

Case 200502604: Falkirk Council

Summary of Investigation

Category

Local government: Planning; policy; administration

Overview

The complainant (Ms C) raised four specific complaints about the inadequate handling of a planning application by Falkirk Council (the Council), submitted by a Planning Consultant (the Agent) on her behalf.

Specific Complaints and conclusions

The complaints which have been investigated are that:

- (a) the Council failed to deal adequately with the pre-planning application enquiry (*upheld*);
- (b) the Council failed to handle the outline planning application adequately and within statutory deadlines (*partially upheld*);
- (c) there were delays by the Council in submitting information in connection with Ms C's appeal to the Scottish Executive Inquiry Reporter's Unit (SEIRU) 1 (*upheld*); and
- (d) the Council failed both to respond and to respond adequately to reminder letters, emails, faxes and telephone calls (*not upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

- (i) offer Ms C a full apology for the shortcomings identified, and consider whether it would be appropriate for this to be reinforced by a modest payment in recognition of the effect of those shortcomings on her;
- (ii) apologise to Ms C for the delay in submitting information to SEIRU and explain why it occurred.

¹ Now known as Scottish Government Directorate for Planning and Environmental Appeals (DPEA)

Main Investigation Report

Introduction

1. On 19 December 2005, the Ombudsman received a complaint from Ms C that Falkirk Council (the Council) had not handled adequately the pre-planning application enquiry (the Enquiry) and, thereafter, a planning application, submitted by a Planning Consultant (the Agent) on her behalf. The Enquiry and subsequent planning application related to the development of land for housing purposes. The application was registered on 1 June 2005. According to Ms C, she and the Agent had contacted the Council on several occasions during 2005, initially regarding the progress of the Enquiry and then regarding the progress of the application. Ms C said that they did not receive either contact from the Council or adequate responses, in good time. In Ms C's view, the Council had avoided putting matters in writing, in order to avoid accountability.

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

- (a) the Council failed to deal adequately with the Enquiry;
- (b) the Council failed to handle the outline planning application adequately and within statutory deadlines;
- (c) there were delays by the Council in submitting information in connection with Ms C's appeal to the Scottish Executive Inquiry Reporter's Unit (SEIRU); and
- (d) the Council failed both to respond and to respond adequately to reminder letters, emails, faxes and telephone calls.

Investigation

3. The investigation of this complaint involved obtaining and reading the documentation, including correspondence between Ms C, the Agent and the Council. I also considered the relevant planning application, the local plan and the appeal responses from SEIRU. I wrote to the Council on 26 February 2007 and 5 March 2007 and received their reply on 23 April 2007. As my investigation progressed, I requested from the Council a copy of the relevant planning file.

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

(a) The Council failed to deal adequately with the Enquiry

5. Ms C told me that the Agent was verbally advised by a planning officer (Officer 1) to submit a pre-planning application enquiry (the Enquiry) regarding the planning proposal, rather than submit a formal application. This was done on 24 February 2005, however, according to Ms C, no contact was received from Officer 1 during the next two months and some nine weeks elapsed before the Agent received an informal reply from Officer 1's superior (Officer 2) on 4 May 2005. He indicated that he was not going to respond to the Enquiry and the Agent should submit a formal outline planning application. This was not the response that Ms C and the Agent had expected, following the initial advice and guidance the Agent had received from Officer 1 during their pre-planning application discussion. Ms C stated that, had it not been for Officer 1's advice to submit the Enquiry, the Agent would have submitted the formal planning application some three months earlier. Documentary evidence which Ms C provided included the Enquiry submitted on 24 February 2005; an email dated 6 April 2005 from the Agent to the Council requesting a response to the Enquiry; and the Agent's note of a telephone call about the Enquiry which he made to Officer 1 on 4 May 2005.

6. In response to my enquiry to the Council, I was informed that they could find no evidence on file that Ms C was told that they were not going to respond to the Enquiry (see paragraph 5). They explained that the purpose of a pre-application enquiry is to give the applicant, without prejudice, an indication of the types of issue which may arise on the submission of a planning application. Pre-application enquiries are generally encouraged in terms of good practice. In this instance, the Enquiry gave rise to concerns over the loss of open space if the site was developed for housing. The Council explained that pre-application enquiries do not take precedence over submitted planning applications and the delay in response in this case and unavailability of the officer concerned was due to workload pressure. A response had been sent to Ms C on her formal complaint on these issues on 9 November 2005, apologising for their failure to deal with the Enquiry in a satisfactory manner. (Having had access to the Council's planning file, I noted that this contained no documentation on the Enquiry.)

7. The Chief Executive of the Council also told me that at that time the then Development Control Unit within the Council was operating with a number of vacancies. In the year 2005/06 the team determined some 1224 applications of varying degrees of complexity which was a significant workload. Faced with

such an amount of work and shortage of staff, it was clearly necessary for any planning authority to prioritise its workload. In the Chief Executive's view it was perfectly reasonable for any planning authority to choose to prioritise the processing of planning applications over pre-application discussions. Since 2005, Development Services had undergone major additions in terms of technology and staffing levels and the shortcomings in pre-application service delivery, experienced by Ms C in early 2005, should not arise again.

(a) Conclusion

8. Ms C believed that the Council failed to deal adequately with the Enquiry on the grounds of delay. The Council have explained that they generally encourage planning enquiries in terms of good practice but it is clear from the Chief Executive's response to me (see paragraph 7) that in early 2005 responding to such enquiries was being given lower priority than dealing with planning applications. It would have been good practice to explain that to people making such enquiries. When the Council responded to Ms C's complaint, they accepted that there was a delay in dealing with the Enquiry and apologised to Ms C. They have also explained that major additions which have been made in terms of technology and staffing levels should mean that the shortcomings in pre-application service delivery experienced by Ms C in early 2005 should not arise again. In all the circumstances, while I uphold this complaint the Ombudsman has no further recommendations to make.

(b) The Council failed to handle the outline planning application adequately and within statutory deadlines

9. The Agent submitted an outline planning application on Ms C's behalf on 31 May 2005 and received confirmation from the Council on 10 June 2005 that the application had been registered. As part of this process, the Council made arrangements to place an advertisement in the local newspaper. However, although the application was for outline planning consent, the Council advertised it as though it was for detailed consent.

10. Ms C commented that the Council's error in the advertisement of the application was inexcusable and she was dissatisfied with the way the Council handled her complaint about the matter. The Agent complained to the Council and then Ms C and the Agent repeatedly tried to contact Officer 1, both by telephone and email, about this error and also to ascertain how matters were progressing but they could not obtain a response.

11. However, on 16 August 2005, the Agent received a telephone call from Officer 1 with the advice that he had decided to refuse the outline planning application on the grounds that it would cause 'adverse amenity for neighbouring houses' and that he would give priority to sending out the Decision Notice. By 23 September 2005 the Decision Notice had not been received by Ms C or the Agent. According to Ms C, she telephoned Officer 2 on that day and he told her that the planning application had been turned down on the grounds 'that the proposal was contrary to open space policy'. She said this advice conflicted with the reasons given by Officer 1 in his assessment of the planning proposal.

12. With regard to the error in advertising the planning application, the Council commented, in their response to the Ombudsman's office dated 19 April 2007, that they accepted that this was an administrative error but that they had corrected this at the earliest opportunity and apologised to Ms C when a response was sent to her formal complaint on 9 November 2005. The Council told me that such errors may occur at the initial processing of information by Development Services, or in the publication process of the newspaper concerned, but they could not give a reason why this specific error occurred. The Council told me that they were currently seeking clarification on the exact origins of this discrepancy. However, when I checked the Council's planning file, I noted that it contained an email, dated 14 July 2005, stating that the error arose from problems with the Council's emerging IT system. Subsequently the Council said that although that was a possible explanation it had not been established with certainty how the error occurred.

13. In respect of the decision to refuse the planning application and the telephone call which Ms C said the Agent had with Officer 1 on 16 August 2005 (see paragraph 11), there was no note of a telephone discussion on that day on the Council's file. However, the planning file did hold an undated, unsigned handwritten note headed 'notes on discussion with [the Agent]' which stated:

'I informed [the Agent] of the consultation responses ... and advised I would be recommending refusal based on potentially adverse amenity grounds on neighbours, primarily due to topography of site ... As I was going on annual leave I asked [Officer 3] to progress application to recommendation on delegated powers.'

14. In their comments to me, the Council explained that Officer 1 was not delegated to make a decision on the planning application. In the event, another

planning officer (Officer 3) drafted an initial report, which was then reviewed internally.

15. Ms C's application was refused planning permission, under delegated powers, on 23 September 2005 for the following reasons:

'(1) The site is an area of open space and it has not been adequately demonstrated that the loss of such open space will have no adverse impact on the visual or recreational amenity of the immediate area. As such it is considered contrary to Policy COM.6 (Open Space and Recreational Facilities) of the Approved Falkirk Council Structure Plan.

