

Scottish Parliament Region: South of Scotland

Case 200703169: East Lothian Council

Summary of Investigation

Category

Local government: Environmental Health; alleged noise nuisance

Overview

The complainant (Mr C) lives in a conservation area in an East Lothian town. His complaint concerned what he considered to be an inadequate response by East Lothian Council (the Council) to his complaints about nuisance from noise from an adjacent children's day care nursery.

Specific complaint and conclusion

The complaint which has been investigated is that the Council have failed to carry out their duties under the Environmental Protection Act 1990, to detect, investigate and take appropriate action in respect of a noise nuisance emanating from an adjacent children's nursery (*partially upheld*).

Redress and Recommendation

The Ombudsman recommends that the Council's Environment Department agree with Mr C and his wife an appropriate regime of noise monitoring from the curtilage of their home over the summer months of 2009 to establish whether or not the noise levels they are experiencing constitute a statutory noise nuisance and, if so, seek instructions from the Council as to further action.

The Council have accepted the recommendation and will act on it accordingly.

Main Investigation Report

Introduction

1. The complainant (Mr C) resides with his wife (Mrs C) in a semi-detached property in a conservation area in a town in East Lothian. His rear garden shares a common boundary with the garden of a detached villa with a sizeable garden area. Both properties are located in a conservation area.

2. The complaint from Mr C which I have investigated is that the Council have failed to carry out their duties under the 1990 Act to detect, investigate, and take appropriate action in respect of a noise nuisance emanating from the Nursery.

Investigation

3. In May 1994, the former East Lothian District Council (the District Council) granted planning consent for the change of use of the villa from office facilities to a children's day care nursery (the Nursery) to accommodate 16 children aged two to five years and six children under two years of age, with opening hours of 08:00-18:00 Monday to Friday. The consent was subject to a single standard condition regarding commencement of use. The change of use commenced and the Nursery has operated continuously since that time.

4. In July 1995, Mr and Mrs C complained about noise levels at the Nursery. The response of the District Council Planning Service was that the change of use applied to all the land within the curtilage of the building, that no condition had been imposed relating to noise, and that noise generated from use of the property, therefore, fell outside planning control.

5. As a result of the reorganisation of local government in Scotland on 1 April 1996, East Lothian Council (the Council) succeeded the District Council as planning and environmental health authority. In 1997, Mr and Mrs C pursued a complaint about noise from the Nursery with the Council's Environmental and Consumer Services Division. The Council have provided me with extant file records of monitoring undertaken by a Senior Environmental Health Officer (Officer 1) from sites in the street to the west and from the rear of a sheltered housing complex to the east, respectively, close to Mr and Mrs C's rear garden and on one occasion on 29 May 1997 from their garden. The conclusion of this monitoring was that there was not excessive noise emanating from the Nursery garden and it was not considered that there was a statutory nuisance. The

Council's Environmental and Consumer Services Division closed their file on 13 August 1997 informing Mr and Mrs C that no further action would be taken on it.

6. In July 1999, Mr C submitted a further letter of complaint of excessive noise emanating from the Nursery. The complaint was passed to Officer 1 who visited the area on 23 August 1999 but found no children in the garden of the Nursery. The Council's file records that Officer 1 made the operator of the Nursery aware of the complaints. The operator was apparently asked to inform Officer 1 when children were using the outside area in order that monitoring could take place. The Council's file is silent on further monitoring in 1999. Thereafter, Mr and Mrs C raised the question of noise levels directly with the operators of the Nursery, and later with the Edinburgh and Lothians Regulation and Inspection Team of the Scottish Commission for the Regulation of Care.

7. The Council say that they had no further contact from Mr C until February 2005 when he requested information on the Council's monitoring of another children's nursery elsewhere. Officer 1 responded to that letter informing Mr C that there were no planning conditions to control noise at the Nursery other than the restriction on hours.

8. On 28 April 2006, Mrs C wrote to the Director of Environmental Services (the Director) about high pitched screaming and screeching from children and shouting by staff six hours a day and five days a week. She stated that the Nursery now had an increased number of children, more vigorous outdoor play, and more equipment in the garden. She requested that the level of noise nuisance be investigated. Mrs C followed her letter up by telephoning on 31 May, 13 and 14 June 2006 when noise levels from the Nursery garden were high.

9. Officer 1 acknowledged receipt of the letter of 28 April 2006. He paid a visit to the area on 4 May 2006 between 10:10 and 11:10 and responded to Mrs C in a letter of 16 June 2006. He stated that recent investigations had not indicated that the use of the garden was causing, or was likely to cause, a statutory noise nuisance. He sent Mrs C a copy of a booklet on noise pollution which referred to the possibility of her raising civil proceedings under section 82 of the Environmental Protection Act 1990 (the 1990 Act).

10. Mrs C sought information from the Council on 20 June 2006 as a request under the Freedom of Information (Scotland) Act 2002. She then wrote to the Director on 21 July 2006 questioning the locus where Officer 1 had monitored the noise (adjacent to a busy road) and queried why the monitoring had not been carried out in her rear garden. She called for the matter to be investigated by an officer with specialist knowledge of noise nuisance.

11. The Director responded on 8 August 2006. He stated that he had appointed a Principal Environmental Health Officer (Officer 2) to visit. Officer 2 made telephone contact with Mrs C and arranged a visit on 25 August 2006 at 11:00. At the time of the visit the garden of the Nursery was being used for quiet activities. The weather in the days thereafter deteriorated and further monitoring did not take place at that time. Mrs C wrote to Officer 2 on 20 October 2006 stating that, since the noise level was less at that time of year, she would contact him again the following Spring.

12. On 13 September 2006, the operator of the Nursery made an application for variation of the original planning consent to extend opening hours (commencing at 07:30 rather than 08:00) and to accommodate 18 children between the ages of two to five years (rather than 16 children). Although Mr and Mrs C objected, planning consent was granted on 9 November 2006.

13. In May 2007, a large trampoline was erected in the garden of the Nursery and noise levels increased.

14. On 4 June 2007, Mr and Mrs C took sound readings using a hand held sound level meter (Precision Gold Environment Meter NO9AQ) which displayed sound level readings every ten seconds. The meter readings were taken from Mr and Mrs C's back door, 18 metres from the shared boundary. Against an average ambient noise level of 48 decibels, the noise rose above 55 decibels for much of the periods 09:30 to 12:00 and 15:30 to 18:00.

15. Mrs C emailed Officer 2 on 5 June 2007 asking for a visit, preferably on a dry Tuesday morning, when she would be at home. She indicated that she intended to measure the level of the noise together with its frequency and duration and sought technical advice. That email did not attach the readings already taken the previous day (which were first presented to the Council with Mr C's letter of formal complaint of 31 March 2008). In the interim, the request in the email for technical advice was not answered.

16. On 17 August 2007, Mr C wrote to the Council's Planning Service regarding the erection of structures including a garden shed and children's slide without consent in the garden area of the Nursery. In that letter Mr C referred to Officer 2's failure to respond to Mrs C's email of 5 June 2007 and to an online complaint submitted in July 2007 which had similarly been ignored. That letter was acknowledged by a Planning Enforcement Officer on 24 August 2007.

17. On 14 November 2007, with a view to expanding provision, the operator of the Nursery made an application for 'Alterations and extension to property including installation of vents, external works including installation of disabled drop off area, footpaths steps and ramp with handrails. Erection of extension, fire escape, and installation of video phone entry system. Retrospective planning permission for erection of children's play equipment and garden shed'. Mr C objected to the application on 28 November 2007 primarily on grounds of noise nuisance, loss of privacy, parking, and traffic congestion. He also expressed particular concern about the introduction of a climbing frame and the importance for the conservation area of retaining a fruit tree in what had been a former orchard. Mr C stated that, because of their previous financial support to the Nursery, the application should be referred to Scottish Ministers.

18. Mr C's first approach to the Ombudsman was received on 17 March 2008. On being informed on 28 March 2008 of the need to complete the Council's procedures, Mr C then pursued the complaint with the Council. An initial response was sent by Officer 2 on 6 May 2008. A final reply dated 25 June 2008 was sent by the Chief Executive.

19. I obtained the Council's comments on the complaint and shared those comments with Mr C. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and the Council were given an opportunity to comment on a draft of this report.

