

Scottish Parliament Region: Highlands and Islands

Case 200800541: Argyll and Bute Council

Summary of Investigation

Category

Local government: Planning; call for enforcement action

Overview

The complainant (Mr C) was aggrieved at the decision of Argyll and Bute Council (the Council) to grant planning consent for the demolition of an adjacent modern villa to allow for the development of land to the rear of his home for residential development. His complaint was restricted, however, to the Council's failure to take enforcement action in respect of breaches of development control.

Specific complaint and conclusion

The complaint which has been investigated is that the Council delayed unreasonably in taking action to enforce two conditions of a planning consent issued for the adjacent residential development (*not upheld*).

Redress and recommendations

The Ombudsman has no recommendations to make.

Main Investigation Report

Introduction

1. The complainant (Mr C) resides in a modern development in Argyll. The small development of ten houses was built in 1990. A further house was built subsequently on land which had been intended as an access to land to the rear of Mr C's home. However, a developer subsequently submitted an application to Argyll and Bute Council (the Council) to demolish a house on the plot adjacent to Mr C's home. Owners of existing houses objected to the planning application and raised a legal action in respect of the deeds pertaining to their development. The complaint to the Ombudsman's office did not relate to the handling of the planning application as such, but was concerned with the Council's response to alleged breaches of development control.

2. The complaint from Mr C which I have investigated is that the Council delayed unreasonably in taking action to enforce two conditions of a planning consent issued for the adjacent residential development.

Background

3. In terms of subsection 127(1) of the Town and Country Planning (Scotland) Act 1997, a planning authority may issue 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.

Investigation

4. I obtained and considered information supplied by Mr C and the response from the Council. 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 delayed unreasonably in taking action to enforce two conditions of a planning consent issued for the adjacent residential development

5. Mr C's house is one of ten built in a small development in 1990. At the time of construction, a gap was left between two houses and the land retained in the developers' ownership to provide access to land behind Mr C's home, which the developers intended to develop for further housing. When this application was refused planning permission by the former Dumbarton District

Council, the developers sold the access strip. An eleventh house was constructed privately.

6. In 2004, an application for outline planning consent (Application 1) was made to the Council for the erection of 16 houses on land to the rear of Mr C's home. Eleven letters of representation were received, including one from Mr C. The Council's Local Area Committee inspected the site on 3 August 2004. Application 1 was approved on 10 February 2005, subject to an agreement in terms of section 75 of the Town and Country Planning (Scotland) Act 1975.

7. On 3 August 2005, a further application was made to the Council for detailed consent for the demolition of one house and the erection of 16 houses (Application 2). Application 2 attracted 41 letters of objection including a letter from Mr C dated 11 August 2005. A report on Application 2 was prepared by the Council's Head of Planning. The report was presented to the Local Area Committee on 6 December 2005. The report set out at length the policy overview, summarised 20 points of objection, including Mr C's concern about erosion of his privacy by overlooking should a garage next door be demolished. None of the statutory consultees objected. The Council's Head of Planning recommended the grant of detailed planning consent subject to 17 conditions. A decision was deferred at the 6 December 2005 Local Area Committee, and agreement to approve was given on 21 February 2006. The detailed consent was not, however, issued until 29 November 2006. The finalised consent conditions for Application 2 included the following:

'(12) Screening shall be provided and thereafter retained between the proposed new road and [Mr C's property]. Exact details and specification of the screening shall be submitted to and approved in writing by the Planning Authority prior to works commencing on site. The screening shall include a timber fence to be a minimum of 2 metres in height above the existing ground levels.

(15) Prior to the commencement of any development, details shall be submitted for the prior written approval of the Planning Authority in consultation with Scottish Water of a drainage scheme that shall incorporate the basic principles of Sustainable Urban Drainage Systems identified in "Planning Advice Note 61" and which shall provide details of surface water run off, measures to slow down run off; methods of treatments and its release into the system, unless prior written consent for variation is obtained in writing from the Planning Authority.'

