TYNWALD COMMISSIONER FOR ADMINISTRATION

Report on a Complaint made against the

Department of the Environment, Food and Agriculture

Case TCA1801

Complaint

1 Mr H, and his daughter Ms H acting on his behalf and with his authorisation, complained that the Department of the Environment, Food & Agriculture had persistently failed to take enforcement action in respect of a breach of planning control, consisting of the erection of two houses adjoining his property some 1.2 metres higher than had been authorised, despite reporting the matter as the building progressed. For simplicity, I shall normally refer to the complainant as Mr H, although matters have increasingly been dealt with by his daughter as time progressed and she sought to relieve her father of stress.

Legislation

2 The area of complaint is governed by the Town and Country Planning Act 1999 ('the Act') and by the Town and Country Planning (Development Procedure) (No 2) Order 2013 ('the Development Procedure Order').

3 Section 23 of the Act provides:

> (2) Any person who commences or carries out any development in breach of planning control is guilty of an offence and liable on summary conviction to a fine not exceeding £5,000.[1]
>
> (3) Subsection (2) is without prejudice to any other means of enforcing planning control in accordance with this Part.

4 Section 25 of the Act provides:

> (1) Where it appears to the Department that there may have been a breach of planning control in respect of any land, it may serve notice on —
>
> (a) any person who is the owner or occupier of the land, or has any other interest in it; or
>
> (b) any person who is carrying out any operations on the land or is using it for any purpose,
>
> requiring him to give to the Department in writing such information as to —
>
> (i) any operations being carried out on the land, any use of the land and any activities being carried out on the land; and
>
> (ii) any matter relating to the conditions subject to which any planning approval in respect of the land has been granted,
>
> as may be specified in the notice.
>
> . . .

[1] As at the relevant time.

(3) If, at any time after the end of 21 days beginning with the date on which a notice under this section is served on any person, he has without reasonable excuse failed to comply with any requirement of the notice, he is guilty of an offence and liable on summary conviction to a fine not exceeding £2,500.

5 Section 26 of the Act provides:

(1) Parts 1 and 2 of Schedule 4 have effect with respect to the issue of, and appeals against, enforcement notices.

(2) Where, at any time after the end of the period for compliance with an enforcement notice —

(a) any steps required by the notice to be taken have not been taken, or

(b) any activity required by the notice to cease is being carried on,

the person who is then the owner of the land to which the notice relates is guilty of an offence.

(3) Where, at any time after the end of the period for compliance with an enforcement notice, a person who has control of or an interest in land to which the notice relates (other than the owner) —

(a) carries on on the land any activity required by the notice to cease, or

(b) causes or permits any such activity to be carried on on the land,

he is guilty of an offence.

(4) A person who is guilty of an offence under subsection (2) or (3) is liable —

(a) on summary conviction, to a fine not exceeding £20,000, or

(b) on conviction on information, to a fine;

and in determining the amount of any fine to be imposed on a person convicted of such an offence, the court shall, in particular, have regard to any financial benefit which has accrued or appears likely to accrue to him in consequence of the offence.

6 Section 27 of the Act provides:

(1) Where the Department —

(a) issues or has issued an enforcement notice in respect of a breach of planning control on any land, and

(b) considers it expedient to prevent the carrying on on the land of —

(i) any activity specified in the enforcement notice as an activity which the Department requires to cease, and

(ii) any activity carried on as part of, or associated with, that activity,

it may, at any time before the expiry of the period for compliance with the notice, serve on any person appearing to it to have an interest in the land or to be engaged in the activity in question a notice (a "**stop notice**") prohibiting the carrying on of that activity on the land or on any part of it specified in the notice.

……

(6) If any person contravenes a stop notice —
(a) after the stop notice was served on him, or
(b) after a site notice has been displayed,
he is guilty of an offence.
……..
(8) A person guilty of an offence under subsection (6) or (7) is liable —
(a) on summary conviction, to custody for a term not exceeding 6 months, or to a fine not exceeding £5,000, or to both; or
(b) on conviction on information, to custody for a term not exceeding 2 years, or to a fine, or to both.

7 Section 38 of the Act provides:

(1) Proceedings for an offence under this Act shall not be instituted except by or with the consent of a relevant Department or the Attorney General.

8 Schedule 4 to the Act provides:

1. Where it appears to the Department that any development is being or has been carried out in breach of planning control, it may, if it considers it expedient to do so having regard to the provisions of the development plan and to any other material considerations, issue a notice (an "**enforcement notice**") —

(a) specifying the matter which is alleged to constitute a breach of planning control;
(b) specifying the grounds on which it is alleged to constitute a breach of planning control;
(c) requiring such steps as may be specified in the notice to be taken in order to remedy the breach —
(i) by making the development comply with the terms (including conditions) of any planning approval which has been granted in respect of the land;
(ii) by discontinuing any use of the land;
(iii) by restoring the land to its condition before the breach took place;
or in order to remedy any injury to amenity which has been caused by the breach.

