

Deeds ease music woes

Music venues and their advisers are optimistic that ‘deeds of easement’ could offer a degree protection from noise complaints when new homes are built within earshot. Lisa Russell reports.

Planning policy in the UK is starting to acknowledge that existing occupants, whether businesses or residents, shouldn’t need to live in fear of noise problems when a new development brings change to their doorstep.

The National Planning Policy Framework (NPPF) now includes the principle of giving responsibility for avoiding noise issues to the ‘agent of change’ – the developer of the new homes or business. The aim is to give some measure of protection to existing occupants or businesses who simply want to carry on as before. However, acceptance of the principle can’t guarantee that no complaints will ever be made or that noisy activities won’t cause a problem – or indeed how complaints will be resolved.

As a result, owners of existing businesses are starting to seek stronger guarantees that they can continue their operations without fear of being closed down. At least two cases this year have involved the use of a ‘deed of easement’ (DoE) requiring a promise that future occupants won’t complain about the noise, which in both cases comes from venues that host live music.

This year’s two cases follow previous use of a DoE for homes being built close to the Ministry of Sound nightclub in London (*Noise Bulletin March 2014 p5*).

The Stables: the latest case

The most recent case is in Milton Keynes, where housing is proposed alongside a long-established music venue, The Stables.

In April, councillors went against their council officer’s recommendation and decided to impose the requirement for a ‘DoE’ as part of the planning conditions (*Noise Bulletin May p1*). Following the meeting, the Stables issued a statement thanking the council members and saying that the deed would provide a line of defence from private nuisance complaints that could result in claims for damages or restrictions on the venue’s activities.

The arguments on behalf of the Stables had been set out by Tim Taylor, partner at law firm Foot Anstey, who had secured the DoEs for the Ministry of Sound in 2014 and for this year’s other case, the George Tavern in east London. Taylor said in April that “this is a forward-looking decision by the Members of the MK planning committee. By requiring the DoE as a condition of the development proceeding, members have helped to secure the future of this fantastic venue while also helping the delivery of much-needed new housing.”

However, the venue’s elation at the

council’s decision was shortlived; a fresh reserved matters planning application (19/01357/REM) has now been submitted for a part of the proposed development site, with no mention of the previous condition.

In February 2017, Abbey Development had been granted outline permission for up to 134 residential units on land immediately to the west of The Stables (15/02337/OUT). It subsequently submitted a reserved matters planning application (18/01304/REM), which was decided by the council in early April. The council’s senior planning officer handling the case had recommended to councillors that there was no need for a DoE, saying that the developer had already put in place adequate mitigation measures. However, councillors were swayed by arguments put forward by The Stables and its advisors that one was needed.

A report to the committee by senior planning officer Elizabeth Verdegem dated 15th March 2019 had said: “The impact of noise is a material planning consideration in the determination of this application, however, it is the LPA’s [local planning authority’s] position that a DoE is a separate civil legal process falling entirely outside the planning system, and the applicant has made it clear that they are not prepared to enter into such an agreement at this time, as part of the planning determination. It is the LPA’s position that this therefore cannot be controlled through planning obligations or conditions and the DoE issue is therefore not a material planning consideration in this case.”

At that stage, the council proposed applying a condition requiring that the developer inform the future occupiers of the dwellings regarding the potential noise nuisance that might be generated from The Stables.

The conclusion on noise in the 15th March report ended: “Officers are also satisfied that the proposed development would not put undue pressure on The Stables’ operations.”

Additional papers were produced just

ahead of the April meeting of the development control committee. The council officer took the position that a planning condition requiring the applicant to enter into a DoE can only be imposed if this is necessary to make the development acceptable. “Such a condition is not considered necessary in this case, would not meet the six tests for conditions and would therefore be open to challenge. The development is acceptable in its current form and therefore there is no need for any further mitigation.”

Extra papers were also submitted by the Stables, including a report by WSP, which it had appointed as its acoustic consultant. WSP’s *Agent of Change Noise Assessment* evaluated the noise reports that had been submitted and considered in connection with the outline application that was approved in 2017 and the original reserved matters application. “Our review holds this report to be unfit for purpose,” said WSP. “Among numerous failings is a fundamental lack of consideration of the implications of low frequency bass beat breakout from the venue and the potential for this to impact future residents. In addition, we have highlighted: the inappropriate adoption of an A-weighted assessment criterion, with an assigned magnitude that does not represent the regularity of the events occurring at The Stables, or provide suitable protection for residential amenity; inadequate survey scope, which was limited to 1h 35 minutes’ measurement during a single event occurring at The Stables; inappropriate conditions during the survey; inadequate reporting of the survey and assessment; inappropriate analysis of the survey measurements, and; reliance on a fundamentally flawed assessment of car park noise.”

