

13 September 2022

Complaint reference:
21 012 123

Complaint against:
Uttlesford District Council

Local Government &
Social Care
OMBUDSMAN

The Ombudsman's final decision

Summary: Mrs X complained about noise from an electricity substation opposite her home. She said the Council accepts there is noise nuisance but cannot act. Mrs X complained the Council did not create a suitable planning condition to mitigate the noise, did not consult UK Power Network, and did not carry out noise assessments as part of the planning process. The Council was at fault for failing to properly discharge the planning condition about noise mitigation. This caused Mrs X prolonged injustice which the Council agreed to remedy.

The complaint

1. Mrs X complained about noise from an electricity substation opposite her home. She said the Council accepts there is noise nuisance but cannot act against the owner of the substation.
2. Mrs X also complains about the relevant planning application process. She said the Council did not put in a suitable condition to mitigate the noise, did not consult UK Power Network (UKPN), and did not carry out noise assessments as part of the planning process.
3. Mrs X said the noise is constant. It prevents her from opening windows, can be heard above the television, disturbs her sleep, and spoils the enjoyment of her garden.

The Ombudsman's role and powers

4. 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*)
5. 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*)

-
6. If we are satisfied with an organisation'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*)

What I have investigated

7. The complaint relates to the Council's consideration of planning matters dating back to 2017 and earlier. We normally do not investigate complaints which are more than 12 months old, unless there are good reasons. Mrs X did not learn about the relevant planning matters until about 2020. She raised the complaint with the Council at the earliest opportunity and brought her complaint to the Ombudsman after exhausting the Council's complaint procedure. I also consider Mrs X's claimed injustice is significant and warrants investigation. I am therefore satisfied there are sufficient grounds in this case to exercise discretion and disapply the usual 12-month rule.

How I considered this complaint

8. As part of the investigation I have considered the following:
- The complaint and the documents provided by the complainant (including his medical evidence).
 - Documents provided by the Council and its comments in response to my enquiries.
 - Planning Practice Guidance.
9. Mrs X and the Council had an opportunity to comment on my draft decision. I considered any comments received before making a final decision.

What I found

Law and guidance

10. The general power to control development and use of land is set out in the Town and Country Planning Act 1990. Permission is required for any development or change of use of land and may be granted by a Local Planning Authority. For this complaint, the Council is the Local Planning Authority.
11. Development proposed in the vicinity of existing businesses, community facilities or other activities may need to put suitable mitigation measures in place to avoid those activities having a significant adverse effect on residents or users of the proposed scheme.
12. In these circumstances the applicant (or 'agent of change') will need to clearly identify the effects of existing businesses that may cause a nuisance (including noise, but also dust, odours, vibration and other sources of pollution) and the likelihood that they could have a significant adverse effect on new residents/users.
13. The agent of change will also need to define clearly the mitigation being proposed to address any potential significant adverse effects that are identified.
14. Where necessary for approval of a permission, a planning condition may be imposed to require details of specific aspects of a development which are not provided in the original application. The applicant must satisfy the condition and apply for it to be discharged by the authority.

-
15. Planning authorities may take enforcement action where there has been a breach of planning control. Enforcement action is discretionary. Government guidance says local planning authorities should act proportionately in responding to suspected breaches of planning control.
 16. Section 171A of the Town and Country Planning Act 1990 provides that a breach of planning control is defined as:
 - the carrying out of development without the required planning permission; or
 - failing to comply with any condition or limitation subject to which planning permission has been granted.
 17. Where there is a breach of a planning condition, the authority may serve a Breach of Condition Notice under section 187A. Failure to comply with a Breach of Condition Notice is an offence that may be tried in the magistrates' court.

Outline planning applications and reserved matters

18. Outline planning permission establishes the acceptability of development, subject to later agreement to details of 'reserved matters'.
19. Reserved matters may be any or all of access, appearance, landscaping, layout, and scale of the development.
20. An application for approval of details of reserved matters is not a planning application, and there is no legal requirement to give publicity to the application.