(2) The site is an area of open space and it is considered the proposal would have an adverse impact on the recreational and amenity value of an area of open space and is likely to set an undesirable precedent for further loss of open space in the locality. As such it is considered the proposal would be contrary to Policy BNS 31 (Protection of Open Space) of the local plan.'

16. As regards statutory deadlines, as the formal outline planning application was registered by the Council on 1 June 2005 then, to meet the requirements of planning legislation, a response should have followed by 1 August 2005 at the latest. The Council did not respond to the outline planning application until 23 September 2005 and only, according to Ms C, after 'unremitting pressure from me and my agents'.

17. In their response to me, the Council agreed that the planning application was registered on 1 June 2005 and determined on 23 September 2005. The Council stated that legislation allows for a right of appeal in such circumstances against the non-determination of the application but, they noted, Ms C chose not to appeal against non-determination.

18. The Council said that several factors contributed to this delay:

'The issues surrounding the application were somewhat complex, including the number of objections received, the land use status of the site and the associated development plan policies and national guidance and advice. These complications in assessing the application, coupled with staff annual leave commitments at that time, meant that the application took longer to determine than would have been anticipated.'

19. In the Council's reply to Ms C dated 9 November 2005, they apologised that it took until 23 September 2005 to determine this application and offered an assurance that they had taken steps to ensure that a similar situation would not arise again.

(b) Conclusion

20. With regard to the error in advertising the application, I can well understand the complainant's concern at this. While the Council have accepted there was an error, when responding to my enquiries they were not able to explain why this had occurred, although they stated that they would seek clarification on this matter.

21. However, as noted in paragraph 12, the Council's planning file contained an email suggesting that the error arose from problems with the Council's emerging IT system. This suggests that either the Council's response to my enquiry was inadequately researched in that it did not take account of the fact that enquiries into the matter had already taken place; or that there was no basis for the statement that the matter was currently being investigated. That is unsatisfactory.

22. As to what Ms C was told about likely grounds for refusal of planning permission, the Council have indicated that Officer 1 was not delegated to make a decision on the planning application. A note on the planning file (see paragraph 13) confirms a discussion with the Agent in which reasons for recommending refusal were given. Thereafter, Ms C says, she heard nothing further until she telephoned Officer 2, who gave different reasons for refusal. While the reasons for refusal of the outline planning application essentially related to both loss of open space and possible adverse impact on amenity, I do not consider there was any essential conflict between the summarised grounds for refusal in the file note (see paragraph 13) which reflects what Ms C says Officer 1 told the Agent; what she says she was subsequently told by Officer 2; and the stated grounds for refusal (see paragraph 15).

23. It is clear that there was a delay in determining the application and the Council failed to meet statutory deadlines. However, the Council have already acknowledged the delay and apologised to Ms C for this and offered her an assurance that they had taken steps to ensure that these problems should not arise in the future. I also note that, because the Council did not seek an agreement with the Agent to extend the deadline for determining the planning

application, Ms C had a statutory right of appeal which she could have exercised because of the delay (deemed refusal).

24. I partially uphold this head of complaint to the extent that there was an error in the newspaper advertisement and delay in determining the application. In commenting on a draft of this report the Council have pointed out that they have already apologised to Ms C and have asserted that in so far as she might have been caused any hardship or injustice by the delay in determining the application she had a remedy – by means of an appeal – which she chose not to exercise. While both points are true as far as they go I consider that they fail to reflect the cumulative effect of the delays and errors in this case and the extent to which they will have inconvenienced and annoyed Ms C.

(b) Recommendations

25. The Ombudsman recommends that the Council make a full apology to Ms C for the shortcomings identified in this report, and consider whether it would be appropriate for this to be reinforced by a modest payment in recognition of the effect of those shortcomings on her.

(c) There were delays by the Council in submitting information in connection with Ms C's appeal to SEIRU

26. Ms C stated her concerns that the Council had not adhered to deadlines set by SEIRU when submitting documents in connection with her appeal.

27. In their reply to me, the Council explained that Ms C had, through the Agent, appealed to SEIRU against the refusal of planning permission, in a letter dated 14 October 2005. Thereafter, the Council admitted that Development Services should have sent the completed questionnaire and supporting documents to SEIRU by 31 October 2005. It would have been open to SEIRU to hold to the deadline but they extended it. The questionnaire and supporting documents were received by SEIRU on 23 November 2005, three weeks beyond the original deadline but within the extended one. The Council also pointed out that SEIRU can award expenses against a Council which they consider to have acted unreasonably and did not do so in this case.

28. In SEIRU's appeal response to Ms C's Agent dated 30 January 2006, SEIRU agreed that the Council should have sent them the questionnaire and supporting documents by 31 October 2005. They concluded that there was no

justification for this failure and considered that the Council had acted unreasonably.

