

## Scottish Parliament Region: South of Scotland

### Case 201204546: East Ayrshire Council

#### Summary of Investigation

##### **Category**

Local Government: Planning; complaint by objector to planning application

##### **Overview**

The complainant (Mrs C) raised a number of concerns about the handling by East Ayrshire Council (the Council) of a planning application for a wind turbine development of 15 turbines near her home.

##### **Specific complaints and conclusions**

The complaints which have been investigated are that the Council:

- (a) did not reasonably assess the impact of the development prior to determining the application (*upheld*);
- (b) did not reasonably obtain and consider independent expert opinion prior to determining the application (*upheld*);
- (c) did not have a reasonable policy in respect of the handling of major planning applications (*upheld*); and
- (d) unreasonably reached an agreement with the applicants under section 75 of the Town and Country Planning (Scotland) Act 1997 before addressing the local residents' concerns (*not upheld*).

##### **Redress and recommendations**

The Ombudsman recommends that the Council:

*Completion date*

- (i) issue a written apology to Mrs C for: the failure to adequately assess the impact of the development in relation to cumulative noise; the failure to obtain an independent report in relation to this prior to reaching a decision; and, the failure to provide adequate information in the planning report in relation to whether, in the event of a decision contrary to the recommendation, there was a significant departure from the development plan in the case of a major development application;

21 November 2014

- (ii) refund the local residents for the cost of the report they commissioned from an acoustic consultant, subject to the production of relevant receipts; and 22 December 2014
- (iii) take steps to ensure that there is clearer reference to relevant statutory procedures in committee reports on planning applications, particularly in relation to whether or not there is a significant departure from the development plan in the case of a major development application. 22 December 2014

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

## **Main Investigation Report**

### **Introduction**

1. The complainant (Mrs C) raised a number of concerns about the handling by East Ayrshire Council (the Council) of a planning application for a wind turbine development of 15 turbines near her home, which was close to another existing large wind turbine development. The application at the centre of the complaint was the third proposal for a wind turbine development in the area by the same applicants. The two previous applications had been withdrawn and refused respectively. On 29 June 2012, the Council's planning committee agreed to approve the application subject to relevant conditions. They also agreed that the decision notice should be withheld until an agreement under section 75 of the Town and Country Planning (Scotland) Act 1997 (a planning agreement that allows a Council to enter an agreement with any party with an interest in any land for the purpose of 'restricting or regulating the development or use of that land') had been made. The section 75 agreement between the Council and the applicants was made in February 2013 and the decision on the application, subject to 47 conditions, was issued on 28 February 2013.

2. The complaints from Mrs C which I have investigated are that the Council:
- (a) did not reasonably assess the impact of the development prior to determining the application;
  - (b) did not reasonably obtain and consider independent expert opinion prior to determining the application;
  - (c) did not have a reasonable policy in respect of the handling of major planning applications; and,
  - (d) unreasonably reached an agreement with the applicants under section 75 of the Town and Country Planning (Scotland) Act 1997 before addressing the local residents' concerns.

### **Investigation**

3. Investigation of the complaint involved reviewing the information received from Mrs C and the Council. My complaints reviewer also obtained advice from one of my planning advisers (the Adviser).

4. The work of the Ombudsman is set out in the Scottish Public Services Ombudsman (SPSO) Act 2002. Section 7(1) of this act states that we are, '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'.

5. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mrs C and the Council were given an opportunity to comment on a draft of this report. An explanation of the abbreviations used in this report is contained in Annex 1. A list of the legislation and policies considered is at Annex 2.

### *Background*

6. In July 2008, an application for the erection of 25 turbines, associated works and the formation of a new access road at a site close to Mrs C's home was submitted to the Council. This was also close to another existing large wind turbine development, which the Council have told us comprised of 215 wind turbines and bounded this site on the north, east and south. On 29 March 2010, the applicants submitted an appeal to Scottish Ministers on the basis of the Council's non-determination of the application. Following a pre-determination hearing on 4 June 2010, the Council's planning committee decided to recommend that the Council adopt the position in terms of the appeal process that the application should have been refused. That recommendation was agreed by the full Council at a meeting on 24 June 2010, and was subsequently conveyed to the Directorate of Planning and Environmental Appeals (DPEA), which handles planning appeals on behalf of the Scottish Ministers. The applicants' appeal to Scottish Ministers regarding the Council's non-determination of the application was withdrawn by them on 13 October 2010.

