

## **Scottish Public Services Ombudsman Act 2002**

### Report by the Scottish Public Services Ombudsman of an investigation into a complaint against:

#### The City of Edinburgh Council

#### Complaint as put to the Ombudsman

1. I received a complaint from solicitors acting for a Mr and Mrs K (the complainants) whose agents had made enquiry of the City of Edinburgh Council (the Council) about whether planning consent was necessary to erect a conservatory extension to the rear of their mid-terraced house. The agents were informed by letter that, on the basis of the information supplied, a formal application for planning permission would not be required for the work. Mr and Mrs K complained through their solicitors that they were misled into believing that consent was unnecessary, and incurred costs in first constructing the conservatory and then taking it down after the Council took enforcement action against them. They complained that, had they not been given the misleading advice, they would not have incurred the substantial construction, demolition and legal fees involved.

#### The Investigation

2. Mr and Mrs K's solicitors and the Council have supplied relevant documents relating to the complaint. My Complaints Investigator interviewed the complainants and officers of the Council's Development Division, and inspected the Council's files.

#### Definition

3. "Permitted development" in terms of the Town and Country Planning (Scotland) Acts refers to proposals which generally because of their small size or limited volume or location are deemed to be sufficiently minor not to require express planning consent. Such proposals are defined through

the Town and Country Planning (General Development) (Scotland) Order currently in force.

#### The Council's Development Control Planning Charter

4. Section 2 of the Council's Development Control Planning Charter, which was revised in January 2002, states that the Council encourages applicants to seek advice about their proposals before an application is made. Through such discussions they say it is possible to resolve any obvious problems and to encourage high quality applications and ensure that applications, once submitted, can be dealt with effectively and efficiently. The Council recognise that "advice needs to be accurate and objective" and is "given without prejudice to the formal consideration of an application".

#### Background

5. The complainants' house is situated in the middle of a row of three terraced houses built off a narrow lane behind a similar terrace fronting onto a main road. Planning permission was originally granted on 18 April 1979 for a total of eight houses in two terraces. On 27 January 1981 an amendment to the original permission was approved reducing the number of approved units to six. The amended permission was subject to two conditions, the second of which stated that: -

'... notwithstanding the provisions of the Town and Country Planning (General Development) (Scotland) Order 1975, the 3 rear terraced dwellinghouses shall not be extended without the prior written approval of the planning authority.'

6. The complainants (Mrs and Mrs K) were not the original owners of their house. They purchased their home in July 2000.

7. Mr and Mrs K's present solicitors have informed me that they understood from Mr and Mrs K that their former solicitor, who acted for them in the purchase, carried out property enquiries which did not seek disclosure of the specifics of planning permissions but rather sought information on whether any repair notices, enforcement notices etc had been issued in relation to the property. Mr and Mrs K did not themselves enquire directly if there were any planning restrictions on the property

when they bought, as at that time they had not contemplated building an extension. Their former solicitor had informed them that, in terms of the burdens on their title contained in the Title Deeds, there would be a requirement for consent from the feudal superior for any extension to the building. In the event, as a result of changes in the law of property regarding burdens, feu superior's consent was no longer required.

8. In late 2001, Mr and Mrs K decided to erect a conservatory extension at the rear of their home and instructed design agents to prepare plans for the necessary applications. A building warrant application was registered with the Council on 1 November 2001. On 5 November 2001 the agents wrote to the Director of Planning enclosing a plan which showed a proposed extension jutting out at right angles from the rear of the main building. The complainants' existing garden shed was not shown. The agents' letter stated: -

'Please find enclosed a copy of a plan prepared for the erection of a conservatory to the rear of the house at the above address which has been lodged with the City of Edinburgh Council for Building Warrant.

We would be grateful if you could inform us as to whether a formal application is required for Planning Permission for this work.

The existing house has not been extended and the proposed conservatory will take up 25% of the available ground (outwith the original house).'

9. The agents' letter was date-stamped as having been received on the same day (5 November). At interview, my officer was informed that, because of a disproportionate volume of workload falling on the planning team serving that part of the Council's area, additional work had been allocated to a team serving another part of the city. The letter was passed to a case officer (Officer 1) from that other team to attend to.

