

Scottish Parliament Region: Highlands and Islands

Case 200603820: Argyll and Bute Council

Summary of Investigation

Category

Local government: Planning; Handling of application (complaints by applicants)

Overview

The complainant, Mr C, raised a number of concerns about the way in which Argyll and Bute Council (the Council) handled two applications for outline planning permission.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the Council raised numerous obstacles delaying the progress of the applications. In particular, Mr C claimed that the subject of road access was only mentioned seven months after the submission of the first application (*not upheld*);
- (b) the Council reneged on an agreement reached in September 2006 that, if the access road was included in the application, they would validate it and recommend it for approval (*not upheld*);
- (c) the Council failed to advise of a change of policy (Policy ENV 14) and the likely effects of that on Mr C's application (*not upheld*);
- (d) Policy ENV 14 is insufficiently specific, leaving it open to differing interpretations (*not upheld*); and
- (e) Council officers applied Policy ENV 14 inconsistently in different Council areas (*not upheld*).

Redress and recommendations

The Ombudsman has no recommendations to make.

Main Investigation Report

Introduction

1. On 13 April 2007 the Ombudsman received Mr C's detailed complaint about the way in which the Council handled two applications for outline planning permission. The applications concerned the same site and the first was submitted by Mr C's brother (Mr A) and the second by Mr C on his brother's behalf. Mr C said that, in dealing with the applications, the Council raised numerous obstacles delaying their progress and that they reneged on an agreement reached in September 2006 (that if the access road were included in the application, it would be validated and recommended for approval). Mr C also complained that the Council failed to alert him to a change of policy (Policy ENV 14) and of its probable effects on the second (Mr C's) application. He alleged that it was improper for officers to have accepted his application as a valid one when they then went on to decide that, in terms of the new policy, it could not be accepted. He said that the new policy was given insufficient publicity in advance of its introduction, thus the public did not have the opportunity to provide their comments on it. Thereafter, he said that the policy was insufficiently specific, was ambiguous and was applied inconsistently throughout the Council's area. As a consequence of the policy, he complained that Mr A had incurred abortive costs.

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

- (a) the Council raised numerous obstacles delaying the progress of the applications. In particular, Mr C claimed that the subject of road access was only mentioned seven months after the submission of the first application;
- (b) the Council reneged on an agreement reached in September 2006 that, if the access road was included in the application, they would validate it and recommend it for approval;
- (c) the Council failed to advise of a change of policy (Policy ENV 14) and the likely effects of that on Mr C's application;
- (d) Policy ENV 14 is insufficiently specific, leaving it open to differing interpretations; and
- (e) Council officers applied Policy ENV 14 inconsistently in different Council areas.

Investigation

3. The investigation of this complaint involved obtaining and reading all the relevant documentation, including correspondence between Mr C and Argyll and Bute Council (the Council). I have also had sight of the appropriate outline planning applications (received by the Council on 19 December 2005 and 17 July 2006); Historic Scotland's Memorandum of Guidance on listed buildings and conservation areas dated 1998; the Council's written statements on the Finalised Draft Local Plan and Modified Finalised Draft Local Plan, respectively dated May 2005 and June 2006; and a report by the Head of Development and Building Control to the Mid Argyll Kintyre and the Islands Area Committee of 6 June 2007. On 13 June 2007 I made a formal enquiry of the Council and their detailed response was received on 6 July 2007.

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

5. The background to the complaint is that, on 19 December 2005, the Council received an outline planning application from Mr A for the erection of a dwelling house in the garden ground of a house in X Road, Tarbert. The Council said that the application was found to be invalid for a number of procedural reasons and they, therefore, wrote on 29 December 2005 advising Mr A of this. They asked that he attend to the outstanding matters as soon as possible and return the required information to the Senior Planning Officer at the Area Office. Mr A was told that, if they did not hear from him within two months, it would be assumed that he did not intend to proceed with his proposals and all the documents would be returned to him. Mr A was also advised that, as a matter of principle, because the development site was within a conservation area, a detailed application would be required. He was invited to speak with the case officer, in advance of him committing further expenditure.

