

## Scottish Parliament Region: South of Scotland

### Case 200502416: Scottish Borders Council

#### Summary of Investigation

##### **Category**

Local government: Planning; Handling of Application (complaint by opponents)

##### **Overview**

The complainant, Ms C (acting on behalf of an Action Group (the Group)) was concerned that Council planning officers had decided there was no requirement for an Environmental Impact Assessment (EIA)<sup>1</sup> in connection with a planning application. She also felt that there were delays in responding to the Group's complaints and concerns.

##### **Specific complaints and conclusions**

The complaints which have been investigated are that:

- (a) the Council did not correctly identify a planning application as a Schedule 2 development or deal with it appropriately (*not upheld*); and
- (b) there were delays in responding to the Group's complaints and concerns (*partially upheld*).

##### **Redress and recommendations**

The Ombudsman recommends that the Council:

- (i) ensure that, where appropriate, planning officers include sufficient detail in their reports on planning applications to demonstrate they have fully considered the EIA Regulations; and
- (ii) emphasise to staff the importance of keeping complainants informed of the progress of any formal complaint and of the stage of the complaints process at which their complaint has been considered.

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<sup>1</sup> Under Schedule 2 of the Environmental Impact Assessment (Scotland) Regulations 1999

## **Main Investigation Report**

### **Introduction**

1. An application was made by a company (the Developers) to Scottish Borders Council (the Council) to erect a poultry shed for free range hens. The plans submitted with the application for the single poultry shed showed the Developers were considering building up to ten sheds on the site. Under the Environmental Impact Assessment (Scotland) Regulations 1999 (the Regulations), a development of ten sheds would require an Environmental Impact Assessment (EIA). The single shed was of a size that it would be classed in the Regulations as a Schedule 2 development. For Schedule 2 developments the Regulations said that an EIA would only be required if the development would have significant environmental impact.

2. An Action Group (the Group) was set up as a response to public concerns about the development and they lodged objections to the application. In particular, they said that, given the likelihood of future development an EIA on all ten sheds should be requested before the application was considered. In November 2005 a report by Council officers was placed before the Council Committee considering the application (the Committee). Although the report stated that it was the view of Council officers that an EIA was not required by the Regulations, the Committee decided to postpone their decision until a full EIA was prepared. In response to this the Developers sought a screening opinion from the Council. (Under the Regulations the Council's formal view on the application of the Regulations is called a screening opinion. If the applicants are unhappy with this opinion they can then apply for a screening direction from the Scottish Ministers.)

3. The Committee considered the formal request from the Developers for a screening opinion at their meeting in December and they upheld their own previous decision to ask for an EIA (paragraph 2). The Developers then sought a screening direction (the Direction) from the Scottish Ministers who, in a report dated 29 March 2006, stated that this was a Schedule 2 development under the Regulations and that an EIA was not required. The Group complained to the Ombudsman that the Council had not followed the Regulations correctly when reviewing the decision in December, that the advice given by Council officers had been wrong and also claimed that there had been delays in dealing with their concerns.

4. The complaints from Ms C which I have investigated are that:
- (a) the Council did not correctly identify a planning application as a Schedule 2 development or deal with it appropriately; and
  - (b) there was delay in responding to the Group's complaints and concerns.

5. In their complaint to the Ombudsman, the Group also said that there had been late notification of the application. I have reviewed the evidence they provided and asked for further detail from the Group. However, it is not clear who they felt should have been notified and when. I have noted that the application was considered by the Committee in November 2005 and the Group were clearly aware of this application in June 2005. The Group's objections were not only put before the Committee in November but the Committee, in effect, agreed with their concerns. In the circumstances, although I have considered this point, I do not comment on it further in this report.

### **Investigation**

6. In investigating this complaint, I reviewed correspondence between the Group and the Council, Council committee minutes and reports, and the Direction. I made enquiries of the Council and also considered the Regulations, related guidance and planning advice note (see Annex 2).

7. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Ms C and the Council were given an opportunity to comment on a draft of this report. Abbreviations used in the report are set out in Annex 1.

### **(a) The Council did not correctly identify a planning application as a Schedule 2 development or deal with it appropriately**

8. The application was lodged on 24 February 2005. In a letter to the Developers of 25 May 2005, the Council said that although, as the Developers were aware, the application did not require a full EIA, their initial consultation with public bodies (for example SEPA<sup>2</sup> and SNH<sup>3</sup>) on this application had highlighted some concerns about the environmental impact of the poultry shed and the Developers were asked to submit an Environmental Statement in support of the application.

