

Scottish Parliament Region: West of Scotland

Cases 200500311 & 200501522: West Dunbartonshire Council

Summary of Investigation

Category

Local government: Planning: Handling of applications and call for enforcement action (complaints by opponents)

Overview

Two complaints were submitted on behalf of four households whose properties shared a rear boundary with a site (the Site) which was developed for housing. The complainants raised a number of concerns regarding the handling by West Dunbartonshire Council (the Council) of planning applications for the Site submitted by a developer (the Developer) and what they saw as unauthorised development.

Specific complaints and conclusions

The complaints which have been investigated are that the Council failed to ensure that:

- (a) the Developer complied properly with the statutory neighbour notification procedure (*not upheld*);
- (b) the planning applications included full details of the proposed ground levels and associated engineering works (*not upheld*);
- (c) proper account was taken of possible encroachment, loss of privacy and light, removal of existing trees and the impact of noise on amenity (*not upheld*): and
- (d) road safety implications were considered (*not upheld*).

Redress and Recommendation

The Ombudsman recommends that the Council take action to secure the early installation of bollards and fencing which they earlier identified as desirable.

The Council have accepted the recommendation and informed the Ombudsman that they would contact the Developer to complete the early installation of the bollards and fencing mentioned in paragraph 25 of the report.

Main Investigation Report

Introduction

1. Mr and Mrs A, Mr and Mrs B, Mr and Mrs C and Mrs D (the Complainants) live in a small town in West Dunbartonshire. The rear of their houses formerly looked on to an embankment beyond which were playing fields. Their complaints, which were submitted to the Ombudsman in February 2006, related to the handling of various planning applications for the development of a site (the Site) and what they saw as unauthorised development.

2. The complaints from the Complainants which I have investigated are that West Dunbartonshire Council (the Council) failed to ensure that:

- (a) the Developer complied properly with the statutory neighbour notification procedure;
- (b) the planning applications included full details of the proposed ground levels and associated engineering works;
- (c) proper account was taken of possible encroachment, loss of privacy and light, removal of existing trees and the impact of noise on amenity; and
- (d) road safety implications were considered.

Investigation

3. The Complainants submitted copies of their correspondence with the Council and photographs of the development during the course of construction. My colleague made enquiries of the Council. I visited the Council and inspected their case files on the planning applications and requests for enforcement. I subsequently visited the Site. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. The Complainants and the Council were given an opportunity to comment on a draft of this report.

4. Mr and Mrs A, Mr and Mrs B, Mr and Mrs C, and Mrs D reside at 5, 7, 13 and 15 X Road respectively. Prior to the completion of the recent development the rear and north east of their homes was overlooked by an escarpment with mature trees including a prominent sycamore. Beyond the escarpment was a raised area of open land which had formerly been playing fields (the Site). Mrs D has resided in her home at 15 X Road for 42 years. Her property, and that of Mr and Mrs C at 13 X Road, adjoins a cart track (the Track) which they have used for pedestrian and motor access.

5. An outline planning consent for 20 houses on the Site was granted by the former Dumbarton District Council but that consent subsequently lapsed. On 6 July 1998, the then owner of the Site (Mrs Z) made application to the Council for outline planning consent for residential development (Application 1). She certified that she had notified, among others, the Complainants. An objection to the proposals was submitted by solicitors acting for Mrs D who expressed concern that the Track might be used for access to the Site.

6. In his report of 12 August 1998 to the Planning Committee on Application 1, the planning officer commented that the Track was unsuitable for heavy construction traffic. Planning consent for Application 1 was granted on 1 October 1998 subject to a condition (condition 15) that 'there shall be no construction or vehicular access to the Site from [X Road]'. Mrs D was informed of the grant of consent on 2 October 1998.

7. Mrs Z subsequently sold her interest in the Site to a development company (the Developer). Some 13 applications were then submitted to and granted by the Council between 24 April 2001 and 2 June 2003 for the development of single plots on the side of the Site farthest from the Complainants' homes. These consents all required that access be taken from another road (Y Road) bounding the Site to the north east.

8. On 23 October 2003 the Developer submitted an application for the construction of eight houses on the remaining part of the Site (Application 2).

(a) The Council failed to ensure that the Developer complied properly with the statutory neighbour notification procedure

9. The Developer certified on his application form in respect of Application 2 that he had carried out appropriate neighbour notification on 2 October 2003.

10. The Council's files record that Mrs C visited the Council's offices on 6 November 2003 and viewed the plans in the presence of the planning case officer (Officer 1). There is no record of Mr and Mrs A, Mr and Mrs B and Mrs D inspecting the original plans for Application 2.

