

Scottish Parliament Region: Mid Scotland and Fife

Case 200703105: Fife Council

Summary of Investigation

Category

Local government: Planning; complaint by objector to planning applications.

Overview

The complainant (Mrs C) raised a number of concerns about the handling by Fife Council (the Council) of applications for a single wind turbine and related proposals near to her home.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) in reaching a decision on a request made for a screening opinion (the Screening Opinion) on the need for an Environmental Impact Assessment (EIA) in respect of an application for planning consent for the wind turbine (the Application), the Council's planning case officer (Officer 1) failed to have regard to appropriate guidance on EIA procedures and that she made statements to support her view that an EIA was not required, which she later contradicted (*not upheld*);
- (b) the Council, when presented with massive local opposition to the Application and Mrs C's letter of objection of 28 November 2007, failed to reconsider the need for an EIA (*not upheld*); and
- (c) the report to committee on the Application failed fully to consider Mrs C's letter of objection and the Council's finalised guidance on wind energy, misrepresented the differences with another current proposal, and contradicted statements made earlier in the Screening Opinion (*not upheld*).

Redress and recommendations

The Ombudsman has no recommendation to make.

Main Investigation Report

Introduction

1. The complainant (Mrs C) lives in a coastal town in Fife. Her complaint to the Ombudsman originally made in March 2008 concerned a number of related applications made in 2006 and 2007 for the development of land adjacent to former docks (the Docks area). Several of these were for the development of business and office units without environmental impact for Mrs C. Her complaint to the Ombudsman focussed on an application (the Application) for planning consent for a single wind turbine 81 metres in height, the energy from which would be used to produce hydrogen gas which would then be used to supply heat and light to neighbouring buildings, with any surplus energy being supplied to the national grid. That complaint was closed on 28 May 2008 because Fife Council (the Council)'s complaints procedures appeared not to have been exhausted, but was re-opened in November 2008 after the Application had been approved subject to conditions and the completion of an agreement under section 75 of the Town and Country Planning (Scotland) Act 1997. Although, in her earlier submission, Mrs C referred to the other development proposals, in deciding to investigate on 14 July 2009, I informed Mrs C of my reasons for not pursuing those matters further.

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

- (a) in reaching a decision on a request made for a screening opinion (the Screening Opinion) on the need for an Environmental Impact Assessment (EIA) in respect of the Application, the Council's planning case officer (Officer 1) failed to have regard to appropriate guidance on EIA procedures and that she made statements to support her view that an EIA was not required, which she later contradicted;
- (b) the Council, when presented with massive local opposition to the Application and Mrs C's letter of objection of 28 November 2007, failed to reconsider the need for an EIA; and
- (c) the report to committee on the Application failed fully to consider Mrs C's letter of objection and the Council's finalised guidance on wind energy, misrepresented the differences with another current proposal, and contradicted statements made in the Screening Opinion.

Investigation

3. I considered a substantial amount of documents provided by Mrs C in support of her complaint. I met with Mrs C and one of her neighbours on two occasions, made enquiries of the Council, inspected their planning files on the Application and interviewed Officer 1. I also identified and considered relevant central government legislation and guidance. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mrs C and the Council were given an opportunity to comment on a draft of this report.

Background

4. Mrs C's house is situated in a residential area, about 450 metres from the site of the developments in the Docks area about which she complained to the Ombudsman's office. Those developments, but not the complaint itself, concerned some six planning applications.

5. In December 2005, an application was submitted by a development company through agents for the erection of four business units (class 4), car parking and an access road at the Docks area. That application was validated on 9 December 2005 and registered on 5 January 2006. Full planning consent subject to 14 conditions was granted on 30 March 2006. Shortly after the submission of the first application, the same agents submitted two further applications for the erection of a three storey office block with associated landscaping, parking and access road and for another two units. That application was validated on 16 December 2005 and registered on 5 January 2006. Full planning consent subject to 14 conditions was granted for the three storey block and for the additional two units on 29 March 2006.

6. According to the Council, the Invest in Fife Team (a strategic partnership of Scottish Enterprise and the Council) first became aware of proposals for a hydrogen technology project in January 2006. Fife was subsequently identified as a possible location following discussions with the Scottish Enterprise Energy Team in Aberdeen and officers from Scottish Enterprise, Fife. Representatives from the Economic Development Team of the Council, after learning of a proposed project at an exhibition and conference in May 2006, first met with the prospective developers on 24 August 2006. Subsequent meetings considered that the constituent parts of the project be taken forward through separate applications.