2. (1) An enforcement notice shall specify the period by the end of which any steps are required to have been taken or any activities are required to have ceased, and may specify different periods for different steps or activities.
(2) References in this Act to the period for compliance with an enforcement notice, in relation to any step or activity, are to the period by the end of which the step is required to have been taken or the activity to have ceased.

…

10. (1) Any person having an interest in the land to which an enforcement notice relates may, at any time before it takes effect in relation to him, appeal to the High Bailiff against the notice on any of the following grounds —

(a) that the matters alleged in the notice do not constitute a breach of planning control;

(b) that the breach of planning control alleged in the notice has not taken place;

. . .

(3) Where an appeal is brought against an enforcement notice, the notice is of no effect pending the final determination or the withdrawal of the appeal.

(4) The validity of an enforcement notice shall not, except by way of an appeal under this paragraph, be questioned in any proceedings whatever on any of the grounds on which such an appeal may be brought.

9 The Development Procedure Order makes provision for applications for, and grants of, planning permission and for appeals against refusals of planning permission.

Delegations

10 The powers of the Department conferred by statute are vested in the Minister. It would clearly be impracticable for the Minister to exercise these powers personally in every case and, accordingly, instruments of delegation are used to empower named officers to do so on the Minister's behalf.

11 In this case, the delegations I have seen were firstly to officer A, a senior planning officer, dated 1 June 2017 authorising that officer "to exercise the functions of the Department relating to Planning Enforcement specified in the Schedule to this authorisation". The Schedule is expressed in broad terms specifying "The functions of the Department, whether created by statute or otherwise, in connection with Planning including the powers, duties and responsibilities of the Department arising from those functions".

12 Further precision is given to the delegation to officer A to include "power to determine whether or not a planning application is required to be submitted in specific circumstances", "power to sign enforcement notices", "power to sign stop notices", and of particular importance in the context of this case:

(g) power to exercise the functions of the Department under the Town and Country Planning Act 1999, of whether in specific circumstances, an enforcement notice should be issued by the Department; and

(h) power to determine whether in respect of unauthorised building operations undertaken within the four year period preceding a written request, there should be issued a letter on behalf of the Department indicating that, in terms of section 26 of the Town and Country Planning Act 1999, an enforcement notice will not be served, and the issue of such a letter.

13 The second delegation is to officer X, the Head of Development Management, and is dated 19 June 2017 and authorises that officer "to exercise the functions of the Department relating to planning in the Schedule to this authorisation". The Schedule contains the same provisions as those noted in the case of officer A, together with extensive powers relating to internal management functions in the Department.

Operational Policy

14 The Department's various powers and discretions relating to planning enforcement involve discretion and professional judgment as to their use and these, approved at the political level, are published in a document entitled "Planning Enforcement Policy". It is these criteria that were required to inform the exercise of the powers delegated to officers A and X.

15 The basic policy objective is stated as follows:

> This policy document enables the function to be carried out in an equitable, practical and consistent manner and clarifies the process for all its 'users'.
>
> **Aims and Objectives**
>
> One of the strategic aims of Government is to 'maintain and build on the high quality of life enjoyed by the Island's community.' The Planning and Building Control Directorate seek to fulfil this aim through effective town and country planning, by enabling sustainable growth whilst protecting the built and natural environment. It seeks to manage development in the public interest and protect general amenity.

16 After noting the various enforcement powers described above, the document goes on to describe how it is intended that they are to be used. The details are prefaced by the warning that "The objective of the enforcement function is compliance and not punishment." Thus:

> "When a breach is established, officers will first seek compliance through negotiation and only resort to formal action when all other routes have been exhausted. It will be normal to allow for a retrospective application to be submitted to regularise the development. Retrospective applications will be dealt with on their planning merits. The applicant will neither gain advantage nor be disadvantaged by the fact that the application is retrospective.".

17 Continuing on the theme of retrospective applications where breaches have occurred, the policy document states:

> "In many cases it is appropriate to allow for the submission of a retrospective application, and allow time for a subsequent appeal before issuing an enforcement notice. Consequently, some cases may take a few months, or longer, to reach a conclusion. If an enforcement notice is served, a reasonable time must be given for compliance.".

18 There are then described three levels of priority in regard to enforcement action, and to judge its urgency:

> Type 1
> Development that results in serious harm to amenities and/or policies of the Strategic or Local Plan and where failure to remedy may set an undesirable precedent for the future.
> Development that could result in irreversible harm, e.g. to a Registered Building. Wherever possible all high priority (Type 1) developments will be visited on the day of receiving the complaint.
> Type 2
> Development that is unlikely to receive approval without significant modification.
> Development that results in widespread harm to amenities.
> Type 3
> Development that only has a localised impact.
> Development that falls outside of the above priorities.

