

Scottish Parliament Region: Highlands and Islands

Case 200900221: The Highland Council

Summary of Investigation

Category

Local government: Planning

Overview

In 1995 the complainant (Mr C) obtained planning permission to build a new house on his land. Planning permission was granted subject to the condition that the existing property on the land (a croft house), would revert to use as a byre, with no use as a dwelling taking place after construction of the new house was completed. Mr C says that as a result of this condition he carried out work to convert the croft house to a byre. Thereafter, in October 2004 Mr C applied for planning permission to convert the byre back to a dwelling house. Permission was refused. He applied again in June 2005 when outline planning consent was granted, subject to conditions including significant access improvements. Mr C considered the planning conditions to be onerous, therefore, he decided to sell the building with outline planning consent to upgrade to a dwelling. He considered that the requirement to meet the planning conditions was reflected in the sale price.

When the new owners moved into and commenced work on the property, it became obvious to Mr C that they were not complying with the planning conditions as set in June 2005. Mr C contacted the Council regarding this, however, he was advised that the works he had previously carried out to convert the former croft house to a byre were not sufficient for the Council as planning authority to accept that the use of the building as a house had ceased. Mr C was also advised that under the Building Regulations the building was assessed as being a house, and had never been converted to byre status. Therefore, the new owners were not required to meet the planning conditions set in the outline planning permission of June 2005. In July 2008 Mr C formally complained to the Council that the house had been occupied without compliance with the 2005 conditions, however, at the conclusion of the Council's investigation he remained unhappy with the outcome. In April 2009, he asked the Ombudsman to investigate the matter.

Specific complaint and conclusion

The complaint which has been investigated is that the Council's handling of the planning situation, in relation to the building adjacent to Mr C's property, was inadequate (*upheld*).

Redress and recommendations

	<i>Completion date</i>
The Ombudsman recommends that the Council:	
(i) consider how best to meet the requirements of the planning conditions set in June 2005 where the need remains; and	15 September 2010
(ii) apologise to Mr C for the inadequate manner in which the planning considerations were handled.	21 July 2010

Main Investigation Report

Introduction

1. Having sold the property on his land with conditional planning consent to convert to a dwelling house, Mr C raised concerns with The Highland Council (the Council) when it became apparent that the required planning conditions were not being met. Following a period of correspondence with the Council on the matter, Mr C formally complained that the Council had failed to impose the agreed planning conditions. He remained unhappy at the conclusion of the Council's investigation and asked the Ombudsman to investigate the matter.

2. In bringing his complaint to the Ombudsman in April 2009, Mr C stated that the outline planning approval he had obtained in 2005 clearly stated that certain conditions must be met for the byre to be used as a house. He asked on what basis the Council's planning department could subsequently ignore their own conditions.

3. The complaint from Mr C which I have investigated is that the Council's handling of the planning situation, in relation to the building adjacent to Mr C's property, was inadequate.

Investigation

4. In investigating this complaint my complaints reviewer considered correspondence provided by Mr C, together with documentation provided by the Council. He also took advice from the Ombudsman's independent planning adviser (the Adviser).

5. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and the Council were given an opportunity to comment on a draft of this report.

Complaint: The Council's handling of the planning situation, in relation to the building adjacent to Mr C's property, was inadequate

6. Given that the circumstances of the case date back to 1995, the first part of the report will set out events in chronological order. Thereafter, I will refer to the advice provided by the Adviser and taken account of in reaching my conclusion.

Events in chronological order

7. In August 1995 the Council advised Mr C that his outline application to build a new dwelling house on his land was approved, subject to a condition that the existing original croft house would revert to use as a byre with no use as a dwelling taking place after construction of the new house was completed.

8. At this time the Council wrote to Mr C to suggest that he also apply as soon as possible for a change of use of the old croft house to a byre. He was told that there was no problem in this consent being granted immediately and he should implement it as soon as possible by removing internal walling and plumbing fittings such that the building could no longer be used as a dwelling. He was also advised that, thereafter, further planning permission would be required to restore the building for use as a dwelling 'thus the planning authority would retain control of the situation in a satisfactory a way'.

9. Mr C was also advised that if at some future date alternative means of access could be secured to the croft, which were acceptable to the Divisional Road Engineer then it may be possible for him to apply to restore the original croft house to use as a dwelling.

