Licensing and Planning

Roy Light, St John's Chambers

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The operation of premises for licensable activities requires both planning and licensing authorisations. There will be overlaps as issues such as noise nuisance may be considered by both planning and licensing committees when deciding whether to grant authorisations and any conditions to be attached.

Planning in licensing

As public houses and hotels have expanded their activities, under the liberalising provisions of the Licensing Act 2003 and more recently the Live Music Act 2012, disputes regarding public nuisance in relation to residential neighbours have increased in number. Local residents may object to applications for new premises licences or make complaints in respect of existing licensed premises. Efforts will be made to reach agreement between the premises and the residents, often with the licensing authority mediating, to resolve matters which may be achieved by adding conditions to the licence.

Conditions will be tailored towards allowing the business and neighbours to co-exist. This may include setting hours, capacity levels and numbers of events. The

aim being to balance the possibly competing interests of the venue with those of people living and working in the area.

What is a licensing authority to do if a premises licence application is made with a terminal hour later than the terminal hour in the planning permission? A licence application to operate to 2300 may be questioned if the premises have planning approval only to 2200.

Licensing and planning are separate regimes and this is recognised by many licensing authority policy statements, but there is no uniformity around the country. Premises with planning to 2200 and licence hours to 2300 will be able to operate lawfully only until 2200 but may intend to apply to have their planning hours varied. As the planning and licensing regime are separate, even if simultaneous applications are made, they will not be determined together. The s.182 guidance has varied on this matter over the years but in the latest guidance:

Where businesses have indicated, when applying for a licence under the 2003 Act, that they have also applied for planning permission or that they intend to do so, licensing committees and officers should consider discussion with their planning counterparts prior to determination with the aim of agreeing mutually acceptable operating hours and scheme design (March 2016, para.9.44).

Is this also intended to address the situation where a licence is being sought for premises with planning permission already in place? And while on the face of it such discussions may appear to be sensible where is the authority for effectively merging the regimes in this way?

Similar but different considerations apply in licensing and planning and different evidence may have been before the committees. There is therefore the possibility of one or other of the committees taking into account irrelevant

considerations or failing to take account of relevant considerations. Applicants will not be privy to such discussions which lack transparency and may be open to charges of bias or improper purpose.

Paragraph 9.44 seems to be in conflict with paragraph 13.57 in any event:

The statement of licensing policy should indicate that planning permission, building control approval and licensing regimes will be properly separated to avoid duplication and inefficiency. The planning and licensing regimes involve consideration of different (albeit related) matters. Licensing committees are not bound by decisions made by a planning committee, and vice versa.

The local planning authority is a responsible authority and able to make representations. If there are relevant matters that it wishes to put to the licensing committee it is able to do so.

Most licensing authorities seem to be of the view that the sensible course at the moment is to keep separate the planning and licensing regimes. It is for operators to ensure that they operate within both their planning and licensing authorisations - if the opening hours differ it will be the shorter hours that will have to be observed.

Licensing in planning

Concerns may arise in the planning process over proposed residential development which may be affected by the operation of existing licensed premises. For example, a developer wishes to build residential accommodation on a brown field site which is next door to a public house which has the benefit of a late licence authorising alcohol, late night refreshment and public entertainment. (TENs and live music exemptions would also apply).

While the pub has traded for years without any problems arising there is concern that its operation will raise public nuisance issues for the proposed accommodation once it is built next door to the pub. This could the result in the pub's activities being curtailed in response to complaints from those who occupy the residential accommodation.

The question is whether the effect on future residents of neighbouring licensed premises is a material consideration in planning decisions. It seems clear that it is but that noise should not be looked at in isolation – it is a question of balance.

National Planning Policy Guidance 123 and the National Policy Statement for England (footnoted in NPPG 123) contain four bullet points. One of these may apply to noise affecting the proposed development rather than noise from the proposed development: *Planning policies and decisions should aim to avoid noise from giving rise to significant adverse impacts on health and quality of life as a result of new development*.

