

Scottish Parliament Region: South of Scotland

Case 200703193: Dumfries and Galloway Council

Summary of Investigation

Category

Local government: Planning; planning application (complaint on behalf of developer)

Overview

The complainant is a planning consultant. His complaint to the Ombudsman concerned the handling by a committee (the Area Committee) of Dumfries and Galloway Council (the Council) of his clients' application (the Application) for planning consent for a dwelling house in a rural area.

Specific complaint and conclusion

The complaint which has been investigated is that there were shortcomings in the consideration of the Application by the Council's Area Committee (*not upheld*).

Redress and recommendations

The Ombudsman has no recommendations to make.

Main Investigation Report

Introduction

1. The complainant (Mr C) is a planning consultant who was called in by the agents involved in an application for planning consent (the Application) to Dumfries and Galloway Council (the Council) for full consent for a single house in a rural location. The Application was refused by a Council committee (the Area Committee) on 12 December 2007. The complaint is made with the knowledge and consent of the applicants (Mr and Mrs A).

2. The complaint from Mr C which I have investigated is that there were shortcomings in the consideration of the Application by the Council's Area Committee.

Background

3. In terms of subsection 7(1) of the Scottish Public Services Ombudsman Act 2002 the Ombudsman is not entitled to question the merits of a decision taken without maladministration by or on behalf of a listed authority in the exercise of a discretion vested in that authority. Subsection 7(8) of the 2002 Act states that the Ombudsman must not investigate any matter in respect of which the person aggrieved has or had a right of appeal to the Scottish Ministers unless the Ombudsman is satisfied that, in the particular circumstances, it is not reasonable to expect the person aggrieved to resort or have resorted to the right or remedy. In this particular instance, an appeal against the Council's refusal of consent for the Application was submitted to Scottish Ministers, was the subject of an inquiry by the Directorate of Planning and Environmental Appeals but was dismissed.

4. The Council have informed me that the Area Committee had full powers to determine the Application on 12 December 2007. If the Area Committee adopts the recommendation of officers for refusal on policy grounds, there is no provision for referral to the Council's Planning, Housing and Environmental Services Committee (the Committee). Had the Area Committee agreed to grant the Application, contrary to officer recommendation based on the Council's policies, then the recommended approval would have been submitted to the Committee for further consideration on policy grounds. In terms of Council Standing Order No 18, had a sufficient number of members been unhappy that a vote had not been held, then they could have taken action to recall the

decision within 48 hours. That would have resulted in the Application being submitted to the Committee.

Investigation

5. My colleague obtained information from Mr C and the Council. He obtained the views of the Ombudsman's planning adviser. My colleague interviewed Mr C, Mr and Mrs A and members and officers of the Council. He left the Ombudsman's service shortly after those interviews. It fell to me to review the complaint file and to draft this report. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C, Mr and Mrs A, and the Council were given an opportunity to comment on a draft of this report.

6. On 24 July 2007, Mr and Mrs A submitted the Application through local agents for planning permission for the erection of a dwelling house with detached studio and workshop, formation of access, erection of a 15 metre high domestic wind turbine, installation of a geothermal heating system and installation of a septic tank and soakaway.

7. The site of the Application is in an Uplands Regional Scenic Area, has an agricultural use and is some 820 metres from a local small building group. The field slopes down to a stream on its western boundary. On its lower levels the field is poorly drained and marshy. In the upper slopes, to the north, there is a disused quarry. Around the periphery there is a mix of mature trees/bushes and stone walls. At the time the Application was considered by the Area Committee Mr and Mrs A lived between three and four miles away from the site.

8. The Application was advertised and attracted three letters of representation – all from residents in the local small building group. The Council's Planning Service undertook consultation on the Application with the Council's Roads, Environmental Standards and Economic Regeneration Services and with the Scottish Environmental Protection Agency, Scottish Water and Scottish Natural Heritage. There were no objections raised by the consultees. Roads Services suggested necessary conditions for approval and Scottish Natural Heritage identified an issue with barn owls and a need to survey and assess the risk of bird strike from the wind turbine.

