

## Scottish Parliament Region: Central Scotland

### Case 201101316: North Lanarkshire Council

#### Summary of Investigation

##### **Category**

Local government: Planning Enforcement

##### **Overview**

The complainant (Mrs C) raised a number of concerns about North Lanarkshire Council (the Council)'s failure to take effective enforcement action against the developer of a number of houses, including the house she owns. In particular, she was concerned that, over a number of years, the Council had failed to ensure that the developer of the site complied with the conditions attached to a planning consent granted in 2002.

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

The complaint which has been investigated is that the Council failed to take reasonable and timely enforcement action against the developer responsible for building Mrs C's home, to address breaches in planning conditions (*upheld*).

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

The Ombudsman recommends that:

- (i) in the event of the owners of the properties covered by the planning conditions themselves taking forward a scheme to carry out the works required, to upgrade the road under planning conditions 7 and 8 (to ensure the provision of satisfactory vehicular and pedestrian access), the Council meet the reasonable costs associated with the works; and
- (ii) the Council apologise to Mrs C for the failings identified in their handling of the enforcement action, including their failure to clarify the position with regard to the communal driveway.

*Completion date*

21 November 2015

19 December 2012

**Ombudsman's Comment**

Recommendation (i) cannot be an open ended commitment for the Authority. I consider that the works should be instructed within a period of three years from the date of this report.

## **Main Investigation Report**

### **Introduction**

1. On 13 November 2002 planning permission was granted for the erection of four dwellinghouses with parking and an access road. As part of the consideration of the application, North Lanarkshire Council (the Council) had considered it necessary to upgrade the private road, which was geometrically substandard and in poor condition. The upgrading of the road was required to ensure the provision of satisfactory vehicular and pedestrian access facilities. The road was unable to be upgraded to an adoptable standard which would normally be required for a development of this scale. However, due to the benefits of developing what was previously a vacant and derelict site, planning permission was granted on the basis that the road was upgraded to as high a standard as possible. Accordingly, three conditions were attached to the planning consent (conditions 6, 7 and 8 as detailed in Annex 2 to the report) requiring: the submission of a scheme for the upgrading works; that works approved under the scheme were to be carried out prior to the occupation of the dwellings; and that a management and maintenance scheme should be submitted. An amended planning application was approved on 4 February 2005 subject to a number of conditions, one being that the conditions relating to the previous planning permission still applied to the consent.

2. A plan detailing the proposed works had been submitted by the developer in May 2005 (in line with condition 6) and a site visit undertaken by Council officials in December 2005, which revealed that some of the houses had been occupied although the works required under the planning conditions 7 and 8 had not been implemented. Mrs C bought her property in 2007 and at that time she was aware the road and communal driveway had to be completed. From February 2007 to August 2010 Mrs C raised her concerns with the Council regarding the failure by the developer to carry out the required works and the Council's delay in taking enforcement action against the developer.

3. On 17 February 2011 Mrs C raised a formal complaint with the Council regarding their handling of the enforcement action and, following completion of the Council's corporate complaints procedure, brought a complaint to my office.

4. The complaint from Mrs C which I have investigated is that the Council failed to take reasonable and timely enforcement action against the developer

responsible for building Mrs C's home, to address breaches in planning conditions.

### *Statutory Framework*

5. The Town and Country Planning (Scotland) Act 1997 (the Act), as amended by the Planning etc (Scotland) Act 2006, provides the framework and statutory duties required under the planning process in Scotland.

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

7. Planning Advice Note PAN 54 Planning Enforcement provides 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; and
- to bring unauthorised activity under control.

8. Section 145 of the Act makes provision for enforcing the conditions to which any planning permission is subject. Government guidance stresses that enforcement action is a last resort and resolution 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.

### **Investigation**

9. Investigation of this complaint involved 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 Mrs C's complaints. I have also obtained the advice of one of my professional planning advisers, who has also reviewed the records.

10. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mrs C and Council were given an opportunity to comment on a draft of this report.

**Complaint: The Council failed to take reasonable and timely enforcement action against the developer responsible for building Mrs C's home, to address breaches in planning conditions**

*Chronology of key events*

11. On 13 November 2002 a planning application for the erection of four dwellings was approved by the Council, subject to a number of conditions. In particular, three conditions (6, 7 and 8) were attached to the consent requiring the submission of a scheme for the upgrading works; that the works approved under the scheme were to be carried out prior to the occupation of the dwellings; and that a management and maintenance scheme should be submitted.

12. On 15 December 2004 an amended planning application was submitted for a substitution of house types. This was approved on 4 February 2005, under delegated powers, subject to a number of conditions. One of the conditions of the amended consent stated that the conditions relating to the previous planning permission (see paragraph 11) still applied to this consent.