Complaint: The Council have failed to carry out their duties under the 1990 Act to detect, investigate, and take appropriate action in respect of a noise nuisance emanating from the Nursery

20. Mr C maintained that the Council failed to carry out their statutory duties under sections 79 and 80 of the 1990 Act by inspecting its area from time to time to detect any statutory nuisance which ought to be dealt with, to take such steps as are reasonably practical to investigate a complaint of statutory

nuisance, and to serve an abatement notice where they are satisfied that a statutory nuisance exists, or is likely to occur or recur, in the Council's area. A copy of the relevant sections of the 1990 Act is reproduced as Annex 2.

21. Mr and Mrs C felt that the Council's acceptance that children using outside play areas attached to day nurseries can create noise problems for residential areas should have encouraged more pro-active patrolling of a high risk location for noise nuisance such as the Nursery. With regard to the Council's responsive investigation duty, Mr and Mrs C were concerned that they had witnessed no monitoring during May 2006. When they telephoned on three occasions in late May and early June 2006 to complain about the playing of loud music in the garden of the Nursery, there had been no action. In the summer of 2006, Officer 1 had paid a single visit on 4 May 2006 and Officer 2 had visited only once on 25 August 2006. In the following year there had been no reply to the email sent on 5 June 2007 or to the complaint submitted electronically through the Council's website in July 2007. They were further aggrieved that there was no substantive response to their letter of 17 August 2007, referring to the lack of action. With reference to the Council's preventative investigation duty, they had examined 14 applications for planning consent for children's day nurseries in residential areas processed by the Council in the years from 2000 to 2006, ten of which were changes of use, that is, new nurseries. They noted that Environmental Health had responded to consultations in six of the ten cases by suggesting that the proposed children's play area be given temporary consent for one year in order that the impact on neighbouring residential properties could be assessed. In the four other applications, noise ratings had been set.

22. In responding in a letter of 21 October 2008 to my enquiries, the Council's Chief Executive informed me that the Council's duties under sections 79 and 80 of the 1990 Act fell to be performed by the Council's Environment Department and more specifically the Environmental Protection Team within that department's Environmental and Consumer Services Division. He stated that qualified Environmental Health officers carry out inspection of statutory notices throughout East Lothian principally by responding to complaints or other intelligence received from members of the public, councillors, the Council's staff and other organisations. Environmental Health officers respond by finding out about the suspected nuisance including environmental monitoring and assessment against statutory and non-statutory guidance and standards as appropriate. Where the Council reaches the view that a statutory nuisance

exists, then the Council could serve a noise abatement order under section 80 of the 1990 Act. The Chief Executive stated that 416 and 334 non-domestic noise and other nuisance investigations had been carried out in 2006/07 and 2007/08, respectively. Around 5% of non-domestic noise complaints resulted in the service of statutory notices in 2007/08.

23. The Environmental Protection Team's remit had been subject to a formal service review in 2004. That review which had been reported to the Council's Environment Policy and Performance Panel had not identified particular issues in relation to nuisance investigation work. The level of service provision by the Council was adjudged to have been broadly comparable with other Scottish councils. The Chief Executive stated that following a report to the Council's cabinet in March 2008, in relation to domestic noise complaints and to anti-social behaviour legislation, the Council had, in May 2008, reviewed and restructured the Environmental Protection Team to provide a better service in response to out-of-hours domestic noise and other complaints and an on-call response in relation to wider community safety, anti-social behaviour, and environmental protection issues, including nuisance investigations.

24. At my request, the Chief Executive furnished me with a detailed statement of the Environmental Protection Team's response to Mr and Mrs C's complaints, with particular reference to the period since April 2006. Officer 1 wrote to Mr C on 16 June 2006 stating that no statutory nuisance had been established. Officer 2 had visited Mrs C on 25 August 2006 when there was some noise from the Nursery but it was not at its worst. He gave his contact details in order to organise a further visit when Mrs C perceived the problem was manifest, but he had not been contacted to attend again in 2006. Officer 2 stated that he had confirmed to Mrs C at their meeting that noise monitoring would normally also be done from a complainer's property. The practicalities of gaining access to properties for unannounced monitoring, however, did not preclude monitoring from other points provided the results were representative. Officer 2 did not discount Officer 1's monitoring from a nearby location as inappropriate but accepted that monitoring could have been done from the rear garden of Mr and Mrs C's home.

