

Scottish Parliament Region: South of Scotland

Case 200500759: Dumfries and Galloway Council

Summary of Investigation

Category

Local government: Planning

Overview

The complaint concerned the development of a site close to an aggrieved person's home and the complainant, on his behalf, alleged that the Council provided incorrect and untimely advice with regard to planning applications and, generally handled the matter with impropriety. As a result, an opportunity to object was denied and significant monies had been spent in trying to resolve the situation.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the Council failed to exert due care and attention when considering an application for outline planning permission (*not upheld*);
- (b) the Council failed to give proper advice on potential remedies (*not upheld*);
- (c) the Council failed properly to consider revoking the outline permission granted (*not upheld*);
- (d) the application for reserved matters was handled with impropriety (*not upheld*); and
- (e) the Council failed to follow their complaints procedure when dealing with the complainant's representations (*not upheld*).

Redress and Recommendation

The Ombudsman has no recommendations to make to the Council.

Main Investigation Report

Introduction

1. On 14 June 2005 the Ombudsman received a complaint from the complainant (Mr C) on behalf of his neighbour, Mr A, who does not enjoy good health. The matter concerned a development site close to Mr A's home where outline planning consent was granted in May 2001 for the erection of a dwelling house and double garage. Mr A had not been aware of this planning consent until 22 June 2004, after he had received notification as a neighbour of an application for reserved matters, and he was aggrieved that he was denied the opportunity to make representations on it.

2. The complaints from Mr C which I have investigated are that:

- (a) the Council failed to exert due care and attention when considering an application for outline planning permission;
- (b) the Council failed to give proper advice on potential remedies;
- (c) the Council failed properly to consider revoking the outline permission granted;
- (d) the application for reserved matters was handled with impropriety; and
- (e) the Council failed to follow their complaints procedure when dealing with the complainant's representations.

Investigation

3. The investigation of this complaint involved obtaining and reading all the relevant documentation, including correspondence between Mr C, Mr A and Mr A's adviser and Dumfries and Galloway Council (the Council). I have also made reference to the appropriate sections of the Town and Country Planning (Scotland) Act 1997 (the Act) and the Town and Country Planning (General Development Procedure) (Scotland) Order 1992 (the Order) and the accompanying advisory circular. I have also had sight of the relevant sections of the Dumfries and District Local Plan 1993 (the Plan) and changes proposed in the Council's finalised Nithsdale Local Plan dated November 2004. A written enquiry was made of the Council on 8 November 2005 and a detailed reply was received on 26 May 2006. Planning advice was also obtained from the Ombudsman's adviser.

4. My findings and conclusions are set out below and, although I have not included every detail investigated in this report, I am satisfied that no matter of significance has been overlooked. Mr C and the Council have been given an opportunity to comment on a draft of this report.

(a) The Council failed to exert due care and attention when considering an application for outline planning permission

5. Mr C says that it was only on 22 June 2004 at a meeting with the Nithsdale Area Planning Manager, just after his neighbour was notified of an application to approve reserved matters, that Mr A became aware that an outline planning application had been approved. At the time of the application the developer claimed to own the development site and the adjoining land and no notification notices were issued. Mr C contended that Council officers did not properly exercise their professional judgement when viewing the application and associated documents by establishing, what to him were, obvious errors.

6. The Council have confirmed that when the original outline application was lodged, the neighbour notification plan showed that the applicant owned all the land around the site. They said there was no evidence to suggest otherwise despite Mr C's contentions. The planning adviser has also confirmed that neither was there, under the relevant legislation, any onus on Council officers to check whether or not the neighbour notification certificate was valid as it is the developer's duty to do so (false certification being an offence).

7. As well as his alleging undue care and attention, Mr C believed that this application in outline should not have been considered under delegated powers as a change of procedures was imminent. He said that such changes would have resulted in officers recommending refusal. In their reply to our enquiries the Council have confirmed that Section 25 of the Act requires applications to be determined in accordance with the Plan unless material considerations indicated otherwise. At the time the outline application was considered (22 May 2001), both the Plan and the Structure Plan 1999 were in operation. They said that this remains the situation as a new local plan has still to be finally adopted. The Plan shows the application site lying within an area where the normally restrictive housing in the countryside policy is relaxed and prior to approval being given, the Council's Planning Policy Group who were consulted, confirmed this and the

application was approved under delegated authority as being in accordance with the Plan.

8. Despite Mr C's contentions in this regard, the Council emphasised that it is a well established national practice to continue to determine applications while a Plan may be under review. Although a new Nithsdale Local Plan has been finalised, the Council confirmed that it was not formally adopted. Nevertheless, the Council said it was persuasive and, therefore, the policy position was examined, but, as the outline proposal was in accordance with the Plan and as detailed in paragraph 7, it was decided appropriate to consider the application under delegated authority. The planning advice received by the Ombudsman confirmed that this was in order.

