

Scottish Parliament Region: South of Scotland

Case 200904711: Scottish Borders Council

Summary of Investigation

Category

Local government: Planning; handling of planning application

Overview

The complainants, a firm of solicitors (Firm C), raised a number of concerns on behalf of its clients, a housing developer (Firm A), about the handling by Scottish Borders Council (the Council) of a planning application submitted for the development of a new secondary school.

Specific complaint and conclusion

The complaint which has been investigated is that the Council did not observe appropriate planning procedures with regard to the new school contained in the application and, in particular, to notify interested parties of significant changes (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

- (i) apologise for the failings identified.

Completion date

19 October 2011

Main Investigation Report

Introduction

1. The complaint was submitted by a firm of solicitors (Firm C) on behalf of its clients, a housing developer (Firm A). In 2004, Firm A submitted a planning application (Housing Application 1) for a road and plot layout for a housing development of 24 houses on land which was in their ownership but part of a larger area in part leased to another firm (the Tenants). Housing Application 1 was validated on 31 May 2004 and was granted conditional consent by the Development and Building Control Committee of Scottish Borders Council (the Council) on 13 February 2006. One of the conditions for the road and plot layout required that an area of ground be safeguarded from development to allow for pedestrian access to the east, in order to ensure that appropriate links were provided between the residential development and the site of a proposed school.

2. An outline planning application for a proposed secondary school on an adjacent site had been submitted in late 2005, was validated on 26 January 2006 and was continued by the Council's Development and Building Control Committee on 10 April 2006. This application was later withdrawn.

3. In the interim, on 10 March 2006 a second application for the new school (the School Application) was submitted by agents on behalf of a building contractor. The School Application, validated on the same day, was for full consent for 'the erection of a secondary school with associated parking and sports facilities' on land then currently used as farmland, east and south of the site in Firm A's ownership. The development of the school was undertaken as a public private partnership, with the school being built on private land and financed by a consortium who on completion would lease the building and associated facilities to the education authority.

4. Neighbour notification was served on the Tenants. However, a director of Firm A was aware of the initial proposal for the school since he replied on 14 March 2006 to a letter from the Head of Planning & Building Standards by suggesting that another site for the school to the west would be more suitable. On 20 March 2006, the same director of Firm A wrote again to the Council objecting to the School Application because of disturbance and flood concerns. He also repeated his views about the alternative site being more suitable.

5. The School Application was the subject of a report to the Development and Building Control Committee on 14 August 2006. That report contemplated a single vehicular access (of the order of 200 metres in length) from a public highway to the north; a car drop off point and lay-by; and a vehicular bridge over a stream. Elsewhere, the report identified that the access road would require to be built at a level above the functional flood plain and that an embankment would be necessary. The School Application was approved subject to 22 conditions and the consent was issued on 28 November 2006. Condition 3 stated that 'the access, footpaths and parking areas to be fully formed and constructed to the specification of the Planning Authority'. Condition 13 provided that 'the design of the new access road across [the stream] (and any footbridges) to be submitted to and agreed by the Planning Authority, in consultation with the Scottish Environment Protection Agency [SEPA] and Scottish Natural Heritage, before the development is commenced'. In a section for the information of the applicant, it was pointed out in respect of condition 3, that the access road would require to be constructed to a standard adoptable by the Council as roads authority.

6. Scrutiny of the information currently available (2011) on the Council's website suggested that when the SEPA, as a statutory consultee, commented on the School Application on 7 July 2006, the proposal on which they were commenting included a proposal to build an embankment for the access drive and a bridge across the stream and its flood plain, albeit none of the plans approved in November 2006 displayed that intent. SEPA did not object but felt certain issues still required to be resolved. In consequence, a second Flood Risk Assessment (FRA) was submitted in September 2006. The FRA referred to a minimum level for the earth embanked access road as 107 metres above ordnance datum. While, in a letter of 18 September 2006, SEPA again did not object to the proposals they remained concerned about possible flooding of an area of proposed car parking.

7. A Landscape Proposal drawing with a contoured site plan, among plans approved on 28 November 2006, showed a spot height on the access drive at the car turning circle of 102 metres and at the centre bridge span of 103 metres, clearly at odds with the information in the FRA on which SEPA were consulted in September 2006. The Council's planning portal displayed one drawing, dated 29 September 2006 and received by the Council on 20 December 2006, giving three relevant spot heights: a height of 107.34 metres at the proposed turning circle; of 109.84 metres at centre span of the proposed bridge; and of 110.65

metres at landfall on the south side of the stream. In comparison, the corresponding figures in the road consent approval profiles of 24 July 2007 were 109.8 metres, 110.6 metres and 110.8 metres.

