The Agent of Change Tiger Bites

KINGS CHAMBERS

The Agent of Change principle is starting to bite. The concept, (reinforced in the National Planning Policy Framework in paragraph 182 in 2012), is designed to address the situation where new residential development is proposed to be introduced near to hospitality venues and night time economy sources of noise. The resulting conflict, between incoming residents and established noise-makers has typically been played out in enforcement proceedings many years later. The Agent of Change principle was intended to front load the debate and mediate the outcome before it ever happens, and it is being seen, in one case after another, to be doing exactly that, with some surprising results in favour of licensed venues.

Corn Exchange

In an appeal decision on 8 January 2021, the planning Inspector upheld the refusal of South Oxfordshire District Council to grant planning permission. The developer sought to demolish parts of the building next door to the Corn Exchange in Wallingford, a charity volunteer run theatre and cinema, in order to build eight flats.

Both buildings were listed, but the effect of the development upon the heritage assets, and the Conservation Area came second to the Inspector's conclusions about the effect upon the living conditions of future occupants of the flats from noise and disturbance. The Inspector's key concern was whether potential complaints from the flats would jeopardise the future use of the Corn Exchange.

The Council have policies in their local plan which seek to avoid adverse effects from sources of pollution, including noise, and require that development should be appropriate for its location and offer realistic potential for appropriate mitigation of any effects.

The Inspector noted that paragraph 180 of the NPPF is also clear that developments should mitigate and reduce to a minimum the potential adverse impacts arising from noise from new development to avoid noise giving rise to significant adverse impacts on health and quality of life.

The Inspector noted:

“46. Paragraph 182 also makes clear that decisions should integrate effectively with existing businesses and where the operation of an existing business could have a significant adverse effect on new development, the applicant (or ‘agent of change’) should provide suitable mitigation before the development is completed.

47. Planning Practice Guidance (PPG) sets out further detailed guidance, including relating to the agent of change principle. This includes taking into account current activities, but also those activities that businesses or other facilities are permitted to carry out, even if they are not occurring at the time of the application being made. The agent of change will also need to define clearly the mitigation being proposed to address any potential significant adverse effects that are identified. Adopting this approach may not prevent all complaints from the new residents/users about noise or other effects, but can help to achieve a satisfactory living or working environment, and help to mitigate the risk of a statutory nuisance being found.”

The Inspector noted in particular that noise can constitute a statutory nuisance under the Environmental Protection Act 1990 and other relevant law. This includes noise affecting balconies and garden, where people are not shielded by any acoustic attenuation built into the fabric of their homes.

She said:

“50. Taking the above together, noise effects can be significant, causing harm to human health and wellbeing and can constitute a statutory nuisance which would necessitate enforcement action. It is therefore critical to assess the effects of noise and disturbance upon future

occupants of the proposed development and the implications for the future use of the Corn Exchange."

She was very careful to consider the situation of the Corn Exchange, as a volunteer run venue and an important community facility for Wallingford. It had opened in 1978 as a 175 seat theatre, and had won awards for its regeneration, as an extensive voluntary organisation and for promoting economic prosperity. It has a diverse offer, including pantomime, musicals and dramas. It is also used by other groups and professional shows, including ballet performances, bands, touring productions, stand up comedy, local school performances, and more.

She took great note of the specification of their PA system and cinema sound system, as well as the types of systems imported for use in live music or theatrical shows, and all the attendant acoustic musical noise as well, such as from drum kits.

There were no restrictions on the operations of the Corn Exchange, either in planning terms or in their premises licence under the Licensing Act 2003. The permitted hours extended to midnight through the week, and 01:00 at weekends, with no specific restrictions on noise levels.

There had been no record of noise complaints, although the occupants of the flat above the Corn Exchange provided evidence to the Inspector that noise levels from performances are audible to the roof terrace and that, in light of their personal circumstances, they were prepared to accept the limited disturbance it caused them. There were no objections to the grant of permission from the Environmental Health Department of the Council.

The importance of the Corn Exchange to the local community in terms of its social and economic benefits was a key issue, and largely agreed between parties. The Inspector said: "It follows therefore that its use should not be prejudiced by the proposed development because of noise and disturbance".

Detailed noise assessments took place at the Corn Exchange and the appeal site. There was significant debate about the accuracy and implications of the noise readings between the acoustic experts, with argument as to what the "typical" and "exceptional" or "occasional" operating conditions were. The Inspector noted:

“60. However, broad agreement was reached in terms of the noise disturbance primarily arising from the lower frequency octave bands. In addition, it was agreed that internal design criteria for music noise levels in the proposed units to be achieved are 40 dB Lzeq, 1min in the 63Hz octave band and 30 dB Lzeq, 1min in the 125Hz octave band with a relaxation of 5 dB for non-habitable rooms”.

