

Scottish Parliament Region: West of Scotland

Cases 200502021 & 200503294: Loch Lomond and The Trossachs National Park Authority

Summary of Investigation

Category

Local government: Planning/unauthorised development

Overview

The complainants were unhappy that Loch Lomond and The Trossachs National Park Authority (the Park Authority) had allowed an unauthorised development to take place, that access to their properties had been affected, and with how the Park Authority had dealt with the complaint.

Specific complaints and conclusions

The complaints which have been investigated are:

- (a) failure by the Park Authority to take enforcement action in respect of unauthorised development of a pathway (*not upheld*);
- (b) failure by the Park Authority to stop a vehicle turning circle being used as a car park (*not upheld*); and
- (c) poor enquiry and complaint handling (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Park Authority:

- (i) formally notify the conservation charity that the pathway near to Mr C and Mr D's homes is unauthorised (see paragraph 9), explain to them in detail why this is the case, and advise that any future development undertaken by the charity within the National Park must go through the proper planning process. The Park Authority should mention this specific case as an example so that the charity is aware that if plans change from those initially envisaged, they must consider whether planning permission should be sought and seek further advice from the Park Authority. This is in line with the Park Authority's *Enforcement Policy* (see paragraph 11). A copy of this formal notification should be sent to Mr C, Mr D and the Ombudsman; and
- (ii) review its complaint handling procedures.

The Park Authority have accepted the recommendations and are currently reviewing the complaint handling procedures as part of an organisation-wide governance review.

Main Investigation Report

Introduction

1. In October 2005 the Ombudsman accepted a complaint from a person who is referred to in this report as Mr C. Mr C was not happy that a pathway had been constructed near to his home by a conservation charity. On the basis of advice from the Loch Lomond and The Trossachs National Park Authority (hereafter referred to as 'the Park Authority') that permission was not necessary, the charity had constructed the path without obtaining planning permission. Mr C's main concern was that the construction of the pathway would lead to an influx of walkers, cyclists and dogs which could lead to pollution of a private water supply that he and his neighbours relied on. Mr C was also not happy with how the Park Authority dealt with his initial enquiry and subsequent complaint about this matter.

2. In February 2006 the Ombudsman accepted a complaint from Mr C's neighbour, referred to in this report as Mr D, about the construction of the pathway. Mr D asked that his complaint be considered alongside Mr C's complaint and Mr C confirmed that this was acceptable. In addition, both Mr C and Mr D raised the issue of a vehicle turning circle near to their homes which was being used as a car park, which they believed the Park Authority should have taken action to stop.

3. The complaints from Mr C which I have investigated are:

- (a) failure by the Park Authority to take enforcement action in respect of unauthorised development of a pathway;
- (b) failure by the Park Authority to stop a vehicle turning circle being used as a car park; and
- (c) poor enquiry and complaint handling.

Investigation

4. Mr C and Mr D live in a small community of cottages within the National Park. As they are not connected to the mains water supply they draw their water from a private catchment on land adjacent to the cottages. The land adjacent to their cottages had been leased by the owner to a conservation charity that wished to develop a pathway to allow access to an area of woodland. The pathway was initially intended to be 'informal', making use of the existing ground surface, and, therefore, was considered by both the conservation charity and the Park Authority not to require planning permission.

In August 2005 Mr C found that engineering works were taking place to construct a 'formal' pathway and, therefore, he contacted the Park Authority. Mr D contacted the Park Authority in January 2006. In addition to their complaint regarding regulatory issues, Mr C and Mr D were concerned that the increase in walkers, and in some cases their dogs, and cyclists would lead to waste which could contaminate the water supplied by the catchment. Mr C asked the conservation charity to fence off the catchment and, additionally, asked the Park Authority to persuade the charity to do so.

5. In the course of my investigation I obtained information and correspondence relating to the complaint from Mr C as well as some additional information from Mr D. I made written enquiries of the Park Authority in respect of their comments on the situation and obtained documentary evidence from them. I also made a visit to the site and spoke to Mr C, and had a telephone conversation with the Park Authority's Director of Planning. I have also had sight of the documents detailed in Annex 3 to this report. Mr C has advised me that there has been a 'long running acrimonious dispute' with the Park Authority. However, this investigation and report refers to the actions of the Park Authority as specified and not to any other issues that are in dispute.

6. 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 Mr D and the Park Authority were given an opportunity to comment on a draft of this report.

