

Scottish Parliament Region: Central Scotland

Case 200401563 & 200500141: South Lanarkshire Council

Summary of Investigation

Category

Local government: Planning, handling of applications

Overview

The complainant (Mr C) resided until November 2005 on the ground floor of a modern block of flats which shared a common access to the rear with an adjacent semi-detached former residential building which had later been converted to offices on the ground and first floors. He objected in 2003 to proposals for change of use of the ground floor to a children's nursery. The complaints investigated related to the handling of two planning applications made by Mr C himself which were not validated by South Lanarkshire Council (the Council) and to the handling of a further application for planning consent to convert the upper floor of the building next door as an extension to the children's nursery.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the Council failed to deal appropriately with and determine Mr C's applications (*not upheld*);
- (b) the Council, in dealing with an application for change of use of the upper floor of the adjacent property, failed to grasp the opportunity to reinforce a policy in their Local Plan for the area (*not upheld*);
- (c) Environmental Services when consulted on the application, failed properly to comment on matters of noise and waste removal (*not upheld*);and
- (d) the Council as planning authority, failed to have proper regard to the availability of more suitable locations for the nursery (*not upheld*).

Redress and recommendation

The Ombudsman has no recommendation to make.

Main Investigation Report

Introduction

1. Mr C submitted two previous complaints to the Scottish Public Services Ombudsman which were not investigated (W030235 and 200400448). Those decisions were the subject of appeal by Mr C and those appeals were considered by two Deputy Ombudsmen. At the time of the second appeal, Mr C made complaints (a) about the handling of two applications for planning consent he had submitted (200401563), and (b) about the Council's processing of the application to convert the upper floor of the property next door to an extension to the existing nursery on the ground floor (200500141). It was decided that the complaints should be investigated together and included in a single report

2. The complaints from Mr C which I have investigated are that:

- (a) the Council failed to deal appropriately with and determine Mr C's applications;
- (b) the Council, in dealing with an application for change of use of the upper floor of the adjacent property, failed to grasp the opportunity to reinforce a policy in their Local Plan for the area;
- (c) Environmental Services when consulted on the application, failed properly to comment on matters of noise and waste removal; and
- (d) the Council as planning authority, failed to have proper regard to the availability of more suitable locations for the nursery.

Investigation

3. The complainant, Mr C, formerly resided on the ground floor of a modern block of flats at 6 X Road in a conservation area in Hamilton. His block, and the neighbouring property at 4 X Road, a semi-detached villa previously subdivided into office use, are separated by an access serving parking at the rear. On 6 December 2002, the entire property at 4 X Road was purchased by a Mr A. Although the ground floor was at that time vacant, a tenant occupied the upper floor office until March 2003. The other half of the semi-detached block, at 2 X Road, also was used for offices.

4. On 4 March 2003 an application for planning consent for the change of use of the ground floor of 4 X Road from office to children's nursery (Application A) was

submitted to the Council and was subsequently registered and validated. Application A was the subject of neighbour notification and advertisement in the local press. It attracted five pro forma letters of objection from the residents of 6 X Road.

5. A report on Application A was prepared by officers on 23 May 2003 and was made available on 4 June 2003 when the agenda for the Hamilton Area Committee on 10 June 2003 was issued. The report highlighted relevant policies in the Hamilton District Local Plan, particularly Policies EN4 and ED16 relating to conservation areas and small scale office developments respectively. The latter policy stated that the level of office development in the area of X Road was considered to be at a maximum and that where an existing office use ceased the preferred use of a property or site should be residential. The report detailed six specific points of objection made by the residents of 6 X Road including increased road traffic, safety concerns about use of the existing common access to the rear, potential increased noise levels and pollution. The officers in considering Policy ED16, took the view that since an office would be retained on the upper floor at 4 X Road, it would not be possible to satisfy privacy and amenity issues if the ground floor were returned to residential use. They recommended the granting of conditional planning consent. The Area Committee approved Application A at their meeting and conditional consent was issued on 11 June 2003. A corresponding building warrant was also issued for the change of use.