(a) Conclusion

9. While Mr C argued with the Council at some length that 'proper' consideration of the plans would have led them to the conclusion that other proprietors with a notifiable interest existed, I am not persuaded by his logic. The Council's role in matters such as this are strictly limited and it was reasonable for them to accept the developer's claim of ownership at face value. This being so, I do not conclude that the Council failed to exert proper care when considering the outline planning application. Nor do I consider that the Council acted incorrectly by approving the outline application under delegated procedures. In the circumstances, I do not uphold this aspect of the complaint.

(b) The Council failed to give proper advice on potential remedies

10. The meeting of 22 June 2004 with the Nithsdale Area Planning Manager was arranged primarily for Mr C and Mr A to establish the reasons why Mr A had been notified of the application for reserved matters and it was at that point that he learned of the outline application which had been approved on 22 May 2001. Despite this, Mr C said the officer gave him limited advice. He also alleged that the Area Planning Manager failed to give appropriate advice to Mr A's adviser when they met on 10 September 2004. As a consequence, the complainant said that it was not until 17 December 2004 that he and Mr A learned that the only means of pursuing their unhappiness with the situation was by considering judicial review or by making a complaint to this office.

11. In their response dated 22 May 2006, the Council said that at the meeting on 22 June 2004 the Nithsdale Area Planning Manger described the remedies available where it was alleged that there were faulty neighbour notification procedures. They said that he pointed out that faulty notification in itself did not invalidate a planning permission and that the Council could not 'undo' a permission for this reason. They said that he also advised that revocation procedures could not be used to remedy this type of fault but that if someone felt they had suffered from a deliberate act, rather than a mistake, they could seek to pursue a prosecution via the police. However, even if such an action was successful, a prosecution would not invalidate the permission.

12. With regard to the meeting with Mr A's adviser on 10 September 2004; the Council pointed out that the adviser was an experienced qualified planning practitioner who would be fully conversant with the available remedies and no specific reference was made to prosecution or judicial review because of this.

13. The Council maintained that the issue of judicial review was one that emerged as the debate over the case developed. They said that it was clear from Mr C's and Mr A's objections that they wished to block the permission entirely and so officers advised that this would not be legitimate. Because the complainant continued to maintain this view and his desire for revocation, this led to the Council specifically considering the matter at the Nithsdale Area Regulatory Committee on 15 December 2004. The Council said that when the issue was addressed, it became necessary to advise the Committee that a remedy other than revocation was available to individuals such as Mr A and Mr C, that is, judicial review.

14. The Council said that it was only at this meeting that the application for reserved matters was finally determined, therefore, it was only at that point that Mr C learned that the Council had not accepted his submissions on the application and that the final option was judicial review.

(b) Conclusion

15. Mr C felt that the Council were less than helpful when he explained the problems connected with the lack of neighbour notification. It was his view that because of what he considered to be faulty procedures, the Council should revoke the outline permission granted on 22 May 2001. However, the Council did not

consider this to be an appropriate response (see paragraph 11 but more fully explained in paragraphs 16 to 20) and I am satisfied that the Council gave Mr C proper advice. Mr A also had the benefit of guidance from his own planning consultant and, while the subject of judicial review was not specifically brought to Mr C's attention until December 2004 (see paragraph 10), it seems to me that this was the result of a natural progression of affairs. Up until then no final decision had been taken on reserved matters and, therefore, there was still the possibility that the application would not progress. It was only with the approval of reserved matters that the position was confirmed and that judicial review perhaps became a viable consideration. On balance, therefore, I do not uphold this aspect of the matter.

(c) The Council failed properly to consider revoking the outline permission granted

16. Once the Council became aware of concerns about notification, Mr C said that they should have given consideration to revoking the permission and not gone on to consider an application for reserved matters. Mr A's adviser made detailed representation on this point in correspondence dated 2 and 21 September, and 4 and 13 December 2004 with a view to the application for reserved matters being refused.

17. The Council confirmed that the application for reserved matters was originally scheduled for consideration at the Nithsdale Area Regulatory Committee on 6 September 2004 but as there was insufficient time to consider the letter of 2 September 2004, it was removed from the agenda and returned to Committee on 20 October 2004. Both Mr C and Mr A's adviser attended the meeting and made representations to the effect that because there were faults in the original application, it was legally invalid. They also disagreed with the consent in principle and officers advised that the principle could not be re-visited, as approval had already been given, except via the revocation procedure. This being the case, Members were of the opinion that they needed additional information on the revocation procedures and other matters, and the application was continued to the meeting of 15 December 2004.

18. I am aware that a briefing meeting for Members on the legalities and consequences of revocations was held before the December meeting and Mr C

has had sight of the associated briefing note. It is worth noting that the note mentions that revocation is a rarely used power; it is not a means of remedying a procedural fault which should be challenged via judicial review; it also points out that revocation may involve the Council in payments of compensation.

