

Complaint reference:
17 000 550

Complaint against:
East Devon District Council

The Ombudsman's final decision

Summary: There is no evidence that the Council failed to take appropriate action to limit the growth of a clay pigeon shooting range near Mr B's address. It appropriately investigated Mr B's noise nuisance complaints. Therefore, the Ombudsman will not challenge the merits of its decisions. But at times its communication with him was poor.

The complaint

1. The complainant, Mr B, complains that the Council failed to take appropriate action to limit the growth of a clay pigeon shooting range causing a statutory noise nuisance near his house. He states that this was aggravated by the Council's failure to respond to his requests for information and factual detail.

The Ombudsman's role and powers

2. We cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us about something a council has done. (*Local Government Act 1974, sections 26B and 34D, as amended*)
3. I have limited my investigations to events after January 2016. Anything prior to this is a late complaint and I have not seen any reason to exercise discretion.
4. We investigate complaints of injustice caused by maladministration and service failure. I have used the word fault to refer to these. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
5. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

How I considered this complaint

6. I have:
 - Read the papers submitted by Mr B and spoke to him on the phone.
 - Considered the Council's comments about the complaint and the supporting documents it provided.
 - Provided both parties with the opportunity to comment on this draft decision and considered their comments.

What I found

Law and guidance

Statutory nuisance

7. Councils must investigate about issues that could be a statutory nuisance - a nuisance covered by the Environmental Protection Act 1990. If they agree that a statutory nuisance is happening, has happened or will happen in the future, councils must serve an abatement notice.
8. For the issue to count as a statutory nuisance it must do one of the following:
 - unreasonably and substantially interfere with the use or enjoyment of a home or other premises;
 - injure health or likely to injure health.
9. In 2003 the Chartered Institute for Environmental Health (CIEH) produced professional guidance for the control of noise specifically in relation to clay target (pigeon) shooting. It contains guidance for shoot organisers thinking of setting up a clay pigeon shooting business for example minimum safety zones, liaison with local residents and shooting restrictions. It also can be used by local authorities who have the regulatory powers to control noise.
10. The guidance also sets out technical guidance for local authorities to measure noise from clay pigeon shooting sites. This includes details of:
 - the measuring equipment;
 - site selection;
 - the weather;
 - shooting length;
 - calculation of shooting level; and
 - reporting of results.
11. The guidance states that any limits set in relation to the site will be a matter for local negotiation. It also states that *“there is no fixed shooting noise level at which annoyance starts to occur. Annoyance is less likely to occur at a mean shooting noise level below 55 decibels (dB), and highly likely to occur at a mean shooting noise level above 65dB. The likelihood of the annoyance levels within this range will depend on local circumstances”*.
12. Annoyance is not the same as a statutory nuisance, but the guidance does state that *“the level of noise experience will usually be an important factor in any assessment of noise nuisance due to clay target shooting”*.

Planning and enforcement

13. There are two forms of shooting ground or site that are typically encountered:
 - Those operating regularly by virtue of an express planning permission or established use.
 - Those operating less frequently under the provisions under the Town and Country Planning (General Permitted Development) Order 1995, which, subject to certain constraints, currently permits up to 28 days usage per annum of given land without the need for an application to the planning authority.

-
14. Section 17B of the Town and County Planning Act 1990 sets out time limits for taking enforcement action for unauthorised development. Development becomes immune from enforcement if no action is taken:
- Within 4 years of substantial completion for a breach of planning control consisting of operational development.
 - Within 4 years for an unauthorised change of use to a single dwellinghouse.
 - Within 10 years for any other breach of planning control (essentially other changes of use).

Community Protection Notice (CPN)

15. Councils have the power to issue CPNs to a person (over 16), business or organisation committing anti-social behaviour which spoils the community's quality of life. In order to issue the CPN the behaviour must:
- have a detrimental effect on the quality of life in those in the locality;
 - be persistent or continuing in nature; and
 - be unreasonable.
16. Government guidance states that a CPN can deal with a wide range of behaviours such as noise nuisance and litter on private land open to the air. It states that issuing a CPN does not discharge the Council from its duty to consider a statutory nuisance or issue an abatement notice but an interaction between the two powers should be considered.

Events leading to the complaint

Background

17. Mr B states that a farm near his house started using the site, without planning permission, for clay pigeon shooting at some point between 1961 and 1983. Local residents have been complaining since the 1990's because of the increase in frequency of the shooting events. He moved into his property in 2012 which is about 1 kilometre from the site and has complained to the Council about noise nuisance and lack of planning permission since this date. As explained in paragraph three, I am only investigating events after January 2016.

