

District Council of Peterborough



Amalgamated 1997

**DISTRICT COUNCIL
of
PETERBOROUGH**

**LOCAL NUISANCE &
LITTER CONTROL ACT 2016**

**Subjective Assessment
Procedure**



DISTRICT COUNCIL of PETERBOROUGH

Subjective Assessment Procedure

- Adoption Reference:** Council Meeting 17/06/2019
Resolution 70/19
- Applicable Legislation:** Local Nuisance and Litter Control Act 2016
This procedure is based on a model procedure prepared by the Environment Protection Authority of SA
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- Review Dates:**

1. PURPOSE AND SCOPE

This procedure provides guidance to officers authorised under the *Local Nuisance and Litter Control Act 2016* (the Act) when using the provisions of Section 50 of the Act to carry out subjective assessments of local nuisance issues.

1.1 Responsibility

This procedure has been written for persons authorised under the Act and, where appropriate, associated administrative staff.

1.2 Legislation

Local Nuisance and Litter Control Act 2016 – Section 50
Local Nuisance and Litter Control Regulations 2017 – Regulation 4
Environment Protection Act 1993

2. RELEVANT DOCUMENTATION

Information sheets relating to the individual nuisance matters.

3. RECORDS MANAGEMENT

It is recommended a procedure to support the decision making process is created.

4. PROCEDURE

Most activity results in an impact of some description – noise, odour, smoke, dust. Some impacts can be described as annoying or interfering but just because the impact exists is not enough to constitute local nuisance as defined under the Act.

The Act doesn't require the use of complicated equipment to quantify the impact of a nuisance, rather it provides support and provisions for the Authorised Officer (AO) to use their own senses to form an opinion. This is described in Section 50:

Section 50 – Evidentiary provisions

- (1) in proceedings under this Act, where it is alleged that a person caused local nuisance within the meaning of section 17(1)(a) or section 17(1)(b), evidence by an authorised officer that he or she formed the opinion based on his or her own senses that –
- (a) the agent alleged to have caused the local nuisance when discharged or emitted from a place or vehicle owned by the person travelled to a place occupied by another person; **and**
 - (b) the level nature or extent of the agent within the place occupied by the other person was such to constitute an unreasonable interference with the person's enjoyment of the place.
- constitutes proof, in the absence of proof to the contrary, of those matters.

In order for a nuisance to be assessed using Section 50, an AO must be able to certify or provide evidence for the following:

- That the activity can be considered under the Act.
- That the activity has resulted in a nuisance that has travelled (Section 50 (1)(a)).
- That the nuisance has unreasonably interfered with another person's enjoyment of an area. (Section 50 (1)(b)).

The effect of Section 50 is to reverse the onus of proof onto the owner of the source nuisance, in effect they must provide evidence to the contrary of the AO opinion.

In short, the local nuisance has to have travelled to another place occupied by another person and cause an unreasonable interference with that person's enjoyment of the area.

4.1 Is the Activity Considered under the Act?

The AO must first determine whether the activity is considered under the Act.

Section 17 of the Act provides a definition of local nuisance which is expanded upon further in Schedule 1 Part 2 – Things that are local nuisance.

Activities that are not considered local nuisance for the purposes of this Act can be found in Schedule 1 Part 3 – Things that are not local nuisance.

Refer to these sections of the Act to determine if the activity is captured under the Act. If not refer the complaint to the appropriate authority which does have a legislative responsibility to manage the complaint.

4.2 Has a Nuisance Occurred and Travelled? (Section 50 (1)(a))

- An AO needs to verify that there is actually an odour, noise, vibration, smoke or dust that warrants further investigation. It is not enough to accept the information provided by a complainant. This is known as verifying the complaint.
- Verifying the complaint may involve a site inspection to the place that is being affected by the potential nuisance and at the time that the potential nuisance is occurring. (refer to SOP on conducting site inspections). In order to schedule a site inspection, it is helpful to have the complainant complete an incident diary so that the site inspection coincides with a time that the impact is occurring (refer to SOP – Managing Nuisance Complaints).
- To satisfy part (a) of Section 50(1), the AO must verify that the potential nuisance has travelled. Therefore, the AO must be able to detect the source of the complaint and an impact at the location of the complainant.
- When observing the nuisance at the location of the complainant, the AO should be located where the complainant claims they experience the impact but this must within a habitable room or an outside courtyard or entertainment area.

4.3 Has the Nuisance Unreasonably Interfered? (Section 50 (1)(b))

Once the AO has verified that there is a potential nuisance (odour, dust, noise, vibration) and there is a potential impact (ie can be heard, felt, smelt, seen or tasted at the complainants property) the AO then needs to determine whether the impact is unreasonable.