9. Mr C was approached by Mr and Mrs A's agents to provide a statement of support for the Application. He provided a detailed statement extending to

41 paragraphs. The agents were informed by the Planning case officer (Officer 1) by letter of 7 November 2007 that the Application would be considered by the Area Committee on 14 November 2007. They were advised that they could attend and make a statement to the Area Committee before the Area Committee made a decision. Enclosed with the letter was a copy of the report prepared on the Application.

10. The primary section of that report extended to 13 pages, with an additional ten-page appendix dealing with relevant local and national planning policy. A second appendix set out in full Mr C's statement in support of the Application with the comments of the Planning Service on points made. The body of the report set out the background of the proposals and detailed a previous refusal of an application for a dwelling house in the same field in November 1988, the outcome of the consultations, the content of the representations, and an assessment of the proposals against the development plan and policies. It culminated with a recommendation to refuse planning consent on four specific grounds.

11. The report was placed before the Area Committee at its meeting on 14 November 2007. Mr C was heard on why the Application should be approved. There was considerable discussion on the merits of the Application. The minutes record that a motion was proposed by one councillor (Councillor 1) and seconded by another (Councillor 2) to refuse the Application (for the reasons stated in the report). An amendment was proposed by a third councillor (Councillor 3) and seconded by a fourth (Councillor 4) to defer consideration of the Application pending a site visit. A roll call vote was taken. Nine members supported the amendment and seven supported the motion. The decision taken by the Area Committee was to defer consideration of the Application pending a site visit.

12. The site visit took place on Friday 7 December 2007. Mr and Mrs A's recollection was that the site visit was attended by five members and by the Area Planning Officer (Officer 2). Officer 2 has stated that the site meeting was undertaken by a Senior Planner (Officer 3) and four councillors. The councillors who attended included Councillor 3, who moved the amendment and is one of four councillors for the local ward. One other local ward councillor attended.

13. The Area Committee resumed consideration of the Application on 12 December 2007. That meeting was attended by 20 councillors. The minute

records that the Area Committee reached a decision on the Application to refuse on grounds that:

- the proposal was contrary to the policy of the Council as stated in Structure Plan Policy D4, ... Local Plan General Policy 15 and to national policy as set out in SPP3 which permit the erection of new houses only in special circumstances identified in development plans and none of these circumstances apply in this case. The applicant had not demonstrated that a dwelling house was essential at this location in terms of Structure Plan Policy D4(5);
- the proposal was contrary to the provisions of Structure Plan Policies D36 and E2 and ... Local Plan General Policies 7 and 42 in that the siting and layout of the proposed dwelling house and associated ancillary work would have an adverse impact on the (local) Uplands Regional Scenic Area;
- the proposal was contrary to the provisions of Structure Plan Policies S21 and E6 in that it had not been demonstrated the proposed wind turbine would not adversely affect the local breeding barn owl population; and
- the approval of this house in this location without adequate policy justification would set an undesirable precedent for further sporadic residential development in the rural area.

14. Mr and Mrs A were aggrieved at how the Area Committee reached their decision. Mr C submitted a letter of complaint to the Council on 14 February 2008. Mr C was not satisfied with the Council's response of 12 March 2008 and submitted an electronic complaint to the Ombudsman on 29 March 2008.

15. Subsequent to the submission of the complaint, an appeal was submitted to the Directorate for Planning and Environmental Appeals on the Application. The appeal was dismissed by letter of 23 July 2008.

Complaint: There were shortcomings in the consideration of the Application by the Area Committee

16. In his letter of complaint to the Council of 14 February 2008, Mr C complained about a lack of a vote by the Area Committee on his client's proposals when consideration of the Application resumed on 12 December 2007. He stated that he had been in attendance in the public gallery but had been unable to speak. He maintained that the clerk of the Area Committee, the local Area Manager (Officer 4) had been manipulative and that

Officer 2 had not provided assistance to members to frame an appropriate amendment to permit a vote to be taken. In complaining to the Ombudsman's office, Mr C specified that Officer 4 had maintained that since there were some eight or nine points in Structure Plan Policy D4 supporting refusal, a competent amendment would have to address all of these. This had thrown those councillors who had sympathy for the merits of the case. Mr C maintained that a number of councillors were in favour of the Application but were not allowed to vote for it.

