

Case 200401956: The City of Edinburgh Council

Summary of Investigation

Category

Local government: Planning; Handling of application (complaint by opponent)

Overview

This investigation regards a complaint from the Secretary (Mr C) of a voluntary association (the Association) about the City of Edinburgh Council's (the Council) handling of the Association's objections to applications which affected the setting of a Grade A listed building.

Specific complaints and conclusions

The complaints which have been investigated are:

- (a) alleged failure to consider the Association's objections (*partially upheld*); and
- (b) alleged failure to refer the applications to Scottish Ministers (*not upheld*).

Redress and recommendations

The Council accepted the Ombudsman's recommendation that the Council apologise to Mr C for their failure adequately to articulate the Association's objections. They also informed her of changes they had introduced to the format of committee reports on planning applications.

Main Investigation Report

Introduction

1. Mr C complained to the Ombudsman on 28 January 2005 regarding the way his written objections to duplicate planning applications for a link road (the link road) had been handled and the Council's failure to refer the applications to Scottish Ministers because they were contrary to development plan and the Council had a financial interest.

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

- (a) alleged failure to consider the Association's objections; and
- (b) alleged failure to refer the applications to Scottish Ministers.

3. The investigation was based on written information provided by Mr C and the Council's response to an enquiry. I visited the site of the applications. While not everything has been included in this report, I am satisfied that nothing significant has been left out. A draft of this report was sent to both the Council and complainant and they were given the opportunity to comment.

4. Mr C is the secretary of an Association (the Association) which was formed in January 2002 with the stated purposes of increasing public awareness of the unique value and to preserve the assets of Caroline Park, a late 17th century listed building in North Edinburgh. The building was awarded category A listing in 1966. However, its setting was impaired by its proximity to nearby gasworks and an oil refining plant. The closure of the gasworks was a major stimulus for major development planning.

5. The Council inherited the North West Edinburgh Local Plan (NWELP) adopted in 1992, from their predecessor. Prior to publishing in draft form its replacement, the Council commissioned from consultants a development guidance document (the Masterplan) for the Granton Waterfront area. In April 1999, the Council approved a contribution of £16.4 million towards the Waterfront project. Agreement with Scottish Enterprise, Edinburgh and Lothian (SEEL) over the structure of a joint venture company was reached in July 1999 and three councillors were nominated to the board. The joint venture company, Waterfront Edinburgh Ltd (WEL) was set up in early 2000. Around this time, the Council also

put the draft Masterplan out for consultation. The finalised Masterplan was approved by the Planning Committee and Council respectively on 30 January and 13 February 2001 as supplementary planning guidance to provide a broad land use and urban design framework against which individual planning applications could be assessed. In March 2001, a consultative draft of the Draft West Edinburgh Local Plan (DWELP) was submitted to the Planning Committee. On 18 April 2002, the DWELP incorporating the Masterplan was approved for development control purposes.

6. The Masterplan covered an area of 140 hectares (345 acres) and 1.3km of waterfront. It envisaged the investment of £1 billion of capital, some 5000-6000 residential units and the creation of 13,500 jobs. It included a vision for a central park with development forming an extended public space incorporating the historic house of Caroline Park, the provision of 30 hectares (75 acres) of new public open space, and a rejuvenated beach area.

7. From the time of their formation in January 2002 the Association took an active interest in applications for planning consent in the Granton Waterfront area. Since the Council owned 50% of the joint venture company (WEL) they were particularly concerned with procedural aspects. The handling of an earlier application for reserved matters for 497 houses, to which the Association objected, was the subject of an earlier complaint to the Ombudsman (200400021).

8. The Association complained that that application, that had been granted consent by the Development Quality Sub-Committee on 24 March 2004, had not been referred to Scottish Ministers under section 16 of the Schedule to the Town and Country Planning (Notification of Applications) (Scotland) Direction 1997 (the 1997 Direction). Under our then complaint handling procedures the complaint was the subject of an enquiry of the Council and it was decided not to conduct an investigation.