6. Mr C was aggrieved at the granting of conditional consent. After obtaining a copy of the officer's report to committee he contacted the Ombudsman by e-mail on 26 June 2003 complaining of improper consultation, irregular procedures and to the report being imprecise. Informed of the need to pursue the Council's internal complaints procedures, he met with the Area Manager, Planning Building Control and Estates on 15 July 2003, then pursued the matter with the Area Manager, Planning and Building Control and with the Chief Executive before requesting that the Ombudsman investigate. Following consideration of the information supplied, a letter was sent to Mr C by a Deputy Ombudsman on 30 September 2003 informing him that in the absence of any indication of any procedural defect on the part of the planning authority in reaching their decision to grant conditional planning consent, Mr C's complaint would not be further pursued. The decision was reconfirmed following consideration of subsequent representations from Mr C and

his solicitors on the first complaint (W030235) and also in respect of a second complaint about the handling of Application A (200400448) opened following the receipt of additional information.

7. In the interim, a second application (Application B) was submitted on behalf of Mr A to provide a new vehicular access to the front of 4 X Road and to fence the rear car park. Mr C received neighbour notification on 29 August 2003. He submitted representations to the Planning Service on traffic and road safety grounds, maintained that implementation of the proposals would be detrimental to his amenity, would disrupt existing traffic calming measures, and would require bollards and a speed bump on X Road to be relocated. Mr C also observed that Mr A had erected a balustrade over a significant length of the shared access apparently without planning permission and contrary to the title deeds and servitude rights of access. (Application B was withdrawn by the applicant on 22 November 2005 without the Council making a decision on the application.)

8. For his own part Mr C, on 19 September 2003 and 14 October 2003 respectively, submitted applications for the erection of bollards adjacent to the shared driveway and to form a new door opening with staircase on the gable of his flat (Applications C and D respectively). The treatment of those applications is dealt with at paragraphs 12 to 26.

9. Another application (Application E) was submitted on behalf of the new owner of the nursery (Mr B) for a change of use of the upper floor of the property at 4 X Road from office to an extension to the children's nursery and was validated on 28 April 2004.

10. Mr C complained to the Ombudsman about the Council's handling of Applications C and D submitted by him on 19 September and 14 October 2003 and a third file was opened on 17 November 2004.

11. On 24 November 2004, the local Area Committee considered a report on Application E relating to the change of use from first floor offices to extension to children's nursery and decided to grant conditional consent. Mr C pursued his concerns about the handling of Application E through the Council's complaints procedures and received a final response from the Chief Executive on

4 February 2005. He was not satisfied with that response and submitted a complaint to the Ombudsman. A fourth file (200500141) was opened on 14 April 2005 in respect of the handling of Application E.

Planning Application C

12. Mr C considered he had completed neighbour notification and owner notification and submitted Application C on 19 September 2003 together with drawings in respect of the formation of a door opening and external access stair at the gable of the block of flats in which he then resided.

13. Receipt of Application C was acknowledged by the Area Manager on 22 September 2003. It was pointed out to Mr C that Application C could not be validated and registered since it lacked the appropriate planning application fee (£110), the neighbour notification required to be cross-referenced to a 1:1250 scale Ordnance Survey location plan, the site and land ownership required to be outlined in the location plan in red and blue respectively, the block plan and part plan did not accurately reflect features on site, and measurements did not correspond with the scale of drawings indicated. Mr C was asked to submit the required information required within 14 days.

14. Mr C said he replied on 1 October 2003. That letter was not, however, received by the Council and they issued a reminder. Mr C responded on 16 October 2003 by submitting the appropriate fee under protest that his proposals should be considered permitted development.