7. In the meantime, on 16 April 2010, a second application was submitted by the applicants for planning consent for the erection of 20 wind turbines and other associated works. On 4 November 2010, the Council refused the application. On 3 February 2011, an appeal was submitted on behalf of the applicants to Scottish Ministers and was passed to the DPEA for determination. Following site inspections on 4 and 5 April 2011 and 12 and 13 May 2011, the Reporter appointed by Scottish Ministers to determine the appeal dismissed it and refused planning permission on 31 May 2011.

8. The third application (the application that Mrs C's complaint relates to) was submitted by the applicants on 16 December 2011, for planning consent for the erection of 15 wind turbines, construction of access tracks, a substation

compound, six borrow pits, one meteorological mast, on site underground cabling, a construction and storage compound and formation of an access road. The Council told us that this application constituted a major development in terms of the Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009 and was assessed as such by the Council's Planning Service. However, they said that the Head of Planning and Economic Development was of the view that the application was not significantly contrary to the Council's development plan and this meant that it did not need to be considered initially by the Council's planning committee in a pre-determination hearing and then by the full Council.

9. This application fell to be determined after the May 2012 Council elections and newly elected councillors received formal training in relation to planning on 24 May 2012. The application was put on the agenda of the planning committee on 8 June 2012, but because of holidays, the Queen's Jubilee and a family bereavement, key members of the applicants' staff were unavailable. On 6 June 2012, the Council received a letter from the applicants asking for the application to be withdrawn from the agenda. This was subsequently agreed.

10. The next planning meeting, a special planning committee on 29 June 2012, had initially been arranged for a pre-determination hearing in relation to an unrelated planning application. However, given the volume of applications that required to be determined prior to the Council summer recess, it was agreed that the application should be considered at that planning committee. The recommendation by the Council's Head of Planning and Economic Development was that the application should be refused.

11. The minute of the special planning committee records that:

'It was agreed that contrary to the recommendation of the Head of Planning and Economic Development there were material considerations to this application, namely socio-economic benefits, together with the Scottish Government policy on Renewable Energy, which outweighed the provisions of the Development Plan. Accordingly, it was agreed to approve the application subject to relevant conditions which were to be remitted to the Head of Planning and Economic Development to determine and that the Decision Notice be withheld until the Solicitor to the Council had satisfactorily concluded a formal agreement under section 75 of the Town and Country Planning (Scotland) Act 1997 with the applicant in respect of matters detailed in Section 8 of the report and such other

matters considered relevant to this application by the Solicitor to the Council in consultation with the Head of Planning and Economic Development.'

12. The minute of the special meeting of the planning committee was placed before the Council at its meeting on 20 September 2012 for formal approval. Mrs C and a number of other residents attended. Following a verbal report by the Council's Head of Legal, Procurement and Regulatory Services and Solicitor, in response to submissions received prior to the Council meeting on the planning decision, the Council made a correction to the minute. A new second sentence was added reading, '[the local planning team leader] provided further clarification in respect of the content of the Committee report and clarified that five turbines were within the Local Plan Area of Search'.

13. The section 75 agreement between the Council and the applicants was made in February 2013 and the decision on the application, subject to 47 conditions, was issued on 28 February 2013.

14. The applicants then made an application in March 2013 to vary the noise conditions contained within the application previously approved. In February 2014, the applicants appealed the Council's non-determination of their application to vary the noise conditions to the DPEA. The appeal has not yet been concluded.

**(a) The Council did not reasonably assess the impact of the development prior to determining the application; and (b) The Council did not reasonably obtain and consider independent expert opinion prior to determining the application**

15. In her complaint to us, Mrs C complained that Council had failed to assess the environmental impact of the application prior to its determination, particularly in relation to noise, water and overwhelming visual impact. She also said that the Council had failed to consider independent expert opinion for a major development with significant environmental impact prior to determination, when there was a lack of properly qualified and experienced in-house officials. We are unable to question discretionary decisions made by local authorities when there is no evidence of maladministration. However, we can consider whether the Council failed to take into account or obtain relevant information when reaching a decision.

16. The Council's Planning Service had asked their Environmental Health Service to comment on the application after it was received in December 2011. The Environmental Health Service sent a copy of their comments on the application to the Council's Planning Service on 18 January 2012. The covering email said that this was a draft of their response and asked if the Planning Service wanted to discuss it. The response said that:

'In relation to noise, I would suggest that in order to best protect the residential amenity of those properties likely to be affected by the development, the cumulative noise impact of this development and those already operational or consented should be considered and the effect of this development should not be measurable above those cumulative levels either emitted or predicted to be emitted from operationable and consented developments as measured at the noted noise-sensitive receptors. The only proviso to that would be where those levels at the noted receptors fall, or are predicted to fall, below the recognised 40dB(A) and 42dB(A) limits.'

