

Scottish Parliament Region: West of Scotland

Case 200501969: East Dunbartonshire Council

Introduction

1. On 21 October 2005, the Ombudsman received a complaint from a man (referred to in this report as Mr C) against East Dunbartonshire Council (the Council) concerning his request for the removal of trees, owned by the Council and overhanging his property.

2. Mr C believed that the Council had been unreasonable in refusing his request to have the birch and oak at the rear of his property felled. Although the trees were originally covered by a Tree Preservation Order (TPO), Mr C successfully appealed this decision but he complained that, despite the change in circumstances, the Council continued to maintain their decision not to fell. He said that this was notwithstanding the fact that the Inquiry Reporter who considered his appeal against the TPO took the view that sound justification had been made for their removal. Mr C said that officers dealing with his complaint had delayed in attending to his correspondence and with his request to purchase the land on which the trees are growing. Furthermore, he believed the Council's actions in this matter had breached his human rights.

3. The complaints from Mr C which I have investigated concerned:

- (a) failure to give proper consideration to his request that oak and birch trees be removed ;
- (b) delay in replying to his letter of 22 September 2003;
- (c) delay in carrying out work to remove a rowan and cherry trees;
- (d) delay in dealing with his request, made on 14 July 2004, to buy the land in question;
- (e) delay in dealing with his, and his solicitor's letters of November 2004;

(f) failure to reply to his solicitor's letter of 14 April 2005 and;

(g) breach of his human rights.

4. Following the investigation of all aspects of this complaint I came to the following conclusion(s):

(a) not upheld, see paragraphs 9 to 14;

(b) upheld, see paragraph 15;

(c) not upheld, see paragraphs 16 to 17;

(d) upheld, see paragraphs 18 to 20;

(e) upheld, see paragraphs 21 to 24;

(f) not upheld, see paragraphs 25 to 26;

(g) not upheld, see paragraphs 27 to 32.

5. In summary, I do not uphold Mr C's main complaint but I find that there were shortcomings in the way in which the Council communicated with him.

6. Specific recommendations the Ombudsman is making resulting from this investigation are that the Council should:

i apologise for the delay in dealing with Mr C's request to purchase the land in question; and

ii apologise for the delay in dealing with his and his solicitor's letters sent in November 2004.

Investigation and findings of fact

7. The investigation of this complaint involved obtaining and reading all the relevant documentation, including correspondence between Mr C and the Council,

and Mr C and the Scottish Executive Inquiry Reporters Unit (SEIRU). I have also had sight of photographs and a video provided by Mr C and a copy of the Planning Reporter's decision dated 22 June 2004 concerning the TPO. I made a written enquiry of the Council on 2 November 2005.

8. For each of the seven heads of complaint I have set out my findings of fact and conclusions below and, while I have not included in this report every detail investigated, I am satisfied that no matter of significance has been overlooked. Mr C and the Council have been given an opportunity to comment on a draft of this report.

(a) Failure to give proper consideration to his request that oak and birch trees be removed

9. On 4 April 2003 Mr C wrote to the Council asking them to take urgent action on the oak and birch trees which were growing on their property close to his home. He said that they had grown too large and shed a large amount of debris, damaged his lawn, blocked out sunlight, were noisy and caused his family to suffer from severe hay fever. He wanted the trees removed and replaced with landscaping. The Council responded on 13 May 2003, saying that they were prepared to remove a rowan and two ornamental cherry trees which they considered would prevent further damage to his lawn. They did not intend to remove the oak and birch in question as they were both covered by a TPO, although they agreed to remove any dead wood and do necessary pruning to ensure their future health and stability.

10. As this was not what he wanted, Mr C maintained his request that the trees be removed and the Council continued to remind him of the existence of the TPO. On 25 November 2003, the Head of Partnership and Planning submitted a report to the Council's Planning Board summarising the position and seeking ratification of his delegated decision to refuse Mr C's request that the trees which were subject to the TPO be removed. On consideration, the Planning Board agreed to make a site visit and this was held on 17 December 2003. Mr C was given the opportunity to attend.

