

The Ombudsman's final decision

Summary: Mr X complains the Council has not properly investigated and acted on a planning enforcement complaint, resulting in his suffering continued noise disruption, distress, time and trouble. We find fault in the Council's application of its planning enforcement policy and fault in its communications with Mr X, causing Mr X injustice. We recommend the Council provides Mr X with an apology, payment for distress and a further response to his complaint. Further, that it amends its policy to accurately reflect its practice.

The complaint

1. Mr X complains the Council has failed to take monitoring and enforcement action on a planning condition controlling noise on a site. Further, it gave the site owner advance warning of an enforcement visit, compromising the outcome. Mr X says he has suffered from continued noise disruption, distress and time and trouble through the complaints process.

The Ombudsman's role and powers

2. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. I refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
3. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
4. We cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us about something a council has done. (*Local Government Act 1974, sections 26B and 34D, as amended*)
5. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

How I considered this complaint

6. I spoke to Mr X and I reviewed documents provided by Mr X and the Council.

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7. I gave Mr X and the Council the chance to comment on a draft of this decision. I considered their comments before making a final decision.

What I found

Planning enforcement

8. Councils have discretion to take enforcement action, when they consider it expedient to do so having regard to the development plan and any other material considerations.

9. It is for a council to decide whether it is expedient to take action: a council does not have to carry out enforcement action simply because the public wants or expects it to.

10. This is made clear in the Government's National Planning Policy Framework which says:

“Effective enforcement is important to maintain public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control. They should consider publishing a local enforcement plan to manage enforcement proactively, in a way that is appropriate to their area. This should set out how they will monitor the implementation of planning permissions, investigate alleged cases of unauthorised development and take action where appropriate.”

Council's Planning Enforcement Protocol (the “Protocol”)

11. The Council publishes its Planning Enforcement Protocol (2015) on its website. This says:
- Its officers undertake routine monitoring of all minerals and waste sites where it has granted planning permission to ensure compliance with conditions and to ensure any unauthorised development is identified, and regularised as appropriate.
 - It will acknowledge an enforcement complaint within 3 days.
 - It will decide if it is a borough or district matter and if so inform both the relevant council and complainant.
 - If it is a county matter it will start investigating within 10 days.
 - If it finds no breach of planning control, it will inform the parties within 15 working days of this decision.
 - If it finds a breach it will take further action and inform the complainant within 15 working days of acting.
 - It will seek cooperation to resolve problems and use formal enforcement powers as a last resort.
 - In most cases it will work jointly with local, bordering and national authorities. It will share information with the district, boroughs, Environment Agency, and other organisations. However, it will base any enforcement action upon planning considerations. It will not seek to substitute and/or duplicate legislative powers of different authorities.

A Certificate of Lawful Existing Use or Development

12. A Certificate of Lawful Existing Use or Development (CLEUD) is a certificate that is legally granted by a Local Planning Authority to retroactively legalise a

previously unauthorised development. The CLEUD certifies that an existing building/use is lawful and prevents any enforcement action being taken.

Principles of good administrative practice

13. In 2018 the Ombudsman published a guidance document setting out the standards we expect from bodies in jurisdiction: “Principles of Good Administrative Practice”. In May 2020 we issued an addendum in response to the COVID-19 pandemic; “Good Administrative Practice during the response to Covid-19”. This shows we expected similar standards from councils, even during crisis working. The following points are relevant in this case.
 - Where you are working with new organisations to deliver services during Covid, or using existing partners in new ways, ensure your organisation keeps proper oversight and direction. Where you delegate responsibility to others (e.g voluntary sector), responsibility remains with your organisation
 - Basic record keeping is vital during crisis working. There should always be a clear audit trail of how and why decisions were made.
 - The basis on which decisions are made and resources allocated, even under emergency conditions, should be open and transparent.
 - Decision reasons should be clear, evidence based and where necessary explained in the particular context and circumstances of that decision.
 - Delays are understandable at this time. Make sure you can explain the reason for any delay to the complainant, and you have documented your reasons.

What happened

Background

14. Mr X lives near to a large industrial estate split into two sites. Council B controls the northern site, which benefits from a CLEUD. This means there are no planning controls, rather any noise issues would be dealt with under environmental health law. The Council controls the southern site. This is subject to planning control.
15. In 1997 the Council granted planning permission for a recycling plant on the southern site. In 2012 the Council considered an application to extend the existing recycling plant.
16. The case officer report on the 2012 application explains the Council considered the noise restrictions imposed on earlier applications should remain. The Council granted planning permission with the condition that any noise on the site, when measured at a height of 1.2 metres above ground level and 3.6 metres from any residential property should not exceed 50 Laeq (equivalent continuous sound level), during any 30 minute period.

