

Committee:	Cabinet	Date: 23 August 2023
Title:	Planning and Environmental Health Issue – electricity sub-station, Mortimer’s Gate, Saffron Walden	
Portfolio Holder:	Cllr Petrina Lees, Leader of the Council	
Report Author:	Peter Holt, Chief Executive pholt@uttlesford.gov.uk	Key decision: Yes

Summary

1. This report updates Members on efforts made to address a planning and environmental health issue around the ongoing noise from an electricity sub-station in Mortimer’s Gate, Saffron Walden. This follows an adverse finding from the Ombudsman recommending that the local authority sought to find a lasting solution to this issue.

Recommendations

2. That Members
 - a. Do not agree to fund the remedial works, or
 - b. Do not agree to fund the remedial works but seek the views of Full Council before finally determining the matter, or
 - c. Agree to fund the remedial works without acceptance of liability subject to Council approving the additional expenditure.

Financial Implications

3. Depending upon the decision there are different impacts. Should Members endorse the officer recommendation there is no financial impact. However, if the decision is to recommend to full council that the work is to be paid for by the council then the cost of that work will need to come from the MTFs Reserve, which is already under pressure and, without intervention to reduce the forecast MTFs deficit, is likely to be exhausted during 2025/26. Should the Cabinet vote to propose to full council to fund the works up to a cost of the sum set out in the confidential appendix to this report. In that eventuality, it will be necessary to notify the external auditors. As Members will have voted against officer advice, it is possible that the decision could have an adverse effect on the auditors’ determination of ‘use of resources’ and therefore their ‘value for money’ assessment. The impact of a negative or qualified value for money assessment from our external auditors would generally reduce public confidence in the authority – ie its impact would be reputational rather than financial.

Background Papers

4. The following papers were referred to by the author in the preparation of this report and are available for inspection from the author of the report.
 - Ombudsman's adverse finding against the Council (as previously reported to Members) – Appendix A
 - Acoustic report prepared by WBM Acoustics on behalf of UDC – Appendix B
 - Legal advice received from commissioned KC – not published (as such legal privileged advice is not disclosable)
 - Quantum of commercially sensitive estimated cost/financial provision for these works (Confidential Appendix C)

Impact

5.

Communication/Consultation	The Council has kept the complainant in touch with progress, as was also recommended by the Ombudsman
Community Safety	Nil
Equalities	Nil
Health and Safety	The issue at the heart of this report is an ongoing noise problem from an electricity substation.
Human Rights/Legal Implications	As addressed in the body of this report.
Sustainability	Nil
Ward-specific impacts	Saffron Walden – Castle, although if the decision is to fund the project then there may be adverse impacts on other Wards as funding will not be available for projects elsewhere in the district
Workforce/Workplace	Nil

Situation

6. Planning permission for the development of the site known as Land North of Ashdon Road was granted planning permission for 167 houses by Planning Committee on 26 November 2014. The estate was built immediately adjacent to an electricity sub-station that had already for many years served an adjacent industrial site. As is quite natural for such industrial electricity sub-stations, it emits a regular hum.

7. The Planning process considered the issue of noise from the electricity sub-station, and included a planning condition that the developer should institute noise reduction measures in place. Importantly, the planning condition imposed did not specify the degree to which noise should be reduced. It should be noted that it is the responsibility of the developer to properly protect homes on the development from adverse levels of noise. The developer duly put in place noise mitigation measures that reduced noise. The heart of the problem is that the noise has not been sufficiently reduced to fall below a level that represents a nuisance to newly built nearby houses.
8. People duly bought the new built houses, whether off plan or after they had been built. In the years since, several of the houses have been sold on to second owners. It is reasonably imagined that the adjacency to an electricity sub-station was a factor in the negotiation over price – with the market ultimately determining a price factoring in any perceived disbenefit.
9. Whether buying off plan, after build, or in a subsequent resale, the basic principle of ‘caveat emptor’ applies – namely ‘let the buyer beware’. That is, the existence of and noise from the electricity sub-station was obvious and cannot reasonably have been a surprise to any buyers. It is not known what number of purchasers successfully negotiated potentially substantial discounts in the purchase price of their homes because of the ongoing noise, who in such cases would then have therefore arguably already received compensation they would have considered proportionate to the disbenefit.
10. In the normal run of things, if an electricity sub-station were built next door to residential properties, the responsibility for ensuring that there was no ongoing noise nuisance would fall on the operator of the sub-station. The local authority’s Environmental Health team would be able to take enforcement action as necessary against the operator of the sub-station. This principle however does not apply in the case of Mortimer’s Gate, as the houses were built many years after the electricity sub-station, and buyers subsequently bought their homes in the full knowledge of the pre-existing electricity sub-station and associated noise.
11. Essentially therefore, we have residents and homeowners living next door to a buzzing electricity sub-station. One of those residents/homeowners made a complaint to the Local Government Ombudsman against the Council, on the basis that they argued (essentially, in summary) that the Council should have imposed and subsequently enforced a tougher and more specific planning condition in the first place, and that as it did not, the Council is now responsible for finding a solution to the ongoing noise issue. To the best of officers’ knowledge, there has only been one such neighbour complaint, though it is equally acknowledged that there is a much larger number of residents within sound of the buzzing electricity sub-station, so this is very much not an issue isolated to one household.
12. The Local Government Ombudsman concluded their investigation, and issued an adverse report against the Council. That report was routinely reported up to Members at Council on 11 October 2022.

