

CABINET ITEM COVERING SHEET PROFORMA

AGENDA ITEM

REPORT TO CABINET

1 JANUARY 2007

**REPORT OF
CORPORATE
MANAGEMENT TEAM**

COUNCIL DECISION

CORPORATE - Lead Cabinet Member – Cllr David Coleman

REPORT OF THE LOCAL GOVERNMENT OMBUDSMAN

1. Summary

This report provides details of a finding of maladministration by the Local Government Ombudsman concerning a planning matter and seeks a decision on the proposed remedy.

2. Recommendations

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. Members consider whether it is appropriate to instruct the District Valuer to advise on whether the Complainant's property has been devalued as a result of spray drift.

3. Reasons for the Recommendations/Decision(s)

To comply with Section 31(2) of the Local Government Act 1974 and to inform the Local government Ombudsman of the action the Council proposes to take in response to her findings.

4. Members Interests

Members (including co-opted members with voting rights) should consider whether they have a personal interest in the item as defined in the Council's code of conduct (paragraph 8) and, if so, declare the existence and nature of that interest in accordance with paragraph 9 of the code.

Where a Member regards him/herself as having a personal interest in the item, he/she must then consider whether that interest is one which a member of the public, with knowledge of the relevant facts, would reasonably regard as so significant that it is likely to prejudice the Member's judgement of the public interest (paragraph 10 of the code of conduct).

A Member with a prejudicial interest in any matter must withdraw from the room where the meeting is being held, whilst the matter is being considered; not exercise executive functions in relation to the matter and not seek improperly to influence the decision about the matter (paragraph 12 of the Code).

Further to the above, it should be noted that any Member attending a meeting of Cabinet, Select Committee etc.; whether or not they are a member of the Cabinet or Select Committee concerned, must declare any personal interest which they have in the business being considered at the meeting, and if their interest is prejudicial, they must also leave the meeting room during consideration of the relevant item.

AGENDA ITEM

REPORT TO CABINET

1 FEBRUARY 2007

**REPORT OF CORPORATE
MANAGEMENT TEAM**

COUNCIL DECISION

CORPORATE - Lead Cabinet Member - Cllr David Coleman

REPORT OF THE LOCAL GOVERNMENT OMBUDSMAN

SUMMARY

This report provides details of a finding of maladministration by the Local Government Ombudsman concerning a planning matter and seeks a decision on the proposed remedy.

RECOMMENDATION

It is recommended 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
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2. Members consider whether it is appropriate to instruct the District Valuer to advise on whether the Complainant's property has been devalued as a result of spray drift.

DETAIL

1. 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. The Ombudsman is required to issue her report without naming or identifying the Complainant or other individuals. This report to Members is therefore drafted in the same way so as not to identify the garage or the Complainant.
2. The Council is required to consider the Ombudsman's report and to inform her, no later than 21 February 2007, of the action it has taken or proposes to take in response to the report.
3. As required by the statutory procedure, a press announcement was published in the local press (the Evening Gazette and the Northern Echo) on 29 November 2006. A copy of the report has also been on deposit for inspection at Municipal Buildings for the required period of 3 weeks. A copy of the report has also been sent electronically to all Members for information.

The Complaint

4. The complaint essentially concerns 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.

1. Noise

5. 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 are now satisfied that any noise emanating from the site is not a statutory nuisance. The Ombudsman has found that the noise problems were quickly abated and solved commendably quickly by Environmental Health. However, she has 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).

2. Drifting Spray Wash

6. Complaints about drifting spray began in September 2004 and the Complainant was advised to keep a log of events. The garage owner'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 his conclusion he wrote:-

"I am clear that although the spray occurs moderately frequently, its impact is not as detrimental or as severe as (the Complainant) would have me believe."

The Ombudsman's Findings

7. In her report the Ombudsman has 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.

8. 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.
9. The Ombudsman appears to accept that the Complainant is more sensitive to the spray drift than most other people. However, she believes 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 has entailed. To remedy this injustice, the Ombudsman has 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.