10. In January 1996 detailed planning permission was granted to Mr C to build a new dwelling house on his land subject to conditions. Condition 7 stated: 'when the new house is completed to a habitable state the change of use is to be implemented and the former croft house shall cease to be used as a dwelling thereafter'.

11. Some years later, in July 2004, and in light of the advice referred to in paragraph 9, about securing alternative means of access and the possibility of re-applying for planning permission, Mr C applied for planning permission to 'knock down an old dwelling house and build a new house on the same site for permanent residence. The old dwelling house was "change of use" to agricultural use only under planning permission for house I'm currently in at same address'.

12. In considering this application, the Council noted that the proposed development would intensify use of a sub standard access from a track, currently serving five houses, onto the public road where visibility was seriously restricted. The Council also noted that the proposed development would be contrary to the policies relating to the number of houses taking access from an

un-adopted road in the Skye and Lochalsh Local Plan and the Highland Structure Plan. Finally, the Council observed that Mr C had failed to submit either satisfactory foul drainage proposals or details of the layout of the site. Mr C's application for planning permission was, therefore, rejected.

13. Around this time Mr C also wrote to the Council in relation to council tax liability for the property, explaining that since 1985 the property had increasingly become used as a 'shed/byre'. As a result of this correspondence the Council accepted that there was no council tax liability for the property, as it was not in use as a house.

14. In March 2005 Mr C again applied for planning permission, however, on this occasion the application was for 'change of use of existing property from byre to dwelling house'. On this occasion the Council's Area Planning and Building Standards Manager stated 'outline planning permission is recommended to convert a ruinous former house, now used for agriculture, back to residential use. A similar application was refused last year, but the applicant has now proposed significant access improvements'. Outline planning permission was, therefore, granted subject to the requirement to meet certain conditions in respect of reserved matters, road safety and to ensure the development did not impede future development opportunities in the area.

15. When, however, the Planning Consent notice was issued in June 2005 to grant outline planning permission the Council erroneously advised Mr C of consent to 'erect a house' subject to the conditions set. This is significant as the Planning Application form (dated 21 March 2005) had applied for 'change of use of existing property from byre to dwelling house', not to erect a house.

16. Mr C considered the planning conditions to be met in relation to the access road and parking were too onerous for him to implement. He, therefore, decided to sell the building with outline planning consent to upgrade to a dwelling house. In his complaint to this office Mr C stated that the burden of implementing the planning conditions was reflected in the sale value of the property.

17. In April 2008, after the purchasers of the property had moved into the croft house without meeting the conditions set out in the outline planning permission, Mr C's wife (Mrs C) contacted the Council to ask when the conditions set in 2005 would be enforced. The Council responded by advising her that the new

owners had submitted a late building warrant application to renovate the old house and carry out some alterations to the internal layout. At this stage Mrs C was also advised that there was never a change of use warrant obtained to change the croft house to a byre, therefore, the property remained as a dwelling under the building regulations.

18. Following this the Council wrote to Mrs C (in April 2008) to advise her that: 'having investigated the matter it was acknowledged that the works being undertaken did not constitute development requiring planning permission and consequently no planning application was required. The works are assessed as being repair and maintenance to a house. The use of the building as a house had not lapsed and repairs could therefore be undertaken.'

19. In June 2008 the Council again wrote to Mr and Mrs C. They said that the use of the building in question as a house had not been abandoned, with the building having sufficient services and facilities to still be classed as a house. Mr and Mrs C were advised that in essence the situation was assessed as a matter of fact and degree and in this instance the evidence clearly demonstrated that the house remained a house.

20. In August 2008 the Council again wrote to Mrs C to explain that the assessment of the building for planning purposes remained as a house, therefore, planning consent was not required to reinstate its lawful use as a house and the refurbishment works (carried out by the new owners) were deemed to have consent under the permitted development rights associated with residential property. The Council also said that the previous planning permission (see paragraph 7) which would have in turn removed that lawful use (as a house) had not been implemented, or implemented in such a manner as to warrant the use of the building as a house being 'abandoned' as verified in case law.

