

Scottish Parliament Region: Lothian

Case 200501503: The City of Edinburgh Council

Introduction

1. On 16 September 2005 the Ombudsman received a complaint from an applicant for planning permission (Mrs C) that the City of Edinburgh Council (the Council) had mishandled her application for change of use of a property to form a crèche/nursery which had been refused under delegated powers. The investigation found that there had been delay in the handling of the application. Whether the complainant's proposals merited approval was, however, a matter in which she had a right of appeal to Scottish Ministers.
2. Mrs C complained that:
 - a. the Council had unduly delayed in determining her application;
 - b. the Council had failed to inform her at the outset of relevant unfavourable planning policies; and that
 - c. despite various discussions with the case officer, there were several factual errors in the report which she considered demonstrated that her application had not been given appropriate consideration.
3. Following investigation, none of the three heads of complaint was upheld:
 - d. there was delay in dealing with the application, however, this was not excessive and the complainant could have availed herself of a statutory right of appeal (paragraph 32);
 - e. the onus of establishing what policies were relevant lay with Mrs C as applicant (paragraph 33); and

- f. to the extent that Mrs C considered the errors were material to the consideration of her application she has a right to appeal the decision to Scottish Ministers (paragraph 34).

Background

4. The Town and Country Planning (Scotland) Act 1997 (as amended) requires a planning authority to determine an application within two months of validation. In the event of a decision not being made within the two month period, or an additional period agreed by the applicant, the applicant may appeal to the Scottish Ministers. Such an appeal must be made within eight months of the date of validation. In the event of refusal, an applicant has six months from the date of intimation of the decision to lodge an appeal with the Scottish Ministers.

The Council's Published Guidance

5. The Council's Development Quality Handbook contains guidance on Private Day Nurseries that were approved on 14 January 1999. In general the Council's local plan policies support the provision of child care facilities that do not involve the loss of residential accommodation or of amenity in residential areas. The guidance at page 3 states that amenity and road safety are salient considerations and planning permission will not normally be granted in respect of properties that are located directly under or over residential properties and/or share an access. The guidance stresses that while car parking requirements will be assessed on merit, the existing on-street parking and traffic situation will be important considerations in determining planning applications.

Investigation and Findings of Fact

6. Mrs C provided documentary evidence in support of her complaint and additional information over the telephone. A written enquiry was made of the Council and its file on the planning application was inspected. Mrs C and the Council have had an opportunity to comment on a draft of this report.

7. Mrs C, who has several years experience in nursery care, identified a ground floor property in a tenement building which she wished to convert for nursery/crèche use. The premises are situated at a point on a street with no

parking restrictions but within 30 metres of its junction with a major commercial arterial road in the city. Mrs C had hoped at the time she first approached the Council as planning authority and the Scottish Commission for the Regulation of Care, that she would obtain the relevant permissions including planning consent and be able to open for business by late August 2005.

8. On 17 March 2005 Mrs C submitted an application for full planning consent to the Council together with the appropriate £240 planning fee. On the application form Mrs C stated that she was seeking planning permission to develop a crèche/nursery for under fives in a terraced house last used for domestic purposes. Mrs C was advised in a letter of 22 March 2005, that there were deficiencies in the application which prevented it being validated relating to neighbour notification, ownership certificate, location plan, floor plans and the description which should have stated 'change of use'. Mrs C subsequently completed the necessary notifications by 31 March 2005. She confirmed that she was not the owner of the premises but had served notice on the owner and she also certified that she had also notified four sets of owners and occupiers.

9. The application was then validated and confirmation was issued in a letter of 7 April 2005. That confirmation referred to the application as 'change of use from terraced house to one room crèche/nursery'. The confirmation letter clearly stated that if a decision was not made by 6 June 2005, then Mrs C would have a right of appeal to the Scottish Ministers exercisable within six months. Mrs C was also informed that the Council intended to determine her application by delegated decision of an officer, rather than the decision being taken by the relevant committee. On 19 April 2005, following an email from Mrs C (when she stated that the whole house would be used for the crèche/ nursery), the description of the application was changed to 'change of use from terraced house to form 3 roomed crèche /nursery'.

10. The application attracted one letter from a neighbour across the street who was not on the list of those notified. That resident, stated in a letter of 18 March 2005, that she had no objection to the proposal which she felt would be of benefit to the community, however, she expressed her concern about traffic problems from

double parked vehicles, particularly at that end of the street.

