

Scottish Parliament Region: Mid Scotland and Fife

Case 200600298: Fife Council

Summary of Investigation

Category

Local government: Policy; Land and Property; Marketing and Selling of Land

Overview

The complainant (Mr C) raised a number of concerns against Fife Council (the Council) that they had not, in a fitting manner, considered his offer to purchase land at a site within East Fife (the Site).

Specific complaints and conclusions

The complaints which have been investigated are that the Council:

- (a) improperly changed their position by not selling two plots of land at the Site which they had marketed during February 2005 (*not upheld*); and
- (a) had not acted properly, in delaying the sale until the development status was known (*not upheld*).

Redress and recommendations

Although the Ombudsman has not upheld this complaint, she is pleased that the Council acknowledged there were gaps in their records of some of the processes involved, regarding their considerations of the development potential of the Site, as it is essential that written records are maintained to the highest standard possible, throughout all planning processes. Therefore, the Ombudsman recommends that the Council review the circumstances which led to this failure; consider whether there are lessons to be learned from this; and advise her of the outcome.

The Council have accepted the recommendations and will act on them accordingly.

Main Investigation Report

Introduction

1. The Ombudsman received a complaint from Mr C that Fife Council (the Council) had not, in a fitting manner, considered his offer to purchase two plots of land (Plot 1 and Plot 2, see Annex 2), at a site within East Fife (the Site) which the Council had marketed for sale during February 2005. In Mr C's view the Council should have delayed the sale of the Site until the development status of the Site was known. Furthermore, had the Council done so, it would have prevented Mr C having undertaken a lot of work, expense and time in preparing a submission for land at the Site, the sale of which was subsequently aborted. According to Mr C, this outcome was a direct result of the Council not knowing what it was doing and behaving incorrectly.

1. The complaints from Mr C which I have investigated are that the Council:
 - (a) improperly changed their position by not selling two plots of land at the Site which they had marketed during February 2005; and
 - (b) had not acted properly, in delaying the sale until the development status was known.

Investigation

2. The investigation of this complaint involved obtaining and reading all relevant documentation, including correspondence between Mr C and the Council. I have reviewed the planning brief for the Site, the developer requirements, the sale particulars and the Council advertisement. I have also viewed Mr C's supporting sketches which he included with his submission. I wrote to the Council on 23 August 2007 and received their reply dated 30 October 2007.

3. 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 improperly changed their position by not selling two plots of land at the Site which they had marketed during February 2005

4. Mr C told me that the Council marketed the Site for sale and then revoked their decision. In Mr C's view, this had resulted from the fact that the Council had not cleared the sale of the Site with all necessary departments and committees before it was marketed. According to Mr C, the Council should

have cleared any planning brief and requirements at the outset and this information should have been available with the particulars related to the Site, when these were sent to him. Furthermore, Mr C stated 'I think it is clear that my offer was the highest'. Nevertheless, Mr C accepted that the Site could go to a better offer or indeed a lower offer but that such a situation had not happened in this case.

5. Mr C told me that, when the Council marketed the Site, he received the particulars in February 2005. These particulars mentioned that a residential development of the Site was generally supported by the Council's Development Services, subject to suitable design and provision of access into the Site. Following the requirements stipulated in the brief, Mr C spoke to the Council's Transportation Services to establish parking standards. I have seen that Mr C endeavoured to meet the requirements that were outlined in the brief (see paragraph 3).

6. In addition, Mr C stated that he telephoned the Council's Planning Department and was told that there were no specific conditions attached to the Site - such as a restriction for a single house plot or a height limit of one and a half storeys. According to Mr C, 'the Planner was open minded regarding my proposal to provide four affordable flats in a two storey building and agreed that there was little opportunity in the area to provide this type of accommodation'.

7. Mr C explained that, following this discussion, he worked on his design to ensure that it fitted in with the existing neighbouring housing. He also had his design costed by a quantity surveyor and considered by an engineer, with regard to structure and likely ground conditions. Finally, an agent considered a likely selling price and, thereafter, Mr C arrived at a price to offer for the Site.

