

STOCKTON-ON-TEES BOROUGH COUNCIL

CABINET RECOMMENDATIONS

PROFORMA

Cabinet Meeting15th March 2007

1. Title of Item/Report

Report of the Local Government Ombudsman

2. Record of the Decision

Cabinet was informed that the Local Government Ombudsman issued a report on the 29 November 2006 in which she criticised the Council for failing to handle nuisance caused by drifting car wash spray.

It was explained that the Council was required to consider the Ombudsman's report and to inform her of the action it had taken or proposed to take in response to the report.

The complaint essentially concerned two issues, noise and drifting car wash spray, arising from the grant of planning permission in 2003 for the extension of any existing garage site. The alterations included an extension to a shop, the re-positioning of a car wash and a new jet wash facility. Whilst planning conditions were imposed with regard to controlling noise and the hours of operation, a condition to control spray was not imposed.

When the re-positioned car wash started operating in May 2004 complaints were received from two nearby residents about noise from both the car wash and the jet wash. Following extensive investigations and the service of an Abatement Notice, appropriate measures were taken by the garage owner to reduce noise levels. Environmental Health Officers were now satisfied that any noise emanating from the site was not a statutory nuisance. The Ombudsman had found that the noise problems were quickly abated and solved commendably quickly by Environmental Health. However, she had criticised the Council for a delay of about 18 months in enforcing a condition in relation to an automatic timer for air conditioning units (to effectively ensure they were not left on at night).

Complaints about drifting spray began in September 2004 and the Complainant was advised to keep a log of events. The Complainant's Planning Consultant and Solicitor also wrote to the Council about the

spray problem. Discussions took place with the garage owner about a possible solution, however, a proposed scheme involving the installation of perspex screening was considered to be inadequate and only a full enclosure of the car and jet wash was considered to be an effective remedy. A further Abatement Notice was therefore served to this effect. The owner appealed against the Abatement Notice and the matter was determined by a Judge sitting in the Magistrates' Court. Following a two-day Hearing the Judge allowed the appeal on the basis that the spray did not constitute a statutory nuisance as he considered it to be an odourless, harmless spray that was not occurring to an extent that caused severe detriment to neighbouring residents.

In her report the Ombudsman had concluded that the Council failed properly to consider:-

- a. the Complainant's objection about spray (which did provide evidence of an existing problem from spray drift but which was too briefly summarised in the Planning Committee report);
- b. existing precedents which warned that spray drift from a car wash was a particular problem;
- c. Environmental Health Officers' recommendations about measures to combat spray; and
- d. the proximity of residential properties (and particularly the Complainant's property) to the re-positioned car wash and new jet wash.

This was maladministration. As a result, the Council failed either to seek an amended application or add a condition to prevent the likely problem of spray drift causing a nuisance to nearby residents.

The Ombudsman appeared to accept that the Complainant was more sensitive to the spray drift than most other people. However, she believed the Council's maladministration has led the Complainant and his partner to unnecessarily suffer a significant loss of amenity and all the upset and adverse effect on his fragile health which that had entailed. To remedy this injustice, the Ombudsman had recommended that the Council should now:-

- a. pay the Complainant £3,500 compensation for the injustice he has suffered so far and his time and trouble in making his complaints to the Council and to the Ombudsman; and

b. either pay the Complainant a further £6,500 compensation for the continuing injustice he will suffer or seek to negotiate with the garage owner for a permanent physical solution to the spray problem to be funded by the Council; and

c. engage the District Valuer to advise whether the Complainant's property has been devalued by the significant loss of amenity due to the spray which should have been prevented or more effectively tackled by the Council, and pay the Complainant any loss of value identified.

Members were informed of Officers' comments and noted that they did not agree with the Ombudsman's conclusion that the Complainant had suffered a significant loss of amenity. With regard to noise, the Complainant had made numerous complaints only one of which was found to be substantiated. This was in respect of a dryer on the car wash. Accordingly an Abatement Notice was served, whereupon the owner ceased the use of the dryer and carried out appropriate work to abate the nuisance. Numerous visits to the premises and to the Complainant's home have been carried out by Environmental Health Officers over the last 2 years in response to complaints about noise. Negotiations with the owner led to the re-positioning the refrigeration units and ensuring that air conditioning units were turned off at night. Environmental Health Officers were satisfied that noise emanating from the site was not a statutory nuisance, however, the Complainant had nevertheless continued to complain about noise.

