

Scottish Parliament Region: Mid Scotland and Fife

Case 200500946: Perth and Kinross Council

Summary of Investigation

Category

Local Government: Planning; Handling of application

Overview

The complaint concerned Perth and Kinross Council's actions in relation to planning matters affecting the site of a hotel situated in wooded grounds.

Specific complaints and conclusions

The complainant (Mr C) a nearby resident complained that Perth and Kinross Council (the Council) failed:

- (a) to take prompt and effective action to implement a Tree Preservation Order for the hotel grounds (*upheld*);
- (b) to have an effective means of enforcement available to prevent trees being felled in the hotel grounds (*not upheld*);
- (c) in a report on a planning application for development at the Hotel failed to address all relevant policies in the Local Plan (*upheld*);
- (d) within a reasonable time to investigate the existence of a claimed right of way through the hotel grounds and to secure the unlocking of a gate (*upheld*);
- (e) to make an accurate and balanced recommendation on the application to the Planning and Development Committee (*not upheld*); and
- (f) their response to his complaint was selective, brief and inaccurate (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

- (i) apologise to Mr C;
- (ii) review the way that their own policies are referred to in reports; and
- (iii) take action to finalise their investigations on the claimed right of way at an early date and inform this office of the outcome.

Main Investigation Report

Introduction

2. On 20 September 2005 the Ombudsman received a complaint from the owner of a property in a Perthshire town (Mr C) concerning Perth and Kinross Council's (the Council) actions in relation to planning matters affecting the site of a nearby hotel (the Hotel) which has extensive wooded grounds.

3. The complaints from Mr C which I have investigated are:

- (a) the Council's failure to take prompt and effective action to implement a Tree Preservation Order (TPO) for the hotel grounds;
- (b) the Council's failure to have an effective means of enforcement available to prevent trees being felled in the hotel grounds over the weekend of 26 and 27 February 2005;
- (c) the Council's report on an application (the Application) for a car park extension to the existing car park at the Hotel failed to address all relevant policies in the relevant Local Plan and in particular policies 1, 3, 4, 14, 22, 28 and 76;
- (d) the Council failed within a reasonable time to investigate the existence of a claimed right of way (the Right of Way) through the hotel grounds and to take appropriate action to secure the unlocking of a gate;
- (e) planning officers failed to make an accurate and balanced recommendation on the application to the Planning and Development Committee; and
- (f) the Council's response to Mr C's formal complaint was selective, brief and inaccurate.

Administrative Background

4. The relevant Local Plan for the area where Mr C resides was adopted by the Council in November 2000. The policies he considers were relevant to the consideration of the application relate to the goal of sustainable development (Policy 1); a desire to conserve landscape features and strengthen and enhance landscape character (Policy 3); a need to submit details of landscape treatment with development proposals (Policy 4); a presumption against granting consent for proposals likely to have an adverse affect on sites supporting specified wildlife species and habitats (Policy 14); a desire to protect native woodland for development (Policy 22); a presumption against the demolition of listed buildings

and works detrimental to their essential character (Policy 28); and the identification of areas of residential and compatible uses where residential amenity will be retained and where possible improved (Policy 76).

Investigation

5. The investigation was based on documents supplied by Mr C and information obtained by written enquiry of the Council. Mr C had the opportunity to comment on the Council's response. Both Mr C and the Council have had the opportunity to comment on a draft of this report.

6. Mr C's home is situated adjacent to the grounds of the Hotel which is accessed from the road on which he resides. The Hotel is situated in about four hectares of garden and woodland and the area is identified in the relevant Local Plan as of special significance.

7. In late 2001 proposals were submitted by a property company to build four dwelling houses on land north east of the Hotel within a listed walled garden. In addition, plans were also mooted to build 15 new homes within the Hotel grounds. The plans for the walled garden site were subsequently amended to three dwellings. This application was refused by the Development Control Committee on 23 January 2002. According to the complainant, it was deemed possible then that house 3 of the amended application would be built on the proposed extension to the overspill car park. In connection with that application, separate permission was granted for the partial demolition of the south wall of the walled garden to create an entrance.

