

Case 201003274: The City of Edinburgh Council

Summary of Investigation

Category

Local government: Planning; handling of application (complaints by opponents)

Overview

The complainant (Mrs C) raised concerns about the City of Edinburgh Council (the Council)'s handling of a planning application for the erection of a two-storey extension at her neighbour's property.

Specific complaint and conclusion

The complaint which has been investigated is that the Council failed to follow due process prior to planning permission being granted for the erection of a two-storey extension at Mrs C's neighbour's property (*upheld*).

Redress and recommendations

	<i>Completion date</i>
The Ombudsman recommends that the Council:	
(i) refer the application to committee to consider whether it would be appropriate to make a revocation order, in terms of the use and development of the land;	21 November 2011
(ii) review the email system currently in place in the planning team to ensure that overloading of inboxes does not result in lost emails on planning applications;	21 November 2011
(iii) feed back my decision on this case to the planning team; and	21 October 2011
(iv) apologise to Mrs C for failing to investigate her complaint properly and for failing to ensure that a local Councillor's request was processed correctly.	21 October 2011

The Council have accepted the recommendations and will act on them accordingly.

Main Investigation Report

Introduction

1. On 5 January 2011, I received a complaint from the complainant (Mrs C) about The City of Edinburgh Council (the Council)'s handling of a planning application for the erection of a two-storey extension at her neighbour's property. Mrs C said the Council failed to act on an email, dated 28 September 2010, sent to them by a local Councillor (Councillor 1) on behalf of Mrs C and her husband, requesting that the planning application go before the planning committee for a committee decision. Mrs C explained that another local councillor (Councillor 2) had agreed to represent her at the committee hearing. Mrs C said the application was subsequently granted by a planning officer under delegated powers.

2. In their response to Mrs C's complaint, the Council acknowledged that Councillor 1's request was made within the prescribed timescale, but explained it was subject to an administrative error and was not acted upon. The Council said the case officer (Officer 1) did not recall receiving a copy of the email and that it was not clear how the breakdown in communication occurred. The Council said they sincerely regretted the error and provided assurances that they would strive to prevent such an error transpiring once again.

3. The Council went on to say 'the request from [Councillor 1] did not provide a material planning reason for the application to go before the committee, as required by procedure'. The Council explained that the decision to approve the application was made under delegated authority; there were no material planning considerations to justify refusal and Mrs C's representations were taken into account.

4. Mrs C felt that as a result of the Council's error, she was denied the opportunity to have her case heard by committee and to be represented by Councillor 2. Councillor 2 indicated that, had the application gone to committee, it could have resulted in a different outcome.

5. Mrs C said:

'We feel that our views have not been fairly represented in the planning process due to an 'administrative error' within the planning department ... This has caused upset to my husband and I and we feel that since there is no appeals process then it is imperative that due process should be

followed and it is not right that an oversight within the department leaves us without our voice being heard by the committee.'

6. The complaint from Mrs C which I have investigated is that the Council failed to follow due process prior to planning permission being granted for the erection of a two-storey extension at Mrs C's neighbour's property.

Investigation

7. In order to investigate this complaint, my complaints reviewer examined the documentation Mrs C provided on her complaint, made enquiries of the Council and Councillor 1 and obtained advice from one of the Ombudsman's Planning Advisers (the Adviser). She considered the relevant provision of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) and the Planning etc (Scotland) Act 2006 (the 2006 Act). She also considered the Council's Procedure Note on Processing Applications - Schemes of delegation for determining planning matters (the Procedure), Guidance Note 1 - Procedures for Elected Members (Note 1) and Guidance Note 2 - Procedures within the Planning Service (Note 2).

8. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mrs C and the Council were given an opportunity to comment on a draft of this report.

Complaint: The Council failed to follow due process prior to planning permission being granted for the erection of a two-storey extension at Mrs C's neighbour's property

What should have happened?

