Parliament Region: South of Scotland

Case 200903486: East Lothian Council

Summary of Investigation

Category

Local government: Planning; pre-planning application advice

Overview

The complainants (Mr and Mrs C) intended to install solar panels on the roof of their home, in a conservation area in a town in East Lothian, and arranged a meeting at the Planning Service offices of East Lothian Council (the Council). They complained about the quality of advice given to them and about the way their subsequent complaint was handled.

Specific complaints and conclusions

The complaints which have been investigated are that:

(a) there was a failure at a pre-application meeting to give appropriate advice (*not upheld*); and

(b) there were failures in the handling of the complaint (*upheld)*.

Redress and recommendations

The Ombudsman recommends that the Council:	*Completion date*
(i) assess the need to supplement internal guidance, with particular regard to the handling of requests for pre-application advice about the proposed installation of microgeneration equipment in conservation areas; and	17 January 2010
(ii) take steps to ensure that the outcome of pre-application meetings and advice are properly recorded.	17 January 2010

The Council have accepted the recommendations and will act on them accordingly.

Main Investigation Report

Introduction

Legislative Background

1. The Town and Country Planning (General Permitted Development (Scotland) Order 1992 (the 1992 Order) specifies categories of development to be regarded as 'permitted' that is, deemed to have planning consent. However, Article 4 of the 1992 Order enables a planning authority, where they consider it expedient to do so, to issue a direction (an Article 4 Direction) removing permitted development rights, for example, in a conservation area. On 6 February 2009, the Town and Country Planning (General Permitted Development) (Domestic Microgeneration) (Scotland) Amendment Order 2009 (the 2009 Order) was laid before the Scottish Parliament. This altered the 1992 Order by adding to the classes of proposals regarded as permitted the installation, alteration, or replacement of solar photovoltoic or solar thermal equipment on a dwellinghouse or a building containing a flat, but with the exclusion that development would not be permitted by this class, in the case of land within a conservation area if the solar photovoltoic or solar thermal equipment would be installed on a wall or part of a roof which a) forms the principal elevation of the dwellinghouse or the building containing the flat; and b) is visible from a road. The 2009 Order came into effect on 12 March 2009. No definition of principal elevation is given in the 2009 Order, but the definition of road follows that given in section 151 of the Roads (Scotland) Act 1984 to include 'footpath' and 'footway'.

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

(a) there was a failure at a pre-application meeting to give appropriate advice; and

(b) there were failures in the handling of the complaint.

Investigation

3. The correspondence supplied by Mr and Mrs C and responses by East Lothian Council (the Council) to my complaints reviewer's enquiries were examined. Advice on the complaint was obtained from my planning adviser. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr and Mrs C and the Council were given an opportunity to comment on a draft of this report.

(a) There was a failure at a pre-application meeting to give appropriate advice

4. Mr and Mrs C reside in a detached two storey home, situated in a backland area in a conservation area in a town in East Lothian. The house was constructed in the mid 1970s and planning consent was granted by East Lothian District Council in June 1994 to add a porch to the north elevation.

5. The Council informed my complaints reviewer that an Article 4 Direction, in terms of an earlier order restricting permitted development rights within the curtilage of a dwelling house including alterations and extensions to a dwelling house in the conservation area, had been brought into force by a predecessor authority in two stages in 1978 and 1981 and covered all 21 designated conservation areas in East Lothian dating from that time. While in 2001 and 2008 the Council had hoped, as part of the Local Plan process, to promote a new Article 4 Direction covering each of its conservation areas, before they are able to do so, a conservation area character appraisal for each of the 29 existing and one new proposed conservation area is required. Resource difficulties and competing priorities have prevented this being completed, although work has started on a programme of appraisals. The upshot is that the current Article 4 Directions remain in force until revised Directions are approved by Scottish Ministers. Asked about a potential for conflict between the Article 4 Direction and the 2009 Order, the Council informed me that they did not consider that in those conservation areas to which it applies the Article 4 Direction overruled the permitted development rights created by the 2009 Order.

6. On 8 May 2003, Mr and Mrs C submitted an application through an architect, for the replacement of existing aluminium windows with white pvc double glazed units. In the site plan and associated photographs of windows to be replaced, the south entrance to their home was described as the 'main entrance' and the north entrance (with porch) as the 'rear entrance'. That application, for which a fee of £110 was payable, was granted on 1 July 2003.

