

Scottish Parliament Region: Central Scotland

Cases 200801197 & 200801300: South Lanarkshire Council

Summary of Investigation

Category

Local government: Planning; handling of application (complaints by opponents)

Overview

The complainants, Mr and Mrs C and Mr D, had objected to the siting of the new Uddingston Grammar School (the New School) when the planning applications were submitted¹. Following the decision by South Lanarkshire Council (the Council) to approve the applications, they remained concerned about the way the planning conditions were enforced and, in particular, about measures designed to minimise flooding.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) alternative sites for the New School were not properly considered (*upheld*);
- (b) the number and wording of planning conditions were inappropriate (*upheld*); and
- (c) the monitoring and approval of the conditions relating to flood prevention were not carried out properly (*not upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

- (i) remind staff of the need to ensure evaluation tools are not only used but used appropriately;
- (ii) review their policy on standard conditions and consider providing guidance to planning officers about when these should and could be altered;
- (iii) review their policy on the appointment of consultants, in an effort to avoid situations where they and an applicant or developer are using the same advisers and, where this is not possible, ensure this is noted and managed; and
- (iv) apologise to Mr and Mrs C and Mr D for the failings identified in this report.

¹ There was more than one planning application associated with this redevelopment, for ease of comprehension I refer to the two applications to which consent was granted.

Main Investigation Report

Introduction

1. From 2005, South Lanarkshire Council (the Council) were undertaking a major renovation and re-building programme of their school buildings. As part of this they intended to refurbish Uddingston Grammar School (the School). During the tendering process, concerns were raised about the practicality of this. The Council's preferred bidder for the contract recommended that the buildings be replaced. The preferred bidder² suggested that a new school (the New School) could be built on the area used by the School as playing fields³. New playing fields would be built adjacent to the New School on land also owned by the Council. The School's Modernisation Team (the Team) prepared a report which supported this recommendation and a planning application was submitted by the company who won the contract to build the New School (the Developer) on this basis. Mr and Mrs C and Mr D objected to the site on a number of grounds and formally objected to the planning application⁴. In particular, concerns were raised that the site was on a flood plain. It was accepted in the report by planning officers that the proposal was in a medium to high flood risk area but they recommended that the application be granted as an exception, as long as specific planning conditions were included to mitigate the risk.

2. On 15 August 2006, the planning application was approved, with 39 conditions attached. Many of these required to be implemented prior to building work or within a specific time of building starting. Mr and Mrs C and Mr D were concerned about the Council's monitoring of the work. Following problems which arose during the building work around the location of a gas main, a second planning application was submitted which related to the grounds to be used by the New School for recreation and also related to flood prevention measures. Conditions from the first application were carried forward to this new application. Following the opening of the New School, Mr and Mrs C and Mr D remained concerned about the monitoring and approval of flood protection and related measures.

² The preferred bidder later became the developer.

³ This was across the road from the current site.

⁴ This application received a significant number of objections.

3. Mr and Mrs C and Mr D brought their concerns to the Ombudsman in August 2008. An investigating officer met with them and then with the Council. Advice was obtained from an independent planning adviser (the Adviser). Following this, I decided that the issue around the initial choice of site merited investigation. Given this, and in response to comments from the Adviser, I also decided to seek further information from the Council on aspects of the planning conditions; and the monitoring and approval of the flood prevention measures.

4. The complaints from Mr and Mrs C and Mr D which I have investigated are that:

- (a) alternative sites for the New School were not properly considered;
- (b) the number and wording of planning conditions were inappropriate; and
- (c) the monitoring and approval of the conditions relating to flood prevention were not carried out properly.

Investigation

5. In considering this complaint my investigating officer obtained and reviewed relevant documentation, sought advice from the Adviser, met with the complainants and their MSP (the MSP) and interviewed Council staff.

6. 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 Mrs C, Mr D and the Council were given an opportunity to comment on a draft of this report.

7. In making my conclusions on this complaint, I have taken into account section 7(1) of the Scottish Public Services Ombudsman Act 2002, which says that 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'. This means that the exercise of professional judgement and the democratic decision of councillors are not considered in themselves. They lie within the discretion of the Council. Instead, the report looks at the administration surrounding those decisions, to ensure that they were made with the appropriate information and taking into account good practice.