9. The Procedure outlines types of application which can be determined by 'suitable officers' in the Planning Department. The Procedure explains 'These delegated powers do not have effect where an elected member has asked that [a planning application] be referred to the Development Management Sub-Committee for material planning reasons ...'.

10. Note 1 states 'where [elected members] consider that the application should be referred to committee, their request should be emailed to the case officer and they must give reasons for their request'. Note 1 sets out five different examples of appropriate grounds for referral, including 'concerns regarding appearance (design, materials, scale, etc)'.

11. For referrals requested by elected members, Note 2 states 'Where a request for a referral from an elected member is justified, the elected member will be informed of the decision. A report will be prepared on the application for inclusion on a committee agenda at the earliest possible date. Where the referral is not justified in material terms, a response will be sent by the group leader to the elected member confirming why their request for referral was not justified. In this case, the application will then be determined under delegated powers'.

The Council's response

12. In their response to an enquiry from my complaints reviewer, the Council said:

'Requests from councillors for planning applications to go to committee will only be granted if material planning reasons are given ... The whole ethos behind the scheme of delegation is to improve the efficiency of the planning process and ensure that elected members' time is directed towards significant planning applications.'

13. The Council explained:

'It is normal practice for case officers dealing with a request for referral to committee to ensure that material planning reasons are given. In circumstances where such reasons have not been provided, a request would be made that material reasons be provided'.

14. The records show that in his email to Officer 1 of 28 September 2010, Councillor 1 asked that Mrs C's neighbour's planning application come before the committee.

15. In emailed communications between the Council and Councillor 1 in November 2010, Councillor 1 noted his surprise that the application had been granted, 'despite a request by myself (not replied to) and [Councillor 2] that it come before committee'. Councillor 1 again confirmed his position later in the communications saying 'I received no reply to this email and assumed that consideration of the request was on-going'. He added 'If I had been informed that it had to be a delegated decision, then at least I would have been able to let my constituent know this was to be the case'. Given the circumstances, Councillor 1 asked to have the Council's decision 're-considered'. The documentation showed that Councillor 2 also asked the Council to revisit their

decision. The Council informed them both that it was not now possible to revisit the decision.

16. The Council's internal investigation of Mrs C's complaint included the following summary of events:

'Application was validated 9 September; therefore 21 day 'window' for Councillors to ask for presentation expired 30 September. [Councillor 2] contacted Head of Planning [(Officer 2)] on 7 October, asking for committee decision. Reply sent dated 7 October explaining that request was out of time, but that [Officer 1] would note his comments on her return from holiday (12 October). [Councillor 1] had been copied in to [Councillor 2] email, as had [Mrs C], objector; but there was no request to reply directly to them.

However, it now appears that [Councillor 1] had emailed [Officer 1] directly on 28 September (still within the time frame) to ask for the application to be presented. He had not copied this to anyone else. Unfortunately, [Officer 1] was on annual leave at that time; her out of office response clearly stated that she would not be returning until 12 October, and giving the Planning Help Desk as an alternative number if help was required.

However, the storage capacity of the mailbox system is inadequate, particularly for Planning where files may have memory – hungry drawings attached. The system blocks easily when staff are away on leave, and further emails are lost to the system. This problem has been raised with management on several occasions. The result is that [Officer 1] had no record of [Councillor 1]'s email on her return. Nonetheless, he would still have received an unable to deliver message because recipient's mailbox was full. Either way, it would not be the case that no response was sent to his email.

There is no record of [Councillor 1] contacting the Help Desk; if he had, a message would have been sent back to the Team Principal and his request would have been accepted. Alternatively, if he had re-contacted [Officer 1] on this matter after her return and explained the circumstance, we would likely have acceded to his request. There would have been time, as the delegated report was not completed and put through until 2 November.

There were no other reasons (eg over six objectors) why the application should have gone to committee. As there is now a legitimate determination, it is not possible to revisit the decision'.

