

Scottish Parliament Region: North East Scotland

Case 201103415: Aberdeenshire Council

Summary of Investigation

Category

Local government: Planning; handling of application; planning enforcement (complaint by opponent)

Overview

The complainant (Mr C) raised concerns that Aberdeenshire Council (the Council) failed to ensure that the developer of the site adjoining his property (the Developer) complied with the conditions of the planning consent.

Specific complaints and conclusions

The complaints which have been investigated are that the Council:

- (a) has unreasonably delayed to ensure that the Developer complies with the conditions of the planning consent (*upheld*); and
- (b) has failed to use appropriate (enforcement) action to ensure that the Developer complies with the conditions of the planning consent (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

	<i>Completion date</i>
(i) provide details of how they are taking matters forward with the Developer (with timeline) now they acknowledge that a breach of condition has occurred;	29 May 2013
(ii) provide a copy of their review of internal communications between Development Management and Environmental Planning Teams;	29 May 2013
(iii) ensure that measures are taken to feedback the learning from this event to all staff (complaint a);	29 May 2013
(iv) ensure that measures are taken to feedback the learning from this event to all staff (complaint b); and	29 May 2013
(v) issue Mr C with a full apology for the failings identified in this complaint.	13 March 2013

The Council have accepted the recommendations and will act on them accordingly, having already met recommendation (v).

Main Investigation Report

Introduction

1. On 29 November 2012 the Ombudsman received a complaint from Mr C that Aberdeenshire Council (the Council) failed to ensure that a developer (the Developer) followed Council rules regarding planning conditions which applied to the estate where Ms C owned his home (the Estate).
2. Mr C stated the problem had continued for a considerable period of time and concerned a neighbouring property which was adjacent to his property (the Site). He stated that there had been considerable correspondence on this matter between him and the Council.
3. Mr C said that the apparent lack of maintenance of the Site, as required by planning conditions, would result in the devaluation of his property and he stated that was due to the Site owner's lack of maintenance as required by Council Planning.
4. The complaints from Mr C which I have investigated are that the Council:
 - (a) has unreasonably delayed to ensure that the Developer complies with the conditions of the planning consent; and
 - (b) has failed to use appropriate (enforcement) action to ensure that the Developer complies with the conditions of the planning consent.

Investigation

5. As part of the investigation my complaints reviewer obtained the Council's complaint file and all documents, plans and policies relevant to this complaint. Advice was sought from one of my independent planning advisers (the Adviser).
6. 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 has unreasonably delayed to ensure that the Developer complies with the conditions of the planning consent

7. Mr C stated that land (with buildings) was sold for development and this was where he built his house. He stated that the design specification for the Site was to retain trees. However, the Developer cut down the trees and dumped building materials of stone and rubble. Mr C said that he has been

pursuing the Council for the last two years about this; but the actual problem had been in existence for over five years. However, a large amount of communication about it was verbal.

8. Mr C said that the land adjacent to his home was completely wooded until about 2004. Thereafter, the Developer felled all of the trees and made an application for more homes. Mr C stated that, according to the design brief, the felling of the trees was within the Developer's rights, provided it was re-planted in the next planting season and made into an amenity park. Mr C stated that in his view it was never the intention of the Developer to replant since they continued to apply for homes.

9. Mr C said that he does not accept that the primary reason, given by the Developer to the Council for the problem not being solved, is financial. He also stated that the Council did not know what their other departments were doing; lacked pro-active follow-up; and refused to enforce the powers they had to solve the problem.

10. I have seen that in the Council's response dated 7 May 2010 to Mr C's telephone concerns, the Planning Inspector stated the matter about replacement tree planting had not been forgotten, however, it had been governed by the Developer's severe financial constraints.

11. The Planning Inspector stated that as recently as November 2009 he had discussed with the Developer about replacement woodland planting. At that time a timescale for potential resolution of the outstanding woodland planting was the middle of 2010.

12. Given Mr C's on-going concerns, the Planning Inspector stated that he tried to contact the Developer to establish planting timescales and awaited a response. He said he would continue to pursue a resolution to this issue which may eventually require a legal remedy; however, he said he preferred compliance - as a legal route normally involved prolongment.