19. The Committee decided against revocation and although Mr C alleges that the briefing note (referred to in paragraph 18) amounted to an instruction to the Committee, I have seen no evidence to suggest that this was the case. When the Committee went on to consider the application for reserved matters both Mr A and Mr C were heard but the decision was to approve, subject to conditions.

(c) Conclusion

20. Mr C believes that the Council did not properly consider whether to revoke outline planning consent. I do not agree. The Council's procedures in this regard are outlined in paragraphs 17 to 18, and they confirm that due consideration was given. Members are entitled to receive detailed advice to assist them in the decision making process and the briefing note provided this. A decision was taken which was not to Mr C's liking but this is not indicative of maladministration. Accordingly I do not uphold this complaint.

(d) The application for reserved matters was handled with impropriety

21. Mr C is of the view that, given the fact that Mr A was disadvantaged by not being notified of the outline permission application which was then approved, the Council should not have proceeded on 15 December 2004 to go on to consider an application for reserved matters. It is clear that his preference would have been for the outline application to have been revoked but the Committee decided against this. Members were, therefore, under an obligation to consider the application before them.

22. In a letter of 8 September 2005 addressed to Mr C from the Council's Planning and Building Control Department, it was explained to him that it had long been standard practice that where a case has been debated at an Area Regulatory Committee and the Committee's decision was to continue consideration of the case (see paragraph 17), subsequent consideration continued where the earlier consideration terminated. Arguments already heard were not rehearsed and consideration was limited to new matters or matters not already discussed. Mr C

believed that this further disadvantaged Mr A in that their representation could only be limited, but I am satisfied that the procedure followed was that normally used. Mr C and Mr A's adviser addressed the Committee and they were not treated differently to any other objector in similar circumstances.

(d) Conclusion

23. Taking the foregoing into account, I have not seen evidence to suggest that the Council acted with impropriety. It is clear that Mr C was unhappy with the procedures but these are the ones which normally apply and are used to prevent duplication of discussion and to save time. Accordingly I do not uphold this complaint.

(e) The Council failed to follow their complaints procedure when dealing with the complaint's representations

24. Mr A's adviser wrote in detail to the Council on 28 October 2004, about the fact this his client had not been notified of the outline planning application made in May 2001. He made firm representations against the subsequent application in relation to reserved matters. Towards the end of his letter he said, in bold:

'In light of the current circumstances my clients herewith register a formal complaint against Dumfries and Galloway Council under the Council's complaints procedure.'

He then went on to outline his specific complaints.

25. The Nithsdale Area Planning manager acknowledged the letter on 16 November 2004 responding to the six points of complaint raised. He concluded that there had been no maladministration in connection with the matter and that the Nithsdale Area Committee would deal with the application at their next meeting. Mr A remained unhappy with this response and his adviser, therefore, registered his dissatisfaction by letter of 4 December 2004, again referring to the formal complaint previously made (see paragraph 24). He said that unless the outline consent was revoked and/or the application for reserved matters was rejected, his client intended to pursue a complaint of maladministration to the Ombudsman and he outlined the form the complaint would take.

26. This letter of 4 December 2004 failed to receive a specific response and the Council then continued the procedure to deal with the application for reserved matters (see paragraphs 21 to 22).

27. On 14 June 2005, Mr C made his formal complaint to this office on behalf of Mr A although at this point it was deemed to be premature (that is, it had not progressed through the Council's complaints process). A formal response to the complaint originally made to the Council was eventually sent to Mr C on 8 September 2005. Amongst other things, it accepted that the agent's letter of 28 October 2004 was not handled in terms of the Council's complaints procedure as it was not viewed as a formal complaint, but, nevertheless, '...a competent response to it was made...' An apology was given for the Council's failure to reply to the agent's letter of 4 December 2004. The Council said that as the matter had repeated what had been said before, and had confirmed the differences of opinion between staff and Mr A and his adviser, there had been little to add. Mr C was advised that the letter to him dated 8 September 2005 completed the Council's complaints procedure and told him that if he was unhappy with it, he had the right to approach the Ombudsman. In their formal response to this office of 22 May 2006, the Council took the view that no prejudice had been caused to Mr A as a result of the way they dealt with his complaint. Nevertheless, they acknowledged there had been failings on the Council's part and reiterated their apology.

(e) Conclusion

28. Mr A's adviser made a formal complaint to the Council on his behalf on 28 October 2004. The Council acknowledged that they did not treat it in accordance with their stated complaints procedure and while I consider that this is a matter for concern, an apology was made prior to this office accepting the complaint from Mr C. Mr C cannot claim any continuing injustice as a consequence, this being so, I do not find maladministration with regard to this part of Mr C's complaint.

28 November 2006

Explanation of abbreviations used

Mr C	The complainant
Mr A	The aggrieved person
The Council	Dumfries and Galloway Council
The Act	Town and Country Planning (Scotland) Act 1997
The Order	Town and Country Planning (General Development Procedure) (Scotland) Order 1992
The Plan	Dumfries and District Local Plan 1993