

Scottish Parliament Region: Highlands and Islands

Case 200600426: The Highland Council

Summary of Investigation

Category

Local government; planning

Overview

The complainant (Mrs C) was concerned about various aspects of The Highland Council (the Council)'s Public and Private Partnership School Building Project (PPP2) and decisions made regarding the replacement of Dingwall Academy.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the Council failed to undertake public consultation between 2001 (when the project was first raised as a possibility) and December 2003 (when outline planning approval was subject to public consultation) (*not upheld*);
- (b) the Ross and Cromarty Planning Committee (the Planning Committee)'s decision to grant outline planning approval was taken to anchor the PPP2 project and with a view to finding a solution to educational provision for schools throughout the Highlands, rather than being based on site specific and local planning considerations (*not upheld*);
- (c) the Council failed to take account of an Electoral Reform Society Ltd managed referendum which took place in February 2005 and which asked the question 'Are you in favour of the new Dingwall Academy being built on the existing playing fields?' 73.5% voted 'No' (*not upheld*);
- (d) the process by which the Planning Committee reached its decision was flawed because members of the community who attended the planning meeting of 16 February 2004 did not get the chance to make any representations without having previously submitted written objections (*not upheld*);
- (e) the Council failed to ensure that Dingwall Community Council (the Community Council) sought and represented local opinion (*not upheld*);
- (f) the Council failed to advise the Chairman of the Community Council to step aside given his alleged conflict of interest (*not upheld*);

- (g) the Council failed to consider advice from the Scottish Executive¹ when they decided to build a new school on a flood plain (*not upheld*);
- (h) the Council failed to carry out an Environmental Impact Assessment (EIA) before making their decision to site the school (*not upheld*);
- (i) in correspondence with the complainant, the Council failed to clarify who made the decision to site the school on the playing fields or the rationale for making that decision (*not upheld*);
- (j) the Council failed to follow their own guidelines by not having a Sustainable Design Statement for the project (*not upheld*);
- (k) the Outline Business Case (OBC) that was presented to the Education, Culture and Sport Committee (the ECS Committee) in its consideration of a course of action regarding PPP2 was too short, one-sided, inaccurate and contradictory to allow the ECS Committee to reach a well informed and balanced decision (*not upheld*); and
- (l) the Planning Committee's decision to approve the reserved matters application on 11 April 2005 went against the requirement of the Local Plan (the Local Plan) (*not upheld*).

Redress and recommendation

The Ombudsman has no recommendations to make.

¹ On 3 September 2007 Scottish Ministers formally adopted the title Scottish Government to replace the term Scottish Executive

Main Investigation Report

Introduction

1. On 11 May 2006, the Ombudsman received a complaint from a woman, referred to in this report as Mrs C, concerning various aspects of The Highland Council (the Council)'s Public and Private Partnership School Building Project (PPP2) and decisions made regarding the replacement of Dingwall Academy.

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

- (a) the Council failed to undertake public consultation between 2001 (when the project was first raised as a possibility) and December 2003 (when outline planning approval was subject to public consultation);
- (b) the Ross and Cromarty Planning Committee (the Planning Committee)'s decision to grant outline planning approval was taken to anchor the PPP2 project and with a view to finding a solution to educational provision for schools throughout the Highlands, rather than being based on site specific and local planning considerations;
- (c) the Council failed to take account of an Electoral Reform Society Ltd managed referendum which took place in February 2005 and which asked the question 'Are you in favour of the new Dingwall Academy being built on the existing playing fields?' 73.5% voted 'No';
- (d) the process by which the Planning Committee reached its decision was flawed because members of the community who attended the planning meeting of 16 February 2004 did not get the chance to make any representations without having previously submitted written objections;
- (e) the Council failed to ensure that Dingwall Community Council (the Community Council) sought and represented local opinion;
- (f) the Council failed to advise the Chairman of the Community Council to step aside given his alleged conflict of interest;
- (g) the Council failed to consider advice from the Scottish Executive when they decided to build a new school on a flood plain;
- (h) the Council failed to carry out an Environmental Impact Assessment (EIA) before making their decision to site the school;
- (i) in correspondence with the complainant, the Council failed to clarify who made the decision to site the school on the playing fields or the rationale for making that decision;
- (j) the Council failed to follow their own guidelines by not having a Sustainable Design Statement for the project;

