

Scottish Parliament Region: Mid Scotland and Fife

Case 201004897: Fife Council

Summary of Investigation

Category

Local government: Planning; Planning application–objection by neighbour

Overview

The complainant (Mr C) complained about changes to proposals for planning consent for a superstore to the rear of his home, specifically about the relocation of a large sprinkler tank, now sited immediately adjacent to his boundary, and also about the way Fife Council (the Council) dealt with correspondence on the matter.

Specific complaints and conclusions

The complaints which have been investigated are that the Council:

- (a) delayed or failed to reply to correspondence (*upheld*);
- (b) failed in their assessment of an initial application and decision on material variations, to demonstrate that contemporary consideration was given to the materiality of the changes and whether further neighbour notification should be carried out (*upheld*); and
- (c) in their assessment of a second application failed to consider whether a report on environmental issues remained valid, the effect on Mr C's property of the changes, whether the application was properly described and whether the sprinkler tank complied with Council policy and design guidance (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

- | | <i>Completion date</i> |
|--|------------------------|
| (i) apologise to Mr C for the identified shortcomings in dealing with his correspondence and complaint and for the inadequacies in record-keeping; and | 23 April 2012 |
| (ii) assess whether there are in fact any noise problems emanating from the plant buildings, and if so, approach the superstore company. | 23 May 2012 |

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

Main Investigation Report

Introduction

1. The complainant (Mr C) resides in a two-story semi-detached house in a town in Fife. The rear garden of his home formerly shared a boundary with an industrial site to the north. That use ceased, the site was cleared, and was subsequently the subject of proposals for a superstore. The most recent proposals changed following approval of the planning application, and a water sprinkler tank and associated buildings housing plant were relocated from the west to the south of the site. Mr C complained about Fife Council (the Council)'s handling of the changes and correspondence on the matter.

2. The complaints from Mr C which I have investigated are that the Council:
- (a) delayed or failed to reply to correspondence;
 - (b) failed in their assessment of an initial application and decision on material variations, to demonstrate that contemporary consideration was given to the materiality of the changes and whether further neighbour notification should be carried out; and
 - (c) in their assessment of a second application failed to consider whether a report on environmental issues remained valid, the effect on Mr C's property of the changes, whether the application was properly described, and whether the sprinkler tank complied with Council policy and design guidance.

Investigation

3. The investigation is based on consideration of information provided by Mr C and the Council. 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 Council were given an opportunity to comment on a draft of this report.

4. Mr C resides in a two storey semi-detached house at 4 X Street which formerly shared a rear boundary to the north with a factory. The adjacent site (extending to 2.2 hectares) to the north is now occupied by a superstore which opened in 2008.

5. A first application for outline consent for a superstore was submitted in December 2003, was refused by the Council in September 2004 and was the subject of appeal to Scottish Ministers in March 2005. Following a public inquiry, the appeal was allowed on 1 June 2006. Conditional outline consent for

the development was granted subject to nine conditions. Condition 1 required that details of siting, design, and external appearance of any building and Condition 5 that a noise assessment, respectively, be submitted to the planning authority before development commenced.

6. On 6 November 2006, a further application (Application 1) was submitted to the Council for the approval of reserved matters for the erection of a superstore (Class 1), formation of access and roundabout, car parking and associated facilities. The application form contained certification that, inter alia, neighbour notification was served on Mr C and his neighbours on the southern periphery of the site. An original site plan dated 27 October 2006 (and received by the Council on 6 November 2006) showed a water sprinkler tank, pumphouse and the retention of an electricity substation on the west side of the proposed supermarket building adjacent to an existing retail building. A two bay loading bay to the south of the proposed supermarket building with an access from the east was also shown on the plans.

7. A noise assessment survey in respect of condition 5 of the outline consent granted on appeal, was completed by consultants (the Consultants) on 2 February 2007 and submitted to the Council. Page 16 of that report shows the general layout submitted on 6 November 2006.