8. The reason given for imposing Condition 12 was to ensure that the privacy and amenity of the neighbouring property owned by Mr C was not unacceptably affected by the proposed development. The justification for Condition 15 was in order to provide for sustainable development, to protect existing and proposed development from the effects of flooding, and to address pollution arising from the interaction of rainwater and the development.

9. Around the time Application 2 was made to the Council, application was also made to the Lands Tribunal for Scotland by the owner of the house to be demolished and the prospective developer (the Developer) under Part 9 of the Title Conditions (Scotland) Act 2003 for the discharge of title conditions. That action is not directly relevant to the complaint but was only finally resolved in the late Spring of 2007. The property next to Mr C's home was sold in July 2007.

10. On 25 July 2007, the local councillor wrote on behalf of his constituents including Mr C. The basis of that letter was that work had been started on the site without suspensive conditions having been discharged. As a result of that letter, a Council Planning Enforcement Officer (Officer 1) visited the site and wrote to the Developer reminding him of the suspensive conditions and that he should contact her with the relevant details to allow these to be discharged prior to development work being undertaken. On 8 August 2007, Mr C himself wrote to the Council's Senior Development Control Officer informing him that work had commenced on site in breach of at least two of the conditions. He invited the Council's Planning Department to visit the site to see if the conditions were being met.

11. Officers of the Council visited the site and ascertained that a number of conditions were not being complied with. There was an initial exchange of views on whether development had commenced, but the demolition of the house adjacent to Mr C's home on 15 August 2007 removed the doubt. The Area Team Leader (Officer 2) wrote to the Developer to confirm this and a Breach of Conditions Notice (BCN) was served on the Developer on 17 August 2007. A site visit was undertaken by officers of the Planning Service on 20 August 2007. They observed the situation regarding water run off from the site, which had occurred when an unexpected amount of rain had fallen over a weekend period. The site manager informed them that the Developer had made a new drain for surface water to run into. Following discussion with the Council's Legal Service, the first BCN was withdrawn. On 22 August 2007,

the Council's Head of Planning Service served a second BCN under Section 145 of the Town and Country Planning (Scotland) Act 1997 referring to breaches of nine conditions including Condition 12 and Condition 15. The BCN specified the following action:

'Condition 12 Action Required: Although at present there is metal fencing in place, the condition clearly states that the screening should include a 2 metres high timber fence. Therefore a timber fence, at minimum 2 metres in height must be erected around the boundary between the proposed new road and [Mr C's property].

Condition 15 Action Required: Details incorporating the basic principles of Sustainable Urban Drainage Systems identified in "Planning Advice Note 61" providing details of surface water run off, measures to slow down run off; methods of treatments and its release into the system are to be submitted to [named planning officers].'

12. The Council's Head of Planning prepared a report dated 24 August 2007. This was considered at the Local Area Committee on 2 October 2007 with the public excluded. Item 4(e) of the Local Area Committee minute records that members considered the report and further discussion took place. The terms of the report were noted.

13. In respect of the 17 conditions, condition 9 was discharged on 29 August 2007, conditions 5, 8 and 17 on 18 September 2007, and conditions 3, 4, 6, 15 and 16 by 17 October 2007.

14. While Mr C was away on holiday his property suffered severe flooding which he considered to have resulted from a breach by the Developer of Condition 15. He wrote to the Council's Complaints Officer (Officer 3), informing that officer of the flooding, and stated that photographs had been taken by a neighbour. Mr C confirmed that there had been no discussion with the Developer about the screening stipulated in Condition 12 and that no two metre high fence had materialised. He pointed out that he had had no reply to his earlier letter. He stated that Officer 1 had visited him. He complained that his privacy and amenity, which was the reason for Condition 12, were clearly of no importance to the Council's Planning Department.

15. Mr C's letter was treated as a stage 1 complaint in the Council's procedures and was passed to Officer 2 for reply. In his reply of

11 January 2008 Officer 2 stated that the Developer began work on site prior to discharging a number of suspensive conditions attached to the consent on Application 2, but Officer 1 had been dealing with the matter and the majority of conditions had been fulfilled. A couple of outstanding issues included the provision of screening between the road and Mr C's property. Officer 1 and a colleague from the Council's Roads Department had carried out a site visit on 9 January 2008 and had also met with Mr C. Officer 2 stated that Officer 1 had been liaising with the Developer's agents. Officer 2 stated that, if the matter was not resolved quickly, he intended to report it to the elected Members with a view to taking enforcement action. Officer 1 would continue to monitor the situation.

