

Scottish Parliament Region: Mid Scotland and Fife

Case 200602790: Perth and Kinross Council

Summary of Investigation

Category

Local government: Land and Property; Remediation of Contaminated Land

Overview

The complainants (Mr and Mrs C) raised concerns about the actions of Perth and Kinross Council (the Council) following it being identified that the land on which their home is situated might be contaminated.

Specific complaints and conclusions

The complaints which have been investigated are that the Council:

- (a) failed to respond in a timely manner to correspondence from Mr and Mrs C and their solicitors and to include them in relevant meetings (*partially upheld*); and
- (b) failed efficiently to handle arrangements for Mr and Mrs C's temporary decant to enable demolition of their home, remediation of the land, and a replacement house to be constructed (*partially upheld to the extent that the Council could have acted earlier to confirm decant arrangements*).

Redress and recommendations

The Ombudsman recommended that the Council review the circumstances of this complaint to ascertain whether guidelines should be produced for dealing with future similar circumstances.

The Council have accepted the recommendation and have started a process of review.

Main Investigation Report

Introduction

1. The complainants (Mr and Mrs C) bought their home in a Perthshire town (Town X) in 1986. It is a modern bungalow built in the previous year. In 2005 they added a conservatory. A year later, in August 2006, Perth and Kinross Council (the Council) informed them that the land on which their home was situated was on a former gasworks site and the land was suspected of being contaminated. Contamination was subsequently confirmed. A neighbour (Mr A), who resides in an adjacent house, has asked to be associated with the complaint.

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

- (a) failed to respond in a timely manner to correspondence from Mr and Mrs C and their solicitors and to include them in relevant meetings; and
- (b) failed efficiently to handle arrangements for Mr and Mrs C's temporary decant to enable demolition of their home, remediation of the land, and a replacement house to be constructed.

Investigation

3. I have examined documents provided by Mr and Mrs C and information obtained from the Council as a result of my enquiry. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. While the recollections of Mr and Mrs C and Council officers do not always fully agree, I do not consider that they have a material bearing on the conclusions reached. Mr and Mrs C and the Council were given an opportunity to comment on a draft of this report.

Background

4. The gasworks in Town X were constructed in the mid nineteenth century and run by a private company. The gasworks were vested in the Scottish Gas Board at the time of nationalisation of utilities in 1949 but were closed in 1963. In 1973 the Scottish Gas Board was dissolved and became a region of the British Gas Corporation.

5. The Council have informed me that they have no knowledge of whether any remedial works were undertaken after the gasworks ceased production. The site was, however, the subject of an application by the British Gas

Corporation on 28 June 1984 to the former Perth and Kinross District Council (the District Council) for outline consent for a single storey dwelling house and permission in principle was granted by the District Council on 21 September 1984. A note on that consent stated:

The applicants are advised that there is a possibility of contamination of the soil on this site from the gasworks and prior to any further work taking place this matter should be investigated properly since, if contamination is found, its removal could be expensive.

6. The site was sold by the British Gas Corporation on 3 May 1985 to a construction company. Application was made by the construction company to the District Council for approval of reserved planning matters and planning consent was granted on 25 June 1985 accompanied by the same note.

7. The Council have informed me that at the time the planning approvals were granted, contamination was not identified nationally in central government guidance as a material consideration and there was very little guidance issued to local authorities. In the absence of guidance, the District Council appear to have recognised that there might be an issue with the site and brought it to the attention of both the British Gas Corporation and the construction company respectively as applicants. It remained the obligation of the construction company as applicant to ensure that the site was suitable for the use proposed when the development was completed.

8. Mrs C informed me that they were not the original owners of the three bedroom house. They purchased it from the first owner in October 1986.

9. The Council stated that when with the implementation of Part IIA of the Environmental Protection Act 1990 (the 1990 Act) contaminated land became a material consideration in development control in 2000, the Council's Environment Service decided that where no 'new receptors' were being introduced, then they would not comment on contamination. They would follow their duties under the 1990 Act for such sites through the Council's Strategy (see Annex B). They maintain that to do otherwise might have caused properties to be blighted, and could have placed unexpected and undue stress on the owner of a property and his or her neighbours.

