

Scottish Parliament Region: North East Scotland

Case 200702113: Directorate for Planning and Environmental Appeals

Summary of Investigation

Category

Scottish Government and Devolved Administration: Planning; Policy/administration

Overview

The complainant (Mr C) raised concerns regarding the Scottish Executive Inquiry Reporters Unit¹ (SEIRU)'s handling of his appeal in respect of a proposed Alteration or Removal of Buildings or Works Order (the Order). In particular, Mr C was unhappy with the actions of the appointed reporter (the Reporter) and the conduct of the corresponding hearing (the Hearing). The specific points of complaint are listed below.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the Hearing and corresponding site visit were not conducted in a proper and fair manner (*not upheld*);
- (b) SEIRU mismanaged the documentation relating to the Hearing (*not upheld*); and
- (c) SEIRU did not fully consider Mr C's subsequent complaints (*upheld*).

Redress and recommendation

The Ombudsman recommends that the DPEA issue an apology to Mr C for the lack of clarity in their responses to his complaints. More generally, she would remind them of the importance of outlining their role and remit to complainants and of providing a clear explanation of what they can and cannot consider. Where they are not able to fully respond to any specific points raised, they should provide details as to why this is the case.

The DPEA have accepted the recommendation and will act on it accordingly.

¹now the Directorate for Planning and Environmental Appeals (DPEA). On 3 September 2007 Scottish Ministers formally adopted the title Scottish Government to replace the term Scottish Executive.

Main Investigation Report

Introduction

1. On 2 November 2007, the Ombudsman received a complaint from a man (referred to in this report as Mr C) regarding the Scottish Executive Inquiry Reporters Unit (SEIRU)'s handling of his appeal in respect of a proposed Alteration or Removal of Buildings or Works Order (the Order). In particular, Mr C was unhappy with the actions of a Reporter (the Reporter) and the conduct of the corresponding hearing (the Hearing).

2. The complaints which have been investigated are that:

- (a) the Hearing and corresponding site visit were not conducted in a proper and fair manner;
- (b) SEIRU mismanaged the documentation relating to the Hearing; and
- (c) SEIRU did not fully consider Mr C's subsequent complaints.

Investigation

3. In writing this report I have had access to the correspondence between Mr C and SEIRU relating to the Hearing and subsequent formal complaint. In addition, I obtained advice from the Ombudsman's Planning Adviser (the Adviser).

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 DPEA were given an opportunity to comment on a draft of this report.

Background

5. In April 2003, Mr C submitted a planning application to Dundee City Council (the Council) in connection with a proposed new dormer window and balcony at first floor level of his property and the erection of a single storey garage and conservatory. This application was approved by the Council's Development Quality Committee (the DQC) on 30 June 2003, however, one of Mr C's neighbours subsequently raised concerns with the Council regarding the work which was being carried out. One of the Council's Enforcement Officers then carried out site visits to Mr C's property on 20 December 2005, 1 February 2006 and 7 February 2006 and noted alterations which deviated from the approved plans.

6. The alterations were noted as changes to windows and doors on the west elevation of the building, a change to a window on the south elevation, a change in size of the proposed double garage, a repositioning of a door on the east elevation and the introduction of two new windows. Two small roof lights were also proposed for the east slope of the garage roof.

7. In light of these alterations, a request was made to Mr C's architect for the submission of amended plans for consideration by the Council. The amended plans were submitted by Mr C's agent on 9 February 2006, who noted that Mr C intended to use the garage as a covered play area for his children, with the upper level also being used for storage. It was also noted that the windows proposed for the east elevation were being reclaimed from the existing house where alterations were being carried out. These amended plans were approved by the Council, as non-material variations, on 20 February 2006. They stated that they had no objection to the use of the garage as a play area for Mr C's children, however, they reminded Mr C that it would not be permissible to use the structure as a separate residential unit. The approval, therefore, permitted the changes to proceed without the requirement for a fresh planning application.

