

Scottish Parliament Region: Mid Scotland and Fife

Cases 200500581 & 200501941: Fife Council

Summary of Investigation

Category

Local government: Planning; enforcement

Overview

Two neighbours (Mr C and Mr D), complained to the Ombudsman that Fife Council (the Council) had not taken appropriate planning enforcement action in respect of a new house which was being constructed adjacent to their respective properties. They made further complaints about the Council's actions in granting planning consent for two windows which overlooked their properties. During the investigation, a further complaint was made regarding the construction of a patio area.

Specific complaints and conclusions

The complaints which have been investigated are that the Council:

- (a) delayed in taking enforcement action by allowing building work, which was not in accordance with the plans, to continue despite Mr C and Mr D's complaints (*not upheld*);
- (b) failed to deal with Mr C and Mr D's complaint regarding the orientation of the house (*upheld*);
- (c) failed to properly consider the effect on Mr C and Mr D's privacy before granting planning permission in respect of the house's lounge windows (*not upheld*); and
- (d) failed to take action in respect of the patio area having said they would (*not upheld*).

Redress and recommendations

The Ombudsman recommends that the Council;

- (i) apologise to Mr C and Mr D for their failure to adequately address their complaint, the shortcomings in reporting on how the incorrect labelling of the plans and the issue of overlooking the gardens have been dealt with; and
- (ii) review their system of dealing with errors in application plans to avoid situations in which members of the public might be misled.

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

Main Investigation Report

Introduction

1. Conditional Planning Permission was granted for construction of a two-storey house on the site in February 2002 but construction work did not start until January 2005. Mr C said the first that he knew of any plans for the site was when building work started. Mr D said that he was aware of the plans but had been assured by his then neighbour that his property would not be adversely affected. Mr D said he was dismayed when a house with large, overlooking windows started to be built close to the back boundary of his garden. Shortly after construction started both Mr C and Mr D complained to Fife Council (the Council) that the house was not being built in accordance with the planning consent.

2. On 24 May 2005 Mr C wrote to the Ombudsman on behalf of himself and Mr D. (Mr D wrote to the Ombudsman on 12 October 2005 to confirm that he wished to have his complaint considered with Mr C's complaint). Mr C enclosed correspondence both he and Mr D had had with the Council. He said that they had failed to obtain satisfactory responses to their complaints from the Council who were allowing building work to proceed despite their concerns. Mr C and Mr D later made complaints about the handling of a further planning application.

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

- (a) delayed in taking enforcement action by allowing building work, which was not in accordance with the plans, to continue despite Mr C and Mr D's complaints;
- (b) failed to deal with Mr C and Mr D's complaint regarding the orientation of the house; and
- (c) failed to properly consider the effect on Mr C and Mr D's privacy before granting planning permission in respect of the house's lounge windows.

4. As the investigation progressed, Mr D identified a further issue concerning the erection of a patio area at the site. The Council initially agreed to take enforcement action but subsequently declined to do so. I, therefore, agreed with Mr D and informed the Council that the investigation would additionally consider whether the Council:

- (d) failed to take action in respect of the patio area having said they would.

Investigation

5. In order to investigate this complaint I have corresponded and spoken with Mr C, Mr D and the Council. I have read the planning documentation and visited the site. I have obtained advice from the Ombudsman's planning adviser (the Adviser). I have identified the appropriate planning policies and guidance. An explanation of the abbreviations used in this report can be found in Annex 1. A list of legislation and policies considered can be found in Annex 2. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C, Mr D and the Council were given an opportunity to comment on drafts of this report.

(a) The Council delayed in taking enforcement action by allowing building work, which was not in accordance with the plans, to continue despite Mr C and Mr D's complaints

6. Mr C and Mr D said that they both started to complain to the Council in February 2005 (although it was not until the end of March that they became aware of each other's complaint) but the Council allowed the building work to continue.