### Interviews with Development staff

10. Officer 1 (who had worked for the Council and its predecessor for over ten years) told my Complaints Investigator that he inspected the drawings and noted that the rear garden area was small and that the floor area of the conservatory was roughly 10m<sup>2</sup>. He suspected that the property might have been built around 1980 and was aware that the predecessor authority, the former City of Edinburgh District Council, had adopted a practice in circumstances of restricted sites of removing "permitted development" rights. Officer 1 surmised that that practice might have applied in this case and he had noted in ink on the 5 November 2001 letter "p.d (permitted development) rights removed?" "10m<sup>2</sup>".

11. Officer 1 had then passed the letter to the team technician (Officer 2) to research the planning history. His intention was that she check back in the archives as to whether the consent had removed permitted development rights which was, in his view, a possibility given the relative size of the house and garden. He was aware that some of the information might well be recorded on microfiche and he anticipated that Officer 2 would come back to him once she had researched the matter and he would then have drafted a letter of reply to be sent out by his team leader.

12. Officer 2 informed my Complaints Investigator that she had joined the team shortly before November 2001, and that she was relatively inexperienced. She accepted that she might not have grasped properly the intent of Officer 1's query as to whether permitted development rights had been removed. She interpreted her remit as looking for evidence as to whether there was a record of any development since the houses had been originally approved. She therefore checked whether permitted development rights had been used up rather than whether the (original) consent had removed permitted development rights. Officer 2 told my officer that she did not find any evidence of subsequent development. She had not read the microfiche which contained the original consent from 1979 nor the 1981 amendment.

13. Officer 2 did not find evidence that the permitted development rights had been used up. She had not reported back to Officer 1, whom she

recalled might have been absent from the office at the time she completed the exercise. Since there was pressure of work on her team at the time she decided that she would draft the letter of reply to be signed by the Area Team Leader (Officer 3). Accordingly, she had a reply typed and placed in Officer 3's tray for signature. She had had no discussion with Officer 3 prior to his signing the letter on 10 December 2001.

14. The original letter from the agents of 5 November 2001 was also endorsed with the written inscription "pp not required". However, neither Officer 1 nor Officer 3 could recall placing that remark on the original letter from the agents.

15. Officer 3's letter to the agents dated 10 December 2001 stated: -

'I refer to your letter of 5 November 2001, and would inform you that, on the basis of the information you have supplied, the proposed rear conservatory for the above property is considered to be Permitted Development. Therefore, a formal application for planning permission will not be required for this work.

If you have any further queries, please telephone (the Team Technician) on (direct dial number).'

16. At interview, Officer 3 recalled that the former District Council, prior to the Town and Country Planning (General Development) (Scotland) Order 1992, had had an occasional but not "consistent" practice of removing permitted development rights in restricted sites. There had, however, been no specific policy. He could not recall that this had been flagged up as an issue for him to consider before signing the letter, but agreed with my Complaints Investigator that the proper response to the enquiry should have been that in respect of the specific proposal which would otherwise constitute permitted development, the Council's prior written approval as planning authority was necessary before development was undertaken.

17. The Council have confirmed that a building warrant was issued on 28 December 2001. Work commenced to the rear of the property shortly thereafter.

#### Representations from neighbours

18. In the absence of an application for planning consent, there was no statutory requirement for Mr and Mrs K's neighbours to be notified of the proposals under either building procedures or development control.

19. Following a telephone call to the Council on 21 January 2002, one of Mr and Mrs K's neighbours (Neighbour 1) wrote to the Council's Head of Planning saying firstly that their neighbour on the other side had informed them that the ground that Mr K was going to build on, according to the title plan, did not belong to him. Neighbour 1 pointed out that the present boundary fence did not appear to correspond to the feu boundary on the title plan. He also questioned whether the position of the building so close (40 centimetres) to his mutual boundary "contravened planning permission" and stated that a building control officer would be visiting the site on 21 January 2002.

20. Mr and Mrs K's solicitors informed me that the original boundaries relating to each of the three properties had been inaccurately marked out on the ground. When Mr and Mrs K became aware of the inaccuracy, they looked into the question of the property boundary. The conservatory was they say built in accordance with the legal property boundaries.