8. The decision to class the alterations as non-material variations was taken in line with the Council's Scheme of Delegation and this was appropriate, however, following the receipt of a number of complaints from neighbours of Mr C, the Director of Planning and Transport (the Director) decided to refer the matter to the DQC to seek approval of the delegated decision. In his report to the DQC, the Director recommended that the decision to allow the alterations be endorsed. However, his report also referred to other options for the Council, including the Order.

9. The Director's report was considered by the DQC, along with representations from Mr C and his neighbouring objectors, at a meeting on 22 May 2006. These considerations were then carried over, pending further advice from the Director, to a special meeting of the DQC on 12 June 2006. This was held in private, under the terms of the Local Government (Scotland) Act 1973 and, following the meeting, the Order was made under Section 71 of the Town and Country Planning (Scotland) Act 1997 (the Act). The Order was dated 19 June 2006 and stated that the works at Mr C's property had substantially affected the amenity of neighbouring occupiers because there was a real likelihood of overlooking and loss of privacy. The Order required Mr C to remove the roof lights and windows on the east elevation of the garage and

instructed the garage to be completed, without windows and roof lights, using the finishing materials proposed in the original consent of 30 June 2003.

10. The Order required subsequent confirmation by Scottish Ministers, however, the order was opposed by Mr C and thus had to be submitted to Scottish Ministers for confirmation, with the opportunity of a hearing under Section 72 of the Act.

11. Under the provisions of Section 265 of the Act, Scottish Ministers appointed the Reporter from SEIRU to hold the Hearing and report to them in connection with the Order. The Hearing was carried out on 16 November 2006 and the Reporter considered submissions from Mr C, the Council and the neighbours of Mr C who had lodged objections, together with the findings from a site visit which the Reporter carried out the same day. Following this, he concluded that the appearance of the garage varied significantly from that originally approved and that the changes were material in planning terms. He considered that the environmental quality of neighbouring residents would be adversely affected by the development if it was completed in accordance with the amended plans and his view was that the development did not follow the terms of Policy 1 of the adopted local plan. The Reporter, therefore, recommended to Scottish Ministers that the Order be confirmed.

(a) The Hearing and corresponding site visit were not conducted in a proper and fair manner

12. Mr C formally complained to SEIRU in a letter dated 13 June 2007. He expressed his dissatisfaction with the remit of the Hearing as the Reporter had given consideration to factors which were not mentioned in the Order and he also felt that these additional factors were given disproportionate emphasis. He was concerned, in particular, that one of these factors (light pollution) had been suggested by one of his neighbours during the site visit and he also raised his concerns that the Reporter did not enter the garage during his site visit. Mr C also felt the Director's report had not been considered by the Reporter and, in addition, he stated that the Reporter had not carried out his duties fully, due to the fact that compromise solutions had not been discussed.

13. SEIRU responded by advising that the Code of Practice for Hearings allows 'further limited discussion of matters' and they stated that the Reporter had been entitled to deal with the additional matters discussed. They assured Mr C that the Reporter had not heard evidence during the site visit. They stated

that his observations were matters of fact and that the problem with light pollution had been self-evident. They also informed Mr C that the Director's report had indeed been considered by the Reporter and mentioned in his report but it had not been appended as it was not specifically submitted as an enquiry document by Mr C's agent. Finally, the Reporter advised that he could not recall any compromise solutions being put before him at the Hearing.

14. Mr C sent a further letter of complaint to SEIRU in which he acknowledged that further limited discussion of matters is allowable but he again expressed concern with the proportion of emphasis given to the additional matters being considered. He also stated his belief that the Reporter's observations were not matters of fact and he felt that SEIRU had contradicted themselves by also stating that the Reporter had expressed an opinion (with regards to light pollution being self-evident). In relation to this matter, he also reiterated his belief that it had been given consideration due to his neighbour's comment and he again expressed his dissatisfaction that the Reporter had not entered the garage during the site visit. In addition, he questioned SEIRU's view that the Director's report had been referred to in the Reporter's report and he stated that it had indeed been formally submitted as an inquiry document. Mr C also requested clarification of the Reporter's remit in terms of compromise solutions as he believed that he should have given consideration to these matters regardless of whether or not they were put to him at the Hearing.

