

## **EXECUTIVE – 16 April 2014**

### **OMBUDSMAN REPORT - MALLORY PARK**

#### **REPORT OF CHIEF EXECUTIVE**

#### **WARDS AFFECTED: NEWBOLD VERDON WITH PECKLETON AND DESFORD**

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Hinckley & Bosworth  
Borough Council

*A Borough to be proud of*

#### **1. PURPOSE OF REPORT**

To advise Members of the findings and recommendations from the Local Government Ombudsman (LGO) into two separate, but related, complaints from residents of Kirkby Mallory, to agree a response to the LGO from the Council and to seek approval for the outline content of a new Notice to the new track operators - Real Motorsport Ltd (RML).

#### **2. RECOMMENDATION**

That the Executive:

- a) accepts, subject to any challenges/comments on general tone and content, the findings and recommendations on the report from the Local Government Ombudsman;
- b) instructs the Chief Executive to action the recommendations immediately;
- c) in pursuance of the recommendations/remedy set out in paragraphs 72 and 73 of the report from the Local Government Ombudsman, agrees that a Notice be served on RML, based on the principles set out in section 5.5 (d) of this report, taking into account the full responses to the resident consultation and any representation from RML, received at the meeting;
- d) agrees, if considered appropriate, a time limit for the Notice, taking into account the options set out in section 5.5 (e) of the report;
- e) agrees that the specific content of the Notice be delegated to the Chief Executive and Chief Officer (Environmental Health), in consultation with the Executive Member, for immediate service on RML.

#### **3. BACKGROUND TO REPORT**

- 3.1 Members of the Executive will recall the meeting on 10 July 2013, where endorsement was given to officers pursuing the court action against the former track operators, Mallory Park Motorsport Ltd (MPML), vigorously on the terms of the 1985 Notice, as understood post January 2013.
- 3.2 The Council was successful in that action in August 2013 and that proved to be an important element in MPML entering Administration in September 2013 and being liquidated in November 2013. Subsequently, Real Motorsport Ltd (RML) has agreed a lease with the owners of the track, Titan Properties, and began operation earlier this month. RML have written to all residents and provided a

calendar of proposed use for complainants with which they will comply voluntarily, until such time as the Council has received and considered independent legal advice, as the basis for serving a new Notice; the 1985 Notice having lapsed with the liquidation of MPML.

- 3.3 Members should note that this calendar involves a significant reduction in activity, as compared with actual levels over the last ten years, and guaranteed noise-free weekends at least once a month over the summer period. The company has already installed monitoring equipment within the circuit to assist in monitoring and controlling noise, temporary bunding and held a public meeting with residents.

#### 4. **OMBUDSMAN REPORT (APPENDIX A)**

- 4.1 The 10 July 2013 report made reference to formal complaints having been lodged with the Local Government Ombudsman - one had been submitted by a couple; the other by a couple on behalf of 47 residents. Those complaints were lodged in May and November 2012 respectively. The final report from the Ombudsman was received by the Council on 5 March 2014.
- 4.2 As Members will see, the Ombudsman is critical of the time taken by the Council to address the complaints made to it by residents, initially from Mr and Mrs X, in 2011. It is for that reason that the remedies set out at the end of the report have been recommended.
- 4.3 Whilst there are mitigating circumstances, which we had raised with the Ombudsman prior to the completion of the report, and which are detailed below, there is no getting away from the fact that this process took longer than it should have done and the Council should agree to the recommended remedies.
- 4.4 For the record, Members are asked to note the following, which were referred to the Ombudsman, but which are not mentioned in the final report.
- i) It has not been recognised that the decision, following the advice of our Barrister, to take a "sample" of five breaches was legitimate and that this step was essential before any application could successfully be made for any injunction. To have identified and served further additional breaches on the Operator would not have influenced the outcome of the enforcement action; on the contrary, it may have delayed it further or even questioned the enforceability of aspects of the notice.
  - ii) There is little recognition of the wider context of this situation. Whilst the narrow legal requirements in relation to noise nuisance do place the focus on addressing the nuisance solely in relation to the citizen(s) affected, the Council does have a wider power to preserve and promote the economic wellbeing of its area, as provided in the Local Government Act 2000 (section 2[4]). The use of these powers has been particularly relevant in the economic circumstances faced across the country since 2007/08 and an expectation that we do so was voiced in particular by the local MP in relation to Mallory Park. This approach was also supported by the Executive and the Ward Councillor, who initially chaired the discussions with residents in the village.

