

EXTRAORDINARY CABINET MEETING

26 NOVEMBER 2024

PART 1 – PUBLIC DOCUMENT

TITLE OF REPORT: Local Government and Social Care Ombudsman’s report of failings in the investigation of statutory noise nuisance by North Hertfordshire District Council (ref. no.: 23 014 065)

REPORT OF: The Environmental Health Manager

EXECUTIVE MEMBER: Executive Member for Housing and Environmental Health

COUNCIL PRIORITY: ACCESSIBLE SERVICES

1. EXECUTIVE SUMMARY

- 1.1 The Environmental Protection & Housing Team of Environmental Health wrongly delayed serving an abatement notice on a business after it had identified that it was causing a statutory noise nuisance.
- 1.2 The complainant was not offered a financial remedy as part of the Council’s formal complaints procedure to reflect her loss of amenity and distress arising from the delay.
- 1.3 That the Council had to show it had acknowledged its failure, it had considered the recommendations of the Local Government Ombudsman’s (LGO) report, and that it had put in place measures to prevent recurrence of the failure.

2. RECOMMENDATIONS

- 2.1. That Cabinet approve this report and accept that where necessary, the Environmental Health Service has already introduced measures that will prevent the recurrence of the failings.
- 2.2. That Cabinet also request the Council to consider the purpose of its Formal Complaints procedure, and that the provision for financial remedy for intangible loss, such as for distress, frustration or loss of amenity, via the offering of compensation be made available, if, and where the Council considers it to be appropriate, to be made available through the complaints’ procedure.

3. REASONS FOR RECOMMENDATIONS

- 3.1. The recommendations in this report have been made so as to allow the Council to accept the measures proposed by the LGO in its report dated 19 September 2024 entitled Investigation into a complaint about North Hertfordshire District Council (reference number: 23 014 065). Category: Environment and regulation – Noise.
- 3.2. The LGO report concluded that the Council's Environmental Health Service, and in particular, the Environmental Protection and Housing Team had failed in its duties to serve an abatement notice within the prescribed timeframe following the identification of a statutory noise nuisance and that as a result, the Council should offer compensation for this failing. The report also found that due to the Council not being able to offer compensation as redress under its formal complaints' procedure, measures to consider the alteration of its formal complaints procedure to enable the offering of compensation for future complaints should be made.
- 3.3. For information, and in response to the LGO report, the Council's Managing Director has accepted in full all of the recommendations made.
- 3.4. The LGO Report, in full, may be found in Appendix A to this report.

4. ALTERNATIVE OPTIONS CONSIDERED

- 4.1. Due to the nature and requirements of the LGO report, namely that it be presented to the Council's Members in an appropriate forum for their information and consideration, no real alternatives exist.
- 4.2. The LGO report requires Members consider and accept the changes proposed, and where appropriate recommend the Council to implement those changes or considerations.
- 4.3. Environmental Health have already implemented the changes required to prevent a recurrence of the failings highlighted, and the Council has also proposed to review its Formal Complaints' procedure to consider the inclusion of the provision to offer compensation, although this is unlikely to occur until 2025.

5. CONSULTATION WITH RELEVANT MEMBERS AND EXTERNAL ORGANISATIONS

- 5.1. Due to the nature of this report, other than discussions with the LGO to agree the final draft of the report, no consultation with Members or external organisations have been required, and nor have they taken place.
- 5.2. The Executive Member, Cllr Dave Winstanley has been advised of the LGO's report, the reasons for the failings and the measures put in place into the Environmental Health Service to mitigate any recurrence.
- 5.3. The Shadow Executive Members, Cllrs Sean Prendergast and Michael Muir are also aware of the report and the need for this report to be presented to Cabinet.
- 5.4. The Council's Senior Leadership Team is aware of the report and its recommendations, and that our Managing Director has accepted the report in full.

6. FORWARD PLAN

- 6.1 This report does not contain a recommendation on a key Executive decision and has therefore not been referred to in the Forward Plan.