8. In the meantime, on 2 August 2006, Firm A's agents submitted a second application (Housing Application 2) for the approval of reserved matters for the erection of 24 houses with integral garages. A site layout submitted on 5 October 2006 showed four house plots to be constructed along the north east boundary. The last three were identified with ground floor levels of 107 metres, 106.5 metres and 106 metres respectively. A note on the submitted site plan identified a gap at the end of a hammerhead between plots 15 and 14 as 'possible access to adjacent site'. Housing Application 2 was validated on 11 August 2006. A decision on Housing Application 2 was delegated to officers and consent was issued on 9 July 2007 subject to nine conditions. Condition 9 required that in the interests of pedestrian access 'a pedestrian footpath link to the new (School) site to the east be provided between plots 14 and 15 before the development is completed'. The approved site layout shows an access corridor, the same width as the proposed road with the description 'possible future access to adjacent site'.

9. Works on the school site had commenced on 19 March 2007 with temporary protective measures and earthworks. The architects for the school development informed the Development Control Service on 28 March 2007 of the commencement of works and periodically updated them with regard to compliance with the 22 conditions imposed on the School Application.

10. On 24 July 2007, structural engineers appointed in respect of the implementation of the School Application submitted plans for road construction consent under the Roads (Scotland) Act 1984 for the access to the proposed school. These plans showed a realigned access snaking to the north east, with the proposed junction with the public highway moved in that direction. A related site layout, which is not dated, indicated significant changes to the boundaries of the school and access corridor. No provision was made in respect of any link to the reserved ground as required in condition 9 of Housing Application 2. The plans included detailed profile heights of the access road which, as it approached the proposed bridge over the stream, required to be built up six metres from existing ground level. Comparison of heights indicated that the height of the access to the school would be from 109 metres to 109.5 metres

adjacent to the nearest (eastmost) plots for which Firm A had been granted consent.

11. In terms of the Roads (Scotland) Act 1984, the structural engineers were required to notify interested parties (owners and occupiers) of the application for road construction consent. The structural engineers wrote to the Tenants on 24 July 2007 informing them that representations should be submitted to the Council by 22 August 2007. Firm A, identified in the Non-Domestic Valuation Roll as owner of the site, was not notified. (The Roads Construction Consent was not issued until 28 January 2009.)

12. According to the Council, condition 3 of the Second Planning Application was signed off on 25 August 2008 on the basis that 'the specification has been agreed as being to adoptable standards. Confirming the works comply following implementation can be arranged with ... Technical Services'. With reference to condition 13, Scottish Natural Heritage and the SEPA informed the planning authority, in letters of 27 February 2008 and 16 April 2008 respectively, that they were satisfied with the proposals on which they had been consulted.

13. The contractor handover of the new secondary school was on 20 July 2009 and the school opened to students on 20 August 2009.

14. Application for building warrant for Firm A's site of 24 houses was submitted on 27 July 2006 and granted on 27 November 2007. Works started thereafter and application was made by Firm A's agents on 7 April 2009 for certificates of completion for the first four houses.

15. The complaint from Firm C which I have investigated is that the Council did not observe appropriate planning procedures with regard to the new school contained in the application and, in particular, to notify interested parties of significant changes.

Investigation

16. The investigation is based on extensive information supplied by Firm C, the Council's responses to enquiries, on scrutiny of information publicly available on the Council's website and on advice provided by the Ombudsman's planning adviser (the Adviser). I have not included in this report every detail investigated but I am satisfied that no matter of significance has been

overlooked. Firm C and the Council were given an opportunity to comment on a draft of this report.

Complaint: The Council did not observe appropriate planning procedures with regard to the new school contained in the application and, in particular, to notify interested parties of significant changes

17. On 4 March 2009 Firm A wrote to the Council's Director of Planning and Development. They expressed concern about what they saw as a change in topography of the access road and sought the Director of Planning and Development's views on how the road could have been constructed with no notification to neighbours. The initial reply from a principal planning officer (the Planning Officer) on 16 March 2009 was that the access road was considered to be permitted development in terms of Class 33 of the Town and Country Planning (Scotland) (General Development) Order 1992. Firm A wrote further on 30 March 2009, seeking information on whether it was planned to plant trees or hedges to screen the houses from the access road. The Planning Officer replied on 14 April 2009, indicating that landscaping matters were still under consideration and that Firm A might wish to contact named officers in the project team.

