

## Scottish Parliament Region: Mid Scotland and Fife

### Case 200801806: Fife Council

#### Summary of Investigation

##### **Category**

Local government: Planning Enforcement

##### **Overview**

The complainant (Mr C) raised a number of concerns about Fife Council (the Council)'s failure to take effective enforcement action against the owners of a neighbouring disused quarry site. In particular, he was concerned that the Council had failed to ensure that the owners of the site had complied with the conditions of a Planning Enforcement Notice, which they issued in 2004.

##### **Specific complaint and conclusion**

The complaint which has been investigated is that the Council failed to take effective enforcement action against unauthorised works at a quarry site next to Mr C's home (*upheld*).

##### **Redress and recommendations**

The Ombudsman recommends that the Council:

- (i) obtain the services of an independent consultant, obtained from a list provided by the Royal Town Planning Institute, to prepare a report within two months with recommendations on the steps which should be taken by the Council to ensure final compliance with the Enforcement Notice. The Council should consider this report at a meeting of the appropriate Committee within one month of receipt and put in hand the measures it considers appropriate to ensure that works are completed as quickly as possible and within a specified timescale;
- (ii) write to all residents neighbouring the site to apologise for their failures to take effective enforcement action in order to protect their amenity; and
- (iii) carry out a full review of enforcement practice within the Council to ensure that similar situations do not arise again. Such a review should consider the relevant planning circulars and advice.

## **Main Investigation Report**

### **Introduction**

1. On 30 September 2008, Mr C complained to the Ombudsman's office about what he considered to be a number of failures on the part of Fife Council (the Council)'s Planning Department. These failures related to the control of unauthorised works being carried out at a disused quarry site next to Mr C's home and related, in particular, to the Council's failure to ensure that the site owners comply fully with a Planning Enforcement Notice issued by the Council in September 2004.

2. The quarry site consisted of a large depression, which was the site of the sand and gravel extraction area, and a substantially larger surrounding yard area, which was used for storage.

3. The Enforcement Notice contained 11 steps that were to be complied with, and provided timescales for completion where appropriate. Step 10 and step 11 related to the removal of waste material and the reinstatement of the sand and gravel extraction area using the remaining materials on site. Step 11 was to be completed within six months. To date this step has still not been completed.

4. Mr C raised his concerns about this and other related issues with the Council on a number of occasions. He received a response to some of his concerns as part of the initial step to the Council's complaints procedure on 15 August 2008. As he remained unsatisfied he raised the matter with the Council's Chief Executive as the final stage in their internal complaints procedure. The Chief Executive replied on 15 September 2008. Mr C remained unsatisfied with the response provided and raised the matter with the Ombudsman's office.

5. The complaint from Mr C which I have investigated is that the Council failed to take effective enforcement action against unauthorised works at a quarry site next to Mr C's home.

### **Investigation**

6. Investigation of this complaint involved visiting the site, obtaining and conducting a detailed review of the planning records and historical information relating to this case as well as the correspondence from the Council relating to

Mr C's complaints. I have also obtained the advice of a professional (planning) adviser to the Ombudsman who has also reviewed the records.

7. 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 failed to take effective enforcement action against unauthorised works at a quarry site next to Mr C's home**

*Quarry site history*

8. It appears that planning permission for the extraction of minerals at this site was granted in 1949 although extraction had been going on since 1914. By the early 1980s use of the site had diversified into skip hire, including parking and storage and the miscellaneous disposal and storage of waste materials. Council documents also highlight that burning of waste at the site was undertaken at this time. None of these activities had the benefit of planning consent. Following unsuccessful discussions between the former District Council and site owners to regularise the activities on the site, an Enforcement Notice was served in 1986 requiring:

- 'all burning of materials should cease.
- All skips and associated vehicles should be removed.
- Scrap vehicles, machinery and other material should be removed within one month of the notice.
- Cessation of the depositing, tipping, sorting and storage of waste materials.
- Waste materials and subsoil currently on site should be covered, where possible, with top soil and the land re-contoured in accordance with a plan to be submitted – within 4 months.'

