

## Scottish Parliament Region: Central Scotland

### Case 201102194: South Lanarkshire Council

#### Summary of Investigation

##### **Category**

Local government: Planning; alleged failure in processing of request by developer

##### **Overview**

The complainant (Mr C) bought a recently constructed property in a small rural development. He and other residents experienced a problem with low water pressure in the water supply to their homes. He considered that to be as a result of South Lanarkshire Council (the Council) not taking appropriate action when the developer informed them of a change in source of the water supply a year after planning consent was granted.

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

The complaint which has been investigated is that the Council, in dealing with the planning application for the development, failed to ensure that the developer provided an adequate water supply to the site (*upheld*).

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

	<i>Completion date</i>
The Ombudsman recommends that the Council:	
(i) apologise for their failure to take appropriate action in respect of the letter of 4 September 2006 from the developer; and	20 August 2012
(ii) consider, in the light of the circumstances detailed in this report, whether they should contribute to the costs incurred in securing a satisfactory water supply.	20 September 2012

## **Main Investigation Report**

### **Introduction**

1. In December 2007, the complainant (Mr C) bought a property in a small rural development of five houses which had been built in implementation of a planning consent granted in 2005 to a residential development company (the Company). In 2006, a director of the company (the Director) informed South Lanarkshire Council (the Council) that, while the application had been made on the basis that the source of the water supply would be private, he intended to make a connection to the public mains and wished the conditions relating to the water supply deleted. The Council took no action. While the Director contacted Scottish Water, he did not pursue a formal application for connection to the public mains. Problems with low water pressure emerged after all the houses were occupied and were only eventually resolved when one of Mr C's neighbours organised a new connection.

2. The complaint from Mr C which I have investigated is that the Council, in dealing with the planning application for the development, failed to ensure that the developer provided an adequate water supply to the site.

### **Investigation**

3. I considered carefully the information provided by Mr C and the Council. I did not find it necessary to meet with Mr C or officers of 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.

4. The small rural development of five houses in which Mr C resides was built following an application for planning permission made on 7 July 2005 to the Council by the Company, for the erection of three new dwellings and the conversion of outbuildings to form two dwellings. That application was the subject of statutory consultation by the Council. On 30 September 2005, Scottish Water responded to the consultation stating that they had no objections to the application. They stated that there were no known public sewers or public water mains at the proposed development site.

5. Planning consent was granted by the Council on 4 November 2005, subject to 12 conditions:

Condition 10 required that 'before development starts, a hydrology report demonstrating that a supply of water for human consumption adequate in quantity and quality can be obtained and is under the developer's control shall be submitted to and approved by the Council as Planning Authority.'

Condition 11 stipulated that 'before the dwelling houses hereby approved are occupied, the private water supply approved under the terms of condition 10 above shall be provided to the satisfaction of the Council as Planning Authority.'

6. Application for building warrant was made in July 2006.
7. On 4 September 2006, the Director wrote to Planning and Building Control Services referring to conditions 10 and 11. He confirmed 'that the water supply to this development is from the Scottish Water mains and not a private supply'. He trusted that 'this clarifies the position regarding condition 10 and 11 and these can be deleted from the approval'. No administrative action was taken by the Council following receipt of this letter.
8. In implementing the planning consent, an original farmhouse was refurbished to a modern standard, existing outbuildings were reconstructed and three new properties were built. The first of the houses was occupied at the beginning of June 2007; Mr C and his family took up residence in December 2007. Mr C informed me that the Director had occupied another of the houses since April 2008.
9. While a problem of low water pressure in the development may not have been immediately apparent, it did arise after all the houses were occupied and that issue (as well as several others) was discussed at a meeting of residents on 5 October 2009, which the Director attended. He was recorded as having stated that he thought the problem might be a leak and the residents agreed that the line of the pipe should be walked to see if this could be identified. At a further meeting of residents on 20 April 2010, without the Director present, it was noted that investigation of the possible leak was too costly at £3000.
10. On 13 June 2010, Mr C emailed Scottish Water. They responded to Mr C that they were unable to get involved with the issue, since the pipe works would still be under warranty with the builders.