The Council completed a noise assessment

18. In January 2016 Mr B complained to the Council about noise from the site. The Council responded and said it had completed one noise monitoring exercise but the results were inconclusive so it needed to repeat it as soon as possible. But this was dependent on the right weather, availability of officers, equipment and time and date of shoots. It said it was going to visit the site again to discuss the issues with the gun club owners.
19. The Council then visited the site on 5 March 2016 to complete another noise assessment and took noise readings from three locations. Mr B states that all the noise readings are invalid because the readings were not taken in accordance with CIEH guidance.
20. The Council wrote to Mr B and other local residents on 10 March 2016 and explained that it completed a recent site visit and was analysing the results. It said it was going to arrange a meeting with the gun club where it would present its results and set out its view of what was reasonable and any realistic suggestions to improve matters.

-
21. In May 2016, the Council met with the gun club to discuss its findings, the resident's concerns and possible noise mitigation strategies. The Council then met with local residents in July 2016 and shared an update report of its findings based on the March 2016 site visit.
 22. The Council explained that in March 2016 it found readings of 57.6 dB, 55.4dB and 56.8dB and that *"a difference of up to 3dB is not perceptible to the human ear... The conclusion from this monitoring is that the requirements of the guidance in the terms of noise levels were not exceeded, and that a significant factor is the distance of most residences from the site. These results do not suggest that further monitoring should be undertaken at this stage"*.
 23. The Council took these readings into account alongside other factors and concluded that there was not a statutory nuisance. Therefore, it would not serve an abatement notice. It did, however, attempt to negotiate noise mitigation arrangements with the gun club who had already offered up the following suggestions:
 - Provide absorbent noise insulation within the covered shooting stands.
 - Use covered shooting stands in preference to the fully open stands.
 - Consider adding a cantilever canopy to the roof of the covered stands if the noise insulation does not provide sufficient improvement.
 - Plant fast growing conifers in a 'ragged edge' layout adjacent to the woodland.
 24. After considering the noise readings and the noise complaints the Council also made additional recommendations:
 - Saturday shoots to total no more than three hours of shooting time, carried out between the hours of 10am and 3:30pm.
 - Friday practice shoots to total no more than two hours of shooting time carried out between 10am and 3pm.
 - Total shooting time per week not to exceed five hours.
 - The number of traps on Saturday shoots to be limited to two at a time.
 - The number of traps on Friday shoots to be limited to one at a time.
 - No shooting to occur on Sundays to Thursdays or on any Bank Holiday.
 - No more than 1 'major event' per month to be held (only between March and October).
 - Noise insulation measures as agreed to be completed before 1 October 2016.
 - Tree planting to be completed by 31 March 2017.
 25. After the meeting in July 2016, Mr B suggested a number of amendments to the update report. The Council then shared its final report in August 2016 but Mr B states that the Council refused allow any amendments and only allowed the gun club to comment. Mr B told the Council that local residents intended to explore taking private legal action against the gun club. The August 2016 final report still contained the above recommendations.
 26. The update report that the Council shared with Mr B in July 2016 included the use of low noise cartridges, but this was not included in the final report. There is also no evidence of the Council explaining why low noise cartridges were not included in the final report.

Mr B complained to the Council

27. In January 2017 Mr B made a formal complaint to the Council. He remained unhappy with the noise from the clay pigeon shooting site and with the Council's handling of the site.
28. The Council said it felt that the matter was concluded in July 2016 after the meeting when Mr B appeared satisfied with the Council's actions and was going to consider private legal action. It did not dispute the fact that Mr B could hear noise from the clay pigeon shooting site but maintained its position that there was no statutory noise nuisance.
29. With regards to CPN's, the Council said that they can be used for general nuisance issues if certain criteria are met. But should not be used in place of specific legislation. From a planning perspective, the Council said that although the site may exceed the 28 day rule, it has exceeded this rule for over 20 years and therefore it is not enforceable and cannot take any action. Therefore, it is not going to take any further action with the site and referred Mr B to approach the Ombudsman if he remained dissatisfied which he did.

The Council completed a second noise assessment

30. The Council completed a second site visit in March 2017 to follow up on the informal noise mitigation measures the gun club offered up in July 2016. It found that the club had implemented all but two of the recommendations.
31. In June 2017, the Council wrote to Mr B and provided him with an update. It told Mr B that the noise monitoring results from its recent site visit in March 2017 support its original position that there is no statutory noise nuisance. It also said that although it is satisfied that there is not a statutory nuisance it was unable to assess the effectiveness of the noise mitigation works because the results were inconclusive. The Council told Mr B that the gun club already complied with seven out of the nine recommendations in its August 2016 report; even though it did not endorse the actual proposed informal agreement at the July 2016 meeting. It also reminded Mr B of his right to take private action against the gun club.