9. This Enforcement Notice was the subject of an appeal to the Scottish Office but the appeal was dismissed in 1987. The Inquiry Reporter commented that the proposals for planning permission to allow tipping would be very detrimental to the amenity of neighbours and that infilling should not be allowed. The decision did, however, allow for the continued operation of mineral extraction and a coal/firewood business.

10. Between 1990 and 1999 there were many complaints regarding breaches on the Enforcement Notice from adjacent residential properties, although the

Council argued that it was difficult to obtain evidence to corroborate these complaints. During 1995, the permission to carry on mineral extraction was removed as a result of the owners' failure to make an application for the agreement to the conditions of working as required under the revised rules. Since then the only permitted use for the site has been as a coal/firewood business.

11. In 1999, the site owners applied for a Certificate of Lawful Use for skip storage/sorting materials for the yard area that was located beside the quarry area. No supporting evidence was submitted and the certificate was refused. In 2000, a further certificate was applied for, with some supporting documentation, but was rejected.

12. In 2001 an enforcement report was presented to the Area Development Committee which highlighted that the following activities were being undertaken at the site without the benefit of planning permission:

- 'Skip hire and storage
- Waste transfer
- Storage of waste materials, including scrap vehicles/machinery
- Disposal of waste materials
- Extraction of sand
- Haulage depot
- Infill in parts of the quarry with waste'

13. The committee decided to take enforcement action by withdrawing the 1986 Enforcement Notice and serving a new notice to cover the unauthorised activities and require restoration of both the sand and gravel extraction area and the yard area. The site owners, however, then submitted a planning application which, if granted, would have authorised the majority of the above activities. This application was rejected by committee in October 2001. The site owners then appealed this decision to Scottish Ministers. This appeal was rejected in January 2003 following a local public inquiry. The Inquiry Reporter on this occasion commented that the continued works on site were very detrimental to the amenity of the residential neighbours.

14. Within six weeks, the site owners lodged an appeal with the Court of Session against the Inquiry Reporter's decision. The date of the appeal was set for 8 July 2004. On 6 July 2004 the Council's Legal Department was contacted

by a solicitor within the Scottish Executive Legal Service advising that the appeal had been abandoned by the site owners, and as such the hearing would not take place. It was later established that it had been formally disposed of on 2 June 2004.

15. On 1 September 2004, the Council issued an Enforcement Notice and a related Stop Notice under the planning Acts. The Stop Notice required that all the unauthorised activities detailed on the Enforcement Notice, notwithstanding the period for compliance in the Enforcement Notice, should stop with effect from 5 September 2004. The Enforcement Notice was issued advising that from the date the notice takes effect, 30 September 2004 (unless appealed), the site owners would be required to:

1. Cease the use of the subjects for a skip hire/skip storage business.
2. Cease the use of the subjects as a waste transfer station.
3. Cease the use of the subjects for the storage and disposal of waste materials.
4. Cease the extraction of sand and gravel from the subjects.
5. Cease the use of the subjects as a haulage depot.
6. Cease all infilling operations on the subjects involving the use of waste materials.
7. Remove all skips associated with the unauthorised use of the subjects as a skip hire/skip storage business.

Time for compliance with steps 1, 2, 3, 4, 5, 6 and 7: one month after this notice takes effect.

8. Remove all waste material and skips associated with the unauthorised waste transfer station currently operating on the subjects.

Time for compliance with step 8: two months after this notice takes effect.

9. Remove all cement-bonded asbestos from the subjects under the Special Waste Regulations 1996 to a facility licensed to accept special waste.
10. Remove the stock pile of demolition/construction waste, brick blocks, aggregate and all putrescible material (including wood and paper) from the subjects.

Time for compliance with step 9 and step 10: three months after this notice takes effect.

