

# Report

on an investigation into  
complaint number 10 010 095 against  
Dudley Metropolitan Borough Council

22 March 2012

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The Local Government Act 1974, section 30(3) generally requires me to report without naming or identifying the complainant or other individuals. The names used in this report are therefore not the real names.

## Key to names used

Mr A

The complainant

## **Report summary**

### **Subject**

#### ***Enforcement***

Mr A complained on behalf of over 100 local residents that there had been unreasonable delay by the Council in controlling and taking action to limit noise, smell and other disturbance from a foundry. In March 2007 the Council issued a noise abatement notice. The foundry appealed against it but this was withdrawn and the notice took effect from 31 December 2007. Also in March 2007 the foundry applied for a permit to operate. The Council appointed consultants to advise on the application and in March 2009 the Council was minded to issue a permit. There was then a period of consultation and the final permit was issued in May 2010.

The foundry could not operate within the terms of the conditions on the permit and activity at the site ceased on 31 December 2010.

#### **Finding**

Maladministration causing injustice, remedy agreed.

#### **Remedy**

The Council to pay the occupiers of the 27 properties most directly affected £250 per household compensation and to pay Mr A £250.

## Introduction

1. Mr A complains on behalf of over 100 local residents who have been affected by noise, smell and other disturbance from a nearby aluminium foundry. He complains that there was unreasonable delay by the Council in controlling and taking action to limit the problems caused by the factory. The factory stopped work at the end of December 2010.

## Legal and administrative background

2. At the outset the activity of the foundry was regulated by the Council under the Pollution Prevention and Control (England and Wales) Regulations 2000. That regime was replaced by the Environmental Permitting (England and Wales) Regulations 2007 which came into force on 6 April 2008.
3. The regulations require that a permit is issued to control emissions to air including odour and noise. The Council must either grant a permit with conditions or refuse the application. An application must be refused if the Council considers that the environmental impact from the activity would be unacceptable or that an operator would be unable to comply with any condition that is likely to be set within a permit. Statutory guidance requires that if a permit is issued it should include conditions which ensure that there should be no reasonable cause for annoyance to local residents at their properties from odour or noise from the operations to which the permit relates. The applicant has the right of appeal to the planning inspectorate against any conditions he considers to be unreasonable.
4. The Council's scheme of delegation provides that a decision to grant a permit is delegated to the cabinet member for environment and culture.
5. The law provides that I shall not normally investigate a complaint about matters of which the complainant became aware more than 12 months previously. In this case I have exercised discretion to start my investigation in March 2007. I did so because the problems that are the subject of the complaint and the injustice claimed by the complainants have been ongoing over a period of time. I do not consider it practical to investigate further back and March 2007 is an appropriate place for the investigation to start, given the chronology I set out in paragraphs 6 and 7.

## Investigation

6. The land occupied by the foundry has a planning use class of B2 (general industrial use). A foundry started work on the site in late 2003. No specific planning consent was required. A noise abatement notice was served on the then operators of the site in February 2004. The Council prosecuted the operators for breaches of the abatement notice and they were fined £10,000 in June 2005. A different firm took over operation of the site in 2006.

7. On 12 March 2007 the Council issued a noise abatement notice with a compliance date of 4 June 2007. Also in March 2007 the foundry applied for an A2 permit under the Environmental Permitting Regulations 2007 and appealed against the noise abatement notice.
8. From March 2007 the Council has said that there were ongoing discussions with the foundry about the noise abatement notice, noise monitoring action and the submission of information by the foundry. Following a series of adjournments the appeal against the noise abatement notice was withdrawn on 7 January 2008 after agreement was reached between the foundry and the Council to amend the compliance date to 31 December 2007. This meant that the foundry could not be prosecuted for any breaches of the notice up to 31 December 2007. At this point a substantial amount of work had been undertaken by the foundry to abate the noise nuisance.
9. In May 2008 the Council appointed consultants to advise on odour and noise in relation to the permit. In June 2008 the Council received the odour consultant's report.
10. A file note refers to a meeting between officers in August 2008 to discuss the drafted committee report on the determination of the permit. The Council has explained that although the report was drafted in the form of a committee report it was not intended to be considered by committee. The recommendation of officers based on the application and the consultant's report then received (on odour) was that the permit be refused. The consultant's comments in respect of odour referred to in the report were that:

"[the foundry] has not provided evidence to show that the environmental impact of the process will be acceptable, on the contrary, the available evidence demonstrates that it is likely that there will be offensive odour from the foundry production process beyond the site boundary. Furthermore there is no evidence to demonstrate that steps will be taken by [the foundry] to prevent emissions of offensive odour beyond the site boundary."

11. It was agreed to await the noise report from the consultants and to set up a meeting with senior officers and members.
12. The noise consultants' report was received in September 2008 and was incorporated into the draft internal report. Paragraph 2.18 refers to the noise levels when last measured in 2008 as being higher in one location than when the previous company was successfully prosecuted in 2005 and the consultant's report is quoted as saying:

"Current noise levels from foundry operations will continue to give rise to reasonable cause for complaint. However, there are no proposals within the information submitted by [the foundry] to [the Council] which lead me to conclude

that [the foundry] are planning to take any steps to reduce existing noise levels from its operations.”

13. Paragraph 2.2 of the report concluded that:

“the reports from external consultants have confirmed that the foundry will not operate without causing annoyance to local residents by way of offensive odour and noise, and that [the foundry] have not submitted proposals to significantly improve the situation.”

14. There was no firm recommendation in the report either to refuse or approve the permit application but paragraph 6.2 said:

“that Members note that there are no current proposals from [the foundry] which [the Council] and our expert consultants can assess as ensuring that there is no reasonable cause for annoyance from odour and noise if a permit is granted.”

15. A file note dated February 2009 (five months after the consultant’s noise report was received) indicates that the permit application was with senior management.

#### **March 2009 meeting**

16. In March 2009 there was a meeting between senior officers, the then leader of the Council and the then cabinet member for the Environment. The draft internal report was considered. Notes of the meeting made by one of the officers say that “the serious implications and consequences of refusing the permit application were considered against the consequences of permitting the installation”. The note went on to say that the decision to issue a permit was taken on the basis that it offered the foundry the opportunity to demonstrate that it was capable of operating within national guidelines. And in commenting on the complaint the Council has said that although the foundry had not demonstrated that it could comply with appropriate conditions in respect of noise and odour that did not mean it was impossible for it to do so.
17. The officer who attended the meeting and made the note is a senior environmental health officer. He explained that his professional view was that the application for the permit should be refused. However the leader of the Council asked whether it was impossible for the company to comply with appropriate conditions and he could not say that it was absolutely impossible.
18. The leader of the Council explained that it would not be unusual for a cabinet member to come to him for a view on difficult or contentious matters. It was on this basis that he was involved in the March 2009 meeting. In his view the permit could be issued but if they were minded to do so then there needed to be a period of consultation. It was agreed to carry out the consultation and to meet again in May 2009.

19. The cabinet member's recall of the meeting was that there was still some information missing from the foundry and it was not certain that they could not comply with a permit with appropriate conditions. By issuing a permit it was putting the onus on the foundry to demonstrate that it could comply.
20. The consultation exercise resulted in two petitions being submitted: one of 165 signatories objecting to the approval of the permit and one of 145 signatories expressing concern about the need for robust conditions to control problems from the site. There were also other letters, telephone calls and emails of objection.