8. An appeal was submitted by the property company against the refusal of their application. The appeal was dismissed by the Scottish Executive Inquiry Reporter.

9. In January 2004, the new owner of the Hotel applied to the Council to build a house within the walled garden. (This was approved in May 2004 but building work had not commenced by early 2005 nor had the garden wall been breached to create an entrance.)

10. Later in 2004 the local Community Council repeated a request they had first made two years earlier namely that the Council implement a TPO for the entire

area of the Hotel grounds. The TPO was approved by Perth and Kinross Council on 14 January 2005.

11. According to Mr C, on Saturday and Sunday 26 and 27 February 2005, two tree fellers cut down in excess of 40 trees within a copse of black alders on a site which was subsequently to become subject of the Application to extend the existing car park at the Hotel. Mr C tried, unsuccessfully, to speak with the Council's enforcement service over the weekend.

12. Mr C said he spoke to one of the men and informed him that he believed that there was a TPO in existence covering the land. The operative denied knowledge of the TPO and said he had been instructed to saw down the trees by the Hotel owner.

13. On Monday 28 February Mr C reported the tree felling to the Council's Planning Department. He was informed that, although the TPO had been approved on 14 January 2005, it had not been formally notified to the Hotel owner.

14. The Council formally notified the Hotel owner of the TPO on 3 March 2005. Formal notification to the Community Council and the general public was given in a local newspaper on 8 March 2005 which stated that the TPO was in provisional effect from 3 March 2005. Mr C states that the site was quickly cleared of fallen trees which were logged and taken away. Tree stumps were, however, left in the ground.

15. Subsequently on 22 April 2005, Mr C received a neighbour notification from the Hotel owner in respect of an application (the Application) to extend the existing car park at the Hotel. Mr C submitted an objection to the Application in a letter of 27 April 2005.

16. Mr C's letter of objection detailed the planning history, the TPO, and relevant sections of Perth and Kinross Council's Highland Plan (Policies 1, 2, 3, 4, 14, 22, 23, 28, 76 and 85). Mr C also drew attention to what he considered to be defects in the site layout plans, which appeared to show the proposed extension to the car park at about a quarter of its actual size and failed to show extensive existing parking at the front of the Hotel. Mr C took exception to the applicant's statement

that no trees on the site would be affected when in excess of 40 tree stumps and numerous other trees immediately adjoining the area would inevitably be affected. Mr C also pointed to the existence of the Right of Way through the grounds that he said Perth and Kinross Council had asserted in August 2002. The route had been obstructed by a locked gate in April 2000, preventing through access by members of the public.

17. Several other letters of objection were submitted from neighbours, the Community Council, and bodies such as the local Civic Trust, The Garden History Society in Scotland, and Scottish Wildlife Trust.

18. A more detailed sketch plan dated 11 May 2005 was submitted by the applicant. The Application was subsequently advertised in the press and on the Council's website. The Application was registered on 25 May 2005.

19. On 3 June 2005 the local newspaper carried a notice that the TPO had been confirmed without modification and that it took effect from that day. It covered the site of the proposed extension to the overspill car park and, since it had not been amended after 14 January 2005, it also included the stumps left after the felling on 26 and 27 February 2005.

20. Mr C updated his earlier letter of objection in a further letter of 16 June 2005. In that letter he stated that he considered the proposal to extend the existing overspill car park to be wholly unsuitable and that it would be contrary to relevant policies in the Local Plan. He also stated that it would be contrary to the TPO, would constitute unnecessary development in a sensitive area, and would seriously affect a significant group of listed buildings, woods and gardens for which Perth and Kinross had environmental responsibility. Mr C suggested that the matter be referred to the Development Control Committee with a recommendation that they be asked to carry out a site visit. Mr C asked that the Application should be refused and the applicant should be encouraged to replant trees that he had had felled.