11. Reinstate the subjects by infilling the sand and gravel extraction area with the remaining rubble, stone and bunding already on the subjects and thereafter cover with topsoil to a minimum depth of 300mm and thereafter grass over.

Time for compliance with step 11: six months after this notice takes effect.'

16. Following the serving of the Stop Notice the Council obtained confirmation by the site owners that they were willing to comply with its terms. On 8 September 2004, the site owners' solicitors contacted the Council to clarify a number of issues in respect of the Enforcement Notice. In particular, they detailed that there was a substantial stock of hardcore currently on the site and the site owners wanted to obtain the Council's confirmation that this material, which they estimated would require approximately 1,000 lorry loads to remove, would be able to remain on site.

17. The solicitors explained that this material would be of use to any individual who may wish to use the site for house building at some future date. In addition, the solicitors requested in this letter that the timescale for complying with step 8 of the Enforcement Notice, requiring the removal of waste material and skips, be extended to a period of six months. They also requested confirmation that the Council would allow them to retain the hardcore on site, and finally that the time period for compliance with step 11 of the Enforcement Notice, in relation to restoration of the sand and gravel area within six months, be extended to two years.

18. In a letter to the site owners' solicitors dated 17 September 2004 the Council confirm that the hardcore could be retained on site, indeed they also explained that if the hardcore was sold and transported outwith the site then this would, in itself, be an unauthorised use of the site. The Council also confirmed in this letter that they were unwilling to extend the periods for compliance with step 8 and step 11 of the Enforcement Notice and, indeed, they highlighted to the solicitors that if they considered these timescales unreasonable then they could appeal the Enforcement Notice to the Scottish Executive before 30 September 2004. The Council also noted in this letter that it had been reported that materials were still being imported into the site in contravention of the Stop Notice. The site owners did not take up their right to appeal the conditions of the Enforcement Notice.

19. Mr C wrote to the Council's Planning and Environment Legal Team on 5 May 2005 requesting clarification on whether the Council considered that the terms of the Enforcement Notice had at that stage been complied with and, if not, what steps the Council intended to take to ensure compliance with the Enforcement Notice.

20. In a memo from the Council's Planning Enforcement Officer (the Officer) to the Council's Planning and Environment Legal Team on 25 May 2005, it states that step 1 to step 8 of the Enforcement Notice had now been complied with. It also detailed that step 9 had been a precautionary measure and that there was no evidence of asbestos on site. Step 10 had been complied with and it was noted that, despite the original request by the site owners that they be permitted to retain the (approx 1,000 lorry loads) of hardcore material on site, this had actually now been removed (the memo states that this was done for financial reasons).

21. Finally, the memo stated that step 11 of the Enforcement Notice had not been complied with. Specifically the memo states that 'This step has not been complied with as a result of the removal of the stockpiled material'. The memo concludes with the Officer stating that 'in view of [a neighbouring resident]'s continuing dissatisfaction with the situation, I enquire if a meeting with the Procurator Fiscal would be beneficial at this stage'.

22. An officer from the Council's Planning and Environment Legal Team wrote to Mr C on 7 June 2005 responding to his earlier letter and providing him with an update. He also advised that although step 11 had not yet been complied with, the Officer would be making regular visits to assess the situation, and he also reassured Mr C that the Enforcement Notice would be complied with fully.

23. In a letter to the site owners from the Officer dated 5 September 2005, it is noted that random site visits had been made by the Officer in April, May, June and September 2005, and it is detailed that it was only recently that the infilling of the sand and gravel extraction area, as required by step 11, had commenced.

24. In a file note prepared by a Council solicitor in October 2005, it details that correspondence had been received from a number of neighbouring residents regarding activities taking place at the site. The note goes on to detail that the

solicitor noted from the Officer that the sandpit infill was now three quarters complete and that this was the last step to be completed.