7. The Council's files record correspondence on the prospective developer's intention to provide all the electrical facilities for the three storey office block (see paragraph 5), through the construction of a building to house specialist equipment to convert water to hydrogen and to use the hydrogen as a fuel to generate electricity. The construction of a single wind turbine was intended as part of the electricity supply system for the office building using renewable energy resources. These proposals were the subject of pre-application discussions which also involved Scottish Enterprise and a local regeneration group. Discussions concerned, amongst other things, the issues of noise assessment and whether an Environmental Statement would be required in respect of the single wind turbine, proposed to be some 81 metres in height (see Annex 3). The prospective developers and their consultants identified in 2006 that the site of the turbine was close to (but not within) a Special Protection Area and set in place autumn and winter bird population surveys, studies of whether there were significant bat populations and whether there would be an issue of interference to radio systems operated by utility companies and those controlling estuarial ship movements.

8. A request was made by the prospective developer's agents on 13 April 2007 that the planning authority carry out a formal screening of the project to determine if an EIA was needed. The Screening Opinion, prepared by Officer 1 and sent to the agents on 10 May 2007 (see Annex 2) determined that an EIA was not needed.

9. Mrs C and her neighbours became aware of the proposals for the hydrogen plant and wind turbine in early June 2007. There being no community council in the area they sought to mobilise public opinion in opposition to the project. Their campaign was featured in a local paper later that month. Through the auspices of a local MSP, Mrs C and fellow residents met with representatives of the prospective developers. In August 2007, an application was made by the prospective developer (the Developer) through agents to the Council for the erection of a building to house plant and machinery (including hydrogen and fuel cell power system). This application was validated on 7 August 2007 and registered on 22 August 2007. It attracted 13 letters of objection including letters from Mrs C. The objections centred on the issue of the safety of the hydrogen processing facility and the connection of the plant and machinery building to the proposed construction of a wind turbine. A report was prepared for the local Area Committee which decided on 14 November 2007 to grant conditional consent.

10. Mrs C's neighbour had obtained a copy of Officer 1's Screening Opinion in June 2007. In advance of the applications for the hydrogen plant and wind turbine being determined, Mrs C wrote a letter of complaint to the Chief Executive on 4 October 2007, criticising points made in the Screening Opinion and querying why another site (to the west) had not been considered by the Council to be a more appropriate location. Receipt of that letter was acknowledged on 12 October 2007 and was initially forwarded to a Council enforcement officer for response. Mrs C wrote again to the Chief Executive on 16 November 2007 reminding him that she awaited a reply. That letter was acknowledged on 30 November 2007. Mrs C took up the lack of a response with the Business Manager in the Chief Executive's office on 14 January 2008. The Business Manager decided that it would be dealt with as an appeal to which the Chief Executive would respond.

11. In the meantime, the Developer, through the same agents, submitted the Application for full planning consent for the erection of an 81 metre high wind turbine. The Application was validated on 16 October 2007 and registered on 6 November 2007. The Application attracted several hundred letters of objection and emails and a 49 page submission from Mrs C sent under cover of a letter of 28 November 2007 to the team leader, Development Services (Officer 2). Mrs C's letter indicated that there was information 'missing' in the proposals to which she wanted answers. The submission from Mrs C stated that she considered a more appropriate site would be the site to the west. Her objections were 1) wind turbine noise (including low frequency noise and its consequences for example on health and sleep deprivation); 2) strobe/shadow flicker effects of the wind turbine; 3) TV interference from wind turbines; 4) the prospect of accidents; 5) the effect on birds and bats; 6) the negative effect on the coast and tourism; 7) the protection against such development afforded in the Local Action Plan, Fife Structure Plan and Scottish Executive advice; 8) the need for stand-off distances/buffer zone from the wind turbine to residential properties; 9) particular problems with the site; 10) the effect on property values; 11) the law on human rights and environmental pollution; 12) the myth of carbon saved from wind turbines; and 13) the myth of hydrogen storage for wind power.

12. The missing information sought by Mrs C was not provided by Officer 2 before he left the Council's employment in December 2007. Mrs C wrote to the Development Manager (Development & Regeneration) (Officer 3) on 21 January 2008, seeking answers to eight specific points and drawing

Officer 3's attention to recent accidents involving wind turbines elsewhere in the United Kingdom. In his response of 25 January 2008, Officer 3 stated that while it was Council practice to acknowledge letters of objection, letters of representation, petitions etc it was not the Council's practice to respond to individual items in letters of objection. He said that the purpose of letters of objection was to raise issues on behalf of third parties and for those issues to be assessed as part of the case officer's assessment of the proposed development, the position in the development plan, responses from statutory consultees, and the material considerations including representations which had been lodged. Officer 3 assured Mrs C that her letter of objection and complaint was being progressed.