21. Neighbour 1's letter of 21 January 2002 was received on 23 January 2002 and passed to a planning enforcement officer (Officer 4) to deal with. Officer 4 acknowledged receipt on 25 January and then researched the planning history of the site. Between 25 and 29 January 2002, he examined the microfiche and took the view that "permitted development rights" had been removed with the 1981 consent for the amendment (paragraph 5 above).

#### The Enforcement Officer's Inspection

22. Officer 4 visited Mr and Mrs K on 30 January 2002 and noted that the walls on the conservatory had been constructed up to the top of the window frames. This extension was not at right angles to the rear wall of

the house. The roof of the extension had not been constructed. Officer 4 also noted the presence of the garden shed.

23. Mr and Mrs K say that they showed Officer 4 a copy of their building warrant and asked whether they could continue to construct the conservatory. They say Officer 4 informed them that they could continue with the construction and completion of the conservatory. He did not mention that he would require them to apply for planning consent.

24. Officer 4 recollected that at his visit Mr and Mrs K had informed him that as far as they were aware they had obtained the relevant planning consent. Since there was a time delay in recording decisions on the planning application handling system he had not contradicted Mr and Mrs K. He did not recall advising them specifically either that they could continue the works on the conservatory to completion or that they should cease work.

25. On his return to the office, Officer 4 had spoken to Mr and Mrs K's agents by telephone and then to Officer 3 who had sent the letter of 10 December 2001. He recalled that he and Officer 3 had discussed the planning merits of the conservatory and whether or not it was acceptable.

26. Officer 4 considered that, notwithstanding Officer 3's letter of 10 December 2001, it would be appropriate to require the submission of an application for planning consent. This would enable neighbours to make representations and allow any objections to be considered in Committee. He wrote to Mr and Mrs K and their agents in separate letters of 1 February 2002. The letter to the agents stated: -

'Confirmation of Enforcement Investigations

I refer to our telephone conversation this morning concerning the above subject.

I have been able to discover which team wrote to you following your letter of the 5<sup>th</sup> of November last year. I can only apologise that the existence of the condition removing permitted development rights had not been unearthed

before the letter advising no formal planning consent was required had been sent out to you. I have in consequence written to your clients, Mr and Mrs K, apologising to them and confirming that I had requested you to make a retrospective application for consent on their behalf.

I would be obliged if you could ensure that the neighbours are formally notified of the development.

Thank you for your co-operation in hopefully resolving this matter.'

Neither this letter nor the letter Officer 4 sent the same day to Mr and Mrs K advised that further work should cease pending the outcome of the planning application.

27. At interview, the complainants stated that they could have requested the builders to stop shortly after receiving the letter of 1 February but were not alerted to a possibility that planning consent would be refused. The Council have informed me that only in extreme circumstances, which were not present in this case, would planning legislation support the service of a stop notice and there is no other planning mechanism to instruct work to stop. Moreover, no planning officer would have been in a position to say whether the application would be approved or refused.

28. In making their clients' complaint to this office, the solicitors have stated that the second condition of the 1981 consent did not remove the permitted development rights in respect of the three rear terraced dwellinghouses. If any of the three rear terraced dwellinghouses were to be extended, then "prior written approval of the planning authority" had to be obtained. The condition did not require the submission of an application for planning permission, rather what was needed in their view was the prior written approval of the planning authority. The solicitors were of the view that the Council's letter dated 10 December 2001 constituted such a written approval.



### Applications for amended building warrant and planning consent

29. An amendment was sought to the building warrant on 8 February 2002 and granted on 22 March 2002. Although subsequent work was undertaken by Mr and Mrs K, the Council informed me that no certificate of completion was issued by the Council in terms of the building procedures. An application for planning consent was submitted on 11 February, and after neighbour notification, four letters of representation were received. These letters related primarily to the effect of the conservatory on the privacy and amenity of adjoining houses.

30. While the case officers who drafted the initial report to present to Committee were of the view that approval of the proposal should be recommended, the Council's Development Quality Management Team who considered the draft report could, however, see no justification for approval as the conservatory did not meet the Council's own approved guidelines. The recommendations were thereafter revised. The final version of the report, which was submitted to Committee on 15 May 2002, noted that the conservatory had been constructed and at the time of the case officer's visit was almost complete. Consequently consent was being sought in retrospect. The report recommended that planning consent be refused.

