

**Case 200503516: East Lothian Council**

**Summary of Investigation**

**Category**

Local government: Planning; Complaints handling

**Overview**

East Lothian Council (the Council) had granted planning permission in 2001 for a new building development near the home of the complainant (Mrs C). During construction it became apparent that a proposed balcony was likely to lead to a loss of privacy for Mrs C. This had not been considered when planning consent had been granted. When the issue came to light, Mrs C complained that this was not dealt with appropriately. In particular, she was aggrieved that the Council were unable to enforce the proposed solution of screening on the balcony.

**Specific complaints and conclusions**

The complaints which have been investigated are that:

- (a) the Council failed to take appropriate action when they became aware that the issue of loss of privacy had not been considered at the planning application stage (*upheld*); and
- (b) the Council did not respond appropriately to Mrs C's complaint (*not upheld*).

**Redress and recommendations**

The Ombudsman recommends that the Council

- (i) approach Mrs C to seek her agreement in pursuing a joint reference<sup>1</sup> to the District Valuer for an assessment of the impact of the overlooking only from the balcony on the value of her home with a view to the Council reimbursing Mrs C for any loss in value<sup>2</sup>; and
- (ii) should also meet the costs of the reference.

---

<sup>1</sup> When a joint reference is made for a valuation both parties have the opportunity to put their views to the District Valuer.

<sup>2</sup> It should be clear in any reference that any valuation should relate only to the effect of the balcony and no other aspect of the development.

## **Main Investigation Report**

### **Introduction**

1. Planning permission was granted for a development of flats near Mrs C's home in 2001. The impact of a proposed balcony on Mrs C's property had not been considered when planning consent was granted. In June/July 2003 East Lothian Council (the Council) became aware that there was a problem with overlooking from upper floor balconies. The Council contacted the developers (Company 1) and it was agreed screening would be put in place. However, when this was installed in December 2005, the owner of the property removed the screening. In response to Mrs C's complaint, the Council said that they had done all in their power to remedy matters.

2. The complaints from Mrs C which I have investigated are that:

- (a) the Council failed to take appropriate action when they became aware that the issue of loss of privacy had not been considered at the planning application stage; and
- (b) the Council did not respond appropriately to Mrs C's complaint.

3. The actions of the Council in relation to their handling of the planning application had been considered and determined by the former Local Government Ombudsman. This investigation, therefore, focussed on the actions of the Council once they had become aware of the problem.

### **Investigation**

4. In investigating this matter, I considered relevant correspondence between the Council and Mrs C, made enquires of the Council and had sight of photographs of the balcony from Mrs C's garden.

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

**(a) The Council failed to take appropriate action when they became aware that the issue of loss of privacy had not been considered at the planning application stage; and (b) the Council did not respond appropriately to Mrs C's complaint**

6. A meeting was held at the site of the development in June 2003 in response to issues raised by a local Councillor (the Councillor). The Council met with Company 1 on 9 July 2003. On 10 July 2003 a letter from Company 1 to the Council confirmed that they had discussed the overlooking issue and agreed to arrange a further site visit to 'agree a suitable means of visual screening'. On 1 September 2003 another site visit was held between Council officers and Company 1 and the screening again discussed. Correspondence followed between the Council and Company 1 in which the Council expressed their concerns that the overlooking issue be resolved. Company 1 subsequently wrote to the Council on 7 October 2003 in the following terms:

'The Mews properties were, as far as it is our understanding, sold 'off plan' some time ago and thus we are only concerned with ensuring that a solution is in place prior to these properties being occupied. We are not seeking any scenario where a solution has to be 'enforced' in respect of these balconies.'

7. Meanwhile, on 8 September 2003 the Councillor raised with Council officers Mrs C's concerns about the ground level at her boundary fence and the height of the town houses. A file note indicates a Council officer discussed this with the Councillor in detail on 29 September 2003. The Council officer confirmed that although the land would be higher than that in the plan, the final height would only be 25cm higher. He also confirmed that they were pursuing with Company 1 the question of screening and ensuring that the land was correctly regraded.

8. Company 1 suffered financial difficulties before the development was completed and the development was taken on by a second building company (Company 2) in 2004. In June 2004, a letter from the Council to Company 2 listed the outstanding enforcement issues. This included a reference to a solution to the overlooking problem. An internal email of 9 July 2004 referred to a site visit attended by a Council officer and Company 2's architect. It said they had discussed building a fence to prevent Mrs C's home from being overlooked from the new car park, reducing the ground levels and installing screens on the upper floor balconies. The email also said that the development was still not

complete.<sup>3</sup> A letter of 5 August 2004 from the Council to Company 2 stated that the screening on the balconies would be considered acceptable if they were to a height of 1.5 metres and that any change to the drawings would be a non-material variation to the planning permission. In response to my enquiries the Council clarified their use of the phrase 'non-material variation' to describe the screens. They said that the screens did not form part of the permission granted and, in their own right, were permitted development and would not have required planning permission.

9. A representative of Mrs C (the Representative) wrote to the Council on 31 August 2004 indicating that she would let the matters rest on the basis that certain works were carried out.<sup>4</sup> These included reducing the level of the ground, installing the timber screen along the boundary wall and the screening on the balcony.