15. The Area Manager responded to Mr C on 29 October 2003. He explained why a fee was payable and confirmed that the location plan required to be cross-referenced with the neighbour notification certificate. He requested the submission of accurately scaled and dimensioned plans, accurately detailing a footpath and handrail adjacent to 4 X Road. He confirmed that representations had been received about the impact of the proposal on the common access road which would be taken into consideration when the application was determined. He concluded by stating that the information submitted to date was insufficient to register Planning Application C.

16. Mr C wrote again to the Council in letters of 10 and 20 November 2003 to which the Area Manager responded on 11 December 2003. He stated that land to the rear of the site in the Council's ownership had not been included in the neighbour notification. The application required to be amended and resubmitted. He restated that accurately scaled and annotated plans remained outstanding. The Area Manager confirmed that Application C remained invalid.

17. On 13 December 2003, Mr C submitted further letters relating to his proposals. The Area Manager responded on 22 December 2003, that Mr C's drawings were not accurately scaled, and restated that certain information was considered material for the determination of the application.

18. Mr C said he did not receive that letter. He also did not query again until 21 October 2004 why Application C had not been determined. He then continued to correspond with the Council about Application C and disputed the Council's need for requesting information from him.

19. In responding on 5 October 2005 to my request for information, the Council said that the main issue outstanding from 22 December 2003 related to the submission of accurate plans detailing the proposed works. The plans submitted by Mr C did not accord in terms of the scale indicated. In short it had been difficult to establish the exact works being proposed by Mr C and their likely impact. By 7 June 2005 the information requested was not forthcoming. In terms of standard practice, Application C was returned to Mr C.

20. The Council said that their inability to validate Application C was not done as Mr C alleged in order to allow the proposals for the extension of the nursery (Application E) to proceed, but was based on Mr C's failure to submit all necessary information. Had all the requested information been submitted, the application would have been validated and determined by the Council.

Planning Application D

21. After Mr C met with the Area Manager on 15 July 2003 (paragraph 6), the residents in his block agreed to erect a fence running along the boundary with the common access to the rear. Their aim was not only to prevent patrons of the

adjacent nursery driving and parking on their property but also to afford Mr C's property more privacy at the rear.

22. Mr C stated that, in advance of submitting a planning application (Application D) for the erection of bollards and change of use of a common driveway to private garden ground at 6 X Road, he corresponded with the Council's Planning Service on 1, 18, 19 and 21 August 2003 and, in the light of their responses, amended his proposals and lodged Application D on 14 October 2003. Application D was received by the Council on 17 October 2003. While the application did not seek express permission for the fence (paragraph 21), the fence was included in the plans Mr C submitted.

23. The Council also regarded Application D as invalid. The Area Manager wrote to Mr C on 21 October 2003 asking him to supply the exact date when neighbour notification and ownership notification were carried out and to provide a copy of the location plan cross referenced to the neighbour notification list. In a further letter of 29 October 2003 the Area Manager requested that Mr C submit, within 14 days, accurate scaled plans of his proposals as the plans submitted by Mr C appeared to him to be inaccurate.

24. Mr C did not specifically respond to the Council's request but said he wrote to the Council on 27 November 2003. A fence at the rear was erected in December 2003. On 22 December 2003, the Council's Head of Planning, Building Control and Estates wrote to Mr C returning Application D. The letter stated that the information required to make the application valid had not been received within the timescale previously given to Mr C and the application could not, therefore, be registered.

25. Mr C wrote to the Council on 5 January 2004, noting that he had had no response to his letter of 27 November 2003. His letter made no mention of the Council's letter of 22 December 2003. Mr C stated that residents had preferred a fence to the proposed bollards and that this was a modest proposal normally regarded as permitted development. He considered that a site visit by a planning officer might help conclude a grant of consent for 'what must, by now, be a validated application'. The Area Manager replied to Mr C on 9 January 2004 informing him that the application had been returned to him on 22 December 2003.

