

## Scottish Parliament Region: Highlands and Islands

### Case 200801053: The Highland Council

#### Summary of Investigation

##### ***Category***

Local government: Building Control service of statutory notice in respect of neighbouring property

##### ***Overview***

The complainant (Ms C) raised a complaint on behalf of her elderly father (Mr A) that the Highland Council (the Council) had failed over a considerable period of time to take appropriate action to require the owner (Mr B) of the property adjoining Mr A's house to rectify problems with his building. Ms C claimed the lack of action was having an injurious effect on Mr A's health and threatened the fabric of his house.

##### ***Specific complaint and conclusion***

The complaint which has been investigated is that the Council had failed over a considerable period of time to take appropriate action to require Mr B, the owner of the property adjoining Mr A's house, to rectify problems with his building (*no finding*).

##### ***Redress and recommendation***

The Ombudsman recommends that the Council continue to monitor closely the property currently owned by Mr B and its effect on Mr A's property, particularly should the current planning consent and building warrant expire.

## **Main Investigation Report**

### **Introduction**

1. Mr A lives in a terraced cottage in a Highland community. The end terraced property is owned by Mr B. The historical circumstances surrounding the situation obtaining in the terrace were previously brought to the attention of the Ombudsman but were not the subject of investigation and are not, therefore, a matter of public record. Mr B has not resided in the end terraced cottage since the early 1990s. According to Mr A's daughter (Ms C), Mr B had allowed the property to fall into a state of dilapidation, and she had grown increasingly concerned at the consequent effect on her elderly father's health and on the fabric of his home. Over the four years or so prior to completing The Highland Council (the Council)'s complaints procedures, she had tried to get the Council to exercise powers available to them to require Mr B to rectify the defects in his property.

2. The complaint from Ms C which I have investigated is that the Council had failed over a considerable period of time to take appropriate action to require Mr B, the owner of the property adjoining Mr A's house, to rectify problems with his building.

### **Investigation**

3. I obtained and considered correspondence from Ms C and made enquiry of the Council. I did not consider it necessary to interview Ms C, Mr A or officers of the Council. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Ms C and the Council were given an opportunity to comment on a draft of this report.

**Complaint: The Council had failed over a considerable period of time to take appropriate action to require Mr B, the owner of the property adjoining Mr A's house, to rectify problems with his building**

4. According to Ms C, Mr B had not resided in the cottage adjoining her father's home since the early 1990s. He had left the property to decay and, around 1998, he partially demolished an extension. Thereafter, he had refused to carry out repairs to his property. Ms C claims that water seeped under both properties from an uncapped water supply pipe next door and that this caused extensive damage to Mr A's house. Mr B's house had been open to the elements since the partial demolition of his extension, and she maintained that

rainwater soaks through the party wall causing further dampness, black mould, smell and timber rot to the fabric of her father's home. The roof structure of Mr B's end terraced property, which is connected to Mr A's home, had in Ms C's view been severely weakened, had partially collapsed, and was showing movement. Ms C provided me with a digital image showing a 3.6 metre high tree growing out of it. She stated that slates and pieces of masonry frequently fall into the space below.

5. Ms C informed me that from around 2003 or 2004, she contacted officers in Environmental Health. She understood that Environmental Health tried to persuade Mr B to undertake repairs but that he refused to comply. A Nuisance Abatement Order was issued on Mr B in January 2005 under the Environment Protection Act 1990. While Mr B apparently lost his appeal, he continued not to comply. According to Ms C, the Council chose not to enforce the Nuisance Abatement Order, and also chose not to carry out the work and to render the account to Mr B.

6. In October 2007, an application was submitted to the Council by Mr B for planning permission for alterations and erection of an extension to the end terraced house, and for a building warrant to extend the dwelling. Ms C submitted a letter of objection on behalf of Mr A to the application for planning consent on 24 October 2007. She expressed doubt as to whether the application was a serious proposal and alleged that the application had been devised deliberately by Mr B to avoid the issue of a notice that would oblige him to carry out immediate works. She requested that any planning consent be made conditional on the applicant immediately instructing a contractor to carry out such emergency repairs as were required to stop the water penetration, and that the Council should actively monitor and enforce this condition within a short time limit. In the event that the condition was not met, the Council should issue a Defective Building Notice under the Building (Scotland) Act 2003 without further delay.

7. The planning consent and building warrant were subsequently issued. The planning consent did not include the condition sought by Ms C.

8. On 1 May 2008, Ms C submitted a formal complaint by email to the Area Environmental Health Officer at the Council. She complained that the Council had consistently failed in its duty to prevent the derelict property next door causing harm to her father as neighbouring occupier. She described her

father's age and state of health, the stress he was under, and the prospect that his home was on the verge of becoming uninhabitable. The presence of the attached dangerous building had, she maintained, left Mr A's home with a nil valuation and he was unable to sell and to move elsewhere.