#### **14 May 2009 meeting**

21. After the consultation there was a further meeting with the leader of the Council. Also present was the chief executive, the head of environmental health and the principal environmental health officer. The notes of the meeting were made by the head of environmental health. They say that he highlighted the opinion of the consultants that there were no conditions that could be attached to a permit that would prevent annoyance to local residents and that his advice was that the application for a permit should be refused. The principal environmental health officer said that there were circumstances set out in guidance when an application must be refused and that those circumstances were present in this case.
22. The note records that the leader considered the decision to be very difficult but felt the Council should issue a permit with conditions accepting that the foundry might well appeal but then it would be for a Government inspector to decide. In response to a question about the reason for the decision, the leader suggested that the decision was made because of the current economic climate. The officer suggested as an alternative three reasons. In summary these were that it would give the foundry a chance to demonstrate compliance with permit conditions, to retain and safeguard employment and to enable effective enforcement.
23. The officer suggested that the leader should sign the decision sheet as it had been his decision on that day but the chief executive said it should be the cabinet member. The decision sheet needed to be advertised for six days which would be after the current cabinet member had retired so would fall to be considered by the new cabinet member.
24. At interview the leader said that his recall was that some officers were saying the foundry would never be able to comply with conditions but others that it may be possible if it was tried and tested. He said the chief executive advised that it was right to take into account economic and employment grounds. He considered that the foundry offered the sorts of jobs they wanted in the borough and that it could rise to 150 jobs if production increased. He felt that not issuing the permit would not have been a solution as the foundry would have continued working while it appealed against the decision.

25. In response to my enquiries on this point the Council replied that the regulations do not specifically exclude taking into account economic circumstances. It was felt appropriate for the Council, in the then economic climate of a recession, to consider such issues as the local economy and jobs. At the time, the number of jobs involved was in the region of 45 and it would have been irresponsible to exclude this factor in the deliberations.

### **The June 2009 decision**

26. A decision sheet was drafted recommending the permit be issued with conditions. The new cabinet member for environment and culture was briefed by senior officers on the background to the matter at a meeting on 22 May 2009. There is no record of the briefing meeting, which was attended by the head of environmental health and an assistant director. In June 2009 the decision sheet was signed by the new cabinet member and the director of the urban environment.
27. At interview the new cabinet member said that the Council had to be mindful of its responsibilities and could not be seen as an authority going out of its way to lose jobs. He said that issuing the permit with conditions was an appropriate way forward and gave the foundry the chance to see if they could comply.
28. The director who was the co-signatory to the report said he considered that it was a finely balanced decision but that the best way forward was to issue the permit with conditions. He said there was "half an eye" to the job situation.

### **Subsequent events**

29. The consultants who had advised on noise and odour were again appointed. A simple permit covering all aspects except noise and odour was issued on 10 November 2009. This contained conditions to control emissions relating to particulate matter (sand and dust) and were applicable immediately but there was no requirement to carry out emission monitoring until the specified compliance dates listed in the permit. When monitoring was carried out in December 2009 a particular source of particulate emissions was identified and full refurbishment of the unit was completed in April 2010. The Council did not consider that prosecution was reasonable as it was satisfied that the foundry was taking reasonable steps to resolve the problem.
30. By June 2010 the foundry had not installed all the required continuous monitors but the positions where they were required were not considered to be likely sources of particulate emissions.
31. A permit covering the noise and odour issues was issued in May 2010. The Council carried out noise monitoring immediately and determined that it was unlikely that the levels required by the permit would be met and informed the foundry. Further monitoring took place in August 2010 and confirmed that the



conditions were being breached. In November 2010 the Council was preparing to prosecute the foundry for breaches of the permit in respect of noise.

32. In respect of odour, the Council did not undertake any monitoring as it considered that it was necessary for the foundry to comply with the permit conditions in terms of control at source, containment and treatment and dispersal of odour. The foundry had not complied with the permit conditions so there would continue to be unacceptable emissions of odour.
33. The foundry announced in September 2010 that it could not comply with the permit conditions and remain a viable business and would stop casting on 23 December 2010 and would vacate the site by 31 March 2011.
34. Throughout the operation of the foundry, complaints were made by local residents and other affected occupiers about noise, odour and particulate fallout. The Council replied to Mr A's complaint on 18 November 2010.

