

Scottish Parliament Region: South of Scotland

Case 200603033: East Lothian Council

Summary of Investigation

Category

Local government: Planning and Environmental Health; objections by neighbours to noise nuisance created by play area development

Overview

The complainant (Mr C) raised concerns about how East Lothian Council (the Council) prepared proposals for the development of a play area immediately adjacent to his flat and their alleged undue delay in taking action on noise nuisance and detriment to privacy he is experiencing.

Specific complaints and conclusions

The complaints which have been investigated are that the Council:

- (a) in preparing their proposals for the play area, failed properly to apply their own Local Plan policies and to anticipate the likely detrimental effect to residents in the development in which Mr C resides (*not upheld*); and
- (b) delayed unduly in taking appropriate action on noise nuisance and detriment to privacy, preferably by relocating the play area (*not upheld*).

Redress and Recommendations

The Ombudsman recommends that following the period of their proposed monitoring, relevant officers of the Council report to the appropriate Committee on options for the play area including the residents' request that it be closed and relocated elsewhere. The Council informed me that they would agree a programme of monitoring with affected property owners and would report the results, together with any residents' views to the Council's Cabinet. The report would include a recommendation as to what further action, if any, should be taken with respect to the location and operation of the play area.

Main Investigation Report

Introduction

1. The complainant (Mr C) bought a flat in a modern block of 17 flats in a coastal town in the area of East Lothian Council (the Council) in January 2005. In September 2006 the Council opened a play area adjacent to the block of flats. This impacted on the amenity of residents in Mr C's development particularly in the form of noise nuisance, invasion of residents' privacy by users of the play area, and anti social behaviour by youths attracted to the area in the evening.

2. The complaints from Mr C which I have investigated are that the Council:
- (a) in preparing their proposals for the play area, failed properly to apply their own Local Plan policies and to anticipate the likely detrimental effect to residents in the development in which Mr C resides; and
 - (b) delayed unduly in taking appropriate action on noise nuisance and detriment to privacy, preferably by relocating the play area.

Investigation

3. The investigation is based on information supplied by Mr C and the Council. A site visit was also paid to the locus of the play area and Mr C was interviewed. Related policies from the East Lothian Council Local Plan 2000 are set out in Annex 2.

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

(a) The Council in preparing their proposals for the play area, failed properly to apply their own Local Plan policies and to anticipate the likely detrimental effect to residents in the development in which Mr C resides

5. The immediate area of the block of flats in which Mr C resides has a complex recent planning history. Prior to the early 1990s the site, which is bounded on the north by a public promenade, was occupied by a garage and car showroom and garage and creamery. The Council's predecessor, East Lothian District Council (the District Council), sought to replace their 1981 Local Plan with a Draft West Sector Local Plan in 1987, but this did not progress beyond the draft consultation stage. In 1989, a development brief was prepared for the locality which included the promenade. With regard to the area to the

south, the development brief stated that the primary use should be for leisure and recreational purposes but did not discount a commercial leisure development or housing. Outline planning consent was granted by the District Council on 4 May 1990 for the development of the whole site in three phases for function suites, restaurant and leisure complex, car parking and hotel/motel accommodation. Detailed planning consent was granted for the first two phases incorporating function suites and leisure complex. These were subsequently implemented and the complex opened in the Spring of 1992. Following demolition of existing buildings, a car parking area was created in the remaining area.

6. An application for detailed planning consent was submitted to the District Council in March 1996 to extend the leisure centre, create 25 residential flats, and redevelop the adjacent promenade area to the north. Following an officer's report in February 1997 recommending refusal, this application was withdrawn. In September 1997 an application for outline consent for a predominantly residential development of 17 flats was submitted to the Council. It attracted some 168 letters of objection. When the Council failed to issue a decision within eight weeks, an appeal was submitted to Scottish Ministers. On 8 September 1998 the Inquiry reporter upheld the appeal and granted conditional outline consent. After approval of a further reserved matters application, the development of 17 flats was built in 2000/2001. Mr C was not a first purchaser.

7. The Council stated that prior to the reorganisation of local government in 1996 the District Council had considered a variety of schemes to improve the promenade and these included providing facilities for young children. There had been a children's paddling pool at the western end of the promenade in close proximity to the site of the development where Mr C resides but this had not been in use during the time of the Council. It had been partially screened by a hut used by a water sports club.