8. A closing date had been set by the Council for 22 March 2005. According to Mr C, he submitted his offer through a lawyer and included his design sketches (see paragraph 3). The Council responded by letter, dated 29 March 2005, and stated that 'no decision had yet been taken on which offer(s) to proceed with'.

9. Within their further letter, dated 28 April 2005, the Council advised 'no decision yet and all offers will be considered by Committee at Policy and Resources Committee on 16 June 2005 and I shall revert to you as soon as possible after that date'.

10. Subsequently, in a further letter to Mr C's lawyer dated 10 August 2005, the Council stated 'still unfortunately liaising with my colleague in Development Services as to ascertaining what the development potential and brief for this site is. Only once this is clear will we be able to confidentially proceed with the prospective purchaser considering that any sale would be subject on planning permission being received'. Mr C understood that at that stage, no decision had been made, however, as the Council then stated 'rest assured your client's offer [Mr C] is of interest to the Council', Mr C considered from this statement that his offer was the best received.

11. On 10 November 2005, the Council advised Mr C that no decision had been reached and on 12 December 2005 outlined that, although some progress had been made, there remained procedural matters to be addressed 'the timescale of which is uncertain'. This letter also intimated that a planning brief had been produced for a single house plot, no more than one and a half storeys in height (see paragraph 7). The Council also outlined that the brief had to go to Committee to be approved.

12. According to Mr C, when he received the letter from the Council dated 12 December 2005, he discussed the single house plot and height restrictions with a policy planner in Development Services (the Policy Planner), who had drawn up the brief for the Site although, in Mr C's view, the Policy Planner appeared vague about how she had arrived at the brief (see paragraph 7 and Annex 2). In addition, Mr C stated that the Policy Planner told him that the brief would be considered at a meeting to be held in March 2006. Thereafter, the Policy Planner told Mr C that, as the brief had a few more hurdles to clear, it would be some time before the Site would be marketed. Mr C then asked the Policy Planner a variety of questions. These were addressed by the Policy Planner (see Annex 2). Mr C stated he also talked to the Policy Planner about affordable housing and that she had agreed there was a need for this. I have seen a letter dated 28 July 2006 from the Estates Services team leader (Team Leader 1) to Mr C which included this statement: 'I note that you contacted colleagues in Development Services and Transportation Services for comments on potential developments. As you will be aware, these discussions are informal with a view to producing a report to the Development Committee and do not guarantee that planning consent will be granted.'

13. In a letter to Mr C dated 23 February 2006, the Council stated that a decision had been made by Development Services 'not to support development on these sites. As Development Services will not support development on the sites, then the Council will not proceed with a sale'.

14. Thereafter, Mr C complained to the Council, regarding the Council's withdrawal of the sale of the Site. I have seen from the Council's Chief Executive's reply to Mr C, dated 28 November 2006, that he was satisfied the Site was appropriately marketed, after having been considered to have the potential for residential development (dependent on the planning process), and there was no reason to expect that a sale could not be completed (see paragraph 6). In addition, the Chief Executive stated that while the Site was on the market, further discussions were held with the local community which led to the view that residential development on the Site was inappropriate. However, 'this did not preclude offers being made on [the Site], as it was still considered that [the Site] still had some development potential, as had been advertised' (see paragraph 3). The Chief Executive agreed that these discussions, regarding the development potential and a possible planning brief for the Site, did delay the final outcome and stated, 'Although protracted, it was finally the inclusion of [the Site] as Protected Open Space within the Local Plan, which meant that [the Site] would most probably not achieve any change of use at all. At that point it was realistic to end the sale of the land once the zoning was known'. The Chief Executive said it was regrettable that these discussions had taken some time and the decision not to proceed with the sale was not communicated until February 2006 (see paragraph 14). However, he was satisfied that the Council had acted correctly in delaying the sale, until the development status was known, and subsequently not completing the sale, once it was apparent that the Site was zoned for open space.

