COUNTRY REPORT: SWEDEN
New Policy Initiatives, Rules and Case Law

Annika Nilsson

Ambient Noise and Housing

Policy Initiatives and Legislation

Swedish law is currently under revision with regards to the protection of health against ambient noise. The revision concerns the *Planning and Building Act*[1] and the *Environmental Code.*[2] The aim is to allow for the densification of buildings in urban areas, as the shortage of housing is regarded as a burden to economic growth in expansive areas. One of the barriers to new housing, especially in urban areas, is the uncertainty on which impact densified housing will have on the requirements in accordance with the *Environmental Code* and the EU Directive 2002/49 on environmental noise[3] to reduce ambient noise from (for example) traffic and industry.

According to the *Environmental Code*, any enterprise that causes nuisance to health and the environment is obliged to take preventive measures, as far as is technically and economically feasible and environmentally justified. The requirements may be updated when the technical, economical or environmental conditions change for the specific enterprise. If, for example, new residential buildings are constructed within the surroundings of the industry, it may be subject to further obligations, e.g. with regard to noise control, as more stringent requirements could be environmentally justified on grounds of the increased amount of people being affected by the nuisance. The situation is similar with regard to noise from traffic. As municipalities sometimes plan for and construct new housing without due consideration of ambient noise levels, enterprises and businesses become subject to

[1] Swedish Code of Statutes 2010:900.

[2] Swedish Code of Statutes 1998:808.

[3] Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise.

further requirements to reduce noise on these grounds. To remedy this problem, the Government has implemented legislative measures, and made further proposals on the matter.

According to the *Planning and Building Act* a municipality may, in a detailed development plan, prescribe maximum levels of interference from e.g. ambient noise. This provision has, hitherto, been regarded as a means for the municipalities to prescribe a local "environmental quality standard" for the area covered by the plan.[4] However, a Governmental Bill was recently put forward, with a proposal for the revision of the provision. Municipalities may still issue maximum levels for ambient noise in a detailed development plan and, as proposed, also in a building permit.[5] The main concern is that these noise levels will prejudice the application of the *Environmental Code*, as is further elaborated below.

Simultaneously, the Government proposed a new ordinance on noise resulting from traffic,[6] with less stringent levels for ambient noise from traffic than are currently applied.[7]

Also the *Environmental Code* is modified with regard to the matter. Generally, the supervisory authority may issue the injunctions and prohibitions required for compliance with the *Code* and regulations issued thereunder (although an injunction may not restrict conditions prescribed in a license). A new provision was adopted that limits the authority's competence in this respect.[8] If the municipality has issued limit values for ambient noise, injunctions grounded on the *Environmental Code* must not prescribe more stringent measures for noise reduction than needed to keep within the municipal limits, not even if this would be possible within the framework of the *Code*. Similar provisions are proposed with regard to the granting and reviewing of licenses.[9] A new or reviewed license condition concerning noise emissions must not, according to the proposal, be more stringent than

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[4] Michanek & Zetterberg: Den svenska miljörätten p. 462, 3 ed. Iustus Publishing, 2012.

[5] Governmental Bill 2013/14:128.

[6] Förslag till förordning om riktvärden för trafikbuller, Ministry of Health and Social Affairs S2014/5195/PBB.

[7] The Swedish EPA, among others, critiziced the proposal inter alia on grounds of too high noise levels, 2014-09-25, NV-05012-14.

[8] Swedish Code of Statutes 2014:901, the Governments Bill 2014:128, the Environmental Code chapter 26 section 9 a), entering into force 2 Jan. 2015.

[9] Ministry Publication Series 2014:31, proposed additional provision in chapter 16, section 2 b) and chapter 24, section 5 a) of the Environmental Code.

required to uphold an ambient noise limit issued for a detailed development plan or a building permit, based solely on the fact that the residential building(s) has been built in accordance to the plan or permit.

Critical Considerations

One would think that the rational way to handle noise problems with regards to housing in a modern society would be to plan the development of new housing in areas with less noise, and to systematically work towards the reduction of noise in existing residential areas. Also if such strategies are put forward as the first-line options in the amendments and proposals, the fact is that the revision of the Planning and Building Act and the Environmental Code presented above will result in less stringent requirements for noise reduction in residential areas and, thus, more residents affected by higher noise levels. The most startling aspect of this development is perhaps that a municipality, by issuing local noise limits, is empowered to restrict application of the *Environmental Code*. If the above is condoned it might merely be a matter of time before environmental protection is further undermined.

