

Section B: Environmental health

B1: Statutory nuisance

The need to establish whether a statutory nuisance exists – tenants should not be disadvantaged because their landlord is a council

1. Mr Birt complained on behalf of his mother-in-law, Mrs Lord, that a council had failed to deal with noise resulting from the defective design of her home. As a result, he said, she suffered from excessive sound transmission through the ceiling from the flat above.

What happened

2. Mrs Lord lived in a ground floor flat owned by the council which was of traditional, post-war construction and one of a block of four. Mr Birt complained to the council about the excessive levels of noise which could be heard in Mrs Lord's flat. He made it clear in his complaint that the family above was not at fault and that the noise appeared to be excessive because of a defect in the construction of the flats.

3. In its reply the council accepted that there was a noise problem and stated that a visit would be made. No visit was made. Mr Birt wrote to the council's chief executive. In this letter he stated that he believed the noise constituted a statutory nuisance. Mrs Lord was visited by an officer from the council who made clear to her that there was little prospect of the flats being sound insulated in the near future and that a transfer to a more suitable property would be the best solution. The council did not make any investigation at this stage of Mr Birt's allegation that the noise level constituted a statutory nuisance.

4. Because he was not satisfied with the council's efforts in dealing with the noise problem, Mr Birt complained to the Ombudsman. The Ombudsman asked the council whether or not it considered the noise level amounted to a statutory nuisance. The council said

that limited sound transmission tests had been carried out. It said that the flat failed to meet the current airborne sound level standard specified by the Building Regulations. Although it was not possible to carry out an impact transmission test due to the lack of necessary equipment, it was the opinion of the environmental health officer that the floor would fail to meet this current standard also.

5. The council said that due to the lack of specialist equipment only limited tests had been carried out but its officers confirmed that a statutory nuisance was likely to occur as a result of the normal use of the properties. The council said that it was unwilling to consider the insulation of Mrs Lord's flat until a pilot programme elsewhere had been proved to be successful in reducing noise levels.

The council's duty

6. The Ombudsman pointed out that the council had a duty to take such steps as were reasonably practicable to investigate a complaint of statutory nuisance. When Mr Birt first complained to the council he said that he had reason to believe that the noise constituted a statutory nuisance. Although the council pursued his complaint with a view to offering a transfer for Mrs Lord (and subsequently did offer a transfer), it did not take any action to establish the extent of the noise nuisance. Mrs Lord, who was 79 years old, did not wish to move out of her flat, other than temporarily to allow sound insulation work to be carried out. It was not until the Ombudsman had Mr Birt's complaint that the council made efforts to investigate whether there was a noise nuisance.

- The council carried out some tests and said that it considered a statutory nuisance was likely to occur in the flats. However, officers were not prepared to state that there was a statutory nuisance in Mrs Lord's flat. The Ombudsman said:

"The council is under a statutory duty to do what is reasonably practicable to establish whether there is such a nuisance and I do not consider that in this case the council acted quickly enough or undertook sufficient tests to establish the degree of nuisance present. This failure is maladministration."

- The Ombudsman continued:

"Although the council cannot serve a notice to abate a nuisance for which it is itself responsible, it should investigate such a complaint and take appropriate action should a nuisance be established. If the flat had been owned by a private landlord and the council were to establish that there was a statutory

nuisance, it would have a duty to serve an abatement notice on that landlord. I do not consider that a tenant should be significantly disadvantaged by the fact that the council is the landlord. The council should do what it would expect a private landlord to do to abate an identified statutory nuisance caused by a defect in premises which it owns."

Recommended action

- As the council accepted that the noise at Mrs Lord's flat was likely to be a statutory nuisance, the Ombudsman considered that the council should carry out work to alleviate the problem and reduce the noise to a more reasonable level. In addition the council was recommended to pay Mr Birt £100 for the time and trouble incurred in making his complaint.

(Report 94/C/4702)

B2: Statutory nuisance

The need for action to ensure compliance with abatement notices – need for adequate record keeping

- Mr Southgate complained that a council failed to take prompt and adequate action in response to his complaints of noise and odour nuisances from a restaurant next door to him.

Odours

- The Ombudsman was satisfied that when Mr Southgate first reported the nuisance caused by cooking smells, the council responded appropriately by

visiting his premises to ascertain if there was evidence of a statutory nuisance. It obtained that evidence and served an abatement notice on the restaurateur.