15. Mr C stated he had undertaken a lot of work and expense in order to make a submission for the Site and due to the Council who, in his view, 'quite frankly did not know what it was doing', all of this work had been aborted. Furthermore, although Mr C acknowledged the inclusion within the sale particulars that the Council was not bound to accept the highest or indeed any offer for the Site, his view was that this did not excuse the Council 'for its incompetence or indeed its gung-ho approach to marketing [the Site]' (see paragraphs 5, 6, 7, 10 and 12). Mr C also stated that with his submission he had enclosed his design sketches of the proposed layout of the Site which had included floor plans and elevations (see paragraph 3), however, the Council made no comment on these sketches.

Mr C also refuted the Council's reasons for their subsequent rejection of his submission, on the grounds that building line and garden ground requirements had not been met. In Mr C's view, these were two issues which could have been negotiated.

16. Mr C considered that at the time of the proposed sale of the Site, the zoning of the Site would have allowed for a residential development (see paragraph 3 and paragraph 6). As the zoning had changed in the draft local plan, the likelihood of a consent being obtained had diminished (see paragraph 15).

17. In their reply to my enquiries, the Council stated that it was clear, from the timetable of events that the position into the zoning of the Site had changed, particularly in relation to the emerging local plan. The draft local plan date was March 2005 and the finalised local plan was August 2006 (see Annex 2). Planning officers were alerted to the possible implications of the Site by the emerging local plan. However, the changed status of this area did not take place until after the Site had been marketed by the Council (see paragraph 6 and paragraph 14). In addition, the Council stated that a fundamental review of the green spaces strategy in the local plan had been taken, following community consultation.

18. According to the Council, the original decision to make the Site available for sale was based on an application to purchase part of the Site to extend the garden of one of the adjacent houses. At that time it was noted that there may have been potential for a larger development on the land, rather than as the extension to an existing garden.

19. Furthermore, before the Site was advertised for sale, the Council told me that comments were invited from the local Councillor, Community Services, Development Services, Housing Services and Transportation Services. According to the Council, 'The local Councillor had reserved his position and asked about consultation with the Community Council. Housing supported the sale of the larger area [Plot 1]. Community Services agreed to the sale of the larger area in principal. Transportation Services supported the development of the larger site, subject to compliance, with guidelines on access. Following this the local member was advised that all services supported the sale'.

20. In addition, the Council told me that it was also noted at a site inspection that Plot 2 (the land opposite) could also be included to improve the development potential and that further consultation with the original parties was carried out. They also stated that, at that time, no objections were raised to the disposal of both sites together (see paragraph 20 and Annex 2).

21. According to the Council (in terms of the procedure for the disposal of land), the Scheme of Administration allows for the disposal of land under delegated powers, where there are no service objections or objections from the local member. At the time the Site was originally advertised, no objections to the sale had been received, therefore, the Council stated it was appropriate for the Site to be offered for sale (see paragraph 3 and paragraph 6).

22. Furthermore, although the Council told me that a planning brief was not usually prepared for small sites, such as was the case in this instance, nevertheless a planning brief had subsequently been produced.

23. I have seen a copy of the planning brief for the Site which included the context, the size and layout of the Site (see Annex 2). The planning brief also listed policies applicable to the development of the Site which included 11 Largo and East Neuk local plan policies (adopted June 1995) and five structure plan policies (adopted July 2002). I observed the statement that 'it should also be noted that the draft St Andrews and East Fife local plan was published in March 2005. The finalised plan is due to be adopted in 2007'. The planning brief also outlined the relevant service providers, potential constraints and, included within the section that addressed developer requirements, was recorded 'Acceptable Uses - Residential development – one detached house'. I have also seen and reviewed the sale particulars which incorporated 'the sale will include a tight timescale to include that the prospective purchaser submits a planning application within 21 days of conclusion of missives and development commences within [six] months and is completed within 18 months of that date'. Offers had to arrive at the Council 'no later than 12 noon on Tuesday 22nd March 2005' (see paragraph 3 and Annex 2).

24. I have reviewed the correspondence from the Council to Mr C's lawyer, dated 10 August and 12 December 2005, which stated that no decision on the sale of the Site had been made (see paragraph 12 and paragraph 13) 'however rest assured your client's offer is of interest to the Council'; and 23 February 2006 that Development Services would not support development of

the Site 'due to the size of the sites, building line and garden ground requirements, and the proposed Local Plan designation' (see paragraph 15 and paragraph 17).