6. On 23 February 2006, as the Council had not heard further from him, they wrote to Mr A returning his application and saying that the Finance Department would shortly return his application fee. Meanwhile, however, on 18 February 2006, Mr C wrote on Mr A's behalf saying that he was now providing all the necessary information but that he questioned the information given to him about a detailed application being required. He maintained that applications for outline consent in conservation areas had already been granted and he said, because of this, he wanted the outline application to be continued.

(This letter crossed with the Council's correspondence of 23 February 2006 and was not received until 27 February 2006.) The Council responded the next day and confirmed that, as the outline application received by them on 19 December 2005 (see paragraph 5) had failed to be registered as valid within a reasonable time, a new application would be required. The Council reiterated their position that a full (detailed) application was required and provided their explanation why. However, they said that as they would not like the applicant to incur abortive expenditure it may be of benefit for Mr C to discuss the proposal with a planning officer, who would be able to give an indication about whether the application was likely to be supported. The applicant could then make an informed decision about the type of application to be submitted (outline or detailed) and a meeting was suggested. This was held on site on 13 March 2006.

7. The Area Team Leader – Development Control wrote to Mr C on 15 March 2006 confirming their discussion at the site visit. Amongst other things, the letter confirmed that, as planning permission had already been granted for a dwelling in the garden ground of an adjacent property, although it had not yet been implemented, it had to be taken into account in the consideration of Mr C's application. It was also confirmed that there was an acceptance in principle of development but that the positioning of any proposed house would be important in terms of overlooking and day lighting. The letter reiterated the Council's view that a full application was the best way to move the application forward but noted the reasons why Mr C wished to pursue an application in outline (because of the element of risk and expenditure), so the Council agreed to give pre-application advice if Mr C made sufficient information available and provided any details requested. They said that if they had this, the Council could then give a realistic indication of whether planning permission would be granted. It was, however, pointed out that all this was subject to the provisos that objections could be made to the plans and that the application could be determined by Councillors. On 4 April 2006 Mr C sent the information requested and a further site visit took place.

8. As Mr C said he heard nothing further, he wrote to the Council on 6 May 2006 reminding them and on 12 May 2006 he received a response from the Council saying that, if all things remained as indicated, it would be reasonable to expect a 'clear officer recommendation of support' or, at the very least, that it would be possible to reach a 'working platform'. It was confirmed that if objections to the proposals were received, the application would go to

members for a decision. Thereafter, the writer (the Area Team Leader) made detailed comments on the application so far submitted, which he hoped would give Mr C the confidence to prepare a detailed application but there was a warning that the guidance given could not bind the Council's consideration.

9. Mr C acknowledged this letter on 31 May 2006 but, nevertheless, he maintained his view that he wished the application to be dealt with in outline. He said that this would allow him to keep his options open about whether to build the house for himself, for a client or to sell the land with outline permission. He said he did not accept the view that had been expressed to him that it would be difficult to attach conditions to an outline application, as the Council had done this in previous situations and he maintained that, as the Council had accepted in principle that a house could be built on the site, they had a duty to recommend that outline consent should be granted. He wanted them to get on to determine the application as it stood and that if they did not intend to do so, he wished their decision in writing. This letter was acknowledged by the Council on 6 July 2006, when the Area Team Leader said that, after consideration, it had been decided to consider the application in outline. However, in order to do so, a new application, with the appropriate fees, would require to be lodged. He said that if no objections were received, the Council should be in the position to 'give favourable conclusion without reporting to Councillors or Committee'. He indicated that it was likely that conditions would be attached (details were given relating to the building line, windows, daylighting, roof heights and spacing, as well as standard conditions relating to highways, parking, landscaping, etc). Again, it was pointed out that this was a preliminary assessment based on the information available and that, in the event of a formal application being made, the Council would be required to take any representations into account. On 17 July 2006, the Council received a further application in outline from Mr C.

