

Business Guides



Statutory nuisances and how to react to service of smell, noise and other abatement notices Business Guide Ref: 079

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Statutory nuisances and how to react to service of smell, noise and other abatement notices

INTRODUCTION

A range of farm activities can occasionally produce noise, smell or other air pollution of sufficient intensity to be regarded as a "Statutory Nuisance" by a local authority. In such cases, where a local authority is satisfied that a statutory nuisance is likely to occur or recur in the future, the local authority may issue an Abatement Notice. Non-compliance with such a notice can result in the local authority initiating criminal proceedings.

This NFU Business Guide provides general information and guidance for NFU members on steps to take if served with an Abatement Notice. NFU members can also obtain free initial legal and professional advice from NFU Call First on 0870 8458458. This document cannot take account of the specific facts of any particular situation, so it is important to take advice relating to your own circumstances from a solicitor in private practice if a formal notice has been served. NFU Call First can refer you to the NFU panel firm of solicitors for your area if you would like them to do so.

THE LAW: THE ENVIRONMENTAL PROTECTION ACT 1990 PART III

Section 79(1) of the Environmental Protection Act 1990 (the EPA 1990) the following matters are capable of being a statutory nuisance if they are either prejudicial to health (i.e. injurious or likely to cause injury) or a nuisance (i.e. they interfere with the personal comfort or enjoyment of other local residents):

- The physical state of premises;
- Smoke emissions;
- Fumes or gas emissions;
- Any dust, steam, smell or other effluvia arising on industrial, trade or business premises;
- Any accumulation or deposit (e.g. a dung heap, rubbish);
- Any animal (including the manner in which it is kept);
- Insects emanating from relevant industrial, trade or business premises (which for this purpose does not include land used for arable, meadow, pasture, market gardens, nurseries or woodland);
- Artificial light emitted from premises;
- Noise (including noise caused by a vehicle, machinery or equipment in a street); and
- Any other matter declared by any Act or Statutory Instrument or regulation to be a statutory nuisance (i.e. a catch-all phrase for future additions).

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ROLE OF THE LOCAL AUTHORITY

Monitoring

Every local authority has a duty to:

- inspect its area from time to time to detect statutory nuisances, and
- take reasonable steps to investigate complaints of nuisance made by any person living in its area.

For the purpose of carrying out the above duty a local authority may authorise a person (or persons) to enter a premises at any reasonable time. Wilful obstruction of such authorised persons is a criminal offence.

Visits by the EHO

In general, where there is a possible problem, the local authority's Environmental Health Officer (EHO) will visit the premises (sometimes on many occasions) to discuss the situation with the occupier and agree, if necessary, a schedule of works designed to eliminate the problem, before resorting to legal proceedings. This is especially true in the case of smell problems where it can be difficult to gather evidence for proceedings.

The EHO will decide whether there is a statutory nuisance and if there is, whether it is likely to recur. A one-off incident is unlikely to result in any action being taken.

Abatement Notices

If a statutory nuisance is found to exist, or if one is likely to occur or recur, a local authority has a legal duty to serve an Abatement Notice requiring:

- abatement of the nuisance, or
- prohibition or restriction of its occurrence or recurrence, and/or
- the taking of steps and carrying out of works for these purposes.

The Abatement Notice will specify a time limit (or limits) for compliance with its requirements.

In some cases a local authority will issue a draft notice. In such circumstances, recipients are sometimes able to negotiate some alterations to the terms of the Notice with the local authority. If the terms are agreed it can be difficult to appeal against the Notice at a later date; for that reason, it is worth taking independent advice before entering into such negotiations, and giving careful consideration to the implications the terms may pose for the business. NFU Regional Offices can assist members with the selection of suitable experts to instruct in relation to this; contact details can be found on the NFU website, at <http://www.nfuonline.com/regions/>.

Service of Notice

If the local authority serves an Abatement Notice, it is normally served on the person responsible for the nuisance, except:

- where the nuisance arises from a defect of a structural nature, when it is served on the owner of the premises; or

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- where the person responsible for the nuisance cannot be found, or the nuisance has not occurred (i.e. it is merely anticipated), when it is served on the owner or occupier of the premises.

WHAT TO DO IF YOU ARE SERVED WITH A NOTICE

Appeal Procedure

Never ignore an Abatement Notice served on you. Any appeal must be lodged at the Magistrates' Court within 21 days of the service of the Notice. If you do not lodge an appeal within this limit, you will lose the opportunity to do so and the requirements of the Notice will become binding on you. It is important therefore to seek legal advice as soon as reasonably possible after service of an Abatement Notice.

If an appeal is lodged experience has shown that some local authorities may try to compromise rather than get involved in expensive Magistrates' Court proceedings. It is advisable to take independent advice regarding the negotiation of terms with the Local Authority as any resulting agreement will be binding. Any compromise must be sanctioned by a Court Consent Order otherwise the Abatement Notice will remain technically in force.

Most Abatement Notice conditions will be suspended until the outcome of the Magistrates' Hearing. However, if the nuisance:

- is actually injurious to health, or
- is of limited duration, or
- the costs of remedial works are not disproportionate to the public benefit to be gained

the Notice may include a statement that immediate remedial measures will be required before the appeal is heard, and which of the above reasons for this apply.