Council's response to the Ombudsman's investigation

32. The Council states that the loudness of the noise is not the only measurement of a statutory nuisance for clay pigeon shooting. It also needs to take into account the size of the operation, the regularity, the length of each event and the time of day. It states that the role of the CIEH guidance is to quantify the role of the annoyance, not to determine whether the noise is a statutory nuisance.
33. The Council accepts that on both occasions it did not always follow the CIEH guidance although it attempted to follow the guidance, where possible. It explained that the guidance is complex and technical and therefore can only be used by qualified noise consultants in the right weather conditions.
34. The Council said when it completed the second noise monitoring exercise in March 2017 it could not conclude that there had been any improvements in noise loudness, despite the improvements the gun club had implemented. It states that this demonstrates how difficult it is to assign noise levels to gun noise and why loudness should not be the determiner of whether a noise is a statutory nuisance.
35. The Council states that the case is not closed and it would be willing to continue its investigations if implement further measurable restrictions if Mr B provided the Council with the relevant evidence.

Analysis

36. When Mr B complained to the Council it took appropriate action and contacted local residents for more information and evidence. It then completed a site visit to complete noise monitoring and assessments. After completing the site visit, analysing the data and considering all of the relevant factors the Council concluded that there was not a statutory nuisance. It therefore decided that it would not issue an abatement notice.
37. Mr B states that the noise assessment and monitoring was flawed because it did not follow government guidance and therefore cannot be relied upon. A statutory noise nuisance is not a binary issue, councils have discretion to decide whether there has been a statutory nuisance and are expected to use their professional judgement. It is the Ombudsman's role to determine whether this has been a properly made decision, not to re-look at the decision itself, unless there has been fault in the process. In this case, I am satisfied that the Council had due regard for the CIEH guidance, took account of relevant information and exercised its discretion appropriately. Therefore, because I have not seen any evidence of fault, I will not challenge the merits of this decision.
38. In response to the Ombudsman's investigation the Council has provided a thorough explanation why it did not follow the CIEH guidance exactly and the interaction between the guidance and a statutory nuisance. Although I am satisfied with the Council's decision about the statutory nuisance, I have concerns about its communication. Mr B raised a number of complaints about the Council failing to follow the guidance which to date it has failed to respond to properly. Therefore, the Council should have provided Mr B with the thorough explanation it gave to the Ombudsman.
39. Although the Council decided it did not need to take any formal action it was aware of the sensitive situation. It therefore took appropriate action to meet with the gun club to explore what action it was prepared to take to reduce the impact of the noise on Mr B. It also produced a report and made nine further informal recommendations and met with Mr B to discuss his concerns.
40. Mr B states that the Council did not update him as to whether the gun club agreed to these additional nine recommendations, the Council states that it told Mr B at the meeting in July 2016, but the minutes do not confirm that he was told this. In addition, the final report was produced after the meeting in August 2016 and still contained the nine recommendations without an update. Therefore, on balance, I have found that Mr B was not given an update about whether the gun club agreed to the additional informal recommendations until June 2017 when the Council wrote to him.
41. I appreciate that they were only informal recommendations that the Council cannot enforce. But given Mr B's complaints and the level of the Council's involvement, it should have better communicated the outcome of the informal agreement with Mr B. Failure to do so is fault and has frustrated him.
42. Although it was only an informal agreement the Council took appropriate action again and completed another site visit in March 2017 to check that the agreed measures had been put in place. It again concluded that there was not a statutory nuisance. I have seen no evidence of fault in the way the Council made this decision because it considered all relevant information and therefore the Ombudsman will not challenge it.

-
43. Mr B asked the Council why it had not used a CPN. The Council said that it would not issue one because this legislation should not be used instead of the statutory nuisance. This response did not seem to have due regard for government guidance which said Council's should consider using both sets of legislation in conjunction with each other; where appropriate. This was fault. But, in response to the Ombudsman's enquiries it has now considered whether the gun club meets this test and decided that it does not. Therefore, I am now satisfied that this issue has been properly considered and there is no further action required by the Ombudsman.
44. With regards to planning enforcement, I am satisfied with the Council's professional judgement that it does not need to take action because the site has become immune from enforcement action. I appreciate Mr B's argument that the Council should have taken enforcement action sooner, but this complaint has not been considered by the Ombudsman because this aspect of the complaint is out of time.

Agreed action

45. In recognition for the faults identified above the Council, within six weeks of my final decision, should:
- Apologise for the frustration, inconvenience and time and trouble he has experienced from poor communication.

Final decision

46. There is no evidence that the Council failed to take appropriate action to limit the growth of a clay pigeon shooting range near Mr B's address. It appropriately investigated Mr B's noise nuisance complaints. Therefore, the Ombudsman will not challenge the merits of its decisions. But at times its communication with him was poor. The Council has agreed to my recommendation and therefore I have completed my investigation.

Investigator's decision on behalf of the Ombudsman