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<sup>2</sup> Scottish Environmental Protection Agency

<sup>3</sup> Scottish Natural Heritage

9. An Environmental Statement was prepared and issued to the public bodies who had already been consulted on the application. Following receipt of the statement, SEPA, who had initially not objected to the application, entered a formal objection and recommended a full EIA be required. They said that they were concerned about a larger development and, although the application was only for one shed, considered that because of a recent decision by the Scottish Ministers which said that where there were multiple applications their 'cumulative impact' could be considered, that a full EIA on all ten sheds should be requested. The report to the Committee by Council officers in November 2005 (see paragraph 2) said that SEPA were correct to state this but that, in this case, multiple applications had not been made and, the view of the officers remained that an EIA was not required.

10. Following the decision of the Committee at the November meeting not to follow the advice of planning officers but to request a full EIA before they would consider the application, the Developers sought a screening opinion. The Group became aware that the Developers had done so. They complained to the Council saying that a screening opinion was not competent. They argued that the decision to request an EIA in November 2005 had determined the matter and the only recourse open to the Developers was to seek a screening direction. In addition, they said that, as they read the Regulations, a screening opinion could only be sought before an application for planning consent was lodged.

11. In a letter dated 21 December 2005, the Council said they had sought specific legal advice about the Group's concerns. They said that they considered nothing in the Regulations prevented a screening opinion being requested from the Council once an application had been submitted. They did agree that the decision made in November 2005 was, in effect, a screening opinion. However, the letter went on to say that it now appeared that under the Regulations, the Committee had not, in fact, been entitled to make a screening opinion in November. The Council said that under the Regulations a screening opinion could only have been issued in response to a request for one made by the applicant or as a response to the lodging of the application if the Council considered one was required. Any screening opinion had to be made within three weeks of either the date of the request for an opinion or the lodging of an application. The application had been submitted more than three weeks before November 2005 and no request for a screening opinion had been made prior to the meeting. The Council added that once a formal screening request had been

made, the Committee had been provided with a legitimate basis to make the decision to request an EIA at the meeting in December.

12. Following the decision by the Committee in December to require an EIA, the Developers sought a screening direction from the Scottish Ministers. The Direction issued by the Scottish Ministers said that the decision whether an EIA was required must be made on a case by case basis but also pointed out that a 1999 circular gave guidance on this. In this circular the indicative threshold for livestock installation was given as 50,000 hens. The shed the Developers were proposing to build was for 32,000 hens. The Direction said this threshold should be considered alongside other selection criteria set out in the guidance. In particular, the Direction stated that while cumulative effects could be considered this was only possible where there were multiple applications currently with the planning authority. The Direction also stated that although the area was environmentally sensitive an EIA would not be required for only one shed.

13. In their final complaint to the Council following the issuing of the Direction, the Group said that, despite the conclusions that an EIA was not required, they still considered the Council had failed to note that this was a Schedule 2 development on receipt of the application and deal with it appropriately. In their response, the Council said that they had never disputed that this was a Schedule 2 development and that the decision of the Scottish Ministers showed that the Council officers had correctly identified all the factors to take in to account before recommending an EIA was not required.

*(a) Conclusion*

14. The Direction supported the view of the Council officers that there was no need for an EIA. It also supported the view that they could only consider the application before them and not possible future applications. The Ombudsman's office can not review the decision of the Scottish Ministers. However, the Group have said they were concerned about the processing of this application by the Council. It was clear from the Regulations that where a Council considered that a Schedule 2 development was being applied for an EIA would only be required if the development would have a significant environmental impact. It was also clear that any screening opinion made on this point by the Council should be made within three weeks of either a request for one by the Developers or the receipt of the application. The letter of May 2005 stated that the Developers were aware that an EIA was not required.

This indicated that the decision that this did not require an EIA was made early in the process and that Council officers had correctly identified this as an issue. The Council also responded to the concerns raised by SEPA and other public sector consultees in the report before the Committee. They did not, indeed, use the phrase Schedule 2 in the correspondence with the Developers that I have seen or say in the report to the Committee what factors they specifically considered in their initial decision that this was not a Schedule 2 development that required an EIA.<sup>4</sup> While, given the evidence that consideration had been made, I am not upholding any aspect of the complaint on the failure to use this specific terminology, a recommendation is being made to ensure that this is made clearer in any future report prepared for a Committee where a Schedule 2 development is being considered.

15. The Group have also complained that the decision to ask for an EIA made in November 2005 should not have been reviewed at the meeting in December 2005.