(a) Failure by the Park Authority to take enforcement action in respect of unauthorised development of a pathway

7. In October 2002 the conservation charity wrote to the Park Authority about the construction of the proposed pathway, advising that much of the pathway would make use of the existing ground surface and would only use hardcore where the path crossed wet or soft ground. The charity also said that they did not consider that such a pathway would need formal planning permission, but that they sought confirmation of this from the Park Authority. In November 2002 the Park Authority's Acting Planning Adviser responded:

'It is noted that you would intend to use existing ground surfaces in the main and that any importation of material is intended for localised use where there is soft ground conditions. From the information available, I would anticipate that the minor nature of these works could be treated as 'de minimis'. Consequently, I confirm that I would not expect planning permission to be required in relation to the provision of footpath access ...'

8. Construction of the pathway began in summer 2005 and Mr C, after visiting the site, telephoned the Park Authority in August 2005 to alert them to 'hundreds of tons of crushed stone ... being incorporated into the pathway' and to ask whether or not the pathway had planning permission. The Park Authority were not able to give Mr C a definitive answer, but said they would check the situation. An Enforcement Planning Officer from the Park Authority made a site visit and reported back to Mr C, but it became clear that the Officer had checked the wrong site and so Mr C wrote to the Park Authority to complain.

9. Following an investigation, including a visit to the correct site, the Park Authority sent a response to Mr C in December 2005. The letter was quite clear in saying that the Park Authority considered:

'that the current footpath creation, as a matter of fact and degree, amounts to an engineering operation requiring planning permission. No planning permission has been granted, or applied for, and the works are, therefore, unauthorised'.

The Park Authority letter went on to say that the *Town and Country Planning (Scotland) Act 1997* and the Park Authority's agreed *Scheme of Officer Delegation* allowed for the rationale supporting a decision on enforcement action against a developer to incorporate whether or not it was expedient to take such action. The Park Authority approached the conservation charity to ask if they would submit a retrospective planning application, but the charity said it was unwilling to do so. Taking all of this into account, the Park Authority reviewed the enforcement file and was of the opinion that it was not expedient or in the public interest to take enforcement action. However, the Park Authority did make the charity aware informally that, despite the earlier advice from the Acting Planning Adviser, the works on the site were not 'de-minimis' and effectively required planning consent.

The Park Authority advised Mr C that it did not consider his concern over the water catchment was a material consideration when deciding not to issue an enforcement notice against the conservation charity, as it was essentially a private matter between residents (the charity and Mr C) which planning legislation or the Park Authority could not resolve.

10. Section 127 of the *Town and Country Planning (Scotland) Act 1997* deals with enforcement notices. Section 127(1) states that:

'The planning authority may issue a notice (in this Act referred to as an 'enforcement notice') where it appears to them –

(a) that there has been a breach of planning control, and

(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations'.

11. The Park Authority's *Enforcement Policy* in the section titled 'Taking Enforcement Action' said that 'The Park Authority does not have a 'duty' to take enforcement action in respect of every breach of planning control that it is made aware of'. In the section titled 'A Message to Developers – Planning Conditions' the *Enforcement Policy* states:

'Developers who have breached the planning regulations can expect ... to receive a written explanation of how the regulations have been breached, what action needs to be taken to remedy the situation, and when this must be done by.'

12. Mr C had mentioned another pathway which was constructed within the Park Authority area by the conservation charity. A planning application had been made by the conservation charity for this other pathway which included a change of use from forestry and agriculture and made clear that the construction involved land engineering of a similar type and scale to the pathway near Mr C's home. The Park Authority granted planning permission for the other pathway, after Mr C had made the complaint about the pathway near his home. Mr C believed that he was being treated unfairly compared to other people in the Park Authority area given that the other pathway had been through the proper planning process and had received permission, whereas the pathway near to his home had not.

13. In relation to the water catchment, Mr D explained that although he and Mr C do not own the land, they have paid for a right to draw water from the catchment and the lease from the landowner to the conservation charity states that the tenant (in this case the charity) will ensure that the water supply is not adversely affected.

