

Appendix 9

Legal Framework

New Roads and Street Works Act 1991

New Roads and Street Works Act 1991 gives the legal right to statutory undertakers (water, gas, electricity, telecommunications, rail and underground operators) to undertake works to install or maintain their networks. As such flexibility must be given to allow these works as a matter of law. A ban on noisy Saturday works could not apply in these circumstances.

The Control of Pollution Act 1974 Sections 60 and 61

The Control of Pollution Act 1974 Sections 60 and 61 deal with the control of noise and 'prior consent for work' on construction sites.

The S60 notice may specify:

- Working practices (e.g. methodology or equipment);
- Working hours;
- Noise limits for the site, possibly including specified hours.

The Act requires that in serving notices the local authority should have regard to:

- Ensuring that "best practicable means" are employed by the Contractor to minimise noise;
- Making the Contractor aware of other methods or plant or machinery that the local authority considers more acceptable; and
- Protecting any 'sensitive receptors' near the site from the effects of noise.

A Section 60 notice may be served by the local authority at any time without consultation with the Contractor or developer. Furthermore, the requirement under a Section 60 notice can be made more onerous if the City receives and upholds complaint in the vicinity. This can have significant implications for the programming and costs of the works.

Failure to comply with a Section 60 notice is an offence without "reasonable excuse" and can lead to prosecution in a Magistrates Court.

The Contractor may apply to the local authority to start work under a Section 61 Agreement. The Agreement must be completed prior to the start of construction work and requires the Contractor (typically in conjunction with their acoustics consultants) to provide detailed information on:

- The works and the method by which they are to be carried out; and
- Measures to minimise noise resulting from the works.

If the City approves the Section 61 application then legally they cannot serve the Contractor with any Section 60 notices throughout the construction programme,

provided that the Agreement is adhered to. This protection can be an attractive approach for sites where noise or vibration is likely to be an issue but is discouraged by the City as it removes the flexibility for the City to later impose stricter controls if required.

Section 61 Agreements can take some time to negotiate, especially for complex construction sites. However, once an application has been submitted, the City must inform the applicant of its decision within 28 days.

The Planning Regime

The City also imposes noise control requirements (typically via conditions attached to a planning consent) on a person or company (the Contractor) when they carry out developments. The City of London requires the submission of a Scheme of Protective Works linked to the COP which is site and works specific detailing how the works are to be completed and how Best Practicable Means (BPM) are to be met to mitigate the effects from noise, dust and vibration.

Infrastructure Schemes Acts and Orders

Major infrastructure schemes such as Crossrail and Bank Station Capacity Upgrade are consented by way of an Act of Parliament and a Transport and Works Act Order and as such major infrastructure projects sit outside of any ban on noisy construction works on a Saturday.

Relevant Cases

Construction works are treated more generously in law than other noise sources as they are a necessary part of the ordinary use and occupation of land and houses. In *Hiscox Syndicates Limited & Anor v The Pinnacle Limited*. [2008] EWHC 145 (Ch) it was said that "...the law takes a common sense view of the matter and, if operations such as demolition and building are reasonably carried on and all proper and reasonable steps are taken to ensure that no undue inconvenience is caused to neighbours, whether from noise, dust or other reasons, the neighbours must put up with it."

It is important that every site is considered in a site-specific assessment of the controls necessary for that site given its location and activities as is the approach in the City's Code of Construction Practice. In *Brentwood BC vs City and Country (Warley) Ltd* 2010 JPL 1443, the Court criticised the council's use of standard conditions, and emphasised that the local authority had to show that it had taken into account measures that were appropriate for that individual site.

Equality Act 2010

In coming to any decision Committee Members must comply with their duties under the Equality Act 2010, in particular the public sector equality duty under section 149 and the duty under section 29 not to do anything that constitutes discrimination when providing a service to the public or a section of the public or exercising a public

function that is not the provision of such a service, and to make reasonable adjustments.

In summary, section 149 of the 2010 Act requires the Council, when exercising its functions, to have 'due regard' to the need to:

1. Eliminate discrimination, harassment and victimisation and any other conduct that is prohibited by or under the Act (which includes conduct prohibited under section 29);
2. Advance equality of opportunity between people who share a relevant protected characteristic and those who don't share it;
3. Foster good relations between people who share a relevant protected characteristic and those who do not (which involves having due regard, in particular, to the need to tackle prejudice and promote understanding). The relevant protected characteristics are: age, disability, gender reassignment, pregnancy and maternity, race, religion, sex, and sexual orientation. In respect of the first aim only i.e. reducing discrimination, etc the protected characteristic of marriage and civil partnership is also relevant. Having due regard to the need to 'advance equality of opportunity' between those who share a protected characteristic and those who do not includes having due regard, in particular, to: the need to remove or minimize disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; the need to take steps to meet the needs of persons who share a protected characteristic where those needs are different from the needs of persons who do not share that characteristic, and encourage those who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low. Further, section 149 provides that the steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities. Compliance with the duties in section 149 may involve treating some persons more favourably than others, but that is not to be taken as permitting conduct that would otherwise be prohibited under the Act (which includes breach of an equality clause or rule, or of a non-discrimination rule).

Paragraphs 12 and 13 of the report provide a summary of the equalities material, which is attached at Appendix 7 and also referred to in Appendix 2. A careful consideration of the material itself however is one of the key ways in which Members can show that they have carried out their duty personally to have "due regard" to the relevant matters. Members must therefore carefully consider the material at Appendix 7. In considering that material and all other material contained in and appended to this report, Members must bear in mind all of the parts of the public sector equality duty set out in the previous paragraphs, and the duty not to discriminate and to make reasonable adjustments set out in section 29.

Where it is apparent from the analysis of the information that any of the proposed recommendations, should they be agreed, would have an adverse impact on those with protected characteristics, then any adjustments that would avoid or reduce that effect (mitigating steps) need to be identified and careful consideration then given to whether and if so how they can be implemented.

Members should be aware that the section 149 duty is not to achieve the objectives or take the steps set out in section 149. Rather, the section 149 duty on the authority is to bring these objectives relating to discrimination into proper consideration when carrying out its public functions. There must be a proper appreciation of the potential impact of the decision on the equality objectives set out in section 149 and of the desirability of promoting them. "Due regard" means the regard that is appropriate in all the particular circumstances in which the authority is carrying out its functions. Provided due regard is had in this way, including considering mitigation measures as described above, it is for the authority to decide, taking into account all relevant factors (which may, depending on the circumstances, include the requirement upon the Council to operate within its budget) how much weight to give to the equality implications of the decision.

In exercising its powers in relation to Saturday noisy working, the City (acting here through Committee members) is exercising a "public function". Under section 29 of the Equality Act 2010, it must not, when exercising a public function, or providing a service to the public or to a section of the public, "do anything that constitutes discrimination, harassment or victimisation" (section 29(6)) and it must make reasonable adjustments (section 29(7)). The duty to make reasonable adjustments arises in relation to disabled persons and under section 20 of, and Schedule 2 to, the Equality Act 2010.