Grounds for Appealing Against an Abatement Notice

The grounds on which an appeal may be based include the following:

- the Notice is not justified (i.e. no/insufficient nuisance is being caused);
- a technical defect or error in the preparation of the Notice;
- the authority has unreasonably refused to accept compliance with alternative requirements, or the requirements of the Abatement Notice are unreasonable in character or extent, or are unnecessary;
- the time limit (or limits) for compliance with any of the requirements of the Notice is insufficient for the purpose;
- where applicable, the best practicable means were used to prevent, or to counteract the effects of the nuisance (see below);
- the Notice has been served on the wrong person and should instead be served on:
 - the person directly responsible for the nuisance, or
 - in the case of a nuisance arising from any defect of a structural character, the owner of the premises, or
 - in the case where the person responsible for the nuisance cannot be found or the nuisance has not yet occurred, the owner or occupier of the premises;

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- the Notice might lawfully have been served on some other person instead of or in addition to the appellant and it would have been just and reasonable for it to have been so served.
- In the case of noise, that the requirements of the Notice are more onerous than the requirements of other notices/consents/legislation in force (e.g. provisions for noise on construction sites under the Control of Pollution Act 1974).

Any one (or more) of the prescribed grounds may be used as the basis for an appeal if they apply to the particular case being considered, although some of the grounds are specific to a type of nuisance. Appeals that are not based on a valid ground for appealing are unlikely to succeed, so it is important to ensure that appropriate grounds for appealing are selected.

It is important to seek legal advice as soon as possible after service of the Notice in order to ascertain whether any of the above or other prescribed grounds may apply.

THE APPEAL

On the hearing of the appeal the Court may:

- quash the Abatement Notice to which the appeal relates; or
- vary the Abatement Notice in favour of the appellant in such manner as it thinks fit; or
- dismiss the appeal.

The Court will also decide which party should pay the costs of the Appeal.

WHAT TO DO IF YOU DECIDE NOT TO APPEAL

If you decide not to pursue an appeal, you should then comply with the Abatement Notice as soon as possible and in any case within the time limit(s) contained in it.

FAILURE TO COMPLY WITH AN ABATEMENT NOTICE

Non-compliance with an Abatement Notice without reasonable excuse is a criminal offence, with a possible fine of up to £20,000 in the Magistrates' Court. A local authority may also bring civil proceedings in the High Court, when it considers that the remedies available in the Magistrates Court are inadequate (e.g. to obtain an injunction to prevent the nuisance continuing). Local residents who are affected by the nuisance could also bring civil proceedings to obtain an injunction to prevent the nuisance continuing and/or to recover damages (see below).

If you are convicted of an offence you may be liable to pay for the prosecution costs and the Notice will remain in force. The Local Authority may also abate the nuisance (i.e. take steps itself to prevent the nuisance recurring) and recover the expenses they incur in doing so from you. Such expenses may carry interest and may be a charge on the premises.

THE DEFENCE OF BEST PRACTICABLE MEANS

In some proceedings it is a ground for appeal and a defence to prove that the "best practicable means" have been used to prevent or counteract the effects of the nuisance. This applies when the nuisance arises on industrial, trade or business premises (e.g. farming premises) except where the nuisance is the result of smoke (unless it is emitted from a chimney), fumes or gas emissions or falls within the final catch-all category. If the defence is proven then the defendant cannot be convicted of failing to comply with an Abatement Notice.

"Best practicable" is defined as reasonably practicable having regard (among other things) to local conditions and circumstances, the current state of technical knowledge and the financial implications of implementing the measures.

"Means" includes the design, installation, maintenance and manner and periods of operation of plant and machinery, and the design, construction and maintenance of buildings and structures to be employed to rectify the problem.

As with an appeal, bringing a case before the Magistrates' Court can be stressful and expensive and this can encourage a negotiated settlement. As always, it is important to consider the implications of anything that is agreed, as the agreement will become binding. In most cases it is likely to be beneficial to seek independent advice and assistance when negotiating terms with the local authority.

Satisfying the Best Practicable Means Test

In order to rely on this defence, an individual is likely to be required to demonstrate that they are:

- following any relevant codes of conduct relating to the activity alleged to give rise to the nuisance. Practices not covered by the Code may also be considered as good agricultural practice, but expert evidence may be required to support the assertion that these practices are good agricultural practice;
- carrying out such treatment or remedial measures as are economically feasible to your particular type of business to eliminate or reduce the nuisance.

THE RIGHTS OF INDIVIDUALS TO BRING PROCEEDINGS FOR STATUTORY NUISANCE

In addition to local authorities, any person may make a complaint to a Magistrates' Court on the ground that he/she is aggrieved by the existence of a statutory nuisance. Complaints from individuals should, therefore, be treated with care. If you receive a complaint from an individual (e.g. a neighbour) it may be worth seeking independent professional advice before responding, as any correspondence may be produced later in the event that a claim is brought. Individuals may also wish to claim compensation for any harm caused by the nuisance through a civil claim. That said, maintaining a good relationship with neighbours can sometimes reduce the chances of problems arising.

CONCLUSION

Nuisance cases are inevitably very dependent on the facts and circumstances involved in each case. What is a nuisance in one location and set of circumstances may not be in a different location and set of circumstances. In the event that an abatement notice is served or civil/criminal court proceedings are threatened or issued it is essential that independent professional advice is sought as soon as possible.

The NFU can take no responsibility for any consequences arising from individual circumstances which cannot be fully accounted for in this draft document. It is advisable to seek professional advice.

For free initial Legal & Professional advice NFU CallFirst 0870 845 8458

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