17. The response went on to say that all private water supplies having the potential to be adversely affected by the effects of the development should be sampled before, during and after construction of the development. It said that the results should be made known to the Council in order to gauge any adverse impact the development may have. It also said that the developer should be made responsible for the protection of these private water supplies, including the installation and maintenance of any treatment plant required as a result of the development.

18. In February 2012, the company involved in the neighbouring wind farm submitted an objection to the application. They said that they had obtained a noise assessment from an acoustic consultancy firm. They stated that this showed that the Environmental Statement had not used the appropriate information relating to their wind farm and, as a consequence, had understated the potential cumulative issues. The assessment also said that whilst the applicants may agree to operate the wind turbine development so that cumulative noise limits are met, this could entail significant constraints on the operation of the development. On 14 March 2012, the applicants were asked to provide a response to these comments. They provided this to the Council on 21 March 2012. The Council have told us that this was forwarded to the Environmental Health Service and they responded on 23 March 2012 to confirm

that the response they issued on 18 January 2012 did not need to be amended or revisited.

19. The Planning Service responded to the Environmental Health Service on 16 May 2012. They asked that the Environmental Health Service confirm that they were not objecting to the proposal and that they were satisfied that the section of the Environmental Statement on noise and cumulative noise was acceptable and accurate. They also asked if there was a noise problem from the development on nearby residential properties. The Environmental Health Service responded on the following day. They said that they had no objections to the development on the grounds of noise. A report for the planning committee was then prepared by the Head of Planning and Economic Development. This said that taking all matters into account, the potential benefits to be accrued from the proposed development did not in this instance outweigh the significant adverse unacceptable impacts and cumulative impacts on the landscape character and visual amenity that would result from the wind farm on the area. It recommended that the application should be refused. However, it said that should planning permission be granted, a condition in relation to noise and any complaint received in relation to noise would be included with any planning consent.

20. On 29 June 2012, the Council's planning committee agreed to approve the application subject to relevant conditions. This was contrary to the recommendation in the planning report. The planning committee also agreed that the decision notice should be withheld until an agreement under section 75 of the Town and Country Planning (Scotland) Act had been made.

21. Mrs C and other residents met the Council on 16 November 2012 and raised concerns about the noise assessment in the Environmental Statement. The Council's Executive Director of Finance and Corporate Support then wrote to Mrs C about this matter on 28 November 2012. He said that she and other local residents had been advised at the meeting on 16 November 2012 that the Council were satisfied that the Environmental Health Service had assessed the noise information within the Environmental Statement in a professional and appropriate manner. However, he also said that if there was information that indicated that there were material inaccuracies or omissions in the information provided by the applicants, it would be open to him to have the noise information further assessed and thereafter to take no further action or, if considered appropriate, to request that the planning application be reconsidered



by the planning committee. He said that he had carefully considered the matters that were discussed, but there were a number of issues that he wanted to clarify with the applicants before he considered matters further. He said that once this information was provided, he would contact Mrs C.

22. On 3 December 2012 and 10 December 2012, the Council wrote to the applicants to clarify some of the information about noise in the Environmental Statement.

23. Following their meeting with the Council, the residents asked an acoustic consultant to review the noise section of the Environmental Statement that had been submitted on behalf of the applicants. He responded to them in a report dated 7 December 2012. In his report on this, the acoustic consultant said that information in relation to some of the turbines on the neighbouring site was incorrect and he did not, therefore, agree with the calculations in relation to the cumulative effect of noise from the proposed development and the neighbouring wind farm. He said that this had been understated in the Environmental Statement and that the cumulative noise limit would be exceeded at certain points by both wind farms acting together. He stated that it would not be possible to devise an enforceable planning condition that could control noise from the development. The report was shared with the Council and was then sent to the applicants.

24. Mrs C, along with other residents and the acoustic consultant, met the Council again on 21 December 2012. The Council have told us that the purpose of this meeting was to allow residents to raise issues and concerns with the Council that would be considered when the planning conditions were being prepared. In January 2013, the Council obtained their own noise impact assessment from a firm of acoustic consultants. This stated that neither the applicants nor the Council had properly considered the cumulative impact of the noise emission levels from the two sites. It also stated that the Environmental Statement had not been completed correctly and that these were not material inaccuracies or omissions, but they were errors. It said that although they did not have the data to enable it to properly undertake a detailed assessment, it was highly unlikely that the development would be able to operate within the recommended limits without undue restrictions or shutdown.