What happened

Outline planning permission and applicant noise assessment

21. The Council approved outline planning permission for a new housing development in 2013. The development was to be built on land which formed part of an industrial site. The developer identified that an electricity sub-station was present at the site and would remain in place after the development was complete.
22. As part of the outline plans, the developer gave the Council a noise assessment report. The report considered the likely noise impact on the new development, including from the electricity sub-station. It states:
23. "Noise readings from the electrical sub-station were taken as part of the assessment. The typical average noise level, at a distance of 5 metres, was recorded as 65 decibels".
24. "*Noise levels affecting residential properties and closest and most exposed to noise emissions from the electrical substation are around 47 dB LAeq during the day and around 46 dB LAeq during the night*".
25. "*Noise emissions from industrial sources, including the electrical substation, are often more intrusive to residents than [sic] noise from other environmental sources and therefore, even though noise levels across the site are broadly dictated by road traffic noise, industrial type noise may require further consideration when determining the detailed design of the development. The development master plan does already incorporate design measures intended to further reduce the noise impact of the substation, including:*
 - *A clear 4m 'Buffer Zone' around the substation, and;*

-
- *An acoustic barrier of approximately 5m height around the edge of the buffer zone to further reduce noise emissions affecting surround [sic] residential areas.”*
26. *“In summary of the above, based on the measured and predicted noise levels at the site; it is considered that acceptable noise environments could be provided for future residents with the design and provision (where required) of appropriate noise mitigation measures. These measures would be straightforward to implement in the design of the development following the grant of outline planning permission. This could be secured through the imposition of suitable planning conditions”.*

Reserved matters and discharge of planning condition about noise

27. The Council’s planning committee considered the applicant’s reserved matters application in 2017. As part of this process, the planning case officer reported to the Council with their views, including about noise from the electricity substation. The officer stated:
28. *“There is an existing electricity substation which is located in the northwestern corner of the application site. This is stated to form a noise constrain on the site and that residential dwellings would need to [sic] located at least 10m away from the noise source together with a range of noise mitigation measure [sic] to be proposed in the form of an acoustic noise barrier and upgraded glazing to those immediate dwellings”.*
29. *“The retained sub-station that is currently an eyesore would be screened by a 4m high timber fence with landscaping to assimilate this within the scheme. The fencing would also act as an acoustic noise barrier. These measures would protect the visual and residential amenity of future occupiers, in accordance with Local Plan Policy GEN2 and GEN4”.*
30. *“A Noise Assessment has been submitted as part of the application. In terms of amenity there is an existing electricity substation that provides a source of noise emissions...To mitigate the noise the nearest dwelling would be no more than 10m and with the erection of acoustic fencing, and the provision of upgraded housing facades and glazed windows to mitigate the noise. Should planning permission be granted details of this would need to be submitted for approval”.*
31. The planning case officer recommended approval of the application, subject to conditions. One of which was:
32. *“Before the commencement of development on the relevant phase of the development that contains the main electricity substation that is located to the rear of the site and which is shown as to be retained on the illustrative masterplan, details of boundary treatment for screening and noise mitigation details of the existing electricity substation shall be submitted to and approved in writing by the Local Planning Authority and thereafter implemented in accordance with the approved details, in accordance with a programme agreed with the Local Planning Authority.”*
33. The developer applied to discharge some planning conditions, including about noise mitigation. The developer told the Council it intended to erect a 4-metre high ‘acoustic’ timber fence and landscaping to screen the sub-station. It also gave the Council drawings of the fence.
34. The Council approved the details and discharged the condition about noise mitigation in January 2017.

Sub-station noise

35. Mrs X bought her home in 2019. The electricity sub-station is directly opposite. Mrs X was aware of the noise from the sub-station before she bought her home, but she said the developer gave assurances it would install an 'acoustic' fence before she moved in.
36. After Mrs X moved into her home, the developer eventually installed a timber fence around the sub-station. Unfortunately, Mrs X did not notice any difference or reduction in noise.
37. Mrs X said the noise is constant and the hum from the sub-station is present indoors at the front of the house. She cannot open windows, cannot sleep if a window is open, and cannot enjoy her garden.
38. Mrs X contacted UKPN about the noise in September 2020. It told her the timber fence was inadequate mitigation and gave her a copy of a noise survey it had conducted in 2019. According to Mrs X, UKPN told the housing developer a timber fence would be inadequate, but it continued with its plans due to costs.

