

The Scottish Public Services Ombudsman Act 2002

Investigation Report

UNDER SECTION 15(1)(a)

SPSO

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Scottish Parliament Region: Mid Scotland and Fife

Case ref: 201301594, Fife Council

Sector: Local government

Subject: Planning; handling of application (complaints by opponents)

Summary

Mr C complained to us about the way the council handled a planning application for a development in the rear garden of a hotel next to his mother (Mrs A)'s property. Mr C raised a number of concerns about the handling of the matter by the council's planning service including issues around neighbour notification; the description of the proposed development; the need for a design statement (required for some proposed developments within conservation areas, which Mr C said applied in this case); inaccuracies in the submitted plans; and considerations about environmental health, potential noise and light pollution, and potential daylight and sunlight restrictions caused by the proposed development. He also complained that representations from the local preservation trust objecting to the proposal had been disregarded, and that the council made their decision before the statutory deadline given to the community council to respond to the planning application had passed. In addition, Mr C complained that the structure that was built was different to that for which permission was given by the council.

We took independent planning advice on this complaint. Although we found that in some cases, the council's actions had been reasonable or had been decisions that they were entitled to take in the course of their consideration of the development, there were a number of aspects to their handling of the matter that we were critical of.

We found that the council should have sought to change the applicant's description of the structure, as it did not accurately reflect the permission being sought and may have misled interested parties; they acted unreasonably in not requiring a design statement to be submitted with the application, which my planning adviser told me had major consequences for the assessment of the application; the council delayed in logging an objection received and the handling report stated that no representations had been received. This was a serious omission which also was consequential to the way in which the application was subsequently handled. We found that the council failed to complete a daylight and sunlight assessment; the development was not

properly assessed for its impact on the conservation area that applied to the location; and the decision was made prior to the end of the time allocated for statutory consultation with the community council.

In relation to Mr C's complaint that the final structure differed from what was applied for, my adviser told me that there is no specific requirement on the council in relation to how much an application can vary: this is for them to decide. However, in this case, the council failed to appropriately log the objection made, which had a knock-on effect in relation to the council's decision to treat some of the variations as minor so, on balance, I upheld Mr C's complaint about this.

In view of all of these failings, based on the advice received from my adviser, I recommended that the council should consider taking enforcement action or discontinuance under section 71 of the Town and Country Planning (Scotland) Act 1997. I also found that the council had failed to respond adequately when Mr C had raised his concerns with them.

Redress and recommendations

The Ombudsman recommends that the Council:	<i>Completion date</i>
(i) review their procedures for ensuring that properly made representations on an application are registered without delay and then taken into account for the purposes of the assessment of the application;	22 September 2015
(ii) consider whether a system to record on file all relevant details found on a site visit against a comprehensive, standard checklist should be introduced;	22 September 2015
(iii) consider the options for enforcement and/or whether it would be appropriate to pursue a section 71 discontinuance or alteration order;	20 November 2015
(iv) also take this matter into account when considering what action to take to remedy the failings we have identified in complaint (a) above. This should include Mr C's comments about the roof panels;	20 November 2015
(v) issue a written apology to Mr C for all of the failings identified in this report; and	21 August 2015

(vi) make all of the officers involved in the handling of both the application and Mr C's complaint aware of our findings.

21 August 2015

Who we are

The Scottish Public Services Ombudsman (SPSO) investigates complaints about organisations providing public services in Scotland. We are the final stage for handling complaints about the National Health Service, councils, housing associations, prisons, the Scottish Government and its agencies and departments, the Scottish Parliamentary Corporate Body, water and sewerage providers, colleges and universities and most Scottish public authorities. We normally consider complaints only after they have been through the complaints procedure of the organisation concerned. Our service is independent, impartial and free. We aim not only to provide justice for the individual, but also to share the learning from our work in order to improve the delivery of public services in Scotland.

The role of the SPSO is set out in the Scottish Public Services Ombudsman Act 2002, and this report is published in terms of section 15(1) of the Act. The Act says that, generally, reports of investigations should not name or identify individuals, so in the report the complainant is referred to as Mr C. The terms used to describe other people in the report are explained as they arise and in Annex 1.

Introduction

1. Mr C complained about Fife Council (the Council)'s handling of a planning application for a development in the rear garden of a hotel next to his mother (Mrs A)'s property. The applicants had described the structure as a 'new pergola' in the existing beer garden and planning permission had been granted for this on 27 April 2012. Mr C also complained about the Council's response to concerns he raised after the structure was built. The complaints from Mr C I have investigated are that:

- (a) the Council's handling of the application was not reasonable (*upheld*);
- (b) the Council's actions in relation to the built development were not reasonable (*upheld*); and
- (c) the Council did not respond reasonably to his correspondence and complaints about these matters (*upheld*).

Investigation

2. In order to investigate Mrs C's complaint, my complaints reviewer has reviewed the information received from Mr C and the Council. He has also obtained detailed advice from one of my planning advisers (the Adviser).

3. The work of the Ombudsman is set out in the Scottish Public Services Ombudsman (SPSO) Act 2002. Section 7(1) of this Act states that we are, 'not entitled to question the merits of a decision taken without maladministration by or on behalf of a listed authority in the exercise of a discretion vested in that authority'.

