

Case 200905003: East Renfrewshire Council

Summary of Investigation

Category

Local government: Education; community use of school facilities

Overview

The complainant (Mr C) raised a number of concerns relating to East Renfrewshire Council (the Council)'s decision to install a multi-use games area (MUGA) in the grounds of a primary school (the School) adjacent to his flat and their subsequent decision that the gates remain open at all times providing unrestricted community use, with consequent detriment to his amenity.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the Council failed to consult residents before installing the MUGA at the School in March 2007 (*not upheld*);
- (b) the Council ignored a more suitable site (*not upheld*);
- (c) the Council ignored Mr C's reasonable requests that the gates of the MUGA be locked after supervised activities had ended in the early evening (*not upheld*);
- (d) the Council's decision in May 2008 to leave the gates open permanently was taken without consulting with or hearing from residents most directly affected (*upheld*);
- (e) the Council ignored Mr C's requests after May 2008, that respite be provided by closing the gates all day on Sundays (*not upheld*); and
- (f) the Council delayed in informing Mr C of his entitlement to make a formal complaint and, if dissatisfied with the way it was dealt with, to take his complaint to the SPSO (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

Completion date

- (i) given the change to community use of the site, now consult with adjacent residents on the change and the current 'open gate' access to the MUGA and, following this, reconsider the 'open gate' policy, taking into account the views expressed. If the 'open gate' policy continues, the matter should also be raised with the Planning Department to consider whether there has been a material change of use and, if so, whether it constitutes a bad neighbour development; and
- (ii) advise both the SPSO and Mr C of the outcome.

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

Main Investigation Report

Introduction

1. The complainant (Mr C) lives in a block of twelve flats inhabited almost entirely by elderly residents. The flats share a common boundary with a primary school (the School) under the control of East Renfrewshire Council (the Council). In March 2007, the Council installed a multi-use games area (MUGA) in the grounds of the School near to the boundary with the block in which Mr C resides. In May 2008, a decision was taken to discontinue the initially adopted practice of locking the gates of the MUGA in the early evening after school related uses ceased. This allowed unrestricted community use and, according to Mr C, brought with it attendant noise nuisance and disturbance.

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

- (a) the Council failed to consult residents before installing the MUGA at the primary school in March 2007;
- (b) the Council ignored a more suitable site;
- (c) the Council ignored Mr C's reasonable requests that the gates of the MUGA be locked after supervised activities had ended in the early evening;
- (d) the Council's decision in May 2008 to leave the gates open permanently was taken without consulting with or hearing from residents most directly affected;
- (e) the Council ignored Mr C's requests after May 2008, that respite be provided by closing the gates all day on Sundays; and
- (f) the Council delayed in informing Mr C of his entitlement to make a formal complaint and, if dissatisfied with the way it was dealt with, to take his complaint to the SPSO.

Investigation

3. I considered Mr C's file of correspondence with the Council and the Council's response to my specific enquiry on the six identified complaints. 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 failed to consult residents before installing the MUGA at the School in March 2007

4. Mr C and his wife (Mrs C) live in a flat in one of two stairs, comprising a block of 12 flats overlooking the grounds of the School. The majority of the 21 residents are over the age of sixty years.

5. The School is a non-denominational school, administered by the Council, whose roll is around 600 pupils. In March 2007, to support the Council's Active Schools Programme (initiated in August 2004 and itself supported by SportScotland) the Council decided to install a MUGA at the school. A MUGA is defined as an artificially surfaced outdoor games court, which can accommodate a variety of sports depending on its dimensions.

6. Mr C is aggrieved that, prior to the installation, there was no notification and consultation with the twelve residents of his block who would be most affected.

7. The Council informed me that the installation of the MUGA involved three of their departments, namely the Education Department, the Property and Technical Services Section and the Planning Division of the Environment Department. The Property and Technical Services Section is the custodian of school buildings and grounds. It is also responsible for management, maintenance, improvement and new build developments and for ensuring that necessary consents are obtained. The Council informed me that the Education Department decided that the MUGA should be installed to provide a much needed space for the physical education curriculum within school hours and also to provide young people with appropriate space to take part in physical activity outwith school hours.