(c) Conclusion

29. It is clear that there was a delay by the Council in sending the questionnaire and supporting documents to SEIRU. While the delay does not appear to have disadvantaged Ms C's appeal it is likely to have been an additional source of annoyance for her, given the delays which had already occurred. I uphold the complaint.

(c) Recommendation

30. The Ombudsman recommends that in making the apology recommended in paragraph 25 the Council also apologise to Ms C for the delay in submitting information to SEIRU and explain why it occurred.

(d) The Council failed both to respond and to respond adequately to reminder letters, emails, faxes and telephone calls

31. Ms C said that Council officials, specifically Officer 1, ignored letters, emails, faxes and telephone calls from herself and the Agent. She stated that the only written communication received from the Council was the formal acknowledgement of receipt of the outline planning application and the faxed decision notice. She considered that the Council avoided putting things in writing to avoid accountability. One example Ms C gave was that she did not receive a reply to her complaint letter dated 6 October 2005, addressed to the Director of Development Services. Thereafter, she formally complained to the Chief Executive on 25 October 2005 and requested that a reply was sent to the Agent. According to Ms C, this complaint letter remained unanswered; however, in her letter to us dated 12 December 2005, Ms C referred to receiving a reply from the Development Control Manager dated 9 November 2005 which she described as 'entirely insufficient'.

32. In their response to me the Council stated that they responded adequately to Ms C's letter, dated 6 October 2005, by means of a letter dated 9 November 2005 from Development Services to Ms C via the Agent. The Chief Executive also stated that she responded to Ms C's letter dated 25 October 2005 on 15 November 2005. This was also addressed to Ms C via the Agent.

33. The Council did not comment on Ms C's allegations that many contacts from Ms C and the Agent to Council officials remained unanswered. The Council's file contained no dated notes of telephone conversations, faxes or letters either from or to the Agent by the Council or with Ms C, other than the Council's letter dated 10 June 2005, registering the planning application, and a letter of 30 June 2005 from the Agent to the Council objecting to a newspaper article and the complainant's correspondence (see paragraph 32). When making her complaint Ms C provided me with copies of the Enquiry dated 24 February 2005; an email, dated 6 April 2005, from the Agent requesting a response to the Enquiry; a file note made by the Agent of a telephone conversation with Officer 1 on 4 May 2005, in connection with the Enquiry when Officer 1 advised that an outline application should be submitted; the letter dated 30 June 2005 (referred to above); and a letter dated 11 July to the Scottish Environment Protection Agency (SEPA) in connection with the application.

(d) Conclusion

34. This head of complaint turns on whether or not the Council corresponded properly with Ms C and the Agent. Ms C stated that the Council failed to respond to reminder letters, emails and telephone calls from the Agent and herself. The following table summarises the documentary evidence available to me of contacts Ms C and the Agent made to the Council and the Council's responses.

Documentary evidence of contact by Ms C and the Agent with the Council	Documentary evidence of Council action/response
24/2/05 pre-application enquiry	
6/4/05 email requesting response to enquiry	
4/5/05 Agent's note of phone call to Officer 1 re enquiry	
31/5/05 outline planning application	10/6/05 notification that application registered. 23/9/05 notice that planning permission refused

30/6/05 Agent's letter objecting to newspaper article	
	[16/8/05?] note of telephone conversation with Agent
6/10/05 complaint letter to Director of Development Services	9/11/05 response from Director of Development Services
25/10/05 complaint letter to Chief Executive	15/11/05 reply from Chief Executive

35. Except in relation to the Enquiry, which I have addressed in part (a) of this report, I do not consider this shows any substantial failure to respond to enquiries.

36. On the adequacy of the responses which were provided by the Council, I have carefully read the documentation which has been made available. Ms C considered the response letter dated 9 November 2005, from the Council, inadequate and complained that this was outwith the response period specified on the Council's website. Although there was some delay in responding to her complaint, having considered the terms of the Council's responses, I cannot agree with Ms C that these did not adequately address the issues she raised in her letters of 6 and 25 October 2005.

37. In all the circumstances, I do not uphold this complaint.

Explanation of abbreviations used

Ms C	The complainant
The Council	Falkirk Council
The Agent	A Specialist Planning Consultant instructed by the complainant to act on her behalf
Officer 1	A planning officer
Officer 2	Officer 1's superior
Officer 3	A planning officer
The Enquiry	Pre-planning application enquiry
SEPA	Scottish Environment Protection Agency
SEIRU	Scottish Executive Inquiry Reporters Unit