Acoustics Forum

WHAT IS OFFENSIVE NOISE? A CASE STUDY IN NSW

Renzo Tonin, Renzo Tonin & Associates (NSW) Pty Ltd,
PO Box 877 STRAWBERRY HILLS NSW 2012, rtonin@renzotonin.com.au

INTRODUCTION

A recent decision in the NSW Land & Environment Court relating to noise emitted from an outside play area of a private school is used as a case study to demonstrate the distinction between "offensive noise" in enforcement actions and "environmental impact" in planning matters. On the surface, the two terms appear to be a manifestation of the same effect, however, there is a difference.

In NSW, the three principal legislation documents pertaining to the planning and enforcement of noise pollution are:

1. Environmental Planning & Assessment Act 1979 (EP&A Act) [1],
2. Protection of the Environment Operations Act 1997 (POEO Act) [2] and
3. Protection of the Environment Operations (Noise Control) Regulation 2008 (POEO Regulation) [3].

The EP&A Act is relevantly about planning matters and ensuring that "environmental impact" associated with new developments or the intensification of existing developments are properly considered and are reasonable before granting development consent to development.

On the other hand, the POEO Act and its Regulation are mostly concerned about enforcement: that is, preventing or putting a stop to the emission of "offensive noise".

In planning, the assessment of "environmental impact" invariably relies upon the use of acceptability criteria which either may be explicitly defined in a Development Control Plan (DCP) or, derived from first principles using the guidelines promulgated in the Industrial Noise Policy (INP) [4] or the Noise Guide for Local Government (NGLG) [5] both of which are produced by the NSW Department of Environment Climate Change and Water (DECCW, formerly the EPA). In general terms, compliance with the acceptability criteria would infer that "environmental impact" or relevantly "noise impact" is acceptable.

In enforcement, "offensive noise" must be proved for there to be a prosecution. The term "offensive noise" is defined in the POEO Act (to be further discussed in detail below).

It has been common practice in the acoustics profession to use the term "offensive noise" when dealing with planning matters and in deriving noise criteria from first principles as if the term were defined in the EP&A Act. In fact, the distinction between "environmental impact" and "offensive noise" has been blurred to such an extent that they are thought of in practice as one and the same thing. That is, having established an acceptability criterion then exceedence of that criterion is an unacceptable "environmental impact" and therefore an "offensive noise".

However, a recent judgement in the NSW Land and Environment Court concerning a resident and a Sydney private school [6] crystallised the difference between planning and enforcement regimes and the use of noise criteria in each.

This paper explores the issues involved in noise impact assessment in planning and enforcement and highlights the different approaches which should be taken (according to the judgment). Note that the judgment relevantly pertains only to the NSW jurisdiction and does not translate to other Australian States where the legislation differs and so does case law.

PLANNING LEGISLATION AND MATTERS FOR CONSIDERATION

When considering whether or not to approve a development, the consent authority (usually the local council) must take into account the requirements of Section 79C "Evaluation" of the EP&A Act, commonly referred to as the "Heads of Consideration".

The Heads of Consideration states that a consent authority is to take into consideration *"the likely impacts of that development, including environmental impacts on the natural and built environments, and social and economic impacts in the locality, the suitability of the site for the development, any submissions made in accordance with this Act or the regulations, the public interest."*

There are no prescriptive acoustic standards to be met in the EP&A Act and there is no requirement in respect of "offensive noise".

In NSW, there is no consistency in codes and standards between regulatory authorities. Whilst it would appear desirable to have common policies across the State (as they do in Victoria) it is up to each regulatory authority to determine what standards it wants to impose on development if any at all.

When deciding whether to approve a development and what conditions to impose, the consent authority, must take into account all the relevant matters it is required to in the Heads of Consideration, the need for the development, the social consequences, noise impacts, its own policies, the views of those persons who object to or support the development and anything else that it reasonably considers relevant.

Upon granting consent, the resulting planning decision is one that should have certainty for everyone, both developers and objectors and result in finality for all parties. Otherwise developers will not be able to rely on the decision and would have no certainty in investing their capital and objectors will not be able to rely on the decision to put a stop to their plight so that they can get on with their life.

In order for this to occur it is not appropriate, when contemplating enforcement action, to commence the process again from the start and to ignore the regulatory authority's contemplation described above.

In other words, when contemplating an enforcement action, one should not treat the matter as if it were a development application *de novo*. The starting point should be to consider objectively what the consent authority had in mind when approving the development and

to interpret the conditions of consent pertaining to that development in that light. This then leads to contemplation of how "offensive noise" should be interpreted and what noise criteria are appropriate

ENFORCEMENT LEGISLATION

Once a planning consent is given, the consent conditions imposed must be complied with (Section 121B of the EP&A Act prosecuted in Class 4 Proceedings in the Land & Environment Court). Therefore, if specific noise conditions are imposed, it is a matter for the development to comply with those noise conditions.