25. A letter of 17 October 2005 from the site owners to the Officer states:  
'Timescale on infilling extraction area, if we can get subsoil for the final stage within this 2 month period, if not then the only alternative we have is that you agree we leave this portion unfilled.'

26. The Officer then reflected this information to a neighbouring resident who had raised concerns about the continuing works. The officer stated that a two month timescale for completion had been suggested by the site owners if subsoil could be found and, if not, they had suggested that they may have to leave a portion of the site unfilled. It was pointed out that this would be discussed further should the need arise.

27. A letter to the site owners from the Officer dated 25 November 2005 states:

'I conducted my most recent site visit on 17 November 2005 and am hopeful that due to the amount of infill material stored the infill and re-grading of the extraction area as required by the Enforcement Notice can be carried out by the end of the year.'

28. There has been regular correspondence from residents living in houses neighbouring the site to the Council about noise, disturbance, heavy lorry traffic, failure of the site owners to comply with the Enforcement Notice, and failure of the Council to take effective enforcement action, as well as a substantial number of allegations of unauthorised activities being continued at the site.

29. As a result of these there have been regular visits to the site by the Officer and he has written to the site owners on a significant number of occasions to advise them of their obligations.

30. In a letter of 5 October 2007 from the Officer to the site owners it is detailed:

'It is evident that to make the site more viable for possible future housing, a larger area is being filled and graded accordingly. This in itself has resulted in an increase in the volume of traffic as more infill material is required ... As step 11 required the infill to be carried out by using material already on site, the importation of infill material from another site to



complete the restoration technically requires planning permission. This has not been sought in an effort to have the site restored as soon as reasonably practicable. Failure not to agree to the proposed timescale would leave the Council with no alternative but to seek formal planning permission for further importation after December 2008 (the new deadline). This would unlikely be granted in view of the time already elapsed.'

31. In a memo to the Council's solicitor, the Officer explains that the site owners are trying to infill and re-grade an area considerably larger than that required by the Enforcement Notice, as the area has been identified as a possible housing site under the local plan. He also states that consideration has been given to reporting the lack of compliance with step 11 to the Procurator Fiscal but, having discussed the matter with his superiors, it was decided that this action would not be appropriate.

#### *Complaints*

32. In the Inquiry Reporter's decision letter following the public inquiry held in February 1987 it states:

'In the reasons for serving the enforcement notice, the district council has referred to the need to remove the unauthorised development because of the nuisance caused to nearby houses, and because it is considered to be inappropriate at this location. Local residents have described the disturbance, pollution and general loss of amenity that they have suffered on weekdays, in the evenings, and at weekends. They have criticised the increasingly unsatisfactory appearance of the site ... Residents are also concerned that the progressive infilling of the sandpit will make any continuing activities such as the coal depot, much more conspicuous because they would be at a higher level.'

33. In the Inquiry Reporter's decision letter following the public inquiry held in October 2002 it states:

'The operations had already generated repeated noise complaints, which demonstrated conflict, and noise levels did not need to be as excessive as a statutory nuisance to disturb local residents.'

34. There is substantial evidence on file that complaints had been received by the Council from local residents for many years about aspects of the site. Mr C was only one of a number of individuals who had expressed their concerns over

continuing disturbance. Although he raised his concerns initially with this office in September 2008, he had been in lengthy correspondence with the Council prior to this date.

*Statutory and policy framework*

35. The Town and Country Planning (Scotland) Act 1997 (the 1997 Act), as amended by the Planning etc (Scotland) Act 2006, provides the framework and statutory duties required under the planning process in Scotland. The Planning etc (Scotland) Act 2006 amendments have no effects on this case.

36. Scottish Government Planning Circular 4/1999 provided an explanation of the general approach to planning enforcement for the period detailed in this report. (This has recently been superseded by Planning Circular 10/2009).

37. Planning Advice Note PAN54 - Planning Enforcement provides guidance and an explanation of the role of planning enforcement. This explains that the key objectives of enforcement are twofold:

- 'to remedy undesirable effects of unauthorised development;
- to bring unauthorised activity under control.'