17. The Council's Group Manager Corporate Support and Governance (Officer 5) in his response of 12 March 2008 to Mr C stated that he considered that the proceedings at the Area Committee meeting on 12 December 2007 were in accordance with proper procedures and the Council's Standing Orders. On 12 December 2007, the Area Committee recommenced consideration of the Application following the site visit. Having heard all representations for and against the Application at the previous meeting on 14 November 2007, and there being no new issues arising which required consideration, the Area Committee had gone into formal session to reach a decision. That did not afford Mr C or any objector the opportunity to be heard again (unless expressly called upon by the Chairman to speak).

18. Officer 5 reported that Officer 4 recollected that he had indicated to the Area Committee that there were eight or nine policy reasons as to why the Application was recommended for refusal and that any amendment to a motion to refuse should indicate planning reasons as to why these various policies should not apply in this case. At no point in the proceedings did he refuse to accept an amendment. It was, rather, simply the case that no competent amendment was proposed or seconded. Two councillors moved and seconded a recommendation that the Application be refused. There being no other proposals put forward, the Area Committee agreed with the motion that the Application be refused in accordance with the recommendation in the report.

19. Officer 5 confirmed that Officer 2 did not assist councillors to frame an amendment to the motion. Officer 2's role, as Area Planning Officer, was to provide professional advice to the Area Committee. The professional advice was that the Application should be refused.

20. In making his complaint to the Ombudsman, Mr C wanted the office 'to investigate fully by verifying with those councillors who were not allowed to vote

how, and why, they were not allowed to do so'. My colleague, who carried out the investigation of the complaint, interviewed three councillors, Officer 2 and Officer 4.

21. My colleague was provided with typewritten notes taken by the Area Committee Administrator of the discussions on 12 December 2007 which, although not verbatim, provide an indication of what was said and by whom. After a presentation of slides had been shown again to assist members, a motion to refuse consent was made and seconded. One councillor from an urban area indicated that he was excited by the proposals and that, if one of the local members was minded to move approval, he would support. A local ward councillor (Councillor 5) engaged in discussion with Officer 4. Officer 4 stated that, in seeking by amendment to challenge the recommendation to refuse, a significant number of policy issues would require to be addressed. Another councillor representing an urban ward, who had not attended the site visit, sought clarification as to whether the site, in part a former quarry, could be considered 'brown field' rather than 'green field'. The Chairman responded that the councillor's remarks were representations rather than a recommendation. When Officer 2 was asked to clarify how members viewing the site as 'brown field' would affect matters, Officer 2 pointed out that the site remained distant from the nearest small building group and that the proposed change of use was contrary to structure policy (D4) which required an agricultural or other use justification.

22. Councillor 5, when interviewed by my colleague, recognised location was an issue with the Application. He stated that he was very supportive of the 'green dimension' of the proposed house and thought it exceptional. He had wanted to propose an amendment, but considered that Officer 4 had not been prepared to accept. He stated that, to his knowledge, four other councillors would have supported his amendment.

23. The Chairman of the Area Committee felt that Councillor 5 had been given the opportunity to present reasons for proposing an amendment to approve the Application but that no amendment had been proposed. For his part, he liked the design and had allowed a free debate. He recalled that Officer 4 had advised Councillor 5 at the meeting on 14 November 2007 of the need to come up with good reasons for going against officer recommendation. He recalled too that there had been instances where the Area Committee had gone against recommendation to support housing in the countryside.

24. The complaint was referred to the Ombudsman's planning adviser prior to the decision to investigate. Relevant comments by the planning adviser were incorporated into an earlier draft of this report and were shared with Mr C, Mr and Mrs A and the Council. The planning adviser commented that the issue turned on what form of motion or amendment would lead to a competent vote on the option to grant consent subject to departure procedure. The issue of a competent motion would be one for the Chair and clerk/legal adviser. He confirmed that it would have been contrary to the Royal Town Planning Institute code of conduct for the planning officer to recommend refusal in his report and then give first hand advice on the alternative to the motion to refuse which would go against his or her professional judgement. He foresaw no difficulty with input from the planning officer, however, insofar as giving advice on the consequence of any proposed wording or course of action was concerned.

