When noise ANNOYS

THE 'AGENT OF CHANGE' PRINCIPLE WAS INTRODUCED TO THE NPPF FOLLOWING CAMPAIGNS TO PROTECT SMALL MUSIC VENUES. BUT IT MAY NOT BE HAVING THE DESIRED IMPACT, SAYS SARAH CLOVER

The introduction of the 'agent of change' principle into the National Planning Policy Framework (NPPF) in 2018 was heralded as a major breakthrough in the protection of music and entertainment venues; but it is questionable whether the celebrations were justified.

The policy amendments were welcomed as if they were binding law. But the agent of change principle is policy only and, arguably, existed prior to 2018 without being particularly effective.

It is certainly true that more attention is being paid to the principle in its current iteration in paragraph 182 of the NPPF; but it is a flexible, if not vague, tool and its application in planning decisions is inconsistent, even chaotic. Practitioners are at the cutting edge of this developing concept and – to a large extent and jointly with decision-makers – are making it up as they go along.

Yet the need for the agent of change principle is undoubted. Our modern imperative for regenerating brownfield, urban spaces to provide new housing nearer to work and transport hubs brings new residential development ever closer to longstanding noisy businesses that were never established with sensitive neighbours in mind.

The conflict in interests is obvious and has been thrown into even sharper focus by the after-effects of the Covid lockdowns. Residents who have tasted previously impossible levels of tranquillity in their town and city settings are now reluctant to give it up to go back to 'normal'. Many who imagined that they would enjoy vibrant and loud city living failed to factor in their consistent need for sleep and respite. The balance can be very hard to achieve and the best opportunities to achieve it always exist at the outset of development, not years after everybody has settled in.

Noise as nuisance

A failure to get this right has depressingly consistent consequences. Noisy entertainment venues obtain premises licences from licensing departments on the basis that they are approved in areas that are expected to be noisy. Planning departments grant planning permission to residential developers who encroach into those noisy areas which are often ripe for regeneration and investment.

The incentives for any party in that exercise to protect the noisy businesses may not be high. Planning authorities need housing and economic input. Developers need profit. The agent of change principle comes with a price tag, which might detract from the viability of the development, or may come out of the pot intended for affordable housing or other planning obligations.

> "THE AGENT OF CHANGE PRINCIPLE COMES WITH A PRICE TAG, WHICH MIGHT DETRACT FROM THE VIABILITY OF THE DEVELOPMENT"

Residents move into their new homes, expecting to enjoy the benefits of central urban locations. Over time, their attitude to noise changes, perhaps as life's burdens, joys and tragedies change their priorities. People have babies, change jobs, suffer in health, but, rather than contemplate moving, they attack the source of their disturbance – very often with effective results.

Noise nuisance complaints are dealt with by yet another department of the local authority and the environmental health officers are under a statutory duty to assess the levels and impacts of noise, without particular consideration for the licensing or planning decisions that have gone before. In the absence of any agent of change protection, the statutory noise nuisance regime will take its standard course, and this can prove devastating for the noisy businesses that have remained consistent throughout.

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Change agent: Protection in principle

The agent of change principle has only ever been reflected in policy to date. What would a statutory principle in primary legislation look like?

- **The principle would need to be flexible enough to cover all the potential scenarios in which the relevant land use conflicts might arise.**
- **The principle would need to have enough precision to allow decision-makers to impose clear directions and restrictions on development.**
- **Legislation would need to impose positive duties upon decision-makers and upon developers. Discretion is unlikely to be effective or consistent.**
- **The duties would involve identifying agent of change scenarios and giving the potential conflicts appropriately detailed analysis, with expert input where required.**
- **There are suitable precedents in the protection of heritage assets and the environment. When the assets are defined in statute they acquire mandatory protection, and decision-makers are under a duty to give that high priority or risk an unlawful decision.**
- **Failures by developers to identify and implement the statutory protections would constitute offences.**

status quo is ever disturbed is clearly the solution, but the particular form that the solution should take is less clear.

There are many possible approaches. The obvious ones involve insulating the new-build, which will offer the most opportunities to mitigate against incoming noise, with design and building materials, including glazing. This can be achieved with planning conditions, with collaborative acoustic reports usually informing the specifics.