15. In SEIRU's further response to Mr C, they advised that the Reporter had a duty to consider all issues raised which relate to the development and they were satisfied that the issues considered were reasonable issues for the Reporter to have taken into account. They reiterated that the Reporter had believed the issue of light pollution to have been self-evident and that he had felt confident that a sound judgement could be made without the need to enter the garage during the site visit. In relation to compromise solutions, they advised that the Reporter had considered all issues raised by parties to the Hearing and he had deemed the development unacceptable for the reasons given in his report. They also reassured Mr C that the Director's report had been included in the evidence considered. They stated that, although the fact that it had not been listed as a production was an error, it did not alter the fact that it had been considered.

16. Mr C contacted the Ombudsman and reiterated his concerns relating to the consideration of matters not mentioned in the Order and the weight given to

the same. He also restated his complaint regarding the Reporter not entering the garage and he indicated his belief that an accurate perspective could not have been gained without having done so, particularly in relation to the level of the garage in relation to neighbouring properties. He again noted his concerns regarding the consideration of the Director's report, the reasoning behind the consideration of light pollution and the lack of consideration of compromise solutions. In addition, Mr C expressed his concern that the Reporter's statement in relation to shrubbery and screening was misleading as it referred to a reduced impact in winter despite the site visit being carried out in November.

17. In considering this complaint, it was my role to consider whether the Reporter's administrative handling of the Hearing and site visit was appropriate and whether his decision was reached following reasonable consideration of relevant information. It has not been my role to assess the technical aspects of the case or to be a further right of appeal against the Reporter's decision.

18. In relation to the issues considered by the Reporter, SEIRU have advised me that 'it is up to the appointed Reporter to give what weight to whatever evidence is presented, or on his own findings, he deems appropriate'. In addition, in response to Mr C's view that the issue of light pollution was only given consideration further to an objector's comment during the site visit, the Reporter confirmed his view that the matter was considered due to it being self-evident. I have sought the Adviser's views and he stated that additional matters can be considered at the Reporter's discretion. He indicated that, in reaching his decision, the Reporter can look at any material planning matter and he advised that the issues considered in Mr C's case were all material planning matters. The Adviser expanded upon this by considering amenity and the Order's conclusion that the building works had substantially affected the amenity of the neighbouring occupiers. He stated that the Reporter had discretion relating to the interpretation of amenity and that, although the Order only referred to amenity in terms of overlooking and loss of privacy, all the other matters considered by the Reporter fell within a reasonable definition of amenity.

19. In responding to my enquiries, SEIRU reiterated their advice to Mr C that the Reporter did not consider it necessary to enter the garage as he was confident that he could see all that he needed to from standing next to the garage. They also noted that he had entered a neighbour's property to see the

impact from first floor level, but had not chosen to enter another neighbour's property as he was confident that he was able to make a sound decision based on what he had seen.

20. With regards to the consideration of compromise solutions, SEIRU advised that the Reporter's duty is to consider the case in front of him. They confirmed that it is not for him to propose compromise solutions although he may consider recommending conditions to mitigate the impact of the scheme.

21. On the Reporter's comments pertaining to shrubbery and screening, SEIRU stated that this referred to the impact of changing seasons and did not refer to the specific position at the time of the site visit.

22. In commenting on the draft report, with regards to the documents listed as productions for the Hearing, SEIRU advised that they asked both parties to submit their statements of case, and list any documents they intended to refer to at the Hearing, no later than four weeks from 3 August 2006. They confirmed that Mr C's agent's statements were submitted on 19 September 2006 and that no list of documents was provided at that stage. They did acknowledge that Mr C's agent submitted a letter dated 17 July 2006 which was referred to as a further submission in support of Mr C's case and it listed various documents, including the Director's report. However, in the circumstances, they did not consider it reasonable for this document to have been listed as a Hearing document when it had not been specifically submitted as such, but rather as part of an earlier submission.