- (k) the Outline Business Case (OBC) that was presented to the Education, Culture and Sport Committee (the ECS Committee) in its consideration of a course of action regarding PPP2 was too short, one-sided, inaccurate and contradictory to allow the ECS Committee to reach a well informed and balanced decision; and
- (l) the Planning Committee's decision to approve the reserved matters application on 11 April 2005 went against the requirement of the Ross and Cromarty East Local Plan (the Local Plan).

Investigation

3. The investigation of this complaint involved obtaining and reading all the correspondence between Mrs C and the Council. In addition, I obtained copies of: the Council's OBC for PPP2; reports submitted to the ECS Committee on 13 September 2001 and 8 November 2001; minutes of the ECS Committee meeting on 13 September 2001; minutes of the ECS Committee Portfolio Holders' Group held on 28 November 2001; a report submitted to a special meeting of the Council on 5 December 2001; reports submitted to the Planning Committee on 16 February 2004 and 11 April 2005; minutes of the Planning Committee's meetings held on 16 February 2004 and 11 April 2005; minutes of the Community Council meeting held on 19 January 2004; guidance issued to Community Councils by the Council; correspondence between the Council and the Scottish Environment Protection Agency (SEPA) regarding flooding issues; a letter from Electoral Reform Society Ltd detailing the results of a referendum; the Education (Scotland) Act 1980; the Local Government (Scotland) Act 1973; the Local Government etc (Scotland) Act 1994; Scottish Planning Policy 7 (Planning and Flooding); Planning Advice Note 69; an extract from the Scottish Executive Development Department Circular 15/1999; an extract from Planning Advice Note 58; comments from members of the public made at meetings held on 4 April 2004 and 8 November 2004; and extracts from the deposit draft of the Local Plan.

4. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mrs C and the Council were given an opportunity to comment on a draft of this report.

Background

5. On 13 September 2001, in response to Scottish Executive Circular 8/2001 (which invited local authorities to bid for funding support for Private Public Partnership school building projects), the ECS Committee considered a report

on the potential scope of a Public and Private Partnership School Building Project (PPP2). Dingwall Academy was one of the schools included in the potential scope of the project. The ECS Committee minutes record that it was agreed that certain schools, including Dingwall Academy, should be further examined for possible inclusion within PPP2.

6. On 8 November 2001, the ECS Committee considered a report drawing Committee Members' attention to a change in the timetable for submitting an OBC to the Scottish Executive to secure funding for PPP2 (the deadline was brought forward from 31 March 2002 to 14 December 2001). The ECS Committee minutes record that the Committee agreed to delegate to a special meeting of the ECS Committee Portfolio Holders' Group consideration of the OBC prior to its submission to the Scottish Executive.

7. On 28 November 2001, the ECS Committee Portfolio Holders' Group met to consider the Council's OBC and make recommendations prior to a meeting of the full Council to be held on 5 December 2001. The part of the OBC that dealt specifically with Dingwall Academy provided an assessment of the current situation, listed issues to be addressed and options for improvement, and detailed 'best case', 'medium case' and 'do minimum' options. The ECS Committee Portfolio Holders' Group meeting minutes record agreement that a report be submitted to a meeting of the full Council on 5 December 2001 recommending that the list of projects (which included Dingwall Academy), and the OBC, be approved for submission to the Scottish Executive. The OBC was approved at the Council's meeting on 5 December 2001.

8. On 1 April 2003, officials from the Council's Education, Culture and Sport Services and from the Council's Property and Architectural Service met with representatives of Dingwall Academy School Board and representatives of some local community organisations, including the Community Council. The Council told me that the purpose of that meeting was to have preliminary discussions about the range of facilities that might be included for the new school and to discuss some possible build solutions. Mrs C, in commenting on a draft of this report, said that she felt the Council had provided her with contradictory information regarding the composition and purpose of this meeting. Mrs C told me that she did not consider that the local community had been involved.