- However, the Ombudsman was not satisfied that the council took prompt and appropriate action to ensure that the notice was complied with. She did not criticise the council for seeking to resolve matters informally when the deadline was not met. But some six months later when Mr Southgate

wrote again, the restaurateur had still not complied with the notice but the council took no action against him. Mr Southgate said that he made further complaints to the council during this period. The council denied receiving them. The Ombudsman could not say with confidence if these complaints were made or not, since the council's files contained no clear chronological record of contacts with, and visits to, Mr Southgate and the restaurant.

4. The council said that officers' notebooks formed part of its record keeping system. The Ombudsman asked to see these, but the council failed to send them. The Ombudsman commented:

"There are differences of view about the extent of visits undertaken by the council to ascertain the extent of the problem. The council's failure to provide evidence it says it has which would verify its claims casts considerable doubt on its existence."

5. The council subsequently issued a second and amended abatement notice and commenced legal proceedings against the restaurateur. The necessary work to abate the nuisance was undertaken but this was some two-and-a-half years after the time when the council concluded that a statutory nuisance existed. The Ombudsman considered that the extent of delay by the council in enforcing the abatement notice was unacceptable.

Noise

6. The Ombudsman was also not satisfied that the council responded promptly and appropriately to Mr Southgate's complaints of a noise nuisance. The paucity of the council's records made it difficult to assess with any certainty what it did and when.

7. After some six months a senior officer gave instructions that Mr Southgate should be visited and sent disturbance record forms to complete. There was no evidence that this happened. Nor was there any evidence of a response by the council following Mr Southgate's subsequent complaint.
8. The Ombudsman considered the council's failure to deal with Mr Southgate's complaints of noise nuisance and to record clearly its actions and decisions to be maladministration. As a result Mr Southgate was left uncertain as to what action, if any, the council was taking in response to each of his complaints. Eventually the nuisance from noise abated, but there was no evidence that this was as a result of any action taken by the council.

Outcome

9. The Ombudsman recommended a payment of £500 to Mr Southgate and added:

"The council should also ensure that its files and records are carefully maintained to record all letters, telephone calls and visits relating to complaints of statutory nuisances and the action taken in each instance."

(Report 95/C/190)

B3: Statutory nuisance

Failure to bring a matter to a conclusion

1. Mr Watson complained that there were failings in the way a council responded to his complaints about noise nuisance.

What happened

2. Mr Watson and his family occupied a basement flat in a converted house. They were disturbed by noise from the flat above. Mr Watson said that he suffered depression, anxiety and loss of sleep which affected his business.
3. The council acquired equipment for carrying out sound insulation tests. It concluded that the structure between the two flats did not meet the standards required by the Building Regulations. It served a notice on the landlord requiring him to do the necessary work. The landlord said that he could not afford to carry out the work and suggested that the council should do the work in default. The council did not pursue this option.

Analysis

4. Mr Watson's complaint about noise nuisance was clearly justified. The Ombudsman commented that the council invested considerable time and energy in investigating it. Surveys and technical appraisals were carried out, and there were three appearances in the magistrates' court, twice when the landlord appealed against notices, and once when the council prosecuted him for non-compliance. This vigorous activity took place over a three year period and, the Ombudsman observed, must have cost the council a considerable amount of expensive officer time.
5. In those circumstances, the Ombudsman found it extraordinary that the council effectively gave up pursuing the matter when the landlord asked the council to do the work in

default. The cost of doing the work would eventually have been borne by the landlord or any future purchaser of the house, but the Ombudsman accepted that the council would have had to pay for the work initially. He was surprised that the council's officers were not prepared to go to the trouble of even having the work costed and then putting to members the option of viring the money into the relevant budget in order to meet the cost temporarily. Given the long history of the case, the Ombudsman thought the council should not have given up so easily. Its failure of will was maladministration.

6. It would have been for the members, having received all relevant information, to decide whether the Watson family should be protected from a statutory nuisance by the council carrying out the work in default. But the Ombudsman was satisfied that Mr Watson suffered the injustice of feeling that the council did not do all it reasonably should have done to reach a sound decision whether or not to carry out the work in default, and that this involved him in avoidable time and trouble in pursuing the complaint.

Outcome

7. The Ombudsman recommended that the council should review the position and decide whether the nuisance still existed; and that if it did the council should receive an officer report giving details of costs and other relevant information so that the council could decide whether it wished to proceed with works in default in order to abate the nuisance. The council was also recommended to pay Mr Watson £250.

(Report 96/B/3831)

B4: Waste regulation

Failure to take vigorous and effective action to regulate the activities of a company – a member with an interest should have taken no part in the council's dealings with the company

1. Mr Davies and Mr Johns complained that a county council failed to respond properly to their repeated complaints of noxious nuisance from a local waste processing plant. The council was at the time the waste regulation authority.

