PLANNING CONDITIONS FOR NOISE

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1 INTRODUCTION

This paper explores the recent changes to the national planning system, its relationship with local policies, and the implications of both on the lawfulness of planning conditions relating to environmental noise.

2 PLANNING POLICY

The national planning system has undergone radical changes since 2012, commencing with the introduction of the National Planning Policy Framework[(1)] (NPPF) in March 2012. The NPPF was produced by the coalition Government, as part of the effort to reduce red tape and facilitate development, and replaced a plethora of Planning Policy Guidance Notes and Statements with a single fifty nine page document containing a single paragraph on noise.

Although the NPPF explicitly references the explanatory note contained in the Noise Policy Statement for England 2010[(2)] (NPSE), produced by the previous Government, its policy aims include a significant difference. The aims to avoid and mitigate 'significant adverse' and 'other adverse' noise impacts respectively are unchanged, but whilst the NPSE included the aim of *"where possible, contribute to the improvement of health and quality of life"*[(3)], this aim is missing from the NPPF. Instead, two new aims are introduced, the first of which is to *"recognise that business will often create some noise and existing businesses wanting to develop in continuance of their business should not have unreasonable restrictions put on them because of changes in nearby land uses since they were established"*[(4)].

This change represents a significant policy shift and signals a Government expectation of greater tolerance to existing or proposed commercial noise sources generally as well as a more cautious approach to permitting nearby noise sensitive development by local planning authorities (LPAs).

The first two aims common to both policy documents, of avoiding 'significant adverse' and minimising 'other adverse' impacts, initially provoked some bewilderment amongst practitioners as to how such vague concepts could be applied in practice. There was unquestionably a paucity of guidance at that time, resulting in frequently argued interpretations from an industry accustomed to the relative simplicity of noise exposure categories[(5)] and the long established British Standards 8233:1999[(6)] and 4142:1997[(7)].

The online suite of forty seven Planning Practice Guidance (PPG) documents which followed (leading many to question the original stated intention of Government replace "*over a thousand pages of policy with around fifty*"[(8)]) fleshed out many of the concepts in the NPPF, and the guidance on noise included an entirely subjective matrix[(9)] of example outcomes illustrating how 'significant adverse' and 'other adverse' noise impacts might be interpreted. The subjective nature of the matrix does not translate conveniently into any sort of objective scale and clearly needs to be considered on a case by case basis.

LPAs quite rightly determine planning applications in accordance with their development plans. An unfortunate feature of Local Plans, however, is their tendency to be out of date even before they are adopted, which results from the painfully slow plan development, consultation and approval process. This is of paramount importance when interpreting local policies for a number of reasons specified in the NPPF and PPG.

The NPPF includes a *"presumption in favour of sustainable development that is the basis for every plan, and every decision*"[10]. This is a very clear direction which may conflict with the application of existing local policies in development control decisions and will influence the eventual replacement of those policies.

To clarify this point, the PPG says "*Where the development plan is absent, silent or the relevant policies are out of date [the NPPF] requires the application to be determined in accordance with the presumption in favour of sustainable development unless otherwise specified"*[11].

Also, *"The NPPF represents up-to-date Government policy and must be taken into account where it is relevant to a planning application or appeal. If decision takers choose not to follow the NPPF, clear and convincing reasons for doing so are needed"*[12].

So LPAs are obliged to follow the NPPF unless they have up-to-date local policies that would justify a departure and, even then, the NPPF has 'material consideration' status. Where local policies conflict with one another, considerations shall be *'guided by the NPPF'*[13]. Where local noise policies are dated, absent or in conflict it appears that national noise policy must take precedence.

Some local politicians may resent what they perceive as heavy handed interference with their local policies and priorities by Central Government, leading to reticence or resistance in prioritising national policies over their own.

This dynamic between national and local policy in decision making is an important backdrop to any consideration of planning conditions because legitimate policy objectives form an essential justification for lawful planning conditions.

3 PLANNING CONDITIONS

The Town and Country Planning Act 1990 (the Act) empowers LPAs to *"grant planning permission, either unconditionally or subject to such conditions as they think fit"*[14]. This power is not unqualified, however, and PPG states that it *"must be interpreted in light of material factors such as the NPPF, this supporting guidance… and relevant case law"*[15].