8. Drawings available on the Council's website record that an amended site plan was submitted to the Council on 26 April 2007. In that site plan, the proposed water sprinkler tank and other outbuildings were shown on the southern boundary of the site and the main superstore building was proposed to be moved northwards away from the southern boundary. The Council say that this resulted in the nearest part of the main supermarket building being moved 14.7 metres further away from the complainant's northern boundary. No documents are retained as to whether the move of the water sprinkler tank and other buildings was requested by the developer or by the Council.

9. A delegated report was prepared on 2 July 2007. The case officer recorded that there had been letters of representation from neighbours and quoted Policy BIT 8 of the Council's Local Plan. He stated that Policy BIT8 only supported bad neighbour development where it would not have an adverse impact on residential amenity, create an unacceptable level of environmental pollution or constitute a safety hazard. He recognised the close proximity of the residential street and that there was potential for 'residential disamenity'. He

noted that the applicant had at the request of Environmental Services proposed three metre high screen fencing to the rear of the site in an attempt to block noise after the applicant had submitted a suitable noise risk assessment.

10. Application 1 was granted conditional consent on 2 July 2007. One of the conditions imposed was that deliveries to the superstore not take place between 22:00 and 07:00. The approved drawings relating to the consent included a site plan showing the footprint only of the water sprinkler tank and other buildings adjacent to the southern boundary of the site. There is no indication that Mr C was an objector to Application 1. In terms of the 2 July 2007 approved site plan, the water sprinkler tank would have been positioned immediately to the north of 6 X Street (the house next door to Mr C's home at 4 X Street).

11. On 26 November 2007, the Council received a further application for 'the erection of external site features including sprinkler tank, ATM [automated telling machine], trolley bays, covered walkway and smoking shelter' (Application 2). Among the drawings submitted were elevation drawings of the water sprinkler tank. The application form contains a certification that, inter alia, neighbour notification was served on the owners of the 12 residential properties on the north side of X Street. An on-line objection was submitted by Mr C's neighbour at 6 X Street. Mr C's neighbour objected to the proposed location for the water sprinkler tank and external plant including the location of refrigeration condensers because of the close proximity to local homes and the potential for noise pollution.

12. The plans for the water sprinkler tank elevations were approved on 3 March 2008. The site plan was further modified as a non material variation with the water sprinkler tank finally being approved on 20 May 2008 ten metres further east than in the plans submitted on 26 November 2007. This meant that it would now be sited immediately behind Mr C's property at 4 X Street rather than his neighbour.

13. Mr C's correspondence with the Council commenced on 4 June 2008 after the large tank was erected behind his rear boundary fence. Mr C wrote to the Council's Development Service expressing concern at the changed location for the water sprinkler tank specifically mentioning a potential flooding risk and a negative effect on the value of his property.

14. A response was sent on 9 July 2008, by the Team Leader Development Promotion and Design (Officer 1). She explained the planning history of refusal, appeal to Scottish Ministers and the subsequent two applications. She stated that according to the certification, Mr C received notification of the two applications. She stated also that Environmental Services was consulted on both applications but raised no issues. She maintained that the water sprinkler tank was a sealed unit unlikely to leak and to cause flooding and that property devaluation was not a planning matter.

15. Mr C wrote to the local manager of the superstore on 25 July 2008. He raised the issue of the proximity of the water sprinkler tank and other issues of light and noise pollution from the service area. He maintained that the noise came from plant machinery, air condition or a ventilation unit running more or less continuously day and night. He reminded the local manager on 21 August 2008 and also wrote to the superstore company's headquarters. A meeting with local residents was held on the initiative of the local superstore manager to discuss residents' concerns regarding the positioning of the water sprinkler tank and noise and light pollution. According to Mr C, the possibility of reducing the impact of the water sprinkler tank by installing separate tanks was discussed.