38. Section 127 of the 1997 Act provides a discretionary power on planning authorities to serve Enforcement Notices where there have been breaches of planning control. Government guidance stresses that this is a last resort and should be sought by negotiation in the first instance. However, the guidance is also firm on the need for consistent, effective action to retain public confidence and, once an authority has taken the steps for formal service of a notice, it should be prepared to see it through to completion as soon as possible. To do otherwise without good reason is generally maladministration. Section 140 of the 1997 Act provides for the service of a Stop Notice before the relevant Enforcement Notice comes into effect where it is considered expedient that the activity should cease immediately while awaiting the outcome of any appeal. There are certain compensation implications of such notices.

39. Since 2005 there has been an increased significance attached to enforcement powers. The Planning etc (Scotland) Act 2006 has resulted in even stronger provisions for enforcement.

40. As well as powers to require individuals on whom an Enforcement Notice has been served to take action in compliance of the notice, councils also have

powers, under section 135 of the 1997 Act, to take direct action themselves to remedy the breach of planning control and then seek to reclaim their costs from the owners. There are various ways, including for example the use of an inhibition action on heritable asset disposal, to ensure recovery of the costs.

#### *Current situation*

41. The deadline for completion of the infill operation has been extended many times. One of the most recent was that the operation would be completed by December 2008. In a letter to the Ombudsman's office of 11 November 2008, the Council advised that all infill material will be on site by the end of December 2008 (this did not state that infill would be complete) and since then, works have continued.

42. Mr C has raised his concerns that material is now, in places, above the height of the surrounding land, although the Council said in their letter of 11 November 2008 that at no point would this be the case.

43. In a letter to the Ombudsman's office received on 13 August 2009, the Council have explained that 'the restoration of the site is progressing and it is considerably improved on its appearance since the time of the appeal to the Scottish Ministers'.

#### *Photographic evidence and site visit*

44. Both Mr C and the Council have provided photographic evidence to reflect the progress made on the site for a number of years. These have shown substantial amounts of material of various types on site. Much of this appears to be waste building materials, rubble, wood, reformed wood products such as MDF (chipboard) etc. There are also substantial numbers of vehicles on site, some of which may be associated with the infill works, some skips which may be being stored, and a number of old vehicles. The site owners are, however, entitled to have vehicles on their land providing they are not used for any unauthorised purpose.

45. In addition, I have visited the site. At the time of my visit to the site there were very substantial amounts of material, mixed building rubble and wood, on site and spread over a considerable area. At the time of my visit this material appeared to substantially exceed the material on site at the time the Enforcement Notice was served.

### *Site dimensions*

46. Mr C has raised his concerns that the area being in-filled is substantially larger than that originally required by step 11 of the Enforcement Notice. The Enforcement Notice requires that the owners:

'11. Reinstate the subjects by infilling the sand and gravel extraction area with the remaining rubble, stone and bunding already on the subjects and thereafter cover with topsoil to a minimum depth of 300mm and thereafter grass over.'

47. The sand and gravel extraction (quarry) area is a specific part of the site. A large area of the site (the yard) is not included in this part of the site. The site plans, which I have reviewed, have not clearly defined what is meant by the sand and gravel extraction area. The Council, in their response to me of 11 November 2008, have explained that according to the site owners, the sand and gravel extraction area is substantially larger than that shown on the plans associated with the previous planning applications. They continue by advising that the Enforcement Notice does not specify an exact area. This appears to indicate that they are of the view that the current infill operation does comply with the area originally intended by the Enforcement Notice.

48. This view is contradicted by earlier correspondence. In the Officer's letter to the site owners of October 2007, it is accepted by the Council that the area being in-filled is greater than that required by the Enforcement Notice. In other correspondence, it is clarified that the reason for this larger area being in-filled is because of the potential future use of the site for housing.