18. Firm A then approached local solicitors who wrote on 16 April 2009 to the Planning Officer. They maintained that insufficient and unsatisfactory scrutiny of the substantial and significant change to the scale and position of the access road and the bus turning area had had, and would have, a direct bearing on the economic viability and potential timescale for selling the houses on Firm A's adjacent development. They pointed out that no provision had been made for the continuance of the footpath from the housing development. They also referred to boundary fence and landscaping issues. In the light of likely financial consequences, they asked that any incomplete works on the access road cease and that an early response be provided to them.

19. The Planning Officer responded to this letter on 24 April 2009, stating that: a) the access road and bus turning area were further away from Firm A's site than had been approved and that, as no levels were specified in the original drawings, there had been no resultant change in terms of the planning approval; b) the link with Firm A's housing development would benefit from further discussion; c) a detailed fencing plan was awaited from the applicant's architect; d) landscaping matters were scheduled to be discussed; and e) future maintenance responsibilities would rest with the facility managers.

20. Information requested on 5 May 2009 by Firm A's builder was supplied by the Planning Officer on 18 May 2009. This essentially related to updates from the architects with regard to progress on the 22 conditions. According to the Council, compliance with condition 3 had been issued by the Planning Officer on 25 August 2008 (see paragraph 12).

21. On 7 July 2009, Firm A wrote to the Head of Major Projects in the Council's Technical Services Directorate on five specific issues. A response was sent on 17 July 2009 in respect of a) the road having been constructed on land not granted planning permission; b) the footway link from Firm A's site to the access road; c) fencing and maintenance treatment; d) proposals to mitigate loss of value of the housing plots; and e) the road construction consent.

22. By the time the new school opened on 20 August 2009, two of the first seven houses in Firm A's housing development had been occupied. These were at the northwest corner of the site furthest distant from the east boundary with the school access corridor.

23. Firm A then instructed Firm C. After carrying out a detailed investigation and seeking the opinion of Senior Counsel, Firm C wrote to the Chief Executive on 8 February 2010. Firm C informed the Chief Executive that Senior Counsel had concluded that: a) elevation of the access road by substantial earthworks was not allowed for in the planning permission for the school; b) the construction of the bridge should have been treated as a reserved matter; and c) had it been, then the proposals would have been intimated to Firm A as owners of the neighbouring land. This would then have allowed Firm A to express concerns about the significant adverse impact that the raised level of some four metres would have on the later phases of their housing development. Firm C indicated that an engineering solution to problems of overlooking and overshadowing was possible, but that it would require the importation of a significant amount of infill (3500m³) and would cost in the order of £275,000.

24. In the absence of a reply, which they had requested within 14 days, Firm C submitted a complaint to the SPSO's office on 4 March 2010.

Firm C's Complaint

25. The complaint submitted to the SPSO rehearsed the background of events and identified the principal issue as the impact which the access road for the

new school had had on Firm A's adjacent development, in the marketability and market value of their proposed houses, and for the amenity of future residents. Firm C maintained that Firm A had not been notified of the School Application in March 2006, but accepted that Firm A had been aware of the application and had been able to submit objections. Firm C stated that, as a consequence of changes to the access road, pedestrians and vehicles would have a view into the bedrooms and gardens to be constructed on the eastern perimeter of Firm A's site. Firm C maintained that the Council had provided two inconsistent explanations why planning permission was not required for the changes to the access road, namely: that the changes were permitted development in terms of Class 33 of the 1992 General Development Order; and that the changes were 'non material variations' (see paragraphs 17 and 19). Firm C stated that remedial action, in the form of raising land within Firm A's site over an area of 2400m² would require importation of some 3500m³ of material at a cost of £100,000; the construction of a retaining wall and structural fence (another £100,000); design costs (£50,000); and £25,000 for other preliminaries. The remedy they sought was for a mechanism to be identified whereby the Council would meet the additional costs involved with land-raising or pay Firm A appropriate compensation for diminished value.