11. While the site visit took place and the Planning Board viewed the trees from Mr C's property, they withdrew early because of the complainant's reluctance to

allow the Council's Project Manager – Environment on his property. The Board subsequently agreed to confirm the delegated decision to refuse consent to remove the trees and Mr C was informed on 3 February 2004. Meanwhile, on 18 December 2003, Mr C submitted a formal appeal to SEIRU to reverse the TPO. A decision was issued on 22 June 2004 allowing Mr C's appeal and granting permission for the felling of the trees but, amongst other things, it was emphasised to the complainant that the permission did not confer any right to fell the trees without the consent of the Council as landowner and owner of the trees. On 14 July 2004 Mr C sought to buy the land concerned.

12. The SEIRU's decision was conveyed to the Planning Board on 3 August 2004, who were asked to note that the Council were not obliged to remove the trees.

13. Mr C continued to lobby for the removal of the trees on the grounds that falling debris was a danger to himself and his family and, on 12 January 2005, he contacted his MSP to make representation on his behalf. The MSP wrote to and subsequently met with the Chief Executive but on 29 April 2005 the view was reiterated that, as landowners, the Council did not intend to remove the trees from the location although they would continue to monitor the trees to ensure that they are in good order. This remains the situation, despite Mr C's continued representation and the later involvement of his MP.

14. Mr C is of the view that the Council have not given proper consideration to his request but it is clear to me that over the years the Council have seriously considered his representations. The documentation I have viewed confirms this. After having the TPO reversed, Mr C thought that the way would be open for the removal of the trees and, while in principle this does allow for the trees to be felled, the fact remains that they are owned by the Council and are on their land. The Council do not consider them to be dangerous and take the view that these mature trees are of amenity value to the area in which Mr C lives. They say that they would only remove such trees in exceptional circumstances. They have specifically considered Mr C's request and have had regard to the SEIRU's decision. Site visits have been made, neighbours have been spoken to and action taken to keep the trees in good health but the Council nevertheless believe that the trees should remain. Taking all this into account, I conclude that they gave proper consideration to Mr C's request and I do not uphold the complaint.

(b) Delay in replying to Mr C's letter of 22 September 2003

15. Mr C wrote to the Council on 22 September 2003 asking them to provide him with a programme for ensuring that the area concerned was kept free of debris from the trees. He did not receive a reply until 14 November 2003, at which time the Council apologised for the delay in getting back to him. They have advised me that the time taken to respond 'perhaps exceeds ideal working practice'. I agree and, therefore, uphold this aspect of the complaint but, as the Council have already apologised for the delay, I do not recommend further action.

(c) Delay in carrying out work to remove a rowan and cherry trees

16. While looking at Mr C's specific complaints about the birch and oak trees and after a site visit to his property on 3 April 2003, Council officers agreed to 'cut down, remove and stump grind' the rowan and cherry trees at the side of his property. This was confirmed in a letter from the Parks and Cemeteries Manager on 13 May 2003, although no time scale was given. Mr C replied on 19 May 2003 asking for a date and that this be done as a matter of urgency. An instruction to carry out the work was raised on 21 May 2003 and the Council's records show that this was completed on 13 June 2003. Notwithstanding, Mr C wrote to the Council on 20 January 2004 complaining that the work had not been done. The Parks and Cemeteries Manager along with a supervisor, therefore, inspected the site but the found the work to have been completed and a letter confirming this was sent on 10 February 2004.

17. I have seen the documentation referred to and cannot conclude that there was delay in completing this work. In the circumstances, I do not uphold this complaint.