8. After the construction of the residential development in which Mr C now resides, the Council in 2003 intimated proposals to residents through Notice of Intention to Develop (NID) procedures. The Council's proposals included the creation of a play area on the site of the former paddling pool. The play area was roughly twice the size of the previous paddling pool. The 2003 NID apparently attracted no objections. However, on 16 July 2004 a further NID was intimated by the Council and six objections from local residents were

received. One of these objections was in the form of a petition signed by 27 residents. None of these local residents opposed the play area specifically but most were concerned with the prospect of the proposals encouraging youths to gather and to engage in anti social behaviour. Mr C understands that that was an acute problem at the time.

9. The Council informed me that the NID proposals for the development of the children's play area did not fall within a category of proposal for which consultation with the police was recommended in terms of relevant central government planning advice. The Council's Project Officer (Engineering) (Officer 1) had previously consulted with the local police on the proposed improvements to the promenade but they had not reported back any concern to him. Upon receiving the letters of representation on the later NID, Officer 1 met informally with two police officers on site on 27 September 2004. Officer 1 showed the police officers the related drawings, explained the Council's proposals, and discussed with them the representations which had been received. According to Officer 1, the police officers had been supportive. Officer 1 responded to those submitting representations. At that time, none of the Council's technical officers who were consulted on the proposals identified any possible problems. The Council's Senior Environmental and Consumer Services Manager did not consider that use of the play area would create a nuisance for residents of the adjacent flats. The application file in respect of the NID, including the letters of objection, was sent to the Scottish Executive¹ Development Department (SEDD). The SEDD informed the Council by letter of 11 January 2005 that they did not propose to intervene.

10. Shortly after this, Mr C and his wife (Mrs C) contemplated buying their flat and met with Officer 1 on site on 25 January 2005 to discuss the Council's proposals. Officer 1 had relevant plans available, explained what was intended and answered specific questions. Mr and Mrs C subsequently purchased their flat and took entry in April 2005.

11. The Council's proposals in respect of the play area were not implemented until early September 2006. The play area, according to the Council, was constructed as envisaged in the NID proposals. At its nearest it is eight metres

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.

(27 feet) from Mr and Mrs C's flat, the living room window of which looks over the promenade to the sea. Mr C and his next door neighbour (Mr B) are the closest residents to the new play area.

12. Mr C informed me that from its opening, the new play area proved popular but created problems for neighbours in the form of increased noise levels and loss of privacy. He stated that adults and their children on the tallest pieces of equipment could look into his windows at first floor level and those of his neighbour Mr B. In the evening, the play equipment was used by youths with similar problems of noise and invasion of privacy.

13. Mr C approached two Members of the Scottish Parliament (MSP 1 and MSP 2) in October 2006. MSP 1 wrote on his behalf to the Director of Environment (the Director) on 25 October 2006 quoting the Council Local Plan 2000 policy C3 (Appendix 2) which stated that 'the location and design of play spaces shall be such that ... noise or other nuisance to residents is minimised by the provision of an appropriate buffer zone' and referred to the enormous distress caused to residents from noise and lack of privacy. MSP 1 asked why the play area could not have been sited on the area of promenade behind the adjacent leisure centre, leaving the area in front of Mr C's flat for car parking. The Director responded to MSP 1's letter on 31 October 2006 and MSP 1 forwarded this to Mr C on 9 November 2006.

14. Mr C remained dissatisfied and in January 2007 he further pursued the relevance of the Council Local Plan 2000 policies C2 and C3 (Annex 2) and referred to the residents unavoidably observing children from their windows. The Director confirmed in a letter of 10 January 2007 that policy C3 related to new housing developments and did not specifically cover the site of the play area.

15. The Council informed me that policy C3 in their Local Plan 2000 (Annex 2) is intended solely for use where play areas are to be introduced into new housing. It is not intended as an overall policy to control the development of play areas. The specific policy was not, therefore, relevant to the proposal to form a play area as part of the improvements to the promenade. The reference in policy C3 to siting play areas in such a way as to avoid causing disturbance or other loss of amenity to neighbouring properties simply restates a basic requirement for all development. When the planning authority assessed the NID, the potential for disturbance or other loss of amenity was considered in the

consultation with the Council's Environmental Protection staff. The conclusion reached on the evidence available was that the siting of the play area was acceptable.

(a) Conclusion

16. The Council's proposals were intimated to owners through the NID procedures and residents had the opportunity to voice their concerns and to object. Most residents in making representations on the second NID referred to issues arising from other aspects particularly anti social behaviour. Mr C bought his flat just after that process was completed. Prior to making his decision to purchase, he and Mrs C met with Officer 1 on site.