9. Mr C had complained on behalf of the Association that the earlier application should have been referred to Scottish Ministers on the grounds that the Council had a financial interest in WEL as a result of its joint ownership, and the application involved a departure from the Masterplan adopted as policy guidance in 2001. The Council's financial interest was not disputed and there was no substantive body of

objections. However, it was noted that an earlier outline consent for the same development had been referred to Scottish Ministers on 2 May 2002 but had neither been called in for determination, nor had any comments been made on the principle of the application. While Mr C considered the Association had been denied due process, it was held that his complaint centred on a dispute about the Council's interpretation of the legislation and as such was a matter for the courts. Confirmation of this office's decision not to pursue complaint 200400021 was sent to Mr C on 23 December 2004. Around the time the first complaint was determined, Mr C wrote expressing his disquiet about other applications in the Granton waterfront area which had been determined and granted by the Development Quality Sub-Committee on 27 October 2004. Mr C set out his Association's complaint in a letter of 28 January 2005 with enclosure (see paragraph 18).

10. Five pairs of applications were submitted to the Council on 15 December 2003 for the link road, and two developments of 37 houses and 17 houses respectively and associated listed building consents. Initially, the Association submitted joint representations on the applications in a letter of 21 January 2004. A second submission was sent by the Association on 18 June 2004 following the submission of revised plans for the link road. The Association were concerned that the land adjacent to the link road on the east had been designated in the Masterplan as part of a central park encircling Caroline Park House. By seeking to straighten what had been envisaged in the Masterplan as a gently curving link road following contours, a parcel of land was created which made possible the planning application for a 37 unit apartment complex. While the earlier letter of 21 January 2004 related to all ten applications for outline, full planning, and listed building consent, the Association's letter of 18 June 2004 was specific to the duplicate applications relating to the new link road and cited the Masterplan to provide a detailed argument as to why the route of the road should not be altered to accommodate access to a residential development of 17 houses in an historic walled garden and to create an area to build 37 residential units. In the Association's view, the proposed link road envisaged a major deviation from the Masterplan, namely, the central park. The Association, in their representations, referred to an e-mail from a Council Legal Officer (Officer 1) of 24 March 2004 that for all practical intents and purposes the DWELP (incorporating the Masterplan)

was to be treated as the development plan. The NWELP of 1992 was stated by Officer 1 to be of limited relevance.

11. Reports on the two applications for full consent for the link road were prepared for the Development Quality Sub-Committee on 20 October 2004. The Director's report stated that five letters of objection were received including objections from the Association and residents of Caroline Park House. The report summarised the objections but did not, in the Representations section, summarise the objection from the Association that the proposed deviation of the road from the route in the Masterplan was not justified. In the assessment section, the Director stated that part of the road planned in the Masterplan had been built as envisaged as a straight, wide, tree-lined avenue. The final third of the road, which the application covered, was envisaged to curve its way to its junction with a road (X Road) to the north. An area of open space was proposed immediately to the east.

'... The land immediately to the east has subsequently been identified as being difficult to make work as an area of open space, owing to changes in ground levels. This area was, therefore, identified as being suitable for housing, the planning applications for which have recently been considered by Committee. In order to accommodate the housing development the link has been realigned so that it now follows a straight line down to [X Road].

In this instance, the departure from the Masterplan is justified and considered to be acceptable'.

12. The Director also noted that WEL was registered under the Companies Act as a private company, which is limited by shares and is owned equally between the City of Edinburgh Council and SEEL. The Council had an interest in the development but, since there had not been a substantial level of objections and the proposals were not contrary to the development plan, referral to Scottish Ministers in terms of the Town and Country Planning (Notification of Applications) (Scotland) Direction 1997 was, in the view of the Director, not required.

