

Directorate for Planning and Environmental Appeals  
Claim for an Award of Expenses Decision Notice

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Decision by Malcolm Mahony, a Reporter appointed by the Scottish Ministers

- Appeal reference: CLUD-290-2000
- Site address: Loanview House, Lang Loan, Straiton EH20 9QT
- Claim for expenses by the appellants, Mr and Mrs McGlynn against Midlothian Council
- Date of inquiry/hearing: 3-4 October 2012

Date of decision: 15 November 2012

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## Decision

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

## Reasoning

1. The claim was made at the appropriate stage of the proceedings.

### Case for the appellants

2. Midlothian Council have failed to observe and comply with the requirements of paragraph 21 of Circular 10/2009: Planning Enforcement. They have approached the application seeking grounds for refusal, rather than without bias determining whether the applicants' submissions were more likely than not.
3. For example, the council discounted evidence of gas supply (dating from May and June 2001) without considering why the appellants would seek to install a gas supply but then fail to exercise use of that supply. There was no evidence that gas was not being supplied. A reasonable authority would not simply have directed itself to absent evidence.
4. Similarly considerations apply to a bill for upgrading the electricity supply dated January 2002.
5. The council have failed to take into account that in the period of over 10 years since the appellants took occupation of their house some documentary evidence would have been destroyed. In 2001, the appellants could not have known that such documentation would be required over 10 years later.

6. The council have applied the wrong legal test by assessing the likelihood of occupation based on the completion status of the building rather than its capability for occupation. There was no evidence that it was not capable of occupation in September 2001.

7. Midlothian placed undue weight on a non-contemporaneous note regarding the completion of the building based on a fleeting observation by a planning enforcement officer from a moving vehicle on the trunk road.

8. They relied on a letter from one of their planning enforcement officers dated 9 June 2004 which noted that work on the dwelling was nearing completion. There was no indication in that letter that the house was not capable of occupation. Indeed, they assert their understanding that the dwelling has been occupied since 2003, namely before completion.

9. Because the council applied the wrong legal test, the appellants were required to submit the present appeal and incur professional fees in pursuing it.

10. The appellants acknowledge that additional documents and evidence supporting their appeal has been lodged since the application. But the council have had ample opportunity to consider them, especially the affidavits, recognise the weight of evidence in support of the appellants' case, and withdraw from the inquiry process. That would have saved the time and expense of one day of the inquiry.

11. For these reasons, the appellants claim for the costs incurred in the preparation and attendance at the 2 day inquiry. However, should I conclude that Midlothian was entitled to find that there was insufficient evidence at the time the application was made, then they seek the expenses occasioned by one day of the inquiry.

#### Response for the council

12. Circular 10/2009 simply confirms that there is no legal requirement for corroboration of the applicant's account of events in order to allow the council to grant a certificate. That does not require the council to accept the applicants' account no matter how improbable.

13. In the present case, the applicants' account was improbable. It was supported by evidence that turned out not to be reliable and lacked credibility. Other evidence contradicted their account, including the planning enforcement officer's site visit note and the appellants' own contrary accounts about when they had moved into Loanview House in other contexts. The appellants' account at the inquiry differed from that set out in their application.

14. The council acted correctly and without bias in determining the application.

15. The appellants' submission regarding gas connection is bizarre. They gave evidence that mains gas was not supplied to Loanview House until well after September 2001. They were unable to say when it was connected and did not provide any bill for gas usage which would show when it began. Since they said they had no hot water until January 2002 and

that this was supplied by an immersion heater, one might deduce that mains gas was not connected until some later point.

16. In their application, the only evidence on electricity connection was a bill which indicated connection some time after January 2002. That bill was misrepresented as being for electricity usage in the previous quarter. Consequently, it was reasonable for the council to disbelieve the appellants' account. The evidence before the inquiry is that it is possible without great difficulty to obtain records of billing for utilities and other household services.

17. Credible and reliable evidence from the record of a planning enforcement officer's site visit was that in March 2002 only the roof trusses of Loanview House were in place, there was no roof covering, and the door and window openings were not filled. This suggests the house was not capable of occupation. Moreover, the appellants and their solicitors had given an account in other contexts that the house was not occupied until after September 2001.

18. The appellants said they had not completed the house by September 2001. It was reasonable for the council to draw from this fact that they had not occupied it.

19. The appellants' account was that the house was substantially complete in September 2001, and the windows were fitted in December 2001. It is hard to see how that fits the response they gave on a form dated 26 September 2002 that the house would not be completed for another three months.

20. There was no temporary occupation certificate commencing on any date in 2001 or 2002.

21. The council have not, as claimed, asserted an understanding that the house was occupied since 2003. Various items of evidence point to different possible dates, and the council are at a loss to say when the house might actually have been occupied. But the appellants have not proved on the balance of probabilities that it was occupied from September 2001.

22. It is plain from the evidence before the inquiry that the council applied the correct legal test.

23. The appellants' affidavits and appeal statement included a number of additions to and contradictions of the case they had made in their application.

24. The appellants' claim for expenses should therefore be rejected.

### Conclusions

25. For context and to avoid repetition, this notice should be read together with the associated appeal decision notice.

26. It is claimed that the council were seeking grounds for refusal rather than determining whether the appellants' submissions were more likely than not. However, since

the onus lies on the appellants to demonstrate their case, any gaps in the evidence are for them to fill. A reasonable authority should indeed take note of absent evidence. Laying gas pipes or electricity lines is not the same as taking supply off them, and it is the latter which the appellants failed to demonstrate.

27. It might be expected that some paperwork will be lost in a period of over 10 years, but the appellants have lost almost everything from the crucial period in 2001. Moreover, they failed to obtain copies or confirmation of documents from statutory authorities or suppliers.

28. The council are alleged to have applied the wrong legal test by assessing the likelihood of occupation based on the completion status of the building rather than its capability for occupation. But the council are in fact charged with assessing the likelihood of actual occupation rather than the capability of the incomplete building to be occupied. It is clear from the Report of Handling that the council's position was based on a range of concerns relating to actual occupation including an absence of any evidence of a gas supply, electricity supply, sewerage connections, or temporary occupation certificate at the relevant date in 2001. They also had a site inspection report indicating that the building was not capable of occupation in March 2002, having no roof slates, doors or windows.

29. I am satisfied that the weight which Midlothian placed on the planning enforcement officer's site inspection note was not excessive. The appellants' advocate's attempts to downplay this evidence were not borne out by my own site inspection from the A720 and its slip road.

30. I do not share the appellants' view that the council relied on a letter from their enforcement officer regarding near completion of the dwelling in June 2004. It was treated simply as one piece of evidence regarding work on the dwelling.

31. Because I do not accept that the council applied the wrong legal test, it follows that this did not require the appellants to submit the appeal.

32. In view of my comments above and, more particularly, my appeal decision notice, there was no reason for the council to withdraw from the inquiry process after assessment of the evidence submitted subsequent to the application.

*Malcolm Mahony*

Reporter