13. In a further letter of 31 January 2008 to Officer 3, Mrs C referred again to the Screening Opinion of May 2007 that an EIA was not necessary. Mrs C claimed that Officer 1 had made three false assumptions. She also raised the issue of whether members of the local Area Committee could determine the Application without bias when they were involved in a group promoting power from wind turbines. In his response of 7 February 2008, which he copied to Officer 1 and her new team leader (Officer 4), Officer 3 gave assurances as to the form of the report and referred to the need for councillors to comply with the National Code of Conduct. He stated that the Council as planning authority was content with Officer 1's Screening Opinion response and the fact that in this particular instance no EIA had been required. After Mrs C responded in a letter of 12 February 2008, Officer 3 replied that he had nothing to add and that the Application would be determined by the local Area Committee in due course, and that all relevant material considerations would be included in the report assessment.

14. On 20 February 2008, the Council's Chief Executive responded to the complaint submitted by Mrs C on 4 October 2007 (see paragraph 10). The Chief Executive stated that he was very sorry that Mrs C did not receive a response within the allocated timescale to her initial complaint. He responded in detail to each part of her letter. His response confirmed that a request for a screening opinion on the need for an EIA had been made and responded to. The letter confirmed that Officer 1's assessment on the need for an EIA had been checked by other staff including Officer 3 and had been confirmed as being correct in this circumstance. The Chief Executive commented on the respective locations. He stated that the Council could not prevent an applicant making an application and in his summary he detailed the prior history of the

Council's knowledge of the proposals from January 2006. The Chief Executive observed that, at the date of his letter, no decision had been made on the Application for the wind turbine which was yet to be considered in committee. The Chief Executive directed Mrs C to the Ombudsman. Mrs C submitted her complaint to the Ombudsman on 28 March 2008.

15. Following representations being made to the planning authority in February 2008 that the three storey office being built was higher than in the approved plans, a fresh application was submitted for amendment to the profile and roof pitch. In her form of complaint to the Ombudsman, Mrs C made reference to both the Application for planning consent for the wind turbine and the fresh application for the office block, neither of which had at that time been determined. (The latter application was received on 14 March 2008 and was granted conditional approval by officers as a delegated decision on 3 June 2008.)

16. Mrs C, who had continued to correspond with the Council, forwarded a response she received from Officer 4 on 23 May 2008 to points that she had sought clarification on in her letter to Officer 2 of 28 November 2007.

17. My colleague who previously dealt with the complaint responded to Mrs C on 28 May 2008 informing her that she appeared not have completed the Council's complaints procedures and that it was not possible for the SPSO to take the matter forward at that time. A related letter was sent to the Chief Executive on 3 June 2008.

18. Mrs C obtained access to Officer 1's report on the Application in advance of the meeting of the local Area Committee which would consider the Application on 18 June 2008. She raised a concern she had first expressed in late January 2008 that 'dozens' of emails from objectors had gone missing from the objections appearing on the Council's website portal in respect of the Application. On 16 June 2008, Mrs C emailed all eight members of the local Area Committee with a summary of the main argument of objectors opposed to the Application.

19. The report prepared by Officer 1 on the Application detailed the outcome of consultations with Transportation Services, the Scottish Environment Protection Agency, Scottish Natural Heritage, the Royal Society for the Protection of Birds, the Civil Aviation Authority, Environmental Services and

others. It also stated that 338 letters of objection had been received. Over three hundred were in the form of a standard letter with a further 34 individual letters. Twenty seven separate grounds of relevant objection were identified. The report then set out the relevant policies against which the Application should be assessed, described the site and the proposals, and detailed at paragraph 1.3.2 and paragraph 2.9.3 why an EIA had not been required. Approximately half of the report was devoted to assessing the proposals against eight criteria which included the representations received. The report concluded that the Application for developing a single wind turbine at the coastal location was acceptable and Officer 1 recommended approval subject to an agreement under Section 75 of the Town and Country Planning Act 1997 (relating to a restoration bond) and 18 conditions.

20. The minute of the meeting of the local Area Committee on 18 June 2008 records that no councillor declared an interest in the particular item, that a vote was taken, and that an amendment to refuse the Application was defeated by five votes to two votes. The local Area Committee agreed that the Application be approved subject 1) to a Section 75 Agreement or other appropriate legal agreement to secure a restoration bond for the removal of the turbine and the appropriate restoration of the land; and 2) the 18 conditions in the report, subject to condition 13 being amended to include a system for reporting the details of the success of any mitigation measures (relating to RADAR and digital signals).