The Inspector found that due to the juxtaposition of the Corn Exchange and the appeal proposals, noise effects on future occupants would be likely to be as a result of structure borne transmission through the wall of the proposed development.

Acoustic enhancements were proposed as part of the revised layout design and internal room layouts sought to minimise habitable rooms along the flanking wall where possible. However, the Inspector was not persuaded that the technical detail provided within the mitigation strategy, as reflected in the plans, could realistically be achieved at the site, and even on the Appellant’s more favourable noise measurements and assumptions, she was not persuaded that the mitigation was realistic.

The Appellants proposed a Grampian condition, which would prohibit development until suitable noise mitigation had been secured, and they were prepared to accept the associated risk. But the Inspector was not happy with that either because she said that there were so many unknowns, even at the time of the Inquiry, that she could not be confident that conditions in the future could resolve the problems.

She said:

“68. Overall, based on the above, there would be a significant risk of harm to future occupants from noise due to uncertainties around the effects and mitigation which could not reasonably be conditioned.”

The Inspector noted that the operations at the Corn Exchange as an important community asset are unrestricted, and that this was even in the context that some noise and disturbance effects were already experienced in the locality, as evidenced in the flat above. It is interesting that there was no comment or criticism about that. Developers will sometimes argue that there should be licence limitations on the premises to avoid noise breakout. This was the case in Crosby Homes (Special Projects) Limited v Birmingham City Council & The

Nightingale Club Birmingham Magistrates' Court [District Judge Zara, 2008]. The District Judge was not persuaded by the developer in that case, in similar circumstances, that any controls should be imposed upon the night club.

The Inspector said she had "considerable concern as to the effects on future occupants of the development from structure borne noise and there is significant doubt as to whether the effects can be realistically mitigated".

Her conclusion is particularly notable:

"76. ***Adopting a precautionary approach***, I therefore consider that there is a significant risk of harm to future occupants from noise and disturbance and thus the development would not provide satisfactory living conditions. Accordingly, the development could also compromise the Corn Exchange as an established entertainment venue as there could be significant potential for future residents to complain in light of my findings".

[Emphasis added].

It is important to note that The Corn Exchange was separately represented at the Inquiry under Rule 6 of the Inquiries Procedure Rules. This intervention by venues can be crucial to ensure that the venue's interests are properly protected.

1000 Trades

This situation was mirrored in the case of 1000 Trades, a live music venue in the Jewellery Quarter in Birmingham, in 2019. The venue also instructed specialist Counsel to represent them at a planning Inquiry, to invoke the Agent of Change principle to resist the conversion of the office block next door to them into residential development. The Council had historically confirmed prior approval for permitted development from office to residential at this site prior to 2016; at a time before the changes to PD required assessment of noise impact. The developer failed to implement in time and was required to seek prior approval again, post the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016. Local planning authorities were given the power under the Amendment Order 2016 to consider noise impacts concerning any permitted development.

When the developer re-applied, the Council refused prior approval, and the developer appealed. At appeal, the developer claimed that their proposed mitigation works would protect their future residents, as well as the operation of the local licensed businesses. They claimed that the sound insulation would be adequate, and that, although the windows to the flats were intended to be openable, that residents would be sensible and keep them closed during times of high noise output from their musical neighbours.

The Inspector disagreed. In his Decision Letter, he stated:

"The mitigation proposed is compromised by its reliance on the actions of a third party, namely the future occupiers, which is beyond the control of either the appellant (the developer seeking to build the flats) or the Council, and, consequently, the proposal would not suitably address the effect of noise from nearby commercial premises on the future occupiers of the proposed development".

This was entirely in line with the representations made on behalf of 1000 Trades' Venue when they stated:

"It is impossible to imagine a more catastrophic impact upon our business than moving from being the home of events like Birmingham Jazz to closure. 1000 Trades is at risk of this outcome if the noise mitigation measures proposed in this appeal – a risk that we feel abstract modelling undertaken by consultants cannot adequately mitigate, given the propensity for 'real world' factors to intervene".

Central to these 'real world' factors are how noise would have been experienced by occupants of the flats. If the planning system had allowed the flats to go ahead, 1000 Trades would have faced the perpetual risk of noise complaints, potentially leading to the licence being revoked and disastrous interference with the business, probably leading to closure.