31. Retrospective planning permission was refused at the Council's Development Quality Sub-Committee meeting on 15 May 2002 for the erection of the conservatory. At the same time enforcement action was authorised to secure its removal. The Sub-Committee also instructed a report from officers on the circumstances giving rise to the matter which was subsequently considered on 8 August 2002 (see paragraph 55 below).

### Enforcement Action

32. On 8 August 2002, the Council served an enforcement notice (Enforcement Notice No 1) under Section 123(1)(a) of the Town and Country Planning (Scotland) Act 1997 regarding the carrying out of development without the required planning permission. Enforcement Notice No 1 intimated the breach of planning control as being: -

'... without planning permission the erection of a conservatory extending 4.3 metres in length on its south east boundary, 3.3 metres in length on its north east boundary, 3.3 metres in width and 3.5 metres in length at the rear of the house at [address]'

33. Enforcement Notice No 1 required removal of the structure within 3 months of the notice taking effect. It provided the following reasons for the notice: -

'... the above breach of planning control has occurred within the last four years. The erection of the conservatory is contrary to North West Edinburgh Local Plan Policy H4, in respect of new development, as the conservatory is not sympathetic in terms of its scale and its effect on the character of the existing house and its surroundings. The conservatory is contrary to non-statutory Policy in respect of House Extensions as it occupies more than one third of the length of the garden and results in a rear garden length of less than 9 metres from the rear wall. Planning permission for the erection of this conservatory was refused by the Council for these reasons.'

34. The Council thereafter served a second enforcement notice (Enforcement Notice No 2) under Section 123 (1)(b) of the 1997 Act on 13 September 2002. That notice referred to a failure to comply with any condition or limitation subject to which planning permission had been granted. It alleged that a condition of the original planning permission for the terrace of houses had not been complied with because the house: -

'has been extended to the rear by the erection of a conservatory extending 4.3 metres in length on its south east boundary, 3.3 metres in length on its north east boundary, 3.3 metres in width and 3.5 metres in height and the prior written approval of the Council for the conservatory has not been given. But for the condition the

erection of this conservatory would have constituted permitted development.'

35. Enforcement Notice No 2 required that the conservatory be removed within three months of the notice taking effect and gave the following reasons for service of the notice: -

'the above breach of planning control has occurred within the last 10 years. This condition was imposed because of the limited size of the garden ground attached to the three terraced dwellinghouses. The conservatory is not sympathetic in terms of scale and its effect on the character of the existing house and surroundings. The conservatory occupies more than one third of the length of the garden and results in a rear garden length of less than 9 metres from the rear wall. Given the impact of the conservatory on residential and visual amenity, the council considers that the control of such development is necessary and therefore the council do not consider that there should be any relaxation of the condition in question.'

### Appeals

36. The complainants did not comply with either notice and instructed their solicitors to appeal both notices to the Scottish Ministers on ground (c) of Section 130 (1) of the 1997 Act, namely that the matters (if they occurred) did not constitute a breach of planning control. No timeous appeal against the refusal of planning consent on 15 May 2002 was submitted.

37. In their original letter of complaint to my office dated 18 November 2002, the solicitors stated that the two enforcement notices had been appealed. They pointed out that if the appeals were unsuccessful, their clients would be obliged to restore the property to its original state at significant cost over and above that already incurred in the original construction of the conservatory. These costs, they maintained, would not have arisen but for the representations made by the Council and the written assurances given in the first instance. They stated that the situation had arisen through no fault of Mr and Mrs K and that their clients

had acted properly throughout and had sought proper permissions for all works undertaken. The solicitors stated that their clients had suffered injustice as a result of maladministration. In the event that, following their appeals, the conservatory could be retained, their clients would still have suffered loss. The solicitors suggested that a decision on the matter by my office be deferred until after the outcome of the appeals to the Reporter had been communicated to the parties. To comply with the "12 month" period specified in the Scottish Public Services Ombudsman Act 2002 for a complaint to be made, their letter was intended to "mark" their clients' distress and complaint against the Council.