13. On 13 May 2005 a plan detailing the proposed road works was submitted, as required by condition 6 above, and a site visit by officials of the Planning Department was undertaken around 20 December 2005. This visit revealed that some houses were occupied, despite the fact that the works required under the conditions 7 and 8 detailed at paragraph 1 had not been implemented.

14. On 21 February 2006 the Council sent a letter to the developer advising that the details for the upgrading of the road had been submitted and approved, however, the works had not yet been carried out. The letter stated that it was imperative that conditions 7 and 8 were fulfilled within 28 days. This period subsequently expired with no works having been carried out.

15. On 4 April 2006, under delegated powers, the Director of Planning and Environment served a Breach of Condition Notice (BCN) on the developer to secure the upgrading of the road. This related to conditions 7 and 8, detailed at paragraph 1.

16. On 24 April 2006 the developer wrote to the Council confirming that work was ongoing, although he was having difficulty in making contact with the solicitors of existing homeowners taking access of the road. The Council were

provided with a copy of the letter to homeowners. An extension of 28 days was requested, with commitment given to informing the Council of weekly progress.

17. On 5 May 2006 the Council wrote to the developer rejecting the time extension but agreeing to an extension of 14 days. As this letter was returned to the Council, the letter was re-issued by recorded delivery on 12 May 2006. Weekly updates were not provided by the developer and a further reminder was sent on 25 August 2006 allowing a further 14 days in which to complete the works.

18. On 17 October 2006 email correspondence began with the Procurator Fiscal requesting an application for the planning authority to link with the Specialist Reporting Agencies secure website. This was to allow the case to be taken forward and referred to the Procurator Fiscal. On 7 March 2007 an email was sent to Procurator Fiscal looking for an update on the application.

19. A further site visit was undertaken by Council Officials and it was established that minor works had been carried out. On 14 March 2007, the Council again wrote to the developer, highlighting that the works remained largely incomplete despite all previous communication and that the Council was now intending to refer the matter to the Procurator Fiscal. The developer was invited to, and attended, a meeting with planning officials on 23 March 2007. The purpose of the meeting was to outline the Council's position and intended course of action and allow the developer a final opportunity to resolve the matter. During the meeting the developer confirmed that the works would be completed within a timescale of around four weeks.

20. On 3 August 2007, as no further work was carried out, further BCNs were issued to the developer giving a final 28 days in which to complete the works. In response the developer wrote to the Council on 28 August 2007 giving notice that the works would start on or around 14 October 2007 and be completed within seven to ten days. Further site visits were undertaken by Council officials throughout October 2007 when it was established again that no further works had taken place.

21. On 25 October 2007 Mrs C wrote to the Council complaining about the road completion and that, while the developer had been given a start date of the week commencing 14 October 2007, no work had started. She explained that damaged had been caused to her car as a result of the condition of the road.

22. Following subsequent emails with the Procurator Fiscal on 2 November 2007, an email was sent to the Council's Legal Department confirming that the initial lodging of the case had been submitted using the online referral system.

23. On 2 February 2008 officials from the Council's Planning Department visited the site following a verbal assurance from the developer that works were to be commissioned that week. While some preparation works were carried out no further works were then carried out.

24. On 25 March and 1 July 2008 Mrs C again wrote to the Council expressing her concern about the delay in the work being carried out to the road. In her letter of 25 March 2008, Mrs C also referred to her concern that the road leading into the courtyard (communal driveway) where the four dwellinghouses, including her own, were situated had not been completed.

25. The Council established that the lodging of the case and associated papers in November 2007 with the Procurator Fiscal had not been successfully completed and in order to reconfirm the Council's position and comply with the legal framework for referring cases to the Procurator Fiscal a further BCN was served on 11 July 2008.

26. On 30 July 2008 the Council wrote to Mrs C explaining that the developer had been contacted formally and had been served formal BCNs, which was the most appropriate level of enforcement action that a Planning Authority would take under these circumstances. The Council explained that due to technical reasons the referral process to the Procurator Fiscal had not been fully completed and the case required to be re-submitted.

27. A further site visit was carried out by Council officials on 28 August 2008. The matter was successfully referred to the Procurator Fiscal in September 2008. The report referred to the Procurator Fiscal advised that there had been two previous cases of non-compliance by the developer relating to access roads serving residential development which had resulted in formal enforcement action being taken. The report further stated that, if left unprosecuted, the breach in planning control had consequences for wider public interest in the assessment of planning applications for new housing developments and the minimum standard of vehicular and pedestrian access

considered acceptable. The report went on to say that it was also important that other developers were deferred from similar breaches in both the Council and public's interest and to prevent financial gains being made through non-completion of developments.