This complaint

17. The Council has provided copies of correspondence exchanged with Mr X and other relevant parties. I have referred to relevant information below.
18. On 13 July 2020 Mr X complained to the Council about noise from the site. He believed the owners were in breach of the noise condition. He asked the Council for evidence of its noise monitoring to date and for it to enforce the condition.
19. The Council sent an acknowledgement on 15 July.

20. On 23 July a Council officer visited the site to survey the nature and extent of the noise. They revisited in 29 July.
21. On 5 August the Council officer spoke to the site owner.
22. Mr X chased the Council on 5 August.
23. The Council's enforcement officer spoke to Mr X about his complaint on 10 August.
24. On 14 August the Council gave a briefing note to a noise consultant and asked for advice on the best course of action. The note detailed the background of the site and the recent site visits. The Council explained its officer had not noticed any unusual noise on either occasion. The officer had also spoken to the site owner on 5 August and the owner was unable to provide any reason as to why more noise may be experienced. However, the officer had spoken to Mr X on 10 August and he remained concerned by the noise.
25. On 27 August the Council officer told Mr X officers would visit the site to see what was taking place in terms of its area to the south and Council B's area to the north. It would then decide whether to carry out noise monitoring.
26. Mr X expressed concern the Council were treating the estate as two separate sites as he was affected by noise from the site as a whole.
27. On 9 September the Council told Mr X it had visited the site and decided to arrange noise monitoring.
28. The Council acknowledged noise may be coming from the northern site, over which it had no control. Mr X said he expected the Council to work with Council B as necessary.
29. The Council says it commissioned noise monitoring on 6 October.
30. Mr X chased the Council on 22 October. He said it had still not carried out noise monitoring or responded to his query about its own routine monitoring. He had also noticed remedial works carried out on site and queried if the Council had warned the owner of an upcoming visit.
31. The Council told Mr X its noise consultant would contact him soon. They had contacted the owner to arrange a visit and if they were already taking steps to reduce noise that was positive. It explained it had arranged monitoring previously but only in response to specific noise complaints.
32. On 3 November a noise consultant carried out noise monitoring from Mr X's address. On the same date they visited the site.
33. On 4 November the noise consultant updated the Council. They referred to evidence gathered. Monitoring showed the noise was at times up to 53db but the consultant considered the southern site contributed no more than 50db of this. This was because the overall site was noisy but the southern site was further away from Mr X's home. The noise consultant considered the southern site was likely compliant with the noise condition, at least at Mr X's property, noting his was not the closest to the site. They also said Mr X had reported the site was quieter than normal that day.
34. The Council told Mr X the outcome of its investigation on 26 November. It said the results of noise monitoring showed the southern site it controlled was operating in line with the noise condition. It would pass these results to Council B for it to consider any action on its own site.

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35. The Council then asked the noise consultant to prepare a formal report of its findings.
36. The noise consultant produced a report dated 9 December 2020. This details the monitoring at Mr X's address and the measurements taken. It explains how the consultant set up the monitoring equipment at a height of 2m above ground and 3.6m from Mr X's property. It says the consultant visited the site that same day to see the location and type of activity on site. The report notes Mr X's comment that it was quieter that day than it was generally.
37. The Council sent Mr X a copy of the noise consultant's report on 10 December.
38. On 15 December the Council referred the matter to Council B. Further correspondence shows the Council continued to liaise with Council B in support of its investigations.
39. Mr X contacted the Council again on 18 December. He explained the site owner was aware of the monitoring visit and reduced noise at that time, however the noise was usually louder. He asked whether the Council would carry out a further unannounced visit. Also, whether it would measure noise impact to those closest to its site. He said the Council had failed to carry out routine monitoring and he wanted it to work with Council B to resolve the continued noise disruption.
40. The Council told Mr X it would address his concerns after he had completed the complaints process on related matters.
41. Mr X raised a complaint on 5 January 2021. He said the Council gave the site owner notice of monitoring and it was less noisy on that day. The Council had not enforced noise conditions over the past ten years. And he wanted the Council to carry out further unannounced noise monitoring.
42. The Council responded on 18 January. It explained it gave notice to ensure it had permission to access the site and for health and safety reasons. The noise consultant carried out a survey and reported the noise generated on the southern site likely complied with the planning condition. The consultant noted Mr X's view the site was quieter than normal that day. While the Council could not comment on this, the consultant said the site was busy and that specific machinery was used so that he could assess some of the noisier activities. This included use of a digger. It was not appropriate to take planning enforcement action on the southern site but it had passed his concerns to Council B and would work with Council B as needed.
43. Mr X escalated his complaint on 19 January. He complained the Council only responded to complaints but was not proactive in enforcing the noise condition. He queried why it had not carried out monitoring since 2010. The noise consultant complained of came from its southern site and others were affected. While the owner did make use of a noisy excavator that day, they did not use the shaker bucket which was a significant source of noise. The Council gave notice of the visit to the owner who then took steps to reduce the noise that day. He expected the Council to have discussed its plans to contact the site owner with him. And he queried why his own evidence of noise was not accepted.
44. The Council responded on 11 February. It said his property was 6m from a busy area on the northern site so it considered this area had the greatest impact on him. It did not carry out routine noise monitoring rather it reacted to complaints. The noise consultant needed permission to access the site and his own home. It works with site owners to resolve issues so any steps taken to reduce noise would be helpful. It referred to its Planning Enforcement Protocol and explained