11. On 12 November 2003, the Developer submitted a revised layout (combining a previous application for a single plot (plot 12)). The Developer certified that neighbour notification in respect of the submission of the amended plans had been carried out on 28 November 2003. The amended Application 2

was registered on 1 December 2003 and advertised by the Council in a local newspaper on 19 December 2003. Mr C maintained (in a subsequent letter of 21 August 2005) that two fellow complainants went to see the amended plans at the Council offices but were told that these were not available.

12. The Council maintain that the appropriate neighbour notification was certified as having been carried out by the Developer in respect of the amended plans for Application 2. Further publicity to the proposals was given by newspaper advertisement. The Council maintained that other neighbours in addition to Mrs C were not precluded from viewing the proposals. The amended Application 2 attracted one letter of objection (from one of the new residents in the first part of the Site to be developed). That objector made representations regarding site levels and a Tree Preservation Order.

(a) Conclusion

13. Planning legislation did not require the Council to verify that a neighbour notification in respect of Application 2 had taken place but rather to check that the developer had certified that he had carried out that notification. This was stated to have occurred. I see no evidence that the Council failed to carry out that check. I do not, therefore, uphold this complaint.

(b) The Council failed to ensure that the planning applications included full details of the proposed ground levels and associated engineering works

14. The Council's files record that the amended Application 2 was the subject of correspondence with the Developer's agent regarding driveways, provision for visitors' parking and other matters. As a result of those interchanges, two proposed individual plots were combined into one. The application was the subject of a report by Officer 1 dated 16 August 2004 and was determined by the Section Head of Planning and Building Control on a delegated basis. Consent, subject to 21 conditions, was issued on 20 August 2004. None of the attached conditions related to access. Three conditions are relevant to the complaint. Condition 6 required that prior to commencement of work, full details including a cross-sectional plan of a retaining wall to the rear of plots 14 to 19 be submitted for the consideration and written approval of the Director of Development and Environmental Services; Condition 9 required vehicle parking spaces and a turning area to be provided before dwelling houses were occupied: and Condition 14 required the retention of trees on the boundary with the Complainants' properties.

15. In granting planning consent for the amended Application 2, the Council say it was recognised that the access to the Site which had been required from Y Road as stipulated in the outline consent (Application 1) was already in place. They stated that it was, therefore, not necessary to attach a condition to the consent to Application 2 prohibiting access from X Road since adequate and appropriate access was already available from Y Road.

16. The Council's files record that plans and proposals were submitted by the Developer's agent as required by the conditions. On 25 January 2005 a proposal to vary the permission to allow stone filled gabions to be employed for support and retention was submitted to the Council.

17. While the Developers proposals were under consideration, Mrs C telephoned the Planning Section on 5 April 2005. She alleged that the development was not being built in accordance with the approved plans. The Council's enforcement officer (Officer 2) visited the Site.

18. Officer 2 wrote to the Developer's agent on 28 April 2005 in respect of the proposals submitted on 25 January 2005 and about Mrs C's concerns. That letter confirmed the Council's acceptance of the discharge of conditions 2 to 5. Officer 2 regarded the proposed use of gabion cages filled with whinstone at two locations to be acceptable. However, since the installation of gabion cages at plot 12 was not a non-material variation it required a separate application for planning consent. With regard to proposed parking areas at plot 14, Officer 2 asked for confirmation that because of the adjacent very steep slope, some form of retention would be employed. He reminded the Developer that, in the interests of good practice, vehicular access to the Site should be taken from Road Y. With reference to the mature sycamore tree located on plot 14 (paragraph 4), Officer 2 advised the Developer's agent that best practice guidance was that no materials should be stored or earth moved within the drip line of the tree.

19. On 2 May 2005, the Complainants and their neighbours at 9 and 11 X Road submitted a complaint to the then Chief Executive raising the issues of piling operations, access being taken to the Site by the Track, site ground levels and screening of the development. The Chief Executive responded in a letter of 12 May 2005. A meeting on site was arranged for 2 June 2005 attended by Mr and Mrs C and Mrs D, Officer 2, the Planning Services Manager

(Officer 3) and the Developer's agent. The outcome of the meeting was confirmed in a letter of 17 June 2005.

20. Subsequent to the meeting, an application for planning consent was submitted in respect of the non-material variation of proposals for plot 12 and registered on 17 June 2005 (Application 3). The Council have informed me that none of the Complainants required to be notified in respect of Application 3 and consent was subsequently granted on 10 October 2005 subject to the same first two conditions as had been applied to Application 2. A report was subsequently prepared on 16 August 2005 regarding the need to afford protection to the sycamore tree. The Council's Planning Committee agreed on 7 September 2005 to serve a Tree Preservation Order.

