

Report

on an investigation into
complaint no 05/B/05334 against
South Cambridgeshire District Council

19 March 2007

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Key to names used

The Factory	The Complainant
Officer A	Planning Officer
Officer B	Environmental Health Officer

Report Summary

Consideration/neighbour amenity

The Factory (not its real name) complains about the way the Council handled a planning application for residential development near their business premises. It says the Council failed to consider the guidance on noise set out in Planning Policy Guidance Note 24 (PPG24), failed to undertake a noise survey, failed to consider the effect existing noise would have on the development and failed to act to protect that development from noise.

The Ombudsman considers there was fault in the way in which the Council dealt with the planning application. In particular, the Council misunderstood the relevance of PPG24, failed to consider how noise from The Factory would impact on the new properties and failed to consider its policies on noise.

The Ombudsman concluded that the maladministration identified created some uncertainty for The Factory about how noise was taken into account when the application was considered. He believes The Factory has been caused an injustice, having been put to considerable time and trouble to try to establish what had been taken into account, along with the expense of legal representation. He considers that it is left not knowing whether changes to the scheme would have been secured had a noise survey been carried out at the time and, if it had, whether this would have avoided a noise complaint it has received from an occupier of one of the new houses. He does not consider that the final level of injustice to The Factory can be established until the noise survey is concluded.

Finding

Maladministration causing injustice.

Recommended Remedy

The Council should extend an intended noise survey to include both the new houses nearest The Factory. It should then inform me of the outcome of the survey so I can consider whether any further remedy is necessary. In addition, it should contribute £5,000 towards the legal costs incurred by The Factory in pursuing the complaint with the Council and with me.

Officers have indicated their willingness to include in their noise survey the two new houses nearest The Factory.

Introduction

1. The Factory complains that there was maladministration in the way the Council dealt with a planning application for residential development near its business premises. It complains in particular that the Council failed to:
 - (a) consider the guidance in PPG 24 in its decision to grant planning permission;
 - (b) undertake a noise survey;
 - (c) consider the effect the existing noise would have on the development;
 - (d) impose stringent conditions on the consent to protect the development from noise; and
 - (e) ensure that the measure used to discharge the condition relating to acoustic screening would protect the houses from noise.

The Factory is concerned that these failures will open it up to more complaints of noise and, because the new houses are closer to it, it will have to take additional measures to reduce noise.

2. For legal reasons, the names used in this report are not the real names of the people concerned.¹
3. The Commission's officer has examined the Council's files and interviewed officers of the Council. The Ombudsman and other Commission officers have also met with the Council's Chief Executive and other officers.

Legal and Administrative Background

Environmental Health Legislation

4. Where the Council considers there is a nuisance it must serve a Notice requiring the abatement of the nuisance.² Noise is one of the matters which may create a nuisance. There is a right of appeal to a Magistrates' Court against an Abatement Notice. Failure to comply with a Notice, without reasonable excuse, is an offence. A defence of using the 'best practicable means' to prevent nuisance can be used where the nuisance arises on industrial, trade or business premises. The cost of the works required to abate the nuisance is relevant when considering whether 'best practicable means' have been employed.

¹ Local Government Act 1974, s30(3)

² Environmental Protection Act 1990, S80

Planning legislation and guidance

5. The Town and Country Planning (Use Classes) Order 1987 categorises business uses. Class B1 uses include industrial uses which can be carried out in residential areas without affecting the amenities of residents. Other industrial uses fall within Use Class B2.
6. Planning Policy Guidance 24 (PPG 24), published by the Department of the Environment in 1994, gives councils guidance on the use of their planning powers to minimise the adverse effects of noise. It:

‘outlines the considerations to be taken into account in determining planning applications both for noise-sensitive developments and for those activities which will generate noise.’

It introduced the concept of Noise Exposure Categories (NECs) to:

‘help local planning authorities in their consideration of applications for residential development near transport-related noise sources.’

It went on to advise that ‘the NEC noise levels should not be used for assessing the impact of industrial noise on proposed residential development because the nature of this type of noise and the local circumstances may necessitate individual assessment and because there is insufficient information on people’s response to industrial noise to allow detailed guidance to be given. It also states that local planning authorities should:

‘consider carefully in each case whether proposals for new noise-sensitive development would be incompatible with existing activities.’