9. This email was acknowledged as a complaint on 1 May 2008. In a response of 2 June 2008, the Area Environmental Health Officer informed Ms C that the Council had decided to have both properties surveyed.

10. Ms C first contacted the Ombudsman on 17 July 2008, concerned that she had heard nothing further from the Council. Our file was closed at that time on the basis that the Council's complaints procedures had not been completed.

11. Not having heard anything further by 17 September 2008, Ms C contacted the Director of Transport, Environmental and Community Services by email and reverted to the Ombudsman on 19 September 2008.

12. On 3 October 2008, the Council's Area Building Standards Manager wrote to Ms C enclosing a copy of the report of a survey carried out on 20 August 2008 by a firm of chartered surveyors (the Chartered Surveyors) on behalf of the Council. Having considered the report, the Area Building Standards Manager stated that he did not consider the building adjoining Mr A's property presently constituted a danger to the public or to adjacent buildings. It was unoccupied and the owner was fully aware of the condition inside. He stated that the owner, Mr B, was being encouraged to progress plans, which would require ensuring that the separating wall was left in a weather tight condition. He drew Ms C's attention to the surveyors' remarks about dampness in a cupboard in Mr A's home where electrical switchgear was located. He stated that he did not intend to serve any notices at that time, would reconsider his position should matters not progress, and confirmed that the Council intended to continue to monitor the property next door to Mr A and would take action, as appropriate, if the building further deteriorated.

13. Ms C did not consider this response answered her concerns and, consequently, she emailed the Chief Executive on 27 October 2008.

14. When Ms C informed the Ombudsman by letter of 26 November 2008 that she had received no reply from the Director of Transport, Environmental and

Community Services or Chief Executive to her emails of 17 September and 27 October 2008 respectively, our file was reopened.

15. On 5 December 2008, the Chief Executive replied to Ms C and apologised to her for the delay in his response. The Chief Executive stated that the Council did not seek a prosecution for non compliance with the Nuisance Abatement Order served on Mr B in January 2005 as they had received legal advice that Mr B was likely to prove reasonable excuse for not carrying out the works. The Chief Executive stated that he was inhibited in saying more because of restrictions imposed by the Data Protection Act 1998. He continued:

'... The Council has no legal obligation to carry out works in default and must have careful regard to the financial implications of doing so. Nonetheless, the possibility of the Council carrying out repairs (relating to the Abatement Notice) using the powers available was explored at some length. Ultimately, however, this was not felt appropriate as it became apparent that the extent of work required to the property exceeded that which could be enforced by virtue of the notice which related purely to the issue of dampness.

As the property is now giving rise to concerns under the Building Standards Regulations, the matter is now being pursued in this regard. I have also instructed Building Standards to contact you directly regarding your request for details of the disrepair ...

I appreciate your frustration regarding the length of time this process has taken to date, however, Council officials are continuing to utilise the most appropriate powers available to assist you resolve this particularly difficult case.'

16. In communicating with this office on 18 December 2008, Ms C referred to a previous survey carried out by surveyors on behalf of the Council in 2004. She stated that she did not accept the Chief Executive's explanation for the Council's failure to use its powers to resolve the problems. She stated that if the Council received legal advice to the effect that the previous Nuisance Abatement Order was unenforceable, that advice was misguided. She stated that she suspected that this related to the absentee owner then being bankrupt but, since he was able to pay off all his creditors in full almost immediately (after being discharged), there would seem, in her view, to be no reason why he could not afford to repair the house, or indeed, sell it if he wished to be relieved of his

responsibilities. She considered that the Council should have exercised its discretionary powers to put matters right. The Council were aware of the negligence of the absentee landowner going back a decade, and were aware that the property's condition would deteriorate rapidly. In 2004, according to the earlier survey, the water penetration could have been halted at a cost of between £5000 and £10000. She also argued that a Nuisance Abatement Order was possibly not the most appropriate route to have taken in the circumstances and she understood that the proceedings in terms of the legislation governing defective buildings placed an obligation on the part of the local authority to step in and carry out works where the owner refuses to do so. She had little confidence that the Council had used its powers effectively or appropriately.

17. Enquiry was made of the Council on 12 January 2009. The Chief Executive's response of 12 February 2009 dealt with the background and details of the report in 2004, the context of the Nuisance Abatement Order, and the discretionary powers available to the Council. The Chief Executive referred to a further report having been commissioned the previous autumn.

18. Because of problems in negotiating access with the owner, Mr B, the proposed survey by an independent firm of structural engineers had not taken place by early June 2009. A decision was taken by the Ombudsman on 8 July 2009 to investigate Ms C's complaint.

