

Scottish Parliament Region: Mid Scotland and Fife

Case 200801970: Fife Council

Summary of Investigation

Category

Local government: Planning; call for enforcement action

Overview

The complainant (Mr C) raised a number of concerns about Fife Council (the Council)'s handling of an application for planning consent by a community group to upgrade a children's play area in a public park adjoining his home which he did not consider had been installed according to the approved plans.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) in reaching a decision to grant planning consent for the application, the Council failed to have proper regard to the amenity of neighbours (*not upheld*);
- (b) the Council's planning enforcement team had not properly investigated the issue of whether the development as built complies with the approved plans (*upheld*); and
- (c) the Council had not taken appropriate steps to secure for the public record a copy of the approved plans (*partially upheld*).

Redress and recommendations

The Ombudsman recommended that, in light of the failure to obtain a copy of the approved plans, the circumstances be reported to the appropriate committee as a potential enforcement action issue.

The Council have accepted the recommendation and will act on it accordingly.

Main Investigation Report

Introduction

1. The complainant (Mr C) lives in a small town in Fife which is served with an active community council (the Community Council). From around 2005 the Community Council actively discussed the upgrading of dilapidated children's play area equipment in a local park. Differences were expressed by members of the community about the worthiness of the project which was taken forward by an amenities group (the Amenity Group) which researched the replacement equipment and liaised with Fife Council (the Council)'s Community Services, raised funds, presented their proposals for discussion through the auspices of the Community Council and submitted applications for planning consent. A first application for planning consent (Application 1) submitted to the Council on 26 June 2006 was withdrawn in August 2006 following considerable local objection to aspects of the design. A second application (Application 2) was submitted on 12 September 2006, and was approved by the Council's local Area Development Committee (the Area Committee) on 8 November 2006. Mr C, whose house adjoins the children's play area, contacted the Council in January 2008 when he considered that the play equipment which had been installed differed materially from the plans submitted with Application 2. The approved plans were subsequently mislaid by the Council.

2. The complaints from Mr C which I have investigated are that:
- (a) in reaching a decision to grant planning consent for the application, the Council failed to have proper regard to the amenity of neighbours;
 - (b) the Council's planning enforcement team had not properly investigated the issue of whether the development as built complies with the approved plans; and
 - (c) the Council had not taken appropriate steps to secure for the public record a copy of the approved plans.

Investigation

3. Mr C supplied me with information and correspondence relating to his complaint and I visited him at his home and took digital images of the children's play area equipment from the park and from within Mr C's home. I made enquiry of the Council and considered their response. I also interviewed officers of the Council's Development Services. 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.

4. Mr C resides in a property in a small Fife town which, until December 2007, he and his wife (Mrs C) ran as a bed and breakfast guesthouse. The west boundary wall of their property adjoins a public park which had an established small children's play area. Most of the original items had been removed because they had become worn out or unsafe. The Community Council had discussed how the children's play area might be upgraded. The proposals were eventually taken forward by the Amenity Group. The Council's Community Services assisted the Amenity Group with issues relating to the design and the procurement of funding and also legal matters relating to land ownership (the public park is leased by the Council from an estate).

5. After securing offers of funding, a representative of the Amenity Group submitted Application 1 to the Council, for planning consent for the enlargement of the existing play park including the removal and replacement of play equipment and associated landscaping. Application 1 was registered by the Council on 26 June 2006.

6. Before being absent from home from May to July 2006, Mr and Mrs C were aware that Application 1 was about to be submitted. While away, Mr C had only limited email contact with home. Mrs C wrote to the then chairman of the Community Council in early May 2006 requesting that the development proposals include football goal posts in recognition that football was at that time the biggest activity in the public park.

7. The Council's Development Service received a number of objections from local residents criticising the size and location of the proposed play area equipment and making a number of other objections.

8. On or around 21 July 2006, amended plans were submitted by the Amenity Group which were the subject of neighbour notification. Mr C inspected the site plan and found it incorrect in respect of showing the area occupied by a bowling club in the north east of the public park, the position of the east gate to the park, and the south boundary wall. According to Mr C, the proposed play area was shown only at 50-60% of the size it would be, which he

considered would be roughly five times the area occupied by existing play equipment.

9. On the initiative of Mr C and two neighbours who were architects, a group of objectors prepared a new proposed design, showed it to objectors, and received their conditional support. Mr C carried out his own analysis of points raised in the objections with a view to seeing whether these could be mitigated. The group considered it essential that a cross section be provided properly to assess privacy issues (and a cross section was provided in respect of Application 1). The group's alternative design proposals were taken by a Fife councillor (the Councillor) to the Amenity Group who refused to make changes other than to the layout.