Departmental complaints

19 While this policy document relating to the enforcement of planning control envisages complaints of breaches of planning law being made to the Department, the Department also has a published complaints procedure appropriate to each of its areas of responsibility. In the current version, it provides in relation to planning matters:

> 1. If you are not provided with the standard of service you expect, please let the Department Officer you are dealing with know. This might enable the complaint to be dealt with 'on the spot'.
> 2. If you fail to get satisfaction, please put your complaint in writing, if possible, to the Directorate you are dealing with. If you prefer, you may telephone or, alternatively, a meeting could be arranged.
> 3. We will aim to let you know how your complaint is being dealt with within seven working days of receipt of your letter.
> 4. If you still feel dissatisfied, you may write to the Chief Executive at the address below. He will aim to review your complaint and how it has been managed and will contact you within seven working days.
> All problems and concerns are taken seriously and everything reasonable will be done to resolve your complaint. The Department of Environment, Food and Agriculture welcomes comments and feedback at any time.

There is no cross reference here, or in the approved policy for planning enforcement, to explain how the very tight timetable for dealing with departmental complaints relates to the potentially extended timetable laid down in relation to enforcement action.

The planning permission

20 The planning permission leading to the contested development was given, after consideration by the Planning Committee, on 18 July 2016 "for the erection of two dwellings with on-site parking at . . . subject to compliance with the following conditions". There followed the usual requirement to commence work within four years; then, an additional condition was imposed:

> Notwithstanding the provisions of the Town and Country Planning (Permitted Development) (No 2) Order 2012 . . . no extension, enlargement or other alteration of the dwelling(s) hereby approved, other than that expressly authorised by this approval, shall be carried out without the prior written approval of the Department.

The drawings and letter accompanying the application were identified. Mr H was duly notified.

21 In the application for planning approval, it had been stated that the proposal did not involve a change in site levels. Mr H had not objected in principle to the proposed development but had urged that the front and rear building lines of the existing properties should maintained for the new houses, as had been done in a previous approval in July 2009. (The construction of the houses is regulated under both planning legislation, the subject of this complaint, and Building Control; the following two paragraphs relate to Building Control and provide context, but are not the subject of this complaint.)

22 Before building work could commence, two garages on the site had to be demolished; they were in fact demolished a month before the planning approval was granted, and without the developer giving the required Notice of Intention to Demolish to the Department. On 20 July 2016, Mr H complained to the Department about this and said:

> I feel that, given the developer's apparent disregard for procedural and health safety matters to date, I should place [details of the demolition and its effects on Mr H's property] on record. I am concerned that if the redevelopment of the site is a continuation of the same approach then the safety of the occupants of, and visitors to, my house may be put at risk and the likelihood of further damage to my property is high.

23 In a response to this complaint dated 3 August 2016, the Department acknowledged that one of the buildings demolished was of a size to require a notification and that none had been received. There had been a breach of the law but, after reviewing the circumstances of the demolition, the Department had decided not take any action against the developer and assured Mr H that, once the building work had begun, the Building Control section "will have an officer on site periodically to carry out statutory inspections of the elements of the construction".

The planning breach

24 By May 2017, construction had been ongoing for several months and the scaffolding had been removed. It then became apparent to Mr H that the ridge of the roofs of the new houses was in his opinion approximately 1.2 metres higher than had been approved. Mr H submitted a formal request to investigate a suspected breach of planning control, adding that it affected the light to the windows in the gable wall of his house and his rear yard, the latter used extensively over the summer months. Mr H's request was acknowledged and he was told that the matter would be investigated. The Department's acknowledgment of 24 May stated:

> In most cases, if it is determined that a breach of planning control has occurred, it will be appropriate to allow for the submission of a retrospective planning application, and to allow time for a subsequent appeal.
> . . .
> If a retrospective planning application is subsequently approved, your enquiry will be closed.
>
> It may not always be appropriate to seek a planning application, and instead the Department may request that the unauthorised works are removed or the activities cease. If the negotiations are successful, again your enquiry will be closed.
> . . .
> If the Department determines not to take any further action because the development does not appear to cause any harm, you may be given an opportunity to provide details of any harm being caused.

Action by the Department

25 On 30 May, Mr H's MHK raised the matter with the Department and asked for it to be looked into. In the next action on 14 July it was recorded that the new building had been estimated at around 1200mm higher than that shown on the approved drawings; on 31 July the difference in the height of the soffits underneath the ridge of the two houses was measured as about 1108mm.

26 On 4 August officer A wrote to the developer:

> It appears to the Department that the ground floor is significantly higher than that shown on the approved drawings by approximately 1 metre. The as built elevational details would also appear to be different from those approved. I have also noted that there is a discrepancy on the site plans with regard to the siting of the houses [in relation to the adjoining roads].
>
> I would strongly advise you to seek professional advice on this matter as, if the Department is correct, you may need to either remove the dwellings or alter them to accord with the approved drawings, if that is possible.