The report also highlighted the need for thorough assessment of the current situation. It said: “The two noise

The Stables in Milton Keynes



assessments submitted by the applicant to date have included a total of just three hours on-site noise monitoring (to support both applications), surveyed just a single event at The Stables, and generally demonstrate a lack of consideration of the range of noise conditions that result from the various uses of The Stables as a venue.”

WSP concluded that a DoE should be agreed to afford a reasonable level of protection for The Stables from the potential impacts of noise complaints in the future. Event noise levels enshrined in such a deed would need to be established from surveys of entertainment events that are adequate in scope to represent the reasonable worst case, and conform with good practice guidance.

“This case, and others, highlights the need for properly thought-out ‘Agent of Change’ noise assessments to be delivered at the appropriate stages of development planning,” says WSP associate director, acoustics, Toby Lewis. “Without fully understanding the noise implications of existing business or community uses it is simply not possible to make plans which demonstrably avoid the introduction of unacceptable risks to those uses in the future.

“For entertainment venues in particular, the risks are compounded by a lack of widely accepted assessment guidance or criteria. Whilst the IoA and CIEH are both currently working on new guidance documents there is uncertainty as to when these documents will be published or whether they will be widely accepted by the industry.

“Whilst Deeds of Easement for noise can provide operators with valuable reassurance and protection, they do not remove the risk of noise complaints or provide complete immunity from future action. Ideally, planning policies and decisions would provide that protection; so that the existing lawful uses are not jeopardised by inappropriate noise sensitive development.”

Milton Keynes Council’s decision notice about the development was issued on 11 April, shortly after the development control meeting that approved the scheme. It says: “No development shall commence until a DoE in respect of noise has been submitted to, and approved in writing by, the Local Planning Authority. The DoE shall relate to the entire development in perpetuity.”

The reason given is: “To safeguard the continued operation of The Stables in accordance with paragraph 182 of the National Planning Policy Framework and to protect the residential amenity of future residents from operational noise at The Stables in accordance with policy D5 of Plan:MK (2019)”.

NPPF

The paragraph it refers to in the latest version of the NPPF – published in February 2019 – says: “Planning policies

and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or ‘agent of change’) should be required to provide suitable mitigation before the development has been completed.”

The UK government’s guidance on plan-making was published online in September 2018 and updated in March 2019. It now makes reference to the agent of change principle and the section in the NPPF, saying: “Where relevant, strategic policy-making authorities should take into account the noise generated by existing businesses when allocating sites, in accordance with the ‘agent of change’ policy set out in the National Planning Policy Framework.”

The legal arguments

A paper on the topic by Michael Lotinga and Toby Lewis of WSP and Tim Taylor of law firm Foot Anstey is being presented this month at Inter-noise 2019 in Madrid. The paper is called *Music venue noise: a development planning case-study examining the application of the Agent of Change principle, a novel legal mechanism, and noise control design issues*.

The authors point out that the incorporation of the agent of change (AoC) principle into planning policy was intended to reinforce protection for established venues; however the policy may fail to provide this in practice.

“Whilst the AoC principle has helped to move on the debate, its current UK planning policy incarnation falls short of actually delivering the legal protection that these venues both crave and deserve,” says the paper. “In the absence of a formal and effective change in policy, an interim answer to this problem lies in the newly-developing area of deeds of easements of noise. In short, the effect of the deed is to prevent there being in law an actionable nuisance arising from the currently existing levels of noise emanating from the venue.

The only circumstances in which there could be such an actionable private nuisance would be if the levels of noise increase above those stipulated in the deed.”

The paper recommends that, unless and until the AoC principle is significantly strengthened in national noise policies, the DoE should be adopted as a planning requirement by all LPAs when asked to consider new residential developments adjoining or adjacent to existing noise-generating venues. “In this way, the AoC

principle can be placed on its proper legal footing: a legal mechanism to ensure that urban areas get the housing they require, whilst retaining the night-time business that makes those same areas thrive.”

Properly and carefully defined, a DoE can temper the expectation of new residents and provide some assurance to venues that, even if their new neighbours do complain, any resulting punitive action will be unlikely to succeed, the author says. “This approach is less than ideal, however, as it does not avoid noise disturbance or complaints from occurring, and its effectiveness in conferring immunity for venues has not been tested in the courts.”