10. In 2003, Mr and Mrs C applied for planning consent and building warrant for a conservatory. At around the same time, their neighbour, Mr A, who lives in

an adjacent nineteenth century end terraced house submitted an application for planning consent and building warrant for the erection of a double garage. In the case of the conservatory, Mr and Mrs C's proposals were regarded as permitted development. The application did not, therefore, go through the development control system in the normal way and Mr and Mrs C's agent was informed by letter of 7 October 2003. The planning application fee and plans were returned. The Council informed me that had the proposals been processed as a planning application, the issue of whether the site might be contaminated land would not have arisen as it was considered to be an extension of an existing use. In the case of Mr A, the application was for a double garage which again did not introduce a 'new receptor'. Accordingly, in neither of these development proposals was the issue of possible contamination of the site mentioned or considered. Mr and Mrs C's conservatory was erected in 2005 and a certificate of completion under the Building (Scotland) Acts was issued on 18 September 2005.

(a) The Council failed to respond in a timely manner to correspondence from Mr and Mrs C and their solicitors and to include them in relevant meetings; and (b) The Council failed efficiently to handle arrangements for Mr and Mrs C's temporary decant to enable demolition of their home, remediation of the land, and a replacement house to be constructed

11. The Council informed me that in light of announcements of significant funds being made available to local authorities in Scotland, they gave further consideration to their responsibilities for contaminated land in respect of Part IIA of the 1990 Act and Contaminated Land (Scotland) Regulations 2005. The former gasworks in Town X was prioritised to be investigated as it was suspected that there might be contamination left as a consequence of the previous use of the site prior to its redevelopment into residential use in 1985. They appointed a firm of specialists in the field of contaminated land to investigate.

12. On 16 August 2006 the Council hand delivered a letter to Mr and Mrs C requesting access to their property to carry out intrusive investigations. The letter recommended that Mr and Mrs C seek independent legal advice. Mr and Mrs C met on 18 August 2006 with the Council's Contaminated Land Co-ordinator (Officer 1) and two of his colleagues. Mr and Mrs C informed me that they were told that should contamination be confirmed they would need to move out of their home to enable the land to be remediated.

13. Investigatory work was undertaken by the specialists on 21 August 2006 when samples were taken. Mr and Mrs C wrote on 29 August 2006 thanking the Council for the sensitive and caring manner in which that investigatory work had been carried out.

14. Acting on the possibility that they might require to relocate, Mr and Mrs C made enquiries about suitable decant accommodation. On 12 September 2006, they identified a property in Town X (the Decant Property) which was well suited for their domestic and business needs in that a container could be accommodated within the curtilage. The current let of the Decant Property was due to expire on 31 December 2006 and would become available soon after. Mr and Mrs C informed me that they were keen not to lose the opportunity of moving temporarily to that property. They maintain that Officer 1 authorised them on 12 September 2006 to go ahead with the let of the Decant Property.

15. The Council informed me that, the actual risk to health had not been quantified by 12 September 2006 and so the action by Mr and Mrs C was pre-emptive. They say that it took a matter of weeks for empirical data from the specialists' site investigations to be analysed and the Council's ability to make decisions awaited confirmation of funds being made available. The Council say that they were not in a position to draw conclusions until the final investigation and screening risk assessment had been completed.

16. As stated, the Scottish Executive¹ had announced the availability of funding for contaminated land remediation with bids invited by 15 September 2006 (Annex B). The Council submitted two bids, one of which was for Mr and Mrs C's home. The Council's bid included the demolition of Mr and Mrs C's home, the remediation of the land, and rebuilding the property at no cost to Mr and Mrs C. (The Scottish Executive informed the Council on 12 December 2006 that their bid for £605,000 had been successful.)