21. Mr C was subsequently made aware that the Development Control Committee would consider the Application on 6 July 2005. At his request, he was provided by fax with a copy of the officers' report with recommendations on

29 June 2005 and copies of letters of objection on 1 July 2005.

22. Mr C attended the Committee meeting on 6 July 2005 and was granted permission to speak to his objections against the proposals.

23. The officers' report detailed the proposals for extending the existing car park by an area of 720 square metres (36 metres by 20 metres) and the planning history of the property as a whole dating back to 1998. The report included a digital image of the site. The officers accepted that trees had been taken down in the past, but stressed that no trees were proposed for felling in the current proposal. The proposals provided for the planting of rhododendron and laurel to help screen the development. The report recorded substantial objection by neighbours and the local community to the development. Eleven points of representation were listed. These were that the proposed car park area was subject to a TPO, the impact on trees, the ready visibility of the car park, lack of information on reinstating adjacent areas, the effect on wildlife, the effect on a listed building, increase in traffic noise, the lack of need for more car parking provision, obstruction of the Right of Way, damage to the environment and a precedent being set for the future. In terms of the Local Plan, however, only Policy 83 relating to the important contribution of trees to the environment of the town was specifically mentioned. While acknowledging the genuine concern of local people, the report stated that the planning application was simply for an extension to the existing car park. Any future application would fall to be considered on its merits. The grounds of the Hotel were covered by a TPO. It was not considered that the proposal would have any impact on two specific listed buildings, nor would it encroach on a disputed Right of Way. No evidence had been submitted that the proposal would have any effect on the wildlife in the area and it was observed that the site of the proposed car park comprised a small part of a much larger wooded area. Notwithstanding an unusually large number of objections, the officers recommended to the Committee that they grant conditional approval to the application.

24. The Committee agreed with the officers' recommendation and conditional planning consent was issued to the applicant on 13 July 2005.

25. On 15 August 2005, Mr C submitted a formal letter of complaint to the Chief Executive. Mr C stated that he considered the report to Committee to have been

highly inaccurate and incomplete. Specifically, Mr C alleged that some seven policies in the Local Plan had not received specific mention. No mention had been made of a condition of care for the remaining tall trees or the Right of Way. Mr C alleged that the Council had failed to:

- implement or take prompt or effective action regarding the implementation of the TPO; enforce the TPO; or provide an effective means of enforcement;
- comply with the provisions of Policies 1, 3, 4, 14, 22, 28 and 76 of the Local Plan with regard to sustainable development, landscape, nature conservation, trees, listed buildings and residential and compatible uses;
- within a reasonable time, investigate the existence of a Right of Way and take appropriate action; and
- make an accurate and balanced recommendation to the Planning and Development Committee.

26. Mr C's letter was acknowledged on 18 August 2005 and passed to the Service Coordinator, Planning and Transportation. It was further acknowledged on behalf of the Executive Director (Planning and Transportation) on 25 August 2005. On 13 September 2005 the Head of Development Control responded by dealing with three main elements of complaint. The letter was signed in the Head of Development Control's absence by the senior officer who had signed the report on the application, and stated:

'It is acknowledged that the Council's response to the request for a Tree Preservation Order to be placed on the trees within the grounds of (the Hotel) was not as prompt as I would have liked. This, however, was simply down to an issue of inadequate resources and other more pressing priorities. I regret that the failure of prompt action may have contributed to the loss of some trees but I do consider that adequate action was taken to complete the TPO process once it was known that the trees were actually under threat. In the event, I consider that the general wooded nature of the grounds of [the Hotel] remains and that the removal of a few trees was not a material influence on the determination for the subsequent planning application for the erection of a house on the site.

'I am satisfied that the subsequent planning application for the erection of the

house within the grounds of [the Hotel] was properly and reasonably considered and determined in accordance with the Development Plan and applicable material considerations. As your letter admits, you were able to participate in the decision making process.