4. 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's handling of the application was not reasonable

5. Mr C raised a number of concerns about the Council's handling of the application. I will deal with each of these separately below.

Neighbour notification

6. The Council were required to issue neighbour notification notices to all owners and occupiers within 20 metres of the site. Mr C complained that although Mrs A's property bordered the site, she was not notified of the development. He referred to Section 271 of the Town and Country Planning (Scotland) Act 1997 and said that this requires that neighbour notification

should be given by personal hand delivery or pre-paid registered or recorded delivery. He said that the Council had stated that they sent the notification by second class post, but Mrs A did not receive it. He referred to an internal Council email that commented that Section 271 did not state that neighbour notification could be sent by first class post.

The Council's response

7. In their response to this aspect of Mr C's complaint, the Council said that they were satisfied that neighbour notification was carried out properly and that the notification was issued as far as they could reasonably confirm. However, they said that they had asked the relevant team to carry out a review to identify any further improvement the Council could make. The Council subsequently added a further step to the neighbour notification process. A record is now kept of the envelopes posted to neighbouring properties to evidence that the letters have been sent out. The Council have also told Mr C that any failure to notify a neighbour did not render the planning permission void, but it was open to challenge in Court.

Advice

8. We asked the Adviser if the Council's actions in relation to neighbour notification had been reasonable. In his response, the Adviser commented that the statutory duty or duty of care of the Council lies in proof of posting but not of delivery. He said that most planning authorities use a computer system to automatically generate notification letters to properties within the 20-metre limit and to process the letters for posting. He stated that this had been accepted as best practice to date by the Scottish Government and its stakeholder groups who had looked into this matter in detail.

9. We also asked the Adviser if it had been appropriate for the Council to send the neighbour notification by first or second class post. In his response, the Adviser said that Section 271 of the Town and Country Planning (Scotland) Act 1997 stated that '... any notice or other document required or authorised to be served or given under this Act may be served or given ... by ...' and subsequently listed several means of service. He stated that his view was that use of the word 'may' made it clear that it is at the discretion of the authority to use any or, indeed, none of the listed means of service, provided a reasonable alternative is used. He stated that first class post is commonly used by authorities in Scotland, although some may use second class, and that this had been confirmed by the Scottish Government.

10. The Adviser also stated that he had noted the improvements made by the Council in relation to checking the notifications issued. He said that, overall, he considered that the Council had acted reasonably in relation to neighbour notification in this case.

Description of development

11. In his complaint to us, Mr C said that the description of the development as a pergola was plainly wrong, misleading and inadequate. He said that the development was higher and larger than many houses and that the description in the application gave no idea of the height, floor area or visual intrusion of the development. He referred to the Court of Session's decision in *Cumming v Secretary of State for Scotland* (the *Cumming* case).

The Council's response

12. The Council wrote to Mrs A's representative on 3 October 2012 and said that it was quite clear what was proposed for the development, although it was accepted as a matter of good practice that the description of the proposal could have more accurately reflected what permission was being sought. They stated that a staff advice note had been drafted to re-emphasise this particular point across all the development management teams. However, in the Council's response to Mr C's complaint dated 20 March 2013, they said that the description gave fair notice of the application and did not fall foul of the principles set out in the *Cumming* case. They said that in the *Cumming* case, the Court found that the description did not fairly describe the development and give full and fair notice of the development and its characteristics. They stated that the situation was very different in this case, as the plan did not extend the development and it could be argued that the development was for a pergola as defined in the dictionary. In their response to the draft copy of this report that was sent to Mr C and the Council for comment, the Council said that there was no doubt or ambiguity about what was being proposed in the application submission. They also said that the description could have been fuller, but that the application included the plans and related documents.

Advice

13. We asked the Adviser if the Council had given full and fair notice of the application when it had notified neighbours. In his response, the Adviser said that there are no rules about how a development is to be described in a planning application. He commented that as a matter of practice, a planning

officer's first concern is to ensure that the description defines clearly how the elements of the development relate to the kind of permission that is required. He said that if they also try to improve the description from the point of view of information to interested third parties, it is likely that they can never do this satisfactorily, as a summary description will never be a substitute for the application plans and documents themselves to give all the detail in which any person might be interested. He stated that this is why the purpose of neighbour notification, and the description of development used in it, is not to provide the application details but to alert interested parties to where they can see these details. The Adviser also said that although Mr C had suggested that the description should give an idea of height, floor area or visual intrusion, he did not consider that detailed specifications of any kind should be included in the application description.

14. The Adviser also said that he agreed with the Council that the Cumming case was concerned with the legal limits of the application that had to be addressed, and not about how it was described within those limits. He stated that his view was that the use of the word 'pergola' as a description of the proposal in this case raised a different issue from that which concerned the Cumming case. He considered that the issue was whether the use of the word 'pergola' was misleading. He said that Mr C's representative had referred to a dictionary definition of a 'pergola' as a 'horizontal trellis or frameworks supported on posts that carries climbing plants and may form a covered walk'. He stated that other definitions appear to be similar and the main purpose as stated in all the sources he had seen was to support plants.