The WSP and Foot Anstey team explains that the way a DoE works is quite simple. “The deed is entered into between the developer, the venue and (if appropriate) the council. In the deed, a right is granted by the owner of the development site to the venue to allow noise from the venue to pass over the neighbouring development site, up to the levels agreed to be representative of its established use.

“By operation of law, the future owners of the new residential dwellings will then become bound by the deed when they acquire their interest in the new dwelling. The deed is registered against the title and is enforceable as a property right, in the same way as any other property right (such as a right of light, right of support etc.)” They add: “In effect, the argument that ‘we were here first’ finally has some legal teeth.”

This addresses the risk of private nuisance action. “Under the EPA, a statutory nuisance means an actionable nuisance in the sense that it is understood at common law,” the paper adds. “Accordingly, the reason why there is no actionable private nuisance is also the reason why there cannot be a successful prosecution under the EPA on the ground that noise emitted is a statutory nuisance.”

The paper goes on to say: “With regard to the Noise Act, the noise levels experienced at the dwelling must be measured with the doors and windows closed. Accordingly, as long as the permitted levels in the ‘current venue noise level’ are being met with all openings shut, there is no possibility of a successful prosecution under the Noise Act.”

Of course the DoE does not eliminate the chance of someone complaining about noise. “Moreover, the fact that a complaint has been made is likely to be a significant concern for the venue operator, notwithstanding the legal protection of the DoE,” adds the WSP/Foot Anstey paper. “However, the operator can nevertheless take comfort from the likelihood that any complaint, whether in private or statutory nuisance, would inevitably fail in the Magistrates Court (subject to the venue

● continued overleaf

Deeds of easement (from previous page)

operating within the terms of the deed), and that public nuisance would be rarely applicable in an urban context.”

Options open to residents concerned about noise from a venue include the right to: complain to the local planning authority (LPA) that the noise is causing them a statutory nuisance; seek a nuisance abatement order from the Magistrate’s Court; take private nuisance proceedings; seek a licence review on the grounds that the venue is causing a public nuisance; complain to the LPA that licence conditions are being contravened; and complain to the police that the noise amounts to anti-social behaviour. “Any of these actions could potentially result in the enforced curtailment of activities at a venue where the potential noise impacts were considered to fall below that of ‘significant adverse effect’ at the planning stage and where the residential developer was therefore not obliged to incorporate any mitigation according to the NPPF AoC policy,” points out the paper.

It adds: “Unfortunately, the lack of any definitive metric defining which might constitute a ‘significant adverse effect’ for entertainment noise, and a general paucity of guidance on the subject, leads to uncertainty for operators, assessors and decision makers in determining when the AoC principle might apply.”

There remains a need to augment the planning policies with effective legal measure, suggest the authors. In the UK, there are two basic types of legal nuisance – common law and statutory – both of which consist of private nuisance and public nuisance. No person may lawfully commit a statutory nuisance, and there are powers available to local authorities for enforcing breaches of the statutory provisions. The relevant statutory nuisances are those prescribed in the Environmental Protection Act 1990 (EPA) and the Noise Act 1996.

Unlike the EPA, the Noise Act prescribes an objective standard for permitted levels of noise affecting residential occupiers at night. If a complaint is made, the council can investigate whether the levels have been exceeded, having regard to the levels specified in the prevailing regulations.

“In contrast to the statutory nuisance provisions, common law nuisance is a tort, ie a wrongful act or an infringement of a non-contractual right, leading to legal liability for that wrongful act,” explains the paper. “It is often caused by someone doing something on their own land which they are entitled to do but which becomes a nuisance when it adversely affects their neighbours’ enjoyment of their land.”

An action in common law (private) nuisance is an action brought by one person with a proprietary interest against another person with a proprietary or possessory interest, whereas an action in common law

(public) nuisance does not require the claimant to have a proprietary or possessory interest. “In practice, common law actions in public nuisance are rare because the statutory regime offers a quicker and cheaper alternative,” points out the paper.

The George: DoE agreed

The WSP and Foot Anstey paper being presented at Inter-noise this month (June) also explains that the principle of the AoC was made paramount in the recent case involving the George Tavern. The council facilitated the close involvement of the tavern in the planning process. WSP and Foot Anstey acted on behalf of the interests of the George; their involvement in that capacity was financially supported by the developer, in line with the AoC principle.

It was proposed that a DoE could be agreed as an upfront measure; the current venue noise levels (CVNLs) enshrined within the draft DoE were considered to be a crucial component, as they will represent the yardstick to which the George could be held in the event of any future noise complaint. The agreed CVNL definition was based on a statistical analysis of measured event levels, using the 90th percentile of the $L_{10, 5min}$ measured within a 4-hour period during an event. This approach outputs a high-weighted aggregate, which ensures that any exceedences should only occur for short periods; this definition was carried through into the DoE. In addition, it was recognised that it would be better to avoid any noise complaints in the first place. The WSP team reviewed the developer’s acoustic assessments and design proposals and negotiated improvements.