7. After the 2009 Order came into force on 12 March 2009, a designated officer in the Council's Development Management team received an email from the Scottish Government and this was forwarded to all members of the team, with an electronic link to the statutory instrument to allow them to download and use it. The Council informed me that discussion and instruction on the use of new legislation received in this way occurred at the team's weekly meetings.

8. Mr and Mrs C informed my complaints reviewer that they were aware of new provisions relating to the installation of solar panels but not the specific details of the 2009 Order. They stated that they made a prearranged visit to the Council's Planning Service offices on 15 May 2009, to discuss their proposals to install solar panels on their roof, and entered the meeting with the expectation that planning consent would be required because their home was in a conservation area. They stated that the duty officer to whom they spoke (Officer 1) was aware of their address and the location of their home but did not have a copy of the 2009 Order to hand when the meeting commenced. Mr and Mrs C informed Officer 1 that, ideally, they would want the solar panels on the south elevation roof. At this point, Officer 1 printed off a copy of the 2009 Order and supplied this to Mr and Mrs C. He read through relevant sections. According to Mr and Mrs C there was no specific discussion of the issues of 'principal elevation' or 'view from a road'.

9. The Council informed me that the meeting was not pre-arranged and Mr and Mrs C had called at the Environment Service office reception and spoken to Officer 1 as duty planning officer that day. The subject of their visit emerged in discussion. Officer 1 has stated that there was no discussion of how the need for planning consent might be obviated. He recalled discussing with Mr and Mrs C how neighbour notification would have to be carried out should they have to make an application to the Council for planning permission. He provided them with a planning application pack and a location plan on which he marked the properties in respect of which neighbour notification would be required. No note of this meeting has been provided by the Council.

10. Mr and Mrs C stated that they left the meeting on 15 May 2009 with the understanding that planning permission was required. They confirmed that they took the copy of the 2009 Order with them. Mr and Mrs C obtained an ordnance survey location plan (£25) the same day (15 May 2009). They submitted an application for planning consent on 18 May 2009 with the related £145 planning application fee.

11. On 20 May 2009, however, a planning technician (Officer 2), wrote to Mr and Mrs C stating that, in order for the Council to see if planning permission was required for the installation of the solar panels, they should submit elevation drawings showing exactly where the solar panels would be placed; how far they would protrude from the roof slope; if the panels would be placed

on the principal elevation of the house; and if the solar panels would be visible from a road. Mr and Mrs C said that they then incurred £200 in instructing an architect to prepare elevation drawings of the proposed solar panels.

12. Mrs C returned to the Planning Department on 5 June 2009 with the requested elevation drawings and met with Officer 2 in the reception area. This was her first meeting with Officer 2. She considered that he had exhibited rudeness and had queried whether the plans submitted were to the required scale. He advised that, in addition, to the five neighbours already notified, a further five neighbours required to be notified. The Council's website records a 1:50 elevation described as 'proposed rear elevation in courtyard' date stamped as received on 5 June 2009. A further drawing of the same elevation was submitted on 8 June 2009. Mr and Mrs C also submitted a photograph taken from a nearby road showing only part of the roof.

13. A letter from an administrative officer of the Council of 8 June 2009, reminded Mr and Mrs C about the need to return the application forms with updated plans showing neighbours notified. This crossed with a letter from Mr and Mrs C to Officer 2 of the same date submitting the information requested and stating that, in their view, the proposed panels would not be on the principal elevation of their house.

14. On 12 June 2009, Mr and Mrs C wrote to Officer 1 asking him when he had visited their property and determined the principal elevation; how the issue of visibility from a road had been assessed; and why, given the terms of the 2009 Order, they had been asked to submit an application. They referred to the Council's Code of Conduct on openness and the Royal Town Planning Institute guidance on professional conduct.

15. Mr and Mrs C thereafter spoke with a principal planner at the Scottish Government and wrote again to Officer 1 on 25 June 2009 seeking a definition from him of principal elevation. They maintained that their home was unusual in that it did not have a principal elevation and if it did, then that was the north entrance to their house, reached first from the street. They asked for a meeting to discuss their proposals.

16. The Council's planning portal recorded that Mr and Mrs C's planning application was withdrawn as invalid on 17 July 2009. Their planning fee of £145 was returned to them. Mr and Mrs C said that they withdrew their

application on the grounds that they considered it had been unnecessary for them to apply.