Sometimes, this alone would not be enough, however, and a combined approach can include insulating a particular venue against the escape of its noise, often from a building that was never designed to contain it. In some situations, the incoming developer has offered to incorporate a bespoke new home for the noisy business as part of the mixed use. In other situations, the developer has offered financial compensation to the noise source, to use in such ways as they see fit, to protect themselves.

It should be borne in mind that, in the cases of future complaints of noise nuisance, noise sources have the defence of "best practicable means" at their disposal, if they have done all they can in their particular situation to prevent their sound output causing a nuisance.

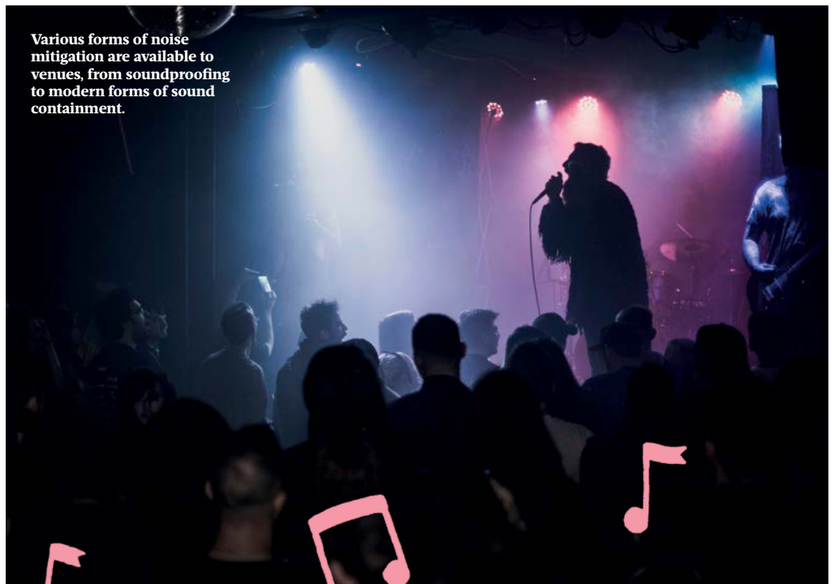
One good deed...

Taking that legal protection to the next level, developers have tried to employ 'deeds of easement' to offer comfort and protection to noise sources. This is a more complicated and uncertain tool. Developers lean toward them because it costs them little, but the comfort to venues is also small.

The idea behind a deed of easement is that the developer confirms in a legal document that the noise source shall have the right to continue at the same levels without being at risk of legal challenge or noise nuisance claims arising from the new development. The landowner and developer can be party to the deed, as well as the noisy business.

The difficulty is that the future occupants of the new units are not party to the deed, and, unless they are notified in the terms of their tenancies, will not be aware of the deed, let alone feel bound by it. The 'poster child' for deeds of easement, the Ministry of Sound in London, for whom the remedy was essentially invented, found itself on the receiving end of complaints within five years. Such deeds are, as yet, untested in the courts and have yet to prove themselves against any challenges based upon statutory rights or duties under the noise nuisance legislation.

Entertainment venues can generate noise oth inside and outside the venue.



Various forms of noise mitigation are available to venues, from soundproofing to modern forms of sound containment.

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There is no doubt that the appetite for developing more densely in urban areas will continue. It ticks a lot of sustainability boxes, including bringing people closer to their places of work, education and leisure, and reducing the need to travel, with consequent environmental benefits.

The measures required to make this city living compatible with businesses that have been *in situ* for a long time, without previously having any need to respond to the sensitivities of residents, are not keeping pace with the rate of change. In reality, all affected parties, including the regulators and decision-makers are only relatively recently waking up to agent of change consequences and attempting to front-load them into planning decisions, rather than just dealing with the enforcement fallout further down the line.

There is much that can be done at the right time, which is at the beginning of the process. As technology develops, there will be even more options to make conflicting land uses compatible with each other. Awareness of the issues among all parties at an early stage is essential, however, and that is the area of most rapid development.