13. In his letter to Mr C of 14 May 2010 the Planning Inspector stated that he had received a response from the Developer and said that, due to the financial constraints previously referred to (see paragraph 10), the Council's Planning Service (the Service) had given an extended resolution period up to

June/July 2011 for the replacement planting and stated: 'the imposition of legal action at this time will not achieve the resolution we seek'.

14. In a further letter to Mr C dated 25 May 2010, the Planning Inspector said that enforcement was a discretionary power, which meant that even where there was a breach of planning control, the Council had to consider if it was in the public interest to take enforcement action. He also stated that the Council was not required to take any particular action on a specific breach of planning control, and indeed could advise that no action was necessary. He added that legal action was not the panacea to all planning issues and each set of circumstances had to be treated individually, as there was not a 'fit all' scenario.

15. In his response dated 18 August 2010 Mr C acknowledged that while 'legal is not a panacea' he stated that 'neither is doing nothing'; that after 90 days there was still no reply to his question (on why no tree planting had been undertaken); neither had a meeting been set up, as he had requested.

16. In his letter to Mr C dated 23 September 2010 the Planning Inspector stated that he had notified the Environmental Health Services Waste Section about deposited waste materials. He also stated that he would forward a letter to the Developer to remind them of their landscaping maintenance obligation and that they provide him with their action plan of resolution. He stated: 'I will request that [the Environmental Planner] equally applies similar pressure to get the tree planting agreed.'

17. I have seen a further letter to Mr C dated 24 November 2010 from the Planning Inspector which advised of his continuing pursuit of this matter.

18. In Mr C's letter dated 8 March 2011 to the Planning Inspector he outlined his concerns with the time delays by the Developer of five years at that point, and asked how long it would take the Council to take firm action against the Developer.

19. In the Planning Inspector's response of 16 March 2011, he outlined the action taken on the linked issues Mr C had raised (see paragraph 7). However, he stated that he fully understood Mr C's frustrations concerning what had become 'a very protracted issue'. He added that he could only reiterate that given the replanting costs involved due to the financial situation of the Developer, the Council was unlikely to instigate direct action and undertake the

tree planting 'as the costs will undoubtedly be unrecoverable' and this was a major consideration.

20. Mr C formally complained about this issue to the Council on 19 April 2011 and they responded on 13 May 2011. In their stage one reply, the Feedback Officer (the Officer) stated that the Developer had financial difficulties and had advised the Council that they did not have the current resources to complete the replanting which they had agreed when the original permission to fell was granted in 2004. However, the Officer stated that the Developer said they did intend to replant as soon as resources were available. The Officer stated that, given this, the only other enforcement route available would be for the Council to arrange and fund the clearing of the Site and the replanting programme. This would be done with the intention of raising a legal action to recover the costs, following completion of the works. However, the Officer stated that given the recent reduction in local authority budgets, they would not be in a position to authorise such works to proceed, due to the anticipated difficulty in recovering any or all of the cost involved. The Officer stated they had been informed by the Service that the Developer had restated their commitment to the replanting programme as soon as resources allow, 'albeit on an unspecified timescale as yet'. Mr C remained dissatisfied with this response.

21. In their stage two reply dated 4 July 2011, the Head of Planning and Building Standards (the Head of Planning) stated that after three postponements the Environmental Planner met with the Developer on 8 June 2011 (the Meeting). This resulted in the Developer agreeing to submit a replanting scheme and having a landscape gardener view and cost the scheme. The Head of Planning stated:

'The original design brief for [the Site] stated that it should be returned to an open parkland/pasture with policy planting (single and groups of large trees) rather than the wall to wall commercial planting that previously existed. As you are aware permission was granted by the Council to thin and fell the area, consequently, no breach of planning condition was committed. The subsequent agreed replanting scheme was not undertaken.'