### *Housing*

49. The Council have explained that this site has now been identified in the draft local plan as a potential future housing site. The site owners have, therefore, been re-grading the site as infilling work has progressed.

50. The local plan being quoted by the Council has not yet been formally adopted by the Council and appears to be in draft form only. The existing local plan, adopted in 1998 and as identified in the Inquiry Reporter's decision letter of January 2003, details that the whole site is outside the defined settlement boundary and inside the countryside and that the site was subject to a general development plan presumption against development.

51. It is not clear from the correspondence at which point the Council made the decision, if indeed any formal decision was made, that this matter had changed from being one of requiring the site owners to simply comply with the terms of the Enforcement Notice, to being one where the compliance with the terms of the Enforcement Notice should be secondary, or at least of no greater importance, to that of the site owners re-grading the area for housing.

52. Had the Council required compliance with the Enforcement Notice before preparation of the new draft local plan, then they could not have given any consideration to the future use of the site for housing as it was not zoned as such within the established development plan.

*Final contours of the site*

53. This is a very major concern to Mr C. He worries that the completed in-filled area will be at a higher level to that of the surrounding area. Indeed, there is some lack of clarity on this point as the Council have advised in their letter to the Ombudsman's office, received on 13 August 2009, that 'there is no requirement to provide plans showing final contours'. However, in their letter of 11 November 2008, they detail that 'At no point will the material be higher than the adjacent land'.

54. Given the problems with the definition of the area which was to be in-filled, Mr C has justifiable concerns that the Council will have similar problems with the height of infill operations and that the finished site will be substantially higher than the surrounding area.

*Summary*

55. Mr C has complained that the Council failed to take effective enforcement action against unauthorised works at a quarry site next to his home.

56. Since the 1980s unregulated activities have been taking place on the yard and quarry site. In 1986, the Council sought to address these by issuing an Enforcement Notice. This Enforcement Notice was the subject of an appeal to the Scottish Office but was dismissed in 1987. The Inquiry Reporter commented that the proposals for planning permission to allow tipping would be very detrimental to the amenity of neighbours and that infilling should not be allowed.

57. In September 2004, the Council issued a further Enforcement Notice requiring the site owners to comply with an 11 step programme. Council officers have stated that ten of these steps were complied with by June 2005. Step 11, however, in respect of the infill operation, was not. The original timescale had required the infill operation to be completed within six months of the Enforcement Notice. This operation is still on-going.

58. The Enforcement Notice issued on 1 September 2004 states that 'The operations hereinbefore specified in Part 3 hereof are contrary to development plan policies and are further harmful to the amenity of the area in which the operations are taking place, in particular the residential amenity'.

59. The Enforcement Notice further details that planning permission, in respect of the operations about which the notice was being issued, was refused by the Council on 22 November 2001 and a subsequent appeal against the Council's refusal was dismissed by the Inquiry Reporter on 20 January 2003.

60. In 2001, the Council gave their reasons for refusal of the application. These were twofold, the second listed was that the development would be contrary to policies within the local development and structure plans. The first reason given was that the application was refused because:

'In the interests of residential amenity, the proposed uses by reason of their range, operation and extent would be inappropriate in such close proximity to residential property due to their potential for disturbance of the residential amenity of surrounding dwellings through noise generation, potential dust disturbance and traffic movements.'

61. From the very first attempts to regulate activities at the site, the protection of residential amenity has always been the central concern for the Council. The disturbance caused to neighbours by the activities on site has been extensive. The scale of disturbance caused was accepted as being substantial by the Council and both Inquiry Reporters who have been involved in considering this case in the past.

62. The Council have also explained that, in their view, to enforce speedy compliance with the terms of the Enforcement Notice would result in a constant stream of large lorries over a prolonged period. They considered that this would represent a significantly more onerous and harmful impact on residential amenity than the currently on-going restoration scheme and timescale.

