

## Scottish Parliament Region: North East Scotland

### Cases 200402036 & 200402211: Dundee City Council

#### Summary of Investigation

##### **Category**

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

##### **Overview**

In October 2004 a planning application was submitted to Dundee City Council (the Council) by the agent of the applicant. The applicant sought planning permission to build a detached house in the side garden of an existing house on a residential street. Two neighbours (Mrs C and Mrs A, and together as the complainants), along with others, objected to the planning application. The complainants subsequently raised concerns about the planning report relating to the proposed development and the role of the Council in facilitating discussions between themselves and the applicant.

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

The complaints which have been investigated are that:

- (a) a flawed report relating to the proposed development was submitted to the Development Quality Committee (*not upheld*); and
- (b) the Council failed to facilitate discussion between the applicant and neighbours (*not upheld*).

##### **Redress and recommendation**

The Ombudsman recommends that the Council develops a written protocol that sets out the Council position and guides the actions of officials following deferral of a planning application to allow discussion between the parties involved.

## **Main Investigation Report**

### **Introduction**

1. In October 2004 a planning application (Application 1) was submitted to Dundee City Council (the Council) by an agent (the Agent) of the applicant. Application 1 sought planning permission to build a detached house in the proposed development. Two neighbours (Mrs C and Mrs A, and together as the complainants), along with others, objected to Application 1. The complainants subsequently raised concerns about a report relating to the proposed development and the role of the Council in facilitating discussions between themselves and the applicant.

2. The complaints from Mrs C and Mrs A which I have investigated are that:
- (a) a flawed report relating to the proposed development was submitted to the Development Quality Committee; and
  - (b) the Council failed to facilitate discussion between the applicant and neighbours.

### **Investigation**

3. The investigation is based on information provided by Mrs C, Mrs A and the Council. This has included correspondence from and between the complainants and the Council, Council Reports relating to planning and Minutes of the relevant Council meetings. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mrs C, Mrs A and the Council were given an opportunity to comment on a draft of this report.

#### **(a) A flawed report relating to the proposed development was submitted to the Development Quality Committee**

4. It is Council practice that all planning applications where a valid objection is made and not withdrawn are considered by the Development Quality Committee (the Committee). This comprises all Council Members. The Committee receives a detailed report on the planning application from the Director of Planning and Development. This is compiled by a planning officer allocated to the planning application. The Committee is not obliged to accept the recommendations in the Director's Report.

5. The complaint is that a flawed report (the Director's Report) in relation to the proposed development was submitted to the Committee for consideration

on 6 December 2004. The Director's Report noted that a previous application had been withdrawn and that the house had been redesigned to take account of planning policy issues and objections raised by neighbours. It noted that Application 1 was the subject of statutory Neighbour Notification and that, following a request to the Agent, the notification was repeated giving neighbours a further 14 days to comment.

6. The Director's Report stated that four objections had been received from neighbours on the grounds of the height and scale of the house relative to the road, the height and pitch of the roof, overlooking and loss of privacy from a rear boundary and proximity of the development to the boundaries. Copies of the objections were available in the Members' Lounges. The Director's Report gave consideration to the objections received, stated that the objections could not be afforded sufficient weight such as to justify the refusal of planning permission contrary to the provisions of the development plan and the strong material considerations in support and recommended that planning permission be granted with conditions.

7. Application 1 was discussed at the Committee meeting on 6 December 2004. The complainants attended this meeting and spoke as objectors. The Committee decision was to defer consideration of Application 1 to allow further discussion between the applicant and the objectors. It is noted that the Agent was not at this meeting.

8. Mrs C wrote on behalf of both complainants to the Council on 25 January 2005, drawing their attention to factual errors in the Director's Report and asking the Council to look into the matters. The complainants considered that these errors in the Director's Report were in the sections dealing with the Materials/style/form and with Objections, in that the Director's Report stated that:

- 'The larger houses on the south side of the street vary in style and material. Some are set down slightly below the road level, others are at road level'. Mrs C advised that this was not correct as only one (very narrow) house was at road level and that all others were set below the road level, often quite substantially.
- 'The proposed house has been redesigned to be parallel to the street with a roof of similar design to other nearby properties' and that 'the architect was requested to amend the previous low, broad, hipped roof, which was out of character and replace it with a steeper pitched roof which

complemented the Arts and Crafts roofs of several of the neighbouring houses'. Mrs C advised that there were no neighbouring houses with a steep 45 degree main roof, as had been planned in the proposed development.

Mrs C also pointed out that a factual error had not been addressed, namely the mix up between East and West elevations in the submitted drawings, stating that this had been pointed out many times, even during the 6 December meeting of the Committee where the wrong elevation was again presented. In conclusion, Mrs C made the point that these concerns were important as they directly affected the question of whether the proposed house fitted in with the neighbouring houses.