8. Following consultation with the Planning Division, the Property and Technical Services Section advised the Education Department that planning consent was not required for the MUGA, since the project did not exceed £100,000 in value and was being developed within the existing school grounds owned by the Council. The Planning Division confirmed the view that the project was 'permitted development' under Class 33 of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992. They stated that, within school sites and under Class 33, planning authorities have permitted development rights to carry out, within their own district, any development under any enactment the estimated cost of which does not exceed £100,000, other

than (i) the development of any of the classes specified in Schedule 2 of the 1992 Order (bad neighbour development); or (ii) development which constitutes a material change in the use of buildings or other land. The Council maintained that, as the development was for an outdoor games court within the grounds of the School, the facility did not constitute a material change of use and was not a bad neighbour development. As the cost of the facility was under £100,000, the proposed facility was permitted development, no formal Notice of Intended Development was requested to be submitted and no formal planning record exists. In sum, there was no requirement to submit a Notice of Intended Development application and no requirement to carry out neighbour notification.

9. Although a copy could not be provided the Council, in response to my enquiries, reported that a member of staff at the school recalled circulating a leaflet to local residents shortly before the installation work was due to commence stating when works would commence and the daily hours of operation.

(a) Conclusion

10. I consider that the concept of a MUGA intended to enhance the physical education dimension of the curriculum of pupils at the School was a desirable aim and was vindicated by a favourable assessment by Her Majesty's Inspector of Education report on the School in June 2009, which recorded that 'all children benefit from more than two hours of good quality physical education each week, one session of which is outdoors'.

11. If the MUGA as originally envisaged was intended solely as an ancillary facility for the School, to be used during school hours or to facilitate early evening or organised use, then I cannot criticise the Council's argument. As a proposed facility, costing less than £100,000, enhancing rather than materially changing existing facilities and not introducing a 'bad neighbour' element, there was no requirement for the authority under planning or building control legislation to apply for a Notice of Intention to Develop. As 'permitted development', no neighbour notification was required nor did residents require to be consulted. Given that there was no requirement to consult residents or to notify neighbours in terms of the relevant planning legislation, I have not seen evidence of a consequent failure by the Council to carry out such consultation and I am therefore unable to uphold this complaint.

12. Notwithstanding the lack of requirement to consult with or to notify neighbours in terms of the planning legislation, I have given thought to whether the Education Department or the Property and Technical Services Section should have alerted neighbours to the proposals. I consider this in more detail under complaint head (d).

(b) The Council ignored a more suitable site

13. Mr C maintained that, of a finite number of sites which could have been used within the school campus, this was the least suitable and would not have been chosen had the facility been intended to be generally available to the community. He identified two other sites in the school grounds.

14. The Council responded to my complaints reviewer's request to explain their process of site selection. The Education Department confirmed that, in accordance with similar projects, there was a set budget available to develop the MUGA facility. Given that the School is in the middle of a housing development, there was no location within the school grounds which was not adjacent to housing. They stated that the site chosen was considered the best value solution. Two alternative sites within the school grounds were considered but rejected in favour of the current location. One site was rejected due to the site of existing car parking and the potential in the future for a stand alone nursery on the area. The other site was rejected because of excessive costs around main services, cabling and retention works which would be required. The Property and Technical Services Section discussed each of the options before choosing the site.

(b) Conclusion

15. I have some sympathy for Mr C's position that the site chosen for the MUGA in proximity to elderly residents is inherently unsuitable. That position is reflected in the disquiet shown by another flat owner about another Council's decision to develop a children's play area on a stretch of promenade immediately outside his property which featured in my predecessor's report on 23 January 2008 (200603033). I am, however, satisfied with the Council's explanation for not locating the MUGA on either of the two alternative sites. It is not for me, therefore, to impose my judgement over the professional discretion of the officers who considered the site selection prior to the commencement of the works in March 2007 or to suggest that the facility be re-sited. I do not uphold this complaint.