### **The Council's position**

35. The Council has referred to section 79(10) of the Environmental Protection Act 1990 which requires the permission of the Secretary of State to prosecute (for the breach of an abatement notice) if it is possible instead to take such action under the Pollution Prevention and Control Act 1999 (the PPC Act) as is the case with the foundry. The Council therefore considered it should determine the A2 permit application which would contain specific conditions to control noise emissions rather than pursuing the noise abatement route. It considers that there were uncertainties about the legalities of taking nuisance action where an activity was subject to controls under the PPC regime although the position has now been clarified following a court case. The noise abatement notice was active throughout the period but for the above reasons the Council did not prosecute for the breach of the notice.
36. In July 2010 officers sought the advice of the Department for the Environment, Food and Rural Affairs (DEFRA). The email said that the Council was having problems from the site with noise and odour and was receiving many complaints. It asked DEFRA about obtaining the Secretary of State's consent to proceed with a prosecution for a breach of the abatement notice. Officers also asked about the process for pursuing enforcement action for a breach of the conditions on the A2 permit. The Department replied immediately. The advice was equivocal but indicated that it was theoretically possible to enforce the permit conditions although a court may be reluctant to hear a case where an appeal was outstanding. It is unclear why the Department referred to an outstanding appeal as there was no outstanding appeal in this case.
37. At interview, the legal officer said that in the three years from January 2008, if evidence of breaches had been collected while the permit was being considered, it would have been possible to prosecute. He understood that priority was given to determining the permit rather than in gathering evidence of breaches of the

abatement notice. He reported in a memo dated 28 February 2011 that he considered it was still expedient to prosecute even though the foundry had ceased trading as it appeared that it had polluted throughout 2006-10, had breached the terms of the abatement notice and permit conditions and it was in the public interest to do so.

38. In commenting on a draft of this report the Council has said that it does not consider that a successful prosecution for non-compliance with the noise abatement notice was certain or, even if it was, that the resulting fine on the foundry operator would have improved conditions for residents at a much earlier date.

### **Impact on residents**

39. The Council accepts that residents have been affected by noise, odour and particulate fallout. The degree of impact varies depending on proximity to the site and the location within the site of various pieces of equipment and processes. The intensity of the operation has varied; at some times the sand reclamation part of the operation operated 24 hours a day, seven days a week; generally the foundry operated two shifts Monday to Friday and until midday on Saturday. The Council received complaints from 12 households between 1 January 2008 and 31 December 2010.
40. While the foundry was operating residents describe windows rattling because of the noise, sand deposited over gardens and cars, being unable to sit in their gardens and disturbed sleep. Many report what they describe as 'obnoxious smells' and those that suffer from breathing problems of the worsening of their conditions and worries about the longer term impact on their health.

### **Conclusions**

41. It is clear to me that the foundry has been a source of considerable annoyance to local residents over a number of years and the Council has accepted that there has been ongoing disturbance caused by noise, odour and particulate emissions. So there is a clear injustice here. On the basis of the evidence I have seen, I have to decide if there was fault on the part of the Council in handling these matters which contributed to that injustice.
42. The prime responsibility for disturbance lies with the foundry operators and regulations are in place to protect the environment for people living in the locality. However, there is a duty on the Council to monitor and enforce regulations appropriately and quickly. This is a duty that I would expect Council officers and members to take seriously given the particular role of the Council in ensuring community well-being.
43. As set out in paragraph 3 of this report, an activity such as a foundry requires a permit to operate, which controls emissions to air, including odour and noise. It is the duty of the foundry operator to apply for the appropriate permit. It is the duty

of the Council to properly consider the application, in good time, and decide whether to grant or refuse it. If the application is granted, appropriate conditions should be included to ensure that there is no unreasonable disturbance to local residents. If the permit is refused then the activity may no longer continue.