while it regularly carried out general site monitoring it did not undertake noise monitoring as a matter of course. Rather it encouraged residents to report concerns or complaints about noise direct to the Planning Enforcement Team. While the overall noise on site exceeded 50db it found the southern site was compliant with the conditions. His own noise equipment did not measure Laeq as required by the condition. It noted Council B had since contacted him and it would work with Council B and other bodies as needed. It did not uphold his complaint.

45. On 26 January the Council contacted the noise consultant as it noticed the survey data reported the noise monitoring took place at a height of 2m whereas the planning condition specified 1.2m. The noise consultant said they could use modelling to calculate the impact of this height difference and that it was likely the noise would be 1db lower at the lower height.
46. On 29 January the noise consultant produced a report with the new calculations. The conclusions drawn from the report were the same except the sound recorded was up to 52db; one db lower. The report also explained how this was calculated, using a 3d soundplan model of the site. The Council sent Mr X a copy of this report on 12 February 2021.
47. Mr X then complained to the Ombudsman. He said the Council:
- gave the site owner advance notice of the noise monitoring visit resulting in less noise that day;
 - had not carried out any monitoring of the site since 2010 despite its Protocol saying it would carry out routine monitoring;
 - did not consider the evidence he gathered and just passed the matter over to Council B.
48. In comments on a draft of this decision the Council:
- acknowledged the Protocol should be more specific about what was included in routine monitoring. It would therefore amend it. However, suggested Mr X was frustrated as it found no breach of the noise condition rather than due to any ambiguity in the Protocol.
 - outlined actions taken between 13 July and 5 August 2020 and provided further evidence in support, to show it did start its investigation within 10 days.
 - explained it commissioned noise monitoring on 6 October and this was undertaken on 3 November. Its officers were working during a pandemic which meant there were extra challenges to overcome. In the circumstances it did not consider any delay significant.
 - explained it had given the noise consultant details of the monitoring required and it was reasonable to rely on their findings. Once it noted the error it took steps to remedy this and this did not affect the outcome.
 - confirmed it did note Mr X's comments that the site was quieter than normal that day. However, the earlier unannounced site visits had not identified anything unusual and neither had the monitoring.
 - explained why it did not consider other properties were affected by noise, taking into account the site layout and lack of complaints. And, explained its view that in practical terms, it could only consider non-compliance with the condition when measuring noise from any residential property that had complained about noise.

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- said it would need six months to amend the Protocol because it would need to put changes before the Planning and Regulatory Committee.
 - said it had already addressed Mr X's complaints on 18 January, noting the digger referred to has the shaker bucket attachment.
49. In comments on a draft of this decision Mr X:
- outlined the planning history and previous incidents which led him to believe the Council tried to influence the outcome of its investigation by giving the site owner notice of the noise monitoring.
 - said he had not seen any evidence the Council or noise consultant actually discussed health and safety matters with the site owner prior to the visit and no-one raised any safety concerns before visiting his own home. He therefore did not believe this was the reason for giving notice of the visit. While the Council may have been entitled to give notice of the visit, in this case it was in its interests to do so.
 - the Council should amend its practice to reflect the Protocol and to ensure effective enforcement.
 - he is unhappy with the Council's comments in response to the draft decision.
 - he would like the Council to carry out noise monitoring on a regular, unannounced basis.