With regard to the criticism about a delay in enforcing a planning condition concerning the installation of an automatic timer for the air conditioning units, Environmental Health Officers were satisfied that management controls were in place to ensure the units were switched off at night and that the units were not the cause of the complaint. This was evidenced by the fact that the Complainant had continued to complain about noise from air conditioning units after the installation of an automatic timer. The complaint about noise had been attributed by Environmental Health Officers to the plant room, however, this noise in itself was not significant and was barely audible against general background noise. Therefore, this was not a statutory nuisance and Officers were unable to satisfy the Complainant with regard to noise.

The problem with spray drift was the more difficult issue. Planning Officers accept that the advice of Environmental Health Officers was not followed and was not made the subject of a planning condition in the original planning approval. Conditions with regard to noise and hours of operation were imposed but not a specific condition in relation to

controlling spray drift. It was felt that this was either an oversight on the part of the Planning Officer or following numerous site visits, and discussions with the owners planning and noise consultants, it was agreed that such a condition was not necessary. Subsequent attempts to agree a resolution to the problem with the garage owner have failed as it was felt that only a full enclosure of both the car wash and the jet wash would prevent any over-spray of water. This would be an expensive solution for the garage owner and would affect the viability of the operation. Fully enclosing the jet wash was likely to result in those using the facility getting wet. The owner therefore appealed against the Abatement Notice. The fact that his appeal was successful perhaps demonstrated that the imposition of a planning condition may not have been reasonable. Accordingly, Officers felt that the matter had been put to the test in a court of law and the Judge's comments were relevant when considering the Ombudsman's finding that a significant loss of amenity had occurred.

The Ombudsman had been asked to further clarify why she considered a significant loss of amenity had occurred, (given the fact that it was not a statutory nuisance and given the comments made by the Judge). Her response was that:-

“The Council may disagree now that there has been a significant loss of amenity due to spray but Environmental Health clearly did not disagree prior to the Judge's decision - given the time it devoted to the case, its recorded actions and the Abatement Notice it served.

I would suggest that the Ombudsman's investigation of the injustice to the Complainant has been much more thorough than any investigation the Judge could undertake in connection with the Hearing. This is not to criticise the Judge, but rather to highlight the limitations of their remit.”

The Head of Legal Services finds the Ombudsman's comments difficult to accept, they effectively sought to disregard the decision on appeal and seemed to place both the Council's and the Ombudsman's judgement above the law. Whilst Environmental Health Officers must be satisfied that a nuisance existed before serving an Abatement Notice, the ultimate decision was made by a Court in any subsequent appeal. In this case the Court heard from expert evidence on behalf of the garage owner, the Complainant himself and the Council's professional Environmental Health Officers. The Judge did not accept that there was a significant loss of amenity. As a result a statutory nuisance from any spray drift was not evidenced to the satisfaction of the Court. The Ombudsman's finding that the Complainant and his partner had indeed suffered a significant loss of amenity “even if it did not amount to a statutory nuisance” was totally at odds with the evidence. For this reason, the Council was

advised not to accept the Ombudsman's suggested remedy.

The Head of Legal Services also took issue with the comment that the Ombudsman's investigation had been much more thorough than any investigation the Judge could undertake. The Judge heard from all parties including the owner and his expert witness whom the Ombudsman makes no mention of having interviewed.

It was explained that whilst the recommendations of the Ombudsman were not legally enforceable, adverse reports should be given full consideration and any decision not to accept them should be subject to a full and public explanation.

Further enquiries were being made with the owner of the garage to seek his views on a permanent physical solution to the problem as recommended by the Ombudsman. Any comments received would be reported at the Cabinet meeting.

RECOMMENDED to Council that

1. The Ombudsman be informed that the Council disagrees with the suggested remedy and that the Council will make the following offer of compensation to the Complainant:-

a. a sum of £1,000 (one thousand pounds) for the Council's failure to impose a planning condition to control spray drift from the car and jet washers; and

b. a sum of £250 (two hundred and fifty pounds) for the time and trouble in pursuing the complaint.

2. The Ombudsman be informed that the Council considers it is unnecessary to instruct the District Valuer since no significant loss of amenity has occurred.

3. Reasons for the Decision

To ensure that all Members of the Council are informed of the Ombudsman's findings and the action to be taken in response to the complaint.

4. Alternative Options Considered and Rejected

None

5. Declared (Cabinet Member) Conflicts of Interest

None

6. Details of any Dispensations

Not applicable

7. Date and Time by which Call In must be executed

Not applicable.

Proper Officer
19 March 2007