> Alternatively, it is open to you to seek to remove the breach of planning control by the submission of a retrospective planning application, which shows the dwellings as built, but I am afraid that, on the evidence available to me, I am not in a position to advise whether or not a retrospective application would be successful. […]
>
> Please let me know, by 14 August 2017, what action you intend to take to resolve this matter.

27 On 7 August the Department wrote to the district's Commissioners to say that they had now had an opportunity to carry out a site survey in order to establish whether the development had been carried out in accordance with the approved plans. Overall, the development corresponded to the approved details, but it appeared that the ground floor was higher than that shown on the approved drawings and that the porch design was different from that approved. The letter went on:

> The information has been communicated to the developer setting out their options. The options available to them are to alter them (sic) to accord with the approved drawings, if that is possible or alternatively, it is open to them to seek to remove the breach of planning control by the submission of a retrospective planning application, which shows the dwellings as built.

The Board displayed this letter on their website, and Mr H contends that it thus appeared to those with neighbouring properties that they would have the opportunity to object to the increased height.

28 On 7 August, the developer's architects replied on the developer's behalf asking how it had been determined that the height of the ground floor was higher by more than a metre, since there were no specific levels shown on the approved drawings; regarding the siting of the houses, they sought further detail and asked what would be the consequences with regard to planning.

29 There was then a site meeting between the architects and officer A, because on 11 August the architects wrote again to the Department at some length to explain their client's position. They pointed out that the application drawings had contained no specific levels information and that none had been requested by the Department; no conditions had been attached to the planning approval with regard to ridge heights, and the ground level had been established to permit level access from the road to the houses' front doors. As to the siting of the houses, reliance was placed on the views of the officer who had submitted the application to the Planning Committee that the set back of the buildings from the existing line – which had concerned Mr H – would not significantly affect his property. The letter concluded:

> We believe that the alleged breaches of planning are not justified and that [the developer] has constructed the dwellings in compliance with the planning approval and building regulations approval. We therefore request that no further action is taken over this matter.

30 Photographs of the new houses in the official file, however, show the ridges of the adjoining existing houses at just below halfway up the dormer windows of the new ones with their roof ridges adding further height still. Handwritten notes next to the photographs record officer A's view about the height difference in these terms:

> "difficult to assess believe that discrep of about 600m". (This was presumably meant to read '600mm'.)

31 On 26 September, the MHK involved asked the Department for an update, having heard nothing in the meantime, and received a response the next day that the matter was with planning enforcement; he wrote at once to planning enforcement, but received no reply and was obliged to chase them on 13 October. The architect had not received any reply to his letter of 7 August and on 18 October he too had to chase a reply; he was then promised a meeting with officer A. Mr H, likewise, was getting impatient at the lack of news, and emailed the Department on 13 October asking what was happening.

The Department's decision

32 Officer A finally replied to the MHK's request of 26 September on 23 October, explaining the difficulty that the plans had not included the existing elevations, details of the proposed levels or a cross-section of the site. The officer considered that the height discrepancy was approximately 600mm,[2] and had based this on the height of the boundary wall, using Google images and photographs of the area. Officer A could see three main issues:

(i) Enforcement action would not be considered to be in the public interest, because any retrospective planning application would not be refused as the changes did not significantly adversely affect neighbours;

(ii) If enforcement action were to be taken, the result would be that the development would have to be regarded as built in breach of planning control, which would mean that the restrictions on permitted development would fall;

(iii) The deviations from the approved plans were not such as would have prevented planning permission being given for them in the first place.

[2] Rather than the 1108mm ascertained on 31 July (25).

33 The email to the MHK continued:

> Currently, the owners [of the new properties] have been advised that it would be in their interest to regularise the situation but if they chose not to it has already been acknowledged that the development is not built in accordance [with the planning approval] and as such could mean that any conditions imposed on the approval no longer apply as they did not implement the approval. On this development some permitted development rights regarding sheds and other structures have been removed.
>
> Given that the differences are not considered significant or to adversely affect the surrounding properties and that if submitted as an application it is unlikely that the differences would result in a refusal, as set out above, the best [way] forward is considered to be to acknowledge that there are some minor differences between the application drawings and the as built dwellings are minor in absolute terms and made no discernible difference to the amenity of any neighbour, or the setting of the houses. This would mean that the conditions on the development would remain in force.

34 Officer A admitted that this course would not give neighbours access to the "due process" that they would get in the course of a retrospective application - but it would enable the conditions imposed in the approval to survive, and that would be of more benefit to them. It must be noted here that the "due process" referred to would normally have enabled Mr H to secure 'interested person' status[3] so that, as well as having the right to make objections to retrospective approval being granted in the first instance, he would also have the right to appeal any approval that might be given. The significance of this was not pointed out in officer A's response to the MHK.