25. Within my review of the complaint file I have considered a letter, dated 11 August 2006, from Team Leader 1 to Mr C. Team Leader 1 stated that, within the sale particulars, the Site was described as a 'possible residential development site' and also 'planning application will require to be determined prior to any transaction being settled'. Thereafter, Team Leader 1 stated that no guarantee was given that planning consent would be granted for any development. He acknowledged that 'it had originally been anticipated that [the Site] would be suitable for a residential development [however], after further consultation with the local community it was felt that this would not be appropriate. The result of this is that [the Site] is now zoned in the St Andrews and East Fife Local Plan as Protected Open Space ... Regrettably it took some time for these discussions with the Community and this decision was not communicated until February 2006'. Regarding these discussions, I have observed that Team Leader 1 had also stated that, following the Site being advertised, initial comments were received objecting to the development of the Site. He stated that 'At that time the scale and depth of feeling relating to the development of [the Site] was not fully appreciated'. He added that, as these concerns were addressed, it became clear that further consideration would require to be given to the sale of the Site. As this situation occurred and coincided with the set closing date, it was considered appropriate to allow the closing date to stand while the concerns were being addressed (see paragraph 15).

(b) The Council had not acted properly, in delaying the sale until the development status was known

26. Mr C stated that he agreed with the Council that the Site was marketed as a possible residential development site and a planning application would require to be determined prior to any transaction being settled (see paragraph 26). Furthermore, he understood and accepted the reasoning for this was due to (i) the Site was not being sold by the Council with planning consent; and (ii) the offer of purchase was dependent on satisfactory planning consent being achieved.

27. However, according to Mr C, the Council told him that while the Site was on the market, further discussions (Mr C presumed with the local community)

were held regarding the development of the Site. In Mr C's view, as the Site was only on the market for six weeks, if discussions were ongoing during this period, why was this not conveyed to interested parties such as himself or, indeed, as he stated 'why was the closing date not deferred until the matter had been resolved?'

28. In Mr C's view, the Council should have carried out consultations fully before the Site was marketed for sale. He considered that this would have given the opportunity for local concerns to have been raised, in good time, by the elected Council members (had they been consulted) and the Site may then not have been marketed.

29. Mr C stated that he complied exactly with what the sale particulars required him to do, both in the design and submission of his offer. Furthermore, although he had complied with Council procedures, this had only led to his time being needlessly spent and expenses being incurred (together with a potential loss of a possible development profit to him), due to the Council having delayed the sale of the Site until the development status was known (see paragraph 1).

30. In their reply to my enquiries, the Council stated that Mr C's solicitor was advised on 27 February 2006 that a decision had been made by Development Services not to support Mr C's proposed development on the land. They stated that this was due to the size of the Site, building line and garden ground requirements not being met and also because of the proposed local plan designation at that time (see paragraphs 16, 17 and 18). The Council stated that they had provided contact details within Development Services if further information was required and told me that a similar letter had been sent to all interested parties.

31. The Council told me that between 12 December 2005 and 23 February 2006, the period when Development Services appeared to have changed their minds and withdrawn their support to market the Site, discussions were ongoing regarding the development potential of the Site. Furthermore, the Council stated that they had included details regarding these discussions in their correspondence with Mr C as follows:

'With regard to your specific timeframe between 12 December 2005 and 23 February 2006, records are at best patchy as to the actual detail of the process that occurred. However, it is clear that the production of the Development Brief re-focussed attention on the principal of selling

[the Site] in the first place. This in turn seems to have led to a re-examination of the practical ability of [the Site] to accommodate development in the context of the Council's operational Development Management policies (in relation to amenity space, garden ground, etc), as well as in the context of the Local Plan zoning. This combination of factors eventually led to Development Services' support for disposal of [the Site] for development being withdrawn.'