21. The Council went on to explain:

'It may be that assessment is a matter of fact and degree but in essence the building was a house, the consent to build a new house required this use to cease (the works required to fully make the house use abandoned were not fully implemented), the application that referred to the byre was rectifying the planning history of the site when in fact what should have been submitted was an application to vary or remove the conditions that

effectively tied the old house and the cessation of its use as a house to your new house. On reflection the change of use application was superfluous given the building still benefited from the established use as a dwelling as that use had not ceased. The Council considers the property to be a house and the works can proceed without the requirement for express planning permission.'

22. In October 2008 Mrs C wrote to the Council to dispute their contention that they (Mr and Mrs C) did not implement conditions to turn the house into a byre. Mrs C also stated that the new owners had moved into the house in November 2006 and had started work immediately, choosing to ignore the conditions of the outline planning consent. Mrs C also pointed out that the Council's Planning Service did not become aware of this until the beginning of 2008, so for over a year the new owners were working on the byre.

23. The Council replied in November 2008 explaining that in their opinion, the works carried out to 'the byre' were not sufficient for the Council as planning authority to accept that the use of the building as a house had ceased. The Council said that 'from photos and inspection this work was not undertaken to the degree to warrant the use of the building as a house to be assessed as being 'abandoned' in terms of planning law, therefore, as stated previously, under the Building Regulations the building was assessed as being a house'.

24. In April 2009 Mr C complained to the Ombudsman. He said that outline planning approval clearly stated that certain conditions must be met for the building to be used as a house. He asked how the Council could ignore the conditions they had set.

Evidence submitted by the Council

25. The paperwork provided by the Council confirmed that they had written to the new owners in December 2007 regarding the work they were doing on the house. The Council said:

'it has come to our attention that the byre referred to in the above application has been converted back into a house. As planning permission granted was only outline the work carried out is un-authorised. In order to regularise the situation you are required to submit a retrospective planning application for the works that have been carried out.'

26. Further communication between the new owners and the Council led to a letter being sent by the new owner's solicitor to the Council in February 2008. The solicitor said:

'having looked through various points with regard to planning permission, the planning permission is specific to the building of a new dwelling house, which, in fact, our clients have not done. We therefore do not see how the reserved matters can be imposed on our client when they are carrying out works outwith the ambit of the outline planning permission document that is currently in place.'

In paragraph 15 I report that the Council had indeed erroneously provided consent to 'erect a house' subject to the conditions set.

27. The solicitor went on to say, 'while our clients are content to carry out the works and apply for retrospective planning permission it will be in order for a change of use of the byre back into a residential dwelling as opposed to the erection of a house'.

28. In March 2008 the new owners wrote to the Council referring to the 'abandoned croft house' and the state of the property at the time of purchase. They explained that the kitchen had a sink with running water and wall units. The electrics were working and a phone line was present. The bathroom was in working order. The new owners provided photographs which they stated reflected the condition of the property when they first viewed it.

29. In response to the correspondence from the new owners and their solicitor, the Council wrote to the new owners in March 2008. They said:

'we can confirm that on the basis of the information submitted the use of the building as a house had not lapsed or been taken over by another use, therefore, planning permission is not required for the house use to be reinstated. I confirm that the works do not require express planning consent.'

30. My complaints reviewer examined the valuation survey report on the property obtained by the new owners prior to purchase. The report noted that the principal roof covering was clad with corrugated iron, a significant degree of corrosion was noted and it was apparent that the roof covering was not wind and water tight.

31. The valuation survey report identified several other factors as requiring attention, including the need for the property to be completely rewired and have all windows replaced. The property was described as requiring 'complete and total renovation/refurbishment both internally and externally and in short can be fairly described, in our opinion, as being a site with four walls'.

32. My complaints reviewer also considered the letter from Mr C to the Council written in 2004, regarding council tax liability for the property (referred to in paragraph 13). In this letter Mr C explained that the property had been in his family for many years. He said that his mother-in-law had inherited the house in 1985, following the death of her mother. He also explained that from 1985 onwards 'the house was abandoned and increasingly became used as a shed/byre' by his father-in-law, who was an active crofter. Mr C said the property was assigned to him in 1995. He said that at this time the property 'was nothing more than a byre and had not been used as a dwelling for many years'. Mr C said that as a result of this letter council tax was never paid on the byre, as the Council accepted that the property was a byre.