25. The Council have told us that the draft planning conditions for the application, with the exception of the noise conditions, were first forwarded to

the applicants' legal agent, by email on 28 January 2013. The Council have told us that they were issued on the basis that they were willing to consider representations from the applicants, but that the planning conditions and the wording of them were matters for the Council to determine. The applicants' legal agent confirmed by email on 29 January 2013 and 8 February 2013, that these conditions were agreed, save for the ironing out of minor inconsistencies. On 31 January 2013, the draft noise conditions were sent to the legal agent. The applicants then confirmed in a letter dated 15 February 2013 that the conditions (apart from those relating to noise) were agreed. The section 75 agreement between the Council and the applicants was made in February 2013 and the decision on the application, subject to 47 conditions, was issued on 28 February 2013.

26. In March 2013, the applicants made an application to vary the noise conditions contained within the application previously approved.

27. The Executive Director of Finance and Corporate Support wrote to Mrs C again on 15 April 2013. He said that he had received a response from the applicants and they had accepted that there had been inaccuracies in the Environmental Statement. However, he said that it appeared to him that these inaccuracies did not materially affect the noise impact of the proposed development. He also said that he had sent the report obtained by the residents from an acoustic consultant to the applicants, but that they considered that these matters had already been dealt with. He said that in view of the conflicting information in relation to noise, the Council had taken its own specialist advice. He said that this had been received and had highlighted the issue of cumulative noise, which was something that the Environmental Health Service had considered and provided advice on when they provided their response to the consultation. He said that he was satisfied that the Environmental Health Service had carried out their duties in a reasonable and appropriate manner.

28. The Executive Director of Finance and Corporate Support also responded to the issue of why the Council did not instruct an independent noise expert prior to the application going to the planning committee for determination. He referred to the statutory consultation process and stated that while it was open to the Council to do so, it was not routinely done and the Council needed to ensure the best use of resources and public funds. He accepted that the Environmental Health Service did not provide expert acoustic advice on the

assessment of noise but was satisfied that given the terms of the Environmental Health Service consultation response of 18 January 2012, it would not have been necessary to instruct an acoustic consultant prior to the planning committee considering the application.

29. In February 2014, the applicants appealed the Council's non-determination of their application to vary the noise conditions to the DPEA.

*Advice obtained*

30. My complaints reviewer asked my Adviser if he considered that the Council had adequately assessed the impact of the application in relation to noise, water and overwhelming visual impact before it was determined. In his response, the Adviser said that with regard to noise, the core of the complaint seemed to be that the information on which the noise assessment was carried out for the Environmental Statement was inaccurate in certain respects. In addition, he said that after this was corrected, the applicants maintained that they could still comply with reasonable noise standards, whilst the objectors, including the company involved in the neighbouring wind farm who submitted a technical report in support of their representations, indicated that the cumulative effect with the noise output from the adjacent wind farm would require the specification of maximum noise levels that might render the development unworkable.

31. The Adviser said that the independent reports that confirmed this was the case were obtained first by the objectors and then by the Council. This was after the decision had been taken on the application by the planning committee, but before the decision notice had been issued by the Council. He said that the objectors, including some local residents, maintained that this meant that consent could not be given for the development, while the Council proceeded to issue the consent in the belief that the stringent conditions imposed, which were intended to deal with the issue of cumulative noise effects, would be operable.

32. The Adviser said that he was of the opinion that, while the Council did correctly identify cumulative noise impact as a key issue, they did not satisfy themselves sufficiently that consent could be given for the development before the planning committee made the decision on the application. He stated that the recommendation from the Environmental Health Service that they had no objections, subject to the imposition of conditions to deal with cumulative noise, probably led the Planning Service, which was dependent on technical advice,

into believing that the development was consentable in the event of a decision to approve the application contrary to their recommendation.

33. The Adviser said that the Planning Service also seemed to have accepted the advice from the Environmental Health Service, regardless of the subsequent dialogue over the objections and the evidence received from the company involved in the neighbouring wind farm before the decision was made. He said that the Planning Service simply repeated the Environmental Health Service's consultation response in the report for the planning committee. He also stated that they indicated little else to the planning committee concerning the issues raised for dealing with the cumulative effect of two wind farms and on whether the new development was viably consentable from this point of view, despite the detailed objection received from the neighbouring wind farm.

34. The Adviser commented that he felt that the Council failed to adequately deal with this matter. I asked the Adviser if he considered that the Council should have obtained any independent expert opinion before they determined the application. He said that there was no legal or advisory requirement for a planning authority to seek expert advice as a matter of course on a matter arising from an Environmental Statement. He said that a planning authority is advised by statutory planning consultees and specifically by the Scottish Environment Protection Agency, Scottish Natural Heritage, Scottish Ministers (for the interests of Historic Scotland) and sometimes the Health and Safety Executive, on matters relating to any Environmental Statement submitted with an application. He said that it is at the planning authority's own discretion who else it wishes to consult, including its own internal services and experts.