17. After Mr and Mrs C made Officer 1 aware of their identification of the Decant Property, Officer 1 on 13 October 2006 requested the Council's Head of Environmental and Consumer Services (Officer 2) to authorise entering into an

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.

agreement for the lease. Officer 2 was initially reluctant to do this since he did not have authorisation or funds in the absence of confirmation from the Scottish Executive that the Council's bid had been successful. Officer 1 and Officer 2 met with Mr and Mrs C in their home on 18 October 2006. After over two hours of discussion, Mr and Mrs C say they terminated the meeting as they felt no progress was being made in respect of addressing their concerns.

18. Mr and Mrs C grew increasingly alarmed at the lack of definite information coming from the Council at this time. They maintain that they sent two letters to the Council's Environmental Health Manager (Officer 3) prior to 1 November 2006 which went unanswered, their solicitors also wrote several letters, and additionally Mr and Mrs C sent several emails to the Council. On 20 October 2006, Mr and Mrs C contacted a consultant in Public Health at Tayside Health Board. After speaking with the Public Health consultant, Officer 2 agreed that the Council should proceed to rehouse Mr and Mrs C as soon as possible. He telephoned Mr and Mrs C that afternoon. Mr and Mrs C understood from Officer 2 that he had authorised the rental of the Decant Property to go ahead, along with a container for business storage, and the costs of their furniture removal and storage etc.

19. On 1 November 2006 Mr and Mrs C met with Officer 3. They handed him two letters seeking clarification of twelve points. They followed this up with four emails on 3, 10, 19 and 26 November 2006 and Mr C spoke again to Officer 3 on 24 November 2006. Officer 3 responded by letter of 27 November 2006, apologised for the delay in his reply, and made reference to a number of recent meetings between Mr and Mrs C and Officer 1. He then dealt with each of their twelve specific points in turn. By then, a date had been set (8 January 2007) for Mr and Mrs C to move out of their home. Information was provided by Officer 3 on what the Council would, and would not, fund.

20. Mr and Mrs C and Mr A then wrote to the Chief Executive on 1 December 2006 expressing further concerns and a copy was provided for the Executive Director of Environment. The Executive Director of Environment's copy was passed to Officer 2 for a response and he wrote to Mr and Mrs C on 21 December 2006. Officer 2's letter was written in the knowledge that the Scottish Executive had approved the Council's bid. He updated Mr and Mrs C about the investigations of contamination, stated that a project timeline for the demolition, remediation and construction had been produced by the Council's Property Services, commented on the mechanics of paying for the lease, and

referred to the delivery of a storage container to the Decant Property to house Mr and Mrs C's business stock. Officer 2 also commented on the general responsibility for works of this nature under the Contaminated Land (Scotland) Regulations 2005. Officer 2 confirmed that management of the procurement for the design and build contract for the replacement house would be undertaken by the Council's Property Services. Officer 2 informed Mr and Mrs C that he had consulted with the Council's Legal Services but that no compensation was payable within the statutory guidance in respect of Mr and Mrs C's circumstances. Officer 2 undertook to write to Mr and Mrs C's solicitor in that regard.

21. The complaint to the Council was acknowledged by email by the Depute Chief Executive on 22 December 2006 and he emailed them again on 22 January 2007 suggesting that he considered the matter to be an ongoing service request. The following day, Mr and Mrs C met with Officer 2 and a colleague. Mr and Mrs C had by then moved to the Decant Property. Officer 2 confirmed the content of that meeting in an email of 23 February 2007.

22. The Council's Environmental Services applied to Development Services on 25 January 2007 to demolish the existing dwelling house and detached garage. A building warrant was granted for the demolition on 12 February 2007. Mr and Mrs C decided to withhold entry to their home to enable demolition until written agreement was reached on all issues giving them concern.

23. When Mr and Mrs C persisted with their complaint, the matter was passed to the Council's Complaints and Governance Officer (Officer 4) to progress. Officer 4 visited Mr and Mrs C at the Decant Property on 10 April 2007. Mr A was also present.

24. In the meantime, Officer 1 updated Mr and Mrs C on 3 May 2007 on the remediation of the land and rebuilding of their home and discussed the differential in estimated costs between the Council's quantity surveyor and Mr and Mrs C's quantity surveyor with regard to the planned replacement house.