The Adviser's comments

33. My complaints reviewer told the Adviser that planning permission in January 1996 to erect the house currently occupied by Mr C was conditional on the requirement that the former croft house 'shall cease to be used as a dwelling thereafter'. The Council had previously advised Mr C (in August 1995) that he would be required to alter the existing house to a byre, by removing internal walling and plumbing fittings, etc. My complaints reviewer asked him if there was any requirement on the Council as Planning Authority to follow up on this condition and, if so, how the Council should have proceeded.

34. The Adviser said that with regard to follow-up by the Council, the planning condition stood perfectly well on its own and no other application was needed. He also said that there was no locus in law for such an application, as a change of use to agricultural use is not a material change of use in planning law. In addition, the cessation of residential use, while it may be required by a planning condition, requires no specific prescription for a use actually to cease legally.

35. The Adviser considered whether there should have been proactive monitoring and confirmation of the position in respect of the condition at the time the new house was 'completed to a habitable state'. He said that as good practice, there should have been such monitoring; however, the lack of a

statutory notice of completion under planning law at that time and the lack of a statutory duty to monitor together with the resource implication for such work, which is a common issue among all planning authorities, makes this an unlikely occurrence. He said that usual practice would be to monitor planning conditions where significant policy issues are at stake or significant public interest or nuisance is likely.

36. I noted that in refusing Mr C's planning application in 2004, the Council referred to the original croft house as 'an intact but ruinous 1 ½ story house'. When permission was subsequently granted in June 2005 the Council still referred to the property as 'an intact but ruinous 1 ½ story house', however on this occasion the Council's report also stated, 'propose to retain existing building and use it as a house, its original use, rather than a byre'. My complaints reviewer asked the Adviser to comment on the Council's reference to the original croft house as a byre.

37. The Adviser said that it was necessary to be clear that the applications in 2004 and in 2005 were not identical. He clarified that the 2004 application (which was refused) was for the erection of a replacement house, ie, a new building on the site of the byre, so it would seem that, at that time that there was no question of refurbishing the (former) croft house in the mind of the applicant (Mr C). Later that year, however, Mr C employed an architect, and in taking the architect's advice a strategy to refurbish the byre and re-apply for planning permission on that basis was adopted, with planning permission being granted in 2005.

38. In email correspondence between Mr C's architect and the Council's Area Planning and Building Control Manager on 29 November 2004 the architect said that Mr C had decided 'not to knock down the existing old house/byre but to propose renovation and change of use to a dwelling'. In responding, without commitment, the Council advised the architect that 'if significant gains in terms of road safety could be found', then it was hoped a solution could be reached.

39. In March 2005 the architect submitted a planning application on behalf of Mr C. The proposed development was described as a 'change of use of existing property from byre to dwelling house' and the applicant ticked the change of use box to indicate the intention for the existing building.

40. The consent subsequently granted was intended for 'alterations to building to form house', with the Council's planning report, which recommended the application, stating, 'outline permission is recommended to convert a ruinous former house, now used for agriculture, back to residential use'. Reference is also made in this planning report to the proposal to use the existing building as a house, 'its original use, rather than a byre'. The outline Planning Consent notice issued, however, was for the erection of a house. I shall refer to this error again in paragraphs 42 and 43.

41. The Adviser considered that this evidence showed that in considering the 2005 planning application, the Council appeared to accept that the use of the building, irrespective of how its condition was described, was for agriculture purposes. He also said it could be assumed that the architect's intention, acting on behalf of Mr C, was to clarify in the terms of any supporting information with the submission, that the use as a byre had taken place. He went on to say that the Council may well have acted on such information without corroboration as there were no objectors and no policy difficulties with the principle of the use, only with the access, which they intended to deal with by conditions.

42. The Adviser reiterated that the planning application in 2005 was submitted, quite deliberately, as mentioned above, by the architect for 'change of use of existing property from byre to dwelling house'. The planning report described the development as 'alterations to building to form house' and the summary generally supported this. He considered, therefore, that the decision notice for 'erection of a house' was confusing, especially as the difference from the 2004 application should have been quite clear. He went on to say that the Council may change the description of any application to ensure that it reflects all the elements of the application which constitute development under the act and which require planning permission, but this decision seemed to have confused rather than clarified matters.