22. Mr C replied on 13 July 2011 and outlined his dissatisfaction with the Council's complaints process, which he said was as inadequate as the manner in which his complaint had been handled over the past several years. Mr C stated that the Developer had no intention of replanting the Site and had in fact

'been very successful in keeping the Council at bay and obviously understand that the Council will not enforce the rules that they continue to breach'.

23. Mr C supported his view by stating that the Developer had applied for planning permission to build new houses and had built and sold new houses during this on-going period (see paragraph 8).

24. The Area Manager responsible for the area in which the Estate was situated (the Area Manager) responded to Mr C on 5 September 2011 and expressed regret for the delay in responding to his concerns. He outlined that Condition 10 of the original consent for the Site for the felling and thinning of the trees in question was granted in 2004, with these works to be undertaken in year one and their replacement through replanting in year two. The Area Manager stated that it was unclear why the agreement to replant was not monitored and the matter followed through, prior to Mr C bringing the issue to the attention of the Council. He stated that the Planning Inspector said he was unaware of the 2004 agreement until after receipt of Mr C's complaint. The Area Manager said he requested that internal communications be reviewed between Development Management and Environmental Planning teams, 'as this seems to have fallen down on this occasion'. The Planning Inspector also stated that he had asked the Planning Service to take discussions forward with the Developer regarding the matter of replanting and subsequently, in the event of non-agreement, that a report be brought before the Area Committee (the Committee) for its consideration on the way forward.

25. The Area Manager stated that it was agreed at the Meeting that a replanting scheme would be submitted, however, no submission date was agreed and to date no such scheme had been received from the Developer. The Area Manager also stated that he had asked that the Planning Service take a discussion forward about further pressing the Developer on the matter of replanting and about the Council directly undertaking the work and seeking redress from the Developer.

26. In his letter to the Area Manager on 1 October 2011, Mr C commented on his dissatisfaction with the lack of progress. In his response of 28 October 2011, the Area Manager stated that he had again asked Planning Service to pursue these matters and had taken the issue up with the Head of Service. He apologised that it was nearly five months since the Meeting, when the Developer agreed to submit plans, and stated 'that should have been

followed up more rigorously'. The Area Manager added that if plans were not submitted, a report would be presented to the Committee as detailed in his letter of 5 September 2011 (see paragraph 24).

First Phase of Monitoring on Site 2004 - 2007

27. The Adviser stated that a scheme of felling / clearance was agreed by the Council in June 2004, together with an associated subsequent replanting scheme. He noted that the felling of the trees, in the area to be subject to the replanting, apparently took place shortly after the correspondence of June 2004, which the Adviser assumed to have been some time in the same year. This then became year one for the purpose of the approval, with the re-planting to take place in the following planting season – year two.

28. The Adviser stated that, from the Council's formal acceptance of the replanting scheme in June 2004 and a letter from the Council dated 26 March 2007, there was no record on file of any apparent action or indeed monitoring of the position regarding the approved replanting at the Site over this period. He said that despite the Council being aware that felling took place in 2004 there was no explanation given for the absence of any activity in those three years. The Adviser stated that, in the absence of any justification from the Council for such inactivity relating to the monitoring of this consent, such behaviour would not seem to be reasonable.

29. The Adviser stated that he would have expected the agreed outcome of the correspondence between the Council and the Developer in the period May to June 2004 to have been followed up automatically, as well as expeditiously, with the Site being monitored for evidence of compliance with the approved replanting scheme in the first planting season after the removal of the trees, which would have been late 2004 to early 2005. He stated that the period of some two and a half years between 2004 and 2007, during which there appears to have been no attention given to this matter, was neither reasonable nor an example of good practice in delivering an acceptable level of service.

30. The Adviser also commented that there was another issue linked to this complaint, which was the failure of the Developer to comply with another condition attached to the original consent, relating to the submission of a Tree Management Scheme.

31. We made further enquiries to the Area Manager on 29 May 2012 about conditions attached to the original consent, relating to the submission of a Tree Management Scheme. We also requested further information regarding whether the Council had considered the service of a Breach of Condition Notice; for example, if, and for what reason, they were satisfied this was not appropriate in this instance.

