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THE CONTROL OF COMMUNITY NOISE THROUGH STATUTORY NUISANCE AND PLANNING POWERS : A COMPARATIVE ASSESSMENT

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1. INTRODUCTION

This paper will compare the purpose and effectiveness of the twin regimes of statutory nuisance and town and country planning powers in the control of the ever growing problem of community noise. The interface between the two approaches will be examined and finally a speculation will be attempted on the roles which the Acoustic Feature Model and possible EC Directives on Noise Criteria (Permissible Immission Levels) may play in the future control of community noise.

2. THE CURRENT SCALE OF THE COMMUNITY NOISE PROBLEM

Public complaints of noise made to local authority environmental health officers continue to rise relentlessly year upon year. As figures contained in the last two Annual Environmental Health Reports (Ref 1) indicate, total complaints reached a new high in 1991/92 with the figure exceeding 130,000. This shows an astonishing 35% rise in the two years since the publication of the previous report in 1990, where the comparative figure was just under 98,000. Speculation can be attempted on the factors contributing to this phenomenon of modern living : are people becoming more sensitised and less tolerant? Are people generally more aware of their rights and better placed to articulate concern through public complaint? Is urban life becoming genuinely noisier with the proliferation of modern creature comforts such as televisions, music systems, DIY tools etc, all of which have a capacity to produce high levels of noise within what would otherwise be a relatively peaceful domestic environment. If the trend towards an inexorable rise in noise complaints is to be taken seriously, one must conclude that somewhere along the line, the system is failing people.

3. STATUTORY NUISANCE V PLANNING: A COMPARISON OF THEIR RELATIVE EFFECTIVENESS

3.1 Statutory Nuisance

The concept of *statutory nuisance* is, I understand, peculiar to the British legal system. Until the High Court clarified the position in 1976 in the landmark judgement in the case of *National Coal Board V Thorne* (Ref 2), statutory nuisance appeared to enjoy a legal status all of its own. This case re-established the relationship between statutory nuisance and the principles associated with common law nuisance by affirming the position that for a statutory nuisance to exist in law, the activities giving rise to the action must either be (a) prejudicial to health or (b) a nuisance at common law, i.e. they must cause a

material interference with the use or enjoyment of a *neighbouring* property. Having said this, it appears that statutory nuisance continues to occupy a special position since not all the defences to a common law nuisance action would appear to be available to contest an action for statutory nuisance under the Environmental Protection Act 1990. The only defences to this latter action being firstly the employment of the *best practicable means*, in the case of a trade or business, to prevent or counteract the nuisance and secondly that the defendant has a *reasonable excuse* for not complying with the terms of notice.

Statutory nuisance action, whilst capable of being instituted in an anticipatory fashion to prevent or avoid a noise nuisance arising, is, for the most part, employed to resolve problems post factum. Since under the circumstances, the Environmental Health Officer (EHO) is presented with a fait accompli, statutory noise nuisance action can be characterised as an operational procedure concerned essentially with damage limitation by attempting to mitigate the level of noise intrusion in order to create a situation where the final levels of noise are tolerable or acceptable. Accordingly, it is, in practice, not always possible, by invoking statutory action for noise nuisance, to deliver an absolute solution to the problem. In the situation where individuals have become highly sensitised to a particular noise, they may nurture expectations of getting the noise to disappear completely by reducing the noise level below the thresholds of audibility. By virtue of the best practicable means defence enshrined in the Environmental Protection Act, the pursuit of such absolute solutions is never a realistic or feasible option which may, in some circumstances leave the complainant feeling dissatisfied and frustrated, since he may feel that he is left with a less than ideal scenario of living with a noise problem which has been reduced in scale, but has not been resolved completely.

Another drawback to the use of statutory nuisance procedures to resolve noise problems, is the need to establish that a nuisance exists in law, before commencing the action. This can prove to be an onerous test since by definition the noise must cause a *material* interference with the enjoyment or use of land, a requirement which must always be more than mere annoyance or disturbance. Such a shortfall in invoking statutory action in response to complaints is borne out in EHOs' official returns on enforcement action (Ref 1) which show that for the year 1991/92, in only 65% of noise sources complained of, was action justified in the eyes of EHOs; and further that is only 9% of cases was statutory enforcement action actually taken. Whilst 76% of noise nuisances were abated informally, 15% or 9,500 cases remained unresolved which must beg questions not only about the effectiveness of the legislation but also the commitment, attitude and effectiveness of local authority EHO's in discharging their statutory responsibilities. This is a sizeable problem since the effect is cumulative with new unresolved cases being added to the EHO's growing case load year upon year.

Although no data is routinely collected on the matter, I believe that the provisions contained in section 81(5) of the Environmental Protection Act 1990 (replicating the old section 58(8) provisions of the Control of Pollution Act 1974) relating to High Court action where summary proceedings would offer an inadequate remedy, are not always invoked as readily as they might be by EHOs. In the case of a serious public noise nuisance (which is, by definition, a crime), EHOs should, in my opinion, consider this course of action as a matter of routine, since the health and well being of an entire community can sometimes be at stake. In discharging his/her statutory functions, the EHO must be concerned with *getting the best result*, having regard to all the circumstances, and in the most dramatic of situations, where nuisance is widespread and the perpetrator completely noncooperative, bringing an operation -

whether it be a construction site, or an illegal entertainment - to a halt, is the only viable and equitable option. Too many EHOs see getting a result as representing the prosecution of statutory breaches to the bitter end in summary trials without undertaking an assessment of the broader picture. Just as EHOs have been seriously criticised in the health and safety field for not always having regard to the most appropriate course of action, when embarking upon legal proceedings, they could face similar criticisms for their failure to act assertively to protect the public interest, by continuing solely to pursue breaches of statutory codes.

An unusual case which was recently reported (Ref 3), showed an imaginative application of the statutory nuisance provisions in the manner in which the EHOs' chose to address a serious problem of vibration. Planning permission had been granted by the local authority to a developer to build 24 luxury apartments close to an existing factory. The EHO stipulated a planning condition citing a vibration criterion of 0.2 m s^{-1} ppv which had not to be exceeded in any of the dwellings. In the event the vibration isolation works which were carried out proved to be ineffective and levels 12 times the stated criterion were recorded in the dwellings at intervals of 10 seconds which, in the opinion of the EHO, rendered all the properties uninhabitable. The local authority proceeded in an action for statutory nuisance but chose not to use section 79(g) EPA 1990 - *noise emitted from premises*, but instead elected to cite section 79(a) on the grounds that the *dwellings* were in *such a state as to be prejudicial to health or a nuisance* by virtue of the excessive levels of vibration. Interestingly the developer of the homes rather than the factory owner was prosecuted for breach of the abatement notice and was convicted. A further point of interest is that had the company chosen to defend the action, the defence of best practicable means would not have been available to them as the nuisance arose on domestic premises.

One of the undoubted success stories of the past year relates to the many successes experienced by EHOs in exercising their default powers in abating noise nuisance from amplified music systems. Since the publication by the Department of the Environment of guidance on the control of noisy parties (Ref 4), the practice of seizing sound systems and thence abating the noise nuisance on the spot by default, has become legitimised and widely adopted.

The Noise and Statutory Nuisance Act 1993

The Act has experienced a mixed degree of success since becoming operative in January of this year. In introducing the Bill, the government reaffirmed the status of statutory nuisance in controlling environmental noise (Ref 5) :

"The principle of statutory nuisance remains the basis on which environmental noise is controlled. It has the merit of enabling an EHO to be flexible and to take full account of local factors such as background noise levels; adjacent activities; time of day; intensity, character and duration of the noise ...."

The Act introduces 4 new powers:

(i) the extension of noise nuisance provisions to control noise from vehicles, machinery and equipment *in the street* (this is a mandatory provision).

(ii) the power of local authorities to grant consents for the use of loudspeakers in the street (this is an adoptive, discretionary provision).

(iii) the power of local authorities to require the owners of audible intruder alarms to meet certain *prescribed requirements* (to be introduced by commencement order).

(iv) the power of local authorities to recover the costs of abating statutory nuisances by default by means of a charge on the premises.

Cases have been reported describing the successful application of the new powers to abate nuisances from car alarms, but equally anecdotal evidence indicates that liaisons with certain regional police forces have been problematical with EHOs being denied access to vital information on vehicle ownership held on the Central Police Computer. I understand that the Noise Council recently discussed this problem and are hoping to address senior police officers on the matter in the near future. A similar disappointment was experienced with the Act's provisions on Burglar Alarms where the enabling provisions appear to have fallen foul of the government's recent deregulation drive. As *Environmental Health News* recently reported on the matter, it appears that this represents an unprecedented example of the government repealing legislation before it has come into force!

3.2 Town and Country Planning Powers

Whilst statutory nuisance action remains within the exclusive purview of environmental health departments to enforce, town and country planning, on the other hand, is one of the few statutory functions discharged by a local authority which is genuinely corporate in nature with many departments including Environmental Health playing a vital role. Or so the theory goes. This is essentially because its activities are predicated upon an approach which is, by its very nature, overtly political. Elected members decide upon the policies which are enshrined within the authority's adopted Local Plans - regard to which is now obligatory under the Planning and Compensation Act 1991 - and furthermore, save for a small proportion of cases which are dealt with under delegated authority, most planning applications continue to be determined by elected members. The role of town and country planning is, therefore, largely strategic and in the context of environmental protection in general and noise control in particular, the planning mechanism has the ability to protect or provide *optimum* environmental standards. In practice, higher standards of noise protection can be sought and achieved if such standards can be justified by reference to Local Plan policies. This approach has enormous advantages both theoretically and practically, since for noise control purposes, it will always be more cost effective - and a better result is always more feasible - if the appropriate investment (in time, effort and money) can be made at the beginning of a project to *design problems out*. Air handling plant is an obvious example where, through a careful process of selection, location, orientation and installation, the plant need not present a problem of noise intrusion providing that noise control features as an essential consideration from the outset. It is essential, from the local authority's point of view, for a high degree