9. On 7 November 2003, the deposit draft (a deposit draft is the term used for a draft plan which is placed on 'deposit' for public inspection prior to the plan being finalised) of the Local Plan went on public consultation for six weeks. The Local Plan contained the following statement 'At Dingwall Academy detailed proposals for redeveloping the school within its own existing grounds in period 2006-2008'.

10. On 1 December 2003, an outline planning application to erect a new secondary school was submitted to the Council. Public advertisement of the application was carried out on 12 December 2003 and the period allowed for representations to be made was extended to 16 January 2004, to take account of the intervening Christmas and New Year holidays. On 16 February 2004, the Planning Committee considered a report recommending that the application be approved subject to a number of conditions and subject to various matters being dealt with in a subsequent reserved matters application. The Planning Committee's meeting minutes record that, subject to revised conditions, the Committee approved the outline planning application.

11. On 4 April 2004, what the Council describe as a 'public consultation evening' was held, at which local people had a chance to find out more about the proposals for the new school, ask questions and record their comments. A similar event was held on 8 November 2004.

12. On 11 June 2004, consent was formally given to the outline planning application following approval by the Scottish Executive (the application was referred to Scottish Ministers given that the Council had an interest in the application).

13. On 31 January 2005, a reserved matters application was submitted to the Council. This application was concerned with all the matters that had not been dealt with in the original outline planning application. On 11 April 2005, the Planning Committee considered a report recommending that the reserved matters application be approved, subject to conditions. The minutes of the Planning Committee's meeting of 11 April 2005 record that the Planning Committee approved the reserved matters application.

(a) The Council failed to undertake public consultation between 2001 (when the project was first raised as a possibility) and December 2003 (when outline planning approval was subject to public consultation)

14. In response to my enquiries, the Council stated that, because the new school was to be built on the existing school campus, they had no duty to carry out public consultation under the Education (Scotland) Act 1980. The Council sought legal advice, which confirmed their position.

15. Mrs C argued that, despite the fact that the Council may not have had a duty in law to consult the public, they had a moral duty to do so.

(a) Conclusion

16. The Council have no duty, under the relevant legislation, to carry out public consultation. Mrs C's personal opinion regarding the Council's moral duty is not the standard against which the Ombudsman must judge whether maladministration or service failure has occurred in this instance. I do not uphold the complaint.

(b) The Planning Committee's decision to grant outline planning approval was taken to anchor the PPP2 project and with a view to finding a solution to educational provision for schools throughout the Highlands, rather than being based on site specific and local planning considerations

17. The Council provided copies of the report submitted to the Planning Committee and the minutes of the Planning Committee's meeting dated 16 February 2006. The Council stated that the report and minutes provided evidence to contradict the assertion made in Mrs C's complaint. They said, in addition, that consideration of any planning application had to be site specific.

(b) Conclusion

18. The report submitted to the Planning Committee and the minutes of the Planning Committee's meeting clearly show that the decision to grant outline planning consent was based on planning considerations. The report referred specifically to policies within the Structure Plan and the Local Plan and contained a detailed planning appraisal. There is no mention, either in the report put to the Planning Committee or in the minutes of the Planning Committee's meeting, of anchoring the PPP2 project or provision of education for schools throughout the Highlands being grounds for approving the outline planning application.

19. I have found no evidence to support Mrs C's assertion. Consequently, I do not uphold the complaint.

(c) The Council failed to take account of an Electoral Reform Society Ltd managed referendum which took place in February 2005 and which asked the question 'Are you in favour of the new Dingwall Academy being built on the existing playing fields?' 73.5% voted 'No'

20. The Council told me that, although it was submitted after the deadline for representations, the referendum was referred to in the report put to the Planning Committee on 11 April 2005. A copy of the referendum was included in the papers submitted to Committee Members.