63. Whilst enforcing completion may require a larger number of lorries for a time, it is clear that it would have been over a substantially less prolonged period than that which has resulted.

64. There are many comments relating to the protection of residents' amenity within the correspondence I have reviewed. There is substantial evidence of negotiation and discussion with the site owners as to the means and timescales for complying with the Enforcement Notice. Except in the context of responding to complaints made by residents, there is little evidence that there has been discussion with neighbours about their amenity, their preferences for a quick solution with more immediate disturbance or a long term solution with less activity.

65. The Council have explained to me that, in their view, the main complaints they received about the site related to the skip hire business and waste transfer station and not about reinstatement. However, it was the disturbance that almost all on-site activities caused that has been the source of the complaints, not one or two specific elements.

66. The Council have provided a number of reasons for their handling of the issue of the failure of the site owners to comply with step 11 of the Enforcement Notice and the Council's decision not to take further action to ensure compliance.

67. They have explained that they would have difficulty in enforcing the six month compliance period detailed in the Enforcement Notice as this period could be successfully appealed against. This is not, however, the case as the site owners did not appeal the decision within the permitted time frame.

68. At various points in the correspondence there is consideration given to requesting that the Procurator Fiscal take action to ensure compliance. The Council have taken the view that the Procurator Fiscal would be unlikely to do so as they considered that the majority of points in the Enforcement Notice had been complied with. However, guidance from the Scottish Government, following consultation with the fiscal service, suggests that properly prepared cases should not be faced with so much difficulty.

69. The Council have further commented that if a case were pursued it could mean an extended timescale and the site owners may stop work. This, they suggest, may lead to a more protracted process. As work is continuing four years after the deadline detailed in the Enforcement Notice, it is difficult to see how much more protracted the process could be.

70. The Enforcement Notice of 2004 failed to define precisely the area that had to be in-filled. The Council have explained to me that the site owners state that the sand and gravel extraction area is much larger than it appeared on previous plans of the site. The site owners are not, however, responsible for interpreting the Enforcement Notice. This is the Council's responsibility. They have accepted that the area being in-filled is substantially larger than that originally indicated in the Enforcement Notice. This being the case, it is difficult to see why they accepted such a significant increase in the area of infill. Whilst the issue of the site being for potential housing development may be a consideration in 2009, it was not a consideration in 2004. Had they taken effective action at that stage the issue of housing would not have arisen.

71. It appears that when the Enforcement Notice in 2004 was prepared, the materials on site were, in the opinion of those who prepared the notice, sufficient to complete the infill of the site.

72. The Enforcement Notice detailed that the site should be reinstated by infilling the sand and gravel extraction area with the remaining rubble, stone and bunding already on the subjects and thereafter cover with topsoil to a minimum depth of 300 millimetres and thereafter grass over.

73. The site owners initially requested that they be permitted to retain what they claimed was over 1,000 lorry loads of hardcore material on site. It is not clear whether this material was identified by officers when formulating the Enforcement Notice as potential infill material. It is also not clear why the materials on site at the time of the Enforcement Notice were not sufficient to carry out the level of infill requested by the notice. There is no indication in the Enforcement Notice that any additional infill material should be imported to the site or that, as mentioned previously, there was any detail of contours provided.

74. In addition to the above, the Enforcement Notice required that step 11 be complied with within six months of the notice. The Officer detailed in a letter to the site owners on 5 September 2005 (five months after the deadline imposed



for complying with step 11) that he had noted that it was only recently that the infilling of the sand and gravel extraction area had commenced. However, in an internal Council file note from October 2005, it is noted that the Officer had advised that the sandpit infill was now three quarters completed.

75. In a letter of 17 October 2005 from the site owners to the Officer it states:  
'Timescale on infilling extraction area, if we can get subsoil for the final stage within this 2 month period, if not then the only alternative we have is that you agree we leave this portion unfilled.'