17. Since the Council were not proposing a new family housing development through their NID for the promenade area, policy C3 does not, therefore, specifically apply. By their own statement (paragraph 15), play areas should be sited in such a way as to avoid causing disturbance or other loss of amenity to neighbouring properties. Mr C contends that the play area causes disturbance and affects his amenity. It is the case, however, that the Council carried out appropriate consultation and notification and noise and privacy issues were not anticipated by them, by those consulted, or by the existing residents at that time. Since there is no evidence of maladministration or service failure, I do not uphold this complaint.

(b) The Council delayed unduly in taking appropriate action on noise nuisance and detriment to privacy, preferably by relocating the play area

18. Immediately following the opening of the play area Mr C spoke to the Council's Landscape and Countryside Manager (Officer 2) and he and Mr B wrote to the Council's Play Area Manager (Officer 3) on 5 September 2006 and 20 September 2006 respectively. On the advice of a member of MSP 1's staff Mr C pursued the issue of noise with the Council's Environmental Health Department. He wrote to the Director on 24 September 2006 referring to 'unacceptable noise pollution' and at the significant loss of privacy that had resulted. The noise levels remained a problem even with windows closed. Mr C suggested that the play facility required to be re-sited to a more suitable location. MSP 2 also wrote on his behalf to the then Chief Executive on 27 September 2006.

19. In the meantime, Officer 2 responded to Mr B's and Mr C's letters to Officer 3 in separate letters of 3 October 2006, informing them of the planning

process the proposals had gone through. Officer 2 stated that instances of youths causing damage or causing nuisance should be reported to the police or the Council's Anti Social Behaviour Hotline. Officer 2 stated that since the beach, like the promenade, was a public space it was difficult to see how noise levels could be kept down particularly when the weather was fine.

20. Mr C responded on 18 October 2006 to the Director stating that the noise pollution from the play area had been created by the Council without an adequate buffer zone, and that neighbours could not have gauged the unacceptable noise levels at the planning stage. He maintained that residents should not have to live with closed windows and drawn blinds. (The Director replied to Mr C on 31 October 2006.)

21. In responding to MSP 2 on 18 October 2006, the Chief Executive enclosed briefing notes prepared by the Director, Officer 1, and Officer 2. In his briefing note the Director stated that he was prepared to monitor noise levels. Given that use of the promenade was likely to reduce during the winter months, any measurement might have to be postponed until the following year.

22. In November 2006 and December 2006, Mr C corresponded with officers of the Council on the removal of some trees and bushes in the vicinity of the play area, about rubbish generated, the lack of appropriate cleaning and rubbish uplifts, the lowering of the bridge element in the play area, and the landscaping of an area owned by the Council lying between the play area and the flats. Some trees and bushes were removed in the vicinity of the play area in early November 2006. Officer 3 responded to Mr C on 18 December 2006 confirming that a certain amount of planting would be done to restore security but that this planting would not be a noise or visual buffer.

23. In December 2006, Mr C met with a Council Environmental Officer (Officer 4) who agreed she would undertake an environmental investigation programme. Officer 4 subsequently delivered the noise monitoring equipment to Mr C on 21 December 2006 and recordings were taken through to 4 January 2007. Subsequently, the play area was again visited by Officer 4 and equipment was installed in Mr C's property for a second period between 30 March 2007 and 14 April 2007 coinciding with the school Easter holidays. Mr and Mrs C moved out of their flat at the end of this period after taking the lease of another property in the town. They informed me that they could not

tolerate the noise from the play area. Their flat is currently occupied by their adult son.

24. Officer 4 prepared a report on 25 June 2007. Her report detailed the periods of monitoring and made particular mention of two visits she had paid on 23 February 2007 and 5 April 2007. On the latter occasion there had been 29 children and adults at the play area. Officer 4 concluded that there was a significant increase in noise levels within Mr C's flat when people used the play area. Officer 4 stated that the noise (up to 68dB_L_{aeq}) was intermittent, but of an intrusive nature, interfered with residents' enjoyment of their properties, and in her opinion constituted a statutory nuisance. Officer 4 was of the view that the excessive noise emanated from the play area and that any contribution to the noise from people on the beach was minimal.

25. On 10 August 2007 the Council's Head of Community Wellbeing (Officer 5) wrote to Mr C informing him of the Council's further consideration of the issues of noise and nuisance arising from the play area. Officer 5 stated that the play area was an integral part of the promenade and beach area facilities. He considered the play area to be a well-used community facility and part of a long established redevelopment programme. The Council did not consider moving or closing the play area to be acceptable options. The Council accepted that at times noise from users of the play area could be intrusive. Additionally, Officer 5 accepted that there might be intrusion on Mr C's privacy from use of certain items of the play equipment notably a high level bridge. He recognised also a problem from sand blowing from the play area into the car park and landscaped area of the Mr C's development. To try to alleviate these problems, Officer 5 stated that the Council intended to lower the bridge component of the play equipment to just above ground level and to infill the fencing to prevent play area sand blowing into the landscaped area and car park. Officer 5 anticipated that lowering of the bridge component would address privacy concerns, would make the area less attractive to older children, make it more suitable for younger children, and might also help with noise related concerns. The Council sought to mitigate the noise nuisance and privacy issues while continuing to provide a valued community facility in a popular and busy location. Officer 5 undertook to review the impact of the alterations in liaison with Mr C over a six month period.