16. On 25 August 2008, Mr C wrote to Officer 1 seeking information on why the proposed re-siting of the water sprinkler tank had been sought and why it had been granted. In her response of 7 October 2008 Officer 1 replied that she was unable to comment on why the tank was re-positioned within the site 'if in fact this was the case'. On 14 October 2008, Mr C's query was registered as an enforcement complaint and was allocated to a planning enforcement officer (Officer 2).

17. In the meantime, on 8 October 2008, the superstore company carried out a light pollution test and its representative telephoned Mr C on 16 October 2008 to inform him of changes that they intended to introduce in response to the complaints of light pollution. A letter of 29 October 2008 confirmed that three flood lights would be switched off.

18. On 24 October 2008, Mr C replied to Officer 1's letter of 7 October 2008. He confirmed that the proposed siting of the water sprinkler tank and associated pumping equipment had indeed changed (paragraphs 6 to 8). Mr C reminded

Officer 1 and Officer 2 in separate letters of 12 January 2009 that he awaited a reply. There was no reply from Officer 1.

19. On 29 January 2009, Officer 2 responded to Mr C. Officer 2 confirmed that there had been no breach of planning consent with regard to the water sprinkler tank. His investigations had concluded that the superstore would require to seek permission for three additional lights which would be angled to reduce glare to residents. Mr C wrote further to Officer 2 on 16 March 2009 to inform him that the three lights were still causing a problem with glare. While they switched off nightly between 11:00 and 23:30 they came on again at 04:00.

20. Mr C then contacted a Member of the Scottish Parliament (the MSP), in September 2009. She wrote to the new superstore manager on his behalf on 25 September 2009 and also to the Council. As a consequence, the superstore manager wrote directly to Mr C. Officer 2 responded to the MSP on 21 October 2009 and 23 December 2009.

21. Mr C himself wrote directly to the superstore manager on 12 January 2010. The manager responded to Mr C stating that his company had complied in good faith with the rules and regulations set in place by the Council. He confirmed that his company had no information on why the position of the water sprinkler tank had been altered. He confirmed, however, that the tank required to be of a specific capacity and that its size could not be altered. Mr C responded on 11 February 2010 stating that two smaller tanks previously discussed on 22 August 2008 (paragraph 15) would be more acceptable to him.

22. On 2 March 2010, the MSP wrote to Mr C advising him that he could seek assistance from a national planning advice service (the PAS). After making contact with the PAS, a volunteer adviser (Ms D) contacted Mr C and they made arrangements to visit the Council's Planning Office together to inspect the relevant files prior to Mr C submitting a formal complaint.

23. In the meantime, a senior representative at the superstore company's headquarters (Ms E) wrote to Mr C on 8 March 2010 informing him that the position of the water sprinkler tank was consistent with what had been proposed in September 2007. The capacity of the tank was 430 cubic metres and that volume could not be reduced. She informed Mr C that her company was unable to assist further. Mr C replied to her on 31 March 2010 stating that his various attempts to get a valid explanation for the re-positioning of the tank had met

with conflicting responses and personal frustration. He considered that the light pollution issue had been partially resolved and was on the way to be remedied and he appreciated the local manager's efforts in that regard. On 12 July 2010, after further investigating the matter, Ms E wrote to Mr C. She stated that the original plans of February 2007 had been prepared by agents. When their proposed layout was looked at in detail and discussed with the superstore company, the design was changed to better accommodate the ventilation and refrigeration plants and to allow sufficient turning space in the yard for lorries. A subsequent application was then submitted by the company to reflect those amendments. Ms E further confirmed that it would not be possible to have two smaller tanks. Her company would, however, look at the possibility of introducing further screening for the water sprinkler tank, through the planting of additional trees. Mr C responded on 30 August 2010 to that letter, thanking Ms E for her explanation. Additionally, he referred to excessive noise from external refrigeration units in the service area.