Officer Comments on the Ombudsman's Findings

10. Officers do not agree with the Ombudsman's conclusion that the Complainant has suffered a significant loss of amenity. With regard to noise, the Complainant has made numerous complaints 3 of which were found to be substantiated. These were the subject of Abatement Notices and appropriate action by the owner was taken, including taking the car wash dryer out of action. Other noise from the plant room and an air line compressor have been abated. 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 are satisfied that noise emanating from the site is not a statutory nuisance, however, the Complainant has nevertheless continued to complain about noise.
11. With regard to the criticism about a delay in installing 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 is evidenced by the fact that the Complainant has continued to complain about noise from air conditioning units after the installation of an automatic timer. The complaint about noise has been attributed by Environmental Health Officers to a fan in the plant room, which as explained above was the subject of an Abatement Notice which ensures it operates at a noise level that is not significant and is barely audible against general background noise. Therefore, this is not a statutory nuisance and Officers are unable to satisfy the Complainant with regard to his continued noise complaints.
12. The problem with spray drift is 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 is 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 is 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 demonstrates that the imposition of a planning condition may not have been reasonable. Accordingly, Officers feel that the matter has been put to the test in a court of law and the Judge's comments are relevant when considering the Ombudsman's finding that a significant loss of amenity has occurred.

13. The Ombudsman has been asked to further clarify why she considers a significant loss of amenity has occurred, (given the fact that it is not a statutory nuisance and given the comments made by the Judge). Her response is 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.”

14. The Head of Legal Services finds the Ombudsman's comments difficult to accept, they effectively seek to disregard the decision on appeal and seem to place both the Council's and the Ombudsman's judgement above the law. Whilst Environmental Health Officers must be satisfied that a nuisance exists before serving an Abatement Notice, the ultimate decision is 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 have indeed suffered a significant loss of amenity "even if it does not amount to a statutory nuisance" is totally at odds with the evidence. For this reason, the Council is advised not to accept the Ombudsman's suggested remedy.
15. The Head of Legal Services also takes issue with the comment that the Ombudsman's investigation has 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.
16. Whilst the recommendations of the Ombudsman are 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.
17. Further enquiries are 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 will be reported at the Cabinet meeting.

FINANCIAL AND LEGAL IMPLICATIONS

Financial

18. The financial implications are dependent upon the level of compensation (if any) Members decide is an appropriate remedy. The Ombudsman's suggested remedy is £10,000, or £3,500 plus the cost of installing a permanent physical solution to the spray problem. In either case, an additional sum to represent any loss of value identified by the District

Valuer. The District Valuer's fees in carrying out a valuation are also payable should Members decide that this is an appropriate way forward.

Legal

17. If the Local Government Ombudsman does not receive details of the action which the Council has taken or proposes to take within the required period of 3 months from publication of the report, or if she is not satisfied with the action the Council has taken or proposes to take, the Ombudsman is required to make a further report and make such recommendations as the Ombudsman thinks fit. The Ombudsman may also require the Council to publish a statement containing details of the action recommended by the Ombudsman and details of why the Council has not taken the action recommended by the Ombudsman. The statement is to be published in 2 local newspapers. Any further report by the Ombudsman is to be considered by full Council.

RISK ASSESSMENT

18. Clearly if the Ombudsman is not satisfied with the action the Council proposes to take in response to her report, there will be further adverse publicity. Also by agreeing to instruct the District Valuer to assess any loss of value there is the risk that the overall compensation package may be in excess of £10,000. However, given the decision in the Magistrates Court, the likelihood of any significant loss of value to the Complainant's property is considered to be low.

COMMUNITY STRATEGY IMPLICATIONS

19. None arising directly from this report.

CONSULTATION INCLUDING WARD COUNCILLORS

20. A public notice has been published in 2 local newspapers. The Ombudsman's report has been on deposit and available for public inspection for 3 weeks beginning on 29 November 2006 and a copy of the report has been sent to all Members.

Head of Legal Services

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Background Papers:

Ward(s) and Ward Councillors:

Property Implications: