

The Ombudsman's final decision

Summary: the Council delayed taking action over breaches of planning control after it gave permission for a turbine in a river. The Council has agreed to the Ombudsman's recommendations to remedy the injustice its delay caused. There was no fault in the Council's decision to discharge a noise condition and that a flooding condition had not been breached.

The complaint

1. I have called the complainant Mrs X. She complained for herself and on behalf of four of her neighbours. Mrs X complained about Harrogate Borough Council's handling of a planning application for a turbine in a nearby river. She also complained about the Council's delay in taking enforcement action about breaches of planning control after it gave planning permission for the turbine.

What I have investigated

2. I have investigated that part of the complaint about the Council's delay in taking enforcement action about breaches of planning control for the approved turbine. The final section of this statement contains my reasons for not investigating the Council's handling of the planning application itself.

The Ombudsman's role and powers

3. The Ombudsman investigates complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. If there has been fault, the Ombudsman considers whether it has caused an injustice and, if it has, she may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1)*)
4. The Ombudsman cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. She must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3)*)
5. The Ombudsman cannot investigate late complaints unless she decides there are good reasons. Late complaints are when someone takes more than 12 months to complain to the Ombudsman about something a council has done. (*Local Government Act 1974, sections 26B and 34D*)

How I considered this complaint

6. As part of my investigation I have:

- considered the complaint and the correspondence provided by Mrs X;
- discussed the issues with Mrs X;
- made enquiries of the Council and considered the comments and documents the Council provided;
- invited comments from Mrs X on the information the Council provided and considered her response; and
- invited comments from Mrs X and the Council on my provisional view of the complaint and considered their responses.

What I found

Background to planning enforcement

7. It is a planning authority's responsibility to consider properly what to do once it is aware of a breach of planning approval. It has no duty to take enforcement action unless it thinks a breach is so serious as to affect public amenity.
8. Government guidance on planning enforcement says that a planning authority should first try to persuade the owner or occupier of a site to remedy the harmful effects of unauthorised development. It is only when such action fails that a planning authority should consider formal enforcement action. Any enforcement action a planning authority decides to take should be proportionate to the breach of planning control.
9. Harrogate Borough Council is a planning authority.

Key facts

10. Mrs X and her neighbours live in a small village with a nearby river. There is a derelict sawmill with an associated millrace.
11. In 2010 a neighbouring landowner, Mr Y, applied for planning permission to install a turbine in the river to create a hydroelectric plant. He intended generating electricity which he would then sell to the National Grid. As Mr Y proposed to do works in a waterway and which might affect a flood defence he required a Flood Defence Consent from the Environment Agency. This consent is intended to ensure activities do not cause a flood risk, make a flood risk worse, or affect the local environment and wildlife.
12. The Council granted Mr Y planning permission for the turbine. It attached several conditions to the permission. One of the conditions required Mr Y to do an acoustic validation test to demonstrate noise levels from the turbine and to do noise attenuation works if necessary. The test results and any attenuation works had to be approved by the Council before Mr Y could use the turbine. Another condition required Mr Y to do the works in accordance with a flood risk analysis he submitted with his planning application.
13. Although Mrs X and her neighbours complained about other issues I have focused on the two described above.
14. In October 2012 Mrs X told the Council Mr Y had installed a metal plate across the spillway of the upper millrace. The metal plate replaced a metal grid. Mr Y did this to increase the water level in the millrace to ensure the turbine would work. This caused water to spill over and flood the surrounding area. An open sluice gate contributed to the flooding. Mr Y initially refused to close the sluice gate although I understand he did close it later. The Council told Mrs Y and her neighbours that

the sluice gate was an existing structure and not part of the planning application. It therefore had no power to require Mr Y to close it.