21. On 30 June 2008, following the local Area Committee's consideration of the Application, Mrs C set out in an eight page document sent to the Ombudsman, the procedures and processes she considered had not been followed properly. On 1 July 2008, after speaking with my colleague, Mrs C submitted an electronic complaint to the Council. That complaint, however, did not repeat the content of the eight page document of 30 June 2008. Mrs C wrote further to the Ombudsman on 28 July 2008 with a 17-page paper analysing the report put to the local Area Committee on 18 June 2008 where she detailed errors and omissions. That document too was not sent to the Council. Mrs C contacted the Ombudsman again on 11 August 2008 and stated that she considered that she had completed the Council's complaints procedures. Since the Ombudsman did not have written confirmation of this, my colleague wrote to the Chief Executive setting out three issues identified in her letters of 28 May and 3 June 2008 to Mrs C. She asked him to confirm that the procedures had been completed. The Chief Executive confirmed by letter of

5 November 2008 that he considered that the Council's complaints procedure had been completed. Upon receipt of that confirmation, the file on Mrs C's complaint was re-opened on 26 November 2008.

22. After a considerable delay in negotiating the terms of the Section 75 agreement, planning consent was issued to the Developer on 21 September 2009.

(a) In reaching a decision on a request made for the Screening Opinion on the need for an EIA in respect of the Application, Officer 1 failed to have regard to appropriate guidance on EIA procedures and that she made statements to support her view that an EIA was not required, which she later contradicted

23. The full text of Officer 1's Screening Opinion of May 2007 (see paragraph 8) is reproduced in Annex 2 to this report.

24. At interview, Mrs C and her neighbour summarised their criticism of the Screening Opinion. Mrs C was critical of Officer 1's descriptions of the area as 'industrial' and housing as 'distant'. They maintained that this led to Officer 1 deliberately ignoring the human environmental aspects and denying that there were 'significant impacts' on the amenity of the local population and detriment to the enjoyment of their homes. In the instance of significant impact, an EIA was not a matter for Officer 1's discretion, it was required. Additionally, the wind turbine proposed was more than five times the height of 15 metres in Annex 2 of the EIA (Scotland) Regulations 1999 (the EIA Regulations) (see Annex 3) and was in Mrs C's view in a densely populated location. Had there been an EIA, then all the facts of the area would have emerged.

25. Officer 1 confirmed that she had worked as a chartered planner for nearly 20 years, and in a promoted post for approximately seven years. The Head of the Development Service had authority under the Council's Scheme of Delegation to determine requests for a screening opinion in terms of the EIA Regulations. In terms of the Development Service's empowerment manual, determination of a request for a screening opinion could be taken by a qualified case officer subject to chartered status. Such determinations were not infrequent and, on average, requests to the Council would be made every three or four weeks (12 or 15 a year). In the particular instance, she had made the determination without reference to her line manager at the time, Officer 2, since

she considered that she had both the authority and professional competence to deal with the request.

26. Officer 1 maintained that the appropriate guidance relating to screening requests was followed. The planning authority's decision in relation to the screening request is not subject to any third party scrutiny; there is no requirement for elected members to assess the opinion of the case officer, and only the applicant can challenge a decision through referral of the screening request to the Scottish Government.

27. While it was the case with regard to an application for a five-wind turbine development over 20 kilometres away that an EIA was required, Officer 1 was of the view that neither the proposal nor the location was similar in scale or characteristics. Furthermore, there was no requirement to consider current applications or planning permissions when considering a request for a screening opinion, unless these added up to a cumulative impact. Officer 1 pointed out that in determining the request for a screening opinion there was no requirement to consider Council policy, such as the Council's Supplementary Planning Guidance on wind energy published as a consultation document in January 2007. Officer 1 stressed that Council policy influences the assessment of the eventual application, but not the need to enter into the EIA process. Even if an application is not processed under the EIA procedures, the same planning issues are considered and technical reports are requested if appropriate. Without an EIA the technical reports would come in as discrete documents as was the case with the Application. If they had been subject to EIA process, the reports would be embodied into a single Environmental Statement. This would have entailed additional advertising requirements and a longer time period for consideration of the Application.

28. Officer 1 stated that the fact that a proposal exceeded the height criterion of 15 metres did not mean that it automatically required an EIA. She maintained that she was entitled in the circumstances to exercise her discretion in the matter and had done so.

(a) Conclusion

29. I have examined the EIA Regulations and the original guidance (Scottish Executive Circular 15 of 1999) and updated guidance (Scottish Government Circular 8 of 30 November 2007). Although the EIA Regulations were not amended, guidance on the process was clarified in Scottish Government

Circular No 8 of November 2007. The changes are not significant in respect of the decision taken by Officer 1 in May 2007 to deem that an EIA was not required. The helpful flow chart in the later guidance, reproduced in Annex 4 of this report, demonstrates that Mrs C and Officer 1 share opposing views as to whether the development site for which the request was made as a Schedule 2 development would be likely to have 'significant effects' on the environment.