It advised that:

‘Such development should not normally be permitted in areas which are – or are expected to become – subject to unacceptably high levels of noise,’

and that:

‘When determining planning applications for development which will be exposed to an existing noise source, local planning authorities should consider both the likely level of noise exposure at the time of the application and any increase that may reasonably be expected in the foreseeable future.’

It suggests various measures that can be used to control the source of, or limit exposure to, noise. These include reduction of noise at the point of generation (eg by using quiet machines and/or quiet methods of working), containment of noise generated (eg by insulating buildings which house machinery and/or

providing purpose-built barriers around the site), protection of surrounding noise-sensitive buildings (eg by improving sound insulation in these buildings and/or screening them by purpose-built barriers), ensuring adequate distance between source and noise-sensitive building or area, restricting activities allowed on the site or specifying an acceptable noise limit. It goes on to state that:

‘Early consultation with the applicant about the possible use of such measures is desirable and may enable them to be incorporated into the design of the proposal before it is formally submitted for determination. Alternatively it may be appropriate for a local planning authority to ensure that such measures are introduced by imposing conditions,’

and that:

‘Where it is proposed to grant permission for noise-sensitive development in areas of high ambient noise, planning conditions should be imposed to ensure that the effects of noise are mitigated as far as possible. For example, intervening buildings or structures (such as garages) may be designed to serve as noise barriers. In some cases sound insulation measures may be considered appropriate’.

7. Development plans set out the local planning authority’s policies and proposals for the development and use of land in its area and so provide the basis for planning decisions. A development plan consists of structure plans prepared by the county council and local plans which are the responsibility of district councils. Local plans contain the more detailed policies and proposals for the area administered by the district council within the framework set by the structure plan. Planning applications must be determined in accordance with the development plan unless material considerations indicate otherwise.³ The presence of an adjoining land use which may be incompatible with a development proposal is a material consideration. The Government has advised that:

‘planning authorities should consider carefully whether particular proposals for new development may be incompatible with existing industrial and commercial activities. The juxtaposition of incompatible uses can cause problems for the occupiers both of the new and of the existing development. For example, where residential development is proposed in the vicinity of existing industrial uses, the expectations of the residents may exceed the standards applied by the planning authority, and may give rise to pressure to curtail the industrial use. This may be a particularly acute problem where other legislation, such as that relating to environmental pollution or public health, might subsequently result in costly new conditions or restrictions being imposed on the industry as a consequence of the new neighbouring development.’⁴

³ Town and Country Planning Act 1990, as amended, s54A

⁴ PPG 4 ‘Industrial and Commercial Development and Small Firms’, Paragraph 18

‘The planning system controls the development and use of land in the public interest. It has an important role to play in determining the location of development which may give rise to pollution.....The planning system should also control other development in proximity to potential sources of pollution. In this way the occupants of the new development can be protected from pollution, and the existing potentially polluting industry should not face unreasonable additional constraints.’⁵

8. The Council’s Local Plan, which was emerging at the time the application in question was considered, designates the area in which the site is based as a group village. Policy SE6 states that residential development up to a maximum of eight dwellings will be permitted in group villages, subject to certain conditions being met. Policy SE13 states there is a general presumption in favour of residential development within village frameworks of group villages which are in accordance with policy SE6.
9. Policy ES6 of the Council’s Local Plan states that:
 - (a) Where an application is made to develop near to an existing commercial or industrial activity, the applicant will be required to demonstrate that any noise or pollution from the existing commercial or industrial activities will not result in unacceptable noise to noise-sensitive development.
 - (b) New noise-sensitive development constructed near to existing industrial or commercial development will need to be designed and orientated so that, as far as practicable, windows of sensitive rooms including living rooms and bedrooms face away from major noise sources.
10. Appendix 11/1 to the Council’s policy sets out the Council’s ‘adopted standards for noise from industrial, commercial or recreational activities affecting residential development.’ It states that:

‘Where the proposals relate to new residential development near to existing commercial, industrial or recreational activities, then the standard seeks to ensure that the façade of noise-sensitive development will not be exposed to any significant increase over background noise levels having regard to the standard detailed....below. This may be achieved either by the layout and design of residential development or, alternatively, the applicant may wish to liaise with the owners of any nearby industrial, recreational or

commercial activities with a view to achieving noise reduction measures at those premises to ensure that the levels specified in the adopted standards are not exceeded.’