25. Officer 2 responded in a letter of 6 May 2008 to Mr C's complaint about lack of action following his email of 5 June 2007. Officer 2 said that he did not respond to this email as it was requesting a monitoring visit on the next dry day and he intended to discuss the matters raised with Mrs C at his next visit. With

reference to the electronic complaint stated to have been submitted in July 2007, Officer 2 stated that he did not have a copy of this email on file or in his archived emails and apologised that he could not give an explanation for the lack of response. In connection with the letter of 17 August 2007, that letter had been acknowledged by the Council's Planning Enforcement Officer. His investigations led to relevant matters being addressed in the subsequent planning application submitted on 14 November 2007 (paragraph 17). He conveyed the Planning Enforcement Officer's apologies for his oversight in not communicating this to Mr and Mrs C.

26. With regard to the noise readings taken by Mr and Mrs C on 4 June 2007, Officer 2 said he had reviewed these but was unable to comment further other than to say that if the readings were of children's voices they were much as might be expected. He stated that the fact that children make a noise was not in dispute. The issue was whether or not statutory nuisance action for an established nursery was sustainable. He stated that previous legal opinion within the Council was that noise from children playing outside was not a statutory nuisance and had, therefore, pursued a planning led or voluntary solution.

27. Officer 2 stated that he visited the Nursery in August 2007 to raise the ongoing nuisance complaints with the operator. He discussed several options to reduce the noise impact of children playing outside including the erection of an acoustic barrier between the Nursery grounds and Mr and Mrs C's rear garden, relocation of play equipment, and using other areas of the Nursery garden for specific noisy activities. In relation to the proposed application to extend the Nursery and to increase numbers, Officer 2 informed the operator that when the application was submitted the Environmental Protection Team would submit comments with regard to seeking to prevent any loss of amenity as a result of increased noise. In the letter of 6 May 2008 to Mr C, Officer 2 confirmed that he had recommended in relation to the then current planning application that an acoustic consultant's report be obtained by the applicant to assess existing and projected noise levels arising from the Nursery and provide details of any noise attenuation measures necessary, including erection of an acoustic barrier. He also confirmed that the case officer had requested the applicant to submit an acoustic consultant's report as part of the consideration of that application.

Other Matters

28. Planning consent for the application submitted in November 2007 (paragraph 17) was issued on 16 October 2008. It set a limit on the hours of operation to 07:30 to 18:00 (condition 2); granted approval for up to 51 children to attend at one time (condition 3); and included a condition aimed at retention of the fruit tree (condition 6). The approved plans provided for an acoustic barrier on the north boundary. No specific condition was imposed relating to noise and the application was not referred to Scottish Ministers. The Council provided me with details of their reasoning for not referring the application.

29. Mr C also commented that although relevant papers relating to a 'green barrier' had been lodged as part of the planning application, the consent had not included an appropriate condition and the approved plans while noting an acoustic barrier had not specified the thickness or density.

Conclusion

30. It is evident from the number of complaints being received in the Ombudsman's office, that noise nuisance is perceived as a real problem affecting people in different ways. Indeed, a report on the same Council's response to complaints of noise generated by children using a play area provided on the promenade of another East Lothian community was included in an earlier compendium (case 200603033; January 2008 compendium). It is inevitable that a significant number of children engaging in play activities outside a day care nursery facility will generate noise. In this instance, the Nursery is in a conservation area, and Mr and Mrs C's rear garden shares a mutual boundary wall with the garden ground of the Nursery.

31. The legislation, the relevant sections of which are summarised in Annex 2, is not prescriptive in defining the level of noise that will constitute a nuisance which should be dealt with through the issue of a statutory nuisance. The Council have informed me (paragraph 22) that only one in 20 complaints of non-domestic noise nuisance in their area result in the issue of a statutory notice.

32. The problem of alleged noise nuisance from the Nursery has been around for over a decade, and was the subject of a number of visits in 1997. The same officer, Officer 1, (who, sadly, died before this report was issued) carried out the initial visit in May 2006. There appears to be no record that Officer 1 requested entry to Mr and Mrs C's rear garden to corroborate the level of noise they stated they were experiencing. Had there been no noise then that would not have

been a problem. However, observations made by Officer 1 from nearby loci, found the noise of children to be audible but that noise was not adjudged by him to be of a level constituting a statutory nuisance. Mr and Mrs C's garden was adjacent to the garden of the Nursery and closer than the two loci chosen by Officer 1. Because of this, I can understand why Mr and Mrs C doubt both the methodology by which the Council concluded that there was no statutory nuisance emanating from the premises and the conclusion itself.

