

Scottish Parliament Region: Mid Scotland and Fife

Case 200603334: Perth and Kinross Council

Summary of Investigation

Category

Local Government: Planning; permitted development; objections

Overview

The complainant (Mr C) raised concerns that Perth and Kinross Council (the Council) had erroneously classified as permitted development the construction of a raised decking structure (the Decking) adjacent to a stretch of river for which his company (the Company) owns the fishing rights. He also complained that the Council failed to take enforcement action when they became aware of their mistake and did not responded timeously to his complaints.

Specific complaints and conclusions

The complaints which have been investigated are that the Council:

- (a) wrongly considered that the Decking was permitted development which did not require planning permission (upheld);
- (b) inappropriately failed to take enforcement action against the owners of the property (the Owners) (not upheld); and
- (c) took an unnecessary length of time to respond to Mr C's complaints (upheld).

Redress and recommendations

The Ombudsman recommends that the Council take steps to ensure that:

- (i) planning officers obtain enough information about a proposed structure to be able to give specific advice rather than standard advice which may not be appropriate to the proposed structure; and
- (ii) they respond to complaints in a timely manner and according to their complaints procedure.

The Council have accepted the recommendations and will act on them accordingly.

Main Investigation Report

Introduction

1. The complainant (Mr C) is the Company Secretary of a company (the Company) which owns the fishing rights for a section of a river (the River). The owners of a property adjacent to the River (the Owners) erected a raised decking structure (the Decking) next to the River. Mr C explained that the Decking hinders fishing at its location.

2. Before erecting the Decking, the Owners contacted Perth and Kinross Council (the Council) to ask whether they required planning permission. They were informed by the Council that the Decking was permitted development and that they could proceed without planning permission.

3. Mr C wrote to the Council about his concerns and raised a formal complaint with the Council on 25 March 2007 that the Owners were permitted to erect the decking without planning permission. Following investigation of this complaint, the Council determined that the Decking was not, in fact, permitted development. They requested that the Owners apply for retrospective planning permission for the Decking but they did not do this.

4. Mr C asked the Council to take enforcement action against the Owners because they did not have planning permission for the Decking. The Council decided not to take enforcement action as they considered that the structure would not be refused planning permission. They also explained that the Company's fishing rights would not be a material consideration for planning permission.

5. The relevant Scottish Executive guidance¹ states that 'an enforcement notice should not normally be issued solely to 'regularise' development which is acceptable on its own merits, but for which permission has not been sought'.

6. The complaints from Mr C which I have investigated are that the Council:
(a) wrongly considered that the Decking was permitted development which did not require planning permission;

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.

- (b) inappropriately failed to take enforcement action against the owners of the property; and
- (c) took an unnecessary length of time to respond to Mr C's complaints.

Investigation

7. During my investigation of this complaint, I considered information supplied by Mr C and by the Council which included the complaints correspondence and background documentation on this complaint. I also made specific enquiries of the Council on aspects of this complaint. I considered the Council's complaints handling policy and the Scottish Executive's Planning Advice Note 54 (PAN 54) on enforcement action.

8. 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.

(a) The Council wrongly considered that the Decking was permitted development which did not require planning permission

9. During the summer of 2003 the Owners erected the Decking. They were advised by the Council that they did not require planning permission as the Decking was permitted development.

10. On 10 April 2006 the Company wrote to the Planning Department of the Council to raise concerns that the Decking had been erected without planning permission. An Enforcement Officer (Officer 1) responded to them and explained that the Decking had been inspected and was considered to be permitted development. Officer 1 explained that, for this reason, the Council did not consider that there had been a breach of planning control so they would not take further action. Officer 1 also explained that planning enforcement was a discretionary function used to regulate breaches of planning control and was not mandatory.

11. Mr C decided to raise a formal complaint with the Council. In their formal response of 16 April 2007 the Council stated that they had decided that the Decking did, in fact, require planning permission. They informed Mr C that Officer 1 would write to the Owners to ask them to submit a planning application in retrospect. They explained that the matter would now be dealt with on planning grounds and the fact that it was in existence would have no bearing on the ultimate decision. They also explained that the Company's fishing interest

would not be a material planning consideration and that this was a private issue between the Company and the Owners.

12. In his response to the Company, the Depute Chief Executive of the Council (the Depute Chief Executive) stated that in 2003 the Owners received advice from a senior manager of the Planning Department (Officer 2) that they did not require consent for the Decking. The Depute Chief Executive advised that this was standard advice given to all applicants at that time who wished to erect decking structures.

13. I asked the Council why their view on this matter had changed. They explained that initially the Council inspected the Decking and took the view that it was permitted development. They stated that this view was expressed by Officer 2 and was taken on the basis that the Decking was located within the curtilage of the Owners' dwelling house. They went on to state that the Council's view changed after further consideration of the curtilage of the Owners' property. They considered that the Decking was outwith the recognised curtilage because of its distance from the dwelling house and because of its unusual location overhanging the riverbank.

(a) Conclusion

14. The Council accept that the initial advice given to the Owners was incorrect and that the Decking did require planning permission. When they realised their error, they asked the Owners to apply for retrospective planning permission but they failed to do this.

15. It is a matter of concern that incorrect advice was given to the Owners and that, despite inspecting the Decking following Mr C's representations, a senior planning manager maintained that it was permitted development. It was only when Mr C's formal complaint was investigated that the Council realised their error.

16. The Council told me that it was standard advice given at the time the Owners erected the Decking that decking structures did not require planning permission. Because of the particularities of its situation, the Decking was not permitted development. Therefore, it was not appropriate for the Council to give standard advice that decking structures were permitted development as this was clearly not the case for all decking structures.