- iii) There is no recognition that, albeit after a period of two years from the initial discussion with them, the former operator (MPML) went into administration only six weeks after the conclusion of the court action and has subsequently been liquidated. This does not support the conclusion that the Council put the interests of the commercial operator before those of local residents!
- iv) It should be acknowledged that the previously accepted interpretation of the 1985 Notice is ambiguous and can be interpreted to allow two full noise days and one practice day per week, in addition to the 40 race days per year. The level of activity allowed and practised by the operator, therefore [endorsed by the son of the family (the Overends) who operated the track for 20 years and who was involved himself] could be and was as high as 196 days a year. It is accepted that this is contrary to the advice received only in February 2013, but it was the commonly held interpretation over a 20+ year period. No challenge to that interpretation was made until late 2012.
- v) The information (legal and otherwise) provided by the complainants did not affect either the timing of the court action or its content. Application to the court concentrated on that area (Saturday activity) where the Council had a strong case in favour in securing a positive outcome.
- vi) Subsequent to the publication of the report by the Ombudsman, the family who operated the track for many years prior to 1985 formally contacted the Ombudsman, raising concerns about factual inaccuracies in the report; facts of which they had direct knowledge; significant in which was the fact that the circuit actually operated at full noise levels on up to two weekdays in addition to Wednesdays and Sundays. In making these comments also, they made very positive comment about the role and approach of the officers of the Council in all their dealings with them.

4.5 The Planning Service has already met with the new operators to give advice on the pending retrospective planning applications relating to construction of areas of bunding around the circuit and other planning issues on site. Advice has been given to submit a suitable noise report on the effect of these bunds to support the applications. This was requested of the previous operator but not received, preventing determination.

RML are believed to be currently undertaking testing on the circuit to identify areas where noise impacts on the surrounding properties, with the intention to erect temporary features to prove their effectiveness or re-profile existing bunds. They have been advised to liaise with the Environmental Health Service on this. If the proposals are proven to be beneficial, and should these require planning consent, applications or amendments to the existing applications will be sought. If obvious progress is not made in assessing the noise issue (assessment) at the site, then enforcement action, and/or the appropriate determination of the applications, will be considered. A more detailed breakdown will be provided to the Ombudsman as required in the recommendation. It is recognised that the new operator has inherited a number of planning issues, but these were pointed out from early discussions as requiring early resolution.

## 5. INDEPENDENT LEGAL ADVICE

5.1 One important recommendation in the report states:

*"Any new negotiations [with the operator] must be informed by independent legal advice about an acceptable level of nuisance causing activity in the location as most of the village is within 500 metres of the racetrack."*

5.2 This advice was commissioned from a Counsel familiar with this area of work. As it is 'privileged' information for the Council, it is not reproduced with this report. However, a confidential copy has been submitted to the Ombudsman, as evidence that the Council has implemented this recommendation and as background to the recommendations in this report. A further confidential copy is available from the Chief Officer (Environmental Health).

5.3 It is necessary and legitimate, nevertheless, to summarise the main points in the Independent Advice, prior to making comments and recommendations, so that Members have the necessary context.

- a) The basic principle is that, as there were few complaints prior to July 2011, activity prior to that point was 'an acceptable level of nuisance' (LGO).
- b) From the most reasonable calculations, the level of annual activity (exclusive of the non-noisy days permitted by Clause 11 of the 1985 Notice) was less than the 166 proposed by MPML in May/June 2013, but significantly greater than the 92 days in the strict interpretation of the 1985 Notice
- c) Limits to Saturday use had been established by the judgement in the August 2013 case against MPML.
- d) Comparisons with activity/noise at other events around the country is inconclusive.
- e) The 'Fen Tigers' judgement of the Supreme Court seems to have the "possibly unintended consequence that councils who are required to issue abatement notices must take into account public interest in motor racing" (paragraph 12 of the Advice).
- f) "There is no legal answer to the question, 'What is an acceptable level of nuisance?'" Ultimately, it is for the Courts to decide on the specific facts of each case.

5.4 It would, of course, be perfectly legitimate for Executive simply to accept the overall conclusions of the advice and agree to levels of activity considerably above those allowable under the strict interpretation of the 1985 Notice. The advice is, after all, 'independent' and has taken into account all the aspects required by the Ombudsman. It is the case that there is 'no legal answer'.