10. The Head of Planning acknowledged the application on 18 July 2006 but advised that it was invalid and gave Mr C details of the reasons why. (This included a requirement that the plans had to take into account, and edge in red, the access road that it was intended to use. It was pointed out that if the road was not in the applicant's ownership, a notice would require to be served on the owner.) Mr C replied to this on 5 August 2006, saying that he had provided what information was required with the exception of that referring to the access road. He said, however, that he had clarified the situation with regard to the access. Notwithstanding Mr C's view, the Council replied that it was still their

opinion that the application was invalid as the access still required to be edged in red and that if the applicant did not own the access, notice would have to be served on the owner. It was suggested that the northern boundary was redrawn but, finally, that the site of the house was not what had been previously discussed and that the plan should accurately reflect the location and extent of the footprint. Mr C was advised that if necessary detail was not provided which would enable the proposal to be considered in outline, Mr C would have to revert to provide a full, detailed application. Mr C provided the information and this allowed his application to be validated on 9 October 2006 and, by letter of 17 October 2006, this was acknowledged. Mr C was also advised that in the event that he did not receive a formal decision by 1 December 2006 he would have the right to pursue a statutory appeal.

11. In the meantime, while Mr C was engaged in discussion about Mr A's outline planning applications (made in December 2005 and July 2006) the Council were working towards developing a new Local Plan and, in May 2006, the Finalised Draft Local Plan was issued for public consultation. This draft did not indicate whether outline applications should be considered in conservation areas but, following this initial round of public consultation, the conservation policy was substantially revised in the Modified Finalised Draft version of the plan which was issued in June 2006. This stated, amongst other things, that 'Outline planning applications will not normally be considered appropriate for proposed development in conservation areas' (Policy ENV 14). The Modified Finalised Draft Plan was then submitted for further public consultation in July and August 2006. Following this period, the Council have advised me that 3,000 representations were received and considered, the analysis of which was not completed until October 2006. Until that time, it was not clear which policies were uncontested and which would require review at a public local inquiry as a consequence of objection. The Council's proposals with regard to conservation areas (see above) were not contested and, therefore, in accordance with Scottish Executive¹ advice, this could be incorporated into the adopted version of the plan once the local inquiry had addressed the future of the contested policies. Government advice is that uncontested policies in the latter stages of plan making are to be accorded significant weight in decision making in preference to adopted, but outdated, plans. In the circumstances, Mr C was

¹ On 3 September 2007 Scottish Ministers formally adopted the title Scottish Government to replace the term Scottish Executive. The latter term is used in this report as it applied at the time of the events to which the report relates.

notified by a letter of this emerging policy position by the Area Team Leader on 27 October 2006, who advised that he could see no exceptional circumstances why this new policy should not apply to Mr C's application and that it was his view that a detailed application was now required. He said that he was aware of Mr C's concern about possible abortive expenditure so he indicated that there was a good chance that the proposals would be accepted. He advised that a detailed application required further specific information, which the Council were entitled to seek in terms of the appropriate planning legislation, and that if this was submitted Mr C's present (outline) application would be converted to detailed and would be considered. However, he further said that if Mr C persisted in requiring his application to be considered as an outline application, he would recommend it for refusal. On 6 June 2007 Mr C's application was considered by the Council and was refused on the grounds that the application, as submitted in outline form, failed to provide an adequate level of detail for proper assessment of the proposal in terms of residential amenity and the character and appearance of the conservation area.

(a) The Council raised numerous obstacles delaying the progress of the applications. In particular, Mr C claimed that the subject of road access was only mentioned seven months after the submission of the first application

12. Mr C believed that the Council were intentionally obstructive in so far as the outline applications submitted by Mr A and himself were concerned and he said, in particular, that the Council belatedly and unreasonably raised the issue of road access.

13. Mr A submitted the first outline planning application to develop the site on 19 December 2005. The Council deemed it to be invalid and told him the reasons why in their letter of 29 December 2005, however, it was not until 28 February 2006 that the Council received information which they had required. Meanwhile, as the Council had not heard further from him, a letter was sent to Mr A on 23 February 2006 returning his application as they considered that it remained invalid. He was also advised that his fee was to be returned (see paragraphs 5 and 6). Thereafter, the Council advised Mr C that it was their view that the application should be made in detail rather than outline and Mr C contested this, as he was entitled, but this led, unavoidably, to delays. On 6 July 2006, as a consequence of Mr C's representations, the Council advised him that they would be prepared to consider an outline application but, as the previous one had lapsed, a new application would require to be made.

