

Case 200402197: The City of Edinburgh Council

Summary of Investigation

Category

Local government: Planning

Overview

The complainants (Mr C and his neighbour Mrs D), were concerned that The City of Edinburgh Council (the Council) failed to require that they be re-notified when an amended planning application was received from Mr C and Mrs D's neighbour. Mr C and Mrs D were also concerned that the original plans and planning application were missing from the Council's planning file.

Specific complaints and conclusions

The complaints which have been investigated are that the Council:

- (a) failed to require that Mr C and Mrs D be re-notified when an amended planning application was received from Mr C and Mrs D's neighbour (*no finding*); and
- (b) failed to keep adequate records (*upheld*).

Redress and recommendation

The Ombudsman has no recommendations to make.

Main Investigation Report

Introduction

1. On 7 March 2005, the Ombudsman received a complaint from Mr C about the way a planning application to build an extension to his neighbour's property had been handled by the Council. Mr C was aggrieved because he felt he had been denied an opportunity to make objections to the planning application and had suffered from a loss of privacy and from overshadowing when the planned extension was built.

2. Mr C explained that when his neighbour originally submitted an application to build an extension to his house, he had raised no objections, as the extension was planned to be built over a garage at the furthest point away from his home.

3. Mr C said that subsequently the Council approved plans which he felt were radically different to the original plans and did so without requiring that the applicant re-notify him. Mr C felt that he should have been re-notified because the subsequent plans changed the location of the extension so that it was much nearer to his home. Mr C asserted that, because the changes from the original plans were so significant in his view, the Council should have considered the plans as a new application rather than an amended one. Mr C noted that had the Council considered the application as a new application then they would have had a duty to require that he be re-notified.

4. Mr C said that, even if the Council were right to consider the plans as amendments to the original application rather than as a new application, the Council should have required re-notification in light of the fact that his interests were affected by the changes to the application. Mr C said that by not requiring re-notification the Council had failed to follow their own guidance on dealing with amended applications.

5. In the course of Mr C's complaint to the Council, they informed him that the original planning application was missing from the file. Mr C pointed out to the Council that in the absence of the original plans it would be very difficult to establish whether the Council had acted properly by not requiring re-notification.

6. On 27 April 2005, the Ombudsman received consent from Mrs D for Mr C to pursue a complaint on her behalf. Mrs D's complaints were the same as

Mr C's and she too felt that she had lost an opportunity to object to the planning application and suffered a loss of privacy and overshadowing as a result of the extension.

7. The complaints from Mr C and Mrs D which I have investigated are that the Council:

- (a) failed to require that Mr C and Mrs D be re-notified when an amended planning application was received from Mr C and Mrs D's neighbour; and
- (b) failed to keep adequate records.

Investigation

8. The investigation of this complaint involved making several written enquiries of the Council. I considered the complaint correspondence between Mr C and the Council, the Council's planning file and the following documents: the Council's Advice for Third Parties on Amendments and Variations to Planning Applications; the procedures for dealing with amendments and variations to planning proposals set out in the Council's Development Control Handbook; the Development Sub-Committee Delegated Application Report; a flowchart setting out the Council's procedure for weeding planning files.

9. 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 Mrs D and the Council were given an opportunity to comment on a draft of this report.

(a) The Council failed to require that Mr C and Mrs D be re-notified when an amended planning application was received from Mr C and Mrs D's neighbour

10. The section of the Council's Development Control Handbook entitled Amendments and Variations to Planning Proposals (the Council's Handbook) and the Council's Advice for Third Parties on Amendments and Variations to Planning Applications (the Council's Advice), set out what should happen when new and amended planning applications are received. The Council's Advice states that:

'Where the substance of an application has changed, the application should be withdrawn and a fresh application submitted. [...] An example of a change in substance is a significant change in the density of a housing development or in the scale or size of a building. In identifying a change in substance, decisions made on whether to request a new application or re-notification/ re-advertisement etc will be at the discretion

of the Head of Planning and Strategy. The circumstances of each particular case will be taken into consideration.'

11. The Council's Advice states that where the substance of an application is judged not to have changed, the changes proposed can be treated as an amendment to an application. The Advice states that:

'There will generally be no further publicity in the following circumstances (subject to the discretion of officers):

- Where the changes proposed are not material in planning terms;
- Where the changes proposed involve clear improvements;
- Where the changes proposed result in compliance with Development Plan policy and non-statutory guidance;
- Where the changes proposed are no more detrimental to the interests of neighbours or those who have commented.