11. After a local farmer reported the position of a leak in the pipe to Mr C in late July 2010, Mr C hired a mini excavator and on 28 August 2010 repaired the 32 millimetre asbestos cement pipe which runs 1250 metres from the 45 centimetre water main. That repair lasted until 9 September 2010, when the pipe leaked again. Mr C made further repairs on 11 September 2010. The costs on both occasions were shared with other residents.

12. Prior to the residents' next meeting on 27 October 2010, another neighbour sought a quotation from a contractor for a new pipe. By March 2011 the situation with regard to low pressure had deteriorated to the extent that at times the residents were without any water.

13. Mr C made enquiry of the Council's Planning and Building Standards Services and had a meeting with the Head of Planning & Building Standards Services (Officer 1). Thereafter, the Planning and Building Standards Manager (Officer 2) responded on 23 and 28 March 2011 to emails from Mr C. Officer 2 originally stated that the Building Regulations required a water supply to be provided, but made no provision for the pressure of that supply. In his email of 28 March 2011 Officer 2 said that the requirement to provide a water supply was removed from the Building regulations prior to the submission of the application for building warrant for the development. Officer 2 also stated that the building warrant application file did not include a drawing showing details of the proposed water supply to the development. Additionally, there were no details of the water supply on the planning application file.

14. On 18 April 2011, Mr C ascertained from Scottish Water that the existing connections to an existing asbestos cement pipe were illegal. On 25 April 2011, Mr C emailed Officer 2 (in advance of a proposed meeting between Officer 1 and the Director) making points about the water supply and other planning and building standards matters. Officer 2 responded on 4 May 2011 detailing various outstanding planning and building standards matters in respect of the development. After his meeting in early May 2011 with the Director, Mr C spoke to Officer 1 on 17 May 2011 and emailed him on 22 May 2011.

15. In responding on 31 May 2011 to Mr C, Officer 1 summarised the outcome of the meeting with the Director and the Council's contact with Scottish Water. Officer 1 stated that the Director had confirmed that the Company was no longer trading and that, in general terms, there were no funds available to carry out the outstanding works. With regard to the water supply, Scottish

Water had stated that the public supply stopped at a stopcock on the public road on the other side of the field through which the pipe runs. Anything after that constituted a private supply. A Scottish Water official believed that the 32 millimetre pipe originally served only the farmhouse and that this would be insufficient to serve the five houses, and would probably account for the low pressure. Officer 1 recorded that the Director had maintained that the low pressure was due to a leak in the field and claimed that the pressure and supply had been acceptable when the houses were first occupied.

16. Scottish Water had informed the Council that two applications for water connection were made to them by the Director. One application was solely for the farmhouse, the second was for the other four houses. These applications had not been progressed by Scottish Water since the requisite fees were not paid. Scottish Water had advised the Council that the supply was illegal but had confirmed that they were unlikely to take action. Any new pipe proposed by residents would require an application to Scottish Water. In the event that the Director did not participate in the scheme, approval could be given to connect to the four houses other than his but, in such case, the supply would remain private as at present. Officer 1 stressed that these were matters under the statutory control and responsibility of Scottish Water and outside the control of the Council. Officer 1 confirmed that the Company was in breach of the planning condition requiring the submission of a hydrology report confirming the quality and quantity of water to the site was acceptable. This condition had been imposed on the basis of the application having stated that a private supply would be used. A further condition required the supply to be provided before occupation of the houses. Officer 1 said that the Director had informed him at their meeting that the Company had ceased trading.

17. On 30 June 2011, Scottish Water registered an application by one of the residents to connect all five properties to the public supply.

18. On 24 July 2011, Mr C emailed a complaint to the Council alleging that it was the Council's fault that the water supply to the development was inadequate and of dubious quality. He urged the Council to get the necessary work carried out as soon as possible and in the meantime provide the residents with alternative means of drinking water, cleaning facilities and toilets. He maintained that the residents and their solicitors were not to blame, the responsibility fell on the Director, who knew that the supply was illegal, and the Council for not doing their job properly. The following day, 25 July 2011,

residents met with an officer of the Council's Environmental Health Service (Officer 3).