38. In replying to the solicitors' letter on 26 November 2002, my Complaints Investigator sought clarification of (a) whether a formal complaint of maladministration had been made to the Council and (b) whether the appeal submission for the Inquiry Reporter included a request to make an award of expenses. The solicitors, in a letter of 8 January 2003, confirmed that their application for award of expenses had been made in connection with the first but not the second enforcement notice. A formal complaint of maladministration had been made on 7 January 2003 to the Chief Executive. (The Chief Executive had, however, merely acknowledged that letter on 27 January 2003 and stated he would defer a reply until the outcome of the appeals was known.)

#### The Reporter's decisions

39. On 17 January 2003 the Inquiry Reporter carried out an inspection of the site. In three separate letters of 25 March 2003 the Inquiry Reporter provided her determination of the appeals against the two enforcement notices and the request for award of expenses.

#### a) The appeal against Enforcement Notice No 1

40. Based on her site visit and calculation of the dimensions of the extension (12.54m<sup>2</sup>) and existing building (66m<sup>2</sup>) and given the presence of an existing shed with a floor area of 2.36m<sup>2</sup>, the Reporter was satisfied that the total area of ground covered by buildings other than the original house (34.6%) within the curtilage in terms of Class 1 (2)(e) of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 exceeded 30%, and that therefore formal planning permission was

required for the conservatory. Had the shed been removed, the percentage figure would then have been marginally over 29% and formal permission would not have been needed.

41. The Inquiry Reporter concluded: -

'as it stands, irrespective of the condition imposed on the 1981 house planning permission, I am satisfied that the conservatory requires formal planning permission. That formal planning permission has not been granted, because neither the building warrant nor the letter of 10 December 2001 can reasonably be construed as the grant of a formal planning permission, which leaves the conservatory as built in breach of planning control. Accordingly, your client's ground (c) appeal fails for Enforcement Notice No 1 relating to carrying out development without the required planning permission.'

42. Whereas section 133 of the 1997 Act normally requires that in consideration of an appeal, consideration should also be given as to whether planning consent should be granted for the matters specified in Enforcement Notice 1, no fee was paid to the Scottish Executive to enable the Scottish Ministers to deal with a "deemed planning application". The Inquiry Reporter made clear that she was not, therefore, able to consider the planning merits of the case and to grant planning consent, even if that would otherwise have been a possibility.

#### b) Request for Award of Expenses

43. In a second letter of 25 March 2003 to the complainants' solicitors, the Inquiry Reporter declined to make any award of expenses. While she considered that the solicitors had presented extensive evidence regarding the Council's handling of their clients' case before Enforcement Notice No 1 was issued, they had presented no evidence in support of their claim that the Council behaved unreasonably. She continued: -

'In this case, the council has adhered to each procedural requirement at each stage of the appeals process, and its actions, which were based on valid planning grounds, have

been fully substantiated on appeal. In addition, I am satisfied that the way in which the council arranges its internal administrative procedures and responds to planning information requests is not a valid planning issue for consideration as part of this appeal process. Therefore, in considering the appeal it would be inappropriate for me to take them into account. Instead, these matters are internal, administrative and procedural, so that any significant concern about maladministration arising should be referred to the Scottish Public Services Ombudsman. In addition, Scottish Executive Circular 1/2000 sets out the procedures for determining planning appeals by means of written submissions. Paragraphs 42 to 45 of that circular refer to awards of expenses, and paragraph 42 specifies that awards can only relate to proceedings after the appeal has been lodged. As a result, I find that claims for awards of expenses can relate only to work on the appeal, not on preceding actions. But even then, they are restricted to expenses necessarily and reasonably incurred. Awards are not intended to be punitive, or to be claims for damages. These are separate matters, which should be taken up either directly with the council, or again with the Scottish Public Services Ombudsman, or the courts, as you think appropriate. In any event, even if you had demonstrated unreasonable behaviour, you have submitted no evidence that this unreasonable conduct caused your clients unnecessary expense, either because it was unnecessary for the matter to come before the Scottish Ministers, or because of the way in which the council has conducted its side of the case.

Therefore, I find that the council has not acted in an unreasonable manner resulting in liability for expenses and, in exercise of the powers delegated to me, I decline to make any award.'

c) Decision on the appeal on Enforcement Notice No 2

44. As with the first appeal, no fee was paid to the Scottish Executive in respect of the appeal to enable consideration to be given to the planning merits of the case and there could therefore be no grant of planning permission even if that would otherwise have been a possibility. The appeal on Enforcement Notice 2 concerned the enforcement of the alleged failure to comply with any condition or limitation subject to which planning consent had been granted and specifically to condition 2(ii) of the 1981 Consent.