It is important to note that the nuisance must be assessed at the location of the impact.

The AO must take into account the level nature and extent of the annoyance and make a determination, based on their senses (taste, touch, smell, hearing and sight) that the annoyance constitutes an unreasonable interference.

5. UNDERTAKING THE ASSESSMENT

5.1 Considerations

Regulation 4(b) provides guidance to assist in the determination of whether the local nuisance has caused an *unreasonable* interference. The use of these guiding principles in conjunction with the considerations listed below can assist AO's through the decision making process.

Regulation 4(b)

A council, and any authorised officers appointed by the council under the Act, must, in administering or enforcing the Act, or in performing, exercising or discharging a function under the Act, in relation to local nuisance (including, in the case of a council, determining what should be the conditions of a nuisance abatement notice), take into account the following matters insofar as they are relevant to the circumstances.

- (i) the sensitivity of the affected premises;
- (ii) the land use categories of the source premises and the affected premises;
- (iii) whether the local nuisance was avoidable;
- (iv) whether, in the case of local nuisance generated by an activity outside of normal business hours, the activity has been so timed to avoid the inconvenience to traffic or pedestrians during normal business hours for example, in the case of early morning rubbish collection, or late night construction works, in populated or high traffic areas);
- (v) whether all reasonable measures have been taken at the source premises to prevent or minimise the local nuisance;
- (vi) whether, in the case of local nuisance generated by an activity carried out under an authorisation within the meaning of the Development Act 1993, the activity is being carried out in accordance with the authorisation.

In addition to the above, AO can consider the following factors:

- The absolute nature of the impact – is it actually noisy, odorous, smoky, dusty?
- How does the nuisance compare to other nuisances that might be present or expected in the area?
- In the case of noise, is the noise well above any background level? ie during lulls in the nuisance noise, is there a significant difference to the overall noise heard?
- Is the nuisance occurring outside of the times specified in Schedule 1 Part 4 of the Act? Is the nuisance occurring during the evenings, night or very early in the morning?
- Relevant to noise in particular, does the noise include any annoying characteristics such as fluctuating volumes, a tone, a beat or impulse, or a characteristic that is not present or expected elsewhere in the area?
- Is the activity of a duration, volume or characteristic that is significantly different to that expected or typical in the area?
- Is the activity adversely affecting people's activities such as conversation, reading, studying, watching television or sleeping?
- How do other people in the vicinity react to the impacts of the activity?
- How easy is it to minimise the nuisance resulting from the activity?

- How common is this nuisance in other similar environments?
- Is the nuisance clearly present within a habitable room?
- Could a reasonable person tolerate the nuisance given the time of day and the duration of the nuisance and/or the fact that it is not typical of activities conducted in the area?
- In the case of noise, is the noise loud enough to interfere with normal speech or disturb normal daytime outdoor recreation?

Not all factors need to be present for an opinion to be formed that the nuisance is causing an unreasonable interference. Ultimately, the **level, nature and/or extent** of a nuisance are important criteria, and reasonable judgement must be used to describe what is acceptable in a given situation.

5.2 What is Reasonable?

When making a reasonable judgement the AO must consider what the reasonable person would accept given the same circumstances. A reasonable person exercises average care, skill, and judgment in conduct and serves as a comparative standard.

A reasonable person may have the following traits:

- A person whose judgement is not biased towards a particular outcome
- A person whose senses are not affected in any way – either over sensitised or dulled.
- A person who avoids extremes of both audacity and caution

5.3 Making the Decision

Record your decision in a manner enabling it to be included as evidence should the investigation require. Attached is a Subjective Assessment (general) checklist to assist with undertaking field subjective assessments.

(Follow the guidelines outlined in the 'Evidence Collection' Procedure.)

It is imperative that the decision made by an AO is recorded and declared by the AO.

Subjective Assessment (general) checklist

NUISANCE AND COMPLAINTS

Nuisance description:

Odour Noise Smoke Dust Fumes Aerosols Animals Vibration Litter Other
Description:

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.....