32. In addition, the Council provided a background to the planning potential of the Site and stated that, up until 11 January 2005, there appeared to have been general agreement between all services that Plot 1 should be disposed of and would be suitable for a single house plot. This situation began to change from 12 January 2005, however, when the Council's Estates Services sought advice on the developability of Plot 2. Transportation Services and Community Services offered no objection to its disposal but there was no formal response from Development Services. However, a verbal comment was issued by the Policy Planner (in a fax from Estates Services on 6 February 2005) that Plot 2 should not be developed but that it could be suitable for an open parking area. Furthermore, there was no record of activity from then until 5 May 2005, during which intervening period, both Plot 1 and Plot 2 appear to have been advertised for sale (see paragraph 3, paragraph 24 and Annex 2).

33. Thereafter, the Council's Chief Executive stated he presumed 'that the correspondence trail began again once offers had been received following the marketing of [the Site]. Emails between the Planner and Estates Service of 5 May and 2 June 2005, give comments on the unsuitability of [the Site] to take a flatted development of four units, reiterating that a single house on [Plot 1] and possibly parking on [Plot 2] would 'just' be acceptable'.

34. According to the Chief Executive, the Local and Community Policy Team did not become involved until 10 August 2005, at which time a request was made to produce a development brief for the Site. This was prepared by the end of November 2005 and copies issued to Transportation Services, Estates Services, the Locality Manager and the local Councillor.

35. The Chief Executive stated that:

'On 30 November 2005, the local Councillor indicated his objection to the sale of [the Site] in principle, and reiterated that this position (shared by the local Community Council) had been known to the Council for some

time. Between then and 22 December 2005, there was correspondence between Development Services and the local Councillor clarifying the process involved to obtain approval for the Development Brief (i.e. drafting of a Committee Report for the East Area Development Committee, initially aimed at the January Committee but put back to the February Committee due to tight timescales relating to Development Services internal signing-off procedures).'

36. Furthermore, the Chief Executive stated that the team leader (Local Community Policy) Development Services (Team Leader 2) had indicated to the local Councillor on 29 January 2006 that the development brief had, in agreement with Estates Services, been held back from Committee pending the resolution of some queries in relation to the planning policy position. According to the Chief Executive, 'It was also indicated that the answers to these questions would determine whether the Development Brief would proceed and if so, it would go through Locality meeting before being reported to East Area Development Committee'.

37. Thereafter, there followed a visit to the Site by Team Leader 2 and the Chief Executive stated it became apparent that there were potentially some reservations about the principle of selling the land for development. The situation was clarified by an emailed reply to Estates Services of 15 February 2006, in which the Policy Planner stated that a development brief would no longer be required as the Site was not to be recommended for development due to:

- size of the Site development (this would contravene the garden ground policy);
- garden ground requirement and the effect that adhering to the building line would have on it; and
- both sites designated in forthcoming draft local plan as public open space (see paragraph 15 and paragraph 17).

38. In response to my enquiries, why the Site was firstly considered suitable for development, then in the draft local plan was designated as a protected open space and thereafter in the final plan it was no longer designated, the Council provided the following statement:

'The decision to show many relatively small areas as 'open space' in the Local Plan was reviewed between Draft and Finalised Plan stages. This was primarily a cartographic/presentational issue to remove the smallest

areas of open space from the proposal maps. However, whilst they were no longer all shown on the Maps, this does not equate with them no longer being 'designated'. All areas of open space (including [the Site]) remained under the protection of policies C6 and C7 of the St Andrews and East Fife Finalised Draft Local Plan.'

39. In addition, the Council also provided the timings for the emerging local plan from the draft local plan stage on 11 January 2005 up to the proposed finalised draft plan (see Annex 2).

(a) and (b) Conclusion

40. Mr C considered that the Council failed to deal adequately with his submission to purchase land at the Site marketed during February 2005. Furthermore, the Council had in Mr C's view, acted in an unfit manner and behaved with incompetence, by delaying the sale then changing its position by withdrawing the sale of the land. The Council have acknowledged that the delay in reaching a decision on the zoning of the Site was unfortunate, however, they stated that this was central to their decision in withdrawing the sale of the Site. They explained and justified their reasons for this decision and why it had been unavoidably delayed (see paragraph 26). Furthermore, Mr C and all parties were kept informed of the Council's consultation process and notified in good time as soon as it became known that Development Services would not support development of the Site (see paragraph 14 and paragraph 26). In addition, as a successful offer of the Site was subjected to obtaining planning consent, there was no guarantee given that Mr C's submission would have had the outcome he wished (see paragraph 27).