26. Mr C informed me that the bridge component of the play area was lowered in late November 2007, some weeks later than originally planned. The Council

confirmed to me that the monitoring period would now be the six month period from December 2007 to June 2008 which would include the Easter holidays and the start of the summer season.

27. I asked the Council to comment on the reference to the noise being a statutory nuisance. The Council's Acting Chief Executive accepted that the level of noise might be considered to be excessive at times, but Officer 4's reference to the noise being a statutory nuisance was incorrect. Statutory noise nuisance in terms of section 79 of the Environmental Protection Act 1990 related to noise emitted from premises, but the Council's legal advice was that the Environmental Protection Act 1990 did not provide a statutory definition of 'premises' and the Council doubted whether the play area site could be regarded as premises from which noise nuisance emanated.

(b) Conclusion

28. Both Mr C and his neighbour Mr B have highlighted the problems they have experienced since the play area facility was opened over a year ago. There has been extensive correspondence. The noise has been monitored. Recent measures have been implemented to mitigate the worst effect of the tallest piece of equipment on Mr C's privacy. Whether those measures will dissuade inappropriate use of the facility by older children and reduce noise is not yet known.

29. It is clearly the case that noise levels increase particularly at the weekends and during the school holidays when the facility provided by the play area is in greatest use. The inappropriate use of the play area in the evening and at night is a matter on which Mr C has consulted with the police who have acknowledged in correspondence to Mr C that the play area and car park is recognised to be in a part of town that is susceptible to late night activity and anti social behaviour. An appropriate police response has resulted.

30. I believe that the Council have not ignored the representations made by Mr C and Mr B directly and through MSP 1 and MSP 2. Officer 4's report clearly agrees that Mr C's amenity is being affected by noise. Having installed the facility some 15 months ago the Council are understandably reluctant to close and relocate it. I do not consider that the Council have delayed unduly in the matter. I do not uphold the complaint. I trust, however, that the Council will approach the forthcoming monitoring period with an open mind.

(b) Recommendation

31. The Ombudsman recommended that following the period of their proposed monitoring, relevant officers of the Council report to the appropriate Committee on options for the play area including the residents' request that it be closed and relocated elsewhere. The Council informed me that they would agree a programme of monitoring with affected property owners and would report the results, together with any residents' views to the Council's Cabinet. The report would include a recommendation as to what further action, if any, should be taken with respect to the location and operation of the play area.

Explanation of abbreviations used

Mr C	The complainant
The Council	East Lothian Council
The District Council	East Lothian District Council
NID	Notice of Intention to Develop
Officer 1	Council's Projects Officer (Engineering)
SEDD	Scottish Executive Development Department
Mrs C	Mr C's wife
Mr B	Mr C's neighbour
MSP 1	A Member of the Scottish Parliament
MSP 2	A former Member of the Scottish Parliament
The Director	The Director of Environment
Officer 2	Landscape and Countryside Manager
Officer 3	Play Area Manager
Officer 4	Environmental Health Officer
Officer 5	Head of Community Wellbeing

East Lothian Council Local Plan 2000

Policy C2

Protection of Recreation, Leisure and Amenity Open Space

The Council's policy expressed in C2 of the East Lothian Council Local Plan 2000 is to retain recreational, leisure and amenity open space and facilities which make a significant contribution to the recreational needs of the community. The policy, however, also sets out the circumstances where an exception may be made.

Policy C3

Children's Outdoor Play Provision in New Housing Development

The Council's policy C3 on children's play provision in new housing development is set out on pages 88 and 89 of the East Lothian Council Local Plan 2000. Broadly, this requires developers of new family housing development to make suitable provision for appropriate and accessible outdoor play space, its nature and extent depending on the size of development. Subsection (iv) of policy C3 states that 'the location and design of play space shall be such that...it can be clearly seen from adjoining housing (and that) noise or other nuisance to residents is minimised by the provision of an appropriate buffer zone.'

The East Lothian Council Local Plan 2000 contains no policy statement with regard to the separate development of new play areas.