35. The Adviser commented that it is the over-riding duty of the planning authority to determine a planning application in the light of the relevant development plan, unless material considerations indicate otherwise. He stated that the contents of the Environmental Statement are material considerations and do not provide any form of scientific or legal proof for the decision to be made.

36. However, having said that, the Adviser said that as soon as clear evidence of any inadequacy in the Environmental Statement may become available, it becomes more incumbent on the planning authority to resolve the uncertainty with regard to the significance of the environmental effects involved. He stated that these may be significant to the terms of the development plan or to the

weight that might be given to a material consideration when making the decision.

37. Whilst the Council did go back to the Environmental Health Service following the objection by the neighbouring wind farm relating to noise, the Adviser said that having considered the matter, his view was that an independent noise report should have been obtained prior to the preparation of the planning committee report and recommendation. He said that he had concluded that the Council had not obtained sufficient information to ensure that the application was consentable on cumulative noise impact grounds and that the planning committee was not made aware of this in the report. He stated that although it would not have been mandatory, he considered that the commissioning of a timely independent report would have been a reasonable option to deal with the matter.

38. The Adviser said that whilst it was within the discretion of the Council to grant permission for the development even if there were certain adverse noise impacts, this can only apply when they are aware of the extent of the likely impact. He concluded that it had been unreasonable for the Council not to obtain such a report at that time and to satisfy themselves that the application was consentable in relation to cumulative noise.

39. We also asked the Adviser if he considered that the Council had adequately assessed the impact of the application in relation to water. He noted that the report for the planning committee responded to the objections on the grounds of threat to private water supplies by the imposition of a condition requiring satisfaction of the Council on measures for protecting such supplies prior to commencement of the development. In his response, he said that the Council had dealt with this in a similar way to noise, but he considered that this condition was more likely to work. The Adviser said that having considered the matter, this was the standard way of dealing with such matters and he had not seen any evidence of failings.

40. The Adviser also commented on the assessment of overwhelming visual impact. He said that in his opinion, this raised the matter of how the assessment of impacts on landscape and on residential amenity had been handled by the Council. He stated that he considered that these were adequately dealt with by the planning report and by the site visit.

*(a) & (b) Conclusion*

41. As stated at paragraph 4, I am unable to question discretionary decisions taken by a local authority when there is no evidence of maladministration. Unless we considered the decision to be wholly unreasonable, we would not normally uphold a complaint on the basis that a different decision could have been made. In addition, we would not uphold a complaint simply because an officer did not follow best practice. In considering areas where professional assessment is involved we would regard that as discretionary, but failure to take into account or obtain material or important information; to follow policies, guidance or professional standards without clear reasons being given; or to correctly note and communicate important information and decisions; would be issues that could amount to maladministration.

42. We did not identify any failings by the Council in relation to the assessment of water and overwhelming visual impact. However, the company involved in the neighbouring wind farm raised concerns about the cumulative impact of the noise emission levels from two wind farms in February 2012. Having carefully considered this matter, including the advice I have received, I do not consider that the Council subsequently explored whether the application was consentable adequately, in view of the cumulative impact of the noise emission levels from this and the neighbouring wind farm. The Adviser has stated that it was extremely unlikely that the application was consentable on cumulative noise impact grounds based on the information held at that time. He has also stated that it was unreasonable for the Council not to obtain an independent acoustic report prior to the preparation of the report for the planning committee in order that the planning committee were adequately informed about the matter. I consider that the Council's failure to obtain sufficient information about the matter before a decision was made amounted to maladministration and, consequently, I have upheld these two elements of Mrs C's complaint.

43. During our investigation, the Council said that they would be happy to reimburse the local residents for the cost of the report they obtained from the independent acoustic consultant. In view of my findings on this matter, I recommend that they do so. We are unable to say what the outcome would have been if the appropriate information had been given to the planning committee and note that the application was unanimously granted despite the recommendation to refuse. The DPEA are also currently considering the conditions in relation to noise.

*(a) & (b) Recommendations*

- |   | <i>Completion date</i> |
|---|------------------------|
| 44. I recommend that the Council:   |                        |
| (i) issue a written apology to Mrs C for the failure to adequately assess the impact of the development in relation to cumulative noise and for the failure to obtain an independent report prior to reaching a decision; and | 21 November 2014       |
| (ii) refund the local residents for the cost of the report they commissioned from an acoustic consultant, subject to the production of relevant receipts.   | 22 December 2014       |

**(c) The Council did not have a reasonable policy in respect of the handling of major planning application**

45. Mrs C complained to us that the Council did not have a consistent and transparent policy on how major development applications were determined. In her correspondence, she stated that there was an obvious failure in consistency in determining the criteria that prompted an application for a major planning development to be referred to the full Council. She considered that the application should have been referred to the full Council.