(d) Delay in dealing with Mr C's request, made on 14 July 2004, to buy the land in question

18. Subsequent to his success in having the TPO overturned, Mr C wrote to the Development and Environmental Department on 14 July 2004 requesting to purchase the area concerned so that he could take responsibility for the trees and their removal. The Council's Estates Surveyor replied on 10 September 2004, saying that the matter had been passed to him that day for attention and he went on to outline the consultation process that must be followed to establish whether the Council wish to sell the ground. The Estates Surveyor also advised that there

might be a slight delay as title deeds required to be ordered from Registers of Scotland to ascertain whether there were any burdens to prevent the sale of the ground. On 15 September 2004 Mr C was given a sale price for the land. Mr C disputed this and eventually produced a lower valuation prepared on his behalf (dated 21 October 2004) but meanwhile the Estates Surveyor wrote again on 19 October 2004 saying that the consultation process with regard to his request to buy had been completed and the officers consulted had objected. In the circumstances, he said he was unable to progress the sale.

19. Mr C felt aggrieved at the decision because he said he had been put to the expense of instructing an independent survey and wrote on 21 October 2004 requiring the names of all the officers who had objected to the sale and their reasons for doing so. The Estates Surveyor replied on 28 October 2004 referring to the consultation process and providing the information requested. He also pointed out that the appropriate Deed of Condition essentially stated that the ground should remain as open space and, while this was not an insurmountable condition, for this reason, he would nevertheless be reluctant to progress the sale. The Estates Surveyor emphasised that, as with other land transactions, the Council was not compelled to sell the ground should it not wish to do so and, given that officers unanimously agreed to retain it, he could not process his request further. In his reply of 10 November 2004, Mr C reiterated his reasons for requesting to buy the ground and asked that the decision be reconsidered. While the Estates Surveyor, in his reply of 15 November 2004, said he fully understood Mr C's reasons which he said were 'fair and valid', he nevertheless reiterated his previous decision that he could not progress the matter any further. He said that the Council did not wish to sell the land to any party.

20. Once Mr C's letter of 20 July 2004 was passed to the Council's Estates Surveyor in September, his request to purchase the land was dealt with expeditiously. However, it took nearly two months for this correspondence to be passed within the department from Planning to Estates. In replying to me, the Council have explained that, in mitigation, the officer to whom the letter was addressed initially, was suffering from workload pressure and coping with staff annual leave during the summer months. Nevertheless, I am of the opinion that this took too long, despite the holidays. I am of the view that this amounts to a service failure and I uphold the complaint. The Ombudsman recommends that the

Council apologise to Mr C for this delay.

(e) Delay in dealing with letters Mr C and his solicitor sent in November 2004

21. On 13 October 2004 an officer from Parks and Amenities contacted Mr C indicating that a further site inspection would be carried out prior to the Council confirming their decision about the removal of the trees. Mr C was keen that the visit took place within the week otherwise he threatened to take legal action.

22. The Council told me that the Commercial Manager, Parks and Amenities was the responsible officer and the final decision about the trees rested with him. However, they said the decision was difficult given the SEIRU's decision to reverse the TPO, the sensitivity of the issue and the implications for the Council both legally and in the future. Although this officer visited the location, a decision about the trees was delayed by work commitments and annual leave. Mr C wrote complaining about this on 8 November 2004 and his view was reinforced by a letter from his solicitor of 12 November 2004 but also requesting that a site visit be made within seven days. The Council said that they sought to meet this deadline but due to a combination of events (training, existing commitments and illness) it was not until about two weeks later that contact was made with Mr C to make the appropriate arrangements and an officer met with Mr C at his home on 26 November 2004. At that time, Mr C was advised that there were no plans to remove the trees and Mr C demanded written confirmation of the Council's intentions. The Council said that the matter was then discussed between those officers involved and it was agreed that, before writing formally to Mr C, the issues should be revisited to ensure that nothing else could be done and that a final decision was robust.

23. Subsequently, the officer responsible for tree advice reported that the trees involved in the dispute had been cut back by persons unknown and a letter to Mr C was further delayed while the Council sought information from local residents to establish the perpetrators. The illegal works to the trees were also reported to the police on 22 December 2004. Nothing further happened over Christmas and New Year but on 20 January 2005 the Council officer contacted the police again and then on 28 February and 21 March 2005, at which point he was advised that the investigation could go no further. It was about this time that Mr C contacted his MSP and on 30 March 2005 the Commercial Manager, Parks and Amenities

responded to the November 2004 letters and Mr C's request for formal notification of the Council's intentions with regard to the two trees.