32. The Adviser considered the Area Manager's response to these issues dated 12 June 2012, with specific reference to the Breach of Condition Notice. He stated that the Area Manager's statement that the status of Condition No 10 had not been satisfied was a view contrary to their prior stance (see paragraph 21). The Adviser said, 'this apparent confusion and change of tack does not reflect well on the Council's initial response'.

33. The Adviser stated that the responsibility for the monitoring of the Site lay, in the first instance, with the Council as planning authority and normally thereafter the chief officer charged by the Council through a delegated power with the responsibility of delivering the planning service; he assumed in this case to be the Head of Planning or their supervisory Director. He stated that this would apply irrespective of whether the provision of a planning enforcement service was within the remit of the Development Management or Environmental Planning teams.

Second Phase of Monitoring on Site 2009 - 2011

34. The Adviser said that in the Area Manager's letter dated 5 September 2011 it stated that the Planning Inspector had been unaware of the letter of approval issued by the Council in 2004 for the felling of trees, conditional upon a subsequent tree planting scheme being implemented. He said this appeared to compound the Council's lack of activity between 2004 and 2007, in that a further two years would elapse before the Planning Inspector's attention was drawn to the Site in 2009. Furthermore, any subsequent planning applications for additional development on the Site should have been cross-referenced to the original consent in a standard site history section in the relevant development application report.

35. The Adviser noted that the second phase of activity appeared to be November 2009 and, in his view, this period of six months (from that date until the Planning Inspector's letter of 25 May 2010 which referred to 'reluctantly extending the time period') was an acceptable length of time to devote to

seeking a negotiated solution with the Developer and in keeping with Scottish Government planning circular No 10/2009 'Planning Enforcement'.

36. Additionally, the Adviser said that research had shown that while planning authorities wanted to see contraveners prosecuted and convicted, fiscals wanted the authorities to make full use of their powers in pursuing alternative remedies, including negotiated agreements, before prosecution was considered, as there was a risk that the court would not apply a sanction where those remedies had not been exhausted. That said, the Adviser stated that the period of further inactivity between May and 24 September 2010, when a meeting was held between Mr C and the Planning Inspector, was difficult to justify; likewise, another delay of two additional months until 24 November 2010 when, in the Planning Inspector's letter of that date, he stated that a negotiated outcome was still being pursued, which the Adviser said did not reflect well on the Council.

37. The Adviser stated that there appeared a hiatus for three and a half months until, in a letter to Mr C dated 16 March 2011 from the Planning Inspector, it stated that the Council would be unlikely to consider moving to serve an Enforcement Notice (and subsequently direct action) due to the costs outlaid probably being unrecoverable.

38. The Adviser stated that this moved the Council's position which had delayed the implementation of enforcement action pending a negotiated outcome to their exercising of a discretionary power not to pursue enforcement action at all.

39. The Adviser concluded that, in his view, over long periods (particularly between 2004 and 2007 and then from November 2009 to March 2011) there was either no activity at all or at least no substantial progress, regarding achieving compliance with the relevant condition(s) of the original planning consent. He also said he had seen nothing on file from the Council which would justify this inactivity and, therefore, must come to the conclusion that the Council's actions were not reasonable. Furthermore, the breakdown in communication and/or record holding, which permitted the Planning Inspector to be unaware in 2009 of the Council's decision and actions from 2004 to 2007 which related to the Site, reflected poorly on the Council. Finally, there appeared to be no information on what the position was regarding the additional condition attached to the original consent, which required the submission of a

Tree Management Scheme and whether the planning authority regarded this condition as having been discharged.

40. On 22 November 2012 I received a letter from the Area Manager which enclosed a report of a meeting of the Committee that took place on 20 November 2012 (the Report). I have seen that section 2.2 of the Report addressed events on the Site from 2004 onwards and stated that as no replanting had to date taken place, 'it is considered that a breach of condition has occurred'. Section 2.5 stated that:

'the less formal approach has not resolved the situation it would be legally correct for [the Council] to pursue the breach of condition 10 of the original approval as it is still within the time limits as prescribed in Section 124 of the Town and County Planning Act. Should the planting still not be carried out then the next stage would be for direct action to be considered.'