14. At the time of Mr C's initial complaint to the Park Authority in August 2005 the local council's website, in the Environmental Services section, had a page on public health which provided information on private water supplies. This webpage stated that more than 50 homes in the area used private water supplies and that the council had a duty to ensure that these supplies were

wholesome and adequate. Private water supplies were regulated in August 2005 by local authorities using The Private Water Supplies (Scotland) Regulations 1992 (as amended by 1998 Regulations) and the Water (Scotland) Act 1980, which is where the duty referred to on the council's website originated. Subsequently, The Private Water Supplies (Scotland) Regulations 2006 were introduced, with effect from 3 July 2006, to govern the quality and maintenance of private water supplies with the objective of ensuring the provision of clean and wholesome drinking water.

15. The Scottish Executive¹ document *Scottish Planning Policy SPP1 – The Planning System* states at paragraph 52:

'The planning system does not exist to protect the interests of one person or business against the activities of another, although in some cases private interests may coincide with the public interest. In distinguishing between public and private interests, the basic question is whether the proposal would unacceptably affect the amenity and existing use of land and buildings which ought to be protected in the public interest, not whether owners or occupiers of neighbouring or other existing properties would experience financial or other loss from a particular development'.

(a) *Conclusion*

16. It is clear from the evidence that the Park Authority gave the conservation charity the correct advice in November 2002 on the basis of the information supplied to them by the charity. The charity changed their plans for the pathway near Mr C and Mr D's homes but did not inform the Park Authority, although it is clear that they should have done so, given the significant difference in what was envisaged in the charity's October 2002 letter to the Park Authority (see paragraph 7) and what was actually constructed. Once the Park Authority was notified by Mr C of the extent of engineering works involved in the pathway they failed to inspect the correct site and were not immediately active in seeking an explanation from the charity or preventing work from continuing. The Park Authority, after investigating Mr C's complaint advised him that the works were unauthorised. However, the legislation and guidance referred to and quoted at paragraphs 9, 10, 11 and 15 makes it clear that the Park Authority has discretion to decide not to pursue enforcement action where they do not believe it to be expedient and/or in the public interest. The Park

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.

Authority followed relevant legislation and their own procedures in this respect and, therefore, under Section 7(1) of the Scottish Public Services Ombudsman Act 2002, I cannot question the merits of this decision. It is also clear to me that the Park Authority were correct in not regarding the water catchment as a material consideration in deciding whether or not to take enforcement action as the legislation governing private water supplies at the time did not place a duty on any party to provide physical protection for the water catchment. Rather, the 1980 Act and the 1992 Regulations set out arrangements for monitoring and assessing the wholesomeness of the water supply as well as allowing for action to be taken by the local council if the supply is not, was not, or was likely not to be wholesome.

17. In relation to the issue of Mr C and Mr D being treated unfairly compared to others due to planning permission being sought for a similar development within the National Park (see paragraph 12), because planning matters are dealt with on a case by case basis it is reasonable for the Park Authority to act differently as long as their actions are in keeping with statute and procedure, as has been shown in this case.

18. Having visited the site and spoken to Mr C I understand how he and Mr D feel in relation to the potential risk they perceive to the private catchment they rely on to supply their water. My observation during my visit was that the route of the pathway was in the area of the water catchment area, which was fenced off with chestnut paling by the conservation charity, which may or may not be adequate to protect the water catchment. It is not the role of the Ombudsman to interpret a lease between two parties, to which Mr C and Mr D appear to be third parties. Under The Private Water Supplies (Scotland) Regulations 2006 it is for the local council to determine the 'relevant person' who provides the water supply, occupies the land from or on which the supply is obtained, or exercises powers of management or control in relation to the supply. My reading of the regulations is that the 'relevant person' in this case is the conservation charity, but it may be appropriate for Mr C and Mr D to discuss the regulations with the local council or, if appropriate, seek legal advice to clarify these matters. The 2006 Regulations also require councils to keep and update publicly accessible records of, and to carry out risk assessment on, private water supplies.

19. On the basis of the evidence I have seen I cannot uphold this aspect of Mr C and Mr D's complaint.

(a) Recommendation

20. Although this complaint has not been upheld, the Ombudsman recommends that the Park Authority formally notify the conservation charity that the pathway near to Mr C and Mr D's homes is unauthorised (see paragraph 9), explain to them in detail why this is the case, and advise that any future development undertaken by the charity within the National Park must go through the proper planning process. The Park Authority should mention this specific case as an example so that the charity is aware that if plans change from those initially envisaged, they must consider whether planning permission should be sought and seek further advice from the Park Authority. This is in line with the Park Authority's *Enforcement Policy* (see paragraph 11). A copy of this formal notification should be sent to Mr C, Mr D and the Ombudsman.