7. A Planner (the Planner) who wrote the report in respect of the planning application wrote to Mr C on 7 March 2005. He said that the Enforcement Officer had recently visited the site regarding certain elements of the approved development and that the matters raised were ongoing and would be periodically monitored.

8. In response to further correspondence the Planner wrote to Mr C again on 7 April 2005. He said that the Enforcement Officer had revisited the site and that the matters raised were still ongoing. He wrote on 25 April 2005 to make arrangements for Mr C to view the planning file and to confirm that he would attend a site meeting with the Enforcement Officer, Mr C and Mr D on 28 April 2005.

9. Following the meeting both Mr C and Mr D wrote to the Planner. They noted that he had identified anomalies in the construction which he intended to discuss with his superiors and with the architect. In the original complaint to the Ombudsman Mr C and Mr D said that they had not been told what the anomalies were.

10. I note however, that subsequently on 6 June 2005 the Planner wrote to Mr C. He told him two anomalies had been discovered. One was that the house had been constructed in the wrong place. This posed a problem for the developer as it was now not possible to construct the wall which was required as a condition of the planning consent. A letter had therefore been sent to the architect for the project advising that all work should cease on site and a new planning application would require to be submitted.

11. On 21 June 2005 Mr C told the Council that work on the site was still ongoing but the Council told me (on 1 July 2005) that the Council had threatened to issue a stop notice and work had ceased. The Enforcement Officer was returning to the site that day (1 July 2005).

12. The Chief Executive wrote in response to the complaint on 14 September 2005. He said that work was not stopped at once as the full extent of the changes were only evolving as the house was being built. Because the developer chose to keep on working, as he reached different parts of the new building, new changes came to light. For example, at the start of the process Development Services were not aware of the implications of a change to the dormer design because it had not been built. Development Services were aware of the change to the positioning of the house and advised the developer that he would potentially need a new planning application. It was only when measurements were double checked and it was realised that the house had been built one metre further west than planned that the full extent of the changes became apparent. The requirement for a new application had been made clear to the developer on 28 April 2005 but the Council did not receive the application until 27 July 2005.

13. The Chief Executive said that when the Enforcement Section of Development Services is involved the Council have to try to find a reasonable conclusion to the matter. Part of effective enforcement action is to try to resolve the problem. The immediate response to someone who is building a house incorrectly is, therefore, not to demolish it but to try to establish the extent of the changes. The question is whether those changes have a more onerous or significant effect on the neighbours i.e. changes which would have resulted in a refusal of the planning application, had that been its original format. The Adviser has pointed out that it is a statutory ground of appeal against any enforcement notice that planning permission ought to be granted, and that unauthorised development is not automatically illegal until an enforcement

notice has been confirmed by Ministers. In this case the changes were found to be significant and action was taken.

14. Guidance on Planning Enforcement is in the Scottish Executive's¹ Planning Advice Note PAN54 Planning Enforcement and Circular 4/1999 (PAN54). Where building work appears not to comply with the planning permission, the Council's policy in line with PAN54, as stated on their website, is to 'try to resolve the situation through discussion and negotiation'. The Council say, however, that where it is considered necessary they will take formal action against those responsible for unauthorised development.

(a) Conclusion

15. It was undoubtedly a factor in this complaint that there was such a long delay between planning permission being granted and work starting which meant that until the house was actually being built Mr C and Mr D had little or no awareness of the plans. It was when work started that they obtained copies of the plans which had been authorised by the Council. I can understand that Mr C and Mr D must have been considerably frustrated during the construction of the house when they repeatedly complained to the Council that the work was not proceeding in accordance with the plans but the Council appeared to pay little attention to their concerns and allowed the work to continue. I agree, however, that it was reasonable for the Council to wait and see what impact the changes would make before taking action. As construction progressed it became apparent that the changes were significant. The Council stopped work by threatening to issue a stop notice and requiring a new planning application to be submitted. The Chief Executive agreed that it took some time to receive the new application but the applicants were entitled to try to resolve and regularise the situation. The Chief Executive's position is in accordance with the relevant planning guidelines and policies identified in paragraph 14. I do not uphold this complaint.