16. Mr C was not happy with this letter and on 22 January 2008 wrote to Officer 3. Mr C stated that the failure of the local office of the Council's Planning Service to enforce conditions was causing him hardship and injustice. He maintained that the visit paid by the two officers on 9 January 2008 was not relevant to the screening condition but was useful in that they could witness damage to roads and pavements in the estate, and the lack of wheel washing facilities which he had previously been assured by the Council's Development Manager (Officer 4) would be in place from 29 October 2007.

17. On 29 February 2008, after discussing the matter with the local area planning team, Officer 4 responded to Mr C. Officer 4 stated that Condition 12 was the only matter outstanding and that he understood the reason why the fence may not have been implemented was due to 'an on-going discussion' between Mr C and the Developer regarding the location of the fence. Officer 4 clarified the Council's understanding of the wording of Condition 12. He also confirmed his understanding that wheel washing equipment had been installed on site. Officer 4 offered Mr C a meeting.

18. Mr C responded on 3 March 2008 and welcomed the offer of a meeting at which he wished his councillor present. Mr C stated that, to his knowledge, there were no wheel washing facilities and that was evidenced in that the Developer was employing a street washing vehicle. Mr C expressed his concern that, nine months after development had commenced, Condition 12 had still not been complied with.

19. On 9 March 2008, Mr C wrote to the Council's then Chief Executive in terms of Stage 3 of the Council's complaints procedure regarding Condition 12

and Condition 15. He pointed out that, in addition to the flooding of his property the previous year, the stream in his garden had been affected by diesel and other pollutants from the development. (He had previously corresponded with the Scottish Environment Protection Agency on that matter) He stated that the Developer had not visited Mr C to discuss the nature of screening between his property and the new development.

20. In a detailed letter of 8 April 2008, the Council's former Chief Executive set out the background of calls for enforcement and the Council's response. The Chief Executive noted that only Condition 12 had remained outstanding since 17 October 2007. However, solid panel fencing had been in place since the development began. The Chief Executive understood that there were issues with regard to the requirements of the Council's Roads Department and burdens in the title deeds of Mr C's property. The Chief Executive accepted that Mr C had a different view from the Council's Planning Service with regard to how far they should have taken the enforcement action. He stated that the carrying out of works in advance of discharging planning conditions was not in itself an offence; but it is only when notices are ignored that the Council seek a prosecution. The Chief Executive felt unable to uphold the terms of Mr C's complaint and provided contact details for the SPSO.

21. Mr C responded to this letter disagreeing with the Chief Executive's conclusions and the lack of informed comment on Condition 15. Mr C stated that he suffered flooding because the Developer created a road across a storm drain above his property and also that he understood the Scottish Environment Protection Agency had reported pollution of the stream to the Procurator Fiscal. He expressed his chagrin that the one condition aimed at protecting his privacy and amenity had been the last to be resolved. The Chief Executive acknowledged receipt on 30 April 2008 and reminded Mr C of the opportunity to refer the matter to the SPSO.

22. Mr C did so by letter of 20 May 2008. He stated that he wished to confine his complaints to Condition 12 and condition 15. He considered that his privacy had not been protected and his property had suffered flooding and pollution from the development site.

The Council's Response to my enquiry

23. In responding to my letter of enquiry of 8 August 2008, the Council provided me with details of the exchange of emails which followed the matter

being reported to them, their attempts to resolve the issues surrounding the discharge of conditions, and the issue of the BCNs. The Council informed me that a BCN does not prevent work continuing on site; it requires the developer to submit the necessary information to discharge the conditions within a period of 28 days. If the breach is causing serious harm to the environment, then an enforcement notice and stop notice could also be served. In this case, it was not felt at that time that the works being carried out were having such serious harm on the environment as to justify issue of a stop notice. A report dated 24 August 2007 was sent to the Local Area Committee. The Council maintain that the Planning Service responded quickly and undertook an appropriate course of action within a reasonable time.