15. The Council told Mr Y he needed retrospective planning permission for the metal plate. But it was not until March 2013 following the Council's threat of enforcement action that Mr Y made a planning application. Mr Y wanted permission to replace the metal grid with a new stone weir. The Council decided not to take enforcement action about the metal plate until it knew the outcome of the planning application.
16. Meantime, in December 2012 Mrs X and her neighbours started complaining about noise from the turbine. Apparently, Mr Y was testing the turbine because, in mid-January 2013, his agent sent the Council a noise report. Mrs X said Mr Y was not testing the turbine but ran it continuously for a month. The Planning Department sent the noise report to Environmental Health for consideration and told Mr Y not to use the turbine in the meantime.
17. Environmental Health was not happy with the noise report and asked for further testing and attenuation works. Mrs X and her neighbours continued to complain that Mr Y was operating the turbine and that they were being affected by noise from it. The Council asked them to keep diaries of when the turbine was running. They refused, saying the Council should gather the evidence itself. In particular, they said the Council should contact the National Grid as it would be able to say when the turbine was on. The Council did not do so. But in response to my provisional view it said it would consider approaching the National Grid in similar circumstances in future.
18. Mrs X said officers told them their diaries would not be evidence as they (the officers) had to witness the turbine when it was in use. Mrs X also said that the turbine was on permanently and so keeping a diary would have been an unmanageable undertaking. She went on to say that although she and her neighbours did not keep diaries they did complain to the Council, so it had a record of when the turbine was in use.
19. Between January and May 2013 officers from Planning and Environmental Health visited the site six times. On three occasions the turbine was not on, and on another it was being tested. It was running during two of the visits. In June the Council served Mr Y with a temporary stop notice requiring him to stop using the turbine. That notice expired the following month and the Council served Mr Y with an enforcement notice, again requiring him to stop using the turbine.
20. Mr Y continued to do noise attenuation works in consultation with the Council. In August he sent the Council another noise report. Environmental Health assessed the report, took noise measurements from the site and nearby properties, and decided Mr Y had demonstrated compliance with the condition regarding noise. Mrs X said it complied because Mr Y ran the turbine at only 80 per cent of its capacity. Mrs X also said Mr Y installed a ventilation grill but did not put in any noise insulation material. She believes the noise measurements should have been taken by an independent agency. In September the Council discharged the condition, but it did not tell Mrs X and her neighbours it had done so until a month later. Mr Y may now use the turbine.
21. Meantime, in August, the Council considered Mr Y's application for a stone weir. The Officer's report on the application said the metal plate had raised the water level and contributed to erosion of the surrounding area. The Officer said the proposed stone weir would create higher water levels but should not increase the

risk of flooding. He acknowledged some self-seeded trees in the upper millrace would die because of the higher water levels. But he said this would not materially compromise the surrounding woodland. The Council approved the application. Mr Y finished constructing the new stone weir in November. Mrs X said the weir is too high and, as Mr Y refuses to close the sluice gates, this contributes to the problems. Mrs X disputes the trees are self-seeded and they are on the bank of the millrace, not in the millrace itself. She said the Council failed to take into account the different levels of the banks and failed to attach conditions to the planning approval which might have prevented flooding.

22. Mrs X and her neighbours complained to the Council about its delay in taking action. The Council accepts it could have been more proactive when it received complaints about the turbine. It has reviewed this and similar cases. It said it would hold workshops to improve communication between departments and to learn lessons and identify good practice. The intention is that it will create new working practices to minimise similar situations arising.
23. Since the Council discharged the noise condition Mrs X and her neighbours have continued to complain about noise from the turbine. Their complaints are now being looked into by Environmental Health. I have not investigated the actions of Environmental Health following the discharge of the noise condition. Nevertheless, it is worth saying that when I wrote my provisional view officers had only heard the sound of rushing water during their visits. They did not consider this to be a statutory nuisance. Mrs X disputes the sound is solely that of rushing water. She said the sound is of water being forced at high velocity with a repetitive churning sound, and a constant tonal sound. Mrs X said the sounds were clearly audible in two of her neighbours' properties. She said the Council should have taken noise readings as part of the planning process and its failure to do so meant the planning application was seriously flawed.
24. Mrs X maintains there is ongoing flooding which is damaging trees and the local environment. She said the water level is higher than the level stated in the planning approval and this has led to flooding and erosion of the surrounding land. The Council does not accept there has been a breach of the flooding condition. It accepts that the water is higher than it was previously. But its view is that the millrace had been largely unused for some time and self-seeded trees had become established in it. The self-seeded trees are now under water because of the higher water levels. When the Council wrote to Mrs X in November it said the Environment Agency was monitoring flow rate. I do not know the outcome of this monitoring, but it may result in the level and flow rate being lowered. However, there is no planning restriction on the amount of water the millrace may contain.