46. In June 2012, a report was prepared for the planning committee. This recommended that the application should be refused for the reasons indicated. The report also stated:

*'Contrary Decision Note*

*Should the Committee agree that this application should be approved contrary to the recommendation of the Head of Planning and Economic Development then the application will not require to be referred to full council as it would not be a significant departure from council policy.'*

47. On 29 June 2012, the planning committee agreed to approve the application subject to relevant conditions, contrary to the recommendation to refuse the application in the planning report. They also agreed that the decision notice should be withheld until an agreement under section 75 of the Town and Country Planning (Scotland) Act had been made.

48. In October 2012, the local residents complained to the Chief Executive that the application should have been referred to the full Council for a decision, as the Council had conceded that it was a major development and it was a

significant departure from the development plan. They said that the previous application, which substantially overlapped with the site for this application, had been determined by the full Council. In the Chief Executive's response of 11 December 2012, she said that the Head of Planning and Economic Development had concluded that it did not constitute a significant departure from the development plan. She said that it was, therefore, appropriate for the application to be referred to the planning committee in terms of the Council's delegation scheme and that it did not require to be referred to the full Council for determination.

49. In March 2013, the applicants made a further application to vary the noise conditions contained within the application previously approved. In February 2014, the applicants appealed the Council's non-determination of the application to vary the noise conditions to the DPEA.

50. In their response to our enquiries, the Council said that the application constituted a major development in terms of the Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009 and was assessed as such by the Council's Planning Service. However, they said that the Head of Planning and Economic Development had assessed the major development as not being significantly contrary to the Council's development plan. They said that this was because the number of turbines had been reduced and the redesigned layout of the turbines took them further away from a number of residential properties and reduced the impact on residential amenity. It also reduced some of the impacts on the landscape character of the Ayrshire Lowlands. The Council said that whilst it was considered that the scheme was still contrary to policies within the development plan, it did not constitute a significant departure, as many of the significant adverse effects of the previous two applications had been reduced to some extent. They told us that it was considered appropriate to refer the application to the planning committee in terms of the Scheme of Delegation for determination, rather than holding a pre-determination hearing.

*Advice obtained*

51. I asked the Adviser if the Council should have their own policy in respect of the handling of major development planning applications. In his response, he commented that Class 4 of the schedule to the Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009 clearly states that the



lower threshold for a major development for an electricity generating station is where the capacity of the generating station is or exceeds 20 megawatts.

52. The Adviser said that it is almost impossible for a Council with even the most basic checking system for validating an application to avoid checking the thresholds of development type or size that trigger the need for a Proposal of Application Notice and a Pre Application Consultation for a major development type. He said that he did not, therefore, see the need for the Council to have its own policy for this process as a whole, considering that it is set out in detail in statute and in the Development Management Procedure circular 4/2009 (now replaced by Circular 3/2013).

53. I also asked the Adviser if he considered that the Council had handled the application in line with the statutory pre-application process for major developments. In his response, the Adviser said that the evidence showed that the Council had dealt appropriately with the application at this stage.

54. The Adviser also referred to the Council's comments that the application constituted a major development, but that they had assessed this major development as not being significantly contrary to the Council's development plan. He commented that the report for the planning committee did not explain why the application was not considered to be a significant departure from the Council's development plan. He also said that this was not explained in the written decisions or other documentation that related to the determination of the application at that time. He said that it was made as a statement of fact in the report contrary to the Council's delegation scheme, which does not specifically allow for this decision to be made by officers. He considered that the matter should, therefore, have been considered by the planning committee.

55. The Adviser commented that the position that the application was not a significant departure was included in the conclusion to the planning committee report with reference to the possibility of any contrary decision to the recommended one. The report said that, 'it would not be a significant departure from council policy', rather than not being a significant departure from the development plan. In addition, it did not refer to the statutory requirement for a pre-determination hearing for major developments that are significantly contrary to the development plan under Regulation 27 of the Development Management Procedure regulations. The issue would, therefore, not have necessarily

appeared to be a statutory planning matter to the planning committee, but one to be considered under the Council's delegation scheme.

56. The Adviser also said that the planning committee report did not explain that not only would a statutory hearing be required in the event of a significant departure from the development plan, but that the final decision must be made by the full Council, as the power of delegation under section 56 of the Local Government (Scotland) Act 1973 is revoked in such circumstances. He stated that considering some members of the planning committee were newly elected members, this should have been made much clearer and that the criteria for a statutory determination on this important point should have been included in the report.