28. Through the prosecution process, various dates were set for trial and cancelled due to reasons outwith the control of the Council. On 11 November 2009 officers from the Council's Planning Service attended a District Court as a witness in a trial regarding this matter. The trial did not go ahead due to the non attendance of the developer and it was postponed until March 2010. The trial was then postponed until 19 May 2010. Following the death of the accused (the developer) the Procurator Fiscal's office advised the Council on 2 June 2010 that the case had been dropped.

29. During the period November 2009 to May 2010 Mrs C had written to the Council requesting updates on the enforcement action being taken in relation to the road.

30. On 8 June 2010 Mrs C had written to a local councillor referring to her concern that the communal driveway which serviced the four dwellinghouses had been left unfurnished. Mrs C referred to condition 5 (as detailed in Annex 2) of the planning permission. The councillor referred Mrs C's concern to the Environmental Services Department.

31. On 24 June 2010 the Council advised the councillor that, given the death of the developer, they had limited options in pursuing the case any further. Given the position of the Procurator Fiscal, no new prosecution opportunities existed in relation to the developer. In respect of the planning enforcement powers relating to breach of conditions, the remaining provisions available related to action against the owners of land on which such a breach had taken place. The Council confirmed that in this instance that would be the residents themselves. The Council further explained that with regard to the communal driveway not having been completed this could only now be pursued via action against the residents. The Council confirmed that action against the residents was not considered appropriate by the Council's Planning Service.

#### *Complainant's concern*

32. Mrs C indicated that she had bought her property in May 2007 from a previous owner. At the time of buying the property she was aware that the road



and communal driveway had to be completed, although the developer had completed work to the turning areas. Mrs C explained that the previous owner of her property had been in contact with the Council and chased the developer, who had indicated that the outstanding work would be carried out. She complained that the Council gave the developer too many chances to complete the work and although she had contacted the Council over a period of four years, the required work was never carried out. Mrs C complained about the inefficiency by the Council in handling of the matter which caused delays which had resulted in the residents being told they would now have to pay for any work to be carried out. Mrs C explained that to prevent damage to her car she had carried out temporary work to repair potholes in the road herself.

33. On 17 February 2011 Mrs C submitted a formal complaint to the Council about the non-compliance with the conditions relating to the planning permission granted in 2002. The Council responded on 11 March 2011 outlining the action taken to try to resolve the matter.

34. On 22 March 2011 Mrs C submitted a further letter relating to her continuing concerns about the Council's handling of the enforcement action. This letter also referred to conditions, 5, 6 and 7 of the planning permission granted in 2002. Condition 5 (as detailed in Annex 2) related to the parking and manoeuvring areas shown on the approved plans. The Council responded on 23 March 2011 providing further explanation of the enforcement action taken by them, but did not specifically refer to condition 5. The Council have advised me that they considered that, while the letter had quoted the terms of the conditions, including condition 5, they had not considered that Mrs C was seeking a specific response.

35. On 23 May 2011 Mrs C submitted a further letter to the Council expressing her concern about the delay in taking enforcement action and this was responded to on 6 July 2011.

#### *Council's response*

36. In responding to Mrs C's complaint, the Council explained that they had attempted to resolve the matter without resorting to legal action. They explained that this course of action accorded with the guidance on enforcement set out by the Scottish Executive. Enforcement action was discretionary and Local Authorities were advised to seek to attempt to resolve matters initially by means of negotiation. The actions of the Planning Service, therefore, involved

communication with the developer and ultimately, when this failed, the serving of formal BCNs. They accepted that the attempts to have the works completed were unsuccessful and that this had taken place over a protracted period of time (2006 to 2008), although a dialogue had opened and different commitments given by the developer, in writing, verbally and in person over that period. They explained that when referring the matter to the Procurator Fiscal, it was important to demonstrate that the Council had fully endeavoured to resolve such breaches without the aid of prosecution.

37. The Council explained that such attempts were exhausted and the case was subsequently referred to and taken on by the Procurator Fiscal. The initial referral had not been completed as intended, as a result of technical matters with the referral process. The Council explained that it was rare that planning enforcement cases got taken as far as prosecution and the Council officers involved had little direct experience of that system. The system used had changed significantly and required special access to the Crown Office website. That was granted, but the officers experienced some problems using the system. In order to re-affirm the Council's position and meet with timescale requirements in successfully taking legal action, further BCNs were issued. While the Council acknowledged that these matters added delays, the case remained live at all times. The Council confirmed that from the point the case was taken up by the Procurator Fiscal in September 2008 they had no control over timescales. They explained that there were subsequent postponements of a pre-trial debate, and three postponements of the trial date, before cancellation of the fourth as a result of the death of the party accused. They explained that Council officials prepared on four occasions for trial dates on 21 August, 11 November 2009 and 15 March and 19 May 2010. On two occasions the trial had been cancelled on the day of the trial.