7. BACKGROUND

- 7.1. This report has been written in response to the recommendations made by the LGO following their investigation into a complaint made to them about the failings of the Council's Environmental Health Service in meeting its obligations under the Environmental Health Act, 1990, sections 79 and 80, and by the Council failing to have in place a provision to offer compensation as part of its Formal Complaints procedure.

- 7.2. The recommendations are that the Environmental Health Service put in place mitigation to prevent the recurrence of its failings, and that the Council consider introducing the provision to offer compensation, and that for these failings, the Council should pay the complainant compensation amounting to £3,000.00 to remedy her loss of amenity and distress suffered. All of the recommendations have been accepted by the Council.

- 7.3. As mentioned, the full LGO report is in the appendix for reference.

- 7.4. To provide a background to the legal framework applicable in this case, the Council has legal duties under the Environmental Protection Act, 1990, sections 79 and 80. Both sections place duties on the Council to take reasonable steps to investigate potential statutory nuisances.

- 7.4.1 The sections require that where the Council is satisfied that a statutory nuisance exists, or is likely to occur or recur, in their area, the Council shall serve an abatement notice imposing all or any of the following requirements:

- (a) requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence;
- (b) requiring the execution of such works, and the taking of such other steps, as may be necessary for any of those purposes,

and the notice shall specify the time or times within which the requirements of the notice are to be complied with.

- 7.4.2 The duty to serve an abatement notice may be discharged by use of other more appropriate legislation, but may not be discharged by an external enforcing authority, or in respect of a confirmed statutory noise nuisance by use of a Community Protection Warning/Notice issued pursuant to the Anti-Social Behaviour, Crime and Policing Act 2014.

- 7.4.3 It is only permissible to attempt to resolve a nuisance informally where (a) a statutory nuisance exists, but it is within the seven-day delay period allowed by law in some cases, or (b) a statutory nuisance does not exist.

7.4.4 To understand the requirements of this duty, it is necessary to understand the definition of a Statutory Nuisance. There are two limbs to statutory nuisance: nuisance and prejudicial to health. The nuisance limb may be defined as something caused by or belonging to another that unreasonably and substantially interferes with the use or enjoyment of a home or other premises, whilst the prejudicial to health limb deals with something that is harmful or injurious to health (as further defined).

7.4.4.1 Statutory nuisance may include:

- (a) any premises in such a state as to be prejudicial to health or a nuisance;
- (b) smoke emitted from premises so as to be prejudicial to health or a nuisance;
- (c) fumes or gases emitted from premises so as to be prejudicial to health or a nuisance;
- (d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance;
- (e) any accumulation or deposit which is prejudicial to health or a nuisance;
- (f) any animal kept in such a place or manner as to be prejudicial to health or a nuisance;
 - (fa) any insects emanating from relevant industrial, trade or business premises and being prejudicial to health or a nuisance;
 - (fb) artificial light emitted from premises so as to be prejudicial to health or a nuisance;
- (g) noise emitted from premises so as to be prejudicial to health or a nuisance;
 - (ga) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street; and
- (h) any other matter declared by any enactment to be a statutory nuisance.

7.4.5 In addition to having to consider the framework of what may constitute a statutory nuisance, then the nuisance applies to a commercial premises or undertaking, the defence of Best Practicable Means (BPM) has to also be considered, both as part of the service of an enforcement notice, or in its prosecution should a notice not be complied with. In this capacity, BPM means all suitable measures that would be reasonably practicable to abate the nuisance, in the circumstance of the business.

7.4.6 In addition to the previous considerations, the enforcing authority need also consider the legally recognised concept of neighbourly give and take. This is when the site, situation or actions of each party shall be considered when assessing the nuisance to ensure that effects of normal life are taken into account. The area where the complainant and business are, is a mixed residential and industrial area. Neighbouring residents must therefore expect a certain level of noise commensurate with such an area, and that neighbourly “give and take” applies in all circumstances (including residential areas) but is of particular consequence in mixed residential and industrial areas; Supreme Court decision

in Coventry and others (Respondents) v Lawrence and another [2014]. The implication of this ruling is that a resident cannot expect the area to be quiet, especially if they have moved into an already existing noisy location, although this does not permit any premises causing a statutory noise nuisance.