41. Section 2.6 estimated tree planting costs of around £1500 / £2000, dependent on ground preparation works. Section 2.7 stated that if the formal enforcement route did not achieve the desired result, then consideration in taking direct action (and recovering costs) would still remain an option to the Council.

(a) Conclusion

42. Mr C complained that the Council had delayed to ensure that the Developer complied with the condition of the planning consent. I have carefully considered all the evidence outlined above and taken account of the advice we have received alongside the issues presented in the documents provided by Mr C and the Council. I have seen evidence that from the period May to June 2004 the Site was not appropriately monitored for compliance of the replanting scheme; and that from 2004 to 2007 there appears to have been no attention given to this issue, to the extent that the Planning Inspector was unaware of the Council's approval in 2004 for the felling of trees until his attention was drawn to the Site in 2009 (see paragraphs 24, 34 and 39) and also no explanation has been given for this or for the subsequent lack of activity about the replanting scheme. I have also considered the Planning Inspector's statement that legal action is not the panacea of all planning issues and acknowledge that each set of circumstances has to be treated individually (see paragraph 14); however, I have not seen explanatory evidence presented in this case that the individual circumstances of the Developer and the Site have been considered in this manner. I consider that these combined failures have

contributed to the overall delay by the Council (who had overall responsibility) to ensure that they took appropriate steps to make certain that the Developer would comply with the condition of the planning consent in good time. I consider that for a period of eight years to pass and still this matter remains unresolved constitutes a service failure by the Council, irrespective of the outcome of the Meeting held on 22 November 2012. Taking all these factors into account, I uphold this complaint.

43. I have noted within the Report that on 22 November 2012 the Committee have now stated that a breach of condition has occurred and they have recorded options available to them (see paragraph 40).

(a) Recommendations

44. I recommend that the Council:	<i>Completion date</i>
(i) provide details of how they are taking matters forward with the Developer (with timeline) now they acknowledge that a breach of condition has occurred;	29 May 2013
(ii) provide a copy of their review of internal communications between Development Management and Environmental Planning Teams; and	29 May 2013
(iii) ensure that measures are taken to feedback the learning from this event to all staff.	29 May 2013

(b) The Council has failed to use appropriate (enforcement) action to ensure that the Developer complies with the conditions of the planning consent

45. Mr C stated that the Council must be required to enforce its own rules in an equitable manner for all residents and not as they see fit or consider important.

46. In their responses to Mr C's complaints, the Council stated on various occasions that they would not pursue a legal remedy, however, they preferred compliance (see complaint (a)).

47. The Adviser stated that initiating enforcement action was a discretionary decision of a planning authority. In Section 127 of the Town and Country Planning (Scotland) Act 1997 he stated that it clearly indicated that an authority

may issue a notice where it appeared to them that there was a breach of planning control and that it was expedient to do so. He said:

'So long as enforcement action has at least been considered by an authority they have discharged their responsibility, with the caveat that any decision not to pursue such action can be deemed reasonable in planning terms.'

48. The Adviser stated that the Council was adamant that, of the various types of enforcement action available to the planning authority, the only one open to them to achieve their objective (of the approved tree planting scheme being carried out) was the service of an enforcement notice, which had it not been complied with, would then have permitted the Council to take direct action to meet the terms of the notice. This would entail the planning authority undertaking the works themselves and then attempting to recover the costs in a separate legal action. Other potential consequences for failure to comply with an enforcement notice were a criminal prosecution or a fixed penalty (neither of these would resolve the issue of the Site left under-treated). The Council took this position in their letters dated 13 May 2011 and 5 September 2011(see complaint (a)).

49. The Adviser said that this may well have been the only option open to the Council if, as they initially stated, no breach of condition existed as Condition No 10 attached to the original consent had been discharged, when written permission was obtained for works to fell trees on the site. However, the Adviser stated this was only one interpretation of the situation (see paragraphs 21 and 32).