The NPPF requires LPAs to consider if *'otherwise unacceptable development could be made acceptable through the use of planning conditions'*[16] but should only be imposed where they are *"necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects"*[17]. These pre-requisites are known as the 'six tests' and are often the subject of debate at planning appeals and Public Inquiries. They should, of course, be fully considered by LPAs in the development of planning conditions too.

The 'six tests' are not new to the NPPF having been carried forward from the predecessor guidance, Circular 11/95[18], with relatively few changes. The PPG reiterates the need for compliance with the tests stating that the *"six tests must be satisfied each time a decision to grant planning permission subject to conditions is made"*[19], and provides guidance on interpretation of the tests.

The first test is that a planning condition is **necessary**. The PPG advises that, for a condition to be necessary, it would have to be appropriate to refuse the permission without that condition. There must be a clear planning reason for it to be necessary and the condition must not be wider in scope than it needs to be to achieve the desired objective.

It is on this question of necessity that the current planning policy backdrop becomes so important. Whilst the guidance on necessity has not radically altered from Circular 11/95[20] to the NPPF, the underpinning reasons for a potential refusal have changed quite significantly. In short, the inferred amenity objectives have become more subjective, less conservative, less standardised and (arguably) more permissive.

To be satisfied that a condition is necessary, therefore, an LPA would need to establish if noise from a development is likely to exceed the lowest observed adverse effect level (LOAEL) or significant observed adverse effect level (SOAEL). The example outcome provided in the PPG describing noise

below the LOAEL threshold states that *"noise can be heard…can slightly affect the acoustic character of the area"*[21] which would therefore be unlikely to preclude audibility in many instances. Some LPAs still seek inaudibility via condition for certain types of development but, in view of the above, such conditions are now unlikely to pass the test of necessity.

There is often uncertainty as to exactly what noise outcomes would result from a development. Where it is possible, but perhaps unlikely, that the LOAEL may be exceeded by noise from a development the LPA may understandably wish to adopt a precautionary approach and to include a noise condition. There are High Court precedents which have supported this approach but these currently relate to air quality[22] and water quality[23] and have not been universally accepted by Inspectors considering noise conditions.

For instance, some Inspectors, when considering the possibility of excess amplitude modulation (EAM) impact from wind farms, have declined to accept a precautionary approach and impose a condition on the basis that it would fail the test of necessity. A number of these decisions have cited 'statutory nuisance' as the means for protecting the public in the event that such impacts occurred.

An obvious difficulty with applying the 'precautionary principle' to planning conditions is the wide range of possible interpretations of the principle. An extreme interpretation would suggest that conditions are necessary to cover even the most unlikely consequences of a development. A well evidenced and balanced risk assessment should therefore underpin any proposed precautionary condition to support its necessity in the event of challenge.

Issuing standard conditions for particular types of development is still relatively common place in LPAs (fixed plant noise limits or schemes to be agreed for insulation, for example) and may be an attractive option to LPA's whose planning or environmental health resources have been reduced. Indiscriminate use will inevitably result in the issue of conditions which are unlawful on the basis of necessity. Furthermore, whilst Circular 11/95 recognised the benefit of standard conditions[24] (albeit with cautious application) the PPG is quite clear stating that *"it is important to ensure that conditions are tailored to tackle specific problems, rather than standardised or used to impose broad unnecessary controls"*[25]. That is not to say that some model conditions could not be used as a starting point and, indeed, the Planning Inspectorate retain a suite of model conditions. Importantly, those which they retain for noise are skeletal, relatively simple and do not drift into the interpretation of the thresholds of LOAELs and SOAELs.

When noise from a development, or likely to effect a development, is predicted to be categorised between the LOAEL and the SOAEL then the corresponding planning situation is unclear. It may initially appear that a noise condition could be justified but that is not necessarily the case. The complication here is that noise should not be considered in isolation[26,27] from other relevant issues, notably the economic, social and other environmental dimensions of proposed development. If these aspects are heavily in favour of the development, then the weight of a reason for refusal on noise grounds is eroded along with the associated necessity for any condition. This means than an LPA may need to understand the relative importance attached to other aspects of a development before deciding if noise issues could justify a refusal and therefore a condition.

In the event that a condition is accepted as necessary, the scope to achieve the target outcome would need to be carefully quantified and set out, as to require more than is strictly necessary would fail the test. This stage alone can, therefore, necessitate the derivation of objective criteria such as noise levels and durations, to correlate with the subjective criteria provided in the PPG.