(a) Conclusion

23. The Adviser's advice, which I have received and accept, is that the Reporter was entitled to consider additional matters at his discretion and was able to exercise discretion in relation to the level of consideration given to each matter. I am satisfied that all additional matters considered by the Reporter were material planning matters and that they all fell within a reasonable definition of amenity. In addition, the specific locations the Reporter visited during the site inspection were for him to decide, using his professional judgement and, in his report, the level of comment afforded to his observations were also matters for his discretion. I can find no evidence of maladministration in respect of the Reporter's actions and I am, therefore, unable to question his discretion or professional judgement.

24. Whilst I note that the Reporter is entitled to recommend conditions to mitigate the impact of his decision, I also note that, in his complaint to SEIRU, Mr C raised specific compromise solutions which he felt should have been given consideration. I consider it reasonable to expect Mr C to have raised these matters during the Hearing and I am satisfied that the Reporter is not duty bound to come up with his own compromise solutions in every case he considers.

25. I note Mr C's interpretation of the Reporter's comments regarding shrubbery and screening and his perception that these were misleading, however, I acknowledge SEIRU's explanation of the meaning of the comments and I deem this to be a reasonable interpretation of the same.

26. It is unfortunate that the Director's report was not listed as a production for the Hearing, however, SEIRU have confirmed that, despite this omission, the report was indeed held on the case file and given consideration by the Reporter and there is, therefore, nothing further I can add to the matter.

27. As I am satisfied that the Hearing and corresponding site visit were conducted in a proper and fair manner, I do not uphold this complaint.

(b) SEIRU mismanaged the documentation relating to the Hearing

28. In his second letter of complaint to SEIRU, Mr C expressed concern over the fact that documents submitted for the Hearing had been lost shortly after the Hearing took place, causing replacement documents to be requested. Mr C raised this concern in connection with his belief that the Director's report had not been considered and, in their response, SEIRU advised that a copy of this report was on the case file and that it had indeed been considered. They did not offer comment on the submitted documents going astray.

29. Mr C reiterated his concerns in his complaint to the Ombudsman and, upon investigating the matter, I have established that, following the Hearing, SEIRU sent the finalised report to the Scottish Executive Development Department for Scottish Ministers to action. The file was recorded as having been received in their mailroom on 22 January 2007, however, it did not reach the Planning Division as intended. Action was, therefore, taken to retrieve duplicate documents and copies of files held by SEIRU, the Council and Mr C's agent were obtained. In the meantime, Scottish Ministers received legal advice confirming that the Order could be confirmed using a copy of the original Order,

however, the file was subsequently located on 2 April 2007. Scottish Ministers then wrote to the Council on 10 May 2007 advising their acceptance of the Reporter's recommendation that the Order be confirmed. In their response to my enquiries, SEIRU highlighted that no decision was issued until the file had been recovered and that all the papers were before Scottish Ministers when their decision was made.

(b) Conclusion

30. Whilst it is unfortunate that the file could not be located between 22 January 2007 and 2 April 2007, I am satisfied that relevant action was taken to retrieve the appropriate information prior to proceeding to confirm the Order. Notwithstanding this, I note that the file was recovered in advance of this confirmation and that all documentation was available to Scottish Ministers when making their decision. In the circumstances, I do not uphold this complaint.

(c) SEIRU did not fully consider Mr C's subsequent complaints

31. In his initial letter of complaint to SEIRU, Mr C raised specific concerns he had regarding the Reporter not having entered the garage during his site visit. He also raised concerns regarding a statement made by the Reporter relating to the screening provided by deciduous trees and shrubs on the boundary between Mr C's property and a neighbouring property. In addition, Mr C expressed concern regarding the potential for overlooking when 'the garage windows ... are below the height of the first floor windows [of his neighbour's property]'. None of these matters were addressed within SEIRU's initial reply and Mr C wrote to them again on 13 September 2007 to express his dissatisfaction with their response. SEIRU subsequently replied on 22 October 2007, however, they again failed to address the latter point pertaining to the potential for overlooking.