15. The Adviser stated that in his view, the use of the term pergola could well be misleading as the structure intended and built did not appear to be primarily to support plants, but to support a roof, opening or otherwise. He said that it not only gave no idea of height, floor area or visual intrusion, but it gave the impression of a function that complemented the use as a garden and not to provide shelter to benefit the use as a catering area. He stated that in his view, a description such as 'construction of a free standing, open sided roof structure over existing beer garden' would have been far more appropriate.

16. The Adviser commented that Mrs A did not receive the neighbour notification and was not actually misled by the description of the development. He also said that the one party who did object did not appear to have been misled, as they commented that the development was not a pergola. However,

Mr C indicated that the community council had been misled by the description and did not follow up their original notice of interest as a statutory consultee.

17. The Adviser then commented that in the Court of Session's decision on the Cumming case, they arrived at two conclusions concerning the requirements of an applicant's description, according to the complainant:

- it must give full and fair notice to interested parties of the permission sought; and
- it must not mislead the reader or put him off his guard.

The Adviser stated that whilst he was not entirely convinced that the first of these criteria applied in this case, he agreed that the description used did not comply with the second point. He said that he considered that the Council should have sought to change it at the outset for the purposes of notification etc and not left it as a matter for its own final assessment of the application.

18. The Adviser stated that the Council had conceded that the description 'could have more accurately reflected what permission was being sought' in their letter dated 3 October 2012. However, he said that this issue was not considered as part of the assessment carried out in the planning report. He considered that what was really meant was that it 'could have more accurately reflected what permission was being sought for'. He stated that the Council's admission was not only significant with regard to the effectiveness of all the notification and advertising procedures at the outset, but also with regard to the comprehension of the officers assessing the application at the decision end of the process.

Design statement

19. In his complaint to us, Mr C said that the applicants had not included a design statement with the application and this went unnoticed by the Council. He said that this made the decision to grant planning permission unlawful and void. He said that the site was in a conservation area and the Town and Country Planning (Development Management Procedures) (Scotland) Regulations 2008 said that any application for permission in such an area must be accompanied by a written design statement about the design principles and concepts that have been applied to the proposed development.

The Council's response

20. In the Council's response to Mr C dated 22 November 2013, they said that the Town and Country Planning (Development Management Procedures) (Scotland) Regulations gave details of situations where design statements are not required, even when that development is within a conservation area, and gave the example of where the development comprised the alteration or extension of an existing building. They said that additionally, any development at the rear of a building within any conservation area may not create a visual impact on the wider conservation area. The Council said that a design and access statement was not requested and the application had been deemed to be complete and valid. They said that they considered that adequate drawings had been submitted and that no additional detail was required. In their response to the draft copy of this report, the Council said that they did not consider that the proposal altered the existing medieval pattern of development, although they agreed that this issue could have more effectively have been brought out in their report on the application.

Advice

21. We asked the Adviser if he considered that the Council should have obtained a design statement from the applicants and if it had been unreasonable that they had failed to do so. In his response, the Adviser said that under Regulation 13 the Town and Country Planning (Development Management Procedures) (Scotland) Regulations 2008, a design statement must be submitted with an application for planning permission, where the proposed development is within a conservation area. He said that there is an exception to this where the development constitutes an alteration or extension of an existing building. However, he said that in this case it was quite clear that the exemption did not exist in view of the concern to ensure the free standing nature of the building for the purposes of avoiding a listed building consent application. He also stated that in this application, the statement was especially relevant to assess the impact of the proposed development on the character of the conservation area, as intended by the legislation. He commented that he considered that the failure to refer to the local conservation area appraisal and management plan was a serious omission from the assessment of the application. He said that this was an important Council planning document and a material consideration.

22. The Adviser commented that the local conservation area appraisal and management plan referred to the character of the area as being largely

dependent on the medieval pattern of land ownership. However, an officer from the Council who dealt with the application (the Planning Officer), had stated that any development to the rear of a building in any conservation area may not create an impact on the wider conservation area. The Adviser said that the Planning Officer's statement highlighted a lack of regard for the character of the area. He said that it was a completely unjustified statement on the basis of the statutory provisions and the policy framework at both national and local level that applied to the area. He said that this led not only to the lack of a design statement but also to the lack of appropriate assessment of the application.

23. The Adviser stated that once the requirement for a design statement had been identified, it should have covered all matters of a design nature that are relevant to the case. He said that, accordingly, he had no doubt that the assessment of the impact on residential amenity involved in this case would have benefitted greatly and would have covered a number of issues that the complainant considered were not included in the Planning Officer's report. The Adviser concluded that the Council had acted unreasonably in not requiring a design statement to be submitted with the application with major consequences for the assessment of the application. He commented that although Mr C considered that the fact that a design statement was not provided made the consent on the planning application void, this was not the case.

Inaccuracies in plans

24. Mr C also complained that the plans submitted by the applicant in support of the application were inaccurate. Firstly, they showed the development as being 13.5 metres long, when the true distance was nearly 18 metres. He commented that it overshadowed this length of Mrs A's garden. He also said that they incorrectly showed that the applicant owned part of Mrs A's garden and failed to show the side window of Mrs A's house across which the development was to be built. In addition, he said that the elevation plans submitted with the application were inaccurate.