9. Application 1 went back to the 31 January 2005 Committee meeting. The Director's Report submitted to this meeting noted that Application 1 had been deferred from the previous meeting to allow the objectors to discuss their concerns with the Agent and that the Agent had advised that his client [the Applicant] did not wish to modify the design again and was more than happy with the present design. The Material/style/form and the Objections sections of the Director's Report remained unchanged from the content submitted to the 6 December 2004 Committee meeting. The Committee approved Application 1 subject to the conditions recommended in the Director's Report and subject to an additional condition that 'the pitch of the roof shall be between 38 and 40 degrees to ensure a satisfactory standard of development'.

10. Mrs C wrote again to the Council on 6 February 2005, pointing out that she had not received a response to her 25 January letter, that the factual errors in the Director's Report had not been corrected, stating her belief that a proper planning decision could not be taken if the facts for the decision were wrong and asking the Council to investigate the matter.

11. Mrs C received a letter dated 11 February in response from the Council, advising that her letter of 25 January and all other objections were available for inspection by Committee Members, per normal practice, prior to the Committee meeting on 31 January. Also, that reference had been made in the Director's Report to the objections, their subject matter and an assessment of their merits and that Mrs C had appeared at the 31 January Committee meeting in a deputation to speak in support of her objection and had reiterated the main terms of the 25 January letter. With reference to the alleged inaccuracies in the

Director's Report, the Council considered these to be matters of subjective interpretation rather than objective fact and, in any event, were of the view that they would not have a significant material impact on the determination of Application 1.

12. The complainants continued to raise their concerns with the Council, but after receiving a letter from the Chief Executive confirming the above position, decided to take their complaint to the Ombudsman.

13. The complaints put to the Ombudsman were considered by a Complaints Investigator. Based on the information made available to this office at the time, it was decided not to conduct an investigation into the complaints. The reasons for this decision were set out in letters sent to the complainants and the Council on 27 April 2005. The complainants accepted that planning permission had been granted and that nothing could be done about that, but continued to have concerns with the way in which the Council had dealt with Application 1.

14. In May 2005 the complainants submitted a set of photographs to the Ombudsman's office showing that all but one of the properties on the south side of street in question were set below street level. The complainants confirmed that the Council had not met their request to rectify the East-West mislabelling of the drawings, stating that at the Committee meeting on 31 January 2005, the wrongly labelled drawings were displayed with a simple relabelling in pencil without any indication of the person responsible for making the change. The complainants also submitted new evidence relating to their original complaints.

15. After making further enquiries of both the complainants and the Council, this office decided to investigate the specific heads of complaint set out in this report. The complainants and the Council were advised of this decision to investigate in letters dated 6 February 2007.

16. The Council does not appear to have addressed directly the issue of the mislabelled drawings with the complainants. However, it is understood from information obtained by the complainants that a Planning Officer (the Officer) has stated that she told the Agent about the error, but that no amended drawings were received. It is also understood that the Officer amended the drawings by hand, agreed this with a more senior staff member and that the drawings were considered to be sufficiently clear to be displayed at Committee and stamped for approval to accompany the decision notice. The Council's

position is that there was no confusion resulting from the mislabelling of the side elevations as the plans referred to the front and rear of the house and due to the slope of the site, the relative elevations were quite clear.

17. Mrs C told the Ombudsman's office in August 2006 that the Agent had submitted another planning application (Application 2) for the same proposed development. The summary section of the Director's Report for Application 2 (dated 28 August 2006) stated that planning permission had already been granted for a virtually identical house on 31 January 2005 and that the current position differed by virtue of a lower roof height and a minor reduction in the rear garden provision. It is noted that the Director's Report for Application 2 stated that 'some [properties] lie below street level', but did not refer to any properties being at road level. Also, that 'the original submitted drawings stated that a roof pitch of 38 degrees was being proposed. On measuring this detail, it was revealed that the pitch was in fact approximately 45 degrees. The Agent was advised on this discrepancy and amended plans accurately reflecting a roof pitch of 38 degrees have now been submitted for consideration'.

*(a) Conclusion*

18. The issue for consideration here is whether the Director's Report was flawed, and if so whether this impacted on the decision made by the Committee to grant planning permission at their 31 January 2005 meeting. The complainants have told this office that they do not dispute that Committee Members are entitled to exercise their discretion on the merits of a planning proposal, but consider that the Committee can only make a judgment based on the quality and accuracy of the information presented to them.

19. On the issue of the drawings (see paragraph 8), I have not been convinced that there was any confusion resulting from the mislabelling of the side elevations, although it was unfortunate that no amended drawings were received from the Agent. However, I cannot agree with or understand the Council's assertion that the alleged inaccuracy relating to the properties being at street level was a matter of subjective interpretation rather than objective fact (see paragraph 11). I note that the Director's Reports considered by the Committee on 6 December 2004 and 31 January 2005 said that some of the houses were set slightly below road level and others were at road level, whereas the August 2006 Director's Report had a change of wording, stating only, when referring to the properties, that some lay below street level.