However, not all noise conditions are written in an unambiguous way, such as the following noise condition pertaining to the development application for the school, the subject of this paper:

8 Any noise emanating from the use at any time shall not have any detrimental effect on the adjoining residential amenity.

How should this condition be interpreted in circumstances where development consent was given for up to 640 students in a school which incorporates outside play areas in locations approved by Council? Does the condition mean that the noise should not be detrimental in an absolute sense (that is the absolute level of noise or exceedance of background) or does it mean any noise in excess of what would normally be expected from the school operating in accordance with its consent conditions (that is, noise above what one would expect from 640 students in this location)?

Neighbouring residents who claim they are adversely affected by noise have a number of choices for advocating their grievances, including a Class 4 prosecution in the Land & Environment Court alleging a breach of a condition of consent. In normal circumstances, this may be the simplest action an aggrieved person could take against a development.

Another action which could be taken is a prosecution under the POEO Act. Under this Act, authorised personnel (e.g. the police and local council officers) and the public (by application to a local court) may direct persons causing "offensive noise" to be emitted from premises to abate that noise. There are various forms of directions which may be given to such persons including a Noise Control Notice, a Noise Abatement Order or a Noise Abatement Direction. A Noise Control Notice and a Noise Abatement Direction may only be issued by authorised personnel. A Noise Abatement Order may be brought by a member of the public and it is an offence to act contrary to an order issued by the Local Court.

What difference is there in seeking a Noise Abatement Order instead of prosecuting a breach of a condition of consent? Put simply, in the former, the applicant must prove that "offensive noise" is emitted from the premises. In the latter, the applicant must prove there is a breach of a condition of consent (such as condition 8 above).

The reader may think that the two are synonymous, however, there is a difference. In the case study described in this paper, the resident decided upon a path of proving "offensive noise".

In the definitions of the POEO Act,
"offensive noise" means noise:

(a) that, by reason of its level, nature, character or quality, or the time at which it is made, or any other circumstances:
(i) is harmful to (or is likely to be harmful to) a person who is outside the premises from which it is emitted, or
(ii) interferes unreasonably with (or is likely to interfere unreasonably with) the comfort or repose of a person who is outside the premises from which it is emitted, or
(b) that is of a level, nature, character or quality prescribed by the regulations or that is made at a time, or in other circumstances, prescribed by the regulations.

In respect of the part of the definition comprising (a)(ii), offensive noise does not mean noise that is unpleasant, irritating, annoying, abhorrent, abusive, detestable, disagreeable or any other like words. It does not even mean noise that is "offensive" in the way that word is used in every day life. That meaning was expunged from the definition of "offensive noise" when the POEO Act replaced the former Noise Control Act 1975.

The Noise Control Act 1975 then defined "offensive noise" as:

"noise that by reason of its level, nature, character or quality, or the time which it is made, or any other circumstances, is likely to be harmful ***or offensive****, or to interfere unreasonably with comfort or repose".* [emphasis added]

The modification of that definition probably occurred because it was seen to include noise which is offensive solely by virtue of its content, such as a noise which is indecent or racist [7].

The salient requirement in the POEO Act is that the noise "interferes unreasonably". In that sense, the term "offensive noise" could equally well be thought of as "unreasonable noise" or even "noise which is an offence under this Act". In fact, it may be better to think of "offensive noise" in that way to avoid confusing it with noise that is (by its ordinary meaning) offensive.

When interpreted in that sense, noise that "interferes unreasonably" must take into account whether or not the activity producing the noise was consented to by council under the Heads of Consideration for not to do so would subvert Council's decision. As stated in the NGLG (Section 2.2.1 Intrusive Noise), *"in the absence of a council policy, intrusive noise would not automatically be considered offensive noise".* Therefore, when considering the "level" of noise, one should not only take into account the intrusiveness of the noise in an absolute sense (i.e. its level above background) but also the level of the noise in comparison with the level that council has assessed as being reasonable in the circumstances when approving the activity or development.

Put simply, if council approved the development and the associated emission of noise subject to certain conditions and the user of the property complied with those conditions, then it should follow that the use would not "interfere unreasonably" and therefore the noise could not be categorised as "offensive noise" notwithstanding that it may be at a level above acceptability standards used to assess planning developments.

THE COURT DECISION

We now turn to the application of the principles discussed above to a recent decision of the Land & Environment Court referred to in the introduction. That case concerned a dispute between a resident and an adjacent private primary school in the Sydney suburb of Strathfield. Private schools (unlike public schools) are subject to the POEO Act (see Figure 1).