19. Mr C's email was treated as a Stage 1 complaint, was acknowledged by Officer 1 on 26 July 2011 and was passed to Officer 2 who responded on 29 July 2011. In his response, Officer 2 acknowledged that the Director's letter of 4 September 2006 had not been verified with Scottish Water at the time, but insisted that this was not a course of action the Council took in most instances. He stressed that paragraph 43 of the Scottish Government's Planning Advice Note 79 on Water and Drainage (PAN 79) stated that the granting of planning permission did not secure connection to public water and waste water infrastructure but that it was the responsibility of the developer to liaise with Scottish Water to ensure that the necessary consent for connection to its network was secured. The provision and securing of a water supply was a matter for the developer.

20. Officer 2 also explained why the two conditions had been imposed, and that the Company had acted after the Director's letter of 4 September 2006 to connect to the public supply but without the consent of Scottish Water. The supply was private, but not in the usual sense of being sourced from a well, borehole, spring or stream, and the condition requiring a hydrology report was arguably superfluous. Officer 2 stated that the provision of a water supply to a building was not covered by the building regulations as it was covered by other legislation, notably the Scottish Water Byelaws 2004. Details of how the properties were to be provided with a water supply were not required in determining the application for a building warrant for the development nor was it necessary for a supply to be available at the time completion certificates were issued in respect of some of the properties. The Council had no enforcement powers under the Building Regulations to address this current issue. Even in cases where action could be taken against defective buildings, the legislation required the Council to serve notice on the owner of the building.

21. With reference to the application for a connection registered on 30 June 2011 with Scottish Water, Officer 2 advised that, in the event this was granted, the responsibility for carrying out the works and their costs would rest with the residents in the development, but that the residents might look to take legal action to recover any expenses they felt were the remit of others, however, the Council could not become involved in that private legal matter. Officer 2 pledged the Council's assistance to help to resolve the situation and to liaise

with Scottish Water. Finally, Officer 2 noted Officer 3's advice to residents at the meeting on 25 July 2011 (namely, that since the properties might be deemed to fail to meet the tolerable standard under section 86 of the Housing (Scotland) Act 1987, a Works Notice under Section 30 of the Housing (Scotland) Act 2006 could be issued and this might attract 25 percent grant assistance towards the cost of connecting to the public mains). The Council could also instruct Scottish Water under section 76D of the Water (Scotland) Act 1980 to provide a temporary supply (bottled water or a bowser) but, in so doing, would seek to recover costs from residents.

22. Mr C confirmed that Works Notices under Section 30 of the Housing (Scotland) Act 2006 were served on 5 August 2011.

23. Mr C further pursued his complaint in a letter of 6 August 2011 to the Executive Director (Enterprise Resources). He stated that at the time each property was occupied, with the exception of the plot owned by the Director, the occupants had no reason to doubt that a proper legal connection to the water mains, or a private supply, had been made. He maintained that five different solicitors would not have passed the properties had this not been the case. He maintained that while the Company was at fault in not following the correct procedures, the Council were complicit in allowing the situation to develop as it had, specifically in allowing the Company to control the development and supply the properties with an inadequate water supply. He considered that, when on 4 September 2006 the Director had informed the Council that he was connecting to a public supply, the Council should have verified that that was possible and checked that it had been approved by Scottish Water. He maintained that while the Company had ceased trading, the Director was still responsible and the Council could, and should, prosecute the Director for an illegal act. He understood that the cost of making a proper connection to the mains supply would be in the region of £30,000 and referred to sections 20 to 24, 30, 40 and 53 of PAN 79 advising that planning authorities required to take a proactive role with regard to water supply issues. He urged the Council to pay for the new legal connection to the properties, compensate the honest residents for the inconvenience they had suffered, and to provide temporary facilities until the work was completed.

24. Mr C's complaint was dealt with at Stage 3 of the Council's Procedures with a response sent on 30 August 2011 jointly by the then Chief Executive and Executive Director (Enterprise Resources). With regard to the question of

verification after the Director's letter of 4 September 2006, the response stated that a year had elapsed between Scottish Water's advice and the Director's statement and it was reasonably assumed that an agreement had been made between the parties. There was nothing to suggest, at that time, that the Director was seeking to mislead the Council and this was why the Council did not verify what he stated. The then Chief Executive and Executive Director (Enterprise Resources) were satisfied that the course of action taken five years ago was not unreasonable and was consistent with the Council's role as Planning and Building Standards Authority. Scottish Water had no requirement to inform the Council of the separate applications for a connection which were not progressed as the relevant fees had not been paid. The then Chief Executive and Executive Director (Enterprise Resources) noted that Scottish Water did nothing to pursue the validation of the applications yet, at the same time, Mr C and other residents were being charged water rates. The letter ended by stating that the Council's procedures were robust and that the Council had no liability in terms of provision of a water supply.