45. The Reporter found in terms of the Scottish Office Development Department Circular 4/1998 that the condition at issue was relevant to planning, relevant to the terraced housing development that was permitted and was enforceable. She also detailed her grounds for finding the condition of the 1981 planning permission to be reasonable and necessary. She further did not consider that it was void for uncertainty or lack of precision.

46. The Inquiry Reporter indicated that, if the condition required written approval rather than formal planning permission, the building warrant granted on 28 December 2001 did not constitute that approval. She then considered the Council's letter of 10 December 2001 in paragraphs 25 to 27 of her determination: -

'The letter from the council dated 10 December 2001 responded to a request about whether or not formal planning permission was required for the conservatory. The request appears to have been based on a detailed set of plans, and the answer was that the conservatory amounted to permitted development, so that a formal planning application was not therefore needed. The reply makes no reference to the terms of the 1981 permission or to any other form of approval, including a written approval required by way of a condition. But even if it had, I am satisfied that the letter of 10 December could not be described as a decision notice or a written approval in relation to the condition, mainly because it expresses no view on the acceptability or otherwise of the conservatory. The letter

simply refers to permitted development and to no need for a formal planning application, whereas the condition only applies to a permitted development extension. Therefore, I consider that the December letter confirms the applicability of the condition to a permitted development conservatory, and it contains nothing that could be construed as meeting or overturning the requirement for prior written approval. Under these circumstances the council's letter of 1 February 2002 is confusing and questionable, because it seeks the submission of a retrospective planning application for an extension that it had already judged would have been permitted development but for the condition on the 1981 permission. The condition did not require the submission of an application for formal planning permission given the earlier stated view that the extension was permitted development.

Accordingly, if the conservatory extension is permitted development, it requires the prior written approval of the planning authority by virtue of the condition imposed on the 1981 house planning permission. That written approval has not been obtained, so that the conservatory has been built in breach of the condition imposed on the 1981 planning permission. Therefore, your clients' ground (c) appeal fails for (the second enforcement notice) served under section 123 (1)(b) of the Act, i.e. failing to comply with any condition or limitation subject to which planning permission has been granted.

I have taken account of all the other matters raised but find none that outweigh the considerations on which my decision is based. Therefore, in exercise of the powers delegated to me, I dismiss your client's appeal and direct that the enforcement notice dated 13 September 2002 be upheld.'

#### The complaint to the authority

47. Following receipt of these decisions the solicitors wrote to my office on 4 April 2003 maintaining that their clients now required to restore the



property to its original state and that the costs involved would not have arisen but for the written representations and assurances made by the City of Edinburgh Council. Their clients held a legitimate expectation that they had obtained all necessary permissions and that the construction of the conservatory would be uncontroversial. The solicitors reminded the Chief Executive in letters of 4 and 14 April 2003 that they awaited a reply.

48. On 8 May 2003 the Chief Executive responded to the solicitors stating that he preferred to await the outcome of the complaint to my office before responding. My Complaints Investigator, when informed by the solicitors of this, then wrote to the Chief Executive on 16 May 2003 pointing out the requirement in the Scottish Public Services Ombudsman Act 2002 for a complaint to be taken fully through a listed body's internal complaints procedure.

49. Before the Chief Executive replied a meeting was arranged for 22 May 2003 which was attended by Officers 3 and 4 from the Council, Mr K and his solicitor and agent. Officer 3 recalled that he and his colleague had suggested a way forward might be to reduce the size of the extension but that this had been rejected by Mr K. There are differing recollections as to who broached the possibility of applying for a Certificate of Lawful Use and Development (CLUD). Officer 3 recalled that there had been discussion as to whether a CLUD application was an appropriate mechanism for obtaining "the prior written approval of the planning authority" as had been required by the condition in the amended consent. Officers 3 and 4 had stated that they would require to obtain advice from the Council's Legal Services on the matter.