20. I consider that the Director's Report did not paint a clear picture relating to the street level of the properties. However, I understand that the contention of the complainants in relation to this complaint is 'that a proper planning decision could not be taken if the facts for the decision were wrong'. The purpose of the Director's Report was to assist the Committee to make a decision and it is known that the Committee made their decision after having access to not only the Director's Report, but also to the objection letters (including the letter from Mrs C dated 25 January – see paragraph 8), and after hearing from the complainants who were given the opportunity to speak to their objections. Therefore, I consider that the Committee Members were made aware of the different descriptions relating to the street level of the properties and that the Committee made the discretionary decision to grant planning permission in the light of this information. Taking all these factors into account, I do not uphold this complaint.

*(a) Recommendation*

21. The Ombudsman makes no recommendation on this point.

**(b) The Council failed to facilitate discussion between the applicant and neighbours**

22. The background to this complaint is that following the Committee meeting on 6 December 2004 and after trying to contact the Agent by telephone, the complainants wrote to him by recorded delivery letter on 17 December 2004. They said that they had been advised by Councillors at the 6 December 2004 Committee meeting to contact the Agent directly to discuss their concerns about the position and height of the proposed development. The complainants asked the Agent to contact them to discuss matters and try to find a mutually agreeable solution for the new house.

23. The Agent responded to this letter on 6 January 2005, advising that the proposed house had already been redesigned and repositioned to meet the requirements of the Planning Department, that his client [the Applicant] did not wish to change the design again and would be pursuing Application 1 in its present form.

24. Application 1 was passed by the Committee on 31 January 2005. The official record of the meeting noted that the Committee had acceded to requests for deputations to address the Committee both in support of and relative to objections to Application 1. The complainants have advised that the Agent

appeared to give the impression, when questioned at the Committee, that he believed that planning officers could approve Application 1. A Committee Member clarified that approval would be granted by the elected Members who comprised the Committee.

25. After the Committee had considered the objections received, it was moved that Application 1 again be deferred to allow discussions between the objectors and the Applicant. However, as an amendment, it was moved that Application 1 should not be deferred. On division, there was a vote of 7 for the motion and 16 for the amendment, whereupon the amendment was declared carried. Thereafter, the Committee approved Application 1 subject to the conditions in the Director's Report and an additional one requiring a lower pitch of the roof (see paragraph 9).

26. Mrs C wrote to the Council 6 February 2005 setting out her concerns about the lack of discussion between the applicant and neighbours. She complained that at the 31 January Committee meeting, the Agent had implied that the Planning Department had discouraged communication between the neighbours and the applicant with the threat of a possible refusal of Application 1, and that this clearly ignored the wishes of both the Committee and the neighbours. Mrs C told the Council that she understood that in response to the deferral of Application 1 (at the December 2004 meeting), the Planning Department should have instructed the applicant to discuss the issue with the neighbours.

27. Mrs A also wrote to the Council on 6 February raising, amongst other issues, a particular concern about the alleged inflexible stance of the Officer with regards to the roof pitch. Mrs A told the Council that the Officer had made it clear to a neighbour that only one roof pitch (45 degrees) was being considered, whereas the drawings had the presence of two optional (lower) roof pitches and the Agent offered a compromise reduction in the roof pitch (38 degrees) at the Committee meeting on 31 January 2005.

28. In their 11 February response to Mrs C, the Council advised that they did make the Agent aware of the reason for the deferral of Application 1 and that there was no evidence to suggest that the Council had discouraged further communication with the neighbours. The Council also advised that neither the Committee nor the Planning Department had powers to compel or instruct an applicant to meet with objectors and could not take an applicant's willingness or



not to amend an application in the light of objections as a consideration in evaluating the planning merits of an application. Mrs C was also informed that the Council had a duty to determine all applications within two months of lodging, failing which an applicant would have the right to appeal to Scottish Ministers on the basis of a deemed refusal.

29. In their 11 February response to Mrs A, the Council stated that it was for an applicant to clearly indicate the proposals on the application and it is for a case officer to remove any ambiguity. The Council considered that the Officer had fulfilled her duty in this regard and that the Officer could not and did not dictate the contents of an application to the applicant. The Council went on to say that if there is a difference between what is stated on two separate occasions by an agent it is not for a planning officer to provide an explanation.

30. The complainants continued to raise their concerns with the Council, but after receiving a letter from the Chief Executive confirming the above position, decided to take their complaint to the Ombudsman (see paragraph 13).