of open communication and reciprocal understanding to exist between officers from environmental health and planning departments, so that, for example, clear agreements can be reached on what, in practice, constitutes a *material change of use* requiring the submission of a planning application. By considering noise in this way rather than by addressing it only when it has become a serious problem, should lead to a greater level of public satisfaction as opposed to an acceptable level of public dissatisfaction since the planning process need not be driven as much by the search for practical compromises or trade offs as is the case with nuisance actions. Hence the planning process is characterised by the pursuit of desirable objectives in the context of the public's present or future expectations with regard to the *preservation of amenity* (Ref 6).

If noise matters are not addressed and controlled at the most appropriate stage - i.e. the design and planning stage - the phenomenon of *hysteresis* may develop (Ref 7). This phenomenon occurs where people become highly sensitised to a new noise source introduced into their community, with the result that in order to satisfy public expectations it may have to be reduced to a greater extent once complaints have been generated than would have been the case if the situation had never been allowed to develop to the complaint stage. The difficulty presented by this situation from the EHO'S viewpoint is that armed only with the abatement powers of statutory nuisance, it may not be feasible to deliver an end result that is, in all senses, satisfactory owing to the limitations presented by the best practicable means defence, with the result that a section of the community are, and will remain dissatisfied.

4. THE INTERFACE BETWEEN PLANNING AND NUISANCE ACTIONS.

In spite of the draconian powers provided in the Planning and Compensation Act 1991 and which are available to planners to resolve breaches of planning permissions by for example, seeking Injunctive Relief, anecdotal evidence, as described in the Birmingham case above (Ref 3), indicates that when things do go dramatically wrong, it is the EHO inevitably, who picks up the pieces and invokes the statutory nuisance powers to achieve an acceptable solution to the problem. Since planning officers have never worked within an enforcement oriented problem solving culture, this is a situation which I do not see changing to any great extent in the future.

In the case of Gillingham Borough Council v Medway (Chatham) Dock Company Limited 1991 described in an earlier paper (Ref 8), the juxtaposition of planning and nuisance was highlighted very clearly. The High Court decision implies that once planning permission for a development or change of use is granted, any subsequent questions of nuisance involving non-physical damage (e.g. noise), must be judged by reference to a neighbourhood, the character of which, now incorporates that development. The case only serves to emphasise the fundamental linkages between the planning system and pollution prevention re-inforced by the statutory requirements for developers to perform environmental assessments. This seminal piece of case law should force planning authorities - and by, implication EHOs - to scrutinise more closely the full environmental effects of new development proposals.

5. THE FUTURE.

Two bodies of research currently being developed are likely to make a significant contribution in the future to the control of community noise. Nicole Porter and her colleagues at the National Physical Laboratory and the ISVR, University of Southampton, have been working for some time developing an *acoustic feature model* for the assessment of environmental noise and their deliberations were reported last year (Ref 7). The acoustic feature model rather than combining the discrete features of a noise into an overall combined noise index, aims to provide as complete a description as possible of the physical magnitudes of all the significant acoustic features present in the noise. The assessment method therefore:-

- provides an accurate and comprehensive description of the noise
- allows for objective comparisons between different situations, thereby aiming for consistency.
- targets cost effective noise control and aims for an equitable trade-off between lowest cost and maximum benefit to the community.

It is hoped that the model will link in more effectively with statutory nuisance actions than has sometimes been my experience with current methodologies such as BS 4142 : 1990.

The European Union has, for some time, nurtured an ambition to incorporate environmental noise within its environment policy making machinery, and in 1992 with the publication of the 5th Action Programme on the Environment (Ref 9), established a number of target levels relating to community noise exposure. It has been suggested (Ref 10) that in order to protect man effectively from the impacts of environmental noise, noise quality criteria must be developed, agreed and adopted throughout the Union. The way forward may be through a directive on noise criteria, thereby establishing permissible noise immission levels, whereby harmonised noise quality criteria so developed would represent a minimum standard for all citizens throughout the European Union. It has been mooted that a criterion of LAeq 65 dB would trigger an obligatory evaluation of the necessity of redevelopment in an inhabited area - a recent WHO study (Ref 11), has estimated that more than 10% of the Union's population currently suffer a daytime noise exposure of LAeq 65 dB or above. It strikes me that the Channel Tunnel and associated infrastructure developments presented an ideal opportunity for the European Union to have pursued a harmonised policy on environmental noise protection. That such a unique opportunity was not seized upon, was indeed a pity. Whether or not such a policy will now be developed or whether such a worthy ideal will be sacrificed on the altar of subsidiarity is something that awaits to be seen.

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