

COPA section 60 notices revisited?

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General legal requirements in drafting notices

1. Are the specified measures clear, sufficiently precise, reasonable and achievable?
2. Are all the requirements clear, unambiguous and capable of being readily interpreted?
3. Will the measures set out in the notice yield a solution and can this be achieved in the time frame prescribed?
4. Has a standard form of wording been used that may not fit the case?

Content of notices

Is the notice enforceable?

- ▶ Can the local authority enforce the notice?
- ▶ How will the notice be enforced?
- ▶ Will it be clear – to the local authority, those residing in the neighbourhood, to the notice recipient – if there has been a breach of the notice?
- ▶ Is there any vagueness which would make it difficult to know if it has been breached?

Is the notice fair?

- ▶ Has the regulator carried out an appropriate balancing exercise before reaching decisions?

Brentwood BC v City & Country (Warley) Ltd (2009), Crown Court

- ▶ Notice served on 23/8/2006
- ▶ Appeal allowed in part by DJ on 25/2/2008, who varied notice
- ▶ Re-hearing, not a review, of magistrate's decision, over 5 days in July 2009
- ▶ So original notice could have been before Crown Court, but parties agreed that varied notice should be
- ▶ Power of Crown Court to confirm the varied notice, quash it or further vary it

Amended notice before Crown Court

(1) All works and ancillary operations which are audible at the *boundary of any residential property*, or at such other place as may be agreed with the Council, shall be carried out only between the hours of 08.00 and 19.00 on Mondays to Fridays and between the hours of *08.00* and 13.00 on Saturdays and at no time on Sundays or Bank Holidays...

(parts changed by DJ in italics)

Brentwood BC v City & Country (Warley) Ltd (2009), Crown Court

- ▶ Crown Court decisions not binding, but may be persuasive
- ▶ No binding precedents cited in judgement, so this decision likely to figure in future disputes
- ▶ Nothing legally notable about the decision, except rare to find one on this point
- ▶ Court very critical about role of experts in not holding a pre-hearing meeting to narrow issues in dispute and provide a joint memorandum for court hearing

Facts of the development

1. Redevelopment of Victorian asylum for residential over several phases
2. Current phase with further 4 years to complete, noise problem for residents already resident from earlier phases and for neighbouring area
3. Some buildings listed, costs higher than anticipated, developer sought PP for additional 62 flats from new build (PP refusal under appeal at time of case)

Heart of the appeal

1. Conceptual basis:

Whether specific restrictions a better regulatory solution to replace general/vague/or excessive controls

2. Should the audibility test stand or be replaced by specific and measurable noise levels within a different daily time regime?

or, alternatively:

3. Should a regime of prohibited activities within certain hours be substituted?

Smart regulation: BBC's approach

1. No protocol on placement of sound recording devices
2. No maximum sound levels produced
3. No paper trail on creation of BBC's standard conditions
4. No rationale for approach adopted: based on custom and practice (folk wisdom)

The audibility issue

1. Whether inaudibility standard is excessive, unreasonable?

Court found that ground of appeal that test of audibility in notice was too vague had failed.

But did find approach inappropriate :
'simplistic, and unreasonable in character and extent':

'In reality the requirement that work be inaudible was a prohibition on work altogether during the prohibited hours'

The audibility issue

2. 'No Guidance actually uses or recommends the test of "audible" adopted by BBC in this Notice; no Guidance says that such a test is unworkable or should not be used; no noise restriction threshold or testing mechanism is flawless.'
3. 'There has in this case been no practical, "on the ground" testing of what "inaudible" means ... Neither has there been any testing ... as to the practical impact of noise level restriction measures in *db* on site.'

Lessons to be learned from the appeal

1. Don't rely on standard conditions, a 'one size fits all' approach
2. Consider all alternatives in Guidance, including where a combination of controls
3. Consult more effectively with developers and their experts
4. Consider (as the default position) using specified quantified limits to noise, specific requirements rather than vague, simplistic or subjective limits

The notice approved by the court (not a precedent/ model condition)

1. The site may operate without any noise restrictions between the hours of:
 - (a) 08.00 and 18.00 Monday to Friday;
 - (b) 08.00 and 13.00 on Saturday.
2. The site shall not operate at all on Sundays and Public Holidays or otherwise outside the hours permitted by this Notice.
3. The site may operate from 07.00 on Monday to Saturday but no powered plant or machinery or power tools shall be used or operated externally before 08.00.
4. The site shall close at 19.00 Monday to Friday and at 17.00 on Saturday but no powered plant or machinery or power tools shall be used or operated externally after 18.00 Mon. to Fri. and 13.00 on Sat.

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