- 7.5 So as to provide the additional background to the case which is not entirely included in the LGO report below is a summary of the key points.
- 7.5.1 As stated, the complainant lives on a residential estate next to an industrial site. The industrial estate has been in existence for approximately 40 years, with the business being at its current location for much of this time. Planning consent for a residential estate to be built next to the industrial estate, where the complainant lives, was granted in 2014. Activities and practices undertaken by the business during much of its time on the site had continued largely unchanged or unchallenged until the complaint was made in 2021.
- 7.5.2 In December 2021, the complainant complained to the Council about noise nuisance emanating from the industrial site, claiming that she was suffering from noise that she believed arose from two main sources at the business, the manual loading and unloading of vehicles, and a fume extraction system at the site.
- 7.5.3 In accordance with the investigative practice current at the time, the complainant was asked to complete diary record sheets and submit noise recordings via the Noise App and any other evidential media available to her. Monitoring visits were carried out by numerous case officers in an attempt to witness the noise to try to determine whether a nuisance was present. In addition, formal noise recordings were also taken using the Council noise recording equipment, and these recordings were also analysed.
- 7.5.4 One of the difficulties with cases of this nature is identifying the source or in this case, the multiple sources of the noise, and then the specific source which is causing any nuisance. The case officer undertook numerous visits to the site and surrounding areas (including to the complainant's home) in an attempt to identify the noise sources. The case officer, as is standard practice, attempted to ascertain the noise sources, consider potential noise mitigation works and whether the site had a Best Practicable Means defence against the service of an abatement notice. Furthermore, the case officer was working closely with the site owners to resolve the problem informally and made significant progress in reducing noise levels.
- 7.5.5 As a result of the investigation, an abatement notice was subsequently served on the business, leading to the employment of an acoustic consultant to identify the potential noise sources contributing to the nuisance. The acoustician identified four noise sources from plant and machinery and one from loading and trolley activities but didn't identify mitigation works. A case review was carried out in the team confirming the inadequacy with the scope of the acoustician's noise assessment and required the site to carry out a further noise assessment. This time the acoustician identified seven noise sources including from plant and machinery (although they didn't highlight loading and trolley activities), and an extensive range of potential mitigation measures.

- 7.5.6 The second acoustician report has formed the basis upon which mitigation measures are being introduced by the business, and although this intervention is still ongoing, progression of the resolution has taken place significantly since the matter was referred to the LGO.
- 7.5.7 During much of the Council's investigation, there were extensive periods of poor or no contact by the complainant, contributing to the limitations and delays in the investigation. Whilst not a justification for the failings of the investigation, lack of communication by the complainant will affect the quality or rate of the investigation. This information was presented to the LGO, but appears not to have been considered as any sort of mitigation.
- 7.6 As mentioned, during the period of this complaint, the Environmental Protection & Housing Team was experiencing significant difficulties in being able to deliver its statutory service. These factors were presented to the LGO, although these to appear not to have been considered.
- 7.6.1 At the time when the complaint was made about the noise, December 2021, due to a number of reasons, there were no officers employed at the Council with the qualifications and expertise required to investigate a complex case of this nature. The case was therefore passed to a series of case officers, including temporary contractors and subsequently a newly appointed environmental health technical officer with minimal experience in their role. These officers were simply not capable of conducting a thorough investigation into this case however they were given the task out of necessity.
- 7.6.2 The Environmental Health Service as a whole, and this team in particular was suffering from an acute staff shortage, a high turnover of officers and was reliant on temporary workers (the quality of which varied significantly) and newly recruited officers with minimal experience, support and oversight.
- 7.6.3 All of the Environmental Health services were also heavily engaged in trying to deliver the ongoing work required to mitigate the worst of the local impact of the Covid pandemic was still a significant draw on the resources of Environmental Health, all of which contributed to the Environmental Protection & Housing Team being crippled with an almost insurmountable backlog of complaints, with a higher than normal proportion of which being were of a more complex nature, and as a result, a higher number of Stage 1, 2 Formal Complaints to respond to, and other LGO complaints against the Team, all of which had to be responded to with a greatly reduced and less experienced team.
- 7.6.4 All of the above factors were presented to the LGO, although there appears to have been no consideration of the impact of them.
- 7.6.4 All of the problems highlighted above were well known to the Environmental Health Service, and had repeatedly been brought to the attention of the Council's Senior Leadership Team and Members, and although every effort was being made to recruit and retain suitably qualified staff, the service suffered continued and repeated staffing issues. These difficulties were exacerbated due to a number of additional local factors including long-term staff absences, pay disparity between neighbouring local authorities and North Herts Council, and an