Noise survey report commissioned by UKPN

39. *"The aim was to make a record of the sound levels in and around the substation and to make an assessment of the likely impact of transformer noise at the new houses. The sound level measurements were carried out on the 24th/April/2019."*
40. *"A new wooden fence, four metres tall, has been installed around the substation: I understand the intention was to hide the substation from view and also to reduce the sound levels at the new properties nearby."*
41. *"The transformer is quite old and quite noisy: the mean sound level beside it was 74dBA... The houses around it were at varying levels of completion at the time of the survey... The sound of the transformer hum was very obvious outside all of them, with sound levels in the range of 45dBA to 57dBA. For comparison, the background levels in the area were about 38dBA in the afternoon and 30dBA at the end of the evening. When the sound levels above are rated using the method of BS4142:2014, the conclusion is that there is a very 'significant adverse impact' from transformer hum."*
42. *"I was able to take some sound level readings in one of the occupied new houses... I found that transformer hum was very clearly audible in a bedroom when a window was slightly open and just audible when it was shut. The levels of the 100Hz tone were around 43dB and 36dB, respectively. These levels lie above and below the reference curve level in the Defra documents NANR45, which is 38dB for 100Hz, implying some cause for concern, at least. I believe that other houses could have significantly higher levels than this."*
43. *"It is not uncommon for transformers... to be fitted with an acoustic enclosure, and these normally give a reduction in sound levels of 15dBA, or slightly more. This improvement should be enough that most future residents will be prepared to accept the situation, though transformer hum will still be audible outside the houses."*
44. *"British Standard BS4142:2014 'Methods for rating industrial and commercial sounds' is the most widely used method for rating sound affecting residences... The essence of the rating method is to compare the 'specific sound level' outside the residential façade with the background sound level would exist in its absence: the greater the difference between the two the greater the 'adverse impact' is judged to be."*

-
45. *“My experience is that BS4142 tends to overestimate the severity of a noise nuisance in situations such as this, where the background levels are low. However, the calculation indicates a very high likelihood of complaints about transformer noise from owners of the new houses.”*
46. *“Defra document NANR45 ‘Procedure for assessment of low frequency noise complaints’...suggests that sound levels should be measured in third octave bands, inside houses, at points where the sound is most noticeable. The results should then be compared with the levels in a ‘reference curve’; if the levels are above the curve, the sound should be considered significant.”*
47. *“In a report of a previous survey carried out in 2012, the sound levels of the transformer was given as ‘65dBA at five metres’...so it appears the sound levels has not changed much, if at all, since then. My experience is that transformer noise levels are generally very steady, over time.”*
48. *“The rating of BS4142 indicates that the rating levels of transformer hum are around 25dBA higher than the background level at night. On this basis, a reduction of 20dBA will be needed to reduce the rating from ‘significant adverse impact’ to merely ‘adverse impact’.”*
49. *“The conclusion from NANR45 analysis is that a reduction of about 5dB(100Hz) would bring the sound levels inside houses below the reference curve when the windows are shut, or about 15dB(100Hz) would be enough when they are open a little.”*
50. *“Taking the two together, it appears that a reduction of about 15dB in the 100Hz tone level, which would equate to 15dBA for this sound, should be enough to satisfy many residents, though transformer hum will still be audible outside the houses.”*
51. On the ‘acoustic’ fence installed by the applicant, the report considered *“the net effect of installing the screen is a reduction of no more than 4-5dB.”*

Environmental health investigation

52. After considering the noise report from UKPN, Mrs X raised a noise complaint with the Council. She asked the Council to investigate.
53. Environmental health officers visited the site to measure the noise in April 2021. They found the area clearly dominated by a tonal hum from the sub-station’s transformer in an otherwise quiet area.
54. The officers inspected the fence the developer installed around the transformer. They observed its effectiveness was affected by gaps underneath. It also appeared to be too low and positioned too far from the transformer to adequately mitigate the noise. The officers questioned whether the fence was of sufficient mass to mitigate against the noise.
55. The officers observed clearly audible, constant, and distinctive noise in Mrs X’s main bedroom with the window partially open. With the windows closed the noise was slightly audible, although not significantly intrusive to prevent or disturb sleep.
56. The officers considered the noise in the living room is unlikely to constitute a nuisance. However, there is a standing wave present. The impact was difficult to quantify, but the officers suspected it is more of an issue in the summer.
57. The officers also noted the hum/drone from the transformer is dominant in the garden despite screening by the house.

-
58. The officers noted the noise was subjectively very tonal and the characteristics of the noise are particularly perceptive and intrusive. They considered the noise is unreasonable in a residential setting and likely to be detrimental to health in the long term.
59. The Council considered whether it could serve an abatement notice on UKPN to stop the noise from the sub-station. It sought legal advice but determined it could not take formal action against UKPN. Relevant caselaw indicates the responsibility to mitigate the noise lies with the developer of the land, as they are seeking to change the nature of the site.
60. The Council also received advice that it could not take action against the developer, as the Council had approved their proposed mitigation.

