

Scottish Parliament Region: Mid Scotland and Fife

Case 200603296: Fife Council

Summary of Investigation

Category

Local government: Planning

Overview

The complainant (Miss C) was concerned that Fife Council (the Council), in the course of processing a planning application, had deleted a term in a Section 75 agreement (the Agreement - a legal agreement between a planning authority and a developer) without referring the matter back to elected members on the Council's East Area Development Committee (the Committee).

Specific complaint and conclusion

The complaint which has been investigated is that the Council dropped a requirement that a developer (the Developer) should demonstrate seven million pounds of membership sales for a proposed golf complex without referring this change back to the Committee (*not upheld*).

Redress and recommendations

The Ombudsman has no recommendations to make.

Main Investigation Report

Introduction

1. On 25 January 2007, the Ombudsman received a complaint from a woman, referred to in this report as Miss C, who was concerned that Fife Council (the Council), in the course of processing a planning application, had deleted a term in a Section 75 agreement (the Agreement - a legal agreement between a planning authority and a developer) without referring the matter back to elected members on the Council's East Area Development Committee (the Committee).

2. The complaint from Miss C which I have investigated is that the Council dropped a requirement that a developer (the Developer) should demonstrate seven million pounds of membership sales for a proposed golf complex without referring this change back to the Committee

Investigation

3. The investigation of this complaint involved obtaining and reading all the correspondence between Miss C and the Council. I also sought the advice of a planning adviser (the Adviser). I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Miss C and the Council were given an opportunity to comment on a draft of this report.

Complaint: The Council dropped a requirement that the Developer should demonstrate seven million pounds of membership sales for a proposed golf complex without referring this change back to the Committee

4. Miss C was concerned about the way the Council had handled a planning application for a golf complex. She said that when the planning application had been approved by the Committee, their approval included a requirement that the Developer should demonstrate seven million pounds in membership sales for the project to go ahead. Miss C said that this requirement was subsequently dropped and that the only requirement was that the Developer should demonstrate seven million pounds in investment. She believed that this change was significant as having to demonstrate membership sales showed that the project was viable and that members of the public were interested in, and would use, the golf complex. Miss C believed that the decision to drop the requirement to demonstrate seven million pounds in membership sales should not have been taken without referring the matter back to the Committee.

Evidence

5. In their application for outline planning permission, under the heading 'Viability', the Developer stated:

'4.3 With prudence in mind, a start on-site will not be made until sufficient revenue from international membership sales has been secured.

4.4 The overall cost of the development is estimated at £15m[illion]. It is reasonable to assume that membership sales will advance at a greater level once the development commences. £7m[illion] is considered a sufficient level of revenue to be secured before a start on site is made.

4.5 In terms of ensuring viability in the construction phase, the applicant is prepared to accept an appropriate clause in [the Agreement] restricting a commencement on site until such a time as independent proof of the securing of £7m[illion] of membership sales is made. Furthermore, the applicant is prepared to put in place a performance bond that will guarantee the completion of the development.'

6. The minutes of the Committee's departure hearing on 29 January 2004, which considered the planning application in relation to the fact that it departed from the Local Plan, stated:

'[the Developer was] prepared to accept a planning condition that no work would start on site until the £7million funding requirement had been secured. In addition, there would be a main contract and performance bond to guarantee that the development was completed in the event of any funding difficulties.'

In response to questions from Councillors, the Developer further stated:

'Funds to proceed with the project were now in place and he [the Developer's representative] found it impossible to believe that the £7 million in membership sales would not be reached. In the event that the membership fees stopped, the golf club would continue. [The Developer] anticipated that the £7 million funding requirement would take less than 6 months to raise.'

7. The Committee considered the application for outline planning permission on 30 March 2004. The planning report, recommending consent, stated:

'2.10 At the Departure Hearing the developers were asked to comment on the possibility of the development not being completed or that the funding necessary might not be reached to enable completion. The developers have confirmed that firstly, no works should start on any part of the site until sufficient funding is in place and guaranteed with proof to this Planning Authority that the development could be completed and secondly, that they would be prepared to lodge a bond with this Council to ensure that, if for any reason there was a funding difficulty during construction, sufficient funds were available to enable the development to be completed ... The commitment to the funding would be demonstrated by the applicant through an appropriate clause in [the Agreement] and an associated bond.'

8. The report recommended approval of the outline planning application, subject to a number of conditions. Two of those conditions were relevant to the issue of funding for the development:

'10. No development shall commence on site until the applicant has lodged evidence to this Council which already demonstrates £7 million of investment has been committed to the proposals.'

The reason for condition 10 is stated as:

'10. To ensure that development does not commence until it has been demonstrated that funding commitment is available for the development to be completed.'

The other condition related to the drawing up of the Agreement:

'B. [The Agreement] required to cover the following heads:

- no works shall start on the site until the developer has demonstrated to the satisfaction of this Planning Authority that £7 million of membership for the golf development approved has been fully committed.
- the developer shall lodge a bond to enable the buildings to be completed.'

9. An early draft of the Agreement stated:

'EIGHTH. No works in furtherance of the Notice of Planning Consent to follow hereon shall commence on the Development Site until it has been demonstrated to the satisfaction of [the Council] that [the Developer has] secured sales of memberships of the proposed private golf club to a value not less than £7 million sterling.'

10. On 25 June 2004, the Developer wrote to the Council stating:
'Clause EIGHTH is unnecessary and should be deleted because the matter is already dealt with by [a condition] of the draft letter of consent ...'
11. On 5 August 2004, the Council replied stating:
'Clause EIGHTH – I agree that this does not need to be in both the Consent Notice and [the Agreement] and I am agreeable to it being deleted from one of them.'
12. Although the clause relating to seven million pounds in funding was removed from the Agreement, the Agreement did still refer to a bond being in place:
'No works in furtherance of the Notice of Planning Consent to follow hereon shall commence on the Development Site until a bond granted by a reputable bank ... has been delivered to [the Council] to secure:

(a) a sum not exceeding Six Million Pounds sterling ... being the maximum cost either of completion of all buildings to be constructed ... or demolition of all uncompleted buildings ...'

The Council's response

13. The Council said Condition 10 of the planning permission referred to seven million pounds in investment being provided and that one of the heads of the Agreement proposed in the report to the Committee stated that seven million pound in membership sales was required.
14. The Council said that, during discussions between the Council, the Developer and the two relevant landowners, the Developer made the point that the proposed requirement in the Agreement was a duplication of the requirement in condition 10. The Council said that duplication of conditions in Section 75 agreements went against advice of Scottish Executive¹ Circular 12/1996, which stated:
'19. There is a tendency on the part of some authorities to include, for the sake of convenience, a range of matters in an agreement including, for

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.

example, all the conditions attached to a planning consent. In the Secretary of State's view this is unnecessary as it would entail unnecessary duplication and frustrate the right of appeal. Authorities should limit agreements to quite specific purposes which may lead to some time savings.'

15. The Council said that Planning and Legal Officers of the Council decided that the requirement would be the subject of a condition only as this adequately protected the Council's interests and provided an easier enforcement regime than Section 75 agreements if things went wrong.

16. The Council said that, when approving the outline application, elected members on the Committee were concerned that the proposed golf complex could end up not being viable and cease trading, which would either leave a 'white elephant building' or a part-finished development. The Council said the provision to include a Section 75 agreement clause requiring seven million pounds in membership sales and the condition to require seven million pounds in investment were imposed to provide a reasonable degree of surety that the proposal demonstrated it was viable prior to construction.

17. The Council argued that both committed investment and membership sales were similar in that they both demonstrated that funds were allocated to the project. They said that the Developer was financing the project entirely from his own funds and that both corroborated membership sales and corroborated investment gave the same degree of security and fulfilled the overall aims of the condition attached to the consent.

18. The Council asserted, therefore, that the aims of elected members were secured and that there was no change in the aim of the original decision by the Committee. The Council said the change from membership sales to private investment only occurred because the original developer sold the site to the Developer who decided to fund the development in a different way.

19. The Council explained that elected members agreed the heads of terms or principles of Section 75 agreements, but that Council officers had wide discretion in drafting agreements. The Council said that only when the aim of the Committee could not be secured would the matter be referred back to the Committee. The Council said that the requirement of elected members in this case was to ensure that the development was properly funded prior to

development commencing to avoid a failure in the development. The Council said that officers achieved this aim. The Council said they considered it unnecessary to refer matters back to the Committee when it was only the legal niceties which had changed, not the overall result which elected members wanted to secure.

Miss C's comments on the Council's response

20. In commenting on the Council's response, Miss C maintained that she did not consider that membership sales and investment were similar or fulfilled the same purpose. She said that membership sales demonstrated that outside investors were prepared to support the project, whereas investment did not. She also disagreed that the decision to remove the clause in the Agreement was a legal nicety. Miss C said that it was an important change which should have been returned to the Committee.

The Adviser's comments

21. The Adviser told me that there was a fine distinction between the past experience of other golf developments, which provides material references for the planning decision in this case as long as they relate to the use and development of land, and the business viability of a similar development (which is not related to the use and development of land).

22. The Adviser said that, in his opinion, ensuring the satisfactory completion of a development so that it was not left incomplete in some essential aspect which affects the environmental impact or other relevant planning consideration was a legitimate planning consideration, whereas the economic viability of a development was not a material consideration.

23. The Adviser told me, therefore, that he did not support what he considered was Miss C's view that the planning process should be used to seek to guarantee the business success of any development proposal. In commenting on a draft of the report Miss C clarified that she felt that the planning process should have been used to protect the town in which the proposed development was to be located rather than to guarantee the business success of any development.

24. The Adviser said that if the Committee had wished, as Miss C believed, for seven million pounds of membership sales to be produced by the Developer in

order to demonstrate the business viability of the development, there would be considerable doubts about the materiality of such a requirement.

25. The Adviser said, however, that if the intention of requiring seven million pounds in membership sales was to have evidence of the necessary capital to complete the development (rather than whether the business would be viable) then he did not see the advantage of a clause in the Agreement requiring seven million pounds of membership sales over the condition in the planning consent requiring seven million pounds in investment, or the need for both.

26. The Adviser noted that the presence of the condition requiring evidence of seven million pounds in investment, combined with the requirement that the Developer provide a six million pound bond, meant there would be no additional benefit, in terms of legitimate planning considerations, in requiring evidence in relation to membership sales.

27. The Adviser told me that the discretion of the Council's officers was generally prescribed by their Scheme of Delegation (the Scheme). He said the Scheme emphasised the positive powers of officers and was clearly designed to afford maximum delegation to ensure that decisions taken at committee were confined to those of strategic policy importance or those that were inherently political in nature.

28. The Adviser said that, in his view, the Council's officers had discretion to decide that the minuted intention for there to be a head of terms in the proposed Agreement relating to membership sales added nothing to the planning condition requiring evidence of seven million pounds in investment. The Adviser said he was satisfied that the Council's officers did not require further approval from the Committee as they were adequately covering the material requirements of the Committee decision.

Conclusion

29. In light of the evidence set out above and the Adviser's comments, I am satisfied that it was appropriate for the Council's officers to decide that the Agreement should not include a clause requiring the production of seven million pounds in membership sales.

30. The Council's officers had discretion to interpret the Committee's intentions in asking that this clause be included in the Agreement. They also

had discretion to reach the decision that requiring seven million pounds in membership sales would not add anything to the planning condition that already required the production of seven million pounds in investment and the clause in the Agreement that required the production of a six million pound bond.

31. In the circumstances, therefore, it was appropriate for the Council's officers not to include a clause relating to membership sales in the Agreement. Consequently, I do not uphold this complaint.

Explanation of abbreviations used

Miss C	The complainant
The Council	Fife Council
The Agreement	The Section 75 agreement between the Council and the Developer
The Committee	The Council's East Area Development Committee
The Developer	The developer who applied for planning permission to build a golf complex
The Adviser	The Ombudsman's planning adviser
The Scheme	The Council's Scheme of Delegation