The Council's response

26. The Chief Executive responded on 9 March 2010 to Firm C's letter of 8 February 2010 (see paragraph 23). He stated that, since the School Application was for full consent, a reserved matter application would have been ultra vires. Reserved matter applications only follow upon outline consents. He took the view that, as the plans relating to the consent did not specify heights, the level of the 'as built' road and bridge did not represent an amendment from the approved plan and those with a potential interest had not commented on this in representations on the School Application. In the context of the scale of the overall development, it may have been acceptable for the amendment to have been treated as a non-material variation to the consent under section 64 of the Town and Country Planning (Scotland) Act 1997. The Chief Executive repeated that, notwithstanding this, as the amended road works cost less than £100,000, planning consent was not required and no neighbour notification was necessary. The applicant for roads construction consent had notified adjoining land owners on 24 July 2007 that revised road profile details had been submitted.

27. In responding to the Chief Executive, Firm C maintained that the School Application should have been treated as a 'hybrid application' and that the approval of details in condition 13 should have been treated as if they were a reserved matter application. It was only when finished levels for the bridge and road were submitted that materiality could be gauged. Firm C took issue with whether the works were permitted in terms of Class 33, given that the School Application was a private sector application by a Private Finance Initiative contractor. They also pointed out that notification of the application for Roads Construction Consent was served on the Tenants in July 2007 and not on Firm A as owners.

28. The Chief Executive replied to Firm C on 4 May 2010. He stated that he was unable to agree that the application should have been treated as a 'hybrid application'. He maintained that the 'as built' road and bridge did not represent an amendment from the approved plan at all. He accepted that Firm A as owners were not directly notified of the application for Road Construction Consent. He informed Firm C that the Planning Department had been advised by the Council's Head of Major Projects that the cost of the amended road works was under £100,000 and could be considered to be permitted development.

SPSO handling of the complaint

29. On initial consideration, it was considered that Firm A would have had knowledge of the matters complained of more than twelve months before coming to the Ombudsman and that the remedy sought (see paragraphs 23 and 25) was of a magnitude suggesting that a legal remedy would be more appropriate. Firm C appealed the decision on the basis that it was unreasonable to institute legal proceedings; that there was injustice to Firm A; and that matters were raised with the SPSO within twelve months of Firm A's awareness of the completed level of the access road. They clarified that the primary motivation behind Firm A's complaint was to seek an apology from the Council for the way in which they handled the access issue, as well as a change in the way in which the Council deal with applications for approval of matters specified in planning conditions. The secondary motivation was to facilitate, with the assistance of the Council, the delivery of a solution to the problem which had sterilised a major part of Firm A's development site. On 9 November 2010, the Ombudsman decided to exercise his discretion to disregard the time bar consideration and to consider the substance of a

complaint that the access road was built without the appropriate planning procedures being followed.

SPSO Planning Advice

30. My complaints reviewer sought advice from my planning adviser (the Adviser) on four specific issues. Firstly, whether the conditional consent granted to the School Application should have been treated as hybrid in nature (with the school being granted full consent subject to conditions and the bridge and access embankment remaining subject to the need for reserved matters application); secondly, whether the alternative access road arrangement proposed could be considered permitted development; thirdly, whether the alternative access road arrangement constituted a non material variation to the planning permission that had been granted; and finally, whether the Council's process of signifying prior approval for compliance with conditions 3 and 13 of the consent had been appropriate.

31. The Adviser considered firstly that it would have been unprecedented to have treated the consent to the School Application as a hybrid consent, which is not a concept recognised in statute law. On the second issue he noted that this had been given due consideration by the Council in February 2007 (there was a memo from the Area Development Control Officer confirming that the Head of Development Control considered the formation of the access and roundabout would constitute permitted development for the reasons previously provided to Firm C). While he had serious reservations regarding the reasons for considering the works as permitted development, he considered that the correspondence showed that due consideration was given to the matter of permitted development by officers and that the Council had the right to make its own judgement on the matter which could only really be challenged on legal grounds in court. On the third point, the Adviser considered that, while there was confusion over the issue of non material variation, when the Council had previously maintained in February 2007 that the changes were permitted by development order, it was a matter for the Council's judgement as to whether there was a material planning issue to address in the proposed variations or whether section 64 of the Town and Country Planning (Scotland) Act 1997 applied, which they had duly made. On the fourth point, the Adviser commented that there was apparent confusion on the Council's part over what was in the consent and what required the submission of further details for approval. He felt, however, that the correspondence confirmed that due

process was carried out to confirm the purification of the two conditions to their apparent satisfaction.