Pauline Forster, who runs the George, has experienced years of concerns about the potential impact of proposed housing developments. She was previously been involved in a disagreement with a developer over a plan to build a set of luxury flats near her pub, eventually winning (*Noise Bulletin July 2016 p4*). In the latest case, resolved in February this year, she was able to secure a DoE from the developers. Taylor said at the time that the innovative legal agreement reflected a commitment from the council to protect music establishments.

“Music venues round the country are justifiably worried about being shut down because of noise complaints from new developments. Tower Hamlets has grasped the nettle here by insisting that this essential legal mechanism goes hand-in-hand with the planning permission. The DoE we drafted and agreed with the council and the developer should now be considered by other local authorities, as it’s the only way to fully safeguard local pubs and music venues, whilst still enabling much-needed housing to be built in urban areas. It’s a win-win situation.”

A need for assurance

Adoption of the AoC principle sounds both simple and logical. Thus a housebuilder developing a site alongside a noisy factory or leisure site should ensure that its homes are designed in such a way that the new occupants will not be disturbed. An alternative would be for the developer to pay for soundproofing of the noisy venue. Similarly, anyone hoping to open a business close to existing homes that have previously enjoyed peace and quiet would need to take measures to contain the noise.

Support for adoption of the principle has been growing, driven by concerns about new developments threatening the livelihood of late-night music venues at a time when many clubs have been closing. The campaign has been spearheaded by organisations including the Music Venues Trust and UK Music (*Noise Bulletin Jan/Feb 2018 p7*). The principle was incorporated into London’s draft plan (*NB December 2017 p1*) and was followed by government backing for its inclusion in the National Planning Policy Framework (NPPF) for England.

Although the AoC principle is widely supported, it is a harder matter to ensure that there is watertight protection in place. Use of a DoE in such situations is a new field and there remain different views on whether a council can insist on one being in place or whether it is a purely private matter. Equally, it remains to be seen how effective they will be if or when a future resident decides to complain anyway.

Big Sky Acoustics director Richard Vivian is cautious about the DoE approach, believing that any protection it provides has yet to be properly tested.

A DoE will typically state that it prevents any current or future owners, occupiers and lessees claiming that there is nuisance, he says. “It does not stop other parties complaining. It does not simply rip-up the statutory duty that the local authority has under the Environmental Protection Act 1990 to pro-actively inspect the area for pollution (including noise pollution) and to take enforcement action if they find it. It does not remove the obligation on the local authority to investigate noise complaints made by any resident. It does not remove the powers of the Licensing Act 2003 either, and as anyone can apply for a review (not just these immediate neighbours) there is a risk of enforcement action for a breach of the licensing objective of the prevention of public nuisance if evidence of that nuisance can be provided. The licensing committee is then likely to impose conditions on the Premises Licence to prevent further noise which might include controlling or prohibiting activities like music or restricting hours which may result in the premises not being viable.”

He adds that he also seen wording that

states a DoE is only granted for “the lawful use of the premises as a public house” so if the operation of the premises is deemed to not be lawful (eg through a breach of a premises licence condition) the validity of the deed would appear to fall away.

“It is better than nothing, and at least it puts the issue on the table for discussion, but it is not, in my opinion, a cast-iron protection for any licensed premises,” he says.

Ryan Diamond, senior solicitor at IBB Solicitors, feels that a lot will turn on the content of the deed itself. “This is obviously not a standard form document and in respect of the George Tavern this is really the first high profile situation in which a deed of this type has been used and widely publicised.

It remains to be seen how effective it proves to be in practice but obviously in deciding whether a deed of this kind provides protection the answer will turn on exactly what the terms have been agreed. I am specifically considering (i) what types of noise nuisance are effectively permitted by the deed, (ii) whether there are any prescribed limits on the noise levels, and (iii) are there any other limits on the making of noise such as specific hours.

“In any event, no deed will provide a guarantee that a neighbour will not complain. However, it may mean that any complaint is a bad one if it falls inside the permitted nuisances within the deed.”

He observes that there seems to be a commitment, at least under the current London mayoral administration, to encourage these kinds of arrangements as part of the planning process in order to preserve iconic locations. He felt that it still seemed to be very much a London-centric solution and it remains to be seen whether deeds of easement will be more widely adopted.