43. I said in paragraph 40 that the outline Planning Consent was for the erection of a house. The Adviser said that this decision was 'quite inexplicable' and he considered the planning decision issued to be poor interpretation and drafting by the Council, as the description of the development as applied for and as described to the area committee was changed for the purposes of the decision notice.

44. The Adviser also noted, however, that from the point of view of a third party (in this case the new owners), the Council's decision certainly could have suggested that the consent was for a new building and that they could carry out refurbishment work without further permission in good faith if they did not realise that there was an issue about change of use. The Council made a determination in March 2008 with regard to planning permission not being required by the new owners (see paragraph 29). This was made on the basis that a change of use of the original croft house had not taken place, but appeared to take account of photographs provided by the new owners in decision making process. However, the Adviser explained that the key consideration in this case was 'use' and the actual situation pertaining to the property and the activities taking place in it over time which defined its use.

45. On the one hand Mr C claimed that the property was used as a byre since 1985, backed by evidence of acceptance by the Council that the property has not been subject to council tax since 1993. On the other hand, the new owners claimed evidence of habitability and lack of any alterations or evidence for the purpose of another use, especially agricultural.

46. The Adviser considered that in the light of the conflicting evidence with regard to the actual use of the former croft house/byre, it appeared that the Council's assessment of the change of use situation was somewhat cursory and that further considerations of the true circumstances were warranted.

47. The Adviser said that he did not consider it was the work or lack of it for conversion to a byre which would affect the use status of the property for planning purposes, although taken with other factors, including timescale, alternative use and owner intentions for the property, it might contribute to any determination on the matter. He said it was the actual use of the property which counted. In taking account of all the evidence, the Adviser said that 'if we are to believe both sets of evidence, we have a habitable building, run down but with functioning services and some furniture, which has been used for animals on and off over the years'. The use for planning purposes has to be the main use, if there are considered to be more than one. The Adviser said that 'on the assumption that no one actually slept there and called the building their home, even if it was used for storage purposes ancillary to residential use, the main use would seem to me to be as a byre'.

Conclusion

48. My first consideration is in relation to the Council's decision on the 2005 planning application. While the application was for a 'change of use of existing property from byre to dwelling house' and although the planning report recommended outline permission 'to convert a ruinous former house, now used for agriculture, back to residential use', the decision notice issued by the Council was for the erection of a house.

49. I consider this to be a significant administrative error on the part of the Council and one which led to further confusion for both Mr C and the new owners.

50. I have given very careful consideration to the Adviser's comments in relation to the use of the property in question. I accept that a key issue in this case was the actual use of what had been the croft house; a matter which I do not consider was given adequate consideration by the Council.

51. In my review of the evidence provided, I have concluded that the actual use of the croft house (at least from the time that the Council accepted that there was no council tax liability on the property, and most probably for some time prior to that) was indeed as a byre, or at the very least, the use as a house for planning purposes had ceased. In reaching this conclusion I have taken account of a number of factors outlined below.

52. I consider that the wording of the 2005 planning application made it clear that the applicant (Mr C)'s view of the existing use of the building was a byre. Thereafter, the Council's own planning report referred to the property as being used for agriculture purposes and the intention to change its use from a byre to a house.

53. I acknowledge that in correspondence with Mr C in June 2008 the Council described the building in question as a house with sufficient services and facilities still to be classed as a house. However, I consider that although this view is material to the argument, it is inadequate in regard to the whole spectrum of evidence that may be considered.

54. Primarily, use for planning purposes is a question of actual occupation and activity that demonstrates the use, not just the fitting out for the use. The Adviser pointed out that case law has established that the dimension of time is

an important one, and other elements such as intent of the owner come into consideration. The evidence appears to be that this was a habitable building, run down but with functioning services and some furniture, which has been used for animals on and off over the years. I was persuaded by the Adviser's view that the use for planning purposes has to be the main use, and 'on the assumption that no one actually slept there and called the building their home, even if it was used for ancillary residential purposes', the main use would seem to have been as a byre and, at the very least, it had fallen out of use as a house.