50. Following the meeting on 22 May 2003, Mr and Mrs K removed the shed from their rear garden. Their agent submitted an application for a certificate of lawfulness on 9 June. This was not validated however until 25 June when the correct forms were submitted. The Council's planning files record that Legal Services sent an internal memorandum to Officer 4 dated 19 June 2003 expressing strong reservations about the appropriateness of applying for a CLUD when Enforcement Notices 1 and 2 remained in force. Notwithstanding this advice, the Council proceeded to determine the CLUD application (see paragraph 53 below).

### The Council's response

51. In his reply of 30 June 2003 to the solicitors' letter of complaint of 7 January 2003 (paragraph 38), the Chief Executive said that the Council's stated position in the appeals against Enforcement Notices 1 and 2 had been that Mr and Mrs K had never sought the approval which the condition in question required, notwithstanding that they were professionally represented by an architect, and knew or should have known of the existence of the condition in question at the time of the architect's approach to the Council, and that the letter of 10 December 2001 did not constitute that written approval. The Chief Executive indicated that paragraph 25 of the Reporter's decision (see paragraph 46 above) had supported that position. He stated firstly that the solicitors' clients had not exercised their rights to challenge this decision and secondly that the merits of the conservatory in question have never been tested at appeal because Mr and Mrs K, notwithstanding that they were legally represented, chose not to appeal on the ground that planning permission for the conservatory should be granted or that the condition in question ought to be discharged.

52. The Chief Executive continued: -

'Your clients claim that the Council has retracted the approval constituted by the letter of 10 December. It is the Council's view that it was entitled to take enforcement action since the letter of 10 December did not constitute approval and it is well grounded in case law that a planning authority is not bound by the terms of informal views expressed by an officer, nor is it barred from taking action in pursuance of its statutory duties, even if that action is in direct conflict with the informal view previously expressed.

It is accepted that the Reporter's determination of the import of the letter of 10 December 2001 is a separate question from that of maladministration relating to matters which are internal, administrative and procedural, which, as the Reporter notes in her decision letter dismissing your clients' claim for expenses in the enforcement notice appeal, are matters for the Scottish Public Services Ombudsman. It

is the Council's position that the omission (to refer to the condition in question in the letter of 10 December 2001) does not, however, amount to maladministration because it was not the duty of the Council to advise on the planning history of the property in question in response to an informal enquiry concerning permitted development rights. No fee was charged to your clients for that enquiry and the letter of 10 December 2001 did not in any event constitute a formal determination of the planning status of the proposed development. Had your clients wished such a formal determination, it was open to them to apply to the Council for a Certificate of Lawfulness of Proposed Use or Development, under Section 151 of the Town and Country Planning (Scotland) Act 1997 and pay the requisite fee for this service which the Council, as planning authority, is obliged to provide. No such application was made. Given that a procedure was available to your clients, and given that your clients did not avail themselves of it, the informal procedure which they chose to invoke cannot be said to be a part of the Council's service. As there is no service failure, it is the Council's view that this matter is not one which it is appropriate for the Scottish Public Services Ombudsman to investigate.'

53. The solicitors advised me on 15 July 2003 that Mr and Mrs K had applied to the Council for a Certificate of Lawfulness of Existing Development. They wrote again on 6 August 2003 to say that they understood from officers that a recommendation was to have been put to the Council's Development Quality Sub-Committee that the application be approved but such a recommendation was not given to the Committee, the application was refused, and a decision notice issued on 31 July 2003.

54. I decided to investigate the complaint on 2 September 2003. The Council informed me by letter of 19 September 2003 that they had no additional comments to add at that stage to those already submitted.

### The Council's consideration in Committee of the circumstances

55. At its meeting on 15 May 2002, where they refused the application for retrospective consent, the Development Quality Sub-Committee instructed a report from officers on situations where permitted development rights had been removed by conditions of previous consents. A report on this subject was prepared by the Director of City Development on 31 July 2002 and was considered by the Council's Planning Committee on 8 August 2002. The report commented on the concept of permitted development and described how the problem in respect of Mr and Mrs K's proposals arose. The problem was identified as one of historic conditions predating the current computer systems. The report concluded that computer systems should be developed for future monitoring but that monitoring of historic conditions continue, as at present, by manual searches of the historic planning files.