Mr C was advised that, should he wish to resubmit the proposal, accompanied by all the information required in his letters of 21 and 29 October 2003, then the application would be given due consideration by the Planning Service. No subsequent application was received by the Council. Mr C stated that the Area Manager accepted Mr C's case for the necessity of the fence during a discussion on 19 January 2004.

26. In submitting his complaint to this office about the treatment of his own applications in November 2004, Mr C alleged that it had taken the Council over a year to handle two simple applications to deal with a door opening at an existing gable window and an equally simple application to erect a timber fence. Mr C was advised of the need to go through the Council's internal complaints procedure culminating in a response from the Chief Executive. He did so by letter of 12 January 2005. The Chief Executive responded on 4 February 2005 stating that information was awaited from Mr C on Application C but that Application D had been returned to him on 22 December 2003.

27. In April 2004, Mr C received neighbour notification from the new owner of the nursery (Mr B) that he had applied to the Council for planning consent for the change of use of the upper floor of the property next door from office to children's nursery (extension to existing operation) and extension to disabled access ramp (Application E).

28. Mr C first made representations on that application in a detailed letter of 28 April 2004. He maintained that permitting the extension of the children's nursery operation would worsen road safety and traffic problems which had been created through approving Application A in June 2003. He claimed that the proprietor of the nursery had been unable to provide the 16 car parking places and other specifications in the earlier conditional consent.

29. Mr C met with the Planning Area Manager and Planning Case Officer on 18 May 2004. On 2 August 2004 he made further representations on the application. He referred to waste and refuse management problems associated with the operation of the nursery. He also reiterated his concerns about inadequate parking provision and alleged that patrons of the nursery were trespassing on the private property of residents in his block. While Mr C accepted

that there was a need for additional children's nursery places, he maintained that that need should be met at a suitable location in a pleasant environment within a suitable building, served by safe and convenient access, adequate car parking, sufficient space for traffic circulation, an ability to cater for traffic volume at peak periods and a large outdoor play area.

30. The Planning Service carried out various consultations on Application E. With regard to waste and refuse management issues, the Council's Environmental Services raised no objection to the proposal but stated they had been advised of complaints regarding early morning deliveries and recommended that no such deliveries occurred prior to 08:00. Roads and Transportation offered no objection to the proposals. The Divisional Engineer responded that he was satisfied that the proposed car parking/drop-off arrangement, in association with adjacent on-street parking and nearby public car park facilities, could satisfactorily serve the extended nursery. He recommended, however, that the school roll be restricted to 50 children excluding children attending an aftercare facility (since those children attended after others had left for the day). The Divisional Engineer considered that the circumstances justified a relaxation in the way car parking standards were applied to the proposal.

31. A report on Application E was prepared on 5 November 2004 for submission to the Area Committee and was presented by the Executive Director, Enterprise Resources. The report firstly detailed the application site which lay within the Hamilton No 1 Outstanding Conservation Area, outlined the proposal, set out the relevant local plan policy and planning history, and detailed the responses to the consultations. In a fifth section detailing with representations, the report noted that the statutory neighbour notification had been undertaken and the proposal had been advertised in the local press. The extent of representation from Mr C and others was detailed. Ten separate grounds of objection were identified and commented upon. One objection was that the proposal was contrary to the approved Local Plan (Policy ED16) in relation to the restoration of office accommodation for residential use. The report commented that 'the proposal seeks to extend the nursery into the upper floor, which I do not consider to be contrary to policy.' In the Assessment and Conclusions the Executive Director stated:

6.1 The application proposes the change of use of existing upper floor office accommodation to that of a children's nursery which would allow an expansion of the existing ground floor operation ... Car parking provision shall continue to be provided to the rear.

6.2 In terms of the impact of the proposal on adjoining properties, particularly the residential flats adjoining the site, I am satisfied that there will be no significant impact on the amenity of the (residents). Similarly, I do not foresee any traffic safety issues being raised and this is supported by the Divisional Engineer.