5.5 However, Members are advised to take a robust and detailed approach, which the Advice allows, for the following reasons:

- a) Whilst negotiation of a 'balance' is advised as the appropriate way forward, in all the circumstances, and we are advised that the Council is entitled to take into account the wider public interest in motor racing, we are strongly advised also by the LGO that significant priority in any such balance must be given to the rights of the residents of Kirkby Mallory to a quality of life far better than some have experienced in the last three years.
- b) Moreover, consultation with residents of the village in May 2013 revealed a significant proportion (by 2:1) strongly rejected a proposal which would have had around 166 days' activity per year. Because it was such a 'strong' rejection, a reduction to a level much closer to 92 days must be considered
- c) Not only that, any allowance even at such a lower level could only be used if there were reduced activity on Saturdays and Sundays; certainly in summer months. Constant activity at weekends was at the core of the many complaints received in 2012/13. Any overall allowance must be:
- distributed to provide a more acceptable level of weekend (especially Saturday and Sunday) activity
  - at reduced noise levels
- d) Notwithstanding the view offered above, RML are strongly of the view that the 92 days allowable under the 1985 Notice's strict interpretation, in a 'normal' year (i.e. not 2014), will be unviable for them. The figure of 92 per annum is proposed, nevertheless, as it is seen to be:
- \* the figure which enables limited two-day weekend use of the track over the summer period.
  - \* the figure which is the absolute minimum at which RML say they can viably operate this year. In subsequent years, they would wish to renegotiate a higher level (see below)
  - \* the figure which allows activity on the remaining either Saturdays or Sundays (the 1985 Notice allowed 40 Sundays' activity, of which 4 could be Saturdays as part of a two day activity); this will allow a maximum of 28 Saturdays/Sundays in the summer, including a maximum of 7 combinations of Saturday and Sunday activity.
  - \* the figure which allows one weekend per month to have no noisy activity.
  - \* the figure which allows noisier use on one week day, similar to the every Wednesday, as allowed by the 1985 Notice.
  - \* the figure which allows use on 15 'other' weekdays' in the year, in addition to the single weekday (see above). There will be a maximum two weekdays' use in any one week.
  - \* part of an arrangement which will not allow any three consecutive day weekend (Friday, Saturday, Sunday or Saturday, Sunday, Monday) activity.

\* part of an arrangement in which allows activity on all other weekdays provided that it is below the 'non-noise-producing' event levels contained in the 1985 Notice

- e) To respond to the representations of RML, Members may wish to consider one of three options, all of which retain 92 days as the allowable level of activity within the Notice:
- Suspend the serving of a Notice for (say) two months, to enable fuller measurement and track modifications to take place.
  - Serve the Notice immediately, with a commitment to review activity after three months' – the end of July 2014 – with the potential to serve a revised Notice immediately on completion of the review;
  - Serve the Notice immediately with a time limit to the end of December 2014, with a view to reserving it unchanged, unless improvements in the impact from activities are made which justify amendments in favour of RML, resulting in the serving of a new Notice for 2015 onwards.

The last option is the one recommended to Members for adoption

- f) In all three options, any review would take into account the level of conformity with the provisions of the Notice by RML (activity levels and noise), the physical rearrangements at the track, the monitoring and evaluation of substantiated complaints, and effective engagement by RML with village residents.
- g) In the longer term, the Council will make it clear that any Notice from 2015 onwards will be subject to noise limits relating to drive by levels to control days at a target noise level at the nearest façade of property e.g. 'X' days at 'A' dBI and 'Y' days at 'B' dBI etc., to be determined by detailed monitoring and negotiation before the proposed Notice expires.
- h) The Council has sought to consult on a detailed framework based on the above principles, but with a limit of 105 days and specific noise levels, which was circulated to the village residents with a request to feedback prior to this meeting. Analysis of initial comments, received prior to the writing of this report, indicated a wide range of views, including those supporting increased levels and those strongly objecting to the proposal of 105 days with noise level controls. It was also commented that it was difficult for residents to comment on a complex proposal and understand noise level figures. It is considered more appropriate and more straightforward, therefore, to recommend that a temporary Notice be served, along the lines suggested earlier (5.5 (d)), which enables the operator to carry out the improvements in 2014 and enables residents to judge the improvements prior to any proposals to change levels of activity. The full results of the consultation (which closes on 14 April) will be reported to the Executive at the meeting.