acute national shortage of suitably qualified and experienced Environmental Health Officers.

- 7.7 For information, many of these issues highlighted still exist today, both within the Council's Environmental Health Service, and nationwide across the professional. The Service has introduced significant changes and has developed a plan to address its staff shortages, but these steps will take significant time and investment in the service, and without this additional support, the risks of future failings remain present, although significantly reduced.

8. RELEVANT CONSIDERATIONS

- 8.1. As the purpose of this report is to consider the LGO report and the recommendations made, the details and contents thereof need to be available. The full copy of the report is provided in the Appendix although a summary is provided here.
- 8.2 The complainant complained that the Council wrongly delayed serving an abatement notice on a neighbouring business after it had identified a statutory noise nuisance. Although the Council had previously accepted it was at fault for this, and had previously introduced mitigating measures, the complainant complained to the LGO that the Council had not offered her a financial remedy to reflect her loss of amenity and distress arising from the delay.
- 8.3 The LGO found that the Council was:
- a. At fault for failing to serve an enforcement notice in a timely manner once it had confirmed the existence of the statutory nuisance, and for this, it should pay the complainant compensation of £3,000.00, and,
 - b. Circulate guidance to relevant staff, to ensure they are aware the law requires them to make a timely, formal decision about whether a reported nuisance amounts to a statutory nuisance; and that it is only permissible to attempt to resolve a nuisance informally where:
 - (a) a statutory nuisance exists, but it is within the seven-day delay period allowed by law in some cases, or
 - (b) a statutory nuisance does not exist. The Council may want to provide a copy of this report as part of the guidance; and,
 - c. That by not offering compensation as part of its formal complaints resolution, the Council should look to consider this as means to remedy intangible loss, such as distress, frustration or loss of amenity.
- 8.4 Although not contained in the LGO report, it can be confirmed that the Environmental Health Service had already previously introduced the findings listed in 8.2.2.b., and although LGO had been made aware of this, it is not reflected in the report.
- 8.5 It has also been confirmed that the Council will review the scope of the response available as part of the Formal Complaints procedure, and will consider the recommendation to include the ability to offer compensation, although no decision on this has actually been made at this time.

- 8.6 It must be noted, that although the LGO gave the Council to consider and respond to their draft recommendation, when this was responded to, the LGO not only failed to consider the response, they also failed entirely to formally acknowledge the response, even though it has since been included in chain email sent by the LGO.
- 8.7 For information, the response to the draft accepted the need for Environmental Health to put in place measures to prevent the recurrence of the failings, and highlighted that those measures had already been put in place some time before the draft LGO report had been submitted. The response also challenged the LGO's calculation for the compensation it felt the Council should be paid. This calculation uses as its base, a daily compensation amount multiplied from when the failing occurred. The challenge highlighted that the starting point chosen by the LGO was incorrect, and that the lack of communication from the complainant should not be used to assume that the measures put in place as a result of the Council's intervention had failed, but that the opposite should be considered, and that the lack of a complaint should indicate that no nuisance was being experienced. As stated, the LGO completely ignored the response to their draft.