16. I have noted that the Group were not informed that the decision of the Committee of November 2005 was being reviewed. However, the Committee were responding to a formal request for a screening opinion and there was nothing in the Regulations which provided for this to be publicised or for objectors to be given notice.

17. The Council have confirmed they were not entitled to issue a screening opinion at the November 2005 Committee meeting. Having reviewed the relevant legislation and guidance, I have not seen grounds to criticise the Council on this issue. It has to be said it was not clear from the relevant guidance and regulations that an applicant could ask for an opinion after the application has been lodged but the Council have taken legal advice on this matter and, as the Scottish Ministers have reviewed the opinion issued in December 2005 and noted no concern about the competence of this decision, I consider that, a valid screening opinion was clearly issued in December 2005. Having considered all the circumstances, I do not uphold this complaint.

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<sup>4</sup> The report concentrates on shed numbers and whether the possibility of future sheds would trigger an EIA but does not explicitly refer to any of the selection criteria set out in the guidance (see paragraph 12).

*(a) Recommendation*

18. The Ombudsman recommends that the Council ensure that, where appropriate, planning officers include sufficient detail in their reports on planning applications to demonstrate they have fully considered the EIA regulations.

**(b) There were delays in responding to the Group's complaints and concerns**

19. From the documentation submitted by them, the Group began corresponding with the Council about the application on 14 June 2005. They received a reply to this letter on 7 July 2005. This included a copy of the letter to the Developers of May 2005 requesting an Environmental Statement (see paragraph 7). The Group wrote again to the Council on 24 August 2005, this was acknowledged on 26 August 2005. An MP also wrote on behalf of the Group to the Council on the 24 August 2005 and he received a response on 7 September 2005.

20. In a letter dated 27 September 2005 the Group said they were aware that a reply had been sent to their MP but were concerned that they had not also received a reply. There was a meeting between the Group and the Council on 5 October 2005 and a letter sent from the Council to the Group on 7 October 2005 apologised for the delay in response.

21. The Group wrote again on 17 October 2005 and asked if they could see the report about the application before it was put before the Committee. On 25 October 2005 they wrote once more to emphasise the need for a swift response. A response was sent to them on 2 November 2005 with a copy of the report. This letter also set out the understanding of the planning officers that an EIA was not required. A letter was sent to the Group on 8 November immediately following the Committee decision of 7 November 2005. The Committee had had the details of the Group's objections when making the decision and, as can be seen from paragraph 2, agreed a full EIA should be required.

22. When the Group became aware that the application was to be reconsidered at a Committee meeting in December 2005. They wrote on 2 December about this and to formally complain about the procedures followed by the Council. The Council responded in detail on 6 December 2005. A further letter was sent by the Group on 15 December 2005 and they received a response on 21 December 2005.

23. The Group wrote to the Council on 17 January 2006 to inform them that they had brought the complaint to the Ombudsman's office and on 31 January 2006 they copied an article from the Scotsman to the Council. On 21 May 2006, following advice from the Ombudsman's office, an email was sent to the Chief Executive to complete the complaints process. In the email, the Group also complained about a late notification and a delay in response. They received a response to this dated 23 May 2006. In his response, the Chief Executive said that he could find no reference to a late notification or the persistent use of holding letters.

*(b) Conclusion*

24. Apart from the delay in replying to their letter of 24 August 2005 the Council have responded rapidly and in detail to all queries put by the Group. Once it was realised that there had been a delay to the August letter a meeting was quickly arranged and an apology made. I would commend them for this.

25. However, although making it clear they were making a formal complaint in December 2005, the Group did not appear to know how to progress this and came to the Ombudsman's office before their complaints were considered by the Chief Executive and the authority's internal process completed. To the extent that they were not provided with information about the complaints process, I partially uphold this complaint.

*(b) Recommendations*

26. The Ombudsman recommends that the Council emphasise to staff the importance of keeping complainants informed of the progress of any formal complaint and of the stage of the complaints process at which their complaint has been considered.

23 May 2007

**Explanation of abbreviations used**

Ms C	The complainant a member of the Group
The Developers	The company who made the planning application
The Council	Scottish Borders Council
The Regulations	The Environmental Impact Assessment (Scotland) Regulations 1999
EIA	Environmental Impact Assessment
The Group	The Action Group set up to oppose the application
The Committee	The Council Committee responsible for the planning decisions
The Direction	The Screening Direction issued by the Scottish Ministers

**List of legislation and policies considered**

The Environmental Impact Assessment (Scotland) Regulations 1999

Planning Advice Note 58

The Environmental Impact Assessment (Scotland) Regulations 1999 Circular  
15/1999