11. The file records show that the planning case officer (Officer 1) delegated to deal with the application paid a site visit on 3 May 2005. She noted that the property was a 'terraced main door property situated in mixed use street, which was predominantly residential and with limited parking'. Shortly after the visit the Council's Transport Planning (Development Control) and Environmental Services were consulted on the application and the application was advertised on 11 May 2005 since the building is situated in a conservation area.

12. The Development Control Manager, Transport Planning responded by memorandum of 14 June 2005 stating that she had no objections to the application, subject to a condition that the applicant submit a management plan demonstrating how children would be dropped off/picked up safely from the proposed premises.

13. When the two month period from formal registration passed without a decision from the Council, Mrs C said that she contacted Officer 1 by telephone to enquire what was happening with her application and why she had not received a decision. She said Officer 1 told her that she did not think that the Council gave permission to crèches situated in terraced buildings, however, if Mrs C was aware of any examples she should let Officer 1 know.

14. On 8 July 2005, following her telephone conversations with Mrs C, Officer 1 wrote to confirm that she required further information to be submitted in the form of a traffic management plan. This would principally demonstrate the number of children expected to attend the nursery each day and how the children would be dropped off and picked up safely on the street. Officer 1 envisaged that the proposed change of use could entail up to 50 additional cars per morning and 50 cars per afternoon, working on the premise that every child would be dropped off and picked up by car and that this could have a significant impact on the surrounding area, in relation to road traffic safety and reduction in residential amenity.

15. In an undated letter to Officer 1 received by the Council on 12 July 2005, Mrs C mentioned a nearby Council crèche where she had worked for five years similarly situated in a terraced block and another in a three storey block in the town centre, situated on a main road with single yellow lines. Mrs C stated that in contrast, the crèche she wished to open was situated in a prime location with free car parking on many places in the street, easy access to public transport and easy access to the crèche as it was on the ground floor. She indicated that she would have a member of staff waiting at the door to assist parents with children arriving or leaving by car or that as a second option she could buy a van as the crèche in the city centre had done. Mrs C said that Officer 1 had informed her that she (Officer 1) did not think that there would be a problem with the application failing as no neighbour had objected. On the basis that she had received no negative feedback about her application, Mrs C handed in her resignation from her employment in July 2005. The Council informed me that Officer 1's recollection of events in the two previous sentences does not reflect those of Mrs C.

16. The Council's files record that a memorandum from Environmental Health, Environmental Assessment dated 15 July 2005 was sent to Officer 1. This stated:

'Environmental Health has serious concerns regarding this proposed development.

The application site is located on the ground and first floors of a tenement and surrounded predominantly by residential properties. The application site is located directly under residential accommodation and shares party walls with two other properties on the first floor of the tenement. This results in the potential for noise disturbance, associated with the activities of the nursery, from the proposed nursery being transmitted to neighbouring properties. The nursery would impact on the amenity of the residential properties and therefore it is for this reason that this Department recommends that the application is refused ...'.

17. On the same day, 15 July 2005, Officer 1 sought further information on Mrs C's traffic management plan. Mrs C responded on 16 July 2005, mentioning that as a

third option in opening the crèche in a prime location easily accessible by public transport and by walking, she intended to give priority in admitting children into the crèche/nursery to those arriving by these methods and lesser priority to accepting children arriving by car.

18. Subsequently Officer 1 assessed the proposal under the departmental scheme of delegation on 4 August 2005 and wrote a 'Delegated Application Report'. The report comprised a site description and history. It outlined relevant planning policy and guidance. It set out the results of consultations, summarised the letter of objection, and detailed the case officer's observations and assessment. The report concluded with the recommendation that the application be refused on grounds that it would be against policy, would remove a residential flat dwelling, would result in increased traffic generation, would adversely affect road safety and would adversely affect neighbouring amenity.

19. In her observations contained in the body of the report, Officer 1 stated her understanding that it was proposed to take up to 23 children per morning and 23 children per afternoon session and that this could potentially generate an additional 92 car trips per day on what tended to be a very busy street for the majority of the day. Officer 1 observed that the crèche facility could worsen the current parking problems and considerably reduce road safety. She also noted that environmental services had objected to the proposal on grounds of reduced residential amenity. She stated that the property shared party walls with two properties on the first floor of the tenement which resulted in the potential for noise disturbance associated with activities of a nursery and would, therefore, have a detrimental impact on the amenity of the residential properties.