(a) Alternative sites for the New School were not properly considered

8. The Council's initial proposal was for a refurbishment of the School. However, bidders for the tender informed the Council that it would likely not be possible to make the existing building conform with current legislation. The

preferred bidder recommended that the School be replaced and suggested a site using the current playing fields.

9. The Team prepared a report considering this proposal. Seven sites were considered in total and a matrix prepared to allow comparison between them. The matrix contained information on each site under the following heads: owner/title, size, local plan designation, environmental issues, site access, flooding impact, ground conditions and contamination and amenity impact. The final column was for comments/recommendations.

10. The Team recommended the site suggested by the bidders and said that the reasons for doing so were: the site was owned by the Council; no consultation or referral was required because of a change of school site⁵; the School could operate while the New School was being built; there would be no impact on roads; the local economy would not be affected by a significant move of site; and the site could take not only the building but also the associated leisure facilities that were required.

11. In considering the matrix and the way it was used, the Adviser noted that the Team had heavily weighted two considerations: sites owned by the Council and whether referral to the Scottish Government was required. Of the seven sites within the matrix, three were owned by the Council and only one would not have required referral to the Scottish Government⁶. The other matters on the matrix were not given the same weighting. The Adviser added that other important considerations such as the relationship of the sites to the school catchment area were not included. He said that 'it has to be concluded that the site selection was not based upon a full and proper assessment of a detailed 'site selection matrix', but upon ownership and procedural considerations only.' He also said 'that does not necessarily mean that the most suitable site was not selected'.

12. In responding to questions on this point, the Council accepted the Adviser's specific criticism (see paragraph 11) but noted that the decision was made within the context of an extremely ambitious project and that most

⁵ Mr and Mrs C and Mr D have argued that this was a change of site. This matter was considered but was not taken forward for investigation.

⁶ This referral would have been education related. The application was referred because it was a development in which the Council had an interest.

redevelopments had taken place within existing campuses. On the few occasions where this did not occur, the redevelopment took place on Council-owned land. Council-owned land was preferred because this removed the potential for any delay caused by extended negotiations with private landowners and also facilitated the planning process, which would lead to a reduction in costs.

(a) Conclusion

13. Having accepted the arguments that refurbishment was not the best way forward, the Team did take steps to review the alternative suggestion put forward by the preferred bidder. They identified some possible other sites in the area and set out a number of factors for comparison. The general process, therefore, was appropriate. However, the report produced with the matrix showed that this tool was not used properly. Instead, two factors were given overriding weight, to the extent that other factors were only considered to a lesser extent.

14. Clearly, in any comparison tool, not all factors need to be given the same weight. The Council have provided an explanation why their ownership of the land would clearly be preferable and I do not think the fact that weighting was given to this was, in itself, unreasonable. However, this did not mean that other factors should not have been considered more carefully. I also consider that the need to consult or refer to the Scottish Government was not a matter that should have been given such significant weighting. The primary issue was to ensure the best site was selected.

15. The Adviser has said the site chosen may have been the best option for the New School. However, it would have been preferable if it could have been evidenced by the Council that all options had been given appropriate consideration. In the circumstances, I uphold this complaint.

16. The Council have accepted the most significant criticism on this point and the recommendation below reflects this.

(a) Recommendation

17. The Ombudsman recommends that the Council remind staff of the need to ensure evaluation tools are not only used but used appropriately.

(b) The number and wording of planning conditions were inappropriate

18. Before considering the planning conditions, it may be helpful to explain the relationship between the various parties involved.

19. The preferred bidder was offered the contract for the New School as part of a broader modernisation programme. They became the Developer of the project and, as such, they made the planning applications in their own name. As the planning authority for the area, the Council were obliged to consider the application and, once it was passed, were responsible for monitoring the development and deciding whether it complied with the consent appropriately, in the same way that they would with any comparable development in which they did not have an interest.⁷ The Council's planning department and enforcement officers, therefore, considered this separately from the Team. The Council have said that, in the event that the development had not complied with the conditions, the Developer would have borne the risk of remedying this and not the Council.