Mr C made this on 17 July 2006 but unfortunately, for a number of reasons (including a reference to an access road which was not in the applicant's ownership), it could not be validated (see paragraphs 9 and 10). Mr C, therefore, required to provide further information and this second outline planning application was then validated on 9 October 2006.

(a) Conclusion

14. While Mr C considered that the Council delayed the consideration of the two outline planning applications made, I do not accept that the evidence available supports this. The first application was never validated for want of further information and the fee was returned to the applicant. Mr C had persistently argued that he should be allowed to proceed with an outline application and he was invited to make another outline application. He did this in July 2006 but the application could not be validated because, again, information was lacking. Further details were requested (including about the access road) but Mr C questioned these and it was not until early October 2006 that the application was validated.

15. While I note Mr C's concern that the issue of the access road was only brought up when the second application was submitted, there was other information lacking which was also required. Having considered the matter carefully, nothing in the available information suggests to me that the Council acted unreasonably and intentionally delayed dealing with either of the outline planning applications referred to. Once the second application was acknowledged as being fully validated, Mr C was told on 17 October 2006 that if he had not received a formal decision by 1 December 2006, he had the right of appeal (see paragraph 10). Despite not receiving a decision by then, Mr C did not appeal and while this was his decision I cannot conclude that the injustice he felt at not receiving a decision until 6 June 2007 should be attributed to the Council. In all the circumstances, I do not uphold this aspect of the complaint.

(b) The Council reneged on an agreement reached in September 2006 that, if the access road was included in the application, they would validate it and recommend it for approval

16. As can be seen above (see paragraphs 9 and 10), the matter of the access road was only one of a number of issues that required to be dealt with before the second outline application could be validated. All the information required by the Council was ultimately provided by Mr C and the application was then validated in October 2006 (see paragraph 13). However, in the

meantime, the Council had been considering and consulting on their new local plan (see paragraph 11) and by October 2006 changes had emerged with regard to this which the Council were obliged, in accordance with government guidance, to take into account. In the circumstances, as the Council could see no exceptional circumstances why this new policy should not apply, Mr C was accordingly advised of it. It was the case that the circumstances of the site and terms of the application were such that it had always been the Council's preference to deal with the application by way of a detailed application.

(b) Conclusion

17. I have seen no evidence of an agreement made with the Council in September 2006 saying that, if information on the access road was provided, they would validate and approve Mr C's application. I have noted that Mr C was advised in July 2006 that if a new application with the appropriate fees was lodged, provided no objections were received, the Council should be in a position to give 'favourable conclusion without reporting to Councillors'. Although Mr C may have felt that this was, in effect, a recommendation for approval, it was not and the Council explained at the time that this was a preliminary assessment based on the information available. I have not, therefore, seen grounds to criticise the Council. In the event, Mr C's application was validated in October 2006 but by then the Council were required to deal with this type of application (applications in conservation areas) differently. Given the circumstances described above (see paragraph 11), I cannot criticise the Council for taking the action they did and I do not uphold the complaint.

(c) The Council failed to advise of a change of policy (Policy ENV 14) and the likely effects of that on Mr C's application

18. Mr C said he was aggrieved when he discovered, after receiving the Area Team Leader's letter of 27 October 2006, that a new policy (Policy ENV 14 of the Finalised Draft of the Argyll and Bute Local Plan as modified in July 2006, and which had been sent to Mr C) had become effective (see paragraph 11). The Area Team Leader advised that this 'tightens up the Council's approach to developments within conservation areas'. This policy itself said, amongst other things, that 'outline planning applications will not normally be considered appropriate for proposed development in conservation areas'.

