

Report

on an investigation into
complaint no 05/C/13355 against
Carlisle City Council

14 May 2007

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Key to names used

- Mr J – the complainant
- Company A – a house building company
- Company B – a house building company

Report Summary

Subject

Planning and Building Control

The complainant says that the Council failed to take effective action over the non-implementation of conditions in a planning permission; failed to protect trees on the site, and granted planning permission for the private development of land intended to be public open space. The Council failed to deal properly with his complaints.

Finding

Maladministration and Injustice: Remedy Agreed

Agreed Remedy

The Council will consider including in its policy a statement that landscaping conditions will normally be enforced. It will review its tree protection procedures and report to the Local Government Ombudsman what action it has taken within three months.

The Council will pay the complainant £250 in recognition of his time and trouble in pursuing his complaint.

Introduction

1. Mr J complains that the Council has failed to take effective action over the non-implementation of landscaping requirements that form part of planning permission for development around his home; has wrongly given permission for the felling of protected trees; and has erroneously granted planning permission for private gardens on land that was to be acquired by the Council as public open space under the terms of a “Section 106” agreement. He further complains that the Council failed to refer his complaints about these matters to its Board of Arbitration, the final stage of its internal complaints procedure.
2. For legal reasons the names used in this report are not the real names of the people and places concerned¹.
3. An officer of the Commission has visited the complainant, has examined the Council’s files and has interviewed officers of the Council.
4. An opportunity has been given for the complainant and the Council to comment on a draft of this report prior to the addition of the conclusions.

Legal and Administrative Background

5. When granting planning permission a council may include conditions which require the developer to do, or refrain from doing, certain things. If conditions are not complied with, the council can take action to enforce them if it considers that it is “expedient” to do so².
6. The Council can include a condition in a planning permission that the developer must enter into a separate legally binding agreement to undertake specified actions³.
7. A council can protect trees in its area by making them subject to Tree Preservation Orders. It is a criminal offence to damage or fell a tree that is so protected⁴.

Background

8. Mr J lives on a large private housing development built in phases by a number of building firms. Mr J’s complaints relate to the developments by Company A and Company B.

¹ Local Government Act 1974, section 30(3)

² Town and Country Planning Act, section 172

³ *ibid*, section 106

⁴ *ibid*, section 210

Planning enforcement issues

9. The development is now largely completed and the houses have been sold. In the case of Company A, the planning permission (originally granted to another firm who in turn sold the land to Company A) includes a condition that a landscaping scheme should be agreed with the Council before development commenced. In fact Company A has developed the site without such an agreement being in place.
10. The Council says that it was faced with three options here. The first was to encourage the company to apply to have the condition removed. The second was to regard the development as unlawful as the condition had not been met, and therefore to take enforcement action. The third was to try to get an agreement with the developer that would achieve the landscaping that the Council thinks is desirable.
11. The Council considers that the first option was pointless as it would not achieve anything. The second option was effectively ruled out once houses were sold as it would have meant taking legal action against all the landowners, including Mr J. The third option was seen as the pragmatic solution and as a result Company A has completed tree planting on the only sizable part of the site that is to be transferred to public ownership as part of a Section 106 agreement. The rest of the site is now in private ownership and no useful purpose would be achieved by pursuing a retrospective landscaping scheme.
12. The Council's policy on landscaping of new development says:

“Where appropriate, the City Council will require landscaping schemes to be submitted as part of the planning application details. These should also include the arrangements and responsibilities for the maintenance of them. Development will be monitored to ensure that such schemes are implemented”.
13. There is a landscaping scheme for the Company B site, but Mr J says that in several cases its provisions have not been carried out, although he acknowledges that most of it is now completed, albeit with delays. The Council's Landscape Architect/Tree Officer says that there have been some problems in getting the work carried out to the standard required by the Council – for instance when the developer re-seeded a football pitch that was to be retained, it was not done well enough and the Council got the developer to re-do it. Mr J accepts that this has been done, although he believes it was only seeded once, but points out that the pitch has not been marked out. The Council says that there is no demand for football pitches in the area. The land is available for informal play and could be marked out in future if demand existed. The Council officers involved believe that the policy of informal negotiation with the developers is achieving the objectives in relation to landscaping.
14. Mr J has shown my investigator a number of examples of what are in his view failures to ensure that the landscaping scheme is fully implemented. This has in past been the subject of complaints by residents to the developers. However, the Council

says that apart from one complaint about noise attenuation on a different part of the site, Mr J has been the only resident to complain to it on an estate of over 900 homes. I have been told by a City Councillor, who is also a member of the Parish Council in whose area the site lies, that he was initially opposed to planning permission for the development. However, he now believes that the developers have "made a fine estate". The Clerk of the Parish Council has confirmed that it has not received any complaints.