20. The first planning consent was issued on 15 August 2006. The consent was granted with 39 conditions. Of these, 14 required to be completed within three months of the date of consent and another seven before development on all or part of the site began.

21. The complainants were concerned about the monitoring of the conditions and the MSP (see paragraph 5) wrote directly to the Council about this. On 20 October 2006, the Council wrote to the MSP detailing which conditions were agreed and which were outstanding. Further details were given in January 2007 and, on 15 August 2007, the Chief Executive wrote referring to six specific conditions. He noted that they should have been implemented prior to the commencement of work. The Chief Executive expressed his dissatisfaction with the Developer and said that if formal submissions were not made soon they would proceed to enforcement action. However, it was also said that, as a general rule, the Council would not prevent a site start 'where the developer was in active discussions with us and was working up schemes/proposals to satisfy those conditions'.

⁷ There are planning provisions which require all such projects where there may be a question of a conflict of interest to be sent to the Scottish Government for consideration; both consents followed this route.

22. The second planning consent for the site was granted on 13 August 2008 (see paragraph 2). The application contained 42 conditions. Again, a number of these required to be completed within a certain time or prior to work. A significant proportion of these were carried forward from the first consent.

23. In order to assess fully whether the conditions were appropriate, the Adviser first looked at the way the Council dealt with the question of monitoring and enforcement of those conditions. On this point, he referred to Planning Advice Note 54 and Circular 4/99⁸. He noted that the process could be slow and cumbersome and, in practice, authorities would generally only proceed if there were no other options. In this case, the Council had a legal contract with the Developer and could pursue problems through that alternative route; negotiations were ongoing throughout the process and information was forthcoming, if rather slowly; and it was also reasonable to assume that compliance with the conditions would be achieved in the foreseeable future.

24. The Adviser concluded that the Council did act in an appropriate manner for such a development by encouraging and negotiating, rather than seeking formal enforcement action. This approach was consistent with normal planning practice. However, the Adviser said that questions could be asked about the number, wording, and relevance of some of the planning conditions. He suggested some major issues could have been cleared before the consent was granted.

25. In response to the Adviser's concerns, the Council said that the conditions were included in response to both general planning matters and the requirements of statutory consultees. They said they were satisfied that the conditions were necessary and relevant.

26. On the detail of the conditions, the Council said that they had a set of standard conditions which were used by planning officers. They accepted that, in this case, some conditions were dealt with throughout the development period. While they had taken a robust position in wording these, the Developer was technically in breach early in the process because they had commenced work without ensuring compliance with some of the conditions and this caused concern. They accepted that 'In hindsight, it would have been appropriate to re-word the conditions accordingly'.

⁸ These are guidance notes issued by the Scottish Government.

(b) Conclusion

27. In reading Circular 4/99, it is clear that the enforcement process is primarily aimed at 'unauthorised development'.

28. In this case, the development itself had been authorised. However, the Council would have the option of enforcement action if they felt a breach of the conditions was so significant that it required to be dealt with. As the Adviser has said, enforcement is a lengthy process and the guidance given to councils is to use this power sparingly and to encourage compliance first. While compliance did not occur within the original time span, it was secured without enforcement action.

29. While I do not criticise the decision not to proceed to enforcement action, given the advice I have received, when a planning application has been controversial, the monitoring and implementation of conditions are often carefully scrutinised by those who initially objected to the decision. This can be frustrating and, at times, worrying for individuals who are not part of the process and may not be aware why the enforcement action is not being openly pursued. Given this, it is important to ensure that careful thought is given to the wording of planning conditions, not only to ensure that they achieve the planning outcome but that they do not unnecessarily raise expectations and concerns.

30. Planning conditions are a part of normal, professional judgement. They are approved by councillors and each condition made on both consents was linked to a specific planning provision to justify and explain its inclusion. It is not the role of the Ombudsman's office to question professional judgement (see paragraph 7). However, the use of standard conditions and, in particular, standard timings for this complex project meant that concern was understandably raised when conditions which the Council had required to be done prior to work starting were not finally dealt with until much later. I note that the Chief Executive himself expressed his concerns in his letter to the MSP.