The Council's response

25. In the Council's response to Mr C's complaint, they said that the structure had been surveyed and measured by Council officers and this had confirmed that the size of the structure and its location on site complied with the approved plans. However, they also said that there was an inaccuracy on the section elevational drawing, which resulted in the structure extending further along the garden than Mr C may have anticipated. They stated that under case law, this

did not legally invalidate the planning consent as the structure had been constructed to the approved size and position within the application site. They also said that they had assessed the relative difference in impact on Mrs A's garden and it was not considered that this would in itself have made the application unacceptable or required an amendment to reduce the length of the structure.

Advice

26. We asked the Adviser if he considered that the Council had unreasonably failed to identify inaccuracies in the plans submitted by the applicant, including the fact that they failed to show the side window in Mrs A's house. In his response, the Adviser said that the issue about the plans incorrectly showing that the applicant owned part of Mrs A's garden was a matter for civil action for the property owner in the event that the development affected the land concerned. He said that this was not normally a material planning consideration. However, had this been pointed out to the Council prior to the determination of the application, they would have been in a position to seek clarification from the applicant with regard to the completion of the ownership certificates. He commented that otherwise, there was no action the Council could take.

27. The Adviser also said that he considered that the case law referred to by the Council was not relevant to the situation, other than the misguided belief that it supported the view that the development as built was not unlawful, unless and until successfully challenged in court. He said that this was of course partly true, but the question of whether or not enforcement action should be taken must also be addressed. The Adviser said that this was a discretionary judgement for the Council. He said that the Council's comments on the matter confirmed that they were effectively making a judgement that any variation from the approved plans is not material in their view to the outcome intended by the plans that were approved. He stated that as things stood, they were not intending to take enforcement action and this was a position that the Council were entitled to adopt.

28. The Adviser also said that the absence of the window in the gable of Mrs A's property from the plans by the architect was regrettable. He commented that it may have been intended only to show the outline of Mrs A's building for positional context and this was common practice for such a sectional plan. However, he said that it was misleading to refer to it as an

elevational plan, as it did not provide the full elevational detail of Mrs A's property. It also omitted the window.

29. That said, the Adviser stated that the Council's acceptance of the plans without this information was not, in his view, unreasonable. He stated that the plans often did not contain all relevant information concerning surrounding property and it is one purpose of a site visit to confirm the key features of the existing site and surroundings. The Adviser said that he would have expected the window to have been noticed at this stage, but there is no record of it other than the later statement by the Planning Officer that the window was noticed. The Adviser also said that he did not consider that the Council acted unreasonably in not seeking amendment to the plan in respect of this window. However, he commented that it was not clear that the position of the window was noted during the site visit and it would be better if the Council were to consider a system to record on file all relevant details found on a site visit against a comprehensive, standard checklist.

Environmental Health consultation

30. Mr C complained that the Council failed to consider the increase in noise that would result from the development and that they failed to consult their Environmental Health Service in relation to this. He said that it was obvious that the erection of a roof over a beer garden would increase the outdoor activities and bring about a serious increase in noise problems. He said that the shape of the structure would also have increased the noise problems. In addition, he said that the structure was causing serious light pollution.

The Council's response

31. In response to Mr C's complaint, the Council told him that all matters relating to residential amenity including noise, lights and general disturbance from the pre-existing beer garden activity are controlled effectively through the licensing of the premises and this would relate to any implications arising from the use of the area resulting from the new structure.

Advice

32. We asked the Adviser if the Council should have consulted their Environmental Health Service in relation to noise and light pollution. In his response, the Adviser said that the application was for a building and not for a change of use. He said that to an extent, the Council could have anticipated a possible material change in the existing use, such as intensification, and dealt

with it in the terms of any conditions attached to the permission. However, he commented that this may not have been so predictable as suggested and, in the light of developments since the grant of permission, there may yet be an issue that a material change of use has taken place without permission and that enforcement action may be justified.

33. The Adviser also commented that on 23 March 2012, following receipt of the application, the Planning Officer made enquiries with the applicant's agent to clarify the need for change of use. The response stated that:

'The external garden area has been used as a 'beer garden' for a period in excess of 10 years. The area is shown on the Premises Licence Layout Plan (copy attached) as an 'outdoor / external drinking area' and this is referred to in the Premises licence document (copy attached) on page 10.

Indeed I did speak to [Officer 1] regarding this matter last August and at that time we were confident that a 'change of use' would not be required.

The applicant has made available to me the full set of licensing documents for your information. Perhaps these should not be readily made public if that is possible.'

34. The Adviser said that on the basis of the response to the Planning Officer's enquiry, she clearly took the view that there was an existing lawful use for a licensed beer garden controlled for the purposes of the Licensing Scotland Act. He also commented that there was no evidence of heaters and lighting details in the application documents at the time of submission to provide a clue to the proposed nature of use, although these clearly appeared with the development. He said that it seemed to him that the enquiries made could have been more searching and that it would have taken little imagination to have anticipated that the expense of covering the area would only be justified through greater use of the area at times when the added shelter would be of most benefit and especially at night. However, he also said that there was clear evidence that consideration was given to the need for a change of use application and that it was dismissed. The Adviser stated that consultation with the Environmental Health Service was not a statutory requirement and concluded that, based on the above, it had not been necessary.