The situation

2. The plant had previously been owned by a firm involved in oil and solvent reclamation. The firm went into liquidation and abandoned the site, leaving the land contaminated and the reception pit and storage tanks full of oil sludges. After some five years a new company, 'Foxes', bought the site. The previous licence was transferred to them and they began to dispose of the oil sludges and prepare the site for waste treatment and transfer. Foxes secured a revised licence to extend operations to the whole site and to extend the range of operations to include solidification, oil water separation, acid neutralisation, bulking of waste, drum shredding and waste transfer. People in the neighbourhood began to complain about distinctive smells.

Criticisms

3. The Ombudsman made a number of criticisms about the way the council dealt with the complaints and with the regulation of the site.

4. A process involving pulverised fuel ash was introduced as a temporary expedient to solve the problem of the oil sludges left by the predecessor company. The council did not intend this to become a permanent feature of the operations. However, it did so. The fact that the council did not prevent this happening without proper

consideration being given to its appropriateness was maladministration.

5. The council took 21 months to issue a new licence. Some of that time was taken up in negotiating with Foxes but most of the delay was the fault of the council. Even after approval, it was clear that the licence lacked a complete working plan. The delay and the failure to secure an effective working plan were maladministration.

6. The council's file contained records of 23 separate requests from a district council for information about the processes and materials involved at Foxes. There was no evidence of these requests receiving any response from the county council, apart from the recollection of a waste regulation officer, which was directly contradicted by officers of the district council. There were no records of a response on the files of either council. On the balance of probability the Ombudsman considered that no response was made to the requests and that was maladministration.

7. The council failed to take the necessary action following enforcement inspections. The evidence suggested that non-compliance with conditions in the licence was discussed with the managers of Foxes but no letters were sent about the matter as the council's policy required. The level of non-compliance against some conditions was very high (in one case 96 per cent) and the failure to write to Foxes drawing attention to repeated and endemic levels of non-compliance was maladministration.

8. An annual audit clearly indicated cause for concern about a wide range of non-compliance with licence

conditions, with some 40 per cent of the conditions being breached. Despite promises of action to both complainants and the district council, and threats to Foxes, the county council took no action.

A member's interest

9. The Ombudsman was also critical of the involvement of a senior member of the council, Councillor X. He had a longstanding friendship with the managing director of Foxes. A number of officers said that Councillor X sought to influence them in their dealings with Foxes.
10. One officer said that Councillor X made it clear to him that letters should not be sent by recorded delivery to the managing director of Foxes. Councillor X denied that. The Ombudsman noted that whether or not Councillor X told the officer explicitly not to send letters by recorded delivery, that was clearly the practical outcome since the record showed that no letters were sent by recorded delivery after that time. The service of letters by recorded delivery served a particular purpose, as evidence of receipt in the event of a prosecution of Foxes, and the council's failure to obtain that evidence by sending a letter in that way could have reduced its ability to take legal action against the company.
11. The Ombudsman had no doubt that Councillor X's influence was significant in terms of its effect upon the officers of the council in seeking to ensure that Foxes complied with its licence and the conditions of the licence. The evidence suggested that Foxes received more favourable treatment than other businesses did in similar circumstances. That was maladministration.
12. The Ombudsman said that Councillor X's connections with the management of Foxes was sufficient to be regarded as a clear and substantial personal or private

interest under the *National code of local government conduct*. He should therefore have played no part in the council's dealing with Foxes. But Councillor X was present at a meeting of the technical services committee when the transfer of the licence to Foxes was considered and did not declare an interest. Neither did he declare an interest when he chaired a sub-committee meeting when tenders including one from Foxes were considered.

13. Councillor X said that if Foxes had submitted an application for planning permission, he would have thought it appropriate to declare an interest. The Ombudsman pointed out that the *Code of conduct* did not draw any distinction, such as Councillor X sought to make, between planning and other matters.

Injustice

14. The Ombudsman recognised that there was no guarantee that any legal action against Foxes would have been successful. She noted that the Environment Agency which took over the council's waste regulating responsibility was still dealing with complaints about Foxes a year later and appeared no closer to a solution.
15. The Ombudsman said that if the council had acted without maladministration and in a diligent and co-ordinated manner, there was at least a possibility that it would have reached a point where it could either have persuaded Foxes to operate in such a way as to cause less disturbance to the complainants and others living in the vicinity, or been in a position to begin legal action. The injustice to Mr Davies and Mr Johns lay in that lost possibility and the disappointment and frustration that their hopes were not fulfilled. She recommended that the council should pay £250 to Mr Davies and £100 to Mr Johns.

(Report 95/C/4840 etc)