10. Following a meeting organised by the Councillor with a group of objectors on 15 August 2006, a further meeting was held locally with the Amenity Group. On 23 August 2006, the Councillor prepared a report for submission to a meeting that month of the Community Council indicating that, because of his open support for the Amenity Group's proposals, he would be declaring an interest and intended to play no part in the deliberations of the Area Committee when it met to consider Application 1 at its meeting on 6 September 2006.

11. Application 1 was withdrawn prior to that meeting. A second planning application, Application 2, was then submitted to the Council, was the subject of neighbour notification, and was validated on 12 September 2006.

12. Mrs C submitted an objection on 22 September 2006 on the limited play value of the proposed equipment, and that if the equipment was to be fully utilised it would have to attract parents and children from outside the town. If they arrived by car, then that would breach the Council's energy policy. Mr C expressed his objections in five separate letters of 26 September 2006 dealing with lack of car parking, the large size (718 square metres) of the proposed children's play area, the positioning of proposed picnic tables which would encourage vandals, the inappropriateness of the proposed materials for the picnic tables in a conservation area, and problems of invasion of privacy from the play equipment. With regard to his objection on grounds of privacy, Mr C indicated that he and his immediate neighbour would be prepared to withdraw their objection if a privacy panel was added to the highest item of equipment.

13. A report was prepared by the planning case officer for the 11 October 2006 meeting of the Area Committee. At that meeting, the Area Committee deferred a decision on the application to their November meeting to enable a site visit to be made and this took place on 3 November 2006.

14. Mr C was absent on business abroad at the date of the site visit and subsequent meeting of the Area Committee. The report on Application 2 was placed before the Area Committee on 8 November 2006. The report set out the bases of the 20 letters of representation, statutory policies and approved guidance, summarised the proposals, and assessed these against the development plan. It concluded that the applicant had carefully thought out the layout and equipment and that the new proposed play park would not utilise more of the large open space in comparison to the original one. The case officer recommended that approval be given subject to a single condition that:

'1. The development hereby approved shall be implemented in accordance with the plan(s) stamped as forming part of this permission unless a variation is required by a condition of the permission or a non-material change has been agreed in writing by the Planning Authority.'

15. The reason given for this condition was to ensure that the development be carried out in accordance with the approved plans unless otherwise agreed.

16. The minute of the 8 November 2006 Area Committee records:

Application 2

Prior to consideration of this item [the Councillor], having previously declared an interest (having previously discussed [Application 2] locally), left the meeting during the item and took no part in the discussion.

The Committee considered (i) an updated report by the Head of Development Services, detailing an Application for the enlargement of an existing play park including the removal and replacement of play equipment and associated landscaping, and (ii) one letter of objection of 18th October, and two letters of support, of 15th September and 3rd November, respectively. The Chair made reference to a site visit carried out to the locus on 3rd November, and some discussion took place over the commendable efforts made by representatives of [the town] to raise funds within their own area to provide local amenities. [Another councillor] made reference to the tenor of objections which suggested that the boundary of the play park was very close to the property boundaries of

several of the objectors, and enquired as to the possibility of moving the boundary of the play park further away.

Decision

It was agreed to approve [Application 2], subject to the one condition and for the reason detailed in the List.'

17. The consent was issued on 13 November 2006 subject to the single condition detailed in paragraph 14.

18. Mr C did not read the planning case officer's report until January 2007 after he returned from business abroad.

19. The play area equipment was installed in the first half of 2007. After it was installed, Mr C considered that his privacy, particularly in his conservatory, was destroyed from the largest items, and that his sitting and dining areas were also overlooked. Additionally, there were parking problems in a privately owned and maintained nearby street and in the publicly maintained road where his home is located. Finally, problems with youths congregating in the park at night disturbed a number of his bed and breakfast guests and resulted in numerous calls to the police. Following one incident when a female guest was so frightened that she dare not leave her room, Mr C and his wife decided to close their bed and breakfast business in December 2007.

20. Mr C initially raised two complaints with the Council on 25 February 2008 but expanded these to four separate complaints in letters of 21 March 2008. The four complaints were:

- loss of privacy particularly from two play towers situated less than 14 metres from his property and 16 metres from his conservatory windows;
- drawings were missing from the planning file and a 3D drawing had been added in April 2007. It was impossible, therefore, to ascertain that what had been constructed was in compliance with what had been approved in November 2006;
- the approval of the play area and towers had lead to a huge increase in youth activity after 21:00; and
- the new play park had increased parking problems in nearby streets.