Findings

50. I will investigate Mr X's recent complaint, from July 2020. I will not investigate earlier complaints about matters arising more than 12 months ago. This is because Mr X did not pursue those complaints with the Ombudsman at the time and there is no good reason to exercise discretion. This includes the Council's planning approvals in 2012 and earlier. While I appreciate Mr X is unhappy with the location of the development, the Council gave permission many years ago and this cannot now be overturned.
51. The Council's Planning Enforcement Protocol (the "Protocol") says it will carry out routine monitoring to ensure compliance with planning conditions. The Council has since explained it carries out general monitoring rather than noise monitoring, however its policy does not make this clear. I find the Council did not carry out noise monitoring at the site in line with its policy and/or its policy does not accurately reflect its practice. This is fault. Mr X had repeatedly asked the Council about its routine monitoring and challenged why it had not carried this out. He also raised this in complaint to the Ombudsman. Mr X's expectations were raised and he suffered frustration when the Council did not meet these. This is injustice.
52. I acknowledge Mr X would like the Council to ensure its practice reflects the Protocol, that is, it should carry out routine noise monitoring. However, the Council has discretion as to its enforcement policy and it is not within my remit to say what it should or should not include. The Council has confirmed it does not carry out routine noise monitoring. Therefore, it should ensure its Protocol is clear on this point.
53. The Council has evidenced it started investigating Mr X's complaint promptly and on reviewing what happened, I consider there was no undue delay between actions taken. However, the Council did not regularly update Mr X, leading him to chase it up. This is not good practice. However, the Council's Protocol does not require the Council to provide ongoing updates and I find this does not otherwise meet our threshold for a finding of fault.

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54. The Council is only responsible for the southern site but it should work with Council B as necessary in line with its policy. The Council referred the matter to Council B shortly after deciding there was no breach on its own site and then continued to liaise with Council B and other relevant bodies. I am satisfied the Council acted in line with its policy here. Though it would have been helpful if it had also told Mr X it was doing so at the time.
55. It is up to the Council whether to give a site owner notice of a monitoring visit. There is no law or policy to say otherwise. I therefore cannot find fault. The Council says it gave notice to ensure it had permission to access the site, for health and safety reasons and for COVID-19 security. I acknowledge Mr X believes the Council acted in bad faith however it is not possible for me to make a finding on what was in the minds of Council officers at the time. There is no substantive evidence that proves the Council acted in bad faith.
56. The Council's policy is to update a complainant after it has taken action. It does not need to discuss its plans in advance. I acknowledge Mr X wanted the Council to discuss its plans with him, however it was not obliged to do so. I do not find fault.
57. I cannot question whether the Council's decision is right or wrong simply because Mr X disagrees with it. I must consider whether there was fault in the way the Council reached its decision.
58. The Council told Mr X its decision there was no breach of the noise condition on 26 November. I am satisfied it reached this decision taking into account the information available to it at the time, which it reasonably believed was accurate. I therefore find no fault in the Council's decision making. It would have been helpful if the decision letter had addressed Mr X's comments that the site was quieter than normal that day. It would also have been helpful if the Council had explained why it did not investigate if there was any breach when measuring noise from other homes. However, I note the Council had opportunity to address these points in response to Mr X's complaints.
59. While the Council completed its complaints process in a timely manner, it did not address Mr X's concerns that the noise monitoring did not pick up the noisiest activities and that the site was quieter on the day of monitoring. Nor did it answer Mr X's query (first raised on 18 December) as to whether it would carry out monitoring from homes closer to the southern site. I consider this amounts to fault. I am satisfied this caused Mr X distress and uncertainty as to whether the Council had taken into account relevant information and properly reached its finding that there was no breach. I note the Council has provided further information on comments on my draft decision, however I consider it should offer a further response directly to Mr X.
60. The Council explained to Mr X it could not accept his evidence of noise as he did not use equipment which measured Laeq as required by the condition. The Council's explanation was appropriate in the circumstances and so I cannot find fault.

Agreed action

61. To remedy the injustice set out above I recommend the Council carry out the following actions:
62. Within one month the Council should:

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- provide Mr X with a written apology for the faults identified;
 - pay Mr X £100 for distress and uncertainty; and
 - provide Mr X with a further complaint response, addressing the points referred at paragraph 59.
63. Within six months the Council should:
- amend its Planning Enforcement Policy as necessary so that its description of monitoring accurately reflects its practice.
64. The Council has accepted my recommendations.

Final decision

65. I find fault in how the Council investigated an alleged breach of planning control and in its communications with Mr X. The Council had accepted my recommendations and I have completed my investigation.

Investigator's final decision on behalf of the Ombudsman

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