Conclusion

25. In reaching my conclusion I have considered carefully the advice given by the Ombudsman's planning adviser to my colleague.

26. It is not the case that all development proposals contrary to development plan stand to be refused. The development plan, in the form of the structure and local plan(s) of an authority, is only adopted following extensive consultation with the community. Together with additional national planning advice, the development plan provides the salient material framework against which proposals should be judged. The existence of relevant policies provides the basis and justification for refusal of proposals which are not in compliance.

27. It is clearly anticipated that in order to approve proposals with inherent merit, the case for a decision made contrary to the development plan ultimately has to be articulated. In the case of the Application, some members liked its green credentials, and others thought a case could be made that the site was 'brown field' rather than 'green field'. If they had wished an opportunity further to explore the possibility of approving the Application as an exception to policy, then members so minded could have moved and seconded a competent amendment to defer further consideration. If not on 12 December 2007 then certainly at a future meeting, reasons for departure would ultimately have had to be formulated.

28. In the absence of any amendment being moved and seconded there was no division on the Application, and it was, therefore, refused. No competent challenge was made in terms of Standing Order No 18 (see paragraph 4). A decision notice was thereafter issued to Mr and Mrs A's agents. That decision was the subject of appeal to Scottish Ministers. The Inquiry Reporter (from the Directorate of Planning and Environmental Appeals) dismissed the appeal on 23 July 2008.

29. I have given careful thought as to whether the failure to propose and second a competent amendment resulted from alleged manipulation by Officer 4 or unhelpfulness by Officer 2 (see paragraph 16) or, alternatively, that most of the members considering the Application were relatively inexperienced.

30. It is the case that 15 out of the 20 members of the Area Committee were newly elected in May 2007. My colleague and I were, however, expressly informed by Officer 5 that, subsequent to their election, intensive training was given to all new members, particularly in relation to planning procedures. If this is the case, then the simple explanation that the lack of an amendment resulted from the inexperience of newly elected councillors must be eliminated. The evidence I have seen does not support that there was manipulation by Officer 4 or that Officer 2 was unhelpful. It is the case that those members who supported aspects of the proposals did not move and second a competent amendment to the tabled motion to refuse.

31. Had the Application been the subject of a vote, it is by no means certain that the division would have led to a decision to approve. It has not been argued, for example, that the majority of members in attendance were in favour. If, as suggested by Mr C, some members felt frustrated at the decision, then the Council's Standing Order No 18 provided for a procedure of recall if a sufficient number of members were unhappy. That did not happen.

32. I can see why Mr and Mrs A and Mr C are aggrieved at the decision on the Application. I do not consider that they have suffered material injustice as a consequence of maladministration or service failure. They availed themselves of the opportunity to appeal on the merits of the Application. Unfortunately for them, that appeal was dismissed. I do not uphold the complaint.

Explanation of abbreviations used

Mr C	The complainant
The Council	Dumfries and Galloway Council
The Area Committee	The Council's local committee
The Application	An application by Mr C's clients for planning consent for a single house in the countryside
Mr and Mrs A	Applicants for planning consent, Mr C's clients
The Committee	The Council's Planning, Housing and Environment Services Committee
Officer 1	The Council's Planning Case Officer
Councillor 1	The member of the Area Committee who moved refusal of the Application on 14 November 2007
Councillor 2	The member of the Area Committee who seconded refusal of the Application on 14 November 2007
Councillor 3	The local ward member of the Area Committee who moved on 14 November 2007 that a site visit be held
Councillor 4	A member of the Area Committee who seconded that a site visit be held
Officer 2	The Council's Area Planning Officer

Officer 3	A Council Senior Planner
Officer 4	The Councils Area Manager, clerk to the Area Committee
Officer 5	The Council's Group Manager Corporate Support and Governance
Councillor 5	The local ward member supportive of the Application