44. I have considered the history of the operation of the foundry since March 2007 and am satisfied that the Council was taking appropriate actions swiftly and properly in relation to statutory nuisance until the end of 2007.
45. It took from March 2007, when the permit application was put in, to May 2010, to issue it with appropriate conditions. This was a period of just over three years, during which residents were exposed to environmental disturbance. I have to consider whether there was unreasonable delay in issuing the permit.
46. Following receipt of the permit application it took the Council over a year to appoint consultants to advise them on the application, in May 2008, and then over a further year to formally take the decision to grant the permit, in June 2009. It then took nearly a further year for consultants to complete drafting the conditions which needed to be applied, before the permit was issued in May 2010. I do not criticise the Council for their actions after May 2010 where appropriate monitoring was conducted to enforce the permit conditions and a prosecution was being prepared even after the foundry had given notice of closure.
47. I accept that throughout this period the Council had to take account of the best use of resources in deciding which course of action to take and also the most viable option to achieve a successful outcome. But this meant that no action was taken to control the ongoing disturbance generated by the foundry. The Council's legal officer considered that if the necessary evidence of ongoing breaches of the abatement notice had been gathered then it would have been possible for the Council to bring a prosecution from January 2008 and for the entire period during which the permit application was being considered. I note the Council's comments at paragraph 38 above but I consider it is likely that a successful prosecution could have improved conditions for residents at a much earlier date. And it may well have been possible to serve further abatement notices in respect of smell and particulate fallout and to prosecute for breaches. Such action would have increased the pressure on the foundry to ensure the operation did not cause disturbance and to consider whether it could operate in that location.
48. I have concerns with the decision-making process to grant the permit, which I believe contributed to the delay. The Council was entitled to grant or refuse the permit. I accept that the decision-makers wished to take into account the local economic context and I have no grounds to criticise the decision itself. However, guidance says that a permit application must be refused if it is considered that the environmental impact from the activity would be unacceptable or that an operator would be unable to comply with any condition that is likely to be set within the permit. This was the professional advice of officers and external consultants informing the decision-making process. It seems that the decision to grant the

permit necessitated complex drafting of conditions which understandably took some further time. Events after May 2010 supported the professional view as the business was unable to comply with conditions and eventually closed.

49. I have also noted that the delegated procedure for taking the decision about the permit, which the Council was entitled to do under its scheme of delegation, lacked transparency and meant that local residents, who had submitted two petitions to the consultation exercise, lost an opportunity to make representations in public to a committee of local councillors.
50. I recognise that some of the delay in this process was due to the decision-making in respect of the permit which I refer to in paragraph 48 above but for the reasons given in paragraphs 46 to 49 I conclude that there has been maladministration by the Council in the time taken to issue the permit and its failure to properly consider how it could control nuisance from the site.
51. This leaves the complainants uncertain as to whether the operations at the foundry might have ceased at an earlier date or the disturbances been controlled sooner had there been no maladministration.

#### **Remedy**

52. Mr A complained on behalf of local residents. I have considered the circumstances of those living in the vicinity of the foundry and taken into account descriptions from local residents referred to in paragraph 40 above. I conclude that many households have been caused unnecessary disturbance but I consider those closest to the site will have been most affected. I have considered a plan of the site and the houses closest to it and have identified 27 properties which I consider likely to have been most affected by disturbance from the site. I consider that each of these households should receive a payment of £250 to remedy the uncertainty and loss of amenity and distress caused. The Council should also pay Mr A £250 for his time and trouble in pursuing the complaint.
53. The Council has agreed to implement my recommendations and I am grateful for its willingness to make amends. I have nevertheless completed my investigation and made public my findings, as I consider this to be in the public interest.



**Dr Jane Martin**  
**Local Government Ombudsman**  
**The Oaks No 2**  
**Westwood Way**  
**Westwood Business Park**  
**Coventry CV4 8JB**

**20 March 2012**