24. The Council stated that Condition 15 of the consent (paragraph 7) relates to the quality and appropriateness of the drainage scheme which would be in place at the time when the development is fully completed and does not relate to the period during which the development work is being undertaken. The Developer provided the information on 21 August 2007 to allow the condition to be discharged, though it was not formally discharged until the Council's letter of 17 October 2007 (paragraph 13). The Council say that they cannot give an opinion on what caused the flooding in Mr C's garden, but maintain that it was not due to the fact that Condition 15 had not been discharged at the time the flooding incident occurred. The Council had no responsibility for the cause of the flooding and issues arising from run off etc into neighbouring properties would be a civil matter between the Developer and the person into whose ground the water had run.

25. With reference to Condition 12 of the consent (paragraph 7), the Council informed me that there already was fencing along a substantial part of what is now the access road to the site and the garden of Mr C's house. They understood that Mr C had approached the Developer with a view to have the fence run directly from B to E rather than B to C to E (see Annex 2) with Mr C taking over a small triangular area where part of his previous neighbour's garage had stood. The difficulty with this was that the triangular area of ground was within the development site and other conditions regarding maintenance of the site would have been unenforceable if the fence had taken the line preferred by Mr C.

26. Since this remained the only condition which had not been discharged, the Council informed me that they did nothing with a view of enabling Mr C to

negotiate with the Developer and resolve issues of burdens/restrictions on titles. While the Council could have required the Developer to discharge the condition they had not done so. They had exercised their discretion not to take enforcement action based on an understanding that negotiations were ongoing between Mr C and the Developer and that the impact of taking enforcement action would be minimal since fencing was already in place.

27. In responding to the draft report, Mr C clarified that there was a 0.9 metre high fence between point A and point B on the plan at Annex 2 and a 1.8 metre high fence between points B and D. He stated that a 1.8 metre high fence was erected between point A and point B by the developer but later replaced by a 2.0 metre high fence. Mr C was of the view that there never had been an intention by the Developer to continue a 2 metre high fence between points D and F. Mr C indicated that although the Developer had previously indicated at a meeting of lawyers that he would be prepared to disperse the triangular area BCE (Annex 2) the Developer had not met with Mr C to discuss the issue.

28. The position at the date this report was finalised was that following discussion with the Council's Planning Service a letter of request to vary the condition was submitted to the Council by the Developer on 21 October 2008 to vary Condition 12, to erect a 2.0 metre high timber fence to the rear of Mr C's home, to retain the existing 1.8 metre high timber fence in the middle section of the boundary, and to erect no fencing at the front of the boundary. The Developer indicated that he was requesting the variation to comply with the restrictions on the installation of fencing included within Roads guidelines and burdens in the title deeds. At 7 November 2008, the application to vary required to be validated. The Planning Service's likely recommendation would be that the application to vary the condition be approved.

Conclusion

29. The evidence before me suggests that the Council's officers acted appropriately in this instance. They secured compliance with most of the conditions (including Condition 15) by 17 October 2007 and, for reasons stated at paragraph 25 and paragraph 26, they effectively decided to defer a decision on enforcing the discharge of the remaining condition (Condition 12). I do not uphold the complaint.

Recommendation

30. The Ombudsman has no recommendation to make.

Explanation of abbreviations used

Mr C	The complainant
The Council	Argyll and Bute Council
Application 1	An application for outline consent for 16 houses on land to the rear of Mr C's home
Application 2	An application for detailed consent for the same development
Condition 12, Condition 15	Two of the 17 conditions attached to the detailed consent in respect of Application 2
The Developer	The developer who implemented Application 2
Officer 1	Planning Enforcement Officer
Officer 2	Area Team Leader, Planning Service
BCN	Breach of Conditions Notice
Officer 3	Development Service Complaints Officer
Officer 4	Development Manager

Plan of Fence