35 Nor did officer A elaborate on what evidence there was to support the view that the excess height made "no discernible difference to the amenity of any neighbour"; that was certainly not the view of Mr H, who having an immediately adjoining property was as well qualified as anyone to judge, and his views were not obtained, much less taken into account. The MHK replied expressing his dissatisfaction with officer A's conclusions, saying that this course was not the answer he had hoped for and that "it sends out completely the wrong message about planning enforcement"; the MHK hoped that the policy would be reviewed and that "people flouting the law to this extent will have planning decisions enforced".

[3] Pursuant to the provisions of the Town and Country Planning (Development Procedure) Order 2OO5; this was recommended for Mr H in the case officer's original report to the Planning Committee.

Controversy

36 Four days after officer A had responded to Mr H's MHK, the developer wrote to the officer on 27 October at length complaining about the Department's delay in dealing with "a complaint as serious as this" and observing that it was costing him significant sums, which he reserved the right to recover by way of legal action. The developer refused categorically to apply for retrospective planning approval because, in his view, there had been no breach of the planning permission. This letter was at once referred upwards within the Department to senior management and to the Minister.

37 The senior manager in question declared an interest in the case by reason of living nearby and took no further part in the matter, referring it effectively to officer X.

38 The developer's architect followed up his client's letter of 27 October on 1 November, arguing strongly that the excess height complained of was not a matter which had been regulated in the planning permission and that the comparisons with the height of the existing neighbouring property shown in the application drawings had been "indicative only and no specific levels were shown". He continued:

> We understand that it is at the Planning Department's discretion to decide if there [is] a significant breach of planning control to merit further action. In this case we ask what would be achieved by the time and substantial expenditure incurred in submitting and processing a retrospective planning application and a potential drawn out appeal hearing?
>
> The construction is nearing completion and in our opinion the dwellings sit well within the streetscape. Apart from changing the entrance canopies, these buildings will remain fundamentally as they are and there is nothing that can be realistically done that might overcome the 'perceived' issues raised by the complainant.

The Minister's involvement

39 The Minister was then briefed by email by officer X on the case on 7 November, repeating in summary the points made by officer A to the MHK, including that the excess height was about 600mm, and that there was no discernible difference to the amenity of any neighbour; he concluded:

> As you are aware, it is a professional judgment on whether or not we would be able to mount a successful prosecution against the development as built. While this does consider the content of the Act, it also takes into account case law and the likely consideration of the High Bailiff of taking action against a development that is apx 600mm higher than as built.

The point was also made that treating the height difference as minor would mean that the condition restricting permitted development rights would remain in force. The Minister expressed himself content to accept the officer's recommendation.

The case law

40 Some of the key elements of the case law which officer A had been aware of and had taken into account were shown to me. They confirmed that in exercising the Department's statutory powers, officer A had, as a matter of law, a wide discretion based essentially on the concept of 'expediency' – which is undefined in the legislation. This indeed reflects the use of that term in Schedule 4, paragraph 1, with regard to enforcement notices.

41 The principles emerging from the cases can be summarised as follows:

- Enforcement action is discretionary and need only be taken where it appears to the authority that it is expedient to do so.
- There should be a balancing of the advantages and disadvantages of a course of action in deciding whether it is expedient.
- Regard should be had to the Development Plan for the area and any other material considerations.
- The prospect of failure in legal action and liability for costs may be a material consideration.
- There is no appeal against a decision that enforcement is not expedient, though the question could be raised in a petition of doleance.
- Where there is a difference between what is approved and what is built, the question is whether it is significant in the context of the development as a whole.

The complaint of maladministration

42 On 5 November, Mr H had written to the Director of Planning & Building Control with a lengthy itemised complaint about the way the case had been handled; the letter was received on 6 November. The points relevant to this complaint made may be summarised as follows:

a. The initial planning application drawings had shown clearly the intended level of the roof ridge of the new houses;
b. The excess height was about 1250mm, or an 11% increase when taken from ground level;
c. The planning application requirements had not been properly met, and the procedure used would be at fault if it turned out that there was insufficient detail in the approvals to allow enforcement action;
d. The developer had been informed of what the Department considered to be in his best interests, but the complainant had not;
e. It was agreed by several local residents in the adjoining streets that there had been a loss of amenity due to the excess height;

f. The letter of 7 August to the Commissioners displayed on their website had given false assurance to residents that they would have an opportunity to voice their objections to a retrospective approval application;
g. The possible loss of the restriction on permitted development rights was a non-issue: the same restriction could be imposed on any retrospective approval.

There was no mention of this itemised protest in the submission to the Minister, despite it being received the day before the submission was made. (The letter had been copied by Mr H, it seems in error, to the Minister of another Department, but there is evidence that it did later reach the Minister.)

43 A further formal notification of a suspected breach of planning control was submitted to the Department by Mr H on 12 November alleging that, despite permitted development rights having been removed by the planning permission, a timber fence had been erected at the rear of the new properties reaching over 3m from the ground level of his property. On 13 November, a full dossier containing a detailed history of matters was submitted by Mr H to the Director of the Planning & Building Control Directorate for urgent review; he added: "I would further request that the on-going works at the development site are stopped immediately and remain ceased until the matters highlighted in the file are resolved through a due process". (The question of this fence remains subject to decision by the Department and is not therefore part of the present investigated complaint.)