⁵ PPG23 ‘Planning and Pollution Control’, Paragraphs 1.31-1.32

The appendix then goes on to explore the background noise levels that are acceptable and how these should be measured.

Investigation

Background events

11. The land that is the subject of the complaint (the site) has had an element of residential usage since the early 1950s. The land that is occupied by The Factory (site two) was originally an airfield. In 1978 the Council granted permission for its usage to be changed from warehouse to industrial.
12. The Factory manufactures parts and has operated from this location for a number of years. Its operation involves the pressing of sheet metal and it has substantial presses that undertake this operation. The premises are ex-World War Two hangers that are not constructed with a view to acoustic deadening. There is no restriction on The Factory's hours of work.

Noise complaints

13. In 2001 The Factory closed one of its other sites and transferred its plant and equipment to site two. Shortly thereafter the Council began to receive complaints of noise nuisance. These were investigated and, in 2002, The Factory was advised by its acoustic consultants to build an earth bund to protect local residents from noise. This was under construction at the time the planning application was being considered.
14. Following further complaints about noise in 2003 Environmental Health began investigating. The Factory advised the Council that it was taking steps to reduce noise from the site. On 1 June 2004 the Council served The Factory with an Abatement Notice as it had established that a statutory nuisance was being created. The Factory appealed the Notice and the case was due to be heard in the Magistrate's Court. The Notice and appeal have now been withdrawn as The Factory and the Council have agreed to conduct a joint noise survey and establish a Noise Protocol.

The application

15. On 4 March 2002 the Council received a planning application for permission to demolish an existing house on the site and to redevelop the garden to provide six new dwellings. Officer A, a planning officer, advised the Commission's officer that he had pre application discussions with the applicant and that he was aware

that some residents had made complaints about noise from site two. He advised that he had visited the site and was not aware of any noise being audible during his visit. He consulted Environmental Health and the Parish Council (PC) on 14 March. In its response to the consultation on 12 April PC commented that an

acoustic barrier would need to be constructed due to the proximity to site two. There is no evidence of a written response from Environmental Health.

16. On 28 August 2002 amended plans were received from the applicant. The PC and Environmental Health were re-consulted on 2 September. In its response the PC again indicated that an acoustic screen would be required. There is no evidence of a written response from Environmental Health.
17. On 20 December further amended plans were received, along with a landscaping scheme. Consultation letters were sent out on the same day. In its response the PC expressed concern that the steel roof proposed for some of the new houses would further transmit noise from site two into the village. Further amended plans were provided on 4 February and consultation letters went out on the same day. On 20 January 2003 Officer B, an Environmental Health Officer, was asked for his specific comments on the effect of noise on the steel roofing proposed. Officer B responded in writing stating:

“I am not aware of any situation where metal roofing would exacerbate a noise problem from a nearby industrial installation....I am currently dealing with complaints [about site two]. The remedies for noise problems from industrial installations are to deal with the matter at source and recommend a solution at the location where a noise is generated....Consequently there are no objections to steel roofing material on some houses that are the subject of this application. “

This is the only written response from Environmental Health on the noise issue.

18. On 14 February the PC again raised its concerns about noise from site two. In its comments it stated:

“This remains to be addressed by the applicants. The Parish Council therefore considers that this site poses severe difficulties for the erection of new dwellings...”
19. A report was prepared for the Planning Committee to consider on 5 March. Officer A advised the Commission's officer that Members of the Committee visited the site prior to this meeting and that no noise was audible. He advised that Members did not indicate that they felt that noise from site two was a problem. However, prior to the Committee meeting the applicant asked for its application to be deferred, pending further discussions with the PC about its proposals for a different site (which was linked to this application). Subsequently the two applications were dealt with separately, with the result that the application in question was decided under delegated powers.
20. On 25 March further minor amendments were received, including a proposal for a 1.8 metre high close boarded fence to provide acoustic screening. Consultation letters were sent out the following day. On 3 April the PC responded, indicating that it supported the acoustic screening proposed.