19. In early August 2009, the Council informed me that Mr B had granted conditional access for an inspection of his property on 10 August 2009. That inspection was carried out by a representative from Building Standards together with a consultant structural engineer. Neither Ms C nor Mr A had been present when the inspection took place.

20. The Chief Executive informed Ms C of progress in a letter of 10 September 2009. A report from the consultant structural engineer was provided to the Council and a Dangerous Building Notice in terms of section 29 and section 30 of the Building (Scotland) Act 2003 was issued to the owner, Mr B, on 26 August 2009 (giving him until 21 September to comply).

21. Mr B failed to do so and workmen, instructed by the Council, attended at the property and fixed loose slates and some masonry to deal with the danger. (The Council confirmed to me that they would seek to recover the costs from

Mr B.) They subsequently informed me by email of 29 October 2009 that a Defective Building Notice was served under section 28 of the Building (Scotland) Act 2003 on 2 October 2009, requiring Mr B, as owner, to take steps to rectify defects to the roof to the rear of his property by 1) making it permanently wind and water tight to prevent further deterioration to the fabric of the building; and 2) providing ventilation to the internal area of the building to allow the inner fabric to dry out. Mr B was given until 6 November 2009 to comply. He failed to comply. The Council have informed me that they will now go out to tender to get the works done and again will seek to recover costs from Mr B.

### *Conclusion*

22. The deteriorating property next door has obviously been a source of worry for Mr A in his advanced years, and also for Ms C who is understandably concerned about her father's welfare. I am cognizant of the personal circumstances affecting Mr B in 2005. Those circumstances appear to have improved sufficiently to allow him to apply for planning consent and building warrant in 2007.

23. At this point in time over four years after the Nuisance Abatement Order was served in 2005, I see no point in enquiring further into the matter. I note that the decision not to pursue Mr B's non compliance was taken in the light of legal advice.

24. In light of Mr B's successful applications for building warrant and planning consent, it is understandable why the Council might have been reluctant initially to take action under the Building (Scotland) Act 2003 in the hope that the disrepair would be attended to when Mr B began building works. From information provided by Ms C, however, it would appear that two years on Mr B has taken no practical steps to implement his consents.

25. I am satisfied that the Council's recent action has been reasonable and that they have taken appropriate steps following the inspection on 10 August 2009 to consider and exercise available powers. The immediate danger to Mr A and any member of the general public from the state of disrepair of Mr B's property was attended to. Mr B failed to attend to the remaining defects in his building. The Council have confirmed to me that further action will be taken by the Council, and that they will look to Mr B to recover their costs.

26. In large measure, the Council have now taken the action Ms C urged them to take. In all the circumstances, I find no reason to continue my investigation. In so doing, I make no finding.

*Recommendation*

27. The Ombudsman recommends that the Council continue to monitor closely the property currently owned by Mr B and its effect on Mr A's property, particularly should the current planning consent and building warrant expire.



**Explanation of abbreviations used**

Mr A	The aggrieved
Mr B	The non resident of the end terraced property adjoining Mr A's home
Ms C	The complainant, Mr A's daughter
The Council	The Highland Council

## **List of legislation and policies considered**

### **The Environment Protection Act 1990**

Section 79 of the Environment Protection Act 1990 defines matters that might constitute a statutory nuisance. These include matters prejudicial to health. Part III of the Environment Protection Act 1990 enables local authorities to take action to inspect, detect and to secure the abatement of a statutory nuisance by serving an abatement notice on the person responsible. If an abatement notice is not complied with, the local authority may take the necessary steps to abate the nuisance itself and may recover the costs that were reasonably incurred in doing this from the responsible person. The Environment Protection Act 1990 also makes provision for any person aggrieved by the existence of a statutory nuisance to make an application to the Sheriff who, if satisfied a nuisance exists, shall make an order requiring the abatement of the nuisance and/or the prevention of its occurrence or recurrence.

### **The Building (Scotland) Act 2003**

Part 4 of the Building (Scotland) Act 2003 came into force on 3 May 2005 and provides a local authority with powers under section 29 and section 30 to serve a 'dangerous building notice' and under section 28 to serve a 'defective building notice'.

#### **Section 30 Dangerous Building Notice**

The work to be specified in a dangerous building notice is the work for the repair, securing or demolition of the dangerous building which the local authority considers necessary to remove the danger. A dangerous building notice must specify dates by which the owner must have begun and completed the work required by the notice and may specify different dates for the commencement and completion of different work.

#### **Section 28 and section 29 Defective Building Notice**

A local authority may serve on the owner of a building a notice (a 'defective building notice') requiring the owner to rectify such defects in the building as the notice may specify. The defects which may be specified in a defective building notice are defects which require rectification in order to bring the building into a reasonable state of repair having regard to its age, type and location.