57. In view of his comments that the planning report failed to give the planning committee adequate information about the circumstances under which the decision could be referred to the full Council, I asked the Adviser what could be done to try to remedy the situation. In his response, the Adviser said that despite the unanimous decision by the planning committee to approve the application contrary to the recommendation in the planning report, there was a possibility, no matter how slight, that a proper explanation of this procedure in the planning committee report might have led to a decision that it was a significant departure from the development plan. This would have led to the application being referred to the full Council and a much greater quorum of members with the potential for a different decision.

58. However, the Adviser also stated that, as is so often the case with planning decisions, both the determination that this was not a significant departure and the decision to grant the application were both discretionary judgements for the Council. One led to another and the decision that was issued to the applicants following completion of the section 75 agreement was legally binding. He said that this decision could have been quashed by judicial review in the courts within six weeks of the decision notice being issued. He also said that the decision could have been revoked prior to implementation by the Council itself with an order under section 65 of the Town and Country Planning (Scotland) Act 1997 or discontinued after implementation with an order under section 71 of that act, but that these options were subject to objection by the applicants to Scottish Ministers and potentially to substantial compensation.

59. The Adviser also commented that the applicants had subsequently applied to the Council to vary some of the conditions attached to the consent and had appealed to the DPEA in view of the Council's failure to determine this application. He said that while the DPEA did not have the power to find the development unacceptable and refuse it outright, they could impose further conditions which may be more effective in reducing cumulative noise impact.

*(c) Conclusion*

60. Mrs C complained that the Council did not have a reasonable policy in respect of the handling of major planning applications and raised concerns that the application had not been referred to the full Council. She said that the Council were not consistent in relation to the criteria for referring major planning developments to the full Council. There is no need for Councils to have their own policies for this process, as it is set out in detail in statute and in the relevant national procedures. However, in view of Mrs C's concerns that the Council had not acted consistently, we have considered whether the Council handled the relevant application appropriately. The advice we have received is that the Council dealt with the pre application procedure in line with the statutory process.

61. However, I do not consider that the determination stage of the application was dealt with appropriately. The report prepared for the planning committee did not provide adequate information for the committee in relation to whether or not the application was a significant departure from the Council's development plan. This was an important consequence of any decision contrary to the recommendation in the report. It also failed to explain that not only would a statutory hearing be required in the event of a significant departure from the development plan, but in that event the final decision must be made by the full Council. The report should have been much clearer on these points to ensure that the newly elected members on the planning committee were reasonably informed about the matter. In view of these failings, I have upheld this complaint.

62. There is a possibility that a different decision would have been reached on the application had the report for the planning committee provided reasonable and appropriate information on these points. We have considered how this matter could be remedied in view of the fact that the decision notice that was subsequently issued made the decision legally binding. The Council could revoke the matter under section 65 of the Town and Country Planning

(Scotland) Act 1997. However, in view of the fact that we cannot definitively say that a different decision would have been reached, I do not consider that it would be proportionate to recommend that the Council consider taking this course of action.

(c) *Recommendations*

- |  | <i>Completion date</i> |
|--|------------------------|
| 63. I recommend that the Council:  |                        |
| (i) issue a written apology to Mrs C for the failure to provide adequate information in the planning report in relation to whether, in the event of a decision contrary to the recommendation, there was a significant departure from the development plan in the case of a major development application; and | 21 November 2014       |
| (ii) take steps to ensure that there is clearer reference to relevant statutory procedures in committee reports on planning applications, particularly in relation to whether or not there is a significant departure from the development plan in the case of a major development application.                | 22 December 2014       |

**(d) The Council unreasonably reached an agreement with the applicants under section 75 of the Town and Country Planning (Scotland) Act 1997 before addressing the local residents' concerns**

64. On 29 June 2012, the planning committee agreed to approve the application subject to relevant conditions that were to be remitted to the Head of Planning and Economic Development to determine. They also recorded that the Decision Notice should be withheld until the Solicitor to the Council had satisfactorily concluded a formal agreement under section 75 of the Town and Country Planning (Scotland) Act 1997 with the applicants in respect of matters detailed in section 8 of the report and other matters considered relevant.

65. On the same day, Mrs C wrote to the Council and raised some concerns about their handling of the matter. The Council responded to Mrs C on 13 July 2012. Mrs C then wrote to the Council again on 13 August 2012.

66. On 20 September 2012, the Council considered the minute of the planning committee for approval as a correct record. Mrs C and a number of other residents attended the meeting. A correction to the minute was made with the addition of a new second sentence reading, '[the local planning team leader]

provided further clarification in respect of the content of the Committee report and clarified that five turbines were within the Local Plan Area of Search'.