Hunting/Species Protection – Wolves

Policy, Legislation and Cases

The wolf is regarded as a controversial species, in Sweden as in many other countries where it is found. Lobbying groups argue that the wolf population should be strictly limited, while others argue for extensive protection. The issue has been subject to perpetual legal consideration in recent years. In October 2014, the Swedish Environmental Protection Agency decided to allow license hunt on wolves for the 2015 winter.[10] In November 2014, the Administrative Court of Appeal concluded that the license hunt decided in 2013 was illegal.[11] Below, I briefly consider the legal controversy surrounding the wolf species.

The wolf was placed under strict protection in Sweden in 1966; at that time the species was extinct in the country. Thereafter a sparse migration from Finland and Russia occurred, and the population has slowly grown. Today the population consists of about 350 wolves, however severely in-bred – the whole population evolved from seven migrated wolves.[12] The

[10] Further referred at note 26.

[11] Further referred at note 27.

[12] Governmental Bill 2012/13:191 p. 16.

large part of the population is located to the central part of Sweden.[13] Especially in these areas there is a very strong opposition against the increasing wolf population.

The Scandinavian wolf is protected under the Annex IV of the EU habitat directive.[14] The main rule, stipulated in Article 12, is that protected species may not be deliberately captured, killed or otherwise disturbed. However, the Member States may, provided that the conditions in Article 16 are met, allow the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

In 2009, the Swedish Government issued a new provision in the *Ordinance of Hunting*, stipulating conditions on which a "license hunt" of e.g. wolves may be decided.[15] The conditions, incorporated from Article 16 in the EU habitat directive, are that there may not be any satisfactory alternative, the hunt may not be detrimental to the maintenance of the wolf population and the population shall be at a favorable conservation status in its natural range. Furthermore, the hunt must be suitable with respect to the population's size and composition and occur selectively and under strictly controlled conditions.

"License hunt" is a term used for a general permission to hunt a certain amount of wolves (or other animals) during a certain time period. The forms and proceedings of the hunt are specified in the decision. The term should not be mixed up with the individual "hunting license" which is granted after passing the hunt exam and a necessary prerequisite for hunting. Generally, it is also necessary to be member of a hunting team which holds the right to hunt in a specific area.

The Environmental Protection Agency decided on license hunt for 27 wolves in January-February 2010.[16] The aim was to reduce inbreeding. At that time, the population was estimated to 200 wolves. 28 wolves were killed. A similar decision was taken for 2011, this time allowing the killing of 20 wolves.[17] Any wolf up to the stipulated number could be killed, and anyone who was holding a hunting license and was member of a hunting team in an area where license hunt was allowed could take part in the hunt. A hunt leader was responsible for ensuring that the hunt complied with the requisite conditions.

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[13] http://www.naturvardsverket.se/Sa-mar-miljon/Vaxter-och-djur/Rovdjur/Fakta-om-varg/, 2014-12-08.

[14] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

[15] The ordinance of hunting (1987:905), Section 23 c). Swedish Code of Statutes 2009:1265.

[16] Swedish Environmental Protection Agency Beslut 2009-12-17, Dnr 411-7484-09 NV.

[17] Swedish Environmental Protection Agency Beslut 2010-12-17, Ärendenr NV 03454-10.

The hunt was not only criticised by Swedish environmentalists. The EU Commission sent a Letter of Formal Notice to the Swedish Government, raising questions on grounds of *inter alia* the unfavorable conservation status of the Scandinavian wolf, the permission to hunt a strictly protected species without the narrow conditions for derogations set out by EU law being met and the absence of a management plan for this endangered species.[18] This resulted in a time-out for the hunting of Swedish wolves, and the Government assigned the Environmental Protection Agency to develop and adopt a management plan for wolves.[19]

The management plan entrenched that favorable protection status for the wolves in Sweden was maintained by a population of 270 species. As the total number was 320 individuals, favorable protection status was considered established.

On the 30th of January 2013, the Swedish Environmental Protection Agency decided on license hunt of sixteen wolves in total, in specific territories.[20] Two wolves could be killed in each territory; preferably one of the alpha animals but not both. Thus, there would be room for another alpha animal to fill the gap. The hunt was regarded as selective as it was directed towards the territories with the highest inbreed. It was claimed to be the only measure that, with regards to the time constraint, could decrease inbreeding and promote a more favorable genetic status in the wolf population. The decision was appealed by some ENGOs which requested an injunctive relief and that the issue should be submitted to the EU Court of Justice for a preliminary ruling. The injunctive relief was admitted but the courts found no need for a preliminary ruling. The judgment from the Administrative Court, in June 2013, overturned the Environmental Protection Agency's decision.[21] The Court found that there were other, more suitable alternatives to decrease inbreeding and that the specific hunt did not fulfill the criteria of a strictly controlled and selective hunt of a limited number of wolves. The Environmental Protection Agency appealed to the Administrative Court of Appeal, which is the judgment referred to below in note 27.