'I acknowledge that the investigation of the claimed pedestrian right of way through the grounds of [the Hotel] has been a much more prolonged exercise than was first anticipated. Notwithstanding, the Council has recently re-confirmed its assertion of the pedestrian right of way and the appropriate legal action will shortly be undertaken.'

27. Having considered this reply, Mr C submitted his letter of complaint to the Ombudsman on 15 September 2005. He regarded it as highly unsatisfactory that the letter was apparently signed on behalf of the Head of Development Control by the case officer who had prepared the report for Committee. He was aggrieved that, despite his own extensive efforts, the reply indicated his complaint had not been fully investigated or even understood. This was, in Mr C's view, exemplified by the author of the letter twice mentioning the building of a house when the application was in respect of a large extension to an overspill car park.

28. Mr C was aggrieved at the selective and brief reply, the administrative failure which led to the TPO not being notified to the owner that resulted in forty trees being felled, and the lack of enforcement cover over weekends. Mr C also considered it unreasonable for the Council to have taken over five years to assert the Right of Way and take the necessary legal action to have the obstruction removed. Mr C stated that he considered that, although almost all objectors had mentioned the effect on wildlife (such as red squirrel drays and bats), this had not featured in the report to the Committee. Mr C stated that he had sent his complaint to the Chief Executive in expectation that an independent enquiry would result. Instead he found that the reply had apparently been signed by the officer who had drafted the report about which he was complaining.

29. I made enquiry of the Council on 20 October 2005. I asked the Council's Chief Executive also to address four issues that I considered required to be examined. Firstly, I sought clarification of the history of the TPO and when the owner of the Hotel had been informed that the TPO was being mooted. Secondly,

I requested the Council to provide information on their resources for 'out of hours' enforcement investigation and whether the Council could have secured retention of the trees in question. Thirdly, I queried what steps the Council had taken subsequent to the assertion of the Right of Way in 2002 to have the obstruction removed. Fourthly, I sought their comments on Mr C's contention that the letter of 13 September 2005 was inaccurate and selective.

The Council's response

30. The Council responded to me on 21 November 2005 on the four points:

(a) *The Tree Preservation Order*

The Head of Development Control stated that the local Community Council initially requested the issue of a number of TPOs in a letter of 18 September 2002. That letter was inadvertently misplaced and as a consequence the Community Council was not advised until a letter of 27 October 2003 outlined to them that it was considered appropriate to promote a TPO in respect of one of the cases which they had raised, namely that relating to the Hotel.

The Council stated that because of other pressing priorities, a TPO was not promoted until action was instructed within the Development Control Service on 14 January 2005 to promote a TPO, and a memorandum and documentation were issued to the Legal Services section on the same date. A provisional TPO was issued to the Hotel owner and a public notice appeared in the local paper on 8 March 2005. A TPO was subsequently confirmed on 1 June 2005, sent by recorded delivery. The public notice appeared in the local newspaper on 3 June 2005. The Order was subsequently recorded in the Land Register on 9 June 2005.

The Council were unaware on what date the owners of the Hotel might first have been informed, whether formally or informally, that a TPO was under consideration.

The Head of Development Control stated that he had apologised to the Community Council (copied to their MSP) that the Council's response was not satisfactory in this case. He had expressed his regret in writing to Mr C that failure of prompt action may have contributed to the loss of some trees. Action was taken to complete the TPO process once it was known that the trees were actually under threat.

(b) *'Out of Hours' enforcement*

The Head of Development Control stated that the Council's enforcement officers do undertake appropriate responses and monitoring 'out of office hours'. However, there is no special direct enforcement contact facility available to the public outside normal office hours.

Until recently the Council had operated on the basis of a single enforcement officer within the establishment of the Development Control service. This had long been recognised as being inadequate for an area of the geographic scale of Perth and Kinross. The Council in its Revenue Budget for 2005/2006 made provision for the appointment of a second enforcement officer and this post was filled in August 2005. The initial priority of the second officer was to address outstanding complaints and to identify issues requiring investigation. The Council were in process of reviewing their enforcement service and were moving towards the establishment of an enforcement policy and protocol to improve both the response to public calls and to introduce more pro-active monitoring.

