

APPEALS PANEL 2

FRIDAY 9 SEPTEMBER 2016 AT 10:00AM

PRESENT: Councillors Bloxham (Chairman), MacDonald and Tinnion (as substitute for Councillor Paton).

OFFICERS: The Deputy Chief Executive
Environmental Health and Housing Manager
Technical Officer

ALSO

PRESENT: Appellant

AP2.1/16 APOLOGIES FOR ABSENCE

An apology for absence was submitted on behalf of Councillor Paton.

AP2.2/16 DECLARATIONS OF INTEREST

There were no declarations of interest in respect of the complaint.

AP2.3/16 PUBLIC AND PRESS

RESOLVED - That in accordance with Section 100A(4) of the Local Government Act 1972, the Public and Press were excluded from the meeting during consideration of the following item of business on the grounds that it involved the likely disclosure of exempt information, as defined in Paragraph Number 1 of Part 1 of Schedule 12A of the 1972 Local Government Act.

AP2.4/16 CORPORATE COMPLAINT - APPEAL

The Chairman introduced the Panel and outlined the purpose of the hearing, together with the procedure to be followed. He gave an assurance that the hearing would be conducted fairly and that all parties would be afforded the time necessary to put their case, following which the Panel would reach a decision.

It was noted that all those present had seen the relevant documentation, copies of which had been circulated.

The Chairman asked the Appellant to summarise the reason for his appeal, he advised the Appellant that the Panel's remit was to consider the Council's handling of the complaint. The Panel were not able to determine the issue of dog barking which was the subject of the complaint.

The Appellant referred to a letter that he had requested be circulated to the Panel following the publication of the agenda and report, he asked why the report was not a public document and; if sections of the "Action Record" contained within the report had been redacted in the copies provided to Members.

The Chairman explained that as a public authority, the Council had a duty to protect the data of third parties, therefore information related to a third party contained in the report had been redacted.

The Appellant stated that he wished to personally question the Officers who had dealt with his complaint in the presence of the Panel. The Chairman informed the Appellant that the procedure of the Appeals Panel, a copy of which had been circulated to the Appellant along with the agenda and report for the meeting, did not allow for this Appellant's to question Officers. The Chairman invited the Appellant to put his complaint to the Panel, highlight the relevant issues, the Panel would then question the Officer based both on issues the Appellant raised and those Members had identified.

The Appellant stated that he considered his complaint constituted an unlawful curtailment of the enjoyment of his land due to the repeated barking of dogs throughout the day and particularly in the early morning and late night.

The Appellant felt that the Technical Officer who had dealt with his complaint had lacked experience and was not competent in his role, and that he had failed to make necessary noise monitoring recordings and maintain accurate written records in respect of his complaint.

The Appellant advised the Panel that his complaint to the Council related to dog barking noise from the property of his neighbour: Ms X. The issue had been ongoing for fourteen years and as a result the Appellant claimed the noise had impacted on his health and blighted his property. In the vicinity of the Appellant's home there were other properties where dogs were kept however, the level of noise he experienced from those properties was not excessive. The Appellant felt badly let down by the Council's handling of his complaint, and sought the Panel's opinion on this matter. He believed that were the Panel to uphold his appeal, the Council would need to consider providing compensation for damages.

Turning to the issue of the handling of his complaint, the Appellant informed the Panel that when the Technical Officer had visited his property on 17 June 2014 to install noise monitoring equipment, on arrival at the Appellant's home the equipment was identified as having flat batteries. On another occasion noise monitoring equipment had also been installed at the Appellant's property and had been left running for more than twenty-four hours which had meant that the recording was damaged. Additionally, once installation of noise monitoring equipment had caused the electrics of his property to be "tripped".

The Appellant noted that over the time of his complaint he had submitted numerous noise diaries to the Council as evidence to support his complaint. He asserted that his repeated request to the Council for copies of the documents had been ignored. He felt that the Panel would have benefitted from seeing the diaries which illustrated the frequency and duration of incidents of barking as well as their timing.

The Appellant referred to a letter from the Environmental Health and Housing Officer on 13 June 2016, in which it was stated that "evidence had been collected ... was not at a level in duration or volume to have been considered to begin a further prosecution..." The Appellant stated there was no designation in law of what comprised harmful level of noise, he asked who had judged that the noise he experienced had not constituted a problem. The Appellant further questioned whether Officers had considered how the impact dog barking noise, occurring at differing times of day affected him. He asked

what number of cases of noise pollution the Council had dealt with and how many of those had been taken forward to prosecution.

Moving to the matter of Council Officer's visits to Ms X's property, the Appellant questioned how Officers identified whether Ms X and her dogs were at the property. The Appellant stated that visits from Officer's had generally taken place during the mid-morning, he wished to know why they had not undertaken visits in the early morning or late evening as the noise diaries he had submitted indicated that Ms X's dogs were barking at those times. The Appellant asserted that two visits to Ms X's property had not been recorded in the activity log.

Furthermore, the Appellant felt that the duration of the visit was insufficient, and in his opinion Officers had spent no more than fifteen minutes on site during a fifteen month period. The Environmental Health and Housing Manager claimed to have conducted a fifteen minutes visit to the site to Ms X's property in November 2015, however, the Appellant stated there was no formal record of the visit in the "Action Record".

The Appellant advised the Panel that Officers had not spoken with residents in neighbouring properties to investigate whether or not they also experienced a nuisance as a result of dog barking noise from Ms X's property. The Appellant felt not seeking the views of neighbouring properties constituted a failure to properly investigate his complaint, and demonstrated that Officers had been overly keen to accommodate Ms X.

The Appellant had been advised by the Council that he was able to take his own action against Ms X for noise nuisance under Section 82 of Environmental Protection Act 1990 and had been provided with guidance forms on how to take such action. He questioned whether a magistrate would consider such a case if the Council was not prepared to take action itself, and added that the fees associated with taking the action may prevent him from being able to progress this.

The Chairman explained to the Appellant that if the Appellant wished to pursue action under Section 82 of the Environmental Protection Act 1990, he would do so through the County Court not the Magistrate's Court.

In response to questions from the Panel the Appellant advised that:

- He was not able to state the precise number of dogs kept by Ms X.
- Repeated requests to the Council for noise diaries had been ignored.
- That he felt Officers had not checked noise monitoring equipment prior to installation at his property.

The Chairman invited the Appellant to summarise his complaint.

The Appellant felt that Officers had not competently addressed his complaint regarding a statutory nuisance which seriously interfered with his enjoyment of his home and had impacted on his health, consequently, he had a case for legal action.

The Appellant left at 10:45am

The Panel invited the Environmental Health and Housing Manager and the Technical Officer to attend the hearing.

The Chairman explained that the Appellant had questioned the competence of the Technical Officer due to the Officer's attending his property with equipment that did not work as a result of flat batteries, the equipment ought to have been checked prior to the Officer travelling to the site.

The Technical Officer confirmed that he had visited the Appellant's property to install noise monitoring equipment which, on arrival had flat batteries. The procedure for managing noise monitoring equipment was that it checked at the office, prior to being taken to site. On that occasion, referred to by the Appellant, although the equipment had been checked at the office, it did not have sufficient power when the Officer arrived at site.

The Environmental Health and Housing Manager explained that statutory noise nuisances were difficult to prosecute as the evidence gathered during an investigation had to prove that the Appellant was experiencing a material interference as a result of the dog barking noise. Mr Wilson's investigation had not been hindered by the occasional noise monitoring needing to be repeated. Mr Wilson's investigation had not been hindered by the occasional noise monitoring needing to be repeated.

In terms of gathering evidence the main methods used were noise monitoring equipment and site visits. A potential problem with the use of equipment was that it was possible for it to be interfered with, although there was no indication that this had occurred in this case. When preparing to conduct site visits, the Officer's consulted the noise diaries submitted by the Appellant to identify the best time(s) to visit the site. In relation to this complaint, three Environmental Health Officers had visited the site over a period of time, which had resulted in an Abatement Notice had been served on Ms X and the Council had subsequently brought a successful prosecution for breaching the Notice.

A Member asked why Officers had not liaised with residents in neighbouring properties to identify if they were able to hear the dog barking noise.

The Environmental Health and Housing Manager explained that as the Appellant had complained of a private nuisance the Council had a duty to confirm whether a material interference was affecting him, through the collection of evidence from his property. It was not appropriate for the Council to encourage people to complain and doing so would potentially weaken a prosecution case, additionally information from third parties was not required as evidence to prosecute a private nuisance. He added that it was noted in the report that the only neighbour to come forward had done so on behalf of Ms X.