15. The Council's policy on enforcement says that action will be taken:

"against *significant* breaches of planning permissions and against development which has not been given approval" (my italics).

"The Council will wherever possible avoid taking enforcement action against a trivial or technical breach."

16. The policy goes on to list the actions that can be taken, including formal Notices to be served on the developer. However, it also says:

"Notices will not be served merely because development is unauthorised, there must be a cogent planning objective in doing so."

Tree Protection

17. The development area includes a number of trees that stand in what was formerly parkland attached to a hospital. They contribute to an attractive environment and are clearly of importance, an opinion shared by the Council that has in the past made many of them the subject of Tree Preservation Orders. Mr J says that in a number of cases the Council has failed in its duty to protect the trees.
18. In one case, two trees that stood on either side of a new access road have disappeared, along with a length of hedgerow. When Mr J complained about this, he was originally told that the trees had been removed by the developer because it was necessary in order to construct the road. It is lawful to remove a protected tree if it is necessary in order to implement a planning permission. Subsequently he was told that the trees had in fact been removed because they were diseased. There is an email on the Council's files from the officer who apparently inspected the trees, confirming that they were terminally diseased. However, my investigation has shown that the officer concerned was confused about the identity of the trees in question. In fact the trees he inspected were at another part of the site. It would appear, therefore, that the trees were removed without permission.
19. The Council's Tree Officer at the time believes that the position of the trees was such that the roots would have intruded into the area where the road was being constructed. Other evidence I have seen on the spread of root systems relative to the size of the tree canopy suggest that this is highly likely. The officer says that had the developer applied for permission to fell the trees, it is likely that it would have

been granted anyway as the species involved (a silver birch and a sycamore) are not of great importance.

20. Mr J believes that, even if it was the case that the roots spread into the road area, it would not have been necessary to remove the trees. He has pointed out other places on the estate where mature trees remain standing close to new roads.
21. In another case, the developer applied for permission to reduce the size of the crown of a protected tree. In fact he was given permission to fell it, and has since done so. The evidence on the Council's files for how this came about is inconclusive, and the officer concerned cannot remember. The Council's current Tree Officer, who was not involved at the time, believes that the tree must have been found to be diseased on the site visit as it is the only one in a line of trees to be felled. There would have been no benefit to the developer in felling it unless it was necessary. The Council did not include a requirement to replace the tree in the written consent to fell it. Mr J has also drawn my attention to other trees that have been removed quite properly with the Council's consent because of disease, but without replacements being planted.
22. I have seen evidence of what was clearly an error by the Council in relation to tree protection. The developer applied for permission to remove trees A and B, but was mistakenly given permission to remove B and C. The trees subsequently felled were A and B, as originally intended by both the developer and the Council. Tree C is still in place, although it could be removed at any time as the permission is legally valid.
23. Mr J is also understandably concerned about a fine avenue of mature trees that line a road on the site. It was originally intended that ownership of the land on which they stand should be transferred from the developer to the Council, and this was included in a Section 106 agreement. However, the developer subsequently sold the land to owners of the new houses on the road as part of their gardens.
24. Mr J says that the Council was at fault in granting planning permission for the houses, with plans showing the land concerned as being within their gardens, when it was intended that this land should be transferred to the Council.
25. Mr J believes that the Council's subsequent decision to vary the agreement so as to remove the land from the areas to be transferred to the Council was part of a "cover-up" of what he sees as the Council's error in granting planning permission. In Mr J's opinion, the authority to determine planning applications given to the Head of Planning Services could not then be exercised by the Development Control Manager. He also says that as the Council's policy does not allow delegation where an application conflicts with a previous decision of the Council.
26. The Council says that the Head of Planning Services could not consider the application because he had declared a personal interest. It was, therefore, appropriate for the Development Control Manager to deal with the application. The latter officer does not accept that the application was contrary to a previous decision.