Otherwise,

- neighbours should be re-notified by the applicant.'

12. The Council's Advice also provides guidance on the materiality of changes. Although the guidance makes clear that the decision to request a new application or re-notification is at the discretion of the Head of Planning and Strategy, it includes the following non-exhaustive list of factors to which reference should be made:

- relevant to planning considerations;
- changes which would nullify the effects of conditions;
- changes likely to make the proposals contrary to current structure/ local plan policies and/ or Council non-statutory guidance;
- environmental impact worsened;
- major design changes;
- relationship to surroundings changed;
- transport impact changed;
- changes to site boundaries and subsequent requirement for neighbour notification;
- where failure to re-advertise would deprive individuals of their legitimate rights to make a representation on an application; and
- where there are a number of small changes which cumulatively decrease the quality of the development either overall or in the details of the application.

13. The Council's Handbook provides further details regarding the Council's statutory duties when considering whether or not an amended planning application should be re-notified:

[...] there are no statutory provisions for publicising (either through re-notification of neighbours or re-advertisement) amendments and non-material variations. [...] In the case of significant changes the applicant is requested to re-notify all neighbours and where appropriate the proposal will be re-advertised. [...] If the changes are considered to be insignificant, or meet objections raised, or are an improvement on the submitted proposals, no further publicity will be undertaken.'

14. I asked the Council for a copy of the planning file, in order to determine whether, in deciding whether Mr C and Mrs D's neighbour's subsequent application should be considered as a new or amended application, the Council had regard to and had followed the guidance at paragraph 10 above. I also hoped the planning file would help me determine whether, when the Council chose to consider the subsequent application as an amended rather than a new application, they had regard to the guidance at paragraphs 10 to 13 above in deciding that re-notification was not necessary in this case. My concern was not to challenge the decisions taken by the Council during their consideration of the planning application and I noted that the decision to request re-notification was a discretionary decision for the Council's Officers. The Ombudsman is barred from questioning the merits of such decisions, if taken without maladministration. My concern was only to determine whether there was any evidence that key decisions had not been taken properly or in line with the Council's guidance.

15. The Council's planning file did not contain the original planning application and contained no documents detailing how the officer responsible for considering the application (the Officer) reached the view that the amended application did not constitute a change in substance and that Mr C and Mrs D did not need to be re-notified. The Officer is no longer employed by the Council. I comment in detail at (b) below on the Council's planning file.

16. The absence of the original planning application means that it is neither possible to know why the Officer reached the conclusions that he did nor whether he followed the guidance detailed at paragraphs 10 to 13. The only available pieces of evidence relating to the original application were a location

plan, which showed that the original application envisaged the extension to be over the property's garage (and thus away from Mr C and Mrs D's property) and a letter from the Officer to the applicant which refers to the amended plans being a significant improvement over the original plans.

17. I asked the Council to retrospectively justify their decision not to request re-notification. The Council, on the basis of the limited evidence available (but with full knowledge of where the extension had been built) and with an inevitable amount of speculation, explained why the Officer would have reached the conclusions he did and explained how they felt that complied with the Council's policies. The Council explained that, although it was acknowledged that the extension was in a different location, that did not, in their view, constitute a material change. The Council explained that the original application involved what was effectively a one and a half storey extension to the property (although the ground floor already existed). They said that the amended application was also for a one and a half storey extension to the property. The Council considered that both applications sought additional accommodation to the existing property and were similar in form and intention. The Council explained that the original application would have been unsuitable because it was too close to a neighbouring property and that would result in a detrimental impact on residential amenity. The Council explained that, in their view, the amended plan had fewer impacts in relation to neighbouring properties in terms of their Council's policy and non-statutory guidance. The Council said that, because the amended application had no adverse impact (again in their view) on neighbouring properties the change to the original application could not be said to be material. The Council, therefore, believed that the decision not to re-notify Mr C and Mrs D was correct.