9. LEGAL IMPLICATIONS

- 9.1. The report from the LGO lists only recommendations that the Council should follow. As these recommendations are not backed by legal sanction, the LGO's requirements should only be considered as such. However, given this standing, it is noted that the Council has already accepted in full the LGO's recommendations, and implementation of all of the recommendations is in progress.
- 9.2. Paragraph 5.6.1 of the Council's Constitution states that Cabinet may, by resolution, prepare and agree to implement policies and strategies other than those reserved to Council.
- 9.3. The main piece of legislation that deals with noise nuisance is Part III of the Environmental Protection Act 1990, Section 79 and 80 (As noted in paragraph 7.3 of this report).
- 9.4. The Control of Pollution Act 1974, Part III Noise, Section 60(2) can also be considered to control noise on construction sites.

10. FINANCIAL IMPLICATIONS

- 10.1. In direct response to the LGO report, the financial implication is the acceptance to pay the £3,000.00 compensation as recommended; this has already been paid.
- 10.2. The longer-term implication of the accepting the recommendations is to consider whether compensation should form part of the Council Formal Complaints procedure. This will be considered at a later time, when the financial implications of such a decision will be reviewed in depth.

- 10.3. A further financial implication not highlighted by the report, but which should be considered as a significant contribution to the cause of the failings, is the Council poor remuneration standards when compared to other local authorities both within Hertfordshire and the region, and how this directly led to the Environmental Health Services' inability to employ competent staff. Alternative measures to resource the Service have since been introduced, but these measures do not compensate for the lack of competent and experienced staff, and unless this issue is effectively addressed, the Council continues to expose itself to this risk.
- 10.4. There are no direct or specific revenue implications linked to this report.
- 10.5. There are no direct or specific capital implication linked to this report, other than the need to address the staff remuneration package available to secure competent and experienced officers working in Environmental Health.

11. RISK IMPLICATIONS

- 11.1. Good Risk Management supports and enhances the decision-making process, increasing the likelihood of the Council meeting its objectives and enabling it to respond quickly and effectively to change. When taking decisions, risks and opportunities must be considered.
- 11.2. The failures highlighted by the LGO report into the service delivery provided by the Environmental Health Service were caused significantly by the inability to employ competent and experienced officers. This risk has not been addressed. The shortages of staff has largely been resolved by employing officers with lesser experience and limited competency, albeit supported by the minimum number of competent and experienced staff, but until and unless sufficient funding is provided to better remunerate prospective additional staff, the risk that staff being unable to properly investigate complex nuisance complaints will continue.
- 11.3. This matter has been raised and a growth bid submitted to provide a minimum response to this, although the potential remuneration which could be offered has still not been improved, meaning that the likelihood that the Service will fill any new vacancies with the calibre of officers it needs remains limited.
- 11.4. The direct financial risks associated with the LGO report have been highlighted, and the potential longer term risk should compensation be included in the formal complaints procedure referred to. There are no other financial risks directly associated with this report.

12. EQUALITIES IMPLICATIONS

- 12.1. In line with the Public Sector Equality Duty, public bodies must, in the exercise of their functions, give due regard to the need to eliminate discrimination, harassment, victimisation, to advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not.
- 12.2. There are no equalities implications as a result of this report.

13. SOCIAL VALUE IMPLICATIONS

13.1. The Social Value Act and “go local” requirements do not apply to this report.

14. ENVIRONMENTAL IMPLICATIONS

14.1. There are no known Environmental impacts or requirements that apply to this report.

15. HUMAN RESOURCE IMPLICATIONS

15.1 There will be no human resource implications linked to this report.

16. APPENDICES

16.1 Appendix A - The full report of the Local Government and Social Care Ombudsman’s (LGO) report dated 19 September 2024 entitled ‘Investigation into a complaint about North Hertfordshire District Council (reference number: 23 014 065)’.

17. CONTACT OFFICERS

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18. BACKGROUND PAPERS

18.1 No additional background papers are included.