24. In reply to my enquiries, the Council's Chief Executive admitted that there was undue delay in responding to Mr C and proffered the Council's apologies. However, she said that this was not intentional and was set against the background of the Council's careful consideration of the matter. She acknowledged that it would have been courteous of the Council to have notified Mr C during this period, advising him of the reasons for delay. I agree and I uphold the complaint. The Ombudsman recommends that the Council formally apologise to Mr C for this.

(f) Failure to reply to Mr C's solicitor's letter of 14 April 2005

25. On receipt of the Council's letter of 30 March 2005, Mr C's solicitors wrote to the Commercial Manager, Parks and Amenities on 14 April 2005 calling on the Council to alleviate, within 14 days, what Mr C considered to be the nuisance of the trees. Failing which, they said, Mr C intended to raise court proceedings. Alternatively, they said that, should the Council have some proposals to make, to submit them within the same time limits. The officer concerned consulted the Council's Legal Department for advice upon whether the letter required a reply and it was decided that because of its terms, it did not. The Council's insurers were, however, alerted to the possibility of legal action.

26. The solicitor's letter was quite unambiguous and I see no reason to criticise the Council for their decision and I do not uphold the complaint. However, I agree with the Chief Executive who in her response to me said that it would have been more courteous to have acknowledged the letter.

(g) Breach of Mr C's human rights

27. Mr C takes the view that in their dealings with him over this matter, the Council have acted in breach of his human rights. In particular, in a letter of 7 October 2003 to the Council, he said that Articles 1 and 8 of Human Rights legislation supported his view that the trees should be removed. (I assume these were references to Article 8 of the European Convention on Human Rights and Article 1 of the first protocol to that Convention. Article 8 deals with the right to respect for private and family life. Article 1 to the first protocol deals with protection of

property. The Human Rights Act 1998 incorporated into UK law most of the provisions of the European Convention, including Article 8 and the first protocol.)

28. Whether a particular action (or inaction) by a public authority constitutes a breach of human rights can only be determined by the courts. In considering this aspect of Mr C's complaint, I have looked first at whether the Council have in place appropriate general measures for considering human rights issues; and secondly whether appropriate account was taken of those issues in considering Mr C's case.

29. The Council have confirmed that they have reviewed their decision-making structure in terms of the Human Rights Act 1998 and have amended their procedures where necessary. I understand that a range of seminars to raise and maintain awareness of human rights issues have taken place and managers have received specific training on identifying such matters.

30. While the Council say that no specific file note exists, the Acting Legal Manager recalls the issue of human rights being discussed with a former Council lawyer on receipt of Mr C's letter of 7 October 2003, prior to him corresponding with Mr C about the matter of the trees. The Council maintain that their correspondence to Mr C has always been written in line with inter-departmental guidance on human rights. Article 8 and Protocol 1 protect an individual's right to enjoy their family life and home and, while the Council have considered Mr C's opinion that this is being affected detrimentally, they have taken the view that there is no evidence of a breach. They point out that Mr C's solicitors have never pursued this aspect of his complaint.

31. My concern is to establish whether the Council have procedures to ensure that human rights issues are properly considered and that this is done so appropriately. Mr C's correspondence has on occasion raised the question of his human rights and, while there is no available file note to cover the discussion that the Acting Legal Manager recalls, on balance I accept that it took place. I have also had sight of a Report to the Planning Board dated 25 November (continued to 17 December) 2003 and an internal letter from the Chief Executive dated 7 October 2004 relating to Mr C's human rights.

32. Accordingly I am satisfied that the Council properly considered this matter and I do not uphold this aspect of the complaint.

28 March 2006

Explanation of abbreviations used

Mr C	The complainant
TPO	Tree Preservation Order
SEIRU	Scottish Executive Inquiry Reporters Unit