21. The Council explained that, although Planning Committee Members considered the referendum, it could not influence the determination of the reserved matters application since the siting of the school on the existing playing fields had been agreed in the outline planning application.

(c) Conclusion

22. The Planning Committee considered the referendum result and was provided with copies of the referendum. I do not uphold this complaint.

(d) The process by which the Planning Committee reached its decision was flawed because members of the community who attended the planning meeting of 16 February 2004 did not get the chance to make any representations without having previously submitted written objections

23. The Council said that members of the public who had not made written representations were not given an opportunity to speak, as to allow that would disadvantage the applicant and Council Officials who were entitled to be fully aware of representations in advance of hearings. The Council provided me with a copy of their Hearings Procedure for Planning Area Committees, which states, 'Third parties who have submitted timeous written objections to the proposal will have the opportunity to make representations [...]'.

(d) Conclusion

24. The fact that only those who had previously made written objections were allowed to speak at the Planning Committee meeting of 16 February 2004 was in line with the Council's normal procedure. I do not uphold this complaint.

(e) The Council failed to ensure that the Community Council sought and represented local opinion and (f) The Council failed to advise the Chairman of the Community Council to step aside given his alleged conflict of interest

25. As complaints (e) and (f) are similar, I am dealing with them together.

26. The Council told me that, in general, they could not interfere in the affairs of a Community Council unless they were doing something which was incompetent or illegal. The Council said that they provided guidance to Community Councils to help them discharge their functions and provided three separate guidance documents that were available on their website. The Council pointed out that these documents specifically referred to the essential role of Community Councils in seeking local opinion and specifically referred to the fact that conflicts of interest had to be declared.

(e) and (f) Conclusion

27. The Council's responsibilities in relation to Community Councils are limited. The statutory basis for setting up Community Councils is set out in Sections 51 to 55 of the Local Government (Scotland) Act 1973 and supplemented by Section 22 of the Local Government (Scotland) Act 1994. That legislation states that Councils have a duty to set up schemes for Community Councils in their areas. It does not impose duties on Councils to be actively involved in the day-to-day running of Community Councils.

28. I, therefore, consider that, beyond providing Community Councils with helpful advice on the carrying out of their functions, it was not for the Council to either ensure that the Community Council sought local opinion or to advise the Community Council's Chairman on conflicts of interest. These were matters for which the Community Council were responsible, not the Council. I do not uphold these complaints.

(g) The Council failed to consider advice from the Scottish Executive when they decided to build a new school on a flood plain

29. The Council acknowledged that Planning Advice Note 69 states that new developments should not normally be built on a flood plain. However, they argued that, in this case, measures such as lowering of land and re-levelling of the pitch at the front of the school together with storage tanks for Sustainable Urban Drainage Systems (SUDS) meant that the plans for the new school were in line with guidance.

30. The Council said that Scottish Executive advice was considered in determining both the outline and reserved matters applications. The Council said that Scottish Planning Policy 1 (SPP1) advises that flood risk is a material factor in the consideration of planning applications. The Council said that SPP7, which deals with Planning and Flooding and was issued on 14 February 2004, was referred to verbally at the Planning Committee's meeting of 16 February 2004. The Council pointed out that a condition of the outline application was that outstanding issues were resolved to SEPA's satisfaction. Condition number (7) attached to the outline planning application stated that full details of flood risk assessment and proposals for surface water drainage works and flood prevention measures were to be submitted and that those would require to meet SEPA's Best Management Practice Guidelines.

31. The Council explained that SEPA was a statutory consultee in the planning process and had been consulted accordingly. They said that following a flood appraisal and an assessment of the impact of building on the flood plain, there was no representation from SEPA in respect of negative impact. The Council submitted correspondence from SEPA, including a letter dated 5 April 2005, which stated 'SEPA confirms that the flood risk aspects of this planning application have now been addressed to the satisfaction of SEPA'.