Although the owners of the Hotel had historically been aware of the importance of the trees to the general landscape of the Hotel (a listed building) and the area in general (through the previous refusal of planning permission for houses within the grounds), the Head of Development Control was unaware when the current Hotel owner took over and whether he was aware of the importance of the trees. In the absence of a confirmed TPO, the Council had no direct control of the retention of the trees.

(c) *The Claimed Right of Way*

The Head of Development Control acknowledged that the investigation of the claimed Right of Way through the grounds of the Hotel and a nearby garden had been a more prolonged exercise than had first been anticipated. The Right of Way was asserted by the Council in August 2002 and further work was undertaken gathering witness statements and clarifying the route through the grounds of the Hotel thereafter. A legal opinion was sought in 2004 and a further report was put before the Enterprise and Infrastructure Committee in August 2005. The Committee agreed once again to assert the route and instructed the Head of Legal Services to take the appropriate legal action to secure the status of the route. The

Council's case was being prepared for the Sheriff Court.

(d) *The Council's response of 13 September 2005*

The Head of Development Control considered the letter of 13 September 2005 to be adequate for its purpose. Simply because a complainer writes at length did not mean that a reply had to be of similar length. Furthermore, it was considered that Mr C's complaint, and in particular his contention that the failure to protect the trees led to the granting of planning permission for the extension of the car park, had been already pursued by him. He referred to it when he was given the opportunity to address the Development Control Committee on 6 July 2005. Mr C's concerns were known and taken into account in the officer's assessment of the planning application.

Mr C's complaint to the Chief Executive was dealt with in the normal way in accordance with the Council's procedure in that it was investigated by the responsible Head of Service. The Head of Development Control said he drafted the letter of reply immediately prior to his absence on annual leave. He regretted the two inaccurate references to a house within the text of the letter as distinct from the extension of the car park referred to in the heading of the letter. The letter was signed during the Head of Development Control's absence on leave, by a Development Control Manager and not by the Planning Officer who processed and considered the planning application.

Mr C's response

31. A copy of the Council's reply was copied to Mr C and he responded in a letter of 9 January 2006.

(a) *The Tree Preservation Order*

Mr C noted the assertion that the Community Council's letter of 18 September 2002 had been inadvertently misplaced. He pointed out that an email by him of 17 January 2003 on the same issue had been 'delivered' to the Director and other parties but had not received a response. Mr C was unaware of any 'threat' to the trees until 26 February 2005. Mr C did not consider that the letter of 13 September 2005 provided an apology for failure.

(b) *'Out of hours' enforcement*

Mr C stated that when he tried to contact the enforcement service on the 26 February 2005 there was no system. The trees came down and the site of the felling was cleared quickly. Mr C found the Council's response vague with regard to direct contact in case of sudden need out of hours.

(c) *The Claimed Right of Way*

Mr C noted that the issue of the claimed Right of Way was being progressed although it had not yet completed.

(d) *The Council's Letter of 13 September 2005*

Mr C said that he did not expect a lengthy letter of reply to his formal complaint but had expected an accurate one. He maintained that the letter replied to selected points and was full of inaccuracies and omissions. In particular, two references were made in the body of the letter to the Application being for a 'house' when it was actually for the extension of an existing car park. He considered that these inaccuracies cast doubt on the recommendation to the Committee to approve the application.

Conclusions and recommendation

(a) *The Council's failure to take prompt and effective action to implement a Tree Preservation Order (TPO) for the hotel grounds*

32. I conclude that, had the Council acted within a reasonable timescale to the Community Council's suggestion and implemented the TPO, the copse of black alders would have been protected. The Hotel owner would then have been obliged to have consulted the Council with regard to his proposals to fell. The existence of the TPO would have had an important and material bearing on the consideration of the Application. As it was, it is possible that the TPO which was confirmed four weeks prior to the determination of the Application on 6 July 2005 covered such stumps that were left after the felling operations in late February 2005 yet that complication was not addressed in the report. I uphold this head of complaint.