13. The Local Government Ombudsman's resulting recommendations were that the Council should:

- Send Mrs X a written apology for its failures when discharging the planning condition about noise.
- Pay Mrs X £500 to recognise the prolonged distress and loss of amenity she suffered.
- Arrange its own noise survey report, which will also assess the degree/level of mitigation required, and then draw up a plan to install appropriate mitigation measures. The Council will notify the Ombudsman if it needs more time to finalise its report.
- Seek to work with the developer to implement the mitigation measures. Should the developer refuse to pay or contribute to the mitigation measures, the Council should fund the mitigation measures instead.
- Share its plans with Mrs X and keep her updated on progress

14. The Council duly and promptly wrote to the complainant with an apology, and paid her £500. The Council also duly arranged its own noise survey report. Subsequent to that, the Council worked with the operators of the electricity sub-station to identify a potentially suitable engineering solution, the estimated cost of which is set out in the confidential Appendix C to this report – confidential on the grounds of commercial sensitivity. The Council then met with the developer to seek to persuade them to fund or contribute to the funding of such an engineering solution. The Council has throughout continued to keep the complainant updated on progress.

15. It is important to note: the Council did not agree to accept all of the Ombudsman's individual findings – most importantly, the Council did not accept liability for any necessary works in the eventuality that its efforts to persuade the original developer to make good were not successful.

16. It is similarly important to note that there is substantial risk of cost overrun well beyond the cost estimate received (set out in confidential Appendix C), because of the unique circumstances of this situation. The engineering solution identified is to build a substantial, roofed brick structure around the electricity sub-station, and of course therefore over-topping it. This necessarily requires the full and active agreement of the electricity sub-station operator, who would understandably need to be satisfied that such a structure would not inhibit their ongoing operation of the sub-station, and that such a building (on and over-topping their land) was a sound structure they were prepared to take on, including its future structural liabilities. It is eminently possible not only that inflation will have pushed up the estimated price, but also that any unexpected contingencies which arose during construction would also have to be picked up by whoever agreed to fund it. Officers advise therefore that a substantial contingency sum should be factored in, pushing up the potential estimated cost, as detailed in confidential Appendix C.

17. Unfortunately, the developer, Bloor Homes, who should be responsible for ensuring that the homes are not adversely impacted by noise, has not agreed to fund such an engineering solution.
18. The Council has carefully considered the Ombudsman's remaining recommendation – namely that “Should the developer refuse to pay or contribute to the mitigation measures, the Council should fund the mitigation measures instead.”
19. The Ombudsman does not have the power to enforce its recommendations, but does have a duty to follow up and potentially issue further reports on any recommendations not duly enacted. The Ombudsman is being thorough in tracking this case, so this is a likely conclusion (should Members follow officer advice in this matter), not an abstract or low level risk.
20. Officers have considered the matter carefully, and taken expert legal advice, and concluded that the authority does not have liability to fund such works of this nature or of the order of this cost. The authority was not the developer, was not the sales agent, and has had no financial interest in this housing development. Although immensely sympathetic to the complainant, and without arguing that there is not an ongoing noise problem, Members are advised that it is not an appropriate use of scarce resources that would otherwise be available to spend on other council services to seek to remedy an issue that is essentially one between the house buyers and the commercial developer from whom they bought their home.
21. The Council does acknowledge that it could, with the benefit of hindsight, have done a more thorough job in setting and thereafter enforcing a more specific planning condition. Officers advise however that this sub-optimal historic approach was not so deficient as to create any legal or financial liability for the ultimate problem, particularly when considering that buyers (and their own advisors) should reasonably have considered the noise issue before completing their purchase, and only proceeding if they were content to own a home next door to this electricity sub-station and the noise it produced, even after a wooden fence was built around it by the developer with the objective of reducing the noise, albeit clearly not sufficiently. In the alternate, they could have declined to buy the property, even at a discount, and said to the developer that they would only go ahead with the purchase (presumably at the higher price) had the developer spent the extra money to add the additional engineering solution now scoped out – and instead of giving discounts, the developer might perhaps have spent that money on more noise insulation.
22. As it is, buyers all went ahead and bought the homes, and one at least is now seeking to have the original developer pick up the cost of a supplementary, additional engineering solution. It would be a matter for any such homeowner to determine whether they thought they had a strong enough legal claim to that effect against the developer to pursue through the courts. To the best of officers' knowledge, there has been no such legal claim against the developer, and it is not for the Council to take a view on whether there is such a claim between two sets of external third parties.

23. The Council does not have a statutory duty to identify any alternative solutions. It may be that property owners on the estate would be able to band together themselves to pay for an engineering solution that would mitigate the ongoing noise they experience and potentially increase the value of their homes as a result.
24. Members should note that because of the scale of the unbudgeted for potential cost, should Cabinet determine that the Council should bear this cost, it would be a final decision for full Council. If this is the chosen course of action, because of the risks set out in paragraph 16 above it is important to limit the council's financial exposure. It is therefore part of the recommendation that the contribution is limited to the sums set out in the confidential Appendix C. Should this sum prove insufficient a further report would be brought to Cabinet.
25. Alternatively, and unusually, it would be possible for Cabinet to hold off making its decision until there had been a full debate on this issue at full Council.

Risk Analysis

26.

Risk	Likelihood	Impact	Mitigating actions
That the Council could be sued by the complainant for relief from the noise nuisance.	1 – low risk	3 – significant impact – exposure	The Council has made every reasonable effort to persuade the original developer to take responsibility to fund a supplementary engineering solution. That having failed, the Council has taken legal advice and determined that it has a very low risk of any successful legal challenge imposing financial liability on the authority.

1 = Little or no risk or impact

2 = Some risk or impact – action may be necessary.

3 = Significant risk or impact – action required

4 = Near certainty of risk occurring, catastrophic effect or failure of project.