(g) Conclusion

32. I am satisfied that the Council considered the relevant Scottish Executive policies and consulted with the relevant Scottish Executive Agency, SEPA, in determining both the outline and the reserved matters applications. After due consideration, and with regard to the relevant policies, both the Council and SEPA determined that building the school on the existing playing fields was appropriate. It is not for the Ombudsman to question a decision which has been taken following due consideration of all relevant information and without maladministration. I do not uphold this complaint.

(h) The Council failed to carry out an EIA before making their decision to site the school

33. The Council provided me with an extract from the 'Scottish Executive Development Department Circular 15/1999 – The Environmental Impact Assessment (Scotland) Regulations 1999' (the EIA Regulations) and an extract of 'PAN 58 – Environment Impact Assessment'. The Council said that the

school and playing fields did not comprise a designated site for the purposes of environmental assessment.

(h) Conclusion

34. The EIA Regulations state that for the developments listed in Schedule 1 of the EIA Regulations an EIA is required. For the types of developments listed in Schedule 2 of the Regulations, authorities are required to 'screen' application to determine whether an EIA is required.

35. Having considered the relevant regulations I am satisfied that the development of the new school was neither a Schedule 1 nor a Schedule 2 development and that consequently no EIA was required. I do not uphold this complaint.

(i) In correspondence with the complainant, the Council failed to clarify who made the decision to site the school on the playing fields or the rationale for making that decision

36. The Council quoted from a letter they had sent to the complainant on 24 February 2005, which stated:

'The decision to build on the playing fields was taken by [the Council] following consideration of all the options available ... the approach to replacement of the school was considered in the analysis for the OBC and the Council's view is that for Health and Safety reasons and in order to minimise disruption to the education of pupils, it is appropriate to build on the lower site rather than either refurbish the existing building or demolish the existing building and build the new school on the upper part of the current site.'

(i) Conclusion

37. The decision to site the new school on the existing playing fields was a discretionary one for the Council to take. The OBC makes clear that thought was given to several options, but that it was the Council's view that building on the existing playing fields was the best option. Regardless of the merits of the decision, I note that Mrs C has been given an explanation regarding the siting of the school. While I am aware that Mrs C is unhappy with the explanation and feels that further justification is required, I am satisfied that the Council have appropriately responded to her enquiries in this respect. I do not uphold this complaint.

(j) The Council failed to follow their own guidelines by not having a Sustainable Design Statement for the project

38. The Council told me that their policy requiring the submission of an Sustainable Design Statement to accompany new planning applications was not formally in place as an adopted document at the time in question. They explained that they had hoped to 'roll out' the policy in Ross and Cromarty in October 2005 but that there had been a delay. They said that when the outline and reserved matters applications were considered there was no policy requirement.

(j) Conclusion

39. There was no requirement for either the outline or reserved matters application to be accompanied by an Sustainable Design Statement. I do not uphold this complaint.

(k) The OBC that was presented to the ECS Committee in its consideration of a course of action regarding PPP2 was too short, one-sided, inaccurate and contradictory to allow the ECS Committee to reach a well informed and balanced decision

40. The Council emphasised that the purpose of the OBC was to persuade the Scottish Executive to provide the Council with funding for PPP2 and that it had succeeded in that purpose. The Council pointed out that the OBC contained a two page summary of the evaluation of the options for Dingwall Academy.

41. Mrs C pointed to two particular concerns she had regarding the OBC. She said that it incorrectly stated that there were no social areas for pupils as there was in fact a common room and she asserted that it stated (contradictorily) that the playing fields were not usable in winter and then stated that they were used at weekends throughout the year. I asked the Council to comment on these specific concerns.

42. The Council responded by stating that the common room was a 'room' and not an 'area' and that it was only available for sixth year pupils. The Council said that it was currently the norm to provide social areas for the majority of all pupils in a secondary school.

43. The Council said that there was no intended contradiction in the OBC about the playing fields. They said that the first reference to the playing fields being used throughout the year established that there was a demand for

community use of the playing fields throughout the year, while the second reference to playing fields being unusable in winter meant that the demand could not be met.