30. In terms of subsection 7 (1) of the Scottish Public Services Ombudsman Act 2002, the Ombudsman is not entitled to question the merits of a decision taken without maladministration by, or on behalf of, a listed authority in the exercise of a discretion vested in that authority. In light of my consideration of the information before me, I see no evidence of maladministration in the process whereby Officer 1 reached a determination, which she was authorised to take, on the request for a screening opinion made in April 2007. I consider that Officer 1's decisions that the site of the Application was not within a 'sensitive area', was not likely to have significant effects on the environment, and that an Environmental Statement was not required were reasonable. I cannot, therefore, uphold Mrs C's complaint.

(b) The Council, when presented with massive local opposition to the Application and Mrs C's letter of objection of 28 November 2007, failed to reconsider the need for an EIA

31. Mrs C informed me at interview that, both prior to and after the Application was registered, she and others had had to undertake considerable research into the detrimental consequences of wind turbines, and to raise issues to be considered as part of the assessment of the Application. She considered that had an EIA been required and an Environmental Statement prepared and advertised, then the public would have been consulted and better able to consider the issues involved and to have concentrated their efforts (for example on noise, effects on TV reception, shadow flicker and electro magnetic effects).

32. Mrs C pointed in particular to paragraph 71 of Scottish Government Circular 8/07 issued on 30 November 2007 which addresses the effect of screening opinions and screening directions and states:

'There may, exceptionally, be cases where a screening opinion has been issued but it subsequently becomes evident that it needs to be changed. This is most likely to be after a negative screening opinion has been issued and new evidence comes to light. If that evidence indicates that EIA is required, the planning authority must not ignore it, but could seek to

persuade the applicant to voluntarily carry out an assessment and to submit an (Environmental Statement) in accordance with the Regulations.'

33. Mrs C considered that her detailed personal letter of objection of 28 November 2007 setting out 13 material points and significant impact on the local population, and the submission of hundreds of letters of opposition to the proposals, should have led to the Council to revise their view on the need for EIA and to request the Developer to prepare and submit an Environmental Statement.

34. The Council informed me that under the EIA Regulations, there are two points in time when a screening request can be made. Under Regulation 5 (1) (see Annex 3), a person who is minded to carry out development may request the relevant planning authority to adopt a screening opinion. The only other occasion is under Regulation 7 (1) after an application is made that appears to the planning authority to be a Schedule 1 or Schedule 2 development (and the application has not been the subject of a prior screening opinion or screening direction and is not accompanied by an Environmental Statement by the applicant) then the authority may proceed to consider the matter as if a request had been made under Regulation 5 (1) with the same timescale applying. The Council have informed me that in this case, the screening opinion was adopted in response to a request under Regulation 5 (1).

35. The Council maintain that there is no requirement or provision in the EIA Regulations to review the need for an EIA once an application is being processed. They accept that an applicant can ask for a revised screening opinion in response to a revised proposal but that did not apply in this case. With regard to the Schedule 3 criteria, they maintain that the level of public interest or the number of objections received are not factors that are taken into account when carrying out a screening determination. Further, that since there is no legal framework in which the need for an EIA would be reviewed during the processing of an application, the Council had not failed in its responsibilities to the objectors or in its application of the statutory regulations relating to Schedule 2 projects.

(b) Conclusion

36. I obtained the views of one of the Ombudsman's planning advisers on the Council's comments. Following discussion with him, I am not persuaded that the Council's comments at paragraph 34 and paragraph 35 are in conflict with

the amended guidance that was issued in paragraph 71 of Scottish Government Circular 8 of 30 November 2007 (see paragraph 32). My reading suggests that, exceptionally, a council, having issued a screening opinion that an EIA was not required, could subsequently alter its stance and request the applicant to provide an Environmental Statement where new evidence comes to light or where the proposals on which the original request was made are amended in a material way.

37. I cannot conclude that the circumstances of this complaint warranted that the Council should have requested the Developer to provide an Environmental Statement, after the Application was registered. While I acknowledge the basis of Mrs C's argument, an EIA and the subsequent consideration of a planning application stand apart. My examination of the Council's file identified that, notwithstanding the decision in the Screening Opinion, a full year earlier the Developer had set in motion the necessary bird and bat surveys and noise studies, and studies of the possible effect of the wind turbine on estuarial navigation systems that would inevitably form part of the assessment of the Application. I do not uphold this complaint.

(c) The report to committee on the Application failed fully to consider Mrs C's letter of objection and the Council's finalised guidance on wind energy, misrepresented the differences with another current proposal, and contradicted statements made earlier in the Screening Opinion

38. Mrs C stressed in her complaint that she did not consider that i) her letter of objection of 28 November 2007 had been fully considered; ii) full account had not been taken of the Council's finalised Supplementary Planning Guidance on wind energy; iii) the similarities with another current proposal had been properly presented; and iv) that statements made in Officer 1's report on the Application were consistent with what she had stated earlier in her Screening Opinion.