55. I am satisfied that, when they were assessing Mr C's planning application in 2005, the Council accepted the building was used as a byre. In paragraph 54 I mentioned that the dimension of time is an important consideration and, in this regard, I am also satisfied that in 2004 Mr C wrote to the Council in relation to council tax liability for the property and explained that, since as long ago as 1985, the property had increasingly become used as a 'shed/byre'. This was accepted by the Council and consequently Mr C was not required to pay council tax for the property.

56. While not commenting on the question of council tax liability itself, I consider that the acceptance by the Council that the property was not liable for council tax, confirms that they were satisfied from the information provided by the owner, Mr C, that the property was not in use as a house at the time.

57. Based on my views in paragraphs 54, 55 and 56, if it was reasonable to conclude the use was for agriculture purposes (and I think it was), then I consider that the Council's decision to advise the new owners that planning permission was not required, to be a further error in the administrative process followed, particularly as it was inconsistent with the assumption on which the 2005 planning permission was based and as their solicitor had told the Council that the new owners were prepared to apply for retrospective planning permission for change of use of the byre back into a residential dwelling (see paragraph 27).

58. It is clear that the intention of Mr C's planning application in 2005 was for the property to be changed from what it had been used for (a byre) back to a dwelling house. However, as the new owners were not implementing the consent which, due to the error in the decision notice, gave permission for the erection of a house, as such, the new owners, understandably felt they did not

have to comply with the conditions attached to this consent, as they were not erecting a new house. Nevertheless, taking into account the fact that the Council considered in 2005 the use of the property to be a byre; the fact that the new owners were prepared to apply for retrospective planning permission for change of use (see paragraph 27) and the Council's planning assessment of the site and access arrangements in 2005, I believe that the Council should have considered taking action to require the new owners to comply with the conditions originally set based on change of use of the property.

59. Based on the evidence I have examined, together with the advice I have received, I conclude that the Council's handling of the planning situation in relation to the building adjacent to Mr C's property was indeed inadequate. Consequently, I uphold this complaint.

60. I turn now to the injustice claimed by Mr C, who, having sold the property on the understanding that it remained a byre with conditional planning permission to upgrade it to a dwelling, considered that he had suffered an injustice in relation to the sale price as a result of the Council not enforcing those planning conditions in relation to access. Having considered the matter carefully and, although I appreciate fully the sense of frustration felt by Mr C at the turn of events, I do not accept his view.

61. The fact is that the Council acted erroneously in the advice given to the new owners that there was no change of use for the property and that, as a consequence, the new owners did not have to comply with the conditions. This is not justification that Mr C suffered an injustice. Nevertheless, it is clear that as a result of the errors I have identified Mr C's legitimate expectations that certain conditions would be applied in relation to access have not been borne out and, as a result, he has found it necessary to raise a complaint with the Council.

62. What remains, therefore, is the question of whether or not the conditions of the consent originally set are still required in the public interest and for consistency in applying planning policy. Of specific concern are the conditions in relation to road safety, an issue which the Council considered to be of particular importance (see paragraphs 9, 12, 14, and 38). My view here is that the Council needs to be fair and consistent, not only in the way in which they arrive at planning conditions but also, importantly, in gaining assurance that those conditions have been met.

63. It is reasonable, therefore, for the Council to consider whether any of the conditions outlined in their letter to Mr and Mrs C of 14 June 2005 still require to be met. Where the Council considers a need remains, it also seems reasonable to ask the Council to ensure the conditions are met at no cost to the new owners.

64. The Council should also formally apologise to Mr C, for the inadequate manner in which the planning considerations were handled.

Recommendations

- | | <i>Completion date</i> |
|--|------------------------|
| 65. I recommend that the Council: | |
| (i) consider how best to meet the requirements of the planning conditions set in June 2005 where the need remains; and | 15 September 2010 |
| (ii) apologise to Mr C for the inadequate manner in which the planning considerations were handled. | 21 July 2010 |

66. The Ombudsman asks that the Council notify him when the recommendations have been implemented.

Explanation of abbreviations used

Mr C	The complainant
The Council	The Highland Council
The Adviser	The Ombudsman's independent planning adviser
Mrs C	The complainant's wife

List of legislation and policies considered

The Town and Country Planning (Scotland) Act 1997