Planning, licensing and residential amenity

35. In his complaint to us, Mr C said that he disagreed with the Council's comments that it was for the licensing board and not the planning department to control the noise and light pollution caused by the structure.

The Council's response

36. In the Council's letter to Mr C dated 11 December 2013, they stated that, as he would be aware, all matters relating to residential amenity including noise, lights and general disturbance from the pre-existing beer garden activity are controlled effectively through the licensing of the premises. They said that this would relate to any implications arising from the use of the area resulting from the new structure. They stated that the licensing board can impose use restrictions and other measures to mitigate any potentially detrimental residential amenity issues arising from the use of the structure or the beer garden.

Advice

37. We asked the Adviser if it had been appropriate for the Council to say that all matters relating to residential amenity including noise, lights and general disturbance from the beer garden are effectively controlled through licensing. In his response, he said that the Council had not stated that it was not for the planning department to consider these issues. He commented that it may have been that the planning department were not inclined to apply planning conditions on the basis of the superficial consideration of amenity impact but, in the event, it may yet be a matter for them to consider whether there has been a material change of use, based on the impact on residential amenity.

Representations from local Preservation Trust

38. The Council received an objection to the application from the local Preservation Trust on 6 April 2012. This stated that they objected to the design of the structure and that it was not a pergola. However, the Planning Officer's handling report on the application, which was completed on 23 April 2012, stated that no representations had been received. The objection was not uploaded to the online case file until 26 April 2012 and planning permission was then granted for the application on 27 April 2012.

The Council's response

39. In their response to Mr C dated 13 November 2012, the Council said that the response from the Preservation Trust had not been referred to in the

Council's report on the application. They stated that this was unfortunate, but the specific issues the Preservation Trust had raised in relation to design were considered by the Planning Officer in the assessment of the proposal.

Advice

40. We asked the Adviser if he considered that there was evidence that the representations received from the Preservation Trust had been taken into account. In his response, he said that he considered that it was significant that the Planning Officer's report had stated that no representations had been received. He said that any representations from them, as a local civic amenity body of long standing, would carry some weight and should be specifically assessed in a case such as this. He stated that had the representations been logged timeously, the report would have addressed them and might have attracted the attention of senior officers or elected members who were in a position to ensure further consideration. He said that in the event of no objections at all being reported, the recommended decision was unlikely to have been scrutinised in any depth.

41. In relation to the content of the representations from the Preservation Trust, the Adviser commented that the Council's report on the application referred to an existing timber fence which, 'by virtue of its height, will further reduce the impact of the proposal on neighbouring properties in terms of visual amenity, and will reduce the impact of the proposal on the wider public view of the Conservation Area.' He said that this was not the impression he had gained from the file photos of the garden and the pergola that had previously been in place, as the statement appeared to make no allowance for the high pitch of the proposed pergola compared with the existing one. He said that the Council's statement was directly opposite to what the Preservation Trust were suggesting. He also said that it was contradictory to the view later expressed by the Planning Officer that there was no public view of the conservation area, as far as land behind the street frontage was concerned. He stated that it was clear, therefore, that the Preservation Trust's representations were not considered. He commented that had they been considered, they could have influenced the assessment at least by raising questions over the interpretation given in the report as it stood.

42. The Adviser said that, in his view, the Council's delay in the logging of the objection from the Preservation Trust was especially serious, not just for what it stated, but for the principle of introducing an objection into the assessment.

Height of structure and daylight/sunlight guidelines

43. In his complaint to us, Mr C said that the Planning Officer who considered the application failed to properly consider the plans and notice that the structure was nearly four foot higher than the garden wall on the boundary of his property. He also said that the Council failed to follow their policy on overshadowing, 'Fife Council Daylight and Sunlight Planning Customer Guidelines'.

The Council's response

44. Mr C said that the Council initially ignored his comments about overshadowing when he raised them. However, in her response to him dated 22 November 2013, the Planning Officer stated that whilst the planning report did not refer to overshadowing and loss of light specifically, she had assessed this at the site. She said that there had been an existing impact on sunlight to the rear of the garden caused by the existing stone boundary wall. She said that the proposed pergola, as detailed on the submitted plans, was open along the east elevation. She stated that when she was at the site, she did not conclude that the proposal would create any unacceptable additional overshadowing and did not result in an unacceptable loss of daylight.

Advice

45. We asked the Adviser if a daylight and sunlight assessment should have been completed and if this should have been addressed in the planning report. In his response, the Adviser said that the height of the structure at its highest point was clear from the one of the cross sections the applicants had provided. He said that it clearly extended significantly above the existing boundary wall, the top of which is indicated specifically by annotation on the plan. He said that the suggested height difference of three feet and nine inches did not appear to have been disputed by the Council. However, this height difference was not referred to explicitly or implicitly in the Council's planning report. This briefly considered possible issues of privacy and disturbance (noise etc) under the heading of residential amenity, but did not consider daylight/sunlight or overshadowing.