39. The 13 points contained in Mrs C's letter of objection are set out at paragraph 11. At interview, Mrs C emphasised that the Council's consultative draft on Supplementary Guidance on wind energy had suggested a 1.5 kilometre buffer zone and whereas in the approved version this had increased to 2.0 kilometres, that buffer distance had not been applied in the case of the Application where the nearest residential properties and other noise sensitive properties such as a large childrens' nursery, a college, and offices were much closer.

40. The other application was the subject of an EIA, but was not determined by the Council. That applicant appealed the Council's deemed refusal to the Scottish Ministers. The appeal was considered by the Directorate of Planning and Environmental Appeals and the inquiry reporter's determination dismissing the appeal was issued on 19 February 2008. Mrs C saw a distinct inconsistency in the decision to refuse the other application some 800 metres from significant housing yet approve the Application where a much larger number of people lived in considerably closer proximity. Finally, Mrs C pointed to contradictions in references in the Screening Opinion and the Application regarding the proximity of residential properties to the proposed site, the characterisation in the screening opinion as an industrial area.

41. In their response on this complaint, the Council stated that, under section 25 of the Town and Country Planning (Scotland) Act 1997 the primary consideration in determining a planning application is the development plan. The full terms of a letter of objection are made available to all committee members. The Council had never operated a system where an individual's letter would be analysed point by point and the primary purpose of the report is to set out how the planning application is being assessed. In most cases the terms of the letters of objection are material considerations where the points raised relate to planning issues leading the determination of the application but, when they stray into issues not governed by the planning system, it is inappropriate for the planning decision to be made in relation to those factors. In the case of the Application, all the letters received were represented in the report as a list of issues raised and the Council maintained that, in their view, it was a reasonable summary.

42. The Council provided me with a detailed analysis of Mrs C's 49-page letter of objection and how the points she raised had been represented and addressed. They pointed out that whilst the letter of objection covered a range of issues, they considered that the report to the local Area Committee adequately summarised these and highlighted key points. As a matter of standard approach, individual quotes, paragraph numbers and references from Mrs C's letter were not made in the text.

43. With reference to the Council's Supplementary Planning Guidance on wind energy, the Council state that this was published in its final form two months before the Application was considered by the local Area Committee on 18 June 2008. It was listed as a policy document taken into account in the

preparation of Officer 1's report. The Council referred to the differences between section 5.18 of the draft document and section 7.10 in the final document. They maintained that while the standard stand-off distance between wind turbines and settlements was increased (from 1.5 kilometres to 2.0 kilometres) it was not insisted upon through the inclusion of the phrase 'every proposal should be treated on its own merits'. The Council informed me that the change in emphasis was interpreted as allowing an application to proceed if the potential impacts of the turbine on residential properties were acceptable even though it was within 2.0 kilometres of the nearest residential building. It was on this basis that the Application was determined.

44. With reference to the other application for five wind turbines on a site (Site A) more than 20 kilometres away, the Council informed me that in some cases the planning authority would refer to other applications for similar developments in the assessment of a specific proposal. In the main, however, this would relate to applications for the same development at that site and the outcome of earlier proposals. Most common is the reporting of a previous refusal of or appeal relating to a similar development at the same site. It was not felt necessary to report the details of the other application within the history section of the report on the application.

45. The Council informed me that the existence of the application and the inquiry reporter's determination of the appeal in respect of Site A were known to Officer 1, and the conclusions of that case were referred to in paragraph 2.4.2 of her report to the local Area Committee on the Application. The Council say that the key factor was not the number of turbines or character of the settlement but whether the planning authority should rely on a report by the then Department of Trade and Industry's Energy Technical Support Unit (ETSU-R-97) in assessing noise. The planning authority had presented a case to the inquiry reporter assessing the appeal against the Council's non-determination of the application for the five wind turbines at Site A. Concerns had been expressed by the Council's Environmental Services about the relevance of the ETSU methodology. In dismissing the appeal, the inquiry reporter had reinforced the relevance of the ETSU methodology, which is advocated in the 2002 revision of the Scottish Executive Planning Advice Note on Renewable Energy Technologies (PAN 45). The Council stated that the inquiry reporter relied on evidence from the appellants in the Site A case that there would be times when, during both day and night, the five proposed turbines at that site would result in increases in noise levels at a large number of properties,

however, the relevant criterion in terms of ETSU-R-97 was acceptability of the noise, and not whether it was audible.