21. On 4 September 2003 planning permission was granted under delegated powers. Officer A advised the Commission's officer that he would normally produce a delegated report. He did not do so in this case as a comprehensive report had already been drawn up in March when Committee had been due to decide the application. Condition 3 imposed on the consent required submission of a scheme for acoustic screening.
22. Further meetings took place between the Council and the applicant's agent to discuss the details of the scheme between September 2003 and September 2004. The applicant's agent met with Officer B on 9 September 2004 to discuss the noise control measures that would be necessary for condition 3 to be discharged. Officer B advised the Commission's officer that he informed the agent at this meeting that in his view the proposed fence would not make much difference but that there was nothing the applicant could be required to do that would reduce noise from site two. He also said that he advised the agent that the Council was working with The Factory to address the noise at source and that this was the best way to deal with the problem.
23. On 10 September 2004 the applicant's agent submitted details of a scheme for acoustic screening. This included a 1.8 metre high close boarded fence for the rear boundary and advised on the specification for the external walls and glazing for doors and windows.
24. On 24 March the Council advised the applicant that it considered that the condition relating to site boundaries had been discharged.

The Factory complains to the Council

25. On 5 April 2005 solicitors for The Factory wrote to the Council when it became aware of building work taking place on the site. It requested a copy of the noise appraisal the Council had carried out when it considered the application and alleged that it had failed to take into account the advice contained within PPG 24 (see paragraph 6) or to ensure that the condition relating to acoustic screening had been adequately complied with.
26. The Council replied on 25 April. It explained that the noise level survey described in PPG 24 was not relevant as it applied to transportation noise rather than industrial noise. It also advised that it had taken the view that a noise survey at the time the application was being considered would not have been helpful as noise recordings taken in response to complaints at the time did not show that noise reached statutory nuisance levels; that recordings showed that the noise level varied considerably depending on weather conditions and the operations being undertaken at The Factory at the time; that a bund was under construction which would have altered the impact of noise by the time the development was built anyway; and that The Factory had claimed that no nuisance was being created and that the bund would reduce this already acceptable level of noise. It went on to say that the most effective means of reducing the noise was at source

and that a condition had been imposed on the permission to require acoustic screening.

The Factory complains to me

27. A solicitor for The Factory made its complaint to me in July 2005 and advised that a complaint about noise had been received from one of the owners of the new houses. The Council was asked for information and comments on the complaint.
28. The Council replied in November 2005. It stated that the site in question already had residential usage as it was originally the garden of an existing bungalow and that the applicant had been advised about orientation of habitable rooms, construction of fences to act as a sound barrier and sound insulation within the properties. It went on to explain why a noise survey had not been conducted and why PPG 24 did not apply. It explained that it took the view that there was no material planning reason to refuse the application, given that a statutory noise nuisance had not been established at the time and that it regarded the noise condition attached to the consent as satisfying the requirements of PPG 24 and its Local Plan. It went on to state that it had not been established that houses closer to site two would experience a greater level of noise and that its view was that the bund would reduce noise for properties that were closer. It again expressed the view that the noise nuisance should be addressed at source and that this is what the Council had concentrated on.
29. The solicitor for The Factory responded to the Council's comments in December 2005. It stated that The Factory did not accept the Council's argument that as a noise nuisance had not been established at the time the planning application was determined it did not need to carry out further testing as part of its consideration of the application. It pointed out that there had been no noise recordings from the point at which the new closest house would sit and therefore the Council could not have concluded that a statutory nuisance was not being created in that position. It also expressed a concern that the only comments on noise made by Environmental Health was in relation to the steel roofing, that the report produced made little reference to noise issues and that the explanation the Council had now put forward for the reasons why it did not carry out a noise survey were arguments created after the fact, with no documentation to back them up. It went on to state that the condition imposed was too vague to be of any use and that the Council should not have discharged it without first assessing what difference the proposed fence would make as an acoustic barrier.