(b) The Council failed to deal with Mr C and Mr D's complaint regarding the orientation of the house

16. Mr C and Mr D complained that the house was incorrectly oriented which allowed their properties to be more overlooked than would have been the case

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.

if the plans had been adhered to. They said that the Council had not dealt with this complaint.

17. In response to my enquiries the Council sent me a location plan which showed that the site was to the northwest of Mr C's property and to the north of Mr D's property.

18. From the elevations of the house contained in the planning application it is clear that Mr C can see what should have been the south elevation and Mr D can see what should have been the west elevation. The Adviser has pointed out that these elevations do not, however, appear with the correct labels in the plans and do not relate to the footprint of the building as shown in the block plan. Indeed, it is impossible to make sense of the relationship between the elevations and the block plan, as they are labelled.

19. I see from the correspondence that Mr D first complained about the orientation of the building on 23 February 2005. When he received no reply he repeated his complaint on 2 and 4 March 2005. The Planner's response of 7 March 2005 did not address this issue. On 29 March 2005 Mr C wrote to the Council. He said that in his view the architect had wrongly annotated the elevation drawings in relation to the points of the compass. He asked if this inaccuracy was picked up in determining the application. The Council's Enforcement Officer wrote to Mr D on 18 April 2005. He said that the incorrect annotation on the drawings originally submitted with the planning application was an error made and acknowledged by the architect, however, the proposed site plan showed the proposed house and its position correctly. The Planner would have been fully aware of the orientation of the proposed building and the impact that this property and its windows would have on all neighbouring properties.

20. I asked the Council for a copy of the minute of the planning committee where the application was considered in February 2002 but it could no longer be found. On 14 September 2007 the Council confirmed the information given to Mr D in the 18 April 2005 letter (see paragraph 19) and said that the Planner was fully aware of the orientation of the proposed building and the impact it would have. The Council, therefore, dealt with the matter appropriately.

21. The Adviser said that it was evident to him as soon as he looked at the plans (and reconciled the elevations with the block plan) that the elevations

were wrongly labelled by the architect from the start, giving rise to confusion at every stage. The Adviser said that this error was systemic but there was no evidence that the orientation was changed at any time or that there was any deliberate attempt to confuse. The Adviser said that he was satisfied that the Council intended to give permission for the house as built, not as suggested by the labelling in the elevations. The Adviser said that, in fact, it would have been impossible to build the house according to the arrangement of the elevations, as they plainly do not fit the block plan for the shape of the building in the site. The Adviser said that the lack of a north point on the plans made reference to the orientation difficult and that the elevations are not consistent with the block plans in other ways which do not give confidence. The Adviser said that the Council would have been within their rights to have returned the plans at the start or request amended plans but planning authorities are under severe pressure to process applications quickly and to spend less time on small developments. The Adviser said that the Planner addressed the issues relating to the consideration of the application from the perspective of the house as it was actually built which suggested that the Council did intend to approve the application in that way. The Adviser also said that, had the application been granted as labelled in the elevations there would have been an even more overbearing upper floor window directly overlooking Mr D's garden.

(b) Conclusion

22. The Council said that the fact that the elevations were incorrectly labelled was a problem which was known to them, and in particular, to the Planner from the beginning of the planning process. In this case the plans were not seen by the complainants until after building had started. If, however, an interested party had taken the time to look at the plans during the application process there was a danger that they would have been seriously misled. I am concerned that the Council took no steps (for example, placing a notice on the plans indicating the correct elevations) in order to avoid such a situation arising. The Adviser said that he was satisfied that the Council intended to grant the application as the house was actually built and there is no evidence that the error misled the Council. There is evidence, however, that Mr C and Mr D were confused about the orientation of the house from when building started and they brought their concerns to the attention of the Council on several occasions during February and March 2005. In his letter to the Council on 28 February 2005 Mr C specifically asked that his concerns be treated as a complaint. It was not until 18 April 2005, however, that the Council told Mr C and Mr D that they knew about the problem. The Council have a policy of

initially attempting to resolve complaints informally, quickly and 'on the spot'. The complaints procedure suggests that this will be done within three days. In this case, however, several weeks passed, during which the house continued to be built, before the issue was addressed. I am, therefore, not satisfied that the Council dealt with this complaint appropriately and I uphold the complaint.