46. The Adviser said that this suggested that such issues may have been missed due to the impression given by the illustration of a pergola from the supplier's catalogue and from the height of the existing pergola, that the new structure did not protrude above the top of the wall. He agreed with Mr C that

the retrospective explanation by the Council that the height was noted, but not considered significant to the question of overshadowing in view of the open sided nature, was quite implausible if a professional assessment of the plans submitted had been carried out.

47. The Adviser said that he had considered the Fife Council Daylight and Sunlight Planning Customer Guidelines. He stated that he had no doubt that a proper assessment should have been carried out by the applicant and submitted with the application.

Conservation area status

48. In his complaint to us, Mr C said that the Council had failed to explain how permission for the structure could have been granted in an outstanding conservation area. He said that the fact that it was away from public viewpoints was irrelevant, and they should have taken Mrs A's viewpoint into account. In addition, he stated that they had failed to take account of sections 59(1) and 64(2) of the Planning (Listed Building and Conservation Areas) (Scotland) Act 1997.

The Council's response

49. In their response to his complaint, the Council said that they considered that the development was properly assessed in relation to the conservation area status. They stated that the proposal was located at the rear, away from public viewpoints, although it was accepted that parts of the proposed structure were visible from Mrs A's garden.

Advice

50. We asked the Adviser if he considered that the Council had failed to assess the development in relation to the conservation area status. In his response, the Adviser said that Mr C had referred to the site as being at the heart of the outstanding conservation area. He said that the status of a conservation area as outstanding no longer existed. However, he commented that, as stated above, the local conservation area appraisal and management plan was an important Council planning document and a serious omission from the assessment of this application. He said that it was a material consideration for the purposes of sections 25 and 37 of the Town and Country Planning (Scotland) Act 1997, which should carry significant weight.

51. The Adviser commented that the local conservation area appraisal and management plan contained a number of comments about the 'hidden gardens' and stone walls and pends which define the medieval pattern of land ownership in the area and which had largely been preserved. He considered that this contradicted any suggestion that the areas behind the street frontage were automatically less significant for the assessment in terms of section 61 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.

52. The Adviser stated that under the circumstances, he was of the view that the impact of the development was not properly assessed for its impact on the conservation area.

53. The Adviser then considered Mr C's complaint that the decision was unlawful, as it did not assess the application for its impact on the preservation of the setting of the listed buildings in the area for the purposes of section 59(1) of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 or for its impact on preserving and enhancing the conservation area for the purposes of section 64(2) of this act. He said that the planning report did specifically refer to these duties under the heading of 'Design and Visual Amenity', which was one of the three general determining issues identified in the report for the decision on the application. He commented that they had confirmed the policy framework that conveyed this statutory aim. The report then assessed the case based on the (disputed) assumption that 'the existing timber fence by virtue of its height will further reduce the impact of the proposal on neighbouring properties in terms of visual amenity, and will reduce the impact of the proposal on the wider public view of the Conservation Area'. It also stated that, 'it is considered that the design, scale, proportions and finishes are acceptable as they do not dominate the site and are sited to the rear of property. Therefore there would not be any detrimental impact upon the appearance of the Listed Building'. The Adviser stated that whilst it cannot be said that the Council failed in the duty imposed under these sections of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, the assessment itself was flawed.

Premature decision

54. In his complaint, Mr C said that the Council had written to the local community council on 23 April 2012 and had asked for their comments on the application within 14 days. This allowed them to 7 May 2012 to respond. However, a decision was then made on the application on 26 April 2012.

The Council's response

55. In the Council's response to Mr C's complaint dated 22 November 2013, they said that the consultation period for the community council had ended on 7 May 2012 and no correspondence had been received from them within that period.

Advice

56. We asked the Adviser if he agreed that the Council had reached a decision on the application prior to the expiry of the statutory consultation period. In his response, the Adviser said that he agreed that the Council was not legally entitled to determine the application prior to 7 May 2012, the time allocated for statutory consultations with the community council.

57. We asked the Adviser what he considered the consequence of these failings to be and what action he considered the Council should take to remedy them. In his response, the Adviser said that although the community council had not responded to the consultation, the fact that a final decision was made prematurely meant that the objection received from the Preservation Trust was not taken into account.

(a) Decision

58. The advice I have received is that the action taken by the Council in relation to neighbour notification was reasonable. There was also evidence that consideration was given to the need for a change of use application and this was dismissed. Consultation with the Environmental Health Service was not a statutory requirement and had not been necessary.

59. However, the Council should have sought to change the description of the development at the outset in order to ensure that interested parties were not misled when they were notified of the application. The Council also acted unreasonably in not requiring a design statement to be submitted with the application. This had major consequences for the assessment of the application. The Council should have noted the position of the side window on Mrs A's house when a visit was made to the site. They also failed to log and consider the only objection to the application received. In addition, they failed to ensure that a daylight and sunlight assessment was carried out and the impact of the development was not properly assessed for its impact on the conservation area. Whilst the Council had taken account of sections 59(1) and

64(2) of the Planning (Listed Building and Conservation Areas) (Scotland) Act 1997, the assessment carried out was flawed. Finally, the Council had reached a decision on the application prior to the expiry of the statutory consultation period. In view of all of these failings, I have upheld Mr C's complaint.