### Findings

56. The Council have not handled this matter well. They initially failed adequately to research the planning history of the small development in which Mr and Mrs K's house is located and an erroneous response was sent to the pre-planning application enquiry made by the agents. I do not accept that, because no fee was associated with the agents' enquiry, that the Council could thereby justify their incorrect response. In a previous investigation report against the same authority a former Commissioner for Local Administration stated that the public are entitled to expect that all advice proffered by a local authority will be accurate. He stated that "Regardless of whether informal or formal procedures are employed the same level of care requires to be exercised..". Similar sentiments are expressed in the Council's own Development Control Planning Charter published in January 2002 (paragraph 4).

57. Armed with their building warrant and the advice tendered to their agent, the complainants were entitled to proceed. Once the works had started it was impossible to comply with the condition of the 1981 amendment which required prior written approval for works which would otherwise have counted as permitted development. The problem with the feu boundaries was not of the complainants' making nor could it reasonably have been foreseen. It was addressed and a design solution found. That solution, which involved angling the rectangular conservatory

and including an additional triangular section, meant that (with the presence of the shed) the works underway exceeded the permitted development threshold and technically required planning consent.

58. Officer 4's visit on 30 January 2002 and his subsequent letters of 1 February 2002 were crucial. The situation as he observed it then justified him to seek a planning application for development which was not "permitted". While a stop notice might not have been appropriate his letters failed to include a clause cautioning the complainants to consider ceasing building works until the planning application was determined. In my view, he could not use the condition of the 1981 amendment to justify his request for a planning application. If between 30 January and sending the letters on 1 February, Officer 4 discovered that contrary to what they said to him the complainants did not have planning consent, his letter could have been more explicit. While the complainants had it within their power to have asked their builder to stop, I accept that there were strong pragmatic grounds for continuing.

59. By the time the application was determined on 15 May 2002, the works were ostensibly complete and it was retrospective consent which was being sought and which was refused. I note that the appeals against the two enforcement notices were not combined with an appeal against refusal of consent and that consequently the merits of the decision to refuse the planning application were not appealed. Further, in addressing the legal arguments in respect of the appeals, the Inquiry Reporter rightly could not comment on the alleged administrative shortcoming which has been raised with my office.

60. The complaint was reactivated following the decisions in the unsuccessful appeals against Enforcement Notices 1 and 2. While there is a difference of recollection as to who requested the meeting on 22 May 2003, one outcome was the application for a Certificate of Lawfulness of Development. There is no indication that Legal Services' views on this were communicated to the complainants or their agents before the CLUD application was validated. When the application was refused Mr and Mrs K suffered further disappointment.

## Recommendations

61. Having considered all the circumstances of this case, I am of the view that the failures that I have identified amount to maladministration and that Mr and Mrs K have suffered an injustice as a result.

62. What seemed a straightforward aspiration by the complainants to extend their home by building a modest rear extension has resulted in more than two and a half years of stress. I believe that, having received written confirmation from the Council that they did not require planning permission, Mr and Mrs K proceeded with the building of their conservatory in good faith and could not have foreseen the problems that lay ahead.

63. In the event Mr and Mrs K have incurred considerable costs, first in constructing the conservatory (and its subsequent demolition) and then in fees involved in the application for planning consent and the Certificate of Lawful Use and Development and the legal costs and fees associated with appealing the two Enforcement Notices. I consider that these costs would not have been incurred had the complainants been advised at the outset that they required prior approval of their proposal.

64. In order to remedy the injustice that has been caused to Mr and Mrs K, I recommend that the Council should apologise to Mr and Mrs K and should meet all the costs identified above. In addition, the complainants should receive financial redress in the sum of £2,000 in recognition of their time and trouble in submitting a complaint to this office and the stress they have endured over a considerable period of time.

65. For their part, however, I believe that Mr and Mrs K should now co-operate with the Council to remove what is left of the conservatory, to enable their neighbours to recover their amenity and outlook.

Professor Alice Brown  
Scottish Public Services Ombudsman

6 September 2004

## **GLOSSARY**

Mr and Mrs K	The complainants
Officer 1	Planning Case Officer
Officer 2	Planning Team Technician
Officer 3	Planning Area Team Leader
Officer 4	Planning Enforcement Officer
Neighbour 1	A neighbour