The views of the Planning Officer

30. Officer A advised the Commission's officer that he could not recall any discussions with Officer B about the application and that he would normally record a file note had he done so. He explained that he would normally rely on Environmental Health to advise him of any concerns it had that needed to be

addressed in the application as its officers had experience of dealing with noise nuisance. He explained that he was aware of the Council's emerging policy (see paragraph 9) but did not consider that it applied in this instance due to the distance of the site from site two and the fact that a wooded area and bund lay between them. He went on to say that he would only normally consider requiring the applicant to re-orientate rooms away from a noise source if Environmental Health had suggested it and it had not in this case. He advised that as Officer B had not raised any concerns with him to indicate that further work was required he took the view that there were no environmental health concerns with the application. Consequently, the only reference to noise in the report produced for Committee was in relation to the PC's comments.

31. Officer A advised that the condition relating to acoustic screening had been imposed on the consent as a result of concerns raised by the PC. As Officer B had raised no concerns he did not consider specifying a decibel level that would be acceptable in the new buildings as part of the wording of the condition. He went on to say that it would be the responsibility of Environmental Health to specify such a level in any case.
32. Officer A advised the Commission's officer that in his view, even if The Factory had raised the points it has now raised at the time of the application, there would have been no reason to refuse it. He indicated that the only change that may have been made was with the orientation of habitable rooms.

The views of the Environmental Health Officer

33. Officer B advised the Commission's officer that it was normal practice for Environmental Health to be consulted on planning applications and that it has a specialist unit that looks at each application and identifies those that are particularly relevant to Environmental Health. He advised that these applications are carefully considered and responses are cross-checked by the scientific support unit. In this case he advised that he recalled responding on the specific concern raised by the PC about the impact of noise on a metal roof. He also advised that it was not uncommon for him to discuss planning applications with planning officers when he saw them in the building.
34. Officer B explained that at the time he was consulted on the application he had conducted noise measurements at the site but that the results were inconclusive. He said that he was qualified in acoustics and was therefore aware of the content of PPG 24 but took the view that this was more relevant to transportation noise and therefore did not apply to this application. Consequently, he did not consider that a noise survey was required.
35. Officer B advised that he was aware that some of the properties had balconies and that these may face the direction of site two. He advised that he was aware of the content of the Council's emerging ES6 policy but that he did not feel that he could have required the applicant to take further measures, such as re-orientation of buildings, as he was aware that a statutory nuisance had not been established

at the time the application was under consideration. He felt that it would have been unreasonable to impose any burden on the applicant when the responsibility for reducing the noise lay with The Factory. He also felt that had stricter conditions been imposed and then challenged by the applicant, the Council would not have been in a position to justify them given that The Factory was already working with the Council to reduce the noise at source. He advised that he had looked at the existing site and noted that the occupants of the bungalow had not made complaints about noise from site two. He therefore took the view that noise was not a problem from this position, which again led him to believe that further action by the applicant was not required. He stated that he had considered all of this at the time the application was under consideration, although he conceded that it had not been documented due to pressure of work.

36. Officer B advised the Commission's officer that he did not accept The Factory's view that noise would be greater closer to the bund and he noted that it had not produced any evidence to suggest that this was the case. He also advised that he had visited the new development and had not been aware of any noise within the properties.
37. Officer B stated that he had not recommended that a condition be imposed on the consent as he took the view that there was nothing the applicant could do to 'detune' noise from site two. He therefore agreed that the 1.8 metre fence could discharge the condition. He stressed that he took the view that it was not the role of the planning system to reduce noise nuisance and that the Environmental Protection Act was more important. He conceded that he knew more now about noise from site two than he did at the time of the application but restated that his view was that the most effective way to deal with the problem is for The Factory to insulate its buildings.