25. The response to the complaint was delayed. Following a meeting of officers on 25 July 2007, the Council's Stage 3 reply was sent on

2 August 2007. Unhappy with that response, Mr and Mrs C and Mr A complained to this office on 24 August 2007.

26. My colleague ascertained that Mr and Mrs C intended to raise an action for compensation for time taken, stress and fees incurred. In a telephone call of 29 November 2007, Mr C stated that he and his wife would be taking legal action on a claim that the Council had given consent in 2003 for Mr and Mrs C's conservatory knowing that the land was contaminated.

(a) Conclusion

27. It is not within the scope of this investigation to consider and reach a view on matters involving the actions of the former District Council or the Council's consideration. It is clear, however, that Mr and Mrs C's complaint originates from an apparent lack of full compliance with the relevant advice notes attached to the relevant planning consents. The consequence of ignoring that advice was accurately predicted (paragraph 5). It is beyond the scope of this investigation to enquire what steps the solicitors acting for the previous owner took in 1985, or Mr and Mrs C took a year later, to check the terms of the planning consents and to query whether the advisory note had been complied with. Had assurances been given by the vendor or original builder to either party which were found not to be accurate, then Mr and Mrs C's recourse would have been against parties other than the Council.

28. The initial period between the Council first contacting Mr and Mrs C on 16 August 2006 for permission to enter their land, and confirmation in December 2006 that the Council's bid for funds had been successful was understandably stressful for Mr and Mrs C. They went from a situation of ignorance that the ground on which their home of 20 years stood was in any way contaminated, to uncertainty as to what the investigation would find, to being confronted with the prospect of decanting for an indefinite period to allow their home and very recently completed extension to be demolished, for the land to be remediated, and for a replacement home to be planned and constructed.

29. The Council have not detailed when they first suspected that a contamination problem might exist but in the summer of 2006, against a background of possible availability of remediation funds, the former gasworks site appeared on a top ten list of sites for specialists to investigate and, by 15 September 2006 the Council made a bid for funding for two sites. The

Council informed me that the contamination was not confirmed immediately but by mid-September the Council must have been sufficiently certain to go forward with that bid. Until 12 December 2006, the Council awaited confirmation that their bid was successful.

30. Faced with the prospect of losing their home, Mr and Mrs C were understandably anxious to make arrangements to ensure the continuity of their livelihood. Council officers, in the absence of authorised funds, had to be guarded in what they could authorise. Mr and Mrs C's letters and emails exemplified a desire to know more. Yet, Council officers were fettered in their ability to answer. While not all correspondence from Mr and Mrs C and their solicitor was answered, and the Council concede that the situation was not articulated at the outset, their initial meeting on 18 August 2006 involving Officer 1 and a colleague was followed by a lengthy meeting with Officer 1 and Officer 2 on 18 October 2006, and a detailed response from Officer 3 of 27 November 2006.

31. In that initial period, I see no evidence that Mr and Mrs C were deliberately excluded from meetings where their attendance would have been advisable. They attended a meeting on 23 January 2007 after which they confirmed they wished to proceed with a formal complaint. They also, subsequently, took the view that they would not hand over the keys of their property until they received necessary assurances about the project.

32. My investigation does not cover the subsequent complex negotiations which took place with regard to entry to carry out remediation and the letting of a contract for the new build project. Those negotiations were carried out in tandem with the Council's consideration of the later stages of the formal complaint. A complaint in respect of those matters has not been submitted to the Council.

33. I consider that the Council could have articulated more clearly the possible outcomes at the outset in correspondence with Mr and Mrs C and their solicitor to ensure that Mr and Mrs C more fully accepted the gravity of their situation. While I acknowledge that might possibly have led to Mr and Mrs C being forewarned of more negative scenarios, (for example, the possibility of the bid being unsuccessful) it might also have persuaded Mr and Mrs C that if contamination were confirmed and the Council's bid for funds proved

successful, they could be confident that the Council were bent on expediting a solution. On balance, I partially uphold this complaint.