6.3 The statutory consultees have raised no objections to the proposal and all relevant concerns can be addressed through the use of conditions. The objections lodged in respect of the application are largely similar to those raised in respect of the original consent and are not supported.

6.4 On the basis of the above, I would, therefore, recommend that planning permission be granted subject to ... conditions ...'.

32. The Executive Director proposed that nine conditions be attached to the consent. The Area Committee accepted the report and agreed to grant conditional consent. The consent was issued on 25 November 2004.

33. Although Mr C had previously asked for sight of the report when it first became available to the public (with the issue of the agenda for the meeting), he did not obtain a copy until 27 November 2004. He then submitted a letter to the Chief Executive on 13 December 2004 taking issue with statements made. Mr C referred again to traffic and parking issues and stressed that the access and parking areas of his block were not for the use of the public. He stated that there had been issues of waste and refuse disposal which had resulted in a nuisance and had caused him distress. He was concerned that Environmental Services had raised no objection. In referring to Local Plan policies ED16 and EN4 he alleged that the Council had squandered the opportunity to implement its own local development plan and consider returning the two storey building next door to residential use. He argued that the author of the report had not paid special attention to the desirability of preserving or enhancing the character or appearance

of the conservation area. Mr C referred to the terms of two National Planning Policy Guidelines (NPPG 18 Planning and the Historic Environment and NPPG 17 Parking Standards). Mr C sought clarification that the Council's car parking guidelines had been met and requested copies of the responses to the consultation on Application E from Roads and Transportation and Environmental Services.

34. The Chief Executive responded to Mr C in a letter of 5 February 2005 with which he enclosed the documents requested by Mr C. He responded to the specific points detailed at paragraph 2(b) and 2(c) as follows:

Planning Policy (paragraph 2(b))

The Chief Executive responded that the Council were required to process planning applications on their individual merits taking into account material considerations such as Local Plan policies. Application A , for the use of the ground floor office accommodation at 4 X Road as a nursery, was considered not to conflict with applicable policy given its relationship with adjacent commercial properties in particular the office use in the upper floor of the building. The subsequent proposal (Application E) for use of the upper floor at 4 X Road as an extension to the ground floor nursery was again assessed against applicable policies and its relationship with the surrounding area. It was considered inappropriate to return the office accommodation to residential use as preferred by the Council through the terms of Policy ED16 when assessing each individual submission. Initially this was on the basis that there was insufficient land available to satisfy current Council guidelines in terms of amenity and privacy for residential use. The Chief Executive stated that the Council could not foresee at the time of the original submission, that the upper floor office would become vacant and, therefore, each proposal was determined on its individual merits.

The Chief Executive stated that Application E was for the change of use of an existing commercial operation within a mixed use environment to that of a nursery. The external appearance of the property was largely unaffected. In the Council's view, the application raised no issues with regard to Policy EN4 of the Hamilton Local Plan. The Council did not consider that there was a requirement to consult with Historic Scotland or that there was any conflict with NPPG 18. Given the site's location within the Conservation Area, the Council had taken a cautionary approach and had advertised the proposal as

a development affecting the character or appearance of a conservation area. There had been no requests by interested organisations to be consulted on the proposals.

Environmental Services' response to the consultation (paragraph 2(c))

The Chief Executive informed Mr C that the Council could not be held accountable for private individuals' misuse of refuse storage containers. That was a private matter between the individuals. The Chief Executive noted that Mr C had raised issues regarding refuse disposal and noise with the relevant Services directly. The Chief Executive understood that Environmental Health Services had requested that Mr C contact the service to make appropriate arrangements for officers to access Mr C's home to carry out appropriate monitoring, but that Mr C had not arranged access to allow officers to monitor for noise nuisance.