The resident complained of noise from the school, particularly the sound of children playing outdoors on the school's lawn in the morning (before school), recess, lunch time and after school and children's outside activities at other times of the day. In addition, noise from the use of yard maintenance equipment such as leaf blowers, gurneys and edge trimmers.

The resident applied to the Burwood local court for a Noise Abatement Order (pursuant to section 268 of the POEO Act 1997) seeking an order for the school to abate the "offensive noise".

The competing arguments are this: The resident says noise emitted

from the school is loud, is intrusive, causes him distress and therefore is offensive. The school says that notwithstanding the loudness of the noise and its exceeding of planning criteria which may apply today, the school is nevertheless compliant with its consent conditions issued by Strathfield Council and therefore it should be permitted to operate in accordance with those conditions. Therefore, the central question is whether or not in these circumstances, noise from the school is "offensive noise".

In the local court hearing, the magistrate took a fairly simple view that where there is a conflict, the parties should negotiate and settle the matter otherwise, he said, he would issue directions that may not be palatable to either party. He concluded based on the evidence that noise from the school should comply with a planning criterion of "background plus 5" and issued orders requiring the construction of a noise barrier 5m in height located close to the common boundary of the properties and the double glazing and mechanical ventilation of the affected residence.

The school appealed that decision in the Land and Environment Court which re-heard the matter in its entirety (a *de novo* hearing). That judgement set aside the decision of the local court and concluded that the school does not emit "offensive noise". The judgement concluded as follows:

"My conclusion on the appropriate assessment is that the advice of [the School's Consultant] *is to be preferred. It needs to be borne in mind that I cannot assess the school activities in a planning sense. The assessment criteria are one aid to determining what the level of acceptable noise should be, as part of the information relevant to determining whether the noise emitted is offensive. The criteria are not to be applied as a standard the school has to meet where there is no evidence that it is not otherwise complying with its conditions of development consent."*

The school argues that it operates within its consent conditions and as anticipated by Council when it made its decision. The Council planner's report stated as follows:

"It is considered that from observations the noise from the play time activities, are not considered excessive and are considered reasonable and accepted by the general community."

In other words, Council's position is that it approved the development in its current form, the development appears to be operating as anticipated by Council and therefore it complies with its consent conditions.

The judgement states as follows:

"All noise that emanates from the normal activities at a school is not offensive. The focus of the case should be that element of the noise above normal school operations which is identified as offensive but no such category of noise has been clearly identified by the Respondent despite attempts to define the offensive noise by him. There is no particular sound above the usual ambient noise expected of a school environment which is particularly identified as giving rise to offensive noise apart from noise resulting from the children's use of the Jobling lawn, and the use of blowers and gurneys. In the absence of such specificity in the Respondent's case, I do not consider there is evidence to enable me to consider any other aspect of the activity at the school which may give rise to noise beyond these two areas."

Therefore, in respect of condition 8 referred to earlier and in paraphrasing the judgement cited above, that condition should be interpreted as *"any noise emanating from the use at any time above normal school operations shall not have any detrimental effect on the adjoining residential amenity"*.

CONCLUSION

The decision in this case study makes a distinction between the assessment of noise impacts in planning and enforcement. "Offensive noise" is an enforcement term defined in the POEO Act and an assessment of unreasonable intrusion under that Act should take into consideration what was permitted by the responsible authority and not in isolation of it. Environmental impact is a planning term referred to but not defined in the EP&A Act and involves the assessment of noise and the consequences of noise emission. Noise criteria are pertinent to both enforcement and planning but, in deriving enforcement criteria where specific criteria are not stipulated, those criteria should not be derived *de novo* from a planning perspective.

In conclusion, it is important to distinguish between the two processes of planning and enforcement. It is common practice for acoustic engineers to refer to the definition of "offensive noise" in the POEO Act in environmental noise assessments and to treat enforcement from a planning perspective. One must differentiate the two processes, firstly by not referring to the "offensive noise" definition in the POEO Act is if it were a planning term and secondly, by not treating an enforcement prosecution as if it were a planning process.

REFERENCES

[1] NSW Environmental Planning & Assessment Act 1979
[2] NSW Protection of the Environment Operations Act 1997
[3] NSW Protection of the Environment Operations (Noise Control) Regulation 2008
[4] NSW EPA Industrial Noise Policy January 2000
[5] NSW EPA Noise Guide for Local Government August 2009
[6] Meriden School v Pedavoli [2009] NSWLEC 183 (22 October 2009) http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2009/183.html
[7] The New South Wales Noise Control Act 1975. Julian Disney. The University of New South Wales Occasional Papers 1-1976