10. Following further correspondence and contact<sup>5</sup> between the Council and Company 2, a timber fence was duly erected<sup>5</sup> and the screens fixed in December 2005. Although she remained unhappy about the height of the fence which she considered was not the height agreed and the height of the land behind the fence, Mrs C had said in an email of 9 November 2005 she would be prepared to let matters rest if the screening on the balconies materialised. As stated in paragraph 1, the owner of the property removed these shortly after they were fitted. Following Mrs C's contacting the Council about this, internal Council email of 11 January 2006 said that Mrs C had told the owner this was a condition in the planning permission but he had refuted this. The email concluded by saying the officer would contact Company 2 to see if they could take any action, if not the only option would be to call a meeting with the owner.

11. In response to my questions, the Council confirmed there was no record of any contact with Company 2 or any action taken by the Council following this email. They said there may have been contact that had not been correctly recorded but the relevant member of staff had since left the Council and was not available to confirm this. The Council also confirmed that there was no

---

<sup>3</sup> A number of prospective purchasers of the properties had not gone ahead when Company 1 suffered financial difficulties.

<sup>4</sup> There was additional correspondence between the Representative and the Council about Mrs C's concerns prior to this letter.

<sup>5</sup> A letter from Company 2 of 31 August 2004 indicate this and the regrading of a car park was scheduled for October 2004.

record of any contact with Mrs C between 11 January 2006 and 5 June 2006. Mrs C raised a formal complaint with the Council about the situation and their failure to take appropriate action in June 2006.

12. A report prepared by the planning department as part of the Council's response to Mrs C's complaint said that they had pursued a solution as they felt a 'moral obligation' but the terms of the planning permission meant they could not require any action. They had sought to use the 'leverage' from their formal pursuit of enforcement matters to negotiate agreement. It was accepted that:

'including references to overlooking in correspondence concerning enforcement of other matters may have given the impression that the balconies also had some formal status ... Responsibility for obtaining the agreement, or compliance, of the occupants of the new houses to the balconies had to rest with the developer, the Council has no power to act, it is regrettable that this agreement has not been achieved.'

13. When responding to Mrs C on her complaint on 29 June 2006 the Chief Executive advised:

'I understand your dissatisfaction with the decision to grant planning permission and with the outcome of that decision. Whilst it is possible to criticise the failure to consider the possible impact of the balconies, it must be acknowledged that this was a controversial and difficult application ... '

*(a) Conclusion*

14. The Council accept that there was a failure to consider the possible impact of the balconies on Mrs C's property (see paragraph 13). Having become aware of the problem in 2003, they did then endeavour to broker a resolution to the problem with the involvement of Companies 1 and 2. I commend them for this and have also noted that Mrs C was reasonable in her response to these attempts in that she was prepared to let the matter rest if the screening on the balcony materialised.

15. However, to date this has been unsuccessful and Mrs C is left in the same situation as she was prior to raising the complaint. The matter remains unresolved. I have also noted that from January 2006 to June 2006 there is no record of any action taken by the Council to progress the situation and, since Mrs C's complaint in June 2006, they have made no suggestions for alternative resolution. It also appears that in January 2006 Mrs C's understanding was that the Council had enforcement powers when in fact they did not (see

paragraph10). It is not clear from the documentation I have seen that the Council made clear to Mrs C the limitations on their actions. The situation remains unresolved and Mrs C's concern and frustration is understandable. The Council became aware in January 2006 that the matter remained unresolved and they took no further action nor did they contact Mrs C to explain the position until she complained to them in June 2006. In all these circumstances, I uphold the complaint.

*(a) Recommendation*

16. As it is not possible to enforce screening on the balcony, the Ombudsman recommends that in order to bring this matter to resolution, the Council approach Mrs C to seek her agreement in pursuing a joint reference<sup>6</sup> to the District Valuer for an assessment of the impact of the overlooking only from the balcony on the value of her home with a view to the Council reimbursing Mrs C for any loss in value.<sup>7</sup> The Council should also meet the costs of the reference.

*(b) Conclusion*

17. In general, the Council consistently responded to concerns raised by Mrs C and on her behalf in full and sought to resolve this situation up until January 2006. I have already commented on the failure of the Council to take any action following Mrs C's contact with them in January 2006 (see paragraph 14). However, when they received a formal complaint in June 2006 they then responded quickly and in detail. As the failure to act between January 2006 and June 2006 has already been dealt with in this report and there was no further failure to respond to Mrs C's formal complaint when it was made in June 2006, I do not uphold this aspect of the complaint.

20 June 2007

---

<sup>6</sup> When a joint reference is made for a valuation both parties have the opportunity to put their views to the District Valuer.

<sup>7</sup> It should be clear in any reference that any valuation should relate only to the effect of the balcony and no other aspect of the development.

**Explanation of abbreviations used**

|                    |  |
|--------------------|--|
| Mrs C              | The Complainant  |
| The Council        | East Lothian Council   |
| The Councillor     | A local Councillor who brought Mr and Mrs C's concerns to the Council                        |
| Company 1          | The original developers  |
| Company 2          | The building firm who took on the development when Company 1 suffered financial difficulties |
| The Representative | Mr and Mrs C's representative who approached the Council with their concerns in 2004         |