21. With regard to the fourth point, Mr C suggested that a comprehensive survey of parking in the vicinity of the public park should be undertaken. A final combined response to these complaints was sent by the Chief Executive on 24 June 2008. Mr C was not satisfied with that response and submitted a letter of complaint dated 19 October 2008 which he hand delivered on 23 October 2008 when he visited the Ombudsman's office.

(a) In reaching a decision to grant planning consent for the application, the Council failed to have proper regard to the amenity of neighbours

22. Mr C complained that in reaching their decision the Area Committee had failed to have regard to the amenity of neighbours and, in particular, issues of noise nuisance, privacy, lack of parking and the play area attracting youths in the evening.

23. In responding on 24 June 2008 to Mr C's complaint, the Chief Executive described the processing of the application which was the subject of a report, a site visit, and a determination at the Area Committee. Members had had access to the individual letters of representation and had visited the site. In the report, the list of points of objection included loss of privacy. The report did not directly cover the issue of privacy, however, the Chief Executive stated that the impact of the proposals on neighbours' amenity was considered as part of the overall assessment of the application.

24. The Council's Head of Service, Development Services, informed me that the Council have specific policies relating to the provision of play areas, but these relate only to housing developments and the requirement of providing play areas commensurate with the scale of the development. Since the proposed development was for the refurbishment of an existing facility, these policies were not deemed relevant. Scottish Executive Development Department Planning Advice Note 77 *Designing Safer Places* (March 2006) provided best practice advice to planning authorities in Scotland on the siting of play areas and was referred to in the report to the Area Committee. The advice given therein was that new play areas for young children should be sited close to dwellings with maximum opportunity for surveillance. Equipment installed should be robust and of the highest quality suitable for its intended use.

25. On the issue of parking, the Chief Executive responded to Mr C that each application is assessed on its individual merits, and the need for consultation is also assessed on the detail of the application. The application was for play

equipment on a play area in an existing public park. The Chief Executive considered that the level of survey suggested by Mr C with his complaint of 21 March 2008 was incompatible with the scale of the application.

26. The planning case officer's report to the Area Committee stated that the Council's Transportation Service was consulted. The Transportation Service's reported view was, that because of the existing play area being there, they had no issues to raise and did not require any conditions to be imposed on approval of Application 2.

27. The Chief Executive stated in his reply to Mr C that the issue of anti-social behaviour was a matter for the police to deal with. The claim of possible anti-social behaviour, given that the site was already a play area, could not have been used as a reason for refusal of Application 2.

(a) Conclusion

28. It appears to me that Mr C and a number of other objectors availed themselves of the opportunity to object to Application 2 which was submitted by the Amenity Group after Application 1 was withdrawn. While Mr C, whose property lies closest to the new play area equipment, sought to involve himself in the proposals to see whether his fellow neighbours' objections could be mitigated or overcome, that was perhaps only possible because the Amenity Group were relatively accessible as a community initiative linked to the Community Council. The process of how the Community Council or the Amenity Group responded to residents' concerns is in my view an entirely separate issue from the Council's consideration of Application 2. Notwithstanding the level of unmitigated objection, the Council required to determine Application 2 on its individual merit. I agree with the Chief Executive that the issue of amenity was addressed in the report, that relevant objections on the grounds of privacy were put to and considered by the Area Committee. While Mr C was no doubt disappointed at the Area Committee's decision to approve Application 2, I do not consider that Mr C has suffered injustice or hardship as a result of maladministration or service failure associated with the decision. That being the case, I do not uphold this complaint.

(b) The Council's planning enforcement team had not properly investigated the issue of whether the development as built complies with the approved plans

29. Mr C considered that, given the wording of the sole condition attached to the consent on Application 2 (paragraph 14) and the subsequent loss of the Council's retained copy of the approved plans, the Council were not able properly to investigate the issue of whether the children's play area complied with the approved plans. Mr C also considered that it was wrong to reach a view on compliance based on a 3D drawing that was not an approved plan.

30. The Council informed me that upon approval of Application 2 on 8 November 2006, two sets of the proposed plans were stamped as approved. One set of plans was issued to the Amenity Group's agent and the other was retained by the Council for the public record. All the other sets of proposed drawings were destroyed. In general, the Council's copies of the approved drawings are available for public inspection on request. The Council believe that their set of approved drawings either went missing following a request by a member of the public to view the drawings, which was done without supervision, or in the process of being sent to their contractor for scanning and uploading onto their internal planning application handling system and on to their publicly accessible planning portal.