17. When deciding whether to take enforcement action against the Owners, the Council considered whether the Decking was acceptable. They considered that the Decking would have been granted consent had a planning application been made. The decision whether to grant consent is a discretionary decision of the Council and it is not possible for me to determine what decision they would have reached, had an application been made by the Owners at the time of erecting the Decking.

18. I cannot, therefore, determine whether the Company has suffered any material injustice resulting from the Council's erroneous advice to the Owners. However, because they were deprived of the opportunity to participate in the planning process in relation to a development which affected them, because of the frustration and uncertainty this caused them and because the Council have acknowledged that they gave erroneous advice to the Owners, I uphold this complaint.

(a) Recommendation

19. The Ombudsman recommends that the Council take steps to ensure that planning officers obtain enough information about a proposed structure to be able to give specific advice rather than standard advice which may not be appropriate to the proposed structure.

(b) The Council inappropriately failed to take enforcement action against the owners of the property

20. The Council, having taken the view that the Decking was 'development' in planning terms and was situated outwith the curtilage of the property, requested submission of a planning application on 23 May 2007 seeking to legitimise the development but the Owners refused to submit an application. In his letter to the Owners Officer 1 explained that when an unauthorised structure was identified, the Council would perform an assessment of planning merits in order to determine whether to take enforcement action or invite a retrospective planning application. However, Officer 1 stated that he could not guarantee the outcome of any planning application.

21. The Council explained to me that they considered their position and ascertained that they were likely to have approved an application in any event and were unlikely to have been successful at an enforcement appeal had they proceeded with formal enforcement action.

22. The Council explained to Mr C that this decision was considered on a case by case basis and that enforcement action would only be taken if the officer's view was that they would have rejected the planning application.

23. PAN 54 on Planning Enforcement states that 'an enforcement notice should not normally be issued solely to 'regularise' development which is acceptable on its planning merits but for which permission has not been sought'.

(b) Conclusion

24. The Ombudsman cannot question the merits of a discretionary decision taken without maladministration. The decision to take enforcement action is a discretionary decision of the Council. The Council considered whether to take enforcement action and decided that it would not be appropriate to do so in this case. The Council have explained this process to me and Officer 1's letter of 23 May 2007 to the Owners also describes the procedure followed. The Council's decision was taken with knowledge of the circumstances and with reference to the relevant planning guidance. I could find no evidence of maladministration in the way this decision was reached and I do not uphold this complaint.

(c) The Council took an unnecessary length of time to respond to Mr C's complaints

25. The Company raised their complaint with the Council on 25 March 2007; they had been in touch with the Council several times since December 2003 on the matter. The Council acknowledged the complaint on 30 March 2007 and explained that they would normally respond fully in ten days. They wrote again on 10 April 2007 to inform Mr C that there would be some delay in responding to his complaint but that he would receive a full response by 16 April 2007.

26. The Council responded fully on 16 April 2007. They explained that contrary to what they had previously said, the Decking did require planning consent and that they would get in touch with the Owners to advise them of the requirement to submit a planning application in retrospect.

27. On 29 May 2007, Mr C wrote to the Council to ask whether the Owners had been asked to submit a retrospective planning application. The Council responded on 13 June 2007 that there were on-going discussions with the Owners about this but that there had been no formal planning submission at that time.

28. Mr C wrote to the Council on 14 June 2007. He raised concerns that the Owners had not been formally notified of the requirement for planning consent. He stated that he considered that the Council were not dealing with issue fairly.

29. The Council responded on 18 June 2007 and explained that the Owners were fully aware of the need to submit a planning application. They explained that enforcement powers under planning legislation are discretionary. They advised that Mr C could take his complaint to the next stage of the complaints procedure should he remain dissatisfied with the Council's response.

30. Mr C wrote to appeal the decision on 18 June 2007. A Depute Director in the Environment Service responded to the appeal on 4 July 2007 and explained that planning officers were continuing to pursue submission of a planning application. He stated that he was content that this was the correct action at that stage.

31. Mr C appealed to the third stage of the Council's complaints procedure on 5 July 2007. The appeal was acknowledged on 9 July 2007 and Mr C was informed that he would receive a response in ten working days. The Council wrote again on 23 July 2007 to suggest a meeting with Mr C. A meeting was held on 9 August 2007 and the Council undertook to respond in writing to Mr C's concerns. On 1 October 2007, Mr C wrote to the Council as he had not received a response. The Council responded on 19 October 2007 and explained that they were still awaiting responses from officers on certain questions. The Council finally provided a full response on 29 November 2007.

(c) Conclusion

32. The Council responded timeously to Mr C's complaints under the first two stages of their complaints procedure. However, there was a substantial delay at the final stage when the complaint was investigated by the Depute Chief Executive. Following the meeting of 9 August 2007, there was a delay of almost four months before a formal response was sent. The Council's procedure provides that a response will be sent within ten working days; however, it took almost four months after the date of the meeting for a full response to be forthcoming. I uphold this complaint.

(c) Recommendations

33. The Ombudsman recommends that the Council take steps to ensure that they respond to complaints in a timely manner and according to their complaints procedure.

34. The Council have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Council notify her when the recommendations have been implemented.

Explanation of abbreviations used

Mr C	The complainant. Company Secretary of the Company
The Company	A company which owned the fishing rights to the section of the River adjacent to which the Decking was erected
The River	A river adjacent to the Decking
The Owners	The owners of a property adjacent to the River who erected the Decking
The Decking	The Decking structure erected by the Owners
The Council	Perth and Kinross Council
PAN 54	Scottish Executive's Planning Advice Note 54
Officer 1	An enforcement officer of the Council
The Depute Chief Executive	The Depute Chief Executive of the Council
Officer 2	A senior manager of the Council's Planning Department