My investigation

61. In response to my enquiries, the Council told me Mrs X first reported noise nuisance in September 2020. Environmental health officers visited the site and contacted UKPN in October.
62. UKPN denied responsibility for any noise nuisance. The Council tried to arrange a meeting with UKPN and the developer, but the developer would not engage.
63. The Council sought legal advice and determined it could not take action against UKPN.
64. The Council met with the developer, who said Mrs X knew about the noise before buying her home. The developer said it made no claims about the acoustic qualities of the fence it installed, and it sold the affected homes at a discounted price.
65. The Council said it consulted its environmental health department about the developer's noise survey report. It also said while the 'acoustic' fence is one metre lower than planned, it is effectively in line with what was recommended in the noise survey report. It said it consulted on and assessed the 'acoustic' fence and there was no suggestion it was inadequate.

Analysis

66. I do not find the Council at fault for its investigation of the noise nuisance. It properly considered matters and reached the reasonable conclusion it could not take action against UKPN.
67. As the agent of change, it was the responsibility of the housing developer to properly protect homes on the development from noise. Now the Council has approved the developer's scheme of mitigation it has no power to compel the developer to install improved mitigation.
68. The Council told me it consulted its environmental health department about the developer's noise survey report before approving the 'acoustic' timber fence. I have reviewed the Council's report to the planning committee and feedback from environmental health. I found comments about noise from a nearby road, but nothing about noise from the electricity sub-station or the associated mitigation measures.
69. The Council also told me the 'acoustic' timber fence installed by the developer was effectively in line with what was recommended in the developer's noise survey report. I have reviewed the noise survey report and found that it did not make any recommendations about noise mitigation. It simply confirms the mitigation measures the developer had planned. It said it considered acceptable

noise levels could be provided and could be secured through suitable planning conditions. It did not offer any opinion on how effective it considered the mitigation would be, nor did it give any specific details about what the noise reduction impact of those mitigation measures would be.

70. The noise report commissioned by UKPN considered the 'acoustic' timber fence is only reducing noise levels by 4-5dB. On the evidence seen, this is not something the Council considered or looked into when the developer applied to discharge the planning condition. The developer did not give any details about the properties of the timber fence or its noise reduction abilities, and the Council did not seek to find this out.
71. It is not enough for the Council to say there was no suggestion the 'acoustic' fence was inadequate. The purpose of the planning condition was for the developer to give specific details for the Council to assess. That did not happen.
72. Any fence can serve as an acoustic barrier, but the specific properties of the fence will determine its effectiveness and to what extent it can mitigate the noise. This was not something the developer gave details about and the Council did not enquire. In effect, the Council left this to chance.
73. The timber fence erected by the developer is clearly inadequate as mitigation against noise from the sub-station. This is evidenced by the Council's environmental health investigation and by the noise survey report carried out on behalf of UKPN. The Council is at fault for failing to adequately check the details of the proposed mitigation.
74. The developer said it made no claims about the acoustic qualities of the fence. I agree. I found it evident in the planning process that the required information and level of detail about the fence was sorely lacking.
75. It is essential the Council properly checks noise mitigation measures in order to safeguard the amenity of residents. The Council recognised the noise risk here, hence the need for a condition about noise mitigation. Unfortunately, it failed to carry out checks on the noise mitigation effectiveness of a timber fence in this context. It also failed to ask the developer to provide specifics about the mitigation qualities of the fence, and what the predicted noise reduction would be.
76. The Council's failure to properly consider the noise mitigation measures before discharging the relevant planning condition has caused Mrs X (and other nearby residents) significant injustice to the extent that a noise nuisance exists.
77. The Council's environmental health department recognised the detrimental impact noise nuisance can have on a person's health. Mrs X has suffered stress, inconvenience, and frustration since buying her home. Her sleep is affected, and she has suffered a loss of amenity as she cannot fully enjoy her home. This has been ongoing for the last few years.
78. In response to my draft decision, the Council told me it has reviewed the actions of officers in the case and taken action to ensure the failings are not repeated. It also said it has changed its practice so that consultees are required to actively respond in cases like this.

Agreed action

79. Within eight weeks of my final decision, the Council agreed to:
 - 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.

Final decision

80. I have completed my investigation. The Council was at fault for failing to properly discharge the planning condition about noise mitigation. This caused Mrs X prolonged injustice which the Council agreed to remedy.

Investigator's decision on behalf of the Ombudsman