The decision confirmed

44 On 16 November, officer A wrote to the developer noting that the ground floor level appeared to be higher than shown on the approved drawings, but admitting that there had been no datum levels or reference levels shown on the drawings with the planning application. The porch design also differed from that approved. Officer A went on:

> I have considered the deviations in the context of the development as a whole and consider that the deviations are minor in absolute terms and have not made a discernible impact on the amenities of the neighbouring properties, the wider street scene or the setting of the house and have determined that it would not be appropriate or proportional to take any planning enforcement action.

On the same day, Mr H was sent a letter in similar terms by officer A's subordinate.

45 Mr H's reply on 20 November pointed out that the relative heights of the new and existing adjacent properties and their respective ground levels were clearly apparent from the approved drawings (which had been prepared to a recognised scale), they were noted in the planning officer's report for the Planning Committee, and had even been the subject of a request for clarification in the context of the previous planning application. The new building was, moreover, 150mm closer to Mr H's property than shown on the drawings.

46 The Department's letter of 16 November had not directly, or in terms, replied to Mr H's detailed and reasoned letter of 5 November, and Mr H pointed out that the latest letter from them largely replicated that to the MHK of 23 October. It was not therefore a reply to his letter of 5 November, but a reiteration of the position already adopted by the Department; the points in Mr H's letter of 5 November had in effect therefore not been considered. The Department subsequently accepted the force of this objection and sent Mr H a detailed reply to his letter of 5 November on 23 March 2018. The Commissioners for the district were informed by officer A of the Department's decision on 22 November.

47 Mr H continued to complain to the Department throughout the remainder of 2017 and into 2018 that they had not properly discharged their functions with regard to the planning breach represented by the excess height of the new houses. Officer X met Mr H's daughter on 20 April 2018 and provided detailed responses to various questions on 23 and 27 April, and 10 and 15 May. On 20 April Officer X confirmed that the enforcement case in relation to the fence was still open, and on 23 April confirmed that the customer care elements of the complaint would be dealt with under the Department's normal complaints policy.

48 On 27 April Officer X advised that a determination under delegated powers not to take formal enforcement action in relation to the height of the house had been made. There is no appeal mechanism for such decisions, and the Department's complaints process cannot overrule this process. Mr H was informed that, while a successful petition of doleance could 'unmake' the decision on the grounds of procedural failure, and the Department would then be compelled to retake the decision, it would not necessarily in the end be different. Mr H was urged to seek legal advice on the matter. He replied on 29 April that he would not be seeking any legal advice or taking any legal action until the Tynwald Commissioner had completed his review.

49 The Department was satisfied that it had handled the case correctly in relation to determining that it was not expedient to pursue formal enforcement action in relation to the height, and they indicated on 10 May 2018 that they could take matters no further in relation to this; if Mr H wished to pursue the matter with the Tynwald Commissioner for Administration he was free to do so. All the correspondence at that stage was then forwarded to me by the Department.

Analysis

(i) Resources and delay

50 Mr H's complaint in May 2017 would clearly have been regarded by the Department as falling into Type 3 in the published guidance (18), in terms of its urgency, which is to say that it fell into the least urgent category. This in itself would explain some of the delays we have seen. In an area short of resources, this would mean that cases of the present kind could only expect to be at the back of the queue in the many calls on official time. The policy with regard to the allocation of resources for enforcement is approved at the political level; any change in it is a matter for the Minister in the first place and, ultimately, for Tynwald.[4]

51 As a matter of good administration, however, the delay in making a decision in this case was considerable – some 23 weeks. The choices going forward were clearly set out in the Department's letter of 4 August 2017 to the developer (26) and from that, and the publication of it on the local commissioners' website, a decision could reasonably have been expected at the latest by the end of September; but everyone had to wait until 16 November (44) for the Department's position to be formally established – and only then it seems as a result of pressure from the MHK, Mr H and the developer during October.

52 The Department have told me that the wording used in their letter of 4 August was misleading and that the standard letter on which it was based has now been amended; they have also drawn attention to the fact that (unlike the 8 weeks for planning applications) they have no time targets in enforcement cases. This leaves me concerned that there should be a clear public understanding of what is likely to happen in enforcement cases, particularly where the amenities of complainants' properties are at issue. In this case, the complainant's perception of the matter was that enforcement action would become less likely as time passed, because it would be seen as harsh to require significant alterations to new houses once they had been completed.

[4] c.f. the Minister's statement in the Keys on 30 January 2018 that planning enforcement "has been woefully under-resourced": Hansard 361 K135.