13. On 20 October 2004, members continued the two applications for the link road in order to pay a site visit. The applications were considered again in

Committee on 27 October 2004, approved, and full conditional consent was issued on 29 October 2004.

14. The duplicate applications for the housing developments of 17 and 37 units were also considered at the same meeting of the Development Quality Sub-Committee. It was decided in line with the 1997 Direction to refer the residential applications to Scottish Ministers. This was stated to be because they were contrary to the approved Local Plan for the area, the NWELP; Policy ED1 in the NWELP stipulates that land within the Granton Partnership Area should be developed for a range of employment purposes.

15. Following the decisions on 27 October 2004, Mr C sent e-mails to a Council Solicitor on 28 October 2004. He referred to the information he had been given by the same solicitor in his e-mail of 24 March 2004 (paragraph 10) regarding the status of the emerging West Edinburgh Local Plan (DWELP) incorporating the consultants' Masterplan. These e-mails were forwarded to the Head of Planning and Strategy, City Development (Officer 2) for a response. He responded to Mr C in a letter of 8 November 2004. Officer 2 explained why the two residential developments had been referred to Scottish Ministers and why it was not considered necessary to refer the link road applications. His letter continued:

'... With regard to the link road, the planning application is just for the link road itself – no other development forms part of this application. There are no policies in the [NWELP] that resist roads in the Granton Partnership Area being built. Indeed, the road is in compliance with transport policies in the plan, in particular Policy T3. On this basis, since the link road is not contrary to any policies in the [NWELP] the Council took the view that it was not necessary under the Notification Direction to refer the application to Scottish Ministers.

In your e-mail dated 29 Oct 2004 to [Officer 1], you seem to be of the understanding that the residential and link road planning applications should be referred to Scottish Ministers because they are contrary to the original Masterplan. Under the Notification Procedure this is not a reason for referring the applications. This determining factor is whether they are contrary to the approved Local Plan, not the approved Masterplan.

The issue of the number of objections received for all of the applications is a secondary issue in this instance and was not a factor in determining whether to refer the applications to Scottish Ministers because the number of objections received was not considered substantial. Normally, 20 or more objections is considered to be substantial.

Accordingly, the applications for the link road were approved by the Development Quality Sub-Committee on 27 Oct 2004 and have now been issued'.

16. Officer 2 concluded his letter by referring to changes in the submitted plans for the proposed road layout. He confirmed that the plans submitted in October 2004 were the same as the revised layout plans submitted in May 2004. The Council had secured in May a reduced carriageway width and this was shown on the revised layout plans submitted shortly afterwards. A dedicated 30 metre right turning lane would be installed as a condition (condition 8) of the consent. Officer 2 confirmed that, with the exception of the most southerly section, all other details shown on the revised layout submitted on May 2004 remained relevant and the plans were stamped up accordingly on 20 October 2004 as the approved plans.

17. Mr C subsequently wrote to the Council's Monitoring Officer (Officer 3) raising the two issues in his complaint to this office. Officer 3 responded to Mr C in a letter of 24 January 2005. Officer 3 considered that the Head of Development's response of 8 November 2004 (paragraph 15) explained why the link road application had not been referred to Scottish Ministers whereas the applications for the two residential developments had been so referred. Officer 3 noted that Scottish Ministers subsequently decided not to 'call in' those applications for determination. Officer 3 did not consider that there would be any basis for his intervention as Monitoring Officer. On the other issue of the treatment of his objections to the link road applications, Officer 3 stated that the terms of the Association's representations and the report itself had been considered. Officer 3 concluded that the issues which the Association raised in their representations were duly discussed in the report and Officer 3 did not see a basis for his intervention.