17. In response to Councillor 1's complaint about the handling of his request, Officer 2 provided an explanation of events which included the following:

'[Officer 1] was on annual leave at [the time your email was sent], and you should have received her out of office response stating that she was away until 12 October, and advising callers to contact the Planning help Desk in the interim. Unfortunately, on her return to the office, she appears to have overlooked your request.'

Councillor 1's response

18. My complaints reviewer asked Councillor 1 to clarify his grounds for requesting that the application be referred to committee. In his response, Councillor 1 said:

'My distinct memory is that at the time I did not request the referral to committee on any particular grounds but simply sent an email to [Officer 1] asking for the matter to be referred to committee. Looking at the reasons for which this can be done, I would in retrospect say that I was referring it on the grounds of concerns regarding appearance and the impact which such an extension would have on existing amenity.'

Advice obtained

19. My complaints reviewer asked the Adviser to determine whether the planning application satisfied any of the five criteria in Note 1 for referral to the planning committee. His response is set out below:

'It seems to me that this was indeed a case of a local development application under the hierarchy regulations which fell to be covered by the section 17 scheme of officer delegation, introduced by the 2006 Act for such types of development.'

The Council's scheme of delegation ... sets out clearly the criteria for withdrawal of any application from the proposed delegated decision list at the request of an elected member (not just a relevant ward councillor) for material planning reasons. [Councillor 1] appears to have intimated his request within the 21 day time limit but omitted to state his reasons. (I note that [Councillor 2] submitted a request apparently out of time but stating reasons which seem to me to be acceptable.)

The Council agreed that an oversight had been made in not dealing with [Counsellor 1]'s request ... While [Counsellor 1]'s request did not address the material planning reasons and there is apparently no formal provision in the scheme of delegation to correct this, it appears to be normal practice for officers to follow up for such reasons where they are not given ... and I believe this to be reasonable practice.

[Councillor 1] has confirmed retrospectively ... that his reasons would have been on grounds of concerns regarding appearance and the impact which such an extension would have on existing amenity, similar to those of [Councillor 2]. I agree that these are suitable reasons within the scheme. Material planning reasons would be similar to those recognised by the courts as satisfying the definition of material considerations for the purposes of sections 25 and 37 of the 1997 Act and are, therefore, those which would relate to the use and development of land and are relevant to the particular situation in question.

I, therefore, agree that there has been a breach of the Council's scheme of delegation which has resulted in the case being determined under delegated powers which it should not have been. This does not mean that the decision would have been any different but I agree with [Councillor 2]'s comments in his email to the complainant of 18 December 2010 that [Officer 1]'s opinion would not necessarily have reflected that of the committee, given the chance to consider the case.

It seems to me that the apology offered by the council in [Officer 2]'s letter of 16 December 2010 seeks not only to apologise for the accepted error in procedure but also to justify the decision as one that the committee would have taken anyway. As [Councillor 2] states, this cannot be assumed. Equally, however, it cannot be assumed that the apparent support of two members for a committee referral would have led to a different decision from the majority of the committee, or even that those members themselves would have voted for a different decision after further consideration and possible site visit. All we have is a procedure to secure further consideration (a second opinion, if you like) from the committee.

Some explanation of the reasons for the oversight is given in the internal [investigation note. It would be reasonable for these to] be taken into

account when considering mitigating circumstances from the situation described.

Finally, as a decision has been issued in the name of the authority, albeit possibly wrongly assuming delegated authority, it legally stands as the decision for the purposes of the planning acts. I am aware of case law [from judicial reviews] which has led to the quashing of a decision that the authority patently did not intend to make, but I can see no other way of changing the decision now without legal challenge. It is not in the gift of the authority to withdraw it as the successful applicant would be prejudiced.'