60. In his complaint to us, Mr C said that he considered it would be possible for the Council to serve a Notice of Discontinuance on the development. We asked the Adviser for his comments on this. In his response, he said that the only way in which a planning authority can seek environmental improvement through intervention over an existing authorised use or development, is by using section 71 of the Town and Country Planning (Scotland) Act 1997. This deals with the power to make a discontinuance order that may also be used for partial discontinuance of use, or for removal or alteration of a structure. He said that they could only do this if, in the first place, they could justify the terms of the discontinuance order as expedient for the proper planning of the area, having regard to the provisions of the development plan and of any material planning considerations. He stated that the discontinuance order must be confirmed by Scottish Ministers after any parties with an interest have been given the chance to object and be heard. The Adviser also commented that compensation may be payable to the owner in the event of an order for removal of the structure.

61. That said, the Adviser said that whilst he agreed that there was a realistic expectation that a discontinuance or alteration order may be considered, he stressed that a Notice of Discontinuance is a discretionary matter for the Council, having regard to the development plan and material planning considerations. However, he said that he had noted that on 23 October 2013, the Council's area committee had considered a motion to proceed with the option of seeking a discontinuance order. They had then agreed 'to encourage and support the aggrieved neighbour to take their case to SPSO', and thereafter 'to consider a report detailing the outcome of any submission to the SPSO at a subsequent meeting'

62. The Adviser commented the options facing the Council might include:

- taking no action and leaving the existing permission in place;
- taking enforcement action against intensification of the use of the property as a beer garden in view of increased noise and levels of disturbance, especially later in the evening;
- pursuing a section 71 discontinuance order for the entire development;

- pursuing an section 71 alteration order for lowering of the roof; or
- considering a combination of the above, possibly subject to conditions restricting the hours of use, the use of lighting or other matters.

Although the decision on what action to take on the matter is for the Council and not the Ombudsman, in light of the number of failings I have identified in this case, I am recommending that the Council consider the options for enforcement and/or whether it would be appropriate to pursue a section 71 discontinuance or alteration order.

(a) Recommendations

63. I recommend that the Council:	<i>Completion date</i>
(i) review their procedures for ensuring that properly made representations on an application are registered without delay and then taken into account for the purposes of the assessment of the application;	22 September 2015
(ii) consider whether a system to record on file all relevant details found on a site visit against a comprehensive, standard checklist should be introduced; and	22 September 2015
(iii) consider the options for enforcement and/or whether it would be appropriate to pursue a section 71 discontinuance or alteration order.	20 November 2015

(b) The Council's actions in relation to the built development were not reasonable

64. Mr C also said that the structure that was built was very different from the structure for which permission was given. He stated that Mrs A raised this with the Council, but they initially dismissed them as minor differences in detailing. However, they then asked the applicant to remove some of them. Mr C also said that whilst the planning permission permitted only a wooden and canvas structure, the structure that was built included a motor powering the retractable roof; metal or plastic panels on the roof; electrical boxes; cables; electric heaters; and a large number of light bulbs. However, he said that the Council decided that some of these were non material variations.

65. Mr C also said that the Council had failed to take into account the views of interested parties in relation to the numerous discrepancies between the

permission granted and the structure built. He stated that although they had attempted to justify their conduct by stating that there was no requirement to consult with neighbours in relation to non material variations, they should have been aware of Scottish Development Department (SDD) Circular 37/1986 (the Circular) which stated that the Secretary of State wishes authorities to consider giving those who have made representations on the original application an opportunity to comment on any subsequent application for non material variation, especially if their representations are relevant to the proposed variation requested. The Circular also states that authorities should consider consulting and taking account of comments in cases where a proposed variation seems likely to be of concern to neighbours or other third parties.

The Council's response

66. The Council wrote to the architect involved in the project on 22 March 2013. They said that:

'I confirm therefore that in terms of the alterations proposed and installed on the approved pergola, namely the electric motors and the down pipes I am prepared to accept these as non material variations to the above consent and no further action will be taken. In all other respects, following the removal of the apron skirts and the connection to the main building, the proposal has been constructed to comply with the approved plans.'

67. The Council also wrote to Mr C and said that there was no requirement to prepare a separate report in relation to a non material variation and there was no requirement in law for the Council to notify any previous objector that an application for a non material variation has been received. However, they also told him that they would review the current internal guidance on non material variations and make this available to all parties. In addition, they said that reference required to be made to the relevant legislation, the Circular and also precedent and established practice. In their response to the draft copy of this report that was sent to Mr C and the Council, the Council said that they had contacted the Scottish Government to check the status of the Circular, but the Government were not clear as to the relevance of the Circular. They also said that they have introduced a more comprehensive set of guidelines on non material variations following on from Mr C's complaint.