25. On 1 September 2011, on receipt of this Stage 3 response, Mr C submitted his complaint to the Scottish Public Services Ombudsman. He stated that he wanted the Council to pay to install an adequate water supply with no expense to the residents, or enforce this upon the Company, and for the Council to pay the majority of the residents compensation for the inconvenience they had had to endure.

26. Mr C informed the SPSO on 16 February 2012 that the pipe from the public main to the development was renewed at a net total cost to the residents of £10,365.25. Following a visit from Officer 3 on 7 November 2011, the Section 30 Notices were withdrawn on 10 November 2011. The Council provided a 25 percent grant to each owner in respect of the Scottish Water connection charge of £351.30 per property less a ten percent administrative charge, that is £79.05.

**Complaint: The Council, in dealing with the planning application for the development, failed to ensure that the developer provided an adequate water supply to the site**

27. The view of one of the SPSO's planning advisers (the Adviser) was sought on: a) what good practice would have been when the Council received the letter of 4 September 2006 from the developer; b) whether they should have requested an amendment to planning consent to delete the two conditions; and



c) whether they should have verified that Scottish Water had been consulted and had approved a connection to the public mains.

*The views of the Adviser*

28. The advice I received from the Adviser was that he would have expected the letter of 4 September 2006 to have initiated one of two responses by the Council (rather than to have assumed that an agreement had been reached between the applicant and Scottish Water, and then to have taken no further action).

29. In the Adviser's view, first, the developer should have been asked to provide copies of correspondence from Scottish Water substantiating the revised position or, more appropriately, given that the original consultation was between Scottish Water and the planning authority, the consultee should have been re-consulted and their verification of the position sought. The thrust of condition 10 of the 2005 consent was to demonstrate the ability of the developer to provide a supply of water for human consumption adequate in quantity and quality, which was under the developer's control. The claim in the letter of 4 September 2006 to have now provided the water through Scottish Water's public mains did not, in the Adviser's view, itself fulfil the condition, as a simple statement to that effect without recourse to Scottish Water did not constitute an acceptable 'demonstration' and, accordingly, verification by Scottish Water would have been required to confirm that the public supply was practically available. Second, the developer's request to have the two conditions 'deleted from the approval' did not equate with terminology used in the relevant planning legislation. Section 42 of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act), specifically provides for the 'Determination of applications to develop land without compliance with conditions previously attached'. In the Adviser's view, the Council should have invited completion of a section 42 application and considered and determined it (see Annex 2).

30. Following receipt of this advice received, specific enquiries were made of the Council.

*The Council's response*

31. The Council's response was provided by their Chief Executive Designate. He stated that Condition 10 of the 2005 planning consent for the development required the submission of a hydrology report demonstrating that a supply of water suitable for human consumption could be obtained to serve the

development. Condition 11 then required the private water supply required under Condition 10 to be provided before any of the approved houses were occupied. These conditions were considered necessary in order to address the consultation response from Scottish Water on the planning application, which stated that there were no known public water mains at the site. These conditions were imposed as it was understood at that time that a private water supply would be provided based on the comments from Scottish Water.

32. Subsequently, correspondence was received from the Director advising that a connection to the public main would be made rather than the provision of a private water supply. This meant that there was no need to provide a hydrology report. The Chief Executive Designate highlighted that a year had elapsed between Scottish Water's comments on the consultation on the planning application and the Director's statement and it was reasonably assumed that an agreement had been made between the parties. There had been nothing to suggest, at that time, that the developer was seeking to mislead the Council and this was why verification was not sought by the Council from the Director or from Scottish Water. In considering whether sufficient information had been provided to allow a condition to be discharged, the Council had to take a proportionate view depending on the issue in question. He maintained that hundreds and thousands of houses had been built within the Council's area without raising the issue experienced at this particular development. He commented that the situation which arose at this site, while extremely unfortunate for the residents within the development, was an exception. As it turned out, two separate applications for a connection to the public supply were lodged by the developer with Scottish Water but they were not progressed as the relevant fees had not been paid. The intention of the developer was clear. The Chief Executive Designate understood that a connection to the public mains had now been provided by Scottish Water, demonstrating that this form of provision was achievable and that a private supply was not necessary.