46. The Council stated that the Application was also the subject of a consultation with the Council's Environmental Services, but the same criticism of ETSU-R-97 by Environmental Services was not presented to the planning authority. In the instance of the Application, Environmental Services advised that the noise levels advocated by ETSU and presented with the noise assessment could be complied with. The applicant submitted a full noise assessment of noise levels experienced in the area and the expected noise levels from the development. The Council say that the planning authority took into account the comments of the inquiry reporter on the determination of that appeal on the use of the ETSU. The Application was considered to be acceptable based on the specific characteristics of the Application site, the advice from Environmental Services, and the scale of the proposal. The key factor from the application and appeal at Site A informed the assessment of the Application.

47. Finally, Officer 1 commented on Mrs C's claim of inconsistency between her Screening Opinion of May 2007 and report to the local Area Committee on 18 June 2008 on the Application. As a general comment, she stated that the two documents had separate purposes and the terminology could not be considered transferable in the context of each document. The phrase 'residential development is distant' was used to convey a sense of separation and the phrasing in the report to committee was intended to show that the Docks area, where the single wind turbine was to be sited, was separate from the residential area. Her report, in her view, did not ignore or set aside the issue of residential amenity. The use of the word 'sensitive' as used in the Screening Opinion, specifically related to the requirements of the EIA screening process and sensitive sites are defined in the EIA Regulations. The use of 'sensitivity' in the report related to the strong feeling that had been demonstrated by the objections. Officer 1 denied that there were contradictory statements in the report relating to noise and residential amenity.

(c) Conclusion

48. If there had been a community council in the area in which Mrs C resides, then it would have been consulted on the Application and it would have been responsible for putting forward the views of the community. Mrs C in a large part adopted that role. She and her neighbours mobilised local opinion and

undertook an impressive amount of research. That research is highlighted in Mrs C's own statement of objection of 28 November 2007 to the Application which extended to 49 pages. Officer 1's report on the Application is also, in my view, cogent and well presented. The Application was put before the local Area Committee on 18 June 2008, and divided the opinion of councillors. Ultimately, the democratic decision of elected members was to approve the Application subject to conditions by five votes to two votes. Issue of the consent was, however, delayed by negotiations over a legal agreement regarding the financial arrangements for restoration of the site and was only issued to the Developer on 21 September 2009.

49. The context of that part of Mrs C's complaint to the Ombudsman, which I have investigated, was not to revisit arguments relating to the merits of whether or not the Application should have been approved. It is not for the Ombudsman's office to suggest that that decision was flawed and should be quashed, but rather to examine the administrative process, comment on any defects found, and make appropriate recommendations.

50. From my examination of the material before me I consider that Mrs C's letter of objection, the full text of which was available to councillors, was appropriately referred to in Officer 1's report; proper account was taken of the Council's Supplementary Planning Guidance on wind energy which had been finalised in April 2008; there was no significant misrepresentation of the differences in the Application compared with the refused proposal for five wind turbines at Site A; and that Officer 1 did not in her report on the Application contradict statements that she had made earlier in her Screening Opinion.

51. This was an application for an 81 metre high single wind turbine on the sea wall of a former Docks area with a variety of current planning uses some 350 metres from the nearest residential property. It was in my view properly considered on its merits and was approved in full consideration of all relevant information. I do not uphold the complaint.

Explanation of abbreviations used

Mrs C	The complainant
The Docks area	A former docks area with a mixture of planning uses and which includes the site of the Application
The Application	An application for planning consent for an 81 metre high single wind turbine on the sea wall of a former docks area
The Council	Fife Council
The Screening Opinion	A part of the administrative process to establish whether an Environmental Statement is required in terms of the Environmental Impact Assessment (Scotland) Regulations 1999
EIA	Environmental Impact Assessment in terms of the Environmental Impact Assessment (Scotland) Regulations 1999
Officer 1	The Council's planning case officer
The Developer	The developer who submitted the Application
Officer 2	The Council's former team leader, Development Services
Officer 3	The Council's Development Manager (Development & Regeneration)

Officer 4	The Council's current team leader, Development Services
The EIA Regulations	The Environmental Impact Assessment (Scotland) Regulations 1999
Site A	Another proposed site for wind turbines 20 kilometres distant
ETSU	Energy Technical Support Unit

Officer 1's Screening Opinion

'ENVIRONMENTAL IMPACT ASSESSMENT (SCOTLAND) REGULATIONS
1999

SINGLE WIND TURBINE AT [the Docks area]

Proposal

The developer has submitted a request for a screening opinion for the above noted proposal on 13.04.07. The development would consist of a single wind turbine with a rotor diameter of 52 metres attached to a tower with a hub height of 55 metres.