32. Mr C also raised his concerns regarding the fact that the Reporter had not considered compromise solutions during the hearing. He put forward a list of compromise solutions which he thought should have been considered and, in their initial response, SEIRU stated that the Reporter did 'not recall any of these matters being put before him at the hearing'. Mr C then stated that he believed the consideration of such matters to have been within the remit of the Reporter, regardless of whether they were put before him and, in their response, SEIRU merely stated that the Reporter 'considered all of the issues raised by parties to

the hearing and concluded that the development in front of him was unacceptable for the reasons given in his report'.

33. Mr C's substantive complaint related to the consideration of matters not mentioned in the Order and SEIRU responded by advising that the Code of Practice for Hearings allowed 'further limited discussion of matters'.

34. In his complaint to the Ombudsman, Mr C stated his belief that SEIRU had not addressed his complaints in the manner that is expected of public bodies and he viewed their actions as 'indifferent, dismissive and curt'. He stated that he was not invited to discuss his concerns and he felt that SEIRU's position suggested that they had the power to make decisions without a requirement to explain their actions to members of the public.

35. In commenting on the draft report, SEIRU stated that once a decision is issued by Scottish Ministers it is final and neither the Reporter nor Scottish Ministers have any further jurisdiction in the matter. They advised that, as a result, it is not possible for them to comment on the merits of a case other than to say that the report to Scottish Ministers was based on the evidence presented at the Hearing, the written submissions by all the parties involved, on all representations received and on the Reporter's site inspection. They stated that Mr C's complaints were not restricted to solely procedural matters but also concerned the reasoning behind the report which they are unable to comment on. They consider that their response letters fully addressed the procedural matters raised by Mr C and that they also responded as far as they were able to in respect of how these matters affected the final report.

(c) Conclusion

36. I do not consider SEIRU's responses to Mr C's complaints to have been as full and clear as they might have been and I believe that more detailed replies could have been provided in an effort to allay his concerns. Whilst their responses in relation to the Code of Practice for Hearings allowing 'further limited discussion of matters', and also to the Reporter's duties in connection with consideration of compromise solutions, were factually accurate, a more comprehensive response to Mr C's detailed comments may have gone further to providing him with some reassurance. Whilst I do not dispute that the Reporter can exercise discretion in such matters, I consider that it would have been appropriate for SEIRU to have responded in more depth in order to attempt to provide Mr C with some further clarity.

37. I acknowledge that SEIRU may be unable to comment on the merits of a decision once it has been finalised, however, I consider it appropriate for them to clearly highlight any matters which they are unable to respond to and to provide a clear explanation of the reasons for this. In the circumstances, I uphold this complaint.

(c) Recommendation

38. The Ombudsman recommends that the DPEA issue an apology to Mr C for the lack of clarity in their responses to his complaints. More generally, she would remind them of the importance of outlining their role and remit to complainants and of providing a clear explanation of what they can and cannot consider. Where they are not able to fully respond to any specific points raised, they should provide details as to why this is the case.

39. The DPEA have accepted the recommendation and will act on it accordingly. The Ombudsman asks that the DPEA notify him when the recommendations have been implemented.

Explanation of abbreviations used

Mr C	The complainant
SEIRU/DPEA	The Directorate for Planning and Environmental Appeals (formerly the Scottish Executive Inquiry Reporter's Unit)
The Order	Alteration or Removal of Buildings or Works Order
The Reporter	Appointed by the DPEA to report to Scottish Ministers (under Section 265 of the Act)
The Hearing	The hearing held by the Reporter under Section 72 of the Act
The Adviser	The Ombudsman's planning adviser
The Council	Dundee City Council
The DQC	The Council's Development Quality Committee
The Director	The Director of Planning and Transport
The Act	Town and Country Planning (Scotland) Act 1997

List of legislation and policies considered

Town and Country Planning (Scotland) Act 1997

Local Government (Scotland) Act 1973