33. The Chief Executive Designate concurred with the Adviser that the wording of the Director's letter of 4 September 2006 did not constitute a formal application to 'not require compliance with conditions'. In this instance, the developer was not asked to submit an application under Section 42 of the 1997 Act to delete the conditions. The Chief Executive Designate stated that in determining whether to request an application in these circumstances, the Council adopted a pragmatic approach taking into account the individual case in

question. In particular, consideration had to be given as to whether, in instances where a developer declined to submit an application, it would be appropriate to take enforcement action against the breach of conditions. In terms of these conditions, it was considered that, given the information available to the Council at the time, the decision not to pursue an application was proportionate. In addition, the Council only became aware of the breach of conditions in March 2011. As a result it was considered that the view taken at the time was reasonable.

### *Conclusion*

34. It is unclear whether in submitting their proposals in July 2005, the Company were aware of the costs of providing a new or upgraded connection to the nearest public main, and had in mind a specific alternative private source (say in a well or spring). The statutory consultation led to Scottish Water commenting that there were 'no known public sewers or public water mains at this proposed development site'. In their response, Scottish Water did not mention any Scottish Water project likely to be implemented in the near future.

35. Had the Council acted in response to that letter by contacting Scottish Water and had Scottish Water advised of the two applications they had received, then a decision to leave the issue to be resolved between the Company and Scottish Water might have been understandable. They did not. In or around 2007, a connection appears to have been made (without Scottish Water's knowledge) to the existing asbestos main. This went undetected by the residents until, with all the houses occupied, low water pressure became a pressing concern. The Director maintained that a leak was the source. Mr C attempted to repair the connection twice, in August and September 2010. Some six months later, on 18 April 2011, Mr C was informed by an officer in Scottish Water that that connection was 'illegal'. And he thereafter informed the Council.

36. Mr C considered that the Council, in dealing with the planning application for the development, failed to ensure that the developer provided an adequate water supply to the site. That somewhat misrepresents the Council's duty as planning authority, which is not to ensure the provision of a supply but rather to ensure that a supply of sufficient quality and quantity is provided. They did not, in my view, ensure the latter and I uphold the complaint.

37. I note that since the complaint was made to me an authorised connection to the public mains supply has been made at considerable cost to existing residents, and that the grant aid provided appears to cover only a small percentage of the overall costs. I also note that Mr C (and other purchasers of the properties) had solicitors acting for them at the time of purchase and property enquiry checks would normally be carried out at that time. Nevertheless, given the failings outlined above, I am of the view that the Council should consider whether the circumstances merit them meeting more of that recent expenditure.

*Recommendations*

- |   | <i>Completion date</i> |
|---|------------------------|
| 38. I recommend that the Council:   |                        |
| (i) apologise for their failure to take appropriate action in respect of the Director's letter of 4 September 2006; and   | 20 August 2012         |
| (ii) consider, in the light of the circumstances detailed in this report, whether they should contribute to the costs incurred in securing a satisfactory water supply. | 20 September 2012      |

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

**Explanation of abbreviations used**

Mr C	The complainant
The Company	The residential development company who applied for and implemented the planning consent for the five houses
The Director	The Director of the Company who took up occupation of one of the five houses in the Autumn of 2009
The Council	South Lanarkshire Council
Officer 1	The Council's Head of Planning and Building Standards Services
Officer 2	The Council's Planning and Building Standards Manager
Officer 3	An officer of the Council's Environmental Health service
PAN 79	The Scottish Government Planning Advice Note 79 on Water and Drainage
The Adviser	One of the SPSO's planning advisers
The 1997 Act	The Town and Country Planning (Scotland) Act 1997

**List of legislation and policies considered**

**Advice on Section 42 of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act)**

Section 42 of the 1997 Act specifically provides for 'Determination of applications to develop land without compliance with conditions previously attached'.

On receiving such an application the planning authority shall consider only the question of the conditions subject to which planning permission should be granted and is not entitled to reconsider whether or not the development is acceptable in principle.