38. The Council indicated that much of the delay encountered in this case had been unavoidable, as they had tried to resolve the matter directly with the developer and then the formal notices required periods for compliance. In addition, once the matter was with the Procurator Fiscal the Council could not influence the timescales. They accepted that, with hindsight, it was possible to say that the assurances of the developer should not have been accepted so readily but, in the majority of cases, outstanding matters such as roads were resolved in that manner. The Council apologised to Mrs C for the delays that may have arisen as a result of their continuing to accept the developer's assurances.

39. The Council stated that, in approaching the enforcement of the conditions, they were satisfied they followed the appropriate action, ending in referral to the Procurator Fiscal. They accepted that this took longer than expected and apologised for that. Given that the court action was not concluded, the Council suggested that the way forward lay with the parties with an interest in the land.

40. As Mrs C had raised in her complaint to my office not only her concern about the delay in taking enforcement action but her concerns about the communal driveway, my complaints reviewer raised this matter with the Council. In response, the Council confirmed that none of the conditions attached to the planning permission for the development granted in 2002 specifically referred to driveways. However, condition 5 of the planning permission used a standard wording requesting details of 'parking and manoeuvring' areas, which could be taken to refer to areas within the site to be used for access or parking and would, therefore, relate to condition 5. The Council confirmed that condition 5 did not form part of the enforcement action taken by them, which related only to conditions 7 and 8. The Council confirmed that as condition 5 was not included within the enforcement action it could be taken that it had not been identified in 2005 as a breach of condition.

#### *SPSO Planning Advice*

41. My complaints reviewer sought advice from my planning adviser (the Adviser) on the issue being raised in this complaint.

42. The Adviser stated that the BCN was introduced into planning enforcement legislation in 1991 as an addition to the Enforcement Notice specifically for breaches of conditions. The intention was to provide a simpler and quicker remedy in such cases. A BCN was seen as appropriate in cases of an alleged breach of condition because the developer had tacitly accepted the conditions by implementing the permission, the issues were likely to be clear cut, and there was likely to be a need for urgent action. It was also particularly apt for use where the planning condition had clearly been breached and the threat of prosecution seemed likely to secure compliance with the condition.

43. He said that in this case the criteria for use of a BCN were met, with conditions in question being clear, concise and appropriate, and had been accepted by the applicant. In addition, there was no dubiety or confusion as to

what works were required in complying with the condition, as an agreed road-works scheme had been submitted and approved.

44. The Adviser said that Scottish Government guidance was clear that enforcement action should always be commensurate with the breach and in this case the failure to complete the access road was, in his view, a serious breach which unacceptably affected public amenity. He said that it was not a technical or trivial breach and clearly merited enforcement action, as set out in the General Approach to Enforcement section of Circular 4/1999. He went on to say that the Council appeared to share this view from the outset as, from the first indication of a breach through prior occupation being noted by officers on 20 December 2005, a BCN was served within three and half months on 4 April 2006 which seemed reasonably expeditious. He said that he felt that it was from that point on, however, that the Council's actions were open to question.

45. Up to the point where the matter was initially but unsuccessfully referred to the Procurator Fiscal in November 2007, a period of almost two years had elapsed since the breach was first established by the Council. Given the nature of the breach and the use of the more expeditious BCN procedures, that in itself appeared to be an inordinately long time. To compound matters, this period included within its first 15 months three separate periods when apparently no action, correspondence or meetings worthy of note took place, totalling 412 days. He stated that in the absence of any explanation he could not see how the authority's claim of 'unavoidable delays' could be substantiated or their stance seen as 'reasonable'.

46. The Adviser also stated that when a referral was eventually made to the Procurator Fiscal in November 2007, some 14 months later, it was apparently technically flawed and, therefore, unsuccessful.

47. The Adviser stated that the Scottish Government expects authorities to pursue the achievement of a compromise solution to resolve a breach of planning control prior to seeking the ultimate sanction of prosecution. Nevertheless, having moved quite swiftly from identifying the breach to carrying out the first BCN service within three and half months, to allow a further 19 months to elapse before implementing a technically flawed referral to the Procurator Fiscal was difficult to accept as being reasonable.