24. With the assistance of Ms D, Mr C submitted a detailed formal complaint to the Council. In an accompanying letter of 3 August 2010, he maintained that the water sprinkler tank had been further relocated eastwards by ten metres. The formal complaint raised twenty questions on a) the handling of Mr C's letters of concern; b) Environmental Health's comments; c) the validation process and subsequent processing of the reserved matters application (Application 1); d) the adequacy of the assessment of the proposal in the delegated planning report; e) the administration of the requests for non material amendment following the grant of planning permission; and f) the administration and processing of Application 2. Questions 12, 13 and 14 asked about the relocation of the water sprinkler tank and Question 18 about its visual effect.

25. Mr C's letter was acknowledged on 12 August 2010. A response was sent on 8 September 2010 by the Council's Development Manager, Development and Regeneration (Officer 3). Officer 3 prefaced his response by confirming that the water sprinkler tank was considered to be a structure rather than a building; that it had been moved some four metres west (sic); and that it was 14.7 metres from the rear of the nearest residential property and did not raise an issue of detriment to privacy from overlooking.

26. On 10 September 2010, the superstore company confirmed that they intended to plant some trees along the boundary as a screen. Mr C stated that

he did not receive that letter at the time but was sent a copy later (paragraph 28).

27. On 22 October 2010, Mr C submitted a follow up letter of complaint to the Council. This was acknowledged as an appeal on 29 October 2010. Following a reminder from Mr C of 30 November 2010, the Chief Executive responded on 22 December 2010. He apologised for the delay in his response, but not did not comment on the specific reasons.

28. On 2 February 2011, another representative of the superstore company followed up the company's letter of 10 September 2010 to confirm that while there had been a delay because of inclement weather conditions, it remained its intention to plant trees to screen the water sprinkler tank. Mr C responded on 15 February 2011 that he had not received the earlier letter. He stated his preference that any trees planted should be conifers rather than deciduous trees since the screening effect of the latter was negligible in winter. Mr C also pointed out that the pipes serving the water sprinkler tank had ruptured in the cold, and that an alarm had rung for several hours.

29. On 8 March 2011, Mr C submitted his complaint to the SPSO.

(a) The Council delayed or failed to reply to correspondence

30. In his complaint to the SPSO of 8 March 2011, Mr C confirmed that since 2008 he had written ten letters to the Council and had received nine letters in reply. He had also written eight letters to the superstore company. His concern with the Council's responses were with their quality and the lateness of response. His initial letters of 4 June 2008 and 25 August 2008 had been responded to in 35 calendar days and 43 calendar days respectively. Subsequent letters of 24 October 2008 and 12 January 2009 had received no response. His letters of complaint of 3 August 2010 and 22 October 2010 had been responded to on 8 September 2010 (36 calendar days) and 22 December 2010 (61 calendar days) respectively. He was concerned also that had Officer 1 properly examined the application files, she would not have questioned the fact that the proposed location of the sprinkler tank had in fact changed twice.

(a) Conclusion

31. Mr C is not recorded as having submitted representations on either Application 1 or Application 2. His correspondence with the Council began after

the water sprinkler tank had been sited in its present position. Mr C's initial contact with the Council was to obtain an explanation why the water sprinkler tank came to be positioned immediately behind his home. The answer (paragraph 23) obtained as a result of a series of requests for information to the Council and to the superstore company was that the company, for operational reasons, considered that the water sprinkler tank repositioned on the south side of the superstore building with that building moved northwards, was a better design solution facilitating delivery to the superstore loading bay.

32. Mr C's initial contacts with the Council amounted to an informal request for information and as such are not subject to response targets. Mr C's complaint was made over two years later. Stage 1 of the Council's complaints procedures stipulate acknowledgement within five working days and a thorough investigation and intimation of the outcome within 20 working days. An appeal for review by the Chief Executive (Stage 2) should be made within a further 20 working days. The procedures provide for written acknowledgement of receipt by the Chief Executive's office within five working days and for the appeal investigation to be carried out and the result intimated to the complainer within 28 working days from the date the appeal is received. These timescales were not met in the case either of Mr C's Stage 1 complaint of 3 August 2010 or his request for a review made on 22 October 2010. I uphold Mr C's complaint and make a recommendation on this and the following complaint.