41. I have considered carefully all the documentation which has been made available to me, including correspondence between Mr C and the Council, and reviewed the Site particulars. Based on the paperwork I have seen, the Council correctly advertised the Site for sale during February 2005 as land that was likely to be suitable for residential development, subject to the granting of planning consent. The appropriate disclaimers were also included in the particulars. Furthermore, I have not seen evidence that there was any opposition to the sale of the Site or that appropriate parties had not been consulted before the Site was marketed (see paragraphs 20, 32 and 33).

42. It is clear that Mr C remains unhappy with the Council's decision not to sell the Site, which followed their subsequent finding that the land should be

protected open space and not developed. The Council followed the correct process in reaching this decision, which was their decision to reach. The Council was entitled to change its mind about the sale of the Site, just as it would have been unreasonable for the Council to proceed to sell the Site when the planning position was unclear (see paragraph 13 to paragraph 15). Furthermore, it would have been equally unreasonable for the Council to sell the Site, once they had decided that the Site should be zoned as open space. Having taken all these factors into account, I do not uphold this complaint.

43. Nevertheless, I am critical that, for the period between 12 December 2005 and 23 February 2006, the Council stated that the relevant records were patchy as to the detail of the process that occurred (see paragraph 32). The Ombudsman, therefore, makes the following recommendation.

(a) and (b) Recommendation

44. Although the Ombudsman has not upheld this complaint, she is pleased that the Council acknowledged there were gaps in their records of some of the processes involved, regarding their considerations of the development potential of the Site, as it is essential that written records are maintained to the highest standard possible, throughout all planning processes. Therefore, the Ombudsman recommends that the Council review the circumstances which led to this failure; consider whether there are lessons to be learned from this; and advise her of the outcome.

45. The Council have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Council notify her when the recommendations have been implemented.

Explanation of abbreviations used

Mr C	The complainant
The Council	Fife Council
The Site	The two plots of land (Plot 1 and Plot 2) for which Mr C had prepared a submission, following the Site being marketed by the Council
The Policy Planner	A policy planner in the Council's Development Services
Team Leader 1	The Council's Estates Services team leader
Team Leader 2	The team leader (Local Community Policy) Development Services
X Road	A road that skirted the Site, to the southern boundary of Plot 1 and the northern boundary of Plot 2
Y Road	A road that skirted the Site, to the southern boundary of Plot 2

The questions Mr C asked of the Policy Planner (see paragraph 13)

Mr C's questions

Policy Planner's answers

Had she seen his scheme?

She thought she had

What was wrong with it?

She thought it did not have enough open space

Had she discussed the brief with the planner mentioned in the particulars?

She said she had not

The plots as advertised in the planning brief for X Road (see paragraph 24, paragraph 31 and paragraph 33)

'[Plot 1] – a 306 m² angular shaped plot, with [X Road] to the southern boundary. Currently the site is utilised as an area of open space within the settlement, laid in grass, with saplings planted throughout. The north/north east of the site, there is a steep embankment, where there is a disused railway line at the foot. To the west, the site is directly adjacent to the existing residential development and its surrounding garden ground.'

'[Plot 2] – a 280 m² plot, across the road from [Plot 1], with [X Road] to the northern boundary, and [Y Road] to the South. To the western boundary, the hedge is directly adjacent to the residential rear garden. The plot would serve as a landscaped parking development within [Plot 1].'

The timings for the emerging local plan (see paragraph 39)

- St Andrews and East Fife draft local plan was approved by Committee for public consultation on 11 January 2005
- Public consultation period from March to May 2005
- Report on representations received to the draft local plan submitted to the East Area Development Committee (for comment) on 5 May 2006 and to the Environment and Development Committee (for decision) on 1 June 2006
- St Andrews and East Fife finalised draft local plan was approved for public consultation at the Environmental and Development Committee on 31 August 2006
- Public consultation period for the finalised draft plan should have been from January to March 2007 but uncertainty surrounding the Fife structure

plan position means that the finalised draft plan has not yet been out to public consultation.