31. While I do not question the adequacy of the conditions to ensure the development was in line with relevant legislation and building standards, I consider that using standard conditions on a development of this complexity was inappropriate; I would also have expected greater thought to be given to their timing at the start of the process. I, therefore, uphold this complaint.

(b) Recommendation

32. The Ombudsman recommends that the Council review their policy on standard conditions and consider providing guidance to planning officers about when these should and could be altered.

(c) The monitoring and approval of the conditions relating to flood prevention were not carried out properly

33. The Scottish Environment Protection Agency (SEPA) had raised concerns initially to the proposed scheme because of concerns that the New School would be built on part of the functional flood plain of the river Clyde. The New School would be protected from flooding but the land which it was on would, therefore, no longer be available if there was a river level rise. However, at the time the first consent was granted, SEPA said that if the proposal was secured by certain conditions this would manage the risk. During the planning process, concerns were also raised by residents about the drainage of surface water from rainfall.

34. The first planning consent was, therefore, granted with conditions relating to issues with water from both river flooding and surface drainage. The Developer had to ensure that work undertaken on an existing embankment⁹ and the new storage capacity was in line with the design which had been approved in the consent. They also had to provide for the maintenance of this scheme. Conditions also required them to provide details of the drainage arrangements. This should be in the form of a Sustainable Urban Drainage Scheme or SUDS.

35. The original scheme, however, could not be implemented because of issues surrounding a gas main and the second consent was granted to a variation of the scheme. The planning report for this application noted that SEPA had confirmed there were no objections but recommended again that conditions were attached and to ensure these were implemented. The conditions relating to the embankment and related compensatory storage were largely the same as the first consent. However, the Developer had to comply with additional conditions relating to the drainage and to provide details of the outflow to the river Clyde. This second consent was not granted until 13 August 2008 but was in process for a significant period prior to this.

⁹ This had been put in place to protect housing in the area, in response to an episode of flooding in the mid 1990s.

36. Once the conditions were set, the Council's role became one of deciding whether or not the Developer had provided enough evidence for them to consider that the requirements under those conditions had been complied with or 'discharged'. The decision whether to discharge each condition ultimately relied on the exercise of judgement by the Council (see paragraph 7). I have considered the steps taken by them to ensure that they exercised this judgement with adequate information and taking into account their policy and procedures.

37. On 1 August 2008, a meeting was held attended by the Council, the Developer and consultants employed by the Council (the Consultants). The note of the meeting states that it was 'to resolve outstanding issues regarding the drainage design to allow related planning conditions to be discharged'. Although this was before the second consent was formally granted, the conditions had been known since June 2008, when the consent was passed to the Scottish Government for a decision as to whether this consent should be 'called-in'¹⁰.

38. The Council officer who attended the meeting (the Officer) was asked about the role of the Consultants. He explained that because of the nature of the site; the flood risk and the high political profile of the application, the Consultants had been providing him with support throughout.

39. At interview, the Officer explained that the Consultants had been chosen because they had already undertaken detailed modelling of the river Clyde downstream of the development, on behalf of another council. They, therefore, had a unique expertise.

40. At the same meeting on 1 August 2008, the Developer also talked about the certificates they were being required to provide. In May 2008, the Council had introduced new guidance for planning applicants. I was provided with a copy of this guidance. This informed applicants that they would be required to certify that any SUDS was in line with the appropriate standards, by providing a design compliance certificate and an independent design check certificate. The

¹⁰ Both applications were referred to the Scottish Government in line with the relevant planning legislation and guidance because the Council had an interest in the development and the number of objections received.

Council also required applicants to certify their Flood Risk Assessment Report by providing a compliance certificate and an independent flood risk assessment.

41. The Officer explained at interview that, as a transitional arrangement when implementing the guidance, the Council required developments that were 'in progress' to provide their own but not the independent assessment. As the conditions relating to flooding and drainage had not been discharged by May 2008, the conditions on the consent relating to the New School came under this transitional procedure. The Developer, at the meeting on 1 August 2008, had queried the role of the Consultants, given that they were prepared to provide these certificates. It was in this context that the Officer explained why he had requested this expertise (see paragraph 39).