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[18] EU Commission Press Release 27 January 2011.

[19] National Management Plan for Wolves 2012-2017, adopted 31 May 2012.

[20] Swedish Environmental Protection Agency Beslut 2013-01-30, Ärendenr NV 01007-13.

[21] Administrative Court in Stockholm, Judgment 2013-05-02, Mål nr 2428-13.

At the end of 2013, the Environmental Protection Agency once again decided on the issue of license hunt for wolves, for the winter of 2014.[22] However, once again the decision was appealed and an injunctive relief admitted, and no hunt was performed in 2014.[23]

Meanwhile, the Swedish Government reversed a procedural provision in the *Hunting Ordinance*.[24] So far, it had been possible to appeal the decisions on license hunt. The Environmental Protection Agency may delegate to the County Administrative Boards to decide on license hunt, e.g. of wolves. From 1 June 2014, it is not possible to appeal such a delegation decision. The County Administrative Board's decision on license hunt may be appealed to the Environmental Protection Agency – but not further.

In October 2014, the Environmental Protection Agency decided to delegate the competence to decide on license hunt in 2015 with regards to wolves to eight County Administration Boards in the central parts of Sweden.[25] The number of wolves allowed to be killed was not specified; it is the County Administrative Boards responsibility to ensure that the favorable conservation status is upheld in the wolf population.

In November 2014 the Administrative Court of Appeal held in the case referred to in note 22 above.[26] The Court concluded that Article 16 in the Habitat Directive allowed for wolves to be hunted, as an exception to the main rule and under certain strict conditions. As it is an exception it has to be interpreted restrictively. According to the principle of proportionality, exceptions must be proportional to the needs which motivate the exception. The deciding authority has to prove that the necessary conditions are in place for any exception, and any such decision must be thoroughly motivated with regards to the reasons, conditions and requirements established by Article 16. The court found the aim to promote genetic variation in the wolf population by reducing inbreeding as acceptable under Article 16 and Swedish law. However, the evidence presented was far from sufficient for a conclusion that the chosen method would be efficient in the long term, and the court found no need for temporary measures to reduce inbreeding in the wolf population. Moreover, considering that

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[22] Swedish Environmental Protection Agency, Beslut 2013-12-19, Ärendenr NV-08512-13.

[23] Administrative Court in Stockholm, Judgment 2014-01-15, Mål nr 30966-13 och 598-14.

[24] Swedish Code of Statutes 2014:297.

[25] EPA Beslut 2014-10-30, Ärendenr NV-06561-14.

[26] Administrative Court of Appeal, Judgment 2014-11-14, Mål nr 3273-13. – The Court would normally have dismissed the case as the hunting period had run out. However, as there was no previous guiding practice concerning the issue, the case was tried.

the number of wolves (16 wolves in the challenged decision) was rather extensive in relation to the total population, the Administrative Court of Appeal concluded, just as the Administrative Court had done as first instance, that the exception could not be accepted.

Three County Administrative Boards have decided on license hunts for a total of 44 wolves for the winter of 2015.[27] The decisions may be appealed to the Environmental Protection Agency but, in accordance with the revised provisions in the *Hunting Ordinance*, no further.

Critical Considerations

Sweden is member of the European Union, and Union law prevails over national law. The Swedish courts obviously do not regard license hunts with regards to wolves, in the current forms that it has been designed, to be acceptable under the habitats directive. If there was any hesitation the courts would not have overruled the decisions but simply submitted them to the European Court of Justice for a preliminary ruling. The EU Commission has previously questioned a more limited license hunt. Still, the Swedish Government not only maintains the license hunt but also expands it.[28] Further, the decisions are, practically, not appellable. Will the EU Commission react on this recent development?

Botniabanan – Effective Access to Justice

Case from the European Court of Human Rights

A recent case from the European Court of Human Rights elucidates some weakness in the Swedish *Act (1995:1649) on Construction of Railways*.[29] (The legislation is similar for the construction of public roads.)