19. I am aware from the information available to me that the Council had been considering a new local plan and had publicly advertised their proposals for consultation (in May, June, July and August 2006) and 3,000 representations

were made. I am, therefore, satisfied, as the Council have advised me in their response of 3 July 2007, that the local plan went through the statutory public consultations procedures and it is my view that Mr C was as well placed as any other member of the public to learn of the public consultation. However, given the ongoing nature of Mr C's outline planning application which was for a development within a conservation area, it may have been appropriate for the Council to have indicated that the emerging plan could affect his planning application. The Council have specifically commented on this saying:

'With hindsight, it would have been appropriate to indicate to [Mr C] in the letter of 6 July 2006 that there was the prospect that policy could change later in the year as part of proposed revisions to the emergent local plan. However, as it was felt that [Mr C] was anxious to proceed, it was thought likely at the time that his application ought to be capable of being determined in advance of any revision taking effect. However, as a valid application was in the event not lodged until three months later, that proved not to be the case.'

(c) Conclusion

20. Given the Council's explanation above, together with the ongoing public consultation, I can understand the reasons why they did not specifically advise Mr C of the emerging policy. However, like them, I agree that it would have been more prudent if they had done so but I do not consider that their inaction amounts to maladministration and, accordingly, I do not uphold the complaint.

(d) Policy ENV 14 is insufficiently specific, leaving it open to differing interpretations

21. The Council said in their response of 3 July 2007 that, following the initial round of consultation, the conservation area policy was substantially revised in the Modified Finalised draft version issued in June 2006 (see paragraph 11). The stated wording has been repeated above (see paragraph 18) and, despite further public consultation in July and August 2006, the Council advised me that no representations were received on this point. In all the circumstances, the Council were then obliged, in accordance with government guidance, to incorporate this policy unchanged into the adopted version of the plan.

(d) Conclusion

22. Notwithstanding Mr C's opinion of the wording of Policy ENV 14, I do not agree that there is evidence of maladministration. The evidence suggests that the Council consulted widely on their proposals. Three thousand

representations were received and, while the use of the word 'normally' allows an element of flexibility in terms of interpretation and implementation, I consider that this is necessary to meet the varying terms of the planning applications submitted to the Council for consideration. This is not a demonstration of fault and, accordingly, I do not uphold the complaint.

(e) Council officers applied Policy ENV 14 inconsistently in different Council areas

23. Mr C maintains that in some areas, after the implementation of Policy ENV 14, the Council went on to consider outline planning applications which related to conservation areas. He sees this as being unfair and he cited as evidence a development in Tobermory. However, as discussed above, the wording of the policy allows some flexibility for Council officers, particularly when acting under delegated powers and it has been confirmed to me that each planning application is dealt with on its merits. Hence, the weight given to the 'normal' policy about conservation areas may differ depending on the circumstances of the particular case.

24. Nevertheless, I made specific enquiry about the development mentioned by Mr C and have been advised that only a small part of the relevant application site was contained within a conservation area, the majority of the site being outside. Consequently, the subsequent granting of outline planning permission was not viewed as a substantial departure from the policy. While I note that Mr C may not like this, the policy is not a rigid one, albeit it is applied in almost every case.

(e) Conclusion

25. In the light of the foregoing, I do not uphold Mr C's complaint. Furthermore, as Mr C maintained that he (and Mr A) had been financially disadvantaged, I have looked closely at the subject of costs. However, it appears that Mr C (or Mr A) paid only the appropriate fee (plus advertising fee) for the second application for outline planning permission. The first fee was returned (see paragraph 6). It does not appear that an agent was instructed. In view of all of this, I cannot conclude that abortive expenditure was incurred and, accordingly, I do not uphold the complaint.

19 December 2007

Explanation of abbreviations used

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| Mr C | The complainant |
| Mr A | The complainant's brother |
| The Council | Argyll and Bute Council |

Glossary of terms

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| Outline planning application | An application to establish consent to approve the development in principle. Once outline planning permission has been granted, full planning permission must be sought for approval of the details, known as reserved matters. |
| Detailed planning application | An application requiring the submission of all details of the planning proposal |