(k) Conclusion

44. The Council's response to Mrs C's criticisms regarding social areas is reasonable and while their assertion regarding the playing fields is more tenuous, I can see some merit in the argument that there is no intended contradiction. Certainly, I do not consider that there are any clear cut inaccuracies or contradictions in the OBC. With regard to the OBC being one-sided, I do not agree. The OBC considered a range of options and outlined a preferred option. I also do not agree that the OBC was too short. The section detailing Dingwall Academy is of similar length to sections devoted to other schools that were proposed for the project. While I note Mrs C's concerns, they represent her personal evaluation of the quality of the OBC, and it is difficult to objectively assess the quality of such a document. Certainly, Elected Members of the Council were happy to recommend it and the Scottish Executive were happy to approve the Council's bid after considering the OBC. I do not consider that the alleged failings in the OBC can be objectively verified. Consequently, I do not uphold the complaint.

(l) The Planning Committee's decision to approve the reserved matters application on 11 April 2005 went against the requirement of the Local Plan

45. The Council said that the departure from the Local Plan was not considered to be significant given that the new academy was to be contained entirely within the school site that was designated for educational purposes. However, the Council pointed out that the report submitted to the Planning Committee on 16 February 2004 had justified the departure from the Local Plan.

(l) Conclusions

46. The departure from the Local Plan was justified by Council Officers and approved by Elected Members at their meeting of 16 February 2004. I do not uphold the complaint.

Further Comments

47. As a postscript to this report, I do note the sensitivity surrounding the issue of replacing schools, particularly when they are being replaced using the PPP funding model, which some have seen as controversial. Schools are an

important part of communities and often hold strong emotional attachments for the people they serve, quite beyond the mere provision of educational services. It is, therefore, the case that changes, particularly substantial ones, are likely to draw objections and complaints. In this case, Mrs C felt very strongly about Dingwall Academy, having been to school there herself. Her strength of feeling has been evident in the way she has pursued her objections and her complaint with the Council.

48. However, that a project prompts strong feelings does not mean that it has been badly administered. Mrs C may have wished to see the Council consult with the local community more and may have wished for them to intervene in the affairs of the Community Council or have produced a Sustainable Design Statement. However, the Council, in determining how to proceed with the project, had regard to its duties and responsibilities under the relevant legislation and policies. While Mrs C wanted the Council to do more and felt they had an ethical duty to do more, the fact is that the Council acted appropriately, in accord with due process, on each of the points I have investigated. I am aware that Mrs C, and others in her local community, will continue to disagree with the Council's decisions surrounding this project. Nevertheless, this report confirms that, for each point of complaint raised, the administration of the project was sound. I hope this will go some way towards resolving matters for Mrs C.

19 September 2007

Explanation of abbreviations used

Mrs C	The complainant
The Council	The Highland Council
PPP2	The Council's Public and Private Partnership School Building Project
The Planning Committee	The Ross and Cromarty Planning Committee
The Community Council	Dingwall Community Council
EIA	Environmental Impact Assessment
The OBC	The Council's Outline Business Case
The ECS Committee	The Council's Education, Culture and Sport Committee
The Local Plan	The Ross and Cromarty East Local Plan
SEPA	The Scottish Environment Protection Agency
SUDS	Sustainable Urban Drainage System
SPP1	Scottish Planning Policy 1
SPP7	Scottish Planning Policy 7
The EIA Regulations	The Environmental Impact Assessment Regulations 1999

List of legislation and policies considered

The Education (Scotland) Act 1980

The Highland Council's Hearings Procedure for Planning Area Committees

The Environmental Impact Assessment Regulations 1999

The Local Government (Scotland) Act 1973

The Local Government etc (Scotland) Act 1994

Planning Advice Note 58 – Environmental Impact Assessment

Planning Advice Note 69 – Advice on Planning and Building in Areas where there is a Risk of Flooding

Scottish Planning Policy 1 – The Planning System

Scottish Planning Policy 7 – Planning and Flooding