"SUCH DEEDS ARE, AS YET, UNTESTED IN THE COURTS AND HAVE YET TO PROVE THEMSELVES AGAINST ANY CHALLENGES BASED UPON NOISE NUISANCE LEGISLATION"

Often, it is the noise sources who are the best informed of the dangers and consequences of new development arriving on their doorstep, as they have been educated about the potential impacts upon their business. They have the greatest incentive to intervene, as developers and planners may have other priorities in the planning balance. Once the issues are squarely on the table, then they can be tackled appropriately.

The current weakness in the system is that it is still only policy. Do we now require primary legislation to put these important issues on a firmer footing?

Sarah Clover is a barrister with Kings Chambers, specialising in licensing, planning and the agent of change principle. She is a trustee for the Music Venue Trust.

But what does it mean?

Many associate 'agent of change' with the idea that developers of residential units in a noisy area should install mitigation to guard against future complaints, particularly to protect existing businesses such as music venues. It is far more than that. There are many ways to control the relationship between new development and extant noise sources, which provide employment and entertainment that enriches our lives. It's important we get that relationship right.

The agent of change principle appears in a number of forms in planning policy and guidance, but has no definition within statutory law. The NPPF was amended in 2018 following a private members' bill tabled by John Spellar MP to introduce an agent of change to the Planning Act 1990.

The government instead chose to implement additions to the NPPF because of difficulties in introducing primary legislation at that time. Paragraph 182 now reads: *"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 principle is unspecific, but is being used creatively, from insulating new builds and noise sources, to negotiating financial exchanges, planning conditions, section 106 agreements, deeds of easement and more.

This variability is both strength and weakness, as practitioners struggle for precedents and consistency in an evolving area. The goal is any arrangement that secures harmonious future co-existence of noise sources and receptors. Conversely, if that appears to be unachievable, the agent of change principle has been proving effective as a reason to refuse development entirely, and there is now a notable body of appeal decisions demonstrating this in action.

When noise annoys: Three times the agent of change principle was used to protect a music venue

2021: The Vestry, Chichester

R (oao) Parkview Homes Limited (Claimant) v Chichester District Council (Defendant) & Sussex Inns Ltd (Interested Party) [2021] EWHC 59 (Admin)
The interested party operated the Vestry as a nightclub and music venue. The claimant was granted planning permission to convert the neighbouring property into residential units. The Vestry sought to protect its position with a s.73 variation to its own planning permission to regularise its operation.

The council's environmental health team concluded that the residential development could probably be mitigated against sound coming from the Vestry, but it would be challenging. The council only sought to address this challenge by requiring the Vestry to achieve certain sound output limits, without specifying how this could be done or pinning the methodology down in conditions.

The judge overturned the council's decision on the basis that officers clearly acknowledged the importance of ensuring the protection of residential amenity from noise but failed to identify a clear path to achieving this.

2019:1000 Trades, Birmingham

In December 2019, 1000 Trades, a licensed live music venue in Birmingham's Jewellery Quarter, relied on the agent of change principle to resist conversion of the office block next door into residential development. Until 2016, the council had always confirmed prior approval for permitted development at this site. The developer needed to reapply, but the council refused.

At appeal, the developer claimed that proposed mitigation works would protect future residents, as well as the operation of local licensed businesses. The sound insulation they proposed would be adequate and residents would sensibly keep windows closed at times of high noise output from their musical neighbours.

The inspector disagreed, saying: "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."

2014: Ministry of Sound, London

A deed of easement to protect noise output was first used between the Ministry of Sound nightclub and the owners of Eileen House in Southwark in 2014.

he residential development was important enough as a symbol of urban regeneration for the Mayor of London to mediate a solution. he consequent deed purported to grant an easement to the nightclub, conferring the right to continue to create the same levels of sound across the developer's land with no risk of complaints from new residents.

But future residents are not signatories to the deed and have statutory rights to complain about noise, which regulators must pursue. he first complaint came within five years. he use of deeds of easement in this context is as yet untested in courts and will have to contend with competing private law rights in nuisance law and regulatory law rights bestowed by local authorities in planning and licensing. hese rights are complicated to mediate, as was fully recognised by the Supreme Court in Coventry v Lawrence [2014] UKSC 13.

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