Conclusion

The embankment works

32. Despite a clear intention to embank the school access drive, evidenced in the statutory consultation process with SEPA (see paragraph 6), the officer's report refers to discussions with SEPA which included a proposed embankment but no plan approved on 28 November 2006 displays an intent to embank the school drive. The absence of this information in relation to the access road, bus turning area and bridge would have meant that any interested party (including Firm A) examining the plans would have understandable difficulty in assessing the impact of any proposed embankment before a decision was made on the School Application. I am critical of that fact and do not accept that it is reasonable for the Council (as it maintains) to have determined a planning application with reference to a layout drawing showing the access where the height and levels are not accurately identified. The need for, and proposed height of, the embankment should also in my view have been specified with greater accuracy in the planning report as a significant feature of the development. Had these two matters been done, it would in large part have avoided the situation which developed.

33. I have taken into account the detailed advice I have received. While I fully understand why a 'hybrid type' of consent should have been mooted in retrospect as appropriate in the particular circumstances, the absence of such a novel suggestion is not one on which I can fault the Council.

The wording and purification of the conditions

34. Whilst it is appropriate for the Council to impose a planning condition which requires the submission of further information before being signed off or purified, the wording of condition 13 refers to the submission of details of 'the design of the new access road across [the stream]'. This might be interpreted as meaning either the whole access road or solely the part where the crossing of the stream is to be made. While the advice I have received is that the Council have the discretion to interpret the condition as it sees fit, it is in my opinion essential that conditions put in place as part of the planning approval process are clear and unambiguous as required by National Planning Policy. Again, I am critical of the Council in this regard.

35. In progressing the planning of the development, the access drive was repositioned in a north easterly direction and onto land outside the site which had been granted consent. Ultimately, the decision that the amended proposals with regard to the access drive should have been considered by the Council to be 'permitted development' in terms of section 33 of General Development Order was a matter for their judgement as planning authority and was given due consideration at the time. However, if the Council considered the application of permitted development to be fully justified, I find it difficult to reconcile why they later argued that the works may also be considered to be non-material variations. It should be noted that whilst the issue of assessing materiality is a matter for the Council, part of the area of land over which the road was constructed was outwith the area to which the planning permission relates (see paragraph 10). Such inconsistency in approach serves to reinforce in the complainant's mind that there has been maladministration. While it is not a matter for me to provide a definitive interpretation of planning regulations, given that this was a planning application of no little significance, I would have expected the Council to ensure it could reasonably and unambiguously justify their decision making if challenged. I do not consider providing two inconsistent explanations in responses to the complainant to be reasonable.

36. In accepting the amended proposals repositioning the access drive, the Council negated the justification for condition 9 of Housing Application 2. At the very least, at that stage the Council should have been proactive in initiating discussion with Firm A as a party with a direct interest that the Council was or should have been aware of. In all of the circumstances as set out above, I consider that the Council although not under a statutory duty to notify the complainer ought in the circumstances of this case to have informed the complainant of the significant changes to the access road and in particular the embankment works.

37. After careful consideration, taking into account all the concerns I have expressed above, I have decided on balance to uphold this complaint.

38. This is clearly a complex and sensitive case and, in re-opening the complaint it was made clear that any decision made would relate to maladministration and service failure and that, if that was found, an appropriate remedy would be recommended. In this case, I am unable to adjudicate in planning terms on what should have happened had the failures identified above

not occurred. In the circumstances, I recommend that the Council apologise for the failings identified.

Recommendation

39. The Ombudsman recommends that the Council:
- (i) apologise for the failings identified.

Completion date
19 October 2011

Explanation of abbreviations used

Firm C	The complainant, a firm of solicitors
Firm A	A housing developer, the client of Firm C
Housing Application 1	Firm A's initial application for a housing development of 24 houses
The Tenants	Firm A's tenants on the land they developed for housing
The Council	Scottish Borders Council
The School Application	A planning application submitted for a new secondary school with access adjacent to the site of Housing Application 1
Housing Application 2	An application submitted on behalf of Firm A for approval of reserved matters relating to their site
The Adviser	The Ombudsman's planning adviser
The Planning Officer	A Council principal planning officer