Address of source of nuisance:

Address of complainant/s: Distance from source of nuisance

Address of complainant/s:	Distance from source of nuisance

Address at which nuisance is being assessed:

Date assessment/s: Time start Time finished

Date assessment/s:	Time start	Time finished

Authorised Officers present:

Other persons present:

GENERAL OBSERVATIONS

Weather conditions (*overcast, rainy, hot, humid, cold etc*)

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Initial observations (*what can you see, hear, touch, smell, taste*)

Photographs taken? Y N

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CONSIDERATIONS

Note: some of these will be assessed in the field, some can be assessed prior or post field subjective assessment

- Does the nuisance satisfy the requirements of S17 of the LNLC Act (ie could it be considered a local nuisance under the LNLC Act?)
- Is the nuisance detectable at another location that is legally accessible by the complainant?
- Landuse of source premises:
- Landuse of affected premises:
- Sensitivity of affected premises: ¹

Low
Medium
High

	Y	N

Describe:

- Does the activity that is generating the nuisance have an authorisation under the *Development Act 1993*?
 - Is the activity being carried out in accordance with the approval under the *Development Act 1993*?²
 - Is the activity or the premises generating the nuisance governed by any other legislation (other approvals, by-laws) that allow the activity?
- Detail:
-

- Is the nuisance occurring outside of the times specified in Schedule 1(4) of the Act for this activity?
- If the nuisance is being generated outside of these hours – is this to avoid inconvenience to traffic or pedestrians?
- Is there a history of complaints for this site for this nuisance?
 - If yes, have the complaints been received from the same complainant?
 - If yes, have previous complaints been verified?
- Have multiple complaints been received for this particular nuisance at this time?
- Is the nuisance occurring during the evenings, night or very early in the morning? (circle appropriate)
- Is the nuisance of a duration, volume or characteristic that is significantly different to that expected or typical in the area?
- Is the nuisance of a duration, volume or characteristic that is significantly different to that expected of this activity?

¹ Low example = a similar landuse to that causing the nuisance
 Medium = a non-compatible landuse
 High example = a kindergarten adjacent a factory

² Check the conditions on the development approval for any relating to noise and other nuisance.

- Is the nuisance clearly present within a habitable room?
- Is the nuisance adversely affecting people's activities such as conversation, reading, studying, watching television or sleeping?
- Is the impact actually noisy, odorous, smoky, dusty?
- How does the nuisance compare to other nuisances that might be present or expected in the area?

Describe:

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- In your opinion, have all reasonable measures been taken at the source of the nuisance to prevent or minimise local nuisance?

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Describe:

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- Are there additional measures that could be taken to prevent or minimise local nuisance?

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Detail:

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- Describe the frequency that the nuisance occurs: eg infrequent, on-going, intermittent:

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Noise specific considerations

Y N

- Is the noise well above any background level? ie during lulls in the nuisance noise, is there a significant difference to the overall noise heard?
- Does the noise include any annoying characteristics such as fluctuating volumes, a tone, a beat or impulse, or a characteristic that is not present or expected elsewhere in the area?

Describe:

.....

.....

- Is this nuisance common in other similar environments?
- Is the noise loud enough to interfere with normal speech or disturb normal daytime outdoor recreation during the day?
- Could a reasonable person tolerate the nuisance given the time of day and the duration of the nuisance and/or the fact that it is not typical of activities conducted in the area?

Additional notes

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SUBJECTIVE ASSESSMENT FINDINGS

Discussion of assessment conducted by the Authorised officer:

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Decision based on the above considerations:

- Yes, this is a local nuisance that is causing unreasonable interference as described in S17(1) of the Act.
- This is an annoyance but not a local nuisance
- No nuisance was detected or observed at the time of the site inspection

Declaration:

I,....., an Authorised Officer pursuant to the Local Nuisance and Litter Control Act 2016, have formed the opinion, based on my own senses that is a local nuisance under the Act .

Potential verified contraventions of Local Nuisance and Litter Control Act

- 18(1) Causing local nuisance – intentionally or recklessly
- 18(2) Causing local nuisance – carrying on an activity that results in local nuisance
- 18(3) Causing local nuisance –
- 22(1) Expiation (a) – Disposing 50L or more of Class B hazardous litter or general litter
- 22(1) Expiation (b) – Disposing up to 50L Class B hazardous litter
- 22(1) Expiation (c) – Disposing up to 50L general litter
- 24 Litterer must remove litter when asked
- 26(1) Liability of vehicle owner
- 20 Person must cease local nuisance if asked
- 30 (9) Failing to comply with a litter or nuisance abatement notice

Is the offending reckless or intentional³?

Comments

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³ Reckless = with the knowledge that an adverse impact may result but not desiring that adverse impact
Intentional = with the knowledge that an adverse impact will result and ensuring that this occurs

Compliance history/attitude

Is this the first non-compliance investigated? Y N

Date	Non-compliance	Action taken	Compliance achieved?

REGULATORY ACTION

	To manage contravention	To manage behaviour change
Advisory/warning letter		
Expiation		
Abatement Notice		

Approved

Signed