18. Mr C submitted a further complaint to this office which was received on 28 January 2005. With regard to the Association's first head of complaint, the Association stated that they had objected to the proposed link road as a major deviation from the Masterplan and which violated a key structural element – the Central Park. Mr C stated that the report to the Development Quality Sub-Committee had listed the Association as an objector, but had made no mention of the nature of its objections in detailing the grounds of objection advanced. As a consequence the Committee, in considering the duplicate application, would in Mr C's view have been led to believe the objections as listed were exhaustive yet failed to consider the grounds for objection raised by the Association. On the second head of complaint Mr C referred to the contradictory information he had been given by Officer 1 in his e-mail of 24 March 2004 (paragraph 10) and Officer 2 on 8 November 2004 (paragraph 15). He maintained that the Head of Planning and Strategy had contradicted Officer 1's legal guidance and had reverted to the 12 year old NWELP to base his decision not to refer the link road applications to Scottish Ministers. He had thereby evaded the opportunity of independent review of the decision by Scottish Ministers. Mr C stressed also that the decision being sheltered from review was a decision by the City Council in favour of a City owned developer authorising the violation of the approved development plan on which the public should have been entitled to rely.

19. I made enquiries of the Council into the complaint on 27 April 2005. The Council responded on 25 May 2005:

(a) Complaint regarding the alleged failure to consider the Association's objections

The Council's response stated that the Director's reports into the Link Road applications stated that there were five letters of objection including objections from the Association and residents of Caroline Park House. These objections were then summarised. The Council acknowledge that the objection from the Association was not summarised in the Representations section of the report (that is that the Link Road's deviation for the Masterplan route was not justified). The Council maintained that, while the reference was omitted in that section of the report it was not disregarded. It had been considered fully and in detail in the Conclusions and Recommendations to the report. A judgement had been made as to whether the route of the road should be altered to accommodate housing and it had been recommended

that this departure from the Masterplan was acceptable. The Council maintained that the objection issue was communicated and stated that representation letters were also made available in full to members of the Sub-Committee in advance of the meeting. The Association had sent a further e-mail on 26 October 2004 on all the Waterfront reports to members of the Development Quality Sub-Committee. This commented that the City Planning Department had failed in its report on the Link Road applications to make mention of the Association's views. The Council state that members were well aware of the Association's views and the issue in the objection was a fundamental factor in determining the application. They apologised that a summary of the objection was not included in the Representation section of the report. The Council stated that then recently introduced changes had been made in the format of reports to the Development Quality Sub-Committee. These changes were intended to assist members to reach sound decisions in planning issues, while reassuring others that all material considerations had been taken into account.

(b) Complaint regarding alleged failure to refer the applications to Scottish Ministers

The Council stated that the notification procedure is contained in Section 16(a)(i) of the Schedule to the Town and Country Planning (Notification of Applications) (Scotland) Direction 1997. This requires applications to be referred to the Scottish Ministers where '... a planning authority have a financial interest ... in the circumstances where: (i) the proposed development does not accord with the adopted or approved local plan for the area or has been the subject of a substantial body of objections ...'.

In accordance with the Direction, the residential applications were all referred to Scottish Ministers as the Council had a financial interest and the development proposed did not accord with Policies ED1 and ED5 in the adopted or approved NWELP. These policies advocate general industrial business development within the Granton Partnership Area and not residential development.

The link road applications were not referred because, although the Council again had a financial interest, the application itself was not contrary to any policies in the approved or adopted NWELP. The application was simply for a road and there are no policies in the NWELP that prevent roads from being constructed in the Granton Partnership Area.

For all of the applications, the decision on whether to refer them to Scottish Ministers was taken against whether they were contrary to the adopted NWELP. The Council believed this to be in accordance with the 1997 Direction and that it had been consistent in its approach over this matter. In this instance, the issue relating to the number of objections received was not a reason for referring any of the applications to Scottish Ministers.