(c) The Council ignored Mr C's reasonable requests that the gates of the MUGA be locked after supervised activities had ended in the early evening

16. The earliest recorded complaint in the correspondence supplied by Mr C was a letter from Mrs C of 26 August 2007 to the Council about the facility being used from before 11:00 to after 20:30 for games of football, with attendant noise nuisance. She asked that the facility be re-sited or its use restricted to school hours. Her letter was acknowledged on 4 September 2007. A response was sent by the Quality Improvement Officer, Education (Officer 1) on 20 September 2007. Officer 1 stated that checks by the Council's anti social behaviour team (ASB Team) had not been successful in reducing a problem of youths hanging around the MUGA and, in consequence, the school janitor had been asked to lock the gates to the MUGA at 18:00 and to re-open them at 07:00 the next day.

17. On 26 October 2007, Mrs C wrote to a local councillor (Councillor 1) seeking assistance. She stated that the security lights on her block facilitated play in the evening and she sought a restriction on times of use of the MUGA.

18. On 2 November 2007, the Technical Services Manager, Property and Technical Services Division (Officer 2) responded on the points Mrs C had made about the siting, hours of operation, and the appearance and suitability of the facility. Officer 2 expressed his disappointment that Mrs C was experiencing difficulties with the use of the MUGA. He stated that the site was the only feasible location; the absence of floodlights did not encourage evening use; and the height of fences erected to prevent balls finding their way into neighbouring properties met Scottish Football Association standards.

19. On 7 November 2007, Councillor 1 wrote to inform Mrs C that the Education Department had confirmed to her that the gates of the MUGA at the School were now being closed between 16:30 and 17:00 and were being opened again at 09:10.

20. Mrs C wrote again to Officer 2 on 13 November 2007, expressing her grievance that the site had been chosen without consultation or prior warning; and that floodlighting was not an issue since it was light enough for play in the early evening for nine months of the year. She raised her human right to enjoy peace and quiet and insisted that a decision to move the MUGA had to be taken at the earliest opportunity. Officer 2 responded on 27 December 2007 that Technical Services had installed the MUGA on the instruction of the Education

Department, had no instruction to re-locate it and was not able, therefore, to accede to Mrs C's demands.

21. The gates to the MUGA were locked in evenings throughout the winter of 2007/08 but were left open during the Easter holidays in April 2008.

(c) Conclusion

22. Since, through the intervention of Councillor 1, a decision was in fact taken to close the gates of the MUGA in the early evening from a date in November 2007 through to the Easter School holiday in April 2008, I am unable to uphold a complaint that a request to close the gates to the MUGA was ignored. The request was initially acceded to but was not continued. I address that issue under complaint head (d).

(d) The Council's decision in May 2008 to leave the gates open permanently was taken without consulting with or hearing from residents most directly affected

23. After the gates to the MUGA were left open during the Easter holidays, Mr C wrote to Councillor 1 on the matter on 15 April 2008 informing her of this. He asked for her assistance in improving the process of ensuring that all gates were locked outside school hours especially before school holidays. He provided her with digital images and pointed to health and safety risks of children climbing on a container storing sports equipment and climbing the high fence of the enclosure. He suggested warning signs be installed to ward off unauthorised activity.

24. The Council said that, following the previous decision to lock the MUGA, the Education Department received representations from a number of elected members, local residents, including local children and young people requesting that the facility remain open. The Convener for Education and the Director of Education discussed the situation and took the view, on balance, that the MUGA should remain open at all times. I was informed that the rationale was that the MUGA provided a controlled environment for local children and young people to play and the decision to re-open the gates took this into account, as well as the Council's agenda to use sports to improve health, and was in accordance with the original aims of school/community use.

25. The Council informed me that the Education Department had no discussion with the Planning Division about leaving the gates open, since it was

not considered necessary and the Education Department was seeking to balance the needs of all concerned.

26. That decision was conveyed in the form of an email from the Education Department to the School janitor. The decision was not the subject of consultation with Mr and Mrs C and other residents.