(b) Failure by the Park Authority to stop a vehicle turning circle being used as a car park

21. In relation to the disputed turning point/car park at the entrance to the pathway, Mr D complained in a letter to the Park Authority in January 2006 that the turning point had effectively become a car park as it was being used in this way by dog walkers. Mr D was of the view that the turning point had been enlarged, re-shaped, bottomed with hardcore and rolled into a parking place for four cars. He said this meant that vehicles that could not turn because of parked cars were driving up the private road to their houses and turning there.

22. In its response the Park Authority advised Mr D, in the context of the legislation and *Enforcement Policy* referred to in this report, that 'the matter of vehicles entering the private road ... is a private matter, not a material planning consideration'. The Park Authority's Senior Access Officer made a site visit in April 2006 and concluded that there was evidence of use of the turning circle as a car park but that the turning circle land was privately owned. Although the conservation charity was not responsible for this land they had agreed to put up a sign to discourage use as a car park.

23. My observation during my visit was also that the turning area for vehicles looked like, and was clearly being used as, a car park.

(b) Conclusion

24. The Park Authority is correct in stating that it has no role in providing appropriate signage or enforcing parking restrictions on private roads and private land and, therefore, I cannot uphold this complaint. It may be

appropriate for Mr D to contact the local authority in relation to parking enforcement measures, and/or seek legal advice to clarify this matter.

(c) Poor enquiry and complaint handling

25. Mr C made his initial complaint about the building of the pathway to the Park Authority by telephone on 18 August 2005 (see paragraph 8). An Enforcement Planning Officer from the Park Authority made a site inspection on 23 August 2005 and on the same day telephoned Mr C to report on the inspection. It was clear to Mr C that the Enforcement Planning Officer had visited the wrong site. The Enforcement Planning Officer visited the correct site on 26 August 2005.

26. On 23 August 2005 Mr C complained in writing to the Park Authority's Chief Executive. A response letter was drafted by the Park Authority on 26 August 2006 but it was not sent. Instead, the Chief Executive and the Senior Access Officer met with Mr C on 8 September 2005 to discuss the contents of the response letter. At that meeting it was agreed that the Park Authority would send a letter to Mr C. A letter dated 11 November 2005 was sent to Mr C, but it was not posted by the Park Authority until early December 2005. The Park Authority explained to me that this delay was, in part, due to the absence through illness of the Director of Planning. The Park Authority also said in its response to my enquiries that it would like to offer its apologies to Mr C.

(c) Conclusion

27. The Park Authority's Enforcement Planning Officer inspected the wrong site on 23 August 2005 and although he inspected the correct site three days later, this error prompted Mr C to complain in writing as he was concerned about the pathway construction works near to his home at that time. In addition there was an extended delay in writing to Mr C and in sending the letter to him, which the Park Authority acknowledged. On this basis I uphold this aspect of Mr C's complaint.

(c) Recommendation

28. The Ombudsman recommends that the Park Authority review its complaint handling procedures.

29. The Park Authority have accepted the recommendations and are currently reviewing the complaint handling procedures as part of an organisation-wide governance review.

24 October 2007

Explanation of abbreviations used

Mr C	The first complainant
The Park Authority	Loch Lomond and The Trossachs National Park Authority
Mr D	The second complainant

Glossary of terms

Hardcore	Hard material in pieces, such as broken bricks or stone, used as a bottom for making roads or foundations
Private water supply	A supply of water other than a supply provided by Scottish Water.
Water catchment	A catchment is an area of land that collects water, which drains to the lowest point in the area. Rain falling on the land will make its way to this lowest point.

List of legislation and policies considered

Town and Country Planning (Scotland) Act 1997

Loch Lomond and The Trossachs National Park Scheme of Officer Delegation

Loch Lomond and The Trossachs National Park Enforcement Policy

Scottish Planning Policy SPP1 – The Planning System

Water (Scotland) Act 1980

The Private Water Supplies (Scotland) Regulations 1992 (as amended by the 1998 Regulations)

The Private Water Supplies (Scotland) Regulations 2006

West Dunbartonshire Council public health webpage on private water supplies

<http://www.wdcweb.info/environmentalservices/DisplayArticle.asp?ID=6165>

Scottish Public Services Ombudsman Act 2002