The key issue is what is taken to be the 'adopted or approved local plan'. Although the NWELP was adopted in 1992 it still remains the approved or adopted plan for the Council. The DWELP, which incorporates the Masterplan as supplementary guidance, was approved by Committee for consultation and, on 18 April 2002, was approved for Development Control purposes. The Council Solicitor's e-mail of 24 March 2004 recognises that the DWELP can be used on a day-to-day basis to help formulate decisions on planning applications. In that respect the plan does represent a material planning consideration which the planning authority has to give due regard to. However, it is the NWELP together with the approved Edinburgh and the Lothians Structure Plan 2004 that constitute the statutory development plan and it is against this plan, and not the DWELP, that any development plan departure must be assessed.

The Council further stated that the Masterplan was indicative only and the precise form alignment of the road would await the planning application stage. In the event the applications showed a straight road alignment as opposed to a road curving down towards the north as shown in the Masterplan; however, a link road is still being provided and the principal of the Masterplan was still being adhered to.

20. Mr C was given the opportunity to comment on the Council's response and did so in an e-mail of 17 June 2005. He maintained with regard to the

Association's objection to the link road proposals that there had been no mention of the integral landscape element of the central park in the report merely 'an area of open space' identified as 'difficult to make work'. With regard to the failure to notify to Scottish Ministers he considered the Council had been inconsistent and referred again to the Application at the centre of his earlier complaint which involved residential development and yet had not been notified. He believed the inconsistency to be total and complete.

21. Subsequently at Mr C's suggestion I visited the site of the link road on 3 October 2005 and, at the owners' invitation, visited Caroline Park House.

(a) *Conclusion*

22. I consider it unfortunate that the Association's objections in the Officer's report on the link road proposals were not summarised in the Representations section of their report to committee. While the Association separately complained about the nearby residential developments, the larger of these proposals for 37 residential units was facilitated by the re-routing of the proposed road from the indicative route given in the Masterplan. I consider that the report's treatment of what the Association saw as a central element of the Masterplan lacked proper articulation of the basic point they were making, namely that the central park swathing and encircling the house was being eroded. Mr C was understandably concerned that the area was offhandedly dismissed as 'an area of open space difficult to work'. I consider the treatment of the objection to be below a satisfactory standard and to that extent I uphold this aspect of the complaint. I accept, however, that the Association's letters of objection were available to members of the committee, and committee members were circulated with relevant information by e-mail on the eve of the committee meeting.

(b) *Conclusion*

23. Whether the Council is correctly interpreting the 1997 Notification Regulations is a matter for the courts to determine. I do not share Mr C's view that the Council have been inconsistent. The outline application for the previous application was referred by Scottish Ministers as contrary to the NWELP of 1992. The basic reason for the subsequent reserved matters application not having been referred was because the principle of the development had previously been accepted by Scottish Ministers who had not called in or commented on the outline application.

In this complaint, the two sets of residential applications were referred to Scottish Ministers since they were contrary to the NWELP. The link road applications were not referred since the application was for a road and that proposal was not contrary to any policy in NWELP. The Council maintain that the route of the road shown in the Masterplan was only indicative. Changing the route by implication did not involve a departure. The Council have provided reasons for their actions and I do not believe that there was maladministration. I do not uphold this complaint.

Recommendations

24. The Ombudsman recommended that the Council apologise to Mr C for their failure adequately to articulate the Association's objections. The Council informed the Ombudsman that they would accept the recommendation and stated that changes have been made to the format of reports to the Sub-Committee to assist members to reach sound decisions on planning issues while reassuring others that all material considerations have been taken into account.

31 October 2006

Explanation of abbreviations used

Mr C	The complainant
The Council	The City of Edinburgh Council
The Association	A voluntary association of which Mr C is the Secretary
The Masterplan	A development guidance document for Granton Waterfront area
SEEL	Scottish Enterprise Edinburgh and Lothian
WEL	Waterfront Edinburgh Ltd – the joint venture company
Officer 1	The Council's Legal Officer
NWELP	North West Edinburgh Local Plan
Officer 2	Head of Planning and Strategy, City Development
Officer 3	The Council's Monitoring Officer
DWELP	Draft West Edinburgh Local Plan
WELP	West Edinburgh Local Plan