(d) Conclusion

27. I have already accepted at paragraph 11 that a MUGA intended as ancillary to and an enhancement of the facilities at the School, to be used during school hours or for prescribed periods of supervised activity in the evenings or at weekends, could clearly be argued to be 'permitted development'. While the Council have referred to a potential for community use (see paragraphs 7 and 24), I do not perceive at the outset that they contemplated an 'open gate' policy. Had that been envisaged, then a strong argument could be made that, in terms of Paragraph 8 of Schedule 2 of the 1992 Order (Annex 2) (bad neighbour development), the use of the land could (a) affect residential property by way of noise; (b) alter the character of an area of established amenity; (c) bring crowds into a generally quiet area; (d) cause activity and noise between the hours of 20:00 and 08:00; and (e) introduce significant change into a homogeneous area. Mr and Mrs C consider that the character of that part of the School grounds adjacent to the building where they reside changed to their considerable detriment after April 2008 from the situation before the construction of the MUGA in March 2007. If it was not considered appropriate to pursue a Notice of Intention to Develop in March 2007, I believe that the consequences of the 'open gate' policy in respect of the MUGA should, at the very least, have been the subject of further formal discussion with the Planning Division in April or May 2008. Had the proposal been firmed up, then there could have been neighbour notification and the residents could have had their say. They were denied that consultation. I uphold this complaint. I make the following recommendations.

(d) Recommendations

28. I recommend that the Council	<i>Completion date</i>
(i) given the change to community use of the site, now consult with adjacent residents on the change and the current 'open gate' access to the MUGA and, following this, reconsider the 'open gate'	29 April 2011

policy, taking into account the views expressed. If the 'open gate' policy continues, the matter should also be raised with the Planning Department to consider whether there has been a material change of use and, if so, whether it constitutes a bad neighbour development; and

(ii) advise both the SPSO and Mr C of the outcome.

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(e) The Council ignored Mr C's requests after May 2008, that respite be provided by closing the gates all day on Sundays

29. On 14 July 2008, after ten youths had been playing football from 18:30 to 22:00 the previous evening, Mr and Mrs C emailed Councillor 1 suggesting that football be played in the grassed area next to the school drive and not in a cage. They suggested that, as a very minimum, the gates should be shut on a Sunday. They sought a prompt and considered reply. That reply was provided on behalf of Councillor 1 by the Director of Education in a letter of 17 July 2008. The Director of Education explained to Mr and Mrs C the recent decision to keep the gates open at all times. He stated that this best served the health and safety aspects and the wishes of the young people. The view taken was that young people were better playing in the MUGA than playing in the street. The Director of Education stated that the Council's Head of Education Services would write further on the matter after she returned from leave on 23 July 2008.

30. The Head of Education Services wrote on 25 July 2008 to Mr and Mrs C. She stated that, following the representations to the Convener, a decision had been taken on balance that the MUGA should remain open for community use. She advised that complaints of unacceptable use should be made to the police or ASB Team. The Council had supported an additional campus police officer, who would be instructed to direct young people on the appropriate use of the facility and the message of maintaining good community relations would be stressed by head teachers of local schools at school assemblies. In an email response, Mr and Mrs C stressed that their concerns were not only anti-social behaviour but also noise of balls banging against the metal fencing. They queried whether councillors, employees or education and planning people had visited the site. They indicated that they had no intention of putting up with these problems forever and would fight for their right by taking whatever steps were necessary to have their peace and quiet restored. The Head of Education Services responded by email of 29 July 2008 stating that the decision to leave

the gates open was a considered judgement 'to (as) best serve the needs of the community'. No advice was imparted on the further pursuit of their grievance.

31. On 20 May 2009 (see paragraph 34) Mr and Mrs C repeated their request that the gates of the MUGA be locked all day on Sundays.

32. In responding to my officer's specific question, the Council informed him that the consideration of leaving the MUGA open or locked was the subject of a number of discussions. Closure of the facility all day on a Sunday was not looked at in isolation. They added that it should be borne in mind that use of the facility by the community also took place at weekends and on holidays.

(e) Conclusion

33. I consider that Mr and Mrs C's request that the MUGA be closed all day on a Sunday was borne out of their frustration that they had no respite from the noise nuisance. By reaching a decision that the gates should remain open permanently the Council responded to the request, albeit harshly. I am unable to uphold this complaint. I have no recommendation to make.