67. A response to Mrs C's letter of 13 August 2012 was issued by the Council on 4 October 2012. Mrs C wrote to the Chief Executive again on 31 October 2012 and raised a number of issues about the application. On 7 December 2012, the local residents obtained a report from an acoustic consultant. On 11 December 2012, the Chief Executive issued a response to Mrs C on a number of issues she had raised. The Chief Executive said that the Planning Service would be willing to meet her and other local residents and proposed a date for this. In January 2013, the Council commissioned a report from an acoustic consultancy firm.

68. In early 2013, the applicants petitioned for a judicial review in relation to the Council's delay in issuing the planning consent. The Council have told us that the proceedings were subsequently dismissed following agreement being reached on the section 75 agreement to allow for planning permission to be issued.

69. On 11 February 2013, local residents wrote to the Council's Chief Executive to raise a number of concerns.

70. The section 75 agreement between the Council and the applicants was made in February 2013. The decision on the application, subject to 47 conditions, was then issued on 28 February 2013.

71. On 15 April 2013, the Executive Director of Finance and Corporate Support wrote to Mrs C in response to the issues she had previously raised about the application. In his response, he said that he was satisfied that there had been no new material information provided to him that would have suggested that the planning application should have been referred back to the planning committee to consider on the grounds of noise.

72. In her complaint to us, Mrs C complained that the Council signed the section 75 agreement and issued the planning consent before all the environmental and other concerns had been addressed.

*Advice obtained*

73. I asked the Adviser if it had been reasonable for the Council to sign the section 75 agreement and issue the planning consent before the residents' concerns had been addressed. I also asked him if the Council could have changed or modified the decision before they signed the section 75 agreement. In his response, the Adviser said that in theory it is not impossible to change a decision before it is issued, as it is not legally made until the date on which it is signed on behalf of the authority. However, he said that in practice, it depends on the procedures that are delegated to officers to complete on behalf of the original decision maker (in this case the planning committee), such as the section 75 agreement, or a legal requirement being imposed, such as a notification direction from Scottish Ministers. In the event that an agreement cannot be signed with the applicant or notification leads to the application being called in by Scottish Ministers, the original decision cannot be carried out. It may be returned to the decision making committee for an alternative decision to refuse an application for which a related agreement has not been signed or to determine how to represent the authority's position if it has been called in.

74. The Adviser commented that in other circumstances, the Council's standing orders would determine whether the matter may be reconsidered. In relation to reconsidering decisions, the Council's standing orders state that:

'No decision of the Council, the Cabinet, Committee, Forum or Panel may be reconsidered and, except where required by statute, no item of business the same or substantially the same as one previously determined by the Council, the Cabinet, Committee, Forum or Panel may be discussed by the Council, the Cabinet, Committee, Forum or Panel within six months of the making of the previous decision or determination of the item, except when two-thirds of the Members for the time being present and voting agree otherwise. A motion by a Member in terms of this Standing Order proposing that a matter be reconsidered or discussed shall, if seconded, be put by the Chair to the meeting in the form 'For the Motion' and 'Against the Motion'.'

75. The Adviser said that in his experience, Councils are highly reluctant to reconsider planning decisions in view of the open-ended precedent that could be set. He said that having considered the matter, he considered that it was reasonable that the Council did not reconsider the decision at this stage. He stated that he was more concerned about the way in which the issue about the

cumulative noise effect was not resolved more satisfactorily before the decision was made on the application in the first place.

76. He also commented that the Scottish Government expect agreements to be concluded quickly and that in this case, the agreement was not completed unduly hastily.

*(d) Conclusion*

77. As stated above, I consider that there were some failings by the Council in this case before the planning committee reached their decision to approve the application. Whilst a reconsideration of the decision would have provided an opportunity for the Council to remedy these problems before the decision notice was issued, under the Council's standing orders, this can only be done if proposed, seconded and then voted for by two-thirds of the Council members present. No member chose to do this and this was a decision that the Council were entitled to take. The advice I have received is that the failings occurred before the decision was made. Having considered this matter carefully, I have not upheld this aspect of Mrs C's complaint.

78. 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 implemented.

**Explanation of abbreviations used**

Mrs C	the complainant
the Council	East Ayrshire Council
the Adviser	the Ombudsman's planning adviser
DPEA	Directorate of Planning and Environmental Appeals



**List of legislation and policies considered**

East Ayrshire Council: Standing Orders, Financial Regulations, Standing Orders Relating to Contracts (January 2008)

Scottish Planning Series Circular 4 2009: Development Management Procedures

The Local Government (Scotland) Act 1973

The Scottish Public Services Ombudsman (SPSO) Act 2002

The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008

The Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009

The Town and Country Planning (Scotland) Act 1997