsman recommends that action is taken to resolve the issue of the oil storage tank as soon as possible.

General Recommendation

34. In light of the general issues raised in the report, the Ombudsman also recommends that the Council review whether and how they should involve affected parties in reaching decisions on issues of privacy.

35. 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.

Explanation of abbreviations used

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| Mr and Mrs C | The complainants |
| The Council | Moray Council |
| Mr and Mrs N | The complainants' neighbours who applied for planning consent |
| 20 X Road | Mr and Mrs N's address |
| LH/6 | The Moray Local Plan Policy, LH/6 House Alterations and Extensions |
| L/IMP3 | The Moray Local Plan Policy, L/IMP3 New Building Design |
| Officer 1 | The Council Planning Officer who determined Mr and Mrs N' planning application |
| L/IMP1 | The Moray Local Plan Policy, L/IMP1 Development in Built-Up Areas |
| The Manager | The Council's Development Control Manager |
| The Director | The Director of Environmental Services |

List of legislation and policies considered

The Moray Structure Plan 1999

The Moray Local Plan 2000

Scottish Office Development Department Circular 4/98 The Use of Conditions in Planning Permissions (February 1998)

Scottish Executive Development Planning Advice Note 40 Development Control (March 2001)

The Moray Local Plan 2000

L/IMP1 Development in Built-Up Areas

This policy states that the Council will try to ensure that proposals for development do not harm the general character of the surrounding area. The main concern of the Council is to ensure that development proposals should neither conflict with nor detract from the character, amenity and design of an area. In interpreting and clarifying this policy, the Council state that they will take into account the Guidelines on Character, Amenity and Design.

The Council set out their Guidelines on Character, Amenity and Design on pages 123-124 of the Local Plan. New developments should be 'good neighbours' and in defining aspects of amenity worth protecting, the Council specifically refer to privacy and sunlight/daylight. With regard to privacy, this relates to both the occupants of a proposed development and surrounding neighbours. With reference to sunlight/daylight the Council state that adequate levels of sunlight and daylight, and to a lesser extent outlook, should be safeguarded for surrounding properties and afforded to new development.

L/IMP3 New Building Design

Policy L/IMP3 states that all building development must be designed to respond adequately to the locality. Applications must meet the following requirements:

- (a) appropriate location in landscape or townscape;
- (b) careful placement on a site, particularly in relation to character, amenity and energy conservation;
- (c) appropriate size and form in relation to existing buildings, sky line and landform;
- (d) appropriate density, layout and orientation in relation to character, amenity, privacy of neighbouring properties and energy conservation; and
- (e) sensitive use of materials and colours in relation to existing setting and environmental impact.

L/H6 House Alterations and Extensions

Policy L/H6 on house alterations and extensions states that these will normally be approved, provided that the appearance of the house and surrounding area is not adversely affected. Approval is, however, unlikely to be granted where the siting and scale of the extension significantly affects the amenity enjoyed by

the occupants of adjoining property (and that will include considerations of sunlight, daylight and privacy).

Scottish Office Development Department Circular 4/1998

Paragraph 2 of Scottish Office Development Department Circular 4/1998 states that conditions applied by planning authorities to planning permissions should only be imposed where they are necessary, relevant to planning, relevant to the development to be permitted, enforceable, precise and reasonable in all respects.

Scottish Executive Development Planning Advice Note 40 Development Control (March 2001)

Planning Advice Note 40 (PAN 40) states that the development control service must satisfy three groups namely developers, members of the public and the Scottish Executive. Paragraph 19 advises that planning authorities must take into account views on planning matters expressed by neighbours, local residents, consultees and others and satisfy them that their views have been considered in reaching a decision. Paragraph 74 states that people have a right to be informed of planning applications likely to affect them and they should be confident that their views will be given due weight when decisions are made. Paragraph 79 states that decisions on planning applications taken in terms of sections 25 and 37(2) should be made in accordance with the development plan unless material considerations indicate otherwise.