21. On 14 September 2005, Officer 2 met again with the Developer's agent. Revised plans were submitted by the Developer's agent on 29 September 2005 proposing an amendment to delete two visitors' parking spaces to the rear of 1 and 3 X Road. Officer 2 wrote to the Complainants and two of their neighbours in separate letters of 30 September 2005 and invited them to inspect the revised plans in the Council's offices by 10 October 2005. He confirmed that the proposals involved replacing the two visitors' parking spaces with a landscaped area that would include bollards at the end of the turning head, a 1.2 metre metal railing fence, a hedge adjacent to the fence, grass and three trees.

22. In commenting on a draft of this report, the Council informed me that the proposals submitted on 29 September 2005 by the Developer followed negotiation with Officer 2. The Council informed me that the proposals submitted:

'... were not approved as a non-material variation to the planning consent. The Council must rely on the cooperation of the Developer to complete this work since it is a voluntary agreement. If it is not completed as agreed, it will not constitute a breach of planning control.'

23. By the Autumn of 2005 the gabion cages had been installed at plot 12 and also at the rear of Mrs D's home. Mrs D commissioned a survey report from an engineer which identified that one set of gabion cages encroached by 1.120 metres (four feet) on to her land.

24. The Council's files record that on 10 January 2006, Officer 2 met again with the Developer's agent on site to discuss measures to protect the sycamore tree. The Developer's agent submitted proposals for a geo grid retaining structure as an alteration to the banking. Officer 2 agreed this to be acceptable on 16 January 2006. Officer 2 carried out a further visit on 11 May 2006, took photographs, and recorded that because of the steep drop, retention was required over a distance of some eight metres. He remained concerned at likely interference with the sycamore tree. He thereafter consulted with Officer 3 who was satisfied with the proposals. Officer 2 wrote to the Developer's agent on 12 May 2006 to confirm that the method of retention proposed was acceptable but that Building Standards might also welcome the opportunity to check and comment.

25. Further proposals for bollards, grass seeding and fencing were received by the Council on 18 September 2006. The Developer's agent was advised on 19 September 2006 that these were acceptable. When I visited the site on 19 August 2007, the bollards had not been installed but temporary fencing had been erected on site. Mr and Mrs B informed me that they considered this offered minimal protection to prevent children or vehicles falling down the slope.

26. The Council stated that the plans approved as part of the planning consent for Application 2 in August 2004 included details of the existing levels on the Site and the proposed levels for the roadway. The plans indicated no under-building and tied proposed house levels to the new roadway which in turn related to the level of Y Road and this had restricted the levels for the Site. The southern perimeter of the Site was a sloping area prior to any construction work. The Council said that contamination hot spots on the Site had required the excavation of material and subsequent capping with a one metre layer of clean soil. The Council maintained that from the outset it was realised that level changes would be required to allow for the residential development of the Site. According to the Council, it was not necessary for the precise method of construction to be detailed and approved as part of the planning application.

(b) Conclusion

27. Ideally, planning consents should anticipate material issues which might arise in a development and incorporate relevant conditions. For a number of reasons, the conditions attached to consents may require to be adjusted or varied as unforeseen issues arise in the course of implementation. When the

nature of the adjustment is material, then a planning authority may require an amended application and a fresh service of neighbour notification.

28. The Site to the rear of the Complainants' homes was higher than their homes prior to being developed. That remains the case but the difference in height is now accentuated with the construction of the new houses. It is clear to me that, as construction works progressed, the Council regarded it advisable to protect and retain the escarpment on the one hand and on the other to safeguard vehicles and children falling down the slope. Measures proposed included the installation of steel gabion cages filled with whinstone (paragraph 18), slope retention measures in the form of geo grids (paragraph 24) and bollards, hedging and a fence (paragraph 25).

29. In the instance of Application 2, the ongoing dialogue with the Developer's agent was considerable. I am unable to conclude that that dialogue was necessitated by earlier failings. It appears to me to have resulted largely from issues which emerged in the course of construction. The Complainants are aggrieved that they were not specifically consulted on measures such as the gabions as part of the planning process. In respect of one set of gabions, at plot 12, Council officers did not consider that could be treated as a non-material variation and Application 3 was sought. According to the Council, because they did not share a common boundary with plot 12, Application 3 did not require neighbour notification to be served on the Complainants. The gabions elsewhere were viewed as non-material variations or building matters, and also did not require a further planning application and neighbour notification.