35. Mr C responded to the Chief Executive in further letters of 25 and 26 February. On 1 March 2005, an Administration Officer supplied Mr C with a copy of the planning consent for his block issued by the former Hamilton District Council in 1987. On 4 March 2005 Mr C sent a wide ranging letter relating to planning, roads and transportation, and environmental services issues involving the three applications in respect of the building next door. On 14 April 2005, a decision was taken to open a fourth file on the handling of Application E (see paragraph 11).

36. Enquiries were made of the Council on 6 September 2005. The Council's Head of Administration responded to the four heads of complaint in two letters of 5 October 2005. He reiterated the points made by the Chief Executive at paragraph 34. Environmental Services, although not statutory consultees, had been asked for their observations. They had had no substantive points to make on Application E in respect of food control, health and safety and environmental protection but had suggested a restriction on early morning deliveries.

37. On the final head of complaint, at paragraph 2(d), the Head of Administration stated that the availability of alternative locations was not a material planning consideration in respect of the consideration of Applications A and E. The Council was obliged to issue decisions based on the submissions lodged by the applicant.

38. Mr C is of the firm belief that the original decision to grant planning consent for the change of use of the ground floor premises at 4 X Road to a children's nursery was flawed and the Council compounded their error by granting planning consent for change of use of the upper floor as an extension to the nursery.

(a) Conclusion

39. Where an application is validated and the planning authority fail to determine the application within eight weeks, the applicant can appeal against a 'deemed refusal'. That right of appeal does not extend to disputes as to whether the information and documents necessary to complete validation have been met. I believe that with both Application C and Application D the Council clearly identified the information they required in order to validate and to determine the applications. I do not uphold this complaint.

(b) Conclusion

40. I note that the Council maintain that they were unaware at the time they were considering Application A between March and June 2003, that the upper floor of 4 X Road had ceased being used as an office. That information had not been disclosed by the applicant. Application A was a proposal for one quarter of the detached building at 2 and 4 X Road. It is now a matter of speculation as to whether the merits of an application for change of use of both floors at 4 X Road to a children's nursery would have been refused on grounds of the Council's policy statement in their Local Plan (ED16).

41. I consider that the report on Application E could have been more explicit in informing the Area Committee that the Council's preference published in their Local Plan was not the change of use to nursery but rather to restore the building to residential use. Having a residential use above an existing nursery, however, might in itself create further opportunity for conflict, already illustrated in Mr C's opposition to the nursery use next door. The Area Committee were entitled to exercise their discretion to decide to grant conditional consent to Application E. On balance, I do not uphold this complaint.

(c) Conclusion

42. The Council's Environmental Services were not statutory consultees on Application E but availed themselves of the opportunity to make comment. Any problems with the capacity of refuse disposal facilities or with regard to noise from cars were properly matters for Mr C to raise as environmental protection issues directly with Environmental Services. I do not consider that Environmental Services failed to assess matters properly in responding to the consultation on Application E. I do not uphold this complaint.

(d) Conclusion

43. The concern of the Council in dealing with the original application (Application A) or the application for the first floor extension (Application E) was not to identify a more suitable site but to determine on their merits the proposals submitted to them. I see no evidence of administrative fault or service failure in this regard. I do not uphold this complaint.

Recommendation

44. The Ombudsman has no recommendation to make.

31 October 2006

Explanation of abbreviations used

Mr C	The complainant
The Council	South Lanarkshire Council
Mr A	The original owner of the nursery
Mr B	Subsequent owner of the nursery
6 X Road	Block of six flats including Mr C's former ground floor flat.
4 X Road	Semi-detached property, formerly offices on ground and upper floor.
2 X Road	Semi-detached property in office use.
Application A	Planning application for change of use of ground floor of 4 X Road approved – June 2003.
Application B	Subsequent planning application for new access submitted in 2003. Withdrawn by applicant and not determined.
Application C	Mr C's planning application for new door and stairway at 6 X Road.
Application D	Mr C's planning application for bollards and change of use of driveway.
Application E	Planning application for extension to nursery by changing use of upper floor approved in November 2004.