### *Conclusion*

76. Since the late 1980s, the site owners have been carrying out activities on site that have clearly not been regularised by either appropriate planning consents or by the drafting and enforcement of suitable Enforcement Notices. Officers appear to have been reacting to suggestions and actions of the site owners and failing to consider the needs of neighbouring residents. It is quite clear that sight was lost of the reasons for the action by the Council in the first place. As a result of this the neighbouring residents have had to suffer many years of disturbance through increased traffic, noise and unsightliness at the yard and quarry area.

77. The Council have reflected statements by the site owners that they have had great difficulty in obtaining the material to complete the infill process. However, if three quarters of the site can be in-filled within a one, two or even three month period as appears to have been the case, then it is not credible that it should take a further four years to obtain sufficient material to complete the infilling of the area.

78. Paragraph 6 of the Introduction to Planning Circular 4/1999 sets out issues planning authorities should consider in relation to deciding on enforcement action. Three of these are:

- consider whether the breach unacceptably harms public amenity, or the existing use of land and buildings merits protection in the public interest;
- ensure any enforcement action is commensurate with the breach of planning control to which it relates; and
- ensure that, should an initial attempt to persuade an owner or occupier of a site to remedy voluntarily the harmful effects of unauthorised development fail, negotiations should not be allowed to hamper or delay

whatever formal enforcement action may be required to make the development acceptable on planning grounds, or to compel it to stop.

79. Twenty-three years after the Council's initial Enforcement Notice, and more than five years after the 2004 Enforcement Notice, enforcement action by the Council is still on-going. The Council have clearly failed to effectively achieve the three points mentioned above.

80. The proper completion of the works to comply with the Enforcement Notice is a separate matter from that of establishing the principle of housing development on the site by the due process of the local development plan, and should not have become a default basis on which the enforcement action was varied from the terms of the notice. In practice, it may be that compliance with the notice would not pre-empt development, but the importation of considerably more material than allowed for in the notice is not only in breach of its terms but may be prejudicial to a fit development for the area by unduly raising the ground level.

81. Allowing such importation of material was totally contrary to the intention of the Stop Notice, which was considered necessary to protect the amenity of neighbours, and yet has had no effect on what was originally seen as a case for urgent remediation. Public confidence can only be undermined by such failure to follow up on a succession of firm decisions for action on this site.

82. At no time during the Council's consideration of this case have they given any consideration to taking steps under section 135 of the 1997 Act which would allow them to intervene directly and complete the works themselves, or instruct a contractor to carry out the works on their behalf. Costs would be recoverable after the works had been carried out.

83. From my examination of the history of the issue, I have serious concerns that the Council's failure to take effective enforcement action brings the planning system into disrepute. For all the reasons identified above, I fully uphold the complaint.

#### *Recommendations*

84. The Ombudsman recommends that the Council:

- (i) obtain the services of an independent consultant, obtained from a list provided by the Royal Town Planning Institute, to prepare a report within

two months with recommendations on the steps which should be taken by the Council to ensure final compliance with the Enforcement Notice. The Council should consider this report at a meeting of the appropriate Committee within one month of receipt and put in hand the measures it considers appropriate to ensure that works are completed as quickly as possible and within a specified timescale;

- (ii) write to all residents neighbouring the site to apologise for their failures to take effective enforcement action in order to protect their amenity; and
- (iii) carry out a full review of enforcement practice within the Council to ensure that similar situations do not arise again. Such a review should consider the relevant planning circulars and advice.

85. The Ombudsman asks that the Council notify him when the recommendations have been implemented.

**Explanation of abbreviations used**

Mr C	The complainant
The Council	Fife Council
The Officer	The Council's Enforcement Officer
The 1997 Act	The Town and Country Planning (Scotland) Act 1997

**List of legislation and policies considered**

Town and Country Planning (Scotland) Act 1997

Planning etc (Scotland) Act 2006

Planning Circular 4/1999

Planning Circular 10/2009

Planning Advice Note PAN 54 – Planning Enforcement