50. The Adviser stated that the uncertainty related to the recovery of costs as a reason for not pursuing enforcement action as outlined by the Council, was a genuine and widespread concern among planning authorities. This raised the criteria of financial circumstances as a possible defence against enforcement action. In this regard the Adviser stated that Government advice to planning authorities did refer to challenges facing small businesses and indicated that:

'The cost of responding to enforcement action may represent a substantial financial burden on a small business, or self-employed person. Planning authorities should take this into consideration when deciding how to handle a particular case. However, where there is clear evidence of a person abusing planning legislation, and the planning authority has been

unable to resolve the issue through negotiation, formal enforcement action is justified' (paragraph 22 of Circular 10/29 refers).

51. The Adviser said it was a defence for the recipient to show they did everything that could be expected of them to secure compliance with the enforcement notice. However, while planning law permits such an approach, in this case, it was not clear what criteria were used and what checks were made by the Council in coming to their conclusion (see paragraph 41).

52. The Adviser stated that he accepted the Council took the initial view that no breach of condition existed with Condition No 10 of the original consent he stated may well have been a logical and reasoned position to adopt. However, for the reasons outlined above, he said he expected the Council to be able to show that they had also considered the appropriateness or otherwise of the service of a Breach of Condition Notice as an alternative course of action, before coming to a decision to pursue an enforcement notice and subsequent direct action.

53. Subsequent to our further enquiries in this regard (see paragraphs 30, 31 and 32), a decision was taken at the Meeting that a breach of condition had occurred (see paragraph 40).

54. The Adviser stated that it was also the position that in planning case law, the financial circumstances of the recipient of an enforcement notice had been taken into account and accepted as a defence against non-compliance along with the needs of small businesses. However, this same advice did encourage enforcement action where there was clear evidence of a person abusing the planning legislation.

55. The Adviser stated that, in this case, while the Developer was apparently building and selling dwellings, he had seen no explanation by the Council why they took a reasoned decision to accept that the financial position of the Developer was such that he would have insufficient funds to carry out the approved landscaping scheme (see paragraph 23).

(b) Conclusion

56. Mr C stated that the Council had failed to use appropriate enforcement action to ensure the Developer complied with the conditions of the planning consent. I have considered very carefully all the evidence outlined above and

taken account of the advice I have received. This complaint is irrevocably linked to complaint (a), however, enforcement is a discretionary decision of the planning authority and compliance with conditions of planning consent is also the responsibility of the planning authority in how they implement this.

57. I consider that the Council should demonstrate they have attempted everything that was reasonable and significant to secure compliance from the Developer towards meeting the condition of the planning consent. I have not seen evidence that this has happened in this case and over a prolonged period of time. For this reason, I uphold this complaint.

(b) Recommendations

58. I recommend that the Council:	<i>Completion date</i>
(i) ensure that measures are taken to feedback the learning from this event to all staff.	29 May 2013

General Recommendation

59. I recommended that the Council:	<i>Completion date</i>
(i) issue Mr C with a full apology for the failings identified in this complaint.	13 March 2013

60. The Council have accepted the recommendations and will act on them accordingly, having already met the recommendation at paragraph 59 above. The Ombudsman asks that the Council notify him when the remaining four recommendations have been implemented.

Explanation of abbreviations used

Mr C	The complainant
The Council	Aberdeenshire Council
The Developer	The developer of the Site
The Estate	The estate where Mr C owns his home
The Site	The neighbouring property
The Adviser	The Ombudsman's Independent Planning Adviser
The Planning Inspector	The Council's Planning Inspector with a responsibility for the Site
The Service	The Council's Planning Service
The Environmental Planner	The Council's Environmental Planner with a responsibility for the Site
The Officer	The officer in the Complaints Department
The Head of Planning	The Council's Head of Planning and Building Services with a responsibility for the Site
The Meeting	A meeting held on 8 June 2011 between the Environmental Planner and the Developer
The Area Manager	The Council's Area Manager with a responsibility for the Site

The Committee

The Area Committee with a responsibility
for the Site

The Report

A report of a meeting of the Committee
held on 22 November 2012