27. Case law appears to support the Council's position in that delegation arrangements need not be construed as being as literal as assumed by Mr J.⁵ The general approach taken by the courts has been that it is for departmental heads to decide on the arrangements whereby delegated powers are exercised.
28. I have seen evidence on the Council's files that the question of the land was considered by officers at the time. The Council says that its Leisure Services department, which would have become responsible for the upkeep of the land, was not in favour of its acquisition. The officers therefore decided that the objective of the Council, which was to retain the avenue of trees, could be achieved in any event, as the trees were the subject of Tree Preservation Orders. It was therefore decided that it was appropriate to remove this stipulation from the Section 106 agreement, subject to the developer agreeing to carry out some planting of new trees. This has now been done, and the Council has undertaken to consider making the new planting subject to Tree Preservation Orders.

The Council's complaints procedure

29. The Council has a procedure for complaints from members of the public. The last stage of this is the opportunity to take the complaint to a Board of Arbitration, which makes the final decision. Mr J was not satisfied with the responses to his complaints from Council officers, in part because the matter had been investigated by one of the officers about whom he was complaining. He therefore requested a Board hearing on 25 September 2005. He heard nothing further and therefore, after writing again to the Council, he complained to me. In February 2006 he received an apology from the Council, acknowledging that his complaint had not been dealt with in accordance with the policy.

Conclusions

30. In relation to the Company B development, I see no reason to criticise the Council. There is an adequate landscaping scheme in existence, and this is well on the way to full implementation. This has taken some time to achieve, but the Council has a discretion, both in law and under its own policy, as to whether to take formal enforcement action. The Council's decision to take a negotiated approach does not amount to maladministration.
31. The Council quite clearly intended that the Company A developer should agree a landscaping scheme before work started. The developer ignored this and went ahead with building and selling the houses. The Council must have been aware of this state of affairs, but it appears to have done nothing about it.

⁵ See for instance *Provident Mutual Life Assurance Association v Derby City Council (1981) 79 L.G.R. 297*

32. Early intervention may have led to the developer producing a scheme very quickly. There is no point in including a condition in a planning permission if the Council has no intention of enforcing it. There is a distinction between exercising a discretion not to take enforcement action for minor breaches of a landscaping scheme that are capable of informal resolution, and taking no action over the failure to produce a scheme in the first place. The failure to ensure that a landscaping scheme was in place was, in my view, maladministration.
33. The injustice that flows from this is not as great as Mr J believes. The developers appear overall to have created a pleasant environment to the satisfaction of the vast majority of the residents. The outstanding landscaping and planting issues do not seriously detract from that position.
34. On the evidence I have seen the Council was not at fault in not securing the transfer of the land on which the protected avenue of trees stood. That permission would not have over-ruled the Section 106 agreement, which the Council could have enforced had it so wished. I accept its reasoning that its main aim of ensuring that the trees are retained has been achieved in any event.
35. I do not accept Mr J's view that the exercise of delegated authority by the Development Control Officer was unlawful as it seems to be within the boundaries held by the courts to be reasonable. Nor do I accept that a planning application relating to one aspect of a legal agreement arising out of previous permissions for the whole development meant that the matter had to be referred to the Committee.
36. I am nevertheless concerned that the additional planting that the Council secured from the developer as the price for accepting the status quo has so far been left unprotected.
37. I also have concerns other tree protection issues. Protected trees were removed without clear indication in the Council's files as to the reasons. Where this appears to have been because of disease, permission to fell has not been conditional upon replacements being planted. In one case the Council gave permission to fell the wrong tree. These are all clear examples of maladministration.
38. Overall, the picture that emerges in relation to tree protection is not re-assuring. I realise that this was a major development and some errors may have been inevitable. However, poor record keeping and a lack of rigour in relation to tree replacement are not excusable.

Recommendations

39. The Council should address my comments on the failure to enforce the landscaping condition, and consider including in its policy a statement that such conditions will normally be enforced.

40. The Council should review its tree protection procedures to ensure that protected trees on development sites are properly monitored. Where decisions are made, these should be properly recorded. If permission is granted for felling protected trees on the basis of disease, replacements should be requested. Within three months the Council should tell me what steps have been taken, and what action has been taken to protect the new planting referred to in paragraph 28. The Council has agreed to this.
41. I am not convinced that the vigour and detail with which Mr J has pursued his complaint with the Council has always been justified by the relatively minor nature of the injustice caused by the planning maladministration I have identified. Nevertheless, his complaints about tree protection matters have exposed some matters of more general public concern.
42. He should also have been given the right to air his grievances before the Board of Arbitration. Had he been allowed to, it is at least possible that he would not have had to complain to me. The Council has accepted my recommendation that the Council pay Mr J £250 in recognition of his time and trouble in pursuing his complaint.

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14 May 2007