17. In submitting their complaint to the Council on 15 September 2009, they referred to the failure to accord them a site visit and considered that they should be reimbursed the expenditure they had incurred in addition to the application fee.

18. Subsequently, Mr and Mrs C sought an opinion on issues and possible courses of action from a firm of town planners (the Chartered Planners). The Chartered Planners responded on 1 October 2009 and advised Mr and Mrs C that if a decision had to be reached on the principal elevation of their home under 5(a) of the 2009 Order, then it would be the one facing north. With regard to 5(b), the view from another local street, if any, could only be fleeting. The Chartered Planners suggested that, on the basis of their reason for withdrawing their application, the logical step would be to install the panels and await a reaction from the Council (either no action or enforcement).

19. At the time this report was drafted, the panels had not been erected.

(a) Conclusion

20. This is the first complaint dealt with in my office, subsequent to the commencement of the 2009 Order, concerning proposals to erect solar panels in a house in a conservation area. It raises two major significant issues, relating to permitted development and a familiar theme of dissatisfaction with the quality of pre-planning application advice.

21. The Council have informed me of the process for disseminating internally within the development management team information on new planning legislation, statutory orders and central government guidance.

22. There is a conflict of evidence as to whether the meeting on 15 May 2009 was prearranged with the topic of enquiry identified beforehand. If as, Mr and Mrs C said, their visit to the Council was by prior appointment and the purpose was disclosed by them, then Officer 1 should have prepared beforehand for that meeting by researching the relevant material planning issues, including the 2009 Order. If, as he maintains, the purpose of the meeting emerged in discussion, he identified the relevant 2009 Order and, most importantly, provided Mr and Mrs C with their own copy to take away with them. While I

have been provided with Officer 1's and Mr and Mr C's recollection of what was said, I have not been provided with any document requesting the meeting or confirming the outcome.

23. For their part, Mr and Mrs C said that they entered the meeting believing that all development in conservation areas required express planning consent. Since the Council maintain that the extant Article 4 Direction does not take precedence over the 2009 Order, that is not the case.

24. The unequivocal advice that I would have expected to be given at such a meeting was that, in the specific circumstance, a proposal to erect solar panels on the roof of Mr and Mrs C's home could be regarded as permitted if the panels were not on the principal elevation of their house and could not be seen from the public road. Otherwise, to be authorised, the proposal required the submission of a planning application.

25. I do not believe that the outcome of the meeting was as clear cut as this. Mr and Mrs C were provided with a copy of the 2009 Order, had the opportunity to study it, and could have gone back to the Council for specific clarification of points before submitting the planning application.

26. Pre-planning advice is of value but is not a statutory service that the Council are required to provide. The service is given without charge and it is not, in my view, incumbent on the Council to pay a site visit at the pre-planning stage in a proposed development of this nature. My planning adviser has informed me that 'principal elevation' was a novel concept introduced with the 2009 Order.

27. I am mindful that, on the one hand, Officer 1 could have advised how the need for planning consent might be obviated and, on the other hand, Mr and Mrs C could have reverted to the Council for clarification before submitting their planning application three days after their meeting. On consideration of the circumstances, I am unable to uphold Mr and Mrs C's complaint. In reaching my decision, I am swayed by the agreed fact that Officer 1 provided Mr and Mrs C with a copy of the 2009 Order to take away with them and to consider. Since I do not uphold the complaint, I do not consider that the Council should meet the costs incurred by Mr and Mrs C.

28. Arising from the circumstances of the complaint, it appears to me that there is an inherent difficulty in fully advising enquirers seeking pre-planning advice on the installation of solar panels in houses in conservation areas, where the determining issues of principal elevation and view from a road are not clear cut. The criteria of view from a road and principal elevation are matters of observation and, even where planning authorities are willing to offer non-statutory pre-application advice, site inspections to check on those matters would have important resource implications. I am reluctant, therefore, to recommend that a site visit should be paid in such circumstances. However, in anticipating that the situation could arise again, the Council might wish to formulate internal guidelines providing, in particular, their operational definition of principal elevation.