(b) Recommendation

23. The Ombudsman recommends that the Council:

- (i) apologise to Mr C and Mr D for their failure to adequately address their complaint; and
- (iii) review their system of dealing with errors in application plans to avoid situations in which members of the public might be misled.

(c) The Council failed to properly consider the effect on Mr C and Mr D's privacy before granting planning permission in respect of the house's lounge windows

24. Mr C and Mr D complained that proper consideration was not given to the extent to which their privacy would be affected before permission was granted for the lounge windows.

25. In the original planning application the drawings show that the lounge of the house is upstairs. There are dormer windows and a bay window which has glass on three sides situated on a platform. When the house was originally built the dormer window overlooked Mr D's garden. The bay window overlooked both Mr C and Mr D's garden.

26. In response to my enquiries Mr C said that he had received no neighbour notification and had been unaware of the plans for the site until work began. Mr D said that he had been in the process of purchasing his property at the time. The original applicant had shown him the plans and assured him that there were no windows overlooking his property. He had therefore not objected.

27. I have obtained a copy of the Planner's report on the original application. In that report he states that:

'concerns relating to privacy with regards the ground floor windows on the open plan porch and sitting room have been amended to include a 2.1 m[etre] high fence. This would protect the privacy of the respective rear gardens of properties'

There is no mention in the report of the upstairs lounge windows or consideration of their impact on privacy.

28. When a further planning application was submitted substantial changes to the dormer window were incorporated into the new plans. No changes were made to the bay window.

The Planner wrote a report in connection with that application. He said:

'When the approved dormer was originally constructed the cill height had been reduced from the original approved cill height of approximately 1.6 metres above the finished floor level to a height of only 1.23 metres which would have been below the average eye level height and thus would have provided future inhabitants added vantage points from which to view adjacent rear gardens. This matter was discussed with the applicant's project manager and as a result the current scheme proposes a dormer design with an internal cill height of 1.5 metres which is sufficient to restrict views, yet allow natural light to enter the room.'

'Privacy concerns have been raised regarding the first floor lounge bay window, which has large glazed windows, low cill heights and vantage points to the north, east and south. However this feature has already been granted consent and even although the internal finished floor level would be higher than originally approved and the cill height would remain as approved, thus reducing the distance between floor level and the lowest point of the window, there would be no further loss of privacy given that the adjacent gardens are already overlooked by other neighbouring properties.'

29. The Adviser said that in relation to the original application, in the absence of any objections on privacy grounds, the Planner was not obliged to comment on the effect of the proposal on the privacy of the surrounding gardens. In the event what he wrote in the report, that the fence would protect the privacy of the surrounding gardens, was clearly incorrect as it failed to take into account the upstairs windows. The fact that the Planner appeared to take into account the overlooking of neighbouring gardens led Mr C and Mr D in this case to have expectations that this factor would be treated as a material consideration when the second application was considered.

30. The Adviser said that there are some parameters which planning authorities use to protect reasonable degrees of internal privacy by preventing overlooking from too close a distance from one house to another. There are no rules or guidelines either at local or national level, however, regarding the overlooking of gardens. This is very much open to interpretation and personal judgement and taste and is not considered to be a material planning matter. In view of the principles of good neighbourliness and the opportunity of the planning application process planning authorities will sometimes act as honest broker to try to improve a situation by negotiation but there is not always an opportunity to do so and it does not always succeed. The Adviser said this was a grey area in planning policy and depends very much on what discretion and negotiation can achieve. In the final analysis the only way to ensure that privacy is protected beyond the minimum that planning policy for separation distance between buildings provides is by acquiring a controlling interest in any property which poses a threat.