(ii) Regularisation

53 Referring further to the policy (16-17), we see however that it is affirmed that, when a breach of planning control is established, "officers will first seek compliance through negotiation and only resort to formal action when all other routes have been exhausted. It will be normal to allow for a retrospective application to be submitted to regularise the development." The retrospective application would thus be the most convenient route. This is consistent with the policy aim that the objective of the enforcement function is compliance and not punishment. (16) However, where the person the Department considers in breach cannot be brought to agree with that view, this course will probably not be taken.

(iii) Enforcement

54 Since the Department cannot compel the developer to make a retrospective application, and if he declines to do so as in this case (36&38), a decision must be made. Unless it is decided to take no action, the next step would be to serve an enforcement notice pursuant to Schedule 4 to the Act (8). This may have three possible consequences: the first, is that the breach may then be remedied; the second is that the developer may appeal against the notice on the ground that no breach has occurred; the third is that the developer will seek retrospective planning permission (which will mean that the enforcement notice will not usually be pursued pending the outcome). If there is no appeal, a retrospective application is the only course normally open to the developer to prevent a successful prosecution under section 26 of the Act, since the planning issue cannot then be raised by the developer as a defence – paragraph 10(4) of Schedule 4.

55 The legal framework for decisions on enforcement has been described above (40-41). I accept that officer A acted within that framework.

(iv) Effect on neighbours

56 In this case, the decision was made to take no action (32&44). It was based firstly on the premise that the breach "did not significantly adversely affect neighbours". The Department points out that this was a professional judgment. But a professional judgment must necessarily take account of all the evidence and, while it is true that measurements had been taken by the Building Control officers and that three site visits had taken place, officer A did not consider it necessary to seek the views of others whose properties were likely to be affected. It was certainly clear that Mr H considered that it affected him as a neighbour; indeed, in his letter of 5 November (42), Mr H asserted that other neighbouring properties besides his were affected.

57 Mr H's perception might have been unreasonable or unjustified, but there is no recorded argument to that effect by officer A, and – despite the indication originally given to Mr H (24) that he could be given the chance to provide evidence of harm – no step was taken to check whether the reported views of others were as he had claimed. The assessment of the facts was therefore limited to the judgment of the officials, and there is no record of the case being discussed with the political Member of the Department who is often consulted in controversial cases. In a matter involving a closely built urban environment, I do not believe that this amounted to good administration.

(v) Excess height

58 Secondly, the decision was based on the assessment that the excess height of the roofs of the new houses was 600mm (32&39). There had been continuing controversy between Mr H and the Department over exactly what the excess consisted of, Mr H contending for a figure of around 1200mm. Various measurements or estimates found their way into the Department's record.

59 While I was investigating this case, Mr H instructed a surveyor outside the Department to resolve the question by making the necessary measurements, using an electronic distance meter. The result was that the height of the new buildings was found to exceed that to be deduced from the approved drawings by 1240mm – more than twice the 600mm accepted by officer A, and used as the basis of the decision reported to Mr H's MHK and the Minister (32&39).

60 The Department now accept that this measurement is likely to be more accurate even than the 1108mm reckoned in July 2017 (25). The decision was therefore taken on the wrong information. Coupled with the failure to take seriously enough the question of the impact on the amenity of neighbouring properties, this error is sufficient to establish that the decision was taken with maladministration.

(vi) The retrospective approval assumption

61 The third basis on which the Department's conclusion was reached was the assumption that retrospective approval would be granted regularising the breach (32).

62 The development in question had been approved by the Planning Committee[5] and in the circumstances which had now arisen it would have been wise, if the opportunity occurred, for the Committee to be asked to determine any retrospective application; they then would decide whether there would be a loss of amenity to neighbours, having received whatever objections might have been advanced by those neighbours. In a location which was already closely built up, and where therefore the precise dimensions of a new-build would have greater significance than in a development in open country, it was bold to predict so confidently what the Committee would decide.

(vii) Due process

63 Officer A acknowledged (34), the course taken would deprive Mr H of 'due process', which included not only the right to submit objections to a retrospective application, but also the right as an 'interested person' to appeal against any grant of approval which might have resulted from a retrospective application. The view of the Department now is that officer A's comment about 'due process' was wrong, because being recognised as an interested person is not a legal right and a referral of the case to the Planning Committee was not inevitable; therefore Mr H had not necessarily been deprived of anything.

64 As we have seen, the involvement of the Planning Committee might indeed never have occurred, whatever decision had been made, but Mr H was given to believe that he had lost a valuable opportunity on account of the decision to take no action. As with the Department's initial action on 4 August, expectations were effectively created and Mr H's sense of grievance later on was thereby increased. Given that the position of interested person (which entitles the holder of it to rights in connection with any appeal) is within the discretion of officials to recommend to the Planning Committee, care must be taken to ensure that it does not appear that it is being avoided only because it will delay the planning process - a concern which the developer expressed (38).

(viii) Permitted development

65 Taking no enforcement action was partly justified (32) by the argument that it would preserve for Mr H's benefit the restriction on permitted development rights contained in the original approval. I found it difficult to understand why officer A, and also officer X in a submission to the Minister (39), had taken this view.