31. The complainants subsequently contacted this office again in March 2006, advising that they had obtained new evidence relating to their complaint. The complainants had continued to pursue their concerns relating to the nature of the contact between the Council and the Agent. They had obtained further information that the Officer, who was not at the 6 December 2004 Committee meeting, had stated that she attended a debriefing meeting at the Council at 09:00 on 7 December 2004. Mrs A has told this office that she telephoned the Officer at 09:45 on 7 December 2004 and has verified that a telephone call was made from her home to the Council at this time and date. Mrs A advised that the Officer, when asked during this telephone conversation, claimed not to have the telephone number of the Agent. Mrs A has also verified that she received a telephone call from the Council at 10:05 that morning, during which the Officer provided the requested telephone number but did not say that she had just spoken to the Agent.

32. The position of the Council is that the Officer could not provide the information when Mrs A telephoned as the file had not yet been brought back from the Committee Chambers, but upon return of the file, the Officer telephoned Mrs A with the information. It is understood that the Officer telephoned the Agent at his office at just before 10:00 that morning, and after establishing that he was not there, contacted him on his mobile telephone a

minute later to advise that the neighbours wished to discuss their objections. The Officer advised that the Agent said that he was unwilling to meet the complainants as his client was happy with the revised designs.

33. There is a letter from the Agent to the Officer, dated 15 December 2004, saying that further to their recent discussions regarding the proposed development he had discussed the matter with his client [the Applicant] and that he had been instructed to confirm to the Officer that they wished to continue with Application 1 in its present form.

34. The Officer has confirmed that no written file note was made to record the 7 December telephone conversation with the Agent, acknowledged that one should have been made in an ideal situation and gave the explanation that the day following Committee was always busy with applicants and agents seeking confirmation of the Committee decisions.

35. The Council have told this office, in a letter dated 21 December 2006, that that there is no formal protocol in place to guide the actions of officials following deferral of a planning application for further discussion. It is normal practice for a planning officer to contact the applicant, or agent if there is one, by telephone at the earliest opportunity to advise them of such circumstances, and that thereafter it is for the applicant to decide how to proceed. The Council have also told this office that, in the light of this case, officers are now advised to follow such a telephone call with written confirmation.

*(b) Conclusion*

36. The question here is whether the Council failed to facilitate discussion between the applicant and neighbours. It is clear that the Committee deferred their decision at the 6 December meeting to provide an opportunity for discussion to take place. It is also clear, from the record of the Committee meeting on 31 January 2005 (when planning permission was granted with conditions), that a number of Committee Members wanted to defer Application 1 again to allow discussion between the applicant and the objectors to take place. However, the majority of the Committee Members did not and the decision not to defer again was reached properly on a democratic basis.

37. I consider that the Council were right in saying that neither the Committee nor the Planning Department had the power to compel or instruct an applicant to meet with objectors. I also consider that the Council does not have a duty to

facilitate discussions between the parties. It is for these reasons that I do not uphold this complaint, as the Council cannot be held to have failed in a duty to facilitate where no such duty exists.

38. However, the Committee decision on 6 December to defer consideration did result in the complainants believing that the Council would in some way be able to require the Applicant or Agent to meet them. It also appears that the lack of a formal process for putting applicants and objectors in contact with each other led to the complainants interpreting Council actions, such as the Officer's apparent reluctance to provide the Agent's telephone number, as signifying that the Council could see no justification for a meeting between the Agent and the complainants, and that as a consequence of this the Agent refused to meet them.

39. The complainants remain dissatisfied with the Council's explanation of the reason for the telephone call from the Officer to the Agent and it is clear that they have spent a considerable amount of time and effort in trying to establish what happened and why. Taking all the above into account, I consider that the Council, when asked, has provided a reasonable account of the events following the 6 December 2004 Committee meeting in relation to this issue.

*(b) Recommendation*

40. It is positive to be able to report that in the light of this case, Council officers are now advised to follow telephone calls relating to planning application deferrals with written confirmation. The Ombudsman recommends that the Council also develops a written protocol that sets out the Council position and guides the actions of officials following deferral of a planning application to allow discussion between the parties involved. It is suggested that this protocol be made available to Committee Members and to those involved in the planning process, as appropriate.

41. The Ombudsman asks the Council to notify her when the recommendations have been implemented.

19 December 2007

**Explanation of abbreviations used**

Mrs C and Mrs A	The complainants, two neighbours of the Applicant
The Council	Dundee City Council
The Applicant	The person seeking planning permission
The Agent	The person seeking planning permission on behalf of the Applicant
The Committee	The Development Quality Committee of the Council
Application 1	The planning application submitted in October 2004 for the proposed development which is the subject of this complaint
The Officer	The planning officer allocated to the planning application
Application 2	The revised planning application submitted in August 2006 for the proposed development
The Director's Report	The report submitted to the Committee for consideration