31. The Adviser said that since the removal of the standard for distances between opposing windows in the Building Standards Regulations in the early 1980s there has been a growing trend to use a standard which has been revived from the Parker Morris Housing Standards of the 1960s for the same issue through supplementary planning guidance. This recommends a separation distance of 18 metres, with at least 9 metres on each side of the boundary where the space exists. In this case, however, the space does not exist on one side. Some authorities who have such a planning standard do, however, allow mitigating measures such as the erection of intervening screens. That is what the Council sought to do to deal with the ground floor overlooking windows. However, the Adviser said that it is unclear whether they did so with a view to mitigating the lack of a 9 metre clearance, taking into account distance between buildings with opposing windows, or to protect the overlooking of the garden.

32. The Adviser said that the Council did not have the same option with regard to the upper floor windows as a screen of such a height would raise other problems of visual amenity and practicality. Accordingly, as they had no specific criteria to follow, they had to decide whether there were reasonable steps they could take to negotiate a lessening of the impact of the overlooking windows. Such steps were negotiable to a degree with the height of the windows in the dormer but little could be done with the bay window as the whole purpose was to increase the visibility. The Adviser pointed out that there could

be no guarantee, either, for the owners of the new house that the view from this window might not be blocked some day by a development of neighbouring land, thereby raising another issue between neighbours that causes unrest but which is not a material issue for planning. The Adviser said that the fact that this window had previously been given permission was a material planning consideration and, therefore, the Council were obliged to take this into account.

33. The Adviser commented on two of the Council's policies. Policy H5 of the adopted relevant Local Plan deals with six criteria for satisfactory residential development. The Adviser said that none of these relate to privacy. The nearest by inference is policy H5(c) which requires development to 'be compatible with its surroundings in terms of land use, density and relationship with existing dwellings' and H5 (e) which relates to visual amenity. The Council's policy for garden ground deals with adequacy of space for the enjoyment of the property rather than the protection of adjacent gardens.

34. The Adviser noted that the Council said they knew about the elevations being incorrectly labelled at the time of the first application, but lack of any reference to this or to the implications of this and to the overlooking issues from the upper floor windows in the Planner's report cannot have inspired confidence during the process. The Adviser also noted that the Council did not offer a full explanation until asked to comment on the first draft of this investigation report in September 2007.

(c) Conclusion

35. Although both windows in the original build had an impact on the privacy of the gardens they overlooked the Planner has not treated them in the same way. In respect of the dormer window, although I am aware that Mr D, whose garden is affected, is not happy with the 0.1 metre reduction in cill height, the Planner has considered the position and made a decision which is designed to restrict viewing from the window. I am satisfied that the Planner's decision was reasonable and I do not uphold this part of the complaint. In respect of the bay window, the Adviser said that the fact that it had achieved planning permission previously was a material planning consideration. The Adviser said that the impact of the window on the neighbouring gardens, however, was not a material consideration and therefore the Planner could not take this into account. The Adviser said that he was satisfied that the Planner took the correct factors into account in making his recommendations. I, therefore, do not uphold this complaint. I am, however, concerned that the Planner's report did not address

the issue of the incorrect labelling. In addition, the issue of overlooking surrounding gardens appeared to be dealt with differently in the reports and the Council did not offer a full explanation of what had been considered until a draft investigation report was issued. At that point the Council accepted that the issues of incorrect labelling and overlooking should have been addressed in the report.

(c) Recommendation

36. The Ombudsman recommends that the Council apologise to Mr C and Mr D for the shortcomings in reporting on how the incorrect labelling of the plans and the issue of overlooking the gardens have been dealt with.

(d) The Council failed to take action in respect of the patio area having said they would

37. In the Planner's report in connection with the Planning Application he said that concerns raised regarding privacy were not considered valid because the scheme 'includes the erection of a 2.1 metre high fence which would screen the rear neighbouring garden areas from the dwellinghouse at ground floor level'.