20. The delegated decision was taken on the application on 11 August 2005 and a decision notice issued on 12 August 2005. The decision notice gave the following reasons:

'1. The application is contrary to policy H8 of the North East Edinburgh Local Plan, as the change of use would result in the loss of a residential dwelling.

2. The proposal is contrary to policy H7 of the North East Edinburgh Local Plan and supplementary policy guidance on 'Private Day Nurseries', as the increased level of traffic would be detrimental to the existing residential amenity and public safety.
 3. The proposed change of use is considered to be contrary to the Policy Guidance on 'Private Day Nurseries' as the crèche would be located directly beneath residential property and is considered detrimental to residential amenity on the grounds of noise transference between the properties'.
21. The reverse of the decision notice clearly set out that if Mrs C, as applicant, was aggrieved by the decision of the planning authority to refuse planning permission for the proposed development then she could, within six months from the date of the notice, appeal to the Scottish Ministers under section 47 of the Town and Country Planning (Scotland) Act 1997.
22. Mrs C, upon receiving the decision notice and seeing the report on which the decision was reached, submitted a representation to the Council. She pointed out that her name had been misspelled and that it had taken three telephone calls on her part to correct the initial error in the description of the proposal. She stated that the premises shared a party wall with only one residential property and that the Care Commission had set limits of seven and eight children in the three medium sized rooms she intended to use, that is a total of 23 children who would attend all day and not in two sessions. The previous use had been as a shop and would not result in the loss of residential accommodation (Policy H8). In addition she had intended to provide a new small scale community facility to meet the need of the local community (Policy H10). She drew attention to the lack of objection on grounds of detriment to residential amenity.
23. Mrs C met with Officer 1 and a Principal Planner on 23 August 2005 to discuss the processing of her application and how the decision to refuse consent was arrived at. She was unhappy with the outcome and telephoned the Head of Planning and Strategy, City Development on 24 August 2005. In a letter of

26 August 2005, he provided his response to the points Mrs C had raised at her meeting and in her telephone conversation with him. He confirmed that the application had taken approximately four months to determine after validation on 7 April 2005, which was longer than the Council's two months target, but that the target was often difficult to achieve with the current workload of applications. In this particular instance there had been a delay in getting consultation responses. These responses had been necessary to complete the assessment of the proposals. Notwithstanding the response from the Transport Consultation, the case officer was required to make her own assessment and felt that there were overriding issues which needed to be taken into account with regard to road safety. He noted Mrs C had stated that the maximum number of children attending would be 21 not 23 but responded that the case officer's observations in the report were a worst case scenario and were appropriate. The Head of Planning confirmed that Environment and Consumer Services' comments had been based on the location of the premises in a tenement and its relation to other properties. With regard to her grievance that she had not been informed earlier, the Head of Planning stated that Mrs C's proposals were not prohibited by legislation, but every proposal had to be considered on its merits in terms of planning policies. The Head of Planning concluded by reminding Mrs C that she had a right of appeal if she wished to challenge the decision.

24. Following receipt of her complaint in this office, Mrs C was advised that she had had a right of appeal on the delay and that it was open to her, if she so wished, to appeal against the merits of the decision to refuse. Mrs C stated that she wanted the Ombudsman to look into administrative matters and reserved her decision meantime as to whether or not to appeal.

25. Since Mrs C's complaint was not premature, and she had alleged injustice as a result of administrative shortcoming and had not submitted an appeal, it was decided to investigate and the Council's further comments were sought by letter of 6 October 2005. The authority responded by letter of 7 November 2005.

The Council's response to the three heads of complaint

(a) The delay

26. The Council stated that between 1 April 1996 and 31 March 2005 there had been a two-third increase in the number of planning applications they had received, but that in the same time period with an increase in planning case officers the percentage of applications determined in two months had increased from 41% to 62%. Between April 2005 and August, 63% of the 1854 applications registered had been dealt with within two months. However, their planning case officers carried an annual caseload of 200 compared to 157-172 in comparable authorities. Officer 1, who works part-time on case work, estimated that between April and August 2005 she had between 40 and 50 applications under consideration at any one time.