31. A report by Mr C of alleged divergence of what had been built from what was approved, was received by the Council on 18 January 2008 and passed to the Council's planning enforcement team. An enforcement officer visited the site on 22 January 2008 and took photographs. On investigating, the planning enforcement officer found that the approved drawings were not on file. An attempt to secure the applicant's copy of the approved drawings proved unsuccessful. The file did contain a contemporary 3D drawing of the proposals submitted on 11 September 2006. The enforcement officer carried out his assessment based on the 3D drawing and consulted the planning case officer who responded that the development did not appear to him to be materially different from the proposed 3D drawing. The enforcement officer sent a letter to Mr C on 26 March 2008 informing him that there was no breach of development control and he was unable to take further action.

(b) Conclusion

32. For the Council to reach a credible determination on the issue of compliance with the approved plans associated with a planning application

would in my view require reference to the plans themselves. The finally approved form of the plans, docketed with the authority's stamp of approval, along with the conditional consent certificate comprise the key legal evidence of their decision. The 3D drawing referred to in paragraph 31 was not formally stamped as an approved drawing by the Council.

33. The fact that the Council's copy of the approved plans has gone astray together with the Council's inability to obtain and check the copy issued to the Amenity Group's agent leads me to the conclusion that the Council cannot presently say with certainty that the development on site complies with the approved drawings. I believe that their investigation was hampered by lack of necessary evidence. There is no conclusive evidence of how the plans were lost from the public record. I uphold Mr C's complaint.

34. The Council informed me they now undertake the scanning of planning documents 'in house' and that has reduced the possibility of documents being lost in transit and mislaid or misfiled. They had reviewed their internal procedures. A new procedure has been implemented in accordance with the Data Protection Act. If a member of the public now wishes to inspect plans, a member of the Development Services staff will remain with the plans to ensure that they are returned following inspection. In light of these procedural changes which will hopefully prevent a reoccurrence, the Ombudsman has no recommendation to make.

(c) The Council had not taken appropriate steps to secure for the public record a copy of the approved plans

35. Mr C was aggrieved that, on discovering the approved plans to be missing, the Council had not taken steps to secure the other copy of the approved plans to enable them further to consider the issue of enforcement.

36. The Council informed me that upon receiving the complaint and discovering that the Council's set of approved drawings were missing, they contacted the Amenity Group's agent to enable a copy of the approved drawings to be made for the Council's records. The Council were informed by the agent that the drawings had been passed to a contractor who, ultimately, mislaid them. The Council's Head of Service, Development Services informed me that the Council had exhausted both options of obtaining a set of stamped approved drawings. They had given consideration to making a request from the architects for a set of drawings, however, since these would not be stamped

approved, it would not be possible to ensure that they were identical to the proposed drawings which the Council had considered and ultimately approved.

(c) Conclusion

37. I sought the views of the Ombudsman's planning adviser on the loss of the approved plans and its consequence for the Council's consideration of whether there was a material breach of development control. I have used his advice in reaching my conclusion on this third complaint.

38. I consider that the Council have taken the initial steps that I would have expected them to take to obtain the applicant's copy of the approved plans. That approach has, however, drawn a blank.

39. The Ombudsman's planning adviser, has suggested that the matter be treated as a potential enforcement issue and put to the appropriate Council committee for a resolution on whether or not it is expedient in all the circumstances for the planning authority to exercise its discretion to take enforcement action. It would be open to the committee in that consideration to invite an affidavit from the planning case officer to whether what is built complies with the approved plans, to take evidence from Mr C and other parties with an interest, or to consider whether, as an alternative to formal action, measures can be taken to mitigate the effect of the play equipment on the privacy of Mr C and other affected neighbours. I partially uphold the complaint to the extent that, having failed to obtain a copy of the approved plans, the Council have not moved on to fully consider the consequences of that failure for dealing with Mr C's complaint that the play area as built does not comply with the plans approved in November 2006.

(c) Recommendation

40. The Ombudsman recommended that, in light of the failure to obtain a copy of the approved plans, the circumstances be reported to the appropriate committee as a potential enforcement action issue.

41. The Council have accepted the recommendation and will act on it accordingly. The Ombudsman asks that the Council notify when the recommendation has been implemented..

Explanation of abbreviations used

Mr C	The complainant
The Community Council	The community council for the town where the public park is situated
The Amenity Group	A group linked to the Community Council which submitted planning applications to the Council for development of a children's play area
The Council	Fife Council
Application 1	The first planning application from the Amenity Group registered on 26 June 2006
Application 2	The second application from the Amenity Group registered on 12 September 2006 and subsequently approved
The Area Committee	The local Area Development Committee which considered Application 2 on 11 October 2006 and 8 November 2006
Mrs C	The complainant's wife
The Councillor	A Fife councillor