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The use of quantitative noise standards as proof regarding 'general amenity' requirements (and some observations about the enforcement of noise SEPPs)

Introduction

The recent Tribunal decision of *Whitehorse CC v St Thomas Anglican Church* [2019] VCAT 1126 (29 July 2019) (***St Thomas***) illustrates the potential to use quantitative noise standards to show compliance / non-compliance with qualitative 'general amenity' requirements.

A general amenity requirement that a use 'must not detrimentally affect the amenity of the neighbourhood' is a common permit condition. It is also contained in Victoria's three commercial zones (C1Z, C2Z and C3Z) and applies as an enforceable requirement to as of right uses.

St Thomas was an enforcement order application in VCAT about whether noise from children playing in an outdoor area at a church was breaching a general amenity condition in the church's planning permit. The Tribunal gave determinative weight to acoustic engineering evidence, applying non-statutory 'industry practice' criteria (background + 10dB for day and evening), over the lay evidence of residents concerning their experience of noise impact.

The reasoning in *St Thomas* shows a pathway between using the quantitative measures in noise standards such as SEPP N-1 (commercial noise) and SEPP N-2 (music noise) to 'bridge the gap' in circumstances where SEPPs aren't directly enforceable. This is interesting and important given the almost complete inability to enforce the noise SEPPs in Victoria for as of right uses.

Mind the gap - enforcement of the noise SEPPs

The noise SEPPs play an important role in noise regulation in Victoria. They set mandatory, quantitative noise limits that apply to most types of noise emitted from commercial premises. They are used for compliance and design purposes.

However, as the EPA's role in noise regulation (especially enforcement) has reduced since the SEPPs were created in the late 80s, a disconnect has arisen.

Only the EPA can enforce the noise SEPPs directly under the *Environment Protection Act 1970* (**EP Act**) (s59, EP Act).

Council's and persons affected by noise can only enforce the SEPPs where compliance with them is required by some other instrument which they can enforce, e.g. a planning permit condition (which can be enforced by 'any person' under s114 of the *Planning and Environment Act 1987*).

The problems with this are that:

- EPA will only typically enforce SEPPs for premises it licences under the EP Act and some large outdoor entertainment venues; (see the *Noise SEPPs Review Discussion Paper*, EPA Publication 1570, s5.1, p. 14); and
- many commercial uses do not need a planning permit.

This limits enforcement options for commercial noise to:

- actions brought under the *Public Health and Wellbeing Act 2008* (**PHW Act**); no objective criteria are provided in this Act and proceedings can only be brought by a council (s64, PHW Act);
- police officer requests to abate noise from entertainment venues under s48AB of the EP Act (again, no quantitative criteria are provided); and
- private nuisance actions brought in the Courts.

The SEPPs provide quantitative noise limits that can be measured and designed to. These benefits are lost when they can't be enforced, despite the blanket statement at s46 of the EP Act that:

> "The emission of noise shall at all times be in accordance with State environment protection policy".

The new noise framework – *Environment Protection Act 2017*

The issues about enforceability outlined above are set to continue under the new *Environment Protection Act 2017*. Section 347 of the *Environment Protection Amendment Act 2018*, like the current framework, provides that only the EPA can prosecute for offences against the Act or Regulations (there are exceptions to this, including in relation to noise from residential premises, but not for noise from commercial premises).

Based on the Government's current 'Exposure Draft' of the Environment Protection Regulations (currently out for public comment), the new noise framework is substantially a translation of the current noise SEPPs into the Regulations and an accompanying 'noise protocol' which will have statutory force under the Regulations. (Note: The most significant change to the existing framework seems to be the mooted inclusion of child care, schools, camping grounds and caravan parks as noise sensitive areas.)

Quantitative standards as proof regarding 'general amenity'

Planning permits often contain a 'general amenity' condition worded such as:

> "The use must not detrimentally affect the amenity of the neighbourhood, including through the:
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> - Transport of materials, goods or commodities to or from the land.
> - Appearance of any building, works or materials.
> - Emission of noise, artificial light, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil."

This requirement is also contained in the Commercial 1 Zone, Commercial 2 Zone and the Commercial 3 Zone and applies to the use of land in these zones even where a permit is not required.

The decision of the Tribunal in *Whitehorse CC v St Thomas Anglican Church* [2019] VCAT 1126 (***St Thomas***) indicates that use of a quantitative standard such as the noise SEPPs and other industry developed standards will carry significant if not determinative weight in determining compliance with the general amenity condition.

St Thomas was an enforcement order application against a church concerning breach of a 'general amenity' condition in a planning permit. The issue was noise to adjoining neighbours from children playing at the church in an outdoor area.

The church led acoustic evidence demonstrating that the noise in question was within industry accepted levels. The Council led lay evidence from neighbours to the effect that noise was unacceptable irrespective of the quantitative assessment. The Tribunal preferred the expert's opinion, stating:

> "66. In considering how to assess whether the amenity of the area has been detrimentally affected by the noise of children from the courtyard, the Respondent had regard to various Tribunal decisions including those already referred to and relied on five principal contentions, with which we agree:
>
> - Any assessment of amenity impact should be objective, rather than subjective.
> - The question of compliance with this kind of acoustic amenity condition is a technical question, depending on acoustic science, as a recognised area of expertise.
> - Independent evidence will ordinarily carry more weight than partisan evidence.
> - This kind of condition does not operate as a bar on any amenity impacts at all.
> - It is instructive to have regard to the kind of analysis and assessment that is routinely undertaken in respect of a proposed use or development.
>
> ...

68. In terms of this assessment, and the assessment of the nature and effect of the noise, the Council submitted that the Tribunal ought to give greater weight to the subjective assessment of the Pirnats than to the expert evidence and experience of Mr Leo and the noise modelling undertaken. The Council submitted that Mr Leo's results should not be given great weight as they do not reflect the experience of the Pirnats and Mr Carter, which suggest a far greater level of noise.

69. We do not accept the contention that if a noise complaint is made to a Responsible Authority, it follows that there has been a breach of a condition requiring that noise must not detrimentally affect the amenity of an area. A Responsible Authority must determine the question of detriment for itself, following investigation of a complaint and consideration of whether the expectation of the complainant is reasonable in the context of the use, the land and surrounding area.

...

72. We therefore consider that, in this case, the only way to objectively assess the extent and impact of the noise emitted is by way of independent acoustic expertise. In that respect, we confirm that we accept the evidence and expertise of Mr Leo, and we accept that the Respondent, in engaging Mr Leo to undertake noise monitoring, identified times and dates on which it considered noise impacts would be greater than usual and did not interfere with the monitoring by changing the nature of activities or instructing participants to behave differently than they otherwise would."

Conclusion

St Thomas demonstrates, in the mind of the Tribunal, the primacy of objective acoustic engineering evidence applying quantitative standards. Whether this puts too much faith in the logic underpinning noise standards in Victoria, that often have uncertain origins, is a question for another day.

Accepting the Tribunal's approach, it stands to reason that breach of noise SEPPs and other noise standards could be taken as good evidence that general amenity conditions are breached. This approach could help to close the gap concerning the limited options for enforcing noise SEPPs. It might even extend to supporting claims of nuisance under the *Public Health and Wellbeing Act 2008.*

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