33. In general, it is not for the Ombudsman to pronounce that a Council have failed to carry out their statutory duties. The legislation cited by Mr C does not define specific levels of noise that constitute a nuisance, nor does it say how a council should investigate a complaint. In this case the Council undertook investigations into Mr and Mrs C's complaints.

34. It is competent for the Ombudsman's office to reach a decision on whether the Council investigated appropriately Mr and Mrs C's complaints over the period since the Spring of 2006 to establish whether there was evidence of a statutory noise nuisance. From the information before me, I cannot see how the Council can be sufficiently certain that the level of noise being experienced by Mr and Mrs C in their property at times did not reach the level of being considered a statutory nuisance. The only readings taken on Mr and Mrs C's property are those taken by them on 4 June 2007 (paragraph 14). The Council's assessments were in essence subjective monitoring by an officer from other points in the vicinity.

35. A major difference from the previous case (200603033), is that the alleged noise nuisance in this instance undoubtedly emanates from children and staff in the garden area of the Nursery premises in private ownership, rather than a Council owned and run play area, which did not constitute 'premises' for the purpose of the 1990 Act. Because of my reservation that the noise investigation has not been demonstrated to have been carried out appropriately, I partially uphold the complaint.

36. I consider that it was a matter for the Council's discretion as to whether the application should have been referred to Scottish Ministers and, had the Council decided to do so, it was by no means certain that the outcome would have entailed refusal of the application or the imposition of a specific condition to limit noise. With regard to the 'green barrier', I note that an acceptable objective

measurement of the level of noise being experienced by Mr and Mrs C has yet to be obtained.

Recommendation

37. The Ombudsman recommends that the Council's Environment Department agree with Mr and Mrs C an appropriate regime of noise monitoring from within the curtilage of their home over the summer months of 2009 to establish whether or not the noise levels they are experiencing constitute a statutory noise nuisance and, if so, seek instructions from the Council as to further action.

38. The Council have accepted the recommendation and will act on it accordingly. The Ombudsman asks that the Council notify him when the recommendation has been implemented.

Explanation of abbreviations used

Mr C	The complainant
Mrs C	The complainant's wife
The District Council	East Lothian District Council
The Nursery	A detached house in a conservation area for which the District Council granted planning consent for change of use in May 1994
The Council	East Lothian Council
Officer 1	The Council's Senior Environmental Health Officer
The Director	The Council's Director of Environment
The 1990 Act	The Environmental Protection Act 1990
Officer 2	The Council's Principal Environmental Health Officer

The Environmental Protection Act 1990 (the 1990 Act)

Section 79 of the 1990 Act (as amended) defines statutory nuisances to include noise emitted from premises which are to be prejudicial to health or a nuisance, and states that it shall be the duty of every local authority to cause its area to be inspected from time to time to detect any statutory nuisances which ought to be dealt with under section 80 of the 1990 Act. Where a complaint of statutory nuisance is made to it by a person living within its area, the local authority must take such steps as are reasonably practicable to investigate the complaint.

Section 80 of the 1990 Act (as amended) states that where a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, in the area of the local authority, the local authority shall serve a notice ('an abatement notice') imposing a requirement to abate the nuisance or to prohibit or restrict its occurrence or recurrence, requiring the execution of such works, and the taking of such other steps, as may be necessary for any of these purposes and shall specify the timescales for compliance.

Section 82 of the 1990 Act (as amended) provides that in Scotland the sheriff may act on a summary application made by any person on the ground that he is aggrieved by the existence of a statutory nuisance. If the sheriff is satisfied that the alleged nuisance exists, or that although abated is likely to occur on the same premises, the sheriff shall make an order requiring the defender to abate the nuisance within a time specified in the order, and to execute any works necessary for that purpose, prohibiting a recurrence of the nuisance, and requiring the defender within a time specified in the order, to execute any works necessary to prevent the recurrence.