Analysis of what happened

25. The key facts described above are not intended to be an in-depth account of what happened but a brief overview of the main events of Mrs X's complaint.
26. The Council accepts it could have been more proactive in its response to the complaints it received about the noise. I am surprised officers visited only six times in the six months following receipt of the first noise complaint, particularly given the number of complaints it received about this. In my view, the Council could have served the temporary stop notice (and therefore the enforcement notice) three months earlier had it responded to complaints more proactively.
27. I also think the Council could have contacted National Grid to get what information it had about when the turbine was in use. I welcome the fact it will consider doing

so in future in similar circumstances. Nevertheless, I see nothing wrong with the Council asking Mrs X and her neighbours to keep diaries showing when the turbine was in use and they were affected by noise. I realise that diary records alone would not be sufficient for the Council to take legal action. And I recognise that Mrs X and her neighbours contacted the Council regularly about the turbine. But they also said the turbine was on constantly. Yet when officers visited (see paragraph 19) they witnessed the turbine in use during only three of the six visits. The National Grid's records would have been a useful tool to show when the turbine was in use, but they would not have shown whether it was noisy. So accurate diary records have an important role to play.

28. I am surprised the Council did not monitor Mr Y's compliance with the enforcement notice it served in July. I realise Mr Y was doing noise attenuation works and testing the turbine, but he should not have been running the turbine other than for testing until he had complied with the noise condition. So I do think the Council could have done more to check Mr Y's compliance with the enforcement notice.
29. The Council is now taking the action described in paragraph 22. I welcome this. But I think the Council should compensate Mrs X and her neighbours for the uncertainty and unnecessary disturbance they suffered because of its failure to act sooner. The Council has agreed to my recommendations and these are set out in the next section.
30. The Council discharged the noise condition in September. It did so only after further inspections and testing by Environmental Health. Mrs X said the Council should have employed an independent agency to do the noise checks. There was no requirement for the Council to employ an independent agency and so I would not criticise it for failing to do so. I have found no fault in the Council's decision to discharge the noise condition. I cannot, therefore, criticise its decision to do so. I think it is worth saying that there was no requirement for there to be no noise at all, only that the condition regarding noise be met.
31. I turn now to the issue of flooding. There is a dispute between the Council and Mrs X about whether flooding is still an issue. Mrs X is adamant that flooding continues to be a problem. The Council says there is no breach of the flooding condition. Its view is that water is contained within the millrace, which has been brought back into use after a long period of disuse. Mrs X is concerned about trees which are now under water. She said the trees only became part of the millrace after the turbine was installed. However, it is the Council's view that the trees self-seeded the millrace when it was not in use. Whether or not the trees are self-seeded is not the issue in my view. The Council decided the trees' loss would not materially compromise the surrounding woodland. That was a view the Council was entitled to reach having taken relevant matters into consideration and is not one I would criticise.
32. I do think, however, that the Council took too long to deal with the metal plate. It was over five months before Mr Y sought retrospective planning permission to remove the metal grill and replace it with a stone weir. Again, I think the Council could have achieved this much sooner, and my recommendations took this delay into account. But there was no requirement for Mr Y to reinstate the metal grid. Nor would I criticise the Council for deciding not to take enforcement action once Mr Y made his retrospective application. This is in line with Government guidance.
33. There is still an issue with the water level in the millrace. Mrs X maintains that this is a planning matter which the Council should have addressed at the planning

application stage. I have explained in the final section why I have not investigated the planning application. In my view the current water level is not a planning matter. Mr Y had to get a Flood Defence Consent from the Environment Agency to ensure his turbine does not cause or make existing flood risks worse, or impact the local environment. If Mr Y's activities are causing flooding that is a matter for the Environment Agency.

Agreed action

- 34. I recommended that the Council pay Mrs X and her four neighbours £150 compensation each for the injustice they suffered because of the Council's delays.
- 35. I also recommended that the Council pay Mrs X a further £100 for the time and trouble she has spent pursuing the complaint.
- 36. The Council agreed to my recommendations.

Final decision

- 37. I have completed my investigation. I am satisfied that the agreed compensation is sufficient to remedy the injustice suffered by Mrs X and her neighbours because of the Council's delays.

Parts of the complaint that I did not investigate

- 38. I have not investigated that part of Mrs X's complaint about the Council's handling of the planning application for the turbine. I explained in paragraph 5 that complaints should normally be made to the Ombudsman within 12 months of someone becoming aware of the matters complained of. The Council approved the application in early 2011. If Mrs X was unhappy with the way the Council handled the planning application she should have complained to the Ombudsman within 12 months of the date the Council approved it. Mrs X did not complain to the Ombudsman until more than two years after the Council approved the application and so I see no reason to consider it now.

Investigator's decision on behalf of the Ombudsman