(f) The Council delayed in informing Mr C of his entitlement to make a formal complaint and, if dissatisfied with the way it was dealt with, to take his complaint to the SPSO

34. In the absence of information on opportunities to pursue their grievance (see paragraph 30), Mr and Mrs C did not raise matters further until they emailed the Head of the Education Services again on 20 May 2009 regarding nuisance and children climbing the fence to their garden ground to retrieve a ball. They stated that the previous evening (19 May 2009) young men had been playing in the MUGA till 21:45. They repeated their request that the gates to the MUGA be closed from 18:00 to 08:00 each day and all day on Sundays. The Head of Education Service's email response of 3 June 2009 referred to a number of complaints having been made to local councillors the previous year about the gates having been closed. The Education Department had approached the Convener and he had made a considered judgement to best serve the needs of the community to leave the facility open. She referred to the installation of a fixed fence panel as a limited noise reduction measure and repeated the information about the campus police officer, guidance by head teachers at assemblies and the ASB Team.

35. Mr C then wrote to his local Member of Parliament (the MP) on 14 June 2009, seeking his assistance. He stated that a child had been playing with a ball in the MUGA at 22:45 the previous evening. He stated that he had asked the Convener of Education and local councillor to visit him at his home and extended the invitation to the MP. In his reply, the MP stated that his colleague (Councillor 2) had raised the issue at a local area forum and had requested costings for various noise reduction modifications. The MP passed on ASB Team contact telephone numbers. Mr and Mrs C emailed Councillor 2 on 27 June 2009, inviting him to visit. Also, on 27 June, they emailed the MP. They stated that their only perceived solution was for the MUGA to be re-sited. The MP responded on 3 July 2009, saying that the matter was for the Council but concurring that anti social behaviour was unacceptable. He wrote on their behalf to the Director of Education and subsequently forwarded to them, on 16 July 2009, a copy of the Director's reply to him of 14 July 2009. That letter recounted the history, stated that community wardens were monitoring the situation and that various steps had been taken to alleviate the concerns of his constituents 'but we are trying to balance this with the entitlement of the community to use what is effectively a community facility situated within the school grounds'.

36. On 28 August 2009, Mr C wrote to the Director of Education complaining about three distinct issues, namely: the purpose and open availability of the MUGA; its location so close to a block occupied by elderly and retired people; and how the Convener's decision might be rescinded. In his view, the MUGA was encouraging teenagers to enter the school grounds and to behave unacceptably and telephoning the ASB Team had little effect. They emphasised that their complaints had only begun when the MUGA was installed in March 2007.

37. In his response of 9 September 2009, the Director explained why in 2007 it was considered there was no need for a planning application, the reason for the MUGA and its particular siting on what was considered the best site. Officers had visited the site. He accepted that it was the use of the MUGA outside school hours which carried the most inconvenience. The issue of noise reduction measures would be investigated but it would not be possible to re-locate the MUGA. The Director's letter ended by informing Mr C that he could seek a review to the Chief Executive within 28 days.

38. Mr C responded to that letter on 21 September 2009. This was sent to the Director of Education and copied to the Chief Executive the same day. He expressed the views that: 1) the Council had a moral obligation to consult before the project commenced; 2) had the MUGA been intended for 24/7 communal use it would not have been located where it was; 3) it was not the case that the MUGA cannot be relocated since there were alternatives; and 4) it was extraordinary that the Convener had made an informed and balanced decision after Mr C's letter to Councillor 1 of 15 April 2008 highlighting health and safety issues. The views of only one party had been sought and Mr C wanted a review.

39. The Chief Executive responded on 22 October 2009. She explained 1) the siting of the MUGA but not why no prior consultation had taken place; 2) the decision to allow constant opening of the gates was 'balanced'; 3) re-location, while possible, was not practical; and 4) the decision to extend the use to the local community was explained. She stated that it was 'inevitable that use of facilities will generate some noise nuisance'. She concluded that she could not uphold the complaint and agree to the removal of the MUGA. The ASB Team telephone number was given. Mr C was signposted to the SPSO.

40. Mr C complained to the SPSO on 25 March 2010. He stated that he was seeking the removal of the MUGA elsewhere within the School campus and access restricted to school activities or supervised after school activities.