27. The Council stated that with Mrs C's application, the time taken reflected the planning case officer's workload during the period. Officer 1 had also approached the case sympathetically to see if issues could be resolved, which led to a number of discussions with Mrs C throughout the processing of the application regarding similar crèche facilities elsewhere in the city.

(b) Alleged failure to set out relevant unfavourable policies at the outset

28. The Council say that it is not their practice to outline to an applicant when he or she registers an application that the application is contrary to policy, or to caution that it could be refused. Experience suggested that this might be interpreted as prejudging the merits. Additionally, some policies might favour the development. Thirdly, it was for the applicant to research guidelines and processes and to come to his or her own view on the level of risk of refusal.

29. With Mrs C's application, no pre-planning application advice had been sought. The report on the application recorded that one Local Plan policy (H10) supported the principle of developing a crèche/nursery facility. Officer 1 was adamant that she gave no indication to Mrs C that consent would be forthcoming. The Council did not accept the contention that by not specifically cautioning an applicant that there is a possibility of refusal, that the Council is thereby responsible for a decision taken by an applicant in his or her private life which assumes planning

consent.

(c) *Alleged inaccuracies in the report.*

30. The Council said that the description was amended following Mrs C's email of 19 April 2005 (paragraph 9). The electronic planning history search on the property had showed no previous applications lodged that were relevant to Mrs C's application. Although Mrs C had included a handwritten note to say that the Care Commission had agreed between seven and eight children per room, the Council say that the number of children to be catered for was not confirmed in writing by Mrs C. From her verbal communications with Mrs C, Officer 1 understood there were to be a maximum of 23 children at any one time within the facility and that there would be a morning and afternoon session and that would entail a change over at lunchtime. This was the number of children used to calculate a worst case scenario in relation to the possible transportation and road safety implications relating to the application. Environmental Services, when consulted, had raised serious concerns relating to the relationship the property had with other properties in the tenement. The concerns related principally to upper and adjacent neighbouring residential properties, whose amenity would be detrimentally affected by the proposal. The Council did not consider that the report contained errors which adversely affected the assessment of the proposal.

Conclusions and recommendations

31. Mrs C clearly feels aggrieved at having to wait over four months to learn that her application had been refused and is concerned at what she sees as errors in the report. My conclusions on each of the three heads of complaint are as follows:

(a) *The delay*

32. The delay in dealing with the application was unfortunate but did not necessarily disadvantage Mrs C. The Town and Country Planning (Scotland) Act 1997 affords an applicant who has not agreed to an extension of the planning authority's two month period to determine his or her application the ability to appeal to the Scottish Ministers. In the event that Mrs C had appealed the Council's failure to provide a determination within two months, it is unlikely given the nature of the appeal process that a decision on a deemed refusal would have been issued

any earlier than 12 August 2005. Although the current situation obtaining where one in three of all applications made to the Council is not determined within two months, must remain a matter of concern, I do not regard the delay in this case as maladministration causing a particular injustice to Mrs C. She, like others, did not have her application dealt with within two months and she is justifiably aggrieved about that delay. However, the Council have provided mitigating reasons for their delay and Mrs C had a right of appeal which was not exercised. I do not uphold this aspect of the complaint.

(b) Alleged failure to set out relevant unfavourable policies at the outset

33. While Mrs C is aggrieved that the Council did not caution her at the outset or in the early processing of her application that she might be unsuccessful, I can understand why the Council have a practice not to brief applicants on policy implications when they register an application. It falls to an applicant or his or her agent to research the relevance of Council policies and to present his or her case as to the merits of the proposals. I do not regard the omission of this preliminary caution by the Council in Mrs C's case to amount to maladministration. I do not uphold this aspect of her complaint.

(c) Alleged inaccuracies in the report

34. While the assessment and report might in Mrs C's view contain errors, it is outside the scope of this investigation to comment on whether these were material. If Mrs C considered that the errors resulted in an unsound decision to refuse, then she had the opportunity available to appeal that decision within six months to Scottish Ministers. She did not avail herself of that opportunity.

28 March 2006

Annex 1

Explanation of abbreviations used

Mrs C	The complainant
the Council	City of Edinburgh Council
Officer 1	The planning case officer who dealt with the application