(a) Recommendation

34. The Ombudsman recommended that the Council review the circumstances of this complaint to ascertain whether guidelines should be produced for dealing with future similar circumstances. The Council have accepted the recommendation and have started a process of review.

(b) Conclusion

35. Mr and Mrs C identified the Decant Property shortly after the investigations commenced on their property. That property was local and was apparently well suited for them to continue the normal operation of their business ventures which required storage on site. The Decant Property was already let, but would become available in early 2007. While a commitment by the Council to enter into a leasing agreement with the landlord would have removed a significant point of uncertainty and would have reduced stress to Mr and Mrs C, it is clear that officers could not initially give the undertakings Mr and Mrs C wanted. Following Officer 2's telephone contact with a Public Health consultant on 20 October 2006, he revised his position and was able to give a commitment. In the event, Mr and Mrs C were able to move to the Decant Property on 8 January 2007.

36. I recognise the dilemma facing Council officers in seeking to expedite a solution to the problem on the one hand but being seen to be acting within their authorised powers on the other. The Council changed their position as a consequence of the involvement of the consultant in Public Health. That decision was taken without knowledge that the bid for funds in respect of Mr and Mrs C's home would definitely be successful. I consider that a major element of the initial stress to Mr and Mrs C might have been removed had the Council been able to give earlier conditional approval to the proposed lease, subject to a successful bid to the Scottish Executive for funds. It would then have been a matter at the discretion of the owner of the property as to whether that would provide a sufficient guarantee to him of continuity of rent. On balance, I again partially uphold this complaint to the extent that the Council could have acted prior to 20 October 2006 in conditionally confirming that, in the event their bid was successful, they would underwrite the costs of Mr and Mrs C lease of the Decant Property.

37. The Council have accepted the recommendation and have started a process of review. The Ombudsman asks that the Council notify her when the recommendations have been implemented.

Explanation of abbreviations used

Mr and Mrs C	The complainants
Town X	The town in which Mr and Mrs C reside
The Council	Perth and Kinross Council
Mr A	A neighbour who has associated himself with the complaint
The District Council	Perth and Kinross District Council
The 1990 Act	The Environmental protection Act 1990
Officer 1	The Council's Contaminated Land Co-ordinator
The Decant Property	Another property in Town X into which Mr and Mrs C moved on 8 January 2007
Officer 2	The Council's Head of Environmental and Consumer Services
Officer 3	The Council's Environmental Health Manager
Officer 4	The Council's Complaints and Governance Officer

Contaminated Land

The contaminated land regime, which was provided for in Part IIA of the 1990 Act as inserted by section 57 of the Environment Act 1995, came into force in Scotland on 14 July 2000. The regime places a duty on local authorities, as the primary regulators, to identify and secure the remediation of contaminated land in their respective areas. Related regulations were introduced in 2000 and in 2005. A second edition of the statutory guidance on Part IIA of the 1990 Act was produced by the Scottish Executive in May 2006 (Paper SE/2006/44). That guidance (Annex 3 Section E paragraph 44) details the circumstances where an authority might wish to waive or reduce its recovery of costs in taking action on land adversely affected by the presence of pollutants.

In June 2006, the Scottish Executive invited local authorities in Scotland to submit bids by 15 September 2006 for projects to be implemented in 2007/08 aimed at addressing unacceptable risks to human health or the wider environment. It was announced that priority would be given to sites where there was evidence of contamination posing known, particularly serious risk of harm. Perth and Kinross Council put forward bids for two projects from a 'top ten' list of sites which they had commissioned specialists to investigate. They were informed on 12 December 2006 that their bid for £605,000 in respect of the former gasworks site in Town X had been successful.

Initial planning advice to local authorities in Scotland was issued in Planning Advice Note 33 The Development of Contaminated Land, which was revised in October 2000, and Planning Advice Note 51 Planning and Environmental Protection. Land contamination may be regarded as a material consideration when individual planning applications are considered as part of the development control process. In any case where new development is taking place, it is the responsibility of the developer to ensure that required and necessary remediation is carried out.