(a) Conclusion

18. In the absence of contemporary evidence I have no grounds either to dispute or agree with the Council's explanations at paragraph 17 above. In order to determine, on the basis of sound evidence, whether there was maladministration in the Officer's handling of this case I needed to have sight of the original planning application and plans. Because those were not available, I could reach no conclusion on this point. Consequently, I make no finding on this complaint.

19. I am aware that this outcome is not very satisfactory for Mr C, and I deal with my concerns regarding the Council's record-keeping below.

(b) The Council failed to keep adequate records

20. The Council explained that it was their normal practice at the time the application was being considered (2003) to sieve files and remove unnecessary documentation, including the removal of superseded plans and notes, once a case was determined. They said it would not be surprising that the original plans were not on file. The Council stressed that at the time the planning application was being considered no formal policy on file retention had been adopted, but it was established practice only to retain plans that had been approved.

21. The Council said there were sound reasons for not retaining superseded plans. They said there had been instances where criticism had been levelled at the Council and at others for keeping drawings that were no longer being considered on file, as that caused confusion in the minds of the public and community bodies. The Council said that in a case that went to court in England, the decision of a planning authority was set aside because the courts could not be sure that the authority had carried out their statutory duty of having regard to the development plan rather than simply taking the view that the amended plans were better than the superseded ones. The Council explained that keeping superseded drawings in a paper-only system also raised the potential for mistakes in identifying approved drawings. They said it was for those reasons that the practice of destroying superseded drawings was adopted.

22. The Council explained that the Planning Department had reviewed their file management and retention policy early in 2005, partly in response to the introduction of the Freedom of Information Act. They provided me with a copy of a flowchart, showing the new procedure to be followed. The new procedure allowed for an audit trail of changes during the application process and meant that the planning file would hold copies of both approved and superseded plans for a period of six years. After six years, the procedure calls for files to be 'weeded' to keep only the plans relating to an approved decision.

(b) Conclusion

23. The Council, in removing documents relating to the original planning application from the planning file, acted in line with the established practice in place at the time in 2003. The Ombudsman, in considering complaints of maladministration, must have regard to the requirements of policy and practice

in place at the time any alleged maladministration occurred. In this case, the Council acted in line with its established practice in place at the time.

24. However, where the policy or practice in place is manifestly unreasonable, by the standards that could reasonably be expected to exist at the time as well as now, the Ombudsman is entitled to find fault. While I note why the Council adopted the practice of removing superseded plans immediately after an application had been determined (see paragraph 21 above), I consider that the practice has serious consequences in terms of allowing key actions and decisions to be audited or reviewed. These consequences have become apparent in this case, as neither the Council nor the Ombudsman have been able to determine with certainty, based on factual evidence, the details regarding the processing of the planning application. The result has been that Mr C and Mrs D's complaint to the Council could not be responded to with the full facts available and, similarly, that I could make no finding regarding complaint (a) at paragraph 18 above.

25. I, therefore, find that the Council's established practice on file retention, the result of which was to hinder my investigation of a complaint from a member of the public, was seriously flawed. It is reasonable to expect that the Council would be able to demonstrate, based on contemporary evidence, compliance with its own policies and guidance and to expect they would have a carefully documented planning file, allowing both internal review and review by the Ombudsman's office. That did not happen in this case.

26. Planning is a highly emotive and contentious subject, which can have a real impact on peoples' lives. The Council's failure to keep adequate records and, therefore, to be able to explain or review their actions based on factual evidence, is a matter of great public concern. I regard the Council's failure to keep adequate records as a serious flaw. Consequently, I uphold this complaint.

27. I note that the Council now recognise the importance of keeping an audit trail of changes on a planning file in their new file retention policy. The Council's new policy is sound, addresses my criticisms at paragraphs 23 to 26 and represents a much needed change to the practice that was previously in place. I, therefore, have no recommendations to make.

23 May 2007

Explanation of abbreviations used

Mr C and Mrs D	The complainants
The Council	The City of Edinburgh Council
The Council's Handbook	The section of the Council's Development Control Handbook entitled Amendments and Variations to Planning Proposals
The Council's Advice	The Council's Advice for Third Parties on Amendments and Variations to Planning Applications
The Officer	The Council's Planning Officer

List of legislation and policies considered

The Council's Advice for Third Parties on Amendments and Variations to Planning Applications

The Council's Development Control Handbook

The Council's Procedure for Weeding Planning Application Files