(b) *The Council's failure to have an effective means of enforcement available to prevent trees being felled in the hotel grounds over the weekend of 26 and 27 February 2005*

33. The Council's geographical area is one of the largest of Scotland's thirty two

Councils. I am pleased to note that the Council's enforcement service was augmented by the appointment of a second enforcement officer in August 2005 and welcome the Council's intention to establish an enforcement policy and protocol, subsequent to the events in this complaint. In the absence of a ratified TPO to protect the copse of alders, it is a matter of speculation whether the intervention of an enforcement officer over the weekend of 26 and 27 February 2005 would have protected the trees from felling. I do not uphold this aspect of complaint.

(c) The Council's report on an application (the Application) for a car park extension to the existing car park at the Hotel failed to address all relevant policies in the relevant Local Plan and in particular policies 1,3,4,14,22,28 and 76

34. Mr C twice made detailed submissions in respect of the Application referring to a significant number of Local Plan policies. He also addressed the Committee at its meeting on 6 July 2005. The officers' report, however, only mentions one specific policy in the Local Plan (Policy 83) although the oral presentation by the planning officer might have referred to other Local Plan policies. In my view, it would have been preferable for the authors of the report to have mentioned the other policies referred to by Mr C and to have commented on their relevance. If the site prior to the removal of the trees had been shown to have been an important wildlife habitat, say of bats and red squirrels, then the assessment would necessarily have required to have addressed at the very least Policy 14 and Policy 22. Mr C had obviously taken the trouble to examine the Local Plan in detail and I consider, in the circumstances of his objections, it was incumbent on the Council to have outlined the policy issues he and others were raising and to have provided a more detailed rejoinder. I uphold this head of complaint.

(d) The Council failed within a reasonable time to investigate the existence of a claimed right of way (the Right of Way) through the hotel grounds and to take appropriate action to secure the unlocking of a gate

35. The Council have been tardy in pursuing this matter since the gate was erected and locked in April 2000 and they asserted the existence of a claimed Right of Way. I uphold this head of complaint.

(e) The planning officers' failure to make an accurate and balanced recommendation on the application to the Planning and Development Committee

36. This head of complaint basically challenges the merits of the officers' recommendation which was accepted by the Committee. This should be distinguished from head (c). While Mr C believes there were flaws in the report and is disappointed that there was a recommendation to grant approval, other than the failure properly to address and to respond to the specific policy issues he raised I see no significant administrative defects in the handling of the application. I do not consider that the officers' recommendation to approve was unreasonable. I do not uphold this head of complaint.

(f) The Council's response to Mr C's formal complaint was selective, brief and inaccurate (upheld)

37. I uphold Mr C's complaint that the letter of 13 September 2005 was inaccurate and also selective. The opportunity could clearly have been taken then to address the issues identified at paragraph 33. Consent was clearly awarded for the extension of a car park and not for a house. If a future application is pursued for change of use from car park to housing, then that application will require to be dealt with on its merits.

Redress and recommendations

38. Following the upholding of four of the six complaints, the Ombudsman recommended that the Council apologise to Mr C, that they review how their own policies are addressed in reports to committee, and that they take action to finalise their investigations on the claimed Right of Way at an early date and advise her of the completion of those investigations.

39. The Council informed me by letter of 12 May 2006 that they accepted the findings of the report

29 August 2006

Explanation of abbreviations used

Mr C	The complainant
The Council	Perth and Kinross Council
The Hotel	The hotel subject to planning matters
TPO	Tree Preservation Order
The Application	The Council's report on an application
The Right of Way	Claimed right of way
Policy 1	A policy relevant to the Application
Policy 3	A policy relevant to the Application
Policy 4	A policy relevant to the Application
Policy 14	A policy relevant to the Application
Policy 22	A policy relevant to the Application
Policy 28	A policy relevant to the Application
Policy 76	A policy relevant to the Application