41. In responding on 9 September 2010 to my officer's letter of enquiry of 24 August 2010, the Council's Head of Democratic and Partnership Services stated that, in an effort to try to find a solution, the Council had decided to close the facility at 21:30 each night for a trial period. The Education Department and community wardens were presently working in partnership to ensure that the facility was locked each night. In addition, the Property and Technical Services Section was exploring locking arrangements and the possibility of purchasing a net for the top of the MUGA to prevent balls coming over the top of the fence. The Education Department had made temporary signs alerting users to the locking arrangement.

(f) Conclusion

42. I believe that this complaint provides an important illustration with regard to how grievances should be dealt with, when they should be regarded as complaints and signposted to my office. I believe that Mr C's representations

should reasonably have been considered by the Council as a formal complaint, dealt with under their complaints procedure and that procedure should, in 2008, have culminated with the legal requirement of signposting Mr C to my office. That did not happen and, for these reasons, I uphold this complaint. I have no particular recommendation to make in this regard.

43. Finally, I am pleased to note that the Council are endeavouring to find a solution where the continuing disruption to Mr and Mrs C and their neighbours' peaceful enjoyment of their homes is recognised in addition to the community's use of a recently introduced facility.

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

Explanation of abbreviations used

Mr C	The complainant
The School	A primary school whose grounds share a common boundary with the property in which Mr C resides
The Council	East Renfrewshire Council
MUGA	A multi-use games area installed in March 2007, adjacent to the boundary
Mrs C	The complainant's wife
Officer 1	The Council's Quality Improvement Officer, Education
The ASB Team	The Council's anti social behaviour team
Councillor 1	A local councillor to whom Mrs C wrote on 26 October 2007
Officer 2	The Council's Technical Services Manger, Technical Services Division
The MP	Mr and Mrs C's Member of Parliament
Councillor 2	Another councillor whom the MP approached

**The Town and Country Planning (General Permitted Development)
(Scotland) Order 1992 (No. 223 (S.17))**

SCHEDULE 2 BAD NEIGHBOUR DEVELOPMENT

The following are the classes of development specified for the purposes of paragraph 33(c)(i):

- (1) the construction of buildings for use as a public convenience;
- (2) the construction of buildings or other operations, or use of land:
 - (a) for the disposal of refuse or waste materials, or for the storage or recovery of reuseable metal;
 - (b) for the retention, treatment or disposal of sewage, trade-waste, or effluent other than—
 - (i) the construction of pumphouses in a line of sewers;
 - (ii) the construction of septic tanks and cesspools serving single dwellinghouses, or single caravans, or single buildings in which not more than 10 people will normally reside, work or congregate;
 - (iii) the laying of sewers; or
 - (iv) works ancillary to those described in sub-paragraphs (i) to (iii);
 - (c) as a scrap yard or coal yard; or
 - (d) for the winning or working of minerals;
- (3) the construction of buildings or use of land for the purposes of a slaughterhouse or knacker's yard or for the killing or plucking of poultry;
- (4) the construction or use of buildings for any of the following purposes:
 - bingo hall
 - building for indoor games
 - casino
 - cinema
 - dancehall
 - funfair
 - gymnasium (not forming part of a school, college or university)
 - hot food shoplicensed premises
 - music hall
 - skating rink
 - swimming pool
 - theatre, or

- Turkish or other vapour or foam bath;
- (5) the construction of buildings for or the use of buildings or land as:
 - (a) a crematorium, or the use of land as a cemetery;
 - (b) a zoo, or wildlife park, or for the business of boarding or breeding cats or dogs;
 - (6) the construction of buildings and use of buildings or land for motor car or motor cycle racing;
 - (7) the construction of a building to a height exceeding 20 metres;
 - (8) the construction of buildings, operations, and use of buildings or land which will:
 - (a) affect residential property by reason of fumes, noise, vibration, smoke, artificial lighting, or discharge of any solid or liquid substance;
 - (b) alter the character of an area of established amenity;
 - (c) bring crowds into a generally quiet area;
 - (d) cause activity and noise between the hours of 8pm and 8am; and
 - (e) introduce significant change into a homogeneous area.