The second of the tests is that a condition is **relevant to planning**. The examples provided by the PPG relate to the objectives being within the scope of the permission and avoidance of repetition of control imposed by separate statutory regimes.

This explicit requirement to be 'relevant to planning' reinforces the need for the policy requirements and other material considerations to be the sole determinants of the test of necessity. Various non-material arguments raised during the consideration of an application may appear relevant and compelling to LPAs but, if they are non-material, they should have no bearing on the decision making process.

The need to avoid duplication of controls with other statutory regimes does have relevance for noise conditions and warrants careful consideration. It may seem superficially that the Licensing[28] and Environmental Permitting regimes[29] would preclude noise conditions being necessary for certain types of development. This can be a dangerous assumption for two reasons. Firstly those regimes have very different noise objectives[30,31] to the planning regime, so resulting conditions may vary. Secondly, if the consented developments later fall outside of those regulatory regimes they may be left without any noise controls whatsoever. Potential duplication certainly deserves consideration but it is probable that conflicts will be relatively rare and only occur in very specific circumstances.

The third test is for a condition to be **relevant to the development to be permitted** and asks *'does the condition fairly and reasonably relate to the development to be permitted?'* Clearly, where an application site has existing noise issues, a condition cannot directly address those issues unless they form part of the application. Attempts to restrict whole site operating times or boundary limits, for example, when granting permission for a discrete element of an established operation would clearly be unlawful.

The fourth test that a condition is **enforceable** is arguably one of the more complex tests to apply. The PPG asks the question *'Would it be practically possible to enforce the condition?'* In the author's experience, these practical considerations can be neglected, particularly where the most vocal parties at a Committee or Inquiry are legal professionals who tend to equate 'enforceable' with 'precision' which is, of course, a separate test.

An experienced acoustician will consider the practical aspects of condition enforcement such as; cost, detection of exceedances, safe and accessible monitoring locations, measurement protocols, handling interferences and the potential for error. Ideally, any draft noise condition will be reviewed with these practical issues in mind. Careful consideration of condition wording and practicable implementation still do not guarantee an enforceable condition, though, without a wider consideration of the nature of the planning enforcement regime.

Planning enforcement is carried out at the discretion of the LPA[32] when they regard it as *"expedient to do so having regard to the development plan and other material considerations"*[33]. The meaning of 'expedient' is not defined in the Act but the Oxford dictionary suggests it is *"convenient and practical although possibly improper or immoral*". In considering the use of enforcement action the LPA should act in a proportionate way and "*have regard to the potential impact on health, housing needs and welfare of those affected by the proposed action, and those who are affected by the breach of planning control"*[33].

The planning enforcement system is perceived as "*complex, cumbersome, and difficult and expensive for LPAs"*[34]. It was perceived to have a *"lack of staff resources and trained staff"*[35] even before the 2008 financial crisis. Enforcement is a discretionary power rather than a duty and the LPA is obliged to consider 'expedience' and many other interests before determining whether or not to enforce, although it is expected to enforce where serious harm to amenity is being caused[36] . Any investigation must have regard to the European Convention on Human Rights[37], associated UK legislation[38,39,40,41] and any relevant enforcement concordats. This combination of factors can make enforcement action a risky and unattractive option to LPAs.

In practice, most investigations into non-compliance are complaint led and it is likely that the LPA (unless a County Council) is simultaneously considering the noise issue as a potential statutory nuisance[42]. As there is an obligation, rather than a discretionary power, to investigate complaints of statutory nuisance and to take action where they are found to exist, this procedure will often take precedence over planning enforcement. A conclusion that statutory nuisance does not exist may also be used to support an LPA's decision that enforcement is neither expedient nor necessary on the basis that serious harm is not occurring. Ironically, where statutory nuisance action is initiated, this too may satisfy the LPA that planning enforcement is not expedient as the issue is already being addressed. This dynamic between the two regimes is understandable, given the extant pressures on LPAs, but it could ultimately result in a failure to pursue planning objectives and to maintain public confidence in the system.

The fifth of the tests is that a condition should be **precise** so that it is clear and unambiguous to the applicant what needs to be done to comply with it. A lack of precision in condition wording can also undermine the interpretation of compliance with other tests such as those of necessity and

enforceability. It seems that poor precision results from rushed or poorly reviewed conditions just as frequently as from a lack of understanding.