The PPG provides that *noise needs to be considered … when new developments would be sensitive to the prevailing acoustic environment*.[1] Central to the matter is the response in the PPG to the self-posed question *Can noise override other planning concerns?:*

It can, but neither the Noise Policy Statement for England nor the National Planning Policy Framework (which reflects the Noise Policy Statement) expects noise to be considered in isolation, separately from the economic, social and other environmental dimensions of proposed development.[2]

[1] Paragraph: 001 Reference ID: 30-001-20140306
[2] Paragraph: 003 Reference ID: 30-003-20140306

So that a combination of additional measures by the developer, such as sealed windows and sound insulation, and a full consideration of other dimensions and benefits of the proposed development are necessary when considering whether the scheme should be approved.

Pauline Forster v Secretary of State for Communities and Local Government etc.[3]

The effect of new housing development on established licensed premises has recently been considered by the High Court and Court of Appeal in *Foster.* The High Court provided valuable guidance and in granting permission to take the matter to the Court of Appeal Lord Justice Laws concluded that the extent to which planning decision-makers should take into account the risk of licence restrictions and/or nuisance actions was an important issue. The question posed for the Court of Appeal was whether the threat posed by new residents to established licensed premises is a material planning consideration, even if noise effects are acceptable in planning terms.

The facts are that Foster owns the George Tavern; a grade II listed public house and music venue in London. Swan Housing Association applied for planning permission for a three-storey building with commercial use on the ground floor and six flats above on a site next door to the pub. Foster objected on the basis that noise complaints from future residents could pose a significant thereat to the venue's future. The planning authority refused planning permission but the scheme was approved on appeal. Foster went to the High Court claiming that the permission had been unlawfully granted at appeal. Lindblom J (as he then was) rejected Foster's claim.

[3] [2015] EWHC 2367 EWHC (Admin); [2016] EWCA Civ 609

The planning authority reasons for refusal included: *the proposed residential accommodation is considered an incompatible use within the vicinity of a public house with live music licence and would be significantly detrimental to the future amenity of occupiers, contrary to policy SP10 of the Core Strategy 2010 and policy DM25 of the Managing Development Document April 2013* (para.7*).*

The Inspector in his decision letter identified 'the main issue' in the appeal as being *whether the future residents of the proposed scheme would be subjected to unreasonable noise levels* (para.26). There then followed an analysis of the noise reports, the layout of the building and proposed mitigation. The Inspector concluded that:

All matters have been taken into account and I find that, with suitable conditions, the living conditions of future residents can be protected from noise generated locally. The appeals are therefore allowed (para.34).

The High Court dismissed the application and the Inspector's decision remained. The High Court was not concerned with the planning merits of the proposed scheme but was concerned only with the lawfulness of the Inspector's decision.

Forster as well as noise had also raised a light issue. Court of Appeal allowed the appeal on the light issue as it had been specifically related to the effect on Forster's business and had not been dealt with in terms by the inspector. The appeal was not allowed on noise but the following by Laws LJ (at para.16) gives valuable guidance for such cases:

1. *the impact of a prospective planning permission on the viability of a neighbouring business may in principle amount to a material planning consideration*;

2. such an argument should be raised *with a sufficient degree of particularity and supporting evidence to enable the Inspector to reach an objective and reasoned conclusion on the point;*

3. if raised in purely general term it *, would most likely do no more than invite the inspector to embark upon a merely speculative exercise; and such a process would be unorthodox and illegitimate.*

4. *No doubt there are situations where the threat posed by a prospective planning permission to a neighbouring business will stare the Inspector in the face: the prospect of a new retail outlet across the street from an established shop selling the same range of goods is an instance. But in other cases and this is surely one, the alleged effects of the proposed development will by no means be so* clear. *Where that is so, an evidence-based case needs to be made.*

Prof Roy Light is a specialist licensing and planning barrister based at S John's Chambers, Bristol (roy.light@stjohnschambers.co.uk).