20. When my complaints reviewer questioned the Adviser on his final paragraph, he clarified that the Council could withdraw planning consent by making a revocation order under Section 65 of the 1997 Act. The Adviser said the committee could not reconsider an application which already had consent, to see whether it should be approved, as it already stood in law. However, the Adviser explained that the committee could consider whether a revocation order should be made. He said this would allow the committee to consider the grounds sited as the reason why he and Councillor 1 felt the matter should have gone to committee in the first place, ie 'concern regarding appearance and the impact which such an extension would have on the existing amenity'.

Further enquiries

21. All parties to the complaint appeared to accept that Councillor 1 sent the email to the Council. However, it was not clear from the Council's responses whether Councillor 1 received any response to his email. In their letter to Councillor 1, the Council suggested that the email was received by Officer 1 but appeared to have been overlooked. In their letter to Mrs C, they said Officer 1 did not recall receiving the email and it was not clear how the breakdown in communication occurred. The Council's internal investigation suggested that due to problems with overloading of the email system, the email did not get through.

22. What was also unclear was whether Councillor 1 was sent any response to his email. The Council suggested that it was likely that he would have received an 'unable to deliver message' as Officer 1's mailbox was full. They also said that had the email got through, Councillor 1 would have received an out of office response advising that Officer 1 would return on 12 October and

23. My complaints reviewer sought advice from our IT officer on the emailed communications between Councillor 1 and the Council. She then made a further enquiry of the Council.

24. In their response, the Council said:

'There is no dispute that [Councillor 1] sent his original email to [Officer 1] within the correct time-frame but [Officer 1] was not aware that he had done so until [Mrs C] mentioned it to her after her return from holiday and [Councillor 1] subsequently re-sent it'.

The Council confirmed that the email address Councillor 1 used in his email was the correct address.

25. The Council explained that as they did not retain emails for longer than three months, it was not possible for them to provide any further clarification on their position, or evidence to support it.

26. The Council said:

'You refer to 'differing accounts' of what happened to [Councillor 1]'s original email. However, these are more in the nature of alternative hypotheses for the same event because, unfortunately, for the reasons set out above, we simply do not know what actually happened. The possibilities can be summarised as:

- (a) whether the email reached the recipients' mail-box in the first place;
- (b) whether the box was full and did not therefore accept the email;
- (c) if the email had reached the box, whether it was deleted as a result of human error before being read; and
- (d) alternatively, if it had been received, whether it was properly printed out for actioning.'

27. The Council went on to explain:

'[Officer 1] advises that her normal working practice on returning after absence is to print out any emails that require further action. However, unbeknown to her at the time, there was a problem with the pc-to-printer link, so it is possible that the email was lost at that point.'

28. The Council said:

'All this must be seen in the context of the considerable amount of email traffic which passes through the Council's system, the vast majority of which reaches its destination safely. Typically, after an absence of four weeks, as in this case, a case officer would find some 200-300 emails awaiting attention. This might explain why [Officer 1] has no specific recollection of a particular email. For the same reason, the sender of an email, if receiving an 'out-of-office' or 'mailbox-full' message might well delete this virtually automatically in order to avoid clogging up his/her mailbox and would not necessarily recall it later.'

29. My complaints reviewer asked the Council if they could confirm the date that Mrs C 'mentioned' the issue of the email to Officer 1 and the date Councillor 1 subsequently re-sent the email.

30. In their response, the Council explained that Officer 1 said she had no record of when the discussion with Mrs C took place. The Council said that as copies of emails were not retained for more than three months, they were unable to clarify when Councillor 1 re-sent his email or provide a print-out of the email itself.

Conclusion

31. Officer 1 would have been entitled to make a decision on the planning application under delegated authority. However, once Councillor 1 requested a referral to the committee, the procedure for determining the application should have changed.

32. All parties accept that Councillor 1 sent the email to the Council. However, the Council have been unable to verify exactly what happened to the email and have instead offered what they now describe as 'alternative hypotheses'.

33. The Council have explained that they only keep email records for three months. This means that Councillor 1's email would have been retrievable up until 28 December 2010. Mrs C sent her formal complaint to the Council on 15 November 2010. Had the Council treated her complaint more seriously and fully considered the implications of their actions, they could have retrieved Councillor 1's email and determined what really happened in this case.