48. The Adviser said that after the initial positive approach to this clear-cut and relatively straightforward matter the Council's response faltered and then became bogged down in a mire of inactivity and repetition. While accepting the volume of paperwork and staff time required, as evidenced by the case files, to bring planning enforcement case to court the periods involved in this case were too long. Regarding the difficulties experienced in dealing with changed procedures at the Procurator Fiscal Office, the Adviser said it must be the authority's responsibility to keep staff up to speed in such matters.

49. The Adviser stated that, in his opinion, the scale of the delay experienced by the complainant was unacceptable and, given the unfortunate conclusion to proceedings, the complainant and her co-residents were now required to live with a very substandard access to their properties, or face substantial costs to make up the road themselves.

#### *Conclusion*

50. Since 2005 the Council were aware that the developer had failed to comply with the conditions attached to the planning consent. Although I accept that the Council were attempting to negotiate with the developer to have the works completed without the need for formal action, I have taken into account the Adviser's advice that this was a serious breach of planning control and that the purpose of serving a BCN was to ensure a quicker remedy. I also acknowledge that the Council have accepted there were delays in their handling of this case and that, with hindsight, they perhaps accepted too readily the promises made by the developer that he would undertake the required work. I am concerned at the number of opportunities given to the developer to resolve the matter following the initial serving of a BCN in April 2006. I also note that Mrs C was aware, prior to buying her property in 2007, that work to the access road had not been completed, however, given that a BCN had been served on the developer in 2006, I consider it was reasonable for Mrs C to have anticipated that the Council would pursue compliance with the relevant planning conditions.

51. I recognise that from the point when the case was eventually successfully referred to the Procurator Fiscal the Council had no control over the subsequent delays. However, it took almost two years from first identifying the breach in conditions before the case was initially passed, unsuccessfully, to the Procurator Fiscal. It then took another ten months before the case was successfully passed to the Procurator Fiscal. That was almost three years from

first identifying the breach in conditions and I consider that this amounted to an unreasonable delay and service failure. As a result of this, Mrs C and her co-residents have had to live with an unacceptable standard of vehicular and pedestrian access and have been left with an unsurfaced access road with no kerbs. If they now wish to bring the road up to a reasonable standard they will have to pay for the works themselves.

52. Mrs C also raised as part of her complaint to my office her concern about the communal driveway leading to the four dwellinghouses, including her own property. It is clear that she was aware of the condition of the communal driveway when she purchased her property in 2007. It is equally clear that the communal driveway did not form part of the enforcement action taken by the Council which commenced in April 2006 prior to Mrs C purchasing her property. While Mrs C raised her concern about the communal driveway with the Council on 25 March 2008, it was not until 8 June 2010 that she again raised this matter with the Council, at which point the Council explained that this matter could only now be pursued via action against the residents. When Mrs C raised a formal complaint with the Council on 17 February 2011 this related to the Council's handling of the enforcement action although Mrs C referred to condition 5 in her letter of complaint of 22 March 2011, the Council's response as detailed at paragraph 40 did not specifically refer to condition 5 and her further letter of 6 July 2011 again referred to the enforcement action.

53. From my examination of the history of this case I have serious concerns about the Council's failure to take timeous, effective enforcement action. It is also clear that Mrs C was throughout the period concerned about the developer's failure to complete the communal driveway leading to the four dwellinghouses and it is of concern that the Council did not clarify their position with regard to the communal driveway when it was first raised in 2008. For all the reasons identified above, I uphold the complaint.

54. Although I have upheld the complaint, I recognise that, in general, a Council cannot be considered by the public to be a developer of last resort where a developer fails to comply with planning conditions. However, in view of the circumstances detailed in this particular case, I make the following recommendations.

*Recommendations*

55. I recommend that:

*Completion date*

- (i) in the event of the owners of the properties covered by the planning conditions themselves taking forward a scheme to carry out the works required, to upgrade the road under planning conditions 7 and 8 (to ensure the provision of satisfactory vehicular and pedestrian access), the Council meet the reasonable costs associated with the works; and
- (ii) the Council apologise to Mrs C for the failings identified in their handling of the enforcement action, including their failure to clarify the position with regard to the communal driveway.

21 November 2015

19 December 2012

**Ombudsman's Comment**

56. Recommendation (i) cannot be an open ended commitment for the Authority. I consider that the works should be instructed within a period of three years from the date of this report.

**Explanation of abbreviations used**

The Council	North Lanarkshire Council
Mrs C	The complainant
The Act	The Town and Country Planning (Scotland) Act 1997
BCN	Breach of Condition Notice
The Adviser	The Ombudsman's independent professional adviser





**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