The Council's comments

38. I, along with other officers of the Commission, met with the Council's Chief Executive and other Council officers on 14 December 2006. At that meeting the Council indicated that although it took the view that both ES6 and PPG 24 were taken into account when the application was considered it accepted that it was at fault in failing to document its consideration and for failing to record any of the noise issues during its consideration of the application. However, it expressed the view that it did not consider that The Factory had been caused an injustice as a result of this failure given that there is no evidence that any occupants of the new houses have complained of noise nuisance. As evidence of that view it explained that officers had visited some of the new residents and most were not aware of the existence of The Factory. While one appeared to have made an enquiry about noise the Council was not aware that this had been put forward as a formal complaint.
39. The Council explained that the situation had moved on since the complaint was made. It explained that the Abatement Notice and the complainant's appeal against it had been withdrawn because The Factory had now taken some steps to

reduce noise and had signed an agreement that would ensure the Best Practicable Means to control the noise from its most noisy operations would be taken. It said that the only remaining issue was noise from the presses and noise recordings were planned to address that issue. That involves a house survey with Council officers taking noise recordings from the existing houses from which noise complaints have been made with the intention of identifying those presses which are causing a noise nuisance during the night. Those presses would then be given a red category, which means they would no longer be used by The Factory at night.

The Factory's comments

40. The Factory disputes the Council's view of what the noise survey is to consider. It argues that the purpose of the noise monitoring exercise is to gather data to enable the two sides to come up with a protocol for the assessment and use of the presses and that there will be occasions when the red presses have to be used at night. It reiterates that this survey is only looking at press noise and that this does not consider other sources of noise that may cause a nuisance to the new properties.

Conclusions

41. In my view the Council had misunderstood the relevance of PPG 24 for applications for new noise-sensitive development close to existing noise sources. While certain sections of it are relevant only to transport noise, the remainder is relevant to other noise sources, including industrial noise, and these should have been properly taken into account. Failure to do so was maladministration.
42. The Factory puts forward the view that the Council should have undertaken an NEC noise survey, as outlined in PPG 24, as part of its consideration of the application. I do not agree as the NEC noise categories apply only to noise from transportation sources, rather than industrial noise.
43. I am concerned that the report on the planning application, prepared for the Planning Committee and considered by the decision-maker, does not mention noise other than to rehearse the concerns put forward by the Parish Council and to include Officer B's comment that he was negotiating with The Factory to reduce the noise at source. In the absence of any written information to show how noise from The Factory was taken into account when determining the application I have to conclude that it was not. This was maladministration.
44. I have seen no documentary evidence that policy ES6 or the accompanying appendix (see paragraphs 9 and 10 of this report) of the Council's emerging Local Plan were considered. This was maladministration.
45. I would not criticise the wording of the condition or the discharge of it when a 1.8 metre fence was proposed, given that Officer B took the view that the only way to reduce the noise was at source and that nothing the developer could have been

required to do would have made any difference. This was the officer's professional judgement and does not seem unreasonable to me.

46. The Factory has raised some concerns about a 'cap' on the amount I have recommended as a contribution to its legal costs in pursuing the complaint. In recommending to the Council what I consider to be a proportionate remedy, I have taken into account the fact that a significant proportion of the legal costs incurred relate to correspondence with my office. As my services are free I do not normally consider that legal representation is required to pursue a complaint with me. I therefore consider the amount recommended to be a reasonable contribution to the costs incurred.
47. I consider the maladministration I have found in paragraphs 41,43 and 44 has created some uncertainty for The Factory about how noise was taken into account when the application was considered. It is clear to me that this has led to it having to go to considerable time and trouble to pursue its complaint, along with the expense of legal representation to try to establish what had been taken into account. It is also left not knowing whether changes to the scheme would have been secured had a noise survey been carried out at the time and, if it had, whether this would have avoided what it describes as a noise complaint it says it has received from an occupier of one of the new houses. In these circumstances the Council's maladministration may have led to greater vulnerability from complaints of noise than otherwise would have been the case. This cannot be finally resolved until further work on a noise survey has concluded.

Finding

48. For the reasons given in paragraphs 41,43 and 44 I find maladministration by the Council causing the injustice described in paragraph 47.
49. To remedy that injustice I recommended that the Council take the following steps:
 - (a) extend, if practicable, the planned noise survey to include both new houses nearest The Factory;
 - (b) inform me of the outcome of the survey so that I can consider whether any further remedy is necessary;
 - (c) contribute £5,000 towards the reasonable legal costs incurred by The Factory in pursuing this complaint with the Council and with me.

Officers have indicated their willingness to include in their noise survey the two new houses nearest The Factory.

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March 2007