34. The Council have suggested that a problem with the link from Officer 1's pc to the printer may have been to blame for the missing email. I would expect any officer who prints out emailed correspondence to check that all relevant documents have been successfully printed before deleting them from their inbox and so do not accept this explanation.

35. What is also unclear is whether Councillor 1 received any response to his email. The Council have offered suggestions of what may have happened in this case. Councillor 1 has said that he did not receive an acknowledgement or response to his email and, therefore, assumed it was being dealt with. It could be suggested that there may have been some onus on Councillor 1 to follow up on his emailed request. However, it is not for this office to investigate actions of councillors and make rulings on such matters.

36. It is not possible for me to clearly determine whether the email was received by the Council. However, it seems likely that the email was either received and not acted upon or it bounced back because Officer 1's mail box was full, a fault which the Council had been aware of for some time and had remained unrectified. In either case, it is arguable that the Council were responsible for Councillor 1's email not being acted upon.

37. The Council have confirmed that, had the email been processed, Officer 1 would have asked Councillor 1 to specify grounds for referral in accordance with normal procedure.

38. The Council informed Mrs C that the application was not eligible for referral to committee. However, Councillor 1 explained that he believed the application could have been referred on the grounds of appearance and impact on existing amenity. Councillor 2 was also of the view that a referral to committee would have been appropriate. The Adviser has confirmed that the application satisfied the grounds for referral to the committee, as set out in Note 1, in terms of the use and development of the land, and I accept his view.

39. Had the application gone before the committee, it is not possible to say whether the committee would have reached a different decision to the planning officer. However, the evidence shows that Mrs C was denied the right to have the application determined by the committee, rather than the delegated planning officer.

40. On balance, I consider that failings by the Council in the planning process resulted in Mrs C being denied her right to have the application determined by the committee and for this reason, I uphold her complaint.

Recommendations

41. The Adviser has said that the Council cannot withdraw consent now that it has been given. However, he has confirmed that the application could go back to the planning committee for them to consider whether it would be appropriate to make a revocation order, in terms of the use and development of the land, ie on the basis of the concerns regarding the appearance of the extension and the impact which the extension would have on the existing amenity.

	<i>Completion date</i>
42. I recommend that the Council:	
(i) refer the application to committee to consider whether it would be appropriate to make a revocation order, in terms of the use and development of the land;	21 November 2011
(ii) review the email system currently in place in the planning team to ensure that overloading of inboxes does not result in lost emails on planning applications;	21 November 2011
(iii) feed back my decision on this case to the planning team; and	21 September 2011
(iv) apologise to Mrs C for failing to investigate her complaint properly and for failing to ensure that Councillor 1's request was processed correctly.	21 September 2011

43. The Council have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Council notify him when the recommendations have been implemented.

Explanation of abbreviations used

Mrs C	The complainant
The Council	The City of Edinburgh Council
Councillor 1	A local councillor
Councillor 2	A local councillor
Officer 1	The case officer
The Adviser	One of the Ombudsman's planning advisers
The 1997 Act	The Town and Country Planning (Scotland) Act 1997
The 2006 Act	The Planning etc. (Scotland) Act 2006
The Procedure	The Council's Procedure Note on Processing Applications - Schemes of delegation for determining planning matters
Note 1	The Council's Guidance Note 1 - Procedures for Elected Members
Note 2	The Council's Guidance Note 2 - Procedures within the Planning Service
Officer 2	The Council's Head of Planning

List of legislation and policies considered

The Town and Country Planning (Scotland) Act 1997

The Planning etc. (Scotland) Act 2006

The Council's Procedure Note on Processing Applications - Schemes of delegation for determining planning matters

The Council's Guidance Note 1 - Procedures for Elected Members

The Council's Guidance Note 2 - Procedures within the Planning Service