The Environmental Health and Housing Manager explained that guidance for Local Authorities pursuing Statutory Noise Nuisance was comprised largely of case law, there was not a standardised definition of what constituted a Statutory Noise Nuisance, prosecution was predicated on the authority being able to prove that a material interference had occurred.

He outlined the areas indicated in the guidelines for assessing if a Statutory Nuisance had occurred, which included: the level of noise and whether it exceeded background levels; frequency of noise; the sensitivity of the complainant to the noise; the nature of and motive for the complaint. Each factor was considered when Officers' assessed whether or not to take a case forward to prosecution, in respect of the

Appellant's current complaint, Officers had considered that the frequency and duration of the barking did not constitute a Statutory Nuisance.

In response to a Member's question regarding a site visit having conducted in November 2015 not being recorded, the Environmental Health Manager responded that he and another Officer had visited the site on the 6 November 2016 and that this had been entered onto the Action Record and details of which were contained on page 33 of the report to the Panel.

Responding to a Member's question regarding the use of new noise monitoring measures, the Environmental Health and Housing Manager explained that Officers now used a different process to monitor noise level, which included the "noise app", this afforded the complainant greater control over the monitoring. The app meant that Council noise monitoring equipment and the completion of noise diaries were no longer required, however, Council monitoring equipment would still be made available to a complainant, if required.

The Environmental Health and Housing Manager advised Members that it was important that Officers came to a conclusion in respect of a complaint, and that it was unwise to continue an investigation over an extended period of time.

A Member asked what purpose the noise diaries served? The Technical Officer advised that the diaries logged incidences of the noise occurring and were submitted as part of the complainant's evidence, they were also useful in assisting Officers to identify the best time(s) to conduct site visits. The noise diary forms used by the Council were based on examples provided in relevant guidance documents.

The Chairman asked why the Appellant had not been provided with copies of the noise diaries he had submitted, noting that the Appellant had claimed to have requested them several times.

The Environmental Health and Housing Manager explained that a Freedom of Information request had been submitted by the Appellant, he understood that all the documentation requested had been supplied to the Appellant. At the Chairman's request he undertook to ascertain if copies of the diaries had been sent to the Appellant, and in the event that they had not, to send copies to him.

Replying to a further question from the Members relating to how Officers were able to identify if Ms X had been at the property, the Technical Officer explained that was difficult, as they visited the site without prior notification. On two site visits he had found that Ms X was not at present at the property, and additionally he had been called out by the Appellant twice in one day, but had not experienced any dog barking from Ms X's property.

The Environmental Health and Housing Manager explained that ordinarily three site visits were enough to form the basis of a prosecution, in this current complaint fifteen site visits had been undertaken. It was his view that Officers had exceeded their required duties in processing the Appellant's complaint.

The Environmental Health and Housing Manager and Technical Officer left the meeting at 11:32am.

The Panel invited the Deputy Chief Executive to the meeting.

The Chairman referred to a request from the Deputy Chief to the Environmental Health and Housing Manager to draft a letter to the Appellant regarding his complaint. The Panel sought assurances that the Deputy Chief Executive had fully investigated the matter prior to his writing to the Appellant.

The Deputy Chief Executive explained that in correspondence which required a technical response he contacted a professionally qualified Officer to outline the details of the matter. He then followed up issues as part of a full investigation of the complaint.

The Deputy Chief Executive advised the Panel that following his investigation of the complaint he considered that the Officers had gone further than could be reasonably expected of them in investigating the Appellant's complaint. He felt that Officer's responses to the Appellant had been well-judged, courteous and helpful, and that more investigation of the complaint would have weakened the Council's position in terms of bringing a prosecution.

The Deputy Chief Executive left the meeting at 11:46am

The Panel then considered the presentation from the Appellants, the evidence that had been presented to them, prior to and during the initial hearing and:

RESOLVED – That, having considered all of the evidence presented, both prior to and at the hearing, the Panel had decided had been no maladministration by Council Officers and that they have performed their statutory function properly in accordance with the relevant legislation.

(the meeting ended at 12:08pm)