[5] It had been referred to them initially because of parking issues.

66 When I asked the Department to clarify the point, they replied that if the difference between what had been built and what had been approved was considered 'material' then it could be argued that the approval had not been implemented at all, and that thus the restrictive condition would fall. By regarding the differences as minor, and not material, officer A was therefore seeking to prevent any argument that the original approval had not been implemented, and that the restrictive condition no longer applied. That was in line with the developer's view that the differences were not 'material' expressed in his letter of 11 August (28).

67 But, in all likelihood, the survival of the condition restricting permitted development would not depend on how the difference in heights was classified. If enforcement action was unsuccessful on the basis that the difference between what was built and what was authorised was *not* material, the planning permission would have been regarded as implemented and the condition would remain in force; if enforcement action was upheld or not appealed, a retrospective application would very probably be needed in order to avoid the prospect of prosecution – and the restrictive condition could at that point be re-imposed. I was unable therefore to see much force in officer A's claim.

(ix) *legal action*

68 A final ground for deciding not to take enforcement action was that it was doubtful if it would succeed (32). This was put primarily as the question of whether a criminal prosecution (with its high standard of proof 'beyond reasonable doubt') would be successful (39). Although it was quite proper to take that issue into account, it was elided with the different question of whether an enforcement notice was justified as a matter of planning law, where the standard of proof would be the civil standard – the balance of probabilities. The two questions were distinct, and possibly complex, yet they appear to have been treated effectively as a single question.

69 Here, it may be that confidence in the prospect of success on planning grounds was in fact undermined by the developer's counter-argument (28) that the reference levels were not made explicit in the application drawings – though the application itself confirmed that there was to be no change in existing levels (21), so that it was equally arguable that making explicit reference to the levels in the scale drawings had been unnecessary, and that the levels could well enough be deduced from them.

70 As this was a routine case, advice from the Attorney General's Chambers was not sought, but I cannot see the concerns expressed about the possibility of legal proceedings as being well thought through. Likewise, in the submission to the Minister (39), the position about legal proceedings was stated in simplistic terms.

Conclusions

71 Overall, the impression is of a case that has been affected by the need of officials to get through a substantial workload – there were 226 enforcement cases in 2017 – in the context of what are admitted to have been inadequate resources. It is fair to record that officer A acted within the framework of the law and the delegation of powers from the Minister, was qualified as a Chartered Member of the Royal Town Planning Institute and was appropriately graded within the Department as a planning enforcement specialist. Nonetheless, the failures I have noted in the previous section do amount cumulatively to poor handling of this case and I am glad to note that a review by the Department of its enforcement procedures has already begun.

72 Although it is not specifically what Mr H complained of, it is apparent that the drawings approved in this case could have been more explicit in regard to the height limitations intended, and left less to be deduced. In closely built environments, height limitations have a particular importance and it is for consideration whether a stricter approach to the detail of planning applications is called for wherever the amenity of nearby properties is likely to be affected.

73 The overall delays in the handling of Mr H's complaints are the subject of a pending complaints procedure within the Department, and must await their decision on what is known as 'customer care'. I have already noted the extent to which delay must have created at least a perception that the decision whether to take enforcement action was being made more difficult. But I accept that the delay may in some measure be attributable to political decisions concerning the allocation of resources, which is outside my remit.

74 In the circumstances, however, I do not see that any causal connection can be established between what went wrong and any actual loss, in financial terms, which Mr H may have sustained in the value of his property or his amenity. That there were faults in the way Mr H's complaint was handled does not inevitably mean that the outcome would have been different if the matter had been dealt with correctly, or that there is a logical progression from the Department's faults to any financial loss Mr H may have sustained.

75 Thus, it is unknown whether retrospective permission for the height difference would have been given if it had been applied for. It is similarly unknowable whether an appeal would have been successful if retrospective permission had been given by the Planning Committee, or what would have happened to an appeal against an enforcement notice. I do not therefore recommend that any diminution in the value of Mr H's property or any loss of amenity in the enjoyment of it, if it can be shown, should result in the payment of compensation to him, but I asked the Department's Chief Executive nonetheless if he would agree to taking the following steps:

(i) to give an apology to Mr H, and to his daughter on his behalf, for the defects in the handling of his complaints that a breach of planning control had occurred;
(ii) to conduct an internal review by the Department of the way in which such breaches of planning control should be dealt with, and lay the conclusions of it before Tynwald by the end of the coming session;
(iii) to reimburse Mr H for the reasonable out of pocket expenses incurred in bringing his complaint, to be settled in the absence of agreement by the Commissioner.

76 In reply he said that he would agree to these proposals. In the event, therefore, I consider that the failures of administration which I have found have been adequately remedied.

Malachy Cornwell-Kelly
Tynwald Commissioner for Administration
28 September 2018