42. The Consultants raised a number of detailed concerns about the SUDS design and insisted on the provision of evidence to support some of the Developer's claims. These included questions about the outfall to the river Clyde and the relationship between levels in the river Clyde and in the drainage system.

43. At the end of the meeting, the Developer said they would provide the additional information by 6 August 2008. The Consultants said they would review quickly. The Officer said that once the design had been agreed, the Developer would be required to sign three of the five certificates as set out in the new guidance and to provide professional indemnity insurance. Only after this would the conditions be discharged.

44. On 13 August 2008 the Consultants provided the Council with a technical note. This note said that 'Generally the calculations and drawings submitted are accepted as demonstrating a design philosophy that protects the school from the impact of extreme storm events allowing for the impact of a surcharged outfall at the river Clyde'¹¹. Between 20 August to 19 September 2008, the certificates required under the Council's procedure were signed. One of these certificates was signed by experts employed by the Consultants, as the Developer had also employed them to provide assistance on part of the scheme. The Officer confirmed he had received a copy of the Developer's insurance on 21 August 2008. This was dated from April 2008 and ran until

¹¹ This note also considered possible impact on residential property and civil infrastructure.

April 2009. The Council also provided a copy of the current insurance from April 2009 to April 2010.

45. In December 2008, the Council confirmed by letter to the Developer a number of matters which had been discharged. The certificates and the technical note had meant most of the conditions relating to flooding had been discharged at this point. However, the Developer still required to submit an 'as built-level' survey. This was submitted on 18 December 2008. The Officer attended a site visit that day to review. On 22 December 2008 the Officer informed the planning department in the Council that the related condition could be discharged¹².

(c) Conclusion

46. Again, the decision whether the conditions had been discharged lies with the professional judgement of individual officers of the Council. They have to do so taking into account relevant standards. The complainants, and Mr D in particular, have raised some very technical questions about the way the flood measures and the SUDS system have been put in place and whether they will be adequate to deal with flooding and rain. They remain unhappy with the answers they have received. However, having reviewed the way in which they decided to exercise their discretion, I have decided the Council has done so appropriately. I, therefore, do not uphold this complaint.

47. The role of the Consultants for both the Developer and the Council does raise a possible conflict of interest. Having seen the notes of the meeting of 1 August 2008, when the Developer was questioned in detail by the Consultants, I do not question the Council's decision that they could rely on the advice provided by the Consultants. However, the fact that both the Developer and the Council were using the same Consultants and were relying on the same information means the underlying data relied on by the Consultants may not have been questioned. I have some disquiet about this and, from the point of view of a complainant, I understand that this could raise concern about the independence of the advice received. I, therefore, recommend that the Council review their policy on the appointment of consultants in order to avoid situations where they and an applicant or developer are using the same advisers.

¹² This information was subsequently shared with SEPA and the Consultants to allow for accurate, future modelling of the area.

(c) Recommendation

48. The Ombudsman recommends that the Council review their policy on the appointment of consultants, in an effort to avoid situations where they and an applicant or developer are using the same advisers and, where this is not possible, ensure this is noted and managed.

General recommendation

49. The Ombudsman further recommends that the Council apologise to Mr and Mrs C and Mr D for the failings identified in this report.

50. The Ombudsman asks that the Council notify him when the recommendations have been implemented.

Explanation of abbreviations used

The Council	South Lanarkshire Council
The School	Uddingston Grammar, old school building
The New School	Uddingston Grammar, new school building
The Team	The Schools Modernisation Team
The Developer	The company who won the contract to build the New School
Mr and Mrs C and Mr D	The complainants
The Adviser	An independent planning adviser
The MSP	An MSP who supported the complaint
SEPA	Scottish Environment Protection Agency
SUDS	Sustainable Urban Drainage Scheme
The Consultants	Consultants employed by the Council to provide specific flooding advice
The Officer	The officer who represented the Council in the meeting on 1 August 2008 and who considered the flood and drainage arrangements

List of legislation and policies considered

Planning Advice Note 54

Circular 4/99