Diamond also points out that such a deed may create problems in marketing residential units; developers are likely to resist such a solution. “The existence of the DoE permitting a noise nuisance is something that inevitably will be picked up as a part of the conveyancing process. Residential purchasers are likely to think twice about a purchase where a permitted noise nuisance is flagged from the outset. The impact on marketability is obvious.”

It is probable that local authorities may not initially be made aware by the complainant that they are the subject of a DoE, Diamond says. But it does seem that the accused will have a good basis for a defence in highlighting the existence of the DoE and indicating that it is a civil dispute. “However again whether or not the producer of the noise nuisance is complying with the terms of the DoE will turn on its contents e.g. the level of the noise, the times in which noise can be produced etc.” He adds that he is not a planning specialist

but has concerns about whether or not the imposition of a DoE as a planning condition is a challengeable decision.

“We of course have the policy conflicts of the overwhelming need for new residential development as against the preservation and promotion of iconic leisure facilities,” he adds. It remains to be seen how any government’s commitment to legislate and promote the former will impact on the latter but I suspect given the overwhelming interest in promoting greater volumes of home building it is possible that the protection of such iconic locations, particularly where there is the risk of a statutory nuisance, may very well be drowned out.”

Further concerns for the Stables

The new reserved matters planning application submitted to Milton Keynes Council has brought further concerns to the Stables following the relief at the councillors’ earlier decision to insist on a DoE.

In early June, the Stables said: “We are saddened to report that since then, the developers have not taken up our invitation to discuss the details of the DoE with our solicitor. Instead, the developer had submitted a new Reserved Matters application for 79 houses to be built on the western half of the development site.”

It added: “After consulting with our solicitors and noise consultants, we have concluded that this latest application puts The Stables at even greater risk than previously.”

The Stables said that the new Reserved Matters Application makes no reference to the existence of The Stables nor to the previous condition that a DoE needed to be in place before the start of work. “It’s as if the developers have ignored the need to protect The Stables and everything that the council asked of them under the previous Reserved Matters approval,” it said. “If this Reserved Matters application were to be approved as it stands, the previous Reserved Matters approval with conditions relating to acoustic fencing, glazing treatments and the DoE falls away.”

Jazz musicians Dame Cleo Laine and the late Sir John Dankworth have always been closely associated with The Stables. The venue opened in 1970 following the conversion of outbuildings at their home. In October 2000, the new Stables Theatre opened its doors, with a second phase of development completed in 2007.

The Stables now presents about 350 concerts each year, along with around 250 educational sessions ranging from interactive concerts for schools to participatory workshops and longer-term projects. An indication of its popularity comes from the fact that some 3,000 people have written to the council in support of protecting the venue.

NEWS IN BRIEF

Child sensitivity

Korean researchers have looked at the impact of noise on mental health of children.

They used a population-based study to show noise is significantly associated with total behavioural problems, and noise sensitivity was significantly associated with internalising, externalising, and total behavioural problems after adjustment. “This is the first report on the impact of noise sensitivity in children and adolescents, and our findings suggest that the negative impact of noise and noise sensitivity on mental health occurs from childhood.”

They found that the magnitude of the association between noise sensitivity and behavioral problems decreased in the high-income group. A high income level seems to be a protective factor against the negative impact of noise and noise sensitivity, in that the influence of noise sensitivity on behavioral problems was found to be reduced even when the average noise level was higher in the high-income group.

Negative impact of noise and noise sensitivity on mental health in childhood Jongseok Lim et al, *Noise and Health* 2018; Vol.20, pp199-211.

Prison term

A noisy neighbour from Kettering has been one of the first offenders in the country to be handed a suspended prison sentence for noise nuisance.

Patrick O’Sullivan of Rockingham House, Rockingham Close, Kettering, had been served with a Community Protection notice by Kettering EHOs in 2017 requiring him to take steps to reduce the impact of loud music and raised voices on neighbours in the block of flats where he lived.

O’Sullivan continued to cause a nuisance and pleaded guilty to breaching the notice in July 2018. He was ordered to pay £1,230 in fines and costs and was subject to a three-year Criminal Behaviour Order, requiring O’Sullivan to not cause a noise nuisance to his neighbours.

EHOs continued to receive complaints and a summons issued. After failing to attend court, O’Sullivan was arrested in November on the back of a warrant obtained by Kettering Borough Council.

O’Sullivan was handed a further fine totalling £3,015, was sentenced to 6 weeks in prison (suspended for 12 months), and is subject to a 9-month Community Order including 20 days Rehabilitation Activity Requirement.

He has also lost possession of the majority of items seized from his property.