Advice

68. We asked the Adviser if he considered that it had been reasonable to decide that some of the variations were non material. In his response, he said

that the parameters for considering non material variations are often dictated at this level of detail by the history of the application, especially the extent to which it attracted objections from consultees or third parties. He said that he would not have criticised the Council for treating any submissions for the matters listed as non material variations in the absence of any objections. However, in this case, an objection had been received, but the Council had failed to log this and to take it into account in the planning report. The Adviser said that the nature of the variations should, therefore, be one of the factors taken into account when the Council is considering the options for enforcement and/or whether it would be appropriate to pursue a section 71 discontinuance order or alteration.

69. We also asked the Adviser what the status of the Circular was. In his response, the Adviser said that it is not at all clear when certain circulars lapse, without a statement to the effect, which is sometimes included in subsequent instruments. He said that in this case, the Circular was published to accompany the implementation of new statutory provisions that related to Scotland under the UK Planning and Housing Act 1986. The Adviser said that these have now been entirely superseded in Scotland, but the guidance on the matter of variations is not affected by material change to the provisions now in force. He said that he, therefore, considered that the Circular was still relevant as advice on good practice, if not definitive government policy. He also said that it should be borne in mind that the Scottish Government has stringently reduced the amount of administrative guidance on the implementation of statutes in recent years as a matter of its policy for simplifying the Scottish planning system.

70. Finally, we asked the Adviser for his comments on the Council's actions in relation to enforcement. In his response, the Adviser said that enforcement action is a discretionary power for the Council under section 127 or section 145 of the Town and Country Planning (Scotland) Act 1997. He commented that it is best practice according to government guidance and the government's template for statutory planning enforcement charters that, if action is to be pursued, the owner is afforded the opportunity first of all to make a planning application or suitable application for approval to remedy the breach. He commented that this may take time. However, he said that greater urgency is encouraged towards formal action where there is a situation involving significant harm to local amenity, but that heavy handedness towards small businesses is also to be avoided.

71. The Adviser commented that it appeared that the informal approach did eventually lead to the removal of plastic side panels that were initially part of the development. He stated that he did not consider that there had been undue delay by the Council in the action taken in relation to the side panels. He stated that he could see no grounds for maladministration on that count. However, in his response to the draft report, Mr C stated that the Council had not taken any action on the roof panels. The Adviser also stated that the overall question of intensification of use was an outstanding matter that the Council could yet address. As stated above, he said that taking enforcement action against intensification of the use of the property as a beer garden in view of increased noise and levels of disturbance, especially in the evening, was an option that the Council could still consider.

(b) Decision

72. Whilst the advice I have received is that it is good practice not to accept non material variations where there have been related objections previously and to require full planning applications with the opportunity for consultation and notification, there is no specific requirement for the Council to do so. That said, I have also received advice that the Council's failure to appropriately log the objection to the application from the local Preservation Trust had a significant knock on effect in relation to the Council's decision to treat some of the variations as non material. In view of this failing, I have also upheld this aspect of Mr C's complaint.

(b) Recommendation

73. I recommend that the Council:	<i>Completion date</i>
(i) also take this matter into account when considering what action to take to remedy the failings we have identified in complaint (a). This should include Mr C's comments about the roof panels.	20 November 2015

(c) The Council did not respond reasonably to his correspondence and complaints about these matters

74. Mr C also complained to us about the Council's response to the complaints. He said that the development was very different from the structure for which permission was given and that the Council had refused to exercise their powers. He said that he considered that the Council's handling of the complaints had been disgraceful. I have referred to the most relevant parts of the Council's responses to Mr C above.

(c) Decision

75. Having carefully considered the matter, I do not consider that the Council adequately investigated or provided satisfactory responses to some of the issues that Mr C raised and that I have considered above. I also consider that the Council failed to explore how the problems could be remedied. In view of this, I have also upheld Mr C's complaint that the Council did not respond reasonably to his correspondence and complaints.

(c) Recommendations

	<i>Completion date</i>
76. I recommend that the Council:	
(i) issue a written apology to Mr C for all of the failings identified in this report; and	21 August 2015
(ii) make all of the officers involved in the handling of both the application and Mr C's complaint aware of our findings.	21 August 2015

77. The Council have accepted the recommendations and will act on them accordingly. We will follow-up on these recommendations. The Council are asked to inform us of the steps that have been taken to implement these recommendations by the date specified. We will expect evidence (including supporting documentation) that appropriate action has been taken before we can confirm that the recommendations have been implemented.

Explanation of abbreviations used

Mr C	the complainant
the Council	Fife Council
Mrs A	the aggrieved, Mr C's mother
the Adviser	the Ombudsman's planning adviser
the Planning Officer	The planning officer from the Council who dealt with the application
Officer 1	an officer from the Council
the Cumming case	Court of Session's decision in Cumming v Secretary of State for Scotland
The Circular	Scottish Development Department (SDD) Circular 37/1986

List of legislation and policies considered

The Scottish Public Services Ombudsman (SPSO) Act 2002

Town and Country Planning (Scotland) Act 1997 (as amended)

The Town and Country Planning (Development Management Procedure)
(Scotland) Regulations 2008

Fife Council Daylight and Sunlight Planning Customer Guidelines

The Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

Scottish Development Department (SDD) Circular 37/1986