(a) Recommendations

29. I recommend that the Council:	*Completion date*
(i) assess the need to supplement internal guidance, with particular regard to the handling of requests for pre-application advice about the proposed installation of microgeneration equipment in conservation areas; and	17 January 2010
(ii) take steps to ensure that the outcome of pre-application meetings and advice are properly recorded.	17 January 2010

(b) There were failures in the handling of the complaint

30. On 15 September 2009, Mr and Mrs C submitted a letter under the Council's feedback procedures setting out five complaints, relating to:

1. their initial meeting with Officer 1;
2. Mrs C's meeting with Officer 2 on 5 June 2009;
3. the failure of the Council to accord them a site meeting;
4. the failure of Officer 2 to give them a definition of principal elevation during a telephone call which ended with Officer 2 putting the phone down on Mrs C; and
5. the conflicting information on neighbour notification given by Officer 1 and Officer 2.

31. This letter was received by the Council on 23 September 2009.

32. The Director of Environment responded to Mr and Mrs C on 12 November 2009. He apologised for the delay in his response. With regard to point 1, he stated that the information given initially by Officer 1 on 15 May 2009 was not definitive and that Officer 1 had expected further contact from them. Regarding point 2, he apologised if Officer 2 did not treat Mr and Mrs C courteously. With reference to point 3, the Director stated that there were no formal guidelines on 'principal elevation'. On point 4, he stated that the Council had not advised Mr and Mrs C that they should apply for planning consent. The Director did not address point 5, regarding neighbour notification.

33. Mr and Mrs C wrote to the Council's Chief Executive on 5 December 2009, enclosing the letter of 1 October 2009 from the Chartered Planners (see paragraph 18).

34. The Chief Executive responded on 16 December 2009, providing information dating back to the construction of Mr and Mrs C's home in 1975, which indicated that the main entrance was on the south side and that the construction of the porch on the north elevation in 1994 did not alter that. The Chief Executive maintained that if solar panels were to be installed on the south (principal) elevation roof slope, they would be visible inter alia from two named public roads to the east and to the west respectively (and would require planning permission). The Chief Executive informed Mr and Mrs C that they could pursue the matter further with the Ombudsman's office.

35. Before doing so, Mr and Mrs C wrote again to the Chief Executive on 30 December 2009, taking issue with the designation of the south elevation of their home as the principal elevation. They remained aggrieved about their initial meeting with Officer 1. They stated that he could have advised placing the panels on the west elevation to obviate the need for planning consent. They stated that the Council's position was contrary to the spirit of the changes contained in the order and that they would appreciate a refund of the expenditure they had incurred.

36. After submitting their complaint to the Ombudsman's office on 6 February 2010, Mr and Mrs C clarified that whereas their planning application fee had been returned to them they had expended £25 in an ordnance survey plan and £200 in architects' fees; that they had sustained stress; and had had to spend time in writing letters. They stated that what they wanted was an

apology, an acknowledgement that the Council had mishandled the matter and a refund of their unnecessary expenditure.

(b) Conclusion

37. The response of the Director of Environment to Mr and Mrs C's letter of 15 September 2009 took eight weeks and failed to deal with the point about conflicting information being given by officers as to who should be neighbour notified. The Director apologised for his response being late. On the issue of neighbour notification, that became a responsibility of the Council themselves with the implementation on 3 August 2009 of the Planning Etc (Scotland) Act 2006. The subsequent letter of 5 December 2009 to the Chief Executive was responded to efficiently on 16 December 2009. The Council's Chief Executive, in supplying information to my complaints reviewer, informed him that a new Customer Feedback team was formed on 1 April 2010 and that, from 1 June 2010, changes made to the Council's Customer Relationship Management system provided the feedback team with significantly improved recording, monitoring and reporting capabilities. I uphold this complaint in relation to the delay and lack of comprehensiveness of the Director's response but regard the complaint as remedied and, in light of the recently introduced changes, I have no recommendation to make.

38. The Council have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Council notify him when the recommendations have been accepted.

Annex 1

Explanation of abbreviations used

The 1992 Order	The Town and Country Planning (General Permitted Development) (Scotland) order 1992
The 2009 Order	The Town and Country planning (General Permitted Development (Domestic Microgeneration) (Scotland) Amendment Order 2009
Mr and Mrs C	The complainants
The Council	East Lothian Council
Officer 1	The duty planning officer who met with Mr and Mrs C on 15 May 2009
Officer 2	A planning technician whom Mrs C met with on 5 June 2009
The Chartered Planners	A firm of town planners from whom Mr and Mrs C obtained advice

Annex 2

Glossary of Terms

Article 4 Direction	An article under Article 4 of the 1992 Order removing permitted development rights for example in conservation areas