The sixth and final test is something of a catch all; that the condition is **reasonable in all other respects**. Unjustifiable and disproportionate burdens will fail the test of reasonableness. This is a clear indication that the scale of the development will have a bearing on just how onerous compliance would be for the applicant, be that in a fiscal or managerial sense.

The introduction of 'proportionate' as integral to reasonableness increases the risk associated with the indiscriminate use of standardised conditions. Whereas an onerous standard or model condition might be acceptable for a development of significant size and value, it may be disproportionate to a smaller development. Wind farms, again, provide a good example of the consideration of the proportionate burdens of conditions. The approach adopted in the Institute of Acoustics (IOA) example condition which is appended to their good practice guide (GPG) [43] has been widely applied to commercial wind farms both before and since its publication. It is particularly onerous, however, so has often been acknowledged as too burdensome for operators of small scale developments. Simplified or less onerous conditions have quite rightly been applied to many smaller development although unfortunately, due the piecemeal development of these, many fail several of the tests and are thus unlawful.

4 CONCLUSIONS

There is no doubt that the fundamental changes to national noise policy since 2012 have had a profound effect on what constitutes unacceptable amenity impacts, and therefore when noise conditions might be **necessary**. These same changes have also influenced what conditions might be **relevant to planning**, **enforceable** and **reasonable**. Unfortunately, these changes have come at a time when LPAs have faced unprecedented pressures on resources resulting in reduced staff, training and continuity, making adaptation particularly challenging.

The recent changes to key standards, such as BS 8233[44] and BS 4142[45], have been sympathetic to the national policy changes and to some extent dovetail with new policy directions. BS 4142 in particular aligns its wording and approach with current planning policy objectives for noise. If applied in an appropriate manner, with due regard to national and local policy requirements, these standards provide useful methodologies and criteria to underpin noise assessments used for planning. They do not negate the much higher degree of subjectivity now involved in the quantification of noise impact but they do at least offer some standardization of approach to practitioners.

There is unquestionably a high level of understanding of relevant national and international guidance amongst acoustics professionals in the UK. Many practitioners also have a detailed knowledge of the planning system as it applies to noise. Far fewer have a rounded and in depth knowledge of current planning policy, development control and planning enforcement matters. Unfortunately this breadth and depth of knowledge is necessary to permit a proper consideration of the noise impacts of development proposals and the drafting of suitable noise conditions when necessary.

A seamless interface between planning and acoustics professionals respectively could provide this balanced perspective but, given development pressures, policy and guidance changes and reduced resources, such an interface is currently unlikely to exist within many LPAs. At the risk of oversimplifying the situation it seems the heart of the problem could be summarised thus: Planners don't understand acoustics and Acousticians don't understand planning. The result is a very high incidence of unlawful noise conditions.

This conclusion is admittedly largely based on anecdotal evidence and opinion. However, personal experience has long suggested that a significant proportion of noise conditions are unlawful and unenforceable. A recent straw poll of noise consultants involved in planning provoked an outpouring of examples of LPAs adhering to unjustifiable and unlawful conditions and noise objectives. Whilst flawed plant noise conditions were the most numerous, other examples included wind turbine noise, industrial operations, entertainment noise, construction noise and residential schemes.

If noise conditions are relied upon by decision makers to make otherwise unacceptable development proposals acceptable, then those conditions may confer essential amenity protection for existing or proposed residents, or protection for business operators. Whilst applicants and some interested parties have options to challenge or vary conditions, the LPA itself has no mechanism to retract conditions or correct errors retrospectively. When permissions are granted with flawed noise conditions, the implications can therefore be both long term and severe for residents, business operators and LPAs.

A majority of development control decision makers are laypersons or generalists (Councillors and Inspectors respectively) who rightly depend upon the advice of professionals. If the prevalence of effective and lawful noise conditions is to be increased, as it needs to be, it is imperative that the two key professions become more closely aligned. More active collaboration, within LPAs in particular, would increase the level of scrutiny of draft noise conditions and encourage the cross-discipline professional development that is so important. How this can be achieved within the current climate of resource reduction and efficiency savings is another question entirely.

The views expressed above are those of the author and do not necessarily reflect the views of employers past or present.

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