(b) The Council failed in their assessment of an initial application and decision on material variations, to demonstrate that contemporary consideration was given to the materiality of the changes and whether further neighbour notification should be carried out

33. In his detailed response of 8 September 2010 to Mr C's formal complaint of 3 August 2010, Officer 3 noted that the main superstore building was 25 metres from Mr C's rear garden boundary and the water sprinkler tank, was approved and remains 14.7 metres from Mr C's residence. As a non-habitable structure, the water sprinkler tank did not raise issues of privacy. In Officer 3's view, the relocation of the tank did not introduce significant harm to the amenity of neighbouring properties. The issue of noise was assessed. In terms of appearance, since the structure was generic and was not proposed on a prominent public frontage, the appearance of the tank was not a critical issue in planning terms. The fact that the site had been allocated for industrial uses was an important factor. The external plant buildings had been approved when

Application 1 was granted consent on 2 July 2007 as a delegated matter (paragraph 9).

(b) Conclusion

34. There is an important difference between providing reasons in retrospect as to why, on the one hand, a particular change can be considered to be a non-material variation and, on the other, providing a clear audit trail that documents that contemporary consideration was given to the issues. In the context of this complaint the Council have been unable to furnish any contemporary assessment of the materiality of the amendment submitted on 26 April 2007 (paragraph 8). It is a matter of fact, however, that the Council did not require a further neighbour notification in respect of the proposed amendment to the reserved matters application (Application 1).

35. Application 2 was approved on 3 March 2008 (paragraph 12). A request was subsequently made by the developer's agent to alter the location of the proposed water sprinkler tank (westwards, away from the rear of 6 X Street). On 20 May 2008 Council officers determined in terms of section 64 of the Town and Country Planning (Scotland) Act 1997, that the change in positioning was non-material in planning terms. In consequence of that determination, there was no requirement for the developer to re-notify. That is a determination which, in exercise of their discretion, the Council's planning officers were entitled to take.

36. I believe that the grounds for this complaint could have been obviated by the Council's retention on file of contemporary documentation from the superstore company's agents introducing amendments on 26 April 2007 to the plans which had been the subject of neighbour notification five months earlier. A file note should have been retained confirming that at that time the changes were deemed not to be material and, therefore, not requiring a fresh neighbour notification.

37. I uphold this complaint. In so doing, I recognise the Council's entitlement to regard the changes as non-material. The issue raised in this complaint relates to accountability. I consider that the Council should apologise to Mr C for not being able to demonstrate from extant records that a change in layout of considerable consequence to the enjoyment of his home was fully and properly considered at the time it was mooted.

(b) *Recommendation*

38. I recommend that the Council *Completion date*

- (i) apologise to Mr C for the identified shortcomings
in dealing with his correspondence and complaint 23 April 2012
and for the inadequacies in record-keeping.

(c) The Council in their assessment of a second application failed to consider whether a report on environmental issues remained valid, the effect on Mr C's property of the changes, whether the application was properly described and whether the sprinkler tank complied with Council policy and design guidance

39. The original noise assessment report was dated 2 February 2007 and was submitted in conjunction with a plan showing the water sprinkler tank and fixed plant buildings proposed on the west side of the proposed main superstore building in relation to condition 5 of the outline consent granted on appeal. Amended plans with a different layout were submitted on 26 April 2007 in respect of the reserved matters application (Application 1).