38. When I visited the site in January 2006 Mr D showed me the fence which had been erected. He said that it appeared to be approximately the correct height and he was satisfied with it as he felt it protected his privacy at ground floor level. Shortly after that visit, however, the developers built a raised patio on their side of the fence and started to construct a ramp. The effect of these developments was that people on the other side of the fence were again visible and able to look directly into Mr D's garden. Mr D said that he was disappointed that a measure designed to protect his privacy had been allowed to be circumvented.

39. I asked the Chief Executive for further information about this and asked what the Council's intentions were. The Chief Executive replied on 21 February 2006. He said that the Council's Enforcement Officer had visited the property and confirmed that the boundary fence had been completed in compliance with the approved plans. He said, however, that the patio area had not been constructed in accordance with the approved drawings. The Chief Executive said that had the house been occupied, the construction of the patio would not have required planning permission as it would have been permitted development. However, permitted development rights did not extend to unoccupied property and given the history of the site with regard to privacy

issues and the complaints received, the Council had decided not to treat these works as minor variations. The Council would write to the developer to ask that either a retrospective planning application be submitted for the works or that the work be done in accordance with the planning approval.

40. I informed Mr D of the Council's decision. In June 2006, however, the Council appointed a new Chief Executive. When Mr D became frustrated by lack of progress, I wrote to the Council again on 17 October 2006. On 27 October 2006 the Council said that they did not intend to pursue any further enforcement action with regard to the patio area.

41. On 30 October 2006 I wrote to the new Chief Executive for an explanation but received no reply. I wrote again on 21 December 2006.

42. The new Chief Executive wrote to me on 9 January 2007. He said that the Council had written to the developers confirming that a retrospective planning application was required for the works or the works carried out had to be altered to conform to the approved plans. The house was, however, now occupied. The decision had subsequently been taken that there was now no need to require the submission of a retrospective planning application and it would now be inappropriate to consider enforcement action. The new Chief Executive said that the Council:

'did not accept that the changes failed to be considered as non-material considerations.'

43. The Council subsequently sent me a copy of a letter which they had sent to the developer on 9 February 2006. The letter noted the construction of the patio and the fact that it deviated from the approved plans (which showed access being taken to the house by two steps). The Council said that an application for planning permission should be lodged if the developers wished to retain the patio area. Alternatively the patio should be removed and steps constructed as per the approved plans.

44. The Adviser said that there are no national guidelines on the height that fencing requires to be beyond the principle that some authorities adopt that intervisibility of less than the standard 18 metres between opposing windows of habitable rooms (not bathrooms with opaque windows etc) may be mitigated by a visual barrier – wall, fence or hedge as suits the site best. The Adviser said that the fact that the Council sought to use this means possibly to protect

garden overlooking is well outside any normal guidance and entirely a matter of what can be negotiated in the interests of reasonableness. The construction of a new patio after the house for which planning permission had been obtained had been completed would be 'permitted development', not requiring planning permission under the planning law (the General Permitted Development Order) and that was what happened before further plans were submitted. The Adviser said that the Council were justified in reviewing their stance when this happened and deciding to take no further action.

(d) Conclusion

45. It is clear from the correspondence that the situation changed when the house became occupied and the advice I have received is that the Council acted appropriately in deciding to take no further action after that. I, therefore, do not uphold this complaint.

46. 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.

Annex 1

Explanation of abbreviations used

Mr C and Mr D	The complainants
The Council	Fife Council
The Adviser	The Ombudsman's Planning Adviser
The Planner	One of the Council's planning officers
PAN54	Scottish Executive's Planning Advice Note PAN54 Planning Enforcement and Circular 4/1999

List of legislation and policies considered

PAN (Planning Advice Note) 54 Planning Enforcement; Scottish Executive

Planning Circular 4/1999 Annex E; Enforcement Notices; Scottish Executive

Largo and East Neuk Local Plan (1995)

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