Flapper & Firkin

A slightly different but related issue was considered in a planning Inquiry which was resolved on 2 September 2020, concerning the Flapper and Firkin, a pub and live music venue on Kingston Row in Birmingham. The venue had closed, and the Council had refused to grant planning permission to the developer to convert it into 27 flats.

The Inspector looked at various issues, including listed buildings and heritage assets; highway safety and the character and appearance of the area. None of these issues would have justified refusal, and the only issue which concerned him was the provision of community facilities, in particular, live music venues. It is notable in this case that the premises were not even in current use - the premises had closed at the start of 2020 when the lease expired. This was not COVID related. None of this prevented the need to protect the building, and specifically, its use as a live music venue.

The premises are situated on the canal, near to the city centre and whilst there are office buildings close by, the predominant use in the immediate vicinity is residential. So, the character of the area already had a pronounced residential element to it, but this was not enough to undermine the protection afforded to the premises.

The music venue operated from a lower ground floor bar of the building and was exclusively used for live music. It had a capacity of 120 people with performances mainly taking place on Friday and Saturday nights. Prior to its closure, it functioned on a model of the tenant operator working in association with band promoters, with a focus on amplified hard rock music.

Birmingham City Council's Development Plan contains planning policies which support the City's existing tourist and cultural facilities. The policies protect and promote smaller scale venues and attractions that are an important part of creating a diverse offer. Policies also support a diverse range of facilities and uses, including community uses and cultural facilities, and they require new residential development to be sympathetic to cultural assets, amongst other considerations.

Not all Local Authority Development Plans will have such specific policies protecting community and cultural venues, and this is something which should be considered. Specific and integrated policies, which link with the licensing and environmental protection regimes are part of the "joined up thinking" which is strongly advocated.

This Inspector in this case also noted that Paragraph 92 of the National Planning Policy Framework similarly, supports community facilities and guards against the unnecessary loss

of valued facilities and services, particularly where this would reduce the community's ability to meet its day-to-day needs.

The appellant's main justification for the loss of the music venue was the number of alternative similar facilities. The appellant submitted evidence from surveyors, highlighting the numbers of alternative premises for the presentation of live music to make the case that the loss of the appeal property would not be unreasonably detrimental. The Reports identified premises located throughout Birmingham, recognising that the visiting public to such premises will not be restricted to local residents. on the basis that the established custom for live music

The Inspector pointed out, however, that it was unclear whether those venues would actually be able to accommodate what would be displaced live music performances that would have taken place at the appeal property. The Inspector was not persuaded that there would be sufficient music venues, if The Flapper was lost to a different use. If the venue was not deemed, in effect, 'surplus' to the provision of music venues, then its loss would be detrimental to such community facilities as it would limit their range. This was an important observation by the Inspector that music venues are not interchangeable - it is not just a numbers game

There was an argument as to whether the premises were viable anyway. The Appellant did not claim that The Flapper, when it was trading, was struggling financially. The Inspector was less interested in the market and economic arguments about the premises then in considerations of its value to the community and whether its loss was acceptable in principle. He was concerned that, once lost, it would be difficult to retrieve, and he considered that the policies were not so much about the protection of facilities on an individual case by case basis, but more about the protection and promotion of smaller scale venues and guarding against unnecessary loss. He said: "A strong level of protection is afforded", and that it was ultimately a matter for the decision maker.

The Inspector also had to consider what planning benefits the proposed development of residential flats would offer, and he found that there were benefits, including the increase of housing provision and a contribution towards the Government's objective of significantly boosting the supply of homes, as well as aiding housing mix and balanced communities, and

other benefits as well. These were not insignificant matters, and they had to be weighed in the balance, but they were not enough to overcome the single harm identified - namely loss of the venue itself. The Inspector said:

"48. In relation to the harm that arises, this concerns the provision of community facilities and, in particular live music venues. It would result in the loss of what can be considered to be a valued community facility. The venues for live music performances would be diminished and the evidence is not of a sufficient strength to demonstrate that such a loss can be satisfactorily justified. This attracts significant weight in my decision and counts against the proposal. Set against this would be the benefits that I have set out. The weight to be attached to the benefit to housing land supply would be moderate. All other benefits carry limited weight. In taking these considerations together, the harm would not be outweighed by the benefits".

Other similar cases are currently under consideration, and the trend emerging is that Councils are getting bolder in refusing residential development, even where more housing would be of benefit, in circumstances where music and other licensed community facilities would be negatively impacted. The Agent of Change tiger is turning out to have teeth after all.

Sarah Clover

Kings Chambers

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