## 6. **FINANCIAL IMPLICATIONS [KP]**

- 6.1 The Local Government Ombudsman recommends in the aforementioned report that costs of up to £8,500 could be awarded as a result of complaints lodged. During 2013/14 the council incurred costs of £16,666 on the legal proceedings and, whilst awarded £23,400 in costs by the Court, none has been received to date from the liquidated company. In addition to this, the Council has expended £7,500 on legal costs to date for this new case and further action could result in significant additional costs.
- 6.2 As part of the outturn procedure for 2013/2014, it is recommended that up to £50,000 of savings in year are transferred to an earmarked "Enforcement Reserve". A supplementary budget of £20,000 has been agreed by the Deputy Chief Executive (Corporate Direction) in accordance with financial regulations for 2014/2015 to meet current and any future costs arising from the case or recommended by the Ombudsman. This will be funded from enforcement reserve to mitigate any impact on the General Fund.

## 7. **LEGAL IMPLICATIONS [ST]**

The original abatement notice was dated 18 December 1985 and served following negotiations with the then operators of the Mallory Park circuit. Case law has decided that it was valid, notwithstanding the coming into force of the current legislation, namely the Environmental Protection Act 1990 (EPA 1990).

The Notice was enforced in the present case in 2013 with the result that the operator, Mallory Park (Motor Sports) Limited, went into liquidation; it now therefore stands lapsed.

Under S. 80 of the EPA 1990, we are obliged to serve an abatement notice on the operator if satisfied that a statutory nuisance, as defined under s. 79, exists or is likely to occur or recur. To serve the Notice, it is necessary to establish the existence, or the potential thereof, of the statutory nuisance. This must be done by assessing evidence relating to complaints of the nuisance.

The owners of the circuit have leased it to Real Motorsport Limited (RML) as operators. Negotiations are taking between the parties. The recommendation contained in the Ombudsman's Report is to seek legal advice with a view to serving a new Notice on RML.

This independent Advice has now been received. The content of the Advice document is considered as Legal Professional Privilege and, as such, is deemed confidential in its form. An aspect of the Legal Advice suggests the service of a Notice which is initially for a given and fixed period of time. This enables the operators of the circuit to put into place measures, some of which involve the carrying out of physical works to some of the circuit as well as monitoring for noise

8. **CORPORATE PLAN IMPLICATIONS**

The considerations and conclusions/recommendations in this report have particular relevance to the elements in the Council’s Corporate Plan relating to Cleaner and Greener Neighbourhoods (minimising environmental nuisance).

9. **CONSULTATION**

Further consultation has been instigated with village residents on the content of a new Statutory Notice, to end at midnight on 14 April, and is reported as a late item to Members to assist in their consideration and construction of the Notice provisions. Responses received by 7 April have been used in the framing of this report, so that any clear misunderstandings or need for clarity can be addressed. Any representation from RML will be circulated to Members also.

10. **RISK IMPLICATIONS**

It is the Council's policy to proactively identify and manage significant risks which may prevent delivery of business objectives.

It is not possible to eliminate or manage all risks all of the time and risks will remain which have not been identified. However, it is the officer's opinion, based on the information available, that the significant risks associated with this decision/project have been identified, assessed and that controls are in place to manage them effectively.

The following significant risks associated with this report/decisions were identified from this assessment:

| Management of significant (Net Red) risks   |  |                 |
|---|--|-----------------|
| Risk Description  | Mitigating Actions   | Owner           |
| That the local community remains dissatisfied with the Council’s actions, thus harming its reputation locally   | Accept the recommendations and enter into early consultation with village residents on the content of a new Statutory Notice, prior to serving such Notice as soon as legitimately possible. | Chief Executive |
| That, by not agreeing the recommendations from the LGO, the Council is seen not to accept a ‘reasonable’ set of conclusions and recommendations.                              | Accept the recommendations for early implementation.   | Chief Executive |
| That, by not agreeing the recommendations from the LGO, the Council is forced to continue with unproductive, costly and time-consuming discussions and (possibly) litigation. | Accept the recommendations for early implementation.   | Chief Executive |



11. **KNOWING YOUR COMMUNITY - EQUALITY AND RURAL IMPLICATIONS**

This report has attempted to ensure that the relative needs and requirements of village residents and the new track operator have been taken into account, balancing their respective interests, but acknowledging the overall conclusions and recommendations received by the Local Government Ombudsman.

12. **CORPORATE IMPLICATIONS**

By submitting this report, the report author has taken the following implications into account:

- Community Safety
- Environmental
- ICT
- Asset Management
- Human Resources
- Planning
- Voluntary Sector

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Background papers: Report to Executive - 10 July, 2013  
Contact officer: Steve Atkinson, Chief Executive, ext 5606  
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