Location

A location plan has been submitted which shows the turbine located on a strip of ground next to the sea wall forming the southern boundary of [the Docks area]. The proposed site is not located within a sensitive area as defined in Regulation 2 (i) although the site is within the vicinity of the SPA and SSSI that covers the Firth of Forth.

Type of Development

The proposed development falls within Schedule 2 of the Regulations; in this case section 3 of the annex to the Regulations.

- i) Installations for the harnessing of wind power for energy production (wind farms)

There are two criteria under this part that would determine the need for EIA screening.

- (i) The development involves the installation of more than 2 turbines; or
- (ii) The hub height of any turbine or height of any other structure exceeds 15 metres.

In this case the height would be exceeded and, therefore, the wind turbine may have an impact that would necessitate the need for an EIA screening.

Assessment of Impacts

The Planning Authority is obliged to assess the proposal against the indicative criteria in Schedule 3 to the Regulations to determine whether or not the

proposed development is likely to have significant effects on the environment. To assist with this assessment, Circular 15/1999 sets out indicative thresholds and criteria regarding the type and scale of development for which the EIA is more likely to be required and conversely the sort of development for which the EIA is unlikely to be necessary. In this case the Circular advises that:

'The likelihood of significant effects will generally depend upon the scale of the development, and its visual impact, as well as potential noise impacts. EIA is more likely to be required for commercial developments of five or more turbines, or more than five MW of new generating capacity.'

In this case there are no landscape designations that would raise a serious issue regarding the visual impact. There is a potential for noise nuisance, however, the site is within an industrial area and the nearest residential development is distant from the proposed location. Whilst there are nature designations in the wider vicinity the land immediately abutting the site is not included. The generating capacity is well within the 5MW threshold.

Conclusion

Whilst the single turbine proposal does breach the height restriction within the Regulations the potential impacts are limited and there are no statutory designated sites that would be directly affected by the development. The developer has previously been advised that an Appropriate Assessment under the Habitats legislation would be required.

[Officer 1]
Planner
May 2007'

The Environmental Impact Assessment (Scotland) Regulations 1999

The Environmental Impact Assessment (Scotland) Regulations 1999 (the EIA Regulations) came into force on 1 August 1999 and take into account the selection criteria in Annex III of European Council; Directive 85/337/EEC as amended by European Council Directive 97/11/EC.

Regulation 5 (1) (4) of the EIA Regulations provides that a person who is minded to carry out development may request the relevant planning authority to adopt a screening opinion to the effect that the development is development requiring an Environmental Impact Assessment (EIA). The authority is required to adopt a screening opinion within three weeks of receipt of the request or such longer period as may be agreed in writing with the person making the request. Regulation 4 (5) requires that where a planning authority have to decide whether development set out in Schedule 2 of the EIA Regulations is EIA development, they shall take into account in making that decision such of the selection criteria set out in Schedule 3 of the EIA Regulations as are relevant to the development.

The extant relevant central government guidance to planning authorities in April 2007 was contained in Scottish Executive Circular 15 of 31 August 1999 (the 1999 guidance - since replaced by Scottish Government Circular 8 of November 2007). The 1999 guidance states that it falls to a planning authority to consider whether a proposed development requires an EIA. In the case of proposed development coming under a category in Schedule 1 of the EIA Regulations, an EIA is mandatory. In the case of development of a type listed in Schedule 2, an EIA is required if the development is likely to have significant effects on the environment by virtue of factors such as its size, nature or location.

Schedule 2 development is defined as (a) being located wholly or in part in a sensitive area as defined in Regulation 2 (1) (defined as sites of special scientific interest, sites subject to nature conservation orders, on an UNESCO World Heritage list, a scheduled monument, a conservation habitat site, or a natural heritage or natural scenic area) or (b) meets one of the relevant criteria or exceeds one of the relevant thresholds listed in Schedule 2. In the case of energy industry developments concerning installations for the harnessing of

wind power for energy production (wind farms) (Schedule 2 Category 3 (1)) the thresholds are (i) the development involves the installation of more than 2 turbines; or (ii) the hub height of any turbine or height of any other structure exceeds 15 metres.

Paragraph 33 of the 1999 guidance states that a planning authority should have regard to the selection criteria in Schedule 3 of the EIA Regulations to determine whether a development is likely to have significant effects on the environment. The broad selection criteria are the characteristics of the development (size, use of natural resources, quantities of pollution, waste generated), the environmental sensitivity of the location, and characteristics of the potential impact (magnitude and duration). Paragraph 34 states that it should not be assumed that conformity with a development plan rules out the need for an EIA but also states that the amount of opposition or controversy to which a development gives rise is not relevant to the determination, unless the substance of opponents' arguments reveals that there are likely to be significant effects on the environment.

FLOW CHART

Establishing whether a development requires EIA