30. I can readily understand why the Complainants may be confused about the extent of negotiations with the Developer's agent. They also appear to me to have justifiable concern that the steep slope created behind their homes is not only potentially hazardous to children and vehicles, but also creates difficulties for maintenance of their rear boundary fences. The height of the roadway in the new development also results in lights from cars shining into bedrooms on the upper floor of nearby homes on X Road. The Council recognised the desirability of the bollards, metal fencing and further planting, by accepting these amendments. The Council informed me, however, that they cannot enforce implementation (paragraph 22). I find that position to be surprising when a retaining wall was required by Condition 6 of Application 2 and visitors' parking spaces were to be provided by Condition 9 yet the

Developer has been relieved by the Council of the necessity of providing these (paragraph 21).

31. While I am not able to uphold this complaint, I nevertheless consider the present situation to be unsatisfactory.

(b) Recommendation

32. The Ombudsman recommends that the Council take action to secure the early installation of bollards, fencing and planting which they earlier identified as desirable.

(c) The Council failed to ensure that proper account was taken of possible encroachment, loss of privacy and light, removal of existing trees and the impact of noise on amenity

33. The Complainants maintained that subsequent to the last neighbour notification they received in late 2003, plans for that part of the Site immediately adjacent to them were submitted and approved without them being notified. They maintained that their privacy, natural light, safety and welfare had all been affected and that a road, supported and retained by stone gabions, had been constructed at a ridiculous height immediately against their fence and towering over their back gardens. My colleague was advised that Mrs D's intended through her solicitors further to pursue the alleged encroachment (paragraph 23).

34. The Council pointed out with reference to encroachment that disputes concerning land ownership are civil issues which require to be pursued through the appropriate legal channels. With regard to the trees, existing trees were highlighted on the approved plans and a condition was included in the consent for Application 2 and repeated in the consent for Application 3, preventing any work being done to the trees without the Council's prior consent. During construction, the Developer asked for permission to remove three trees. Following consideration of the request, permission was given for their removal. The Council stated that the new houses to the north were set sufficiently far back from the existing houses on X Street to prevent any unacceptable over shadowing. The removal of the three trees would have increased daylight to the rear of the properties. With reference to privacy, the Council considered there were no issues of unacceptable overlooking involving direct distances and views from the window of one property to the window of another property. It was in their view, common for gardens in urban areas to be overlooked by

neighbouring properties. In this instance, there were no windows or doors allowing direct overlooking of a neighbour. Conditions 16 and 17 in the August 2004 consent for Planning Application 2 had sought to restrict noise levels and hours of working because the Site was surrounded by existing residential properties. The Council pointed out that in any building site noise disruption might be expected.

(c) Conclusion

35. I accept that the Complainants' amenity was affected during construction works particularly by the work immediately adjacent to their property boundaries. The Council anticipated this with the inclusion of appropriate conditions in the consent for Application 2. The Council are correct to say that matters of ownership are not for them. The Council relayed to the Developer's agent concerns raised by the Complainants during construction works. These were acted upon to the Council's satisfaction without the Council having recourse to formal enforcement action. On balance, I do not uphold this complaint.

(d) The Council failed to ensure that road safety implications were considered

36. The Council stated that during the processing of Planning Application 2, Road Services within the Council were consulted and appropriate conditions (Conditions 8 to 12) were attached to the August 2004 consent. Since all roads and footpaths were to be completed to the adoptable standards of the Roads Authority, road safety and other elements were taken into account by Roads Services.

(d) Conclusion

37. I am satisfied that road safety was taken into account in the consideration of Planning Application 2. I am satisfied that when matters were raised by the Complainants during construction works these were relayed to the Developer. I do not uphold this complaint

38. The Council have accepted the recommendation and informed the Ombudsman that they would contact the Developer to complete the early installation of the bollards and fencing mentioned in paragraph 25 of the report. The Ombudsman asks that the Council notify her when the recommendations have been implemented.

Explanation of abbreviations used

The Complainants	Mr and Mrs A, Mr and Mrs B, Mr and Mrs C and Mrs D
The Site	The area subject of planning applications in 1998 and 2003
The Council	West Dunbartonshire Council
X Road	The road where the Complainants live
The Track	A track at the side of Mrs D's home
Mrs Z	The applicant in respect of Application 1
Application 1	An outline consent for the entire site submitted by Mrs Z
The Developer	The applicant in respect of Application 2
Y Road	A road leading north west from X Road providing access to the Site
Application 2	A second application for planning consent for part of the Site
Officer 1	The Planning Case Officer
Officer 2	Planning Officer (Enforcement)
Officer 3	Planning Services Manager
Application 3	A third application for planning consent

Glossary of terms

Gabion	A large steel cage with inert material used to retain slopes
Geo grid	A concrete matrix used for retention which allows for drainage