40. On examination of the planning files in May 2010, Mr C and Ms D found no evidence on file to confirm that any consideration was given to the potential impact of the amended layout, no further consultation with Environmental Services and no reference in the delegated handling report as to whether the previous noise assessment based on a different layout remained valid. In his request for a review of 22 October 2010, Mr C asked the Council to show how at the time they took account of the fact the noise report was based on a superseded layout, whether the authors responsible for the report of 12 February 2007 were informed of the altered layout, and that they had both considered and confirmed it did not affect their findings or recommendations.

41. The Chief Executive, in his response of 22 December 2010, repeated what Officer 1 had stated in her letter of 9 July 2008 (paragraph 14) in relation to Application 1. With regard to Environmental Services' suggestion when consulted that a planning condition be imposed related to noise generated by plant and equipment, Development Management viewed the issue of this source of noise as one that could be controlled through environmental legislation when such noise is deemed to be a statutory nuisance. The Chief Executive stated that it was not considered that the condition suggested was either reasonable or enforceable and, consequently, no such condition was imposed. The Chief Executive further stated that the noise consultant's report

recommended that plant should be within the decibel levels required to meet the NRC 25 Noise Rating Curve standard at a distance of one metre from the plant to avoid disturbance to residential property. He went on to state that Environmental Services' consultation response of 13 March 2007 specifically referred to these requirements and raised no issues in relation to the need to review the assessment to take account of the revised position of the plant. The Chief Executive was unable to provide Mr C with the documented evidence of the officer's assessment of the need to review the noise assessment report he had requested. He stated that this documentation would not normally be retained on the file, unless there had been a need to write to the consultant requesting an amended report.

42. The Council's Chief Executive in response to my enquiry confirmed that although the external plant was indicated on a related application for building warrant, the plant buildings in terms of regulation 3 and Schedule 1 of the Building (Scotland) Regulations 2004 were exempt from the Technical Standards and were outside the control of Building Standards and Safety. He supplied a copy of the Environmental Services consultation response. He stated that with regard to Development Services, the approach taken in noise assessment is to specify the maximum permissible noise level emanating from plant (as measured one metre from the plant) to achieve compliance with Noise Rating Curve (NRC25) at the nearest noise sensitive premises. He further stated that the noise assessment report assumed an attenuation distance of 29 metres between the plant and noise sensitive premises. He accepted that, with the implementation of the amended proposals, the distance between the plant and residential property was less than this and that, on this basis, a revised noise assessment could have been requested. In mitigation he stated that noise reduction measures were also being proposed and the applicants were aware of the standard which had to be achieved. He pointed out that while a planning condition could have been imposed to ensure that compliance with NRC 25 was achieved, this would normally have been monitored and enforced (if required) by Environmental Services.

(c) Conclusion

43. My remarks at paragraph 36 are also relevant here. There is a lack of contemporary record to suggest that following submission of the amended layout on 26 April 2007, contemporary consideration was given as to whether the consultant's noise assessment remained valid.

44. While a decision to regard the re-location of the plant and potential for noise as material might have led to re-notification, a determination that the changes were not material (and that the noise assessment remained valid) would not have had that consequence.

45. I uphold this complaint and make one recommendation.

(c) *Recommendation*

46. I recommend that the Council	<i>Completion date</i>
(i) assess whether there are in fact any noise problems emanating from the plant buildings, and if so, approach the superstore company.	23 May 2012

47. 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

Mr C	The complainant
The Council	Fife Council
4 X Street	The complainant's home address
Application 1	An application for planning consent for approval of reserved matters submitted to the Council in November 2006
The Consultants	Consultants appointed by the applicant to prepare a noise assessment report in February 2007 in respect of Application 1
6 X Street	The complainant's neighbour's house
Application 2	An application for detailed planning consent
Officer 1	The Council's Team Leader Development Promotion and Design
Officer 2	a Council planning enforcement officer
PAS	A national planning advice service
Ms D	A volunteer case officer with PAS
MSP	A member of the Scottish Parliament
Ms E	A senior representative of the superstore company

Officer 3

The Council's Development Manager,
Development and Regeneration