The Government may, in accordance with chapter 17 in the *Environmental Code (1998:808)*, reserve the right to consider the permissibility of certain operations, e.g. of a proposed

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[27] Värmland County Administrative Board 2014-11-28, 218-8140-2014, Dalarna County Administrative Board 2014-12-05, Dnr 218-13034-2014 and Dnr 218-13034-2014 and Örebro County Administrative Board, Decision 2014-11-28, Dnr 218-6634-2014.

[28] The new Government after the elections in autumn 2014 has not shown any signs to alter the policy.

[29] European Court of Human Rights, Case of Karin Andersson and Others v. Sweden, 25 September 2014.

railway. An Environmental Impact Assessment and other information needed for the decision shall be attached to the application. The EIA shall present the reasonable alternatives for the stretch and design of the railway that is being considered. The Government's decision concerning the project's permissibility is binding for the subsequent proceedings. The decision is a general statement of the permissibility of the project and its location, not a detailed decision. A detailed railway plan has to be developed and adopted before the commencement of the construction work. The railway plan is comparable to a license under the *Environmental Code*.

The railway called Botniabanan is a new railway line along the east coast in northern Sweden. The most controversial issue is that it was planned to run through a Natura 2000 area; a nature conservation area established by and strictly protected under the EU birds and habitats directives.[30] However, these matters were not the focus in this case. The applicants claimed that the Swedish courts had failed to ensure them a fair trial in respect of their civil rights.

In October 1999, the National Rail Administration applied to the Government for permission under chapter 17 in the Environmental Code to construct a 10 km long railway section, constituting the final section of the Botniabanan (totally 190 km). The Rail Administration presented some alternative railway stretches, all located within a specified "corridor" through the landscape. In June 2003 the Government, after having heard the EU Commission, granted permission for the construction of the railway, somewhere within the proposed corridor.

Several persons, owning property within the corridor in which the construction of the railway was permitted or living there, petitioned to the Supreme Administrative Court for a judicial review. The petitioners claimed that the location of the railway had a direct and clear bearing on their civil rights.

In December 2004 the Supreme Administrative Court dismissed the petitions, on grounds that it was not possible to determine who would be affected and thus entitled to bring an action until the exact route of the railway was established in the railway plan. The Court

[30] Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds and the Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

stated that the parties concerned would be able to obtain a judicial review of the later decision to adopt the railway plan. [31]

The railway plan was adopted by the Rail Administration in June 2005. Twelve persons living in the area appealed to the Government, invoking that the specific stretch of the railway would cause nuisance such as noise and vibrations affecting the enjoyment of their property. Through a decision in June 2007, the Government rejected the appeals, with the argument that the specific stretch chosen in the railway plan was situated within the corridor that had already been accepted in the decision of permissibility.

The applicants then petitioned to the Supreme Administrative Court for judicial review, arguing that their civil rights were affected by the Government's decision and that they had not had these rights considered and determined by a court, in violation of the European Convention on Human Rights. In December 2008 the Supreme Administrative Court rejected the petition, finding that the railway plan was in line with the Government's permissibility decision from 2003 and that the proceedings for the adoption of the plan did not demonstrate any failings.[32] The Supreme Administrative Court concluded that the question of permissibility was within the power of the Government, and that the decision was binding for subsequent proceedings. If private interests were affected by the location of a railway project, judicial review could be instituted through proceedings against the Government's permissibility decision. The Supreme Administrative Court further stated that the fact that it, in its judgment in December 2004, had concluded that no individual petitioner could be considered to have *locus standi* in relation to the permissibility decision did not compel it to now include the issues of permissibility of the project or its general location in the current examination of the adaption of the railway plan.

The applicants in the European Court of Human Rights claimed that the Swedish courts had failed to ensure them a fair trial in respect of their civil rights. Once the Government's permissibility decision in June 2003 had taken effect it was binding for the courts and authorities, and the subsequent examinations could only decide on issues relating to the construction and design of the railway. The only effective way to determine their civil rights would have been a judicial review before the Supreme Administrative Court. However, that possibility had been denied, first by the court's dismissal of the petition for judicial review in

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[31] RÅ 2004 ref. 108.

[32] RÅ 2008 ref. 89.

December 2004 and then by its judgment in December 2008 not to examine issues of location in the proceedings concerning the railway plan.

Not surprisingly, the European Court of Human Rights concurred with the above, and concluded that there had been a violation of article 6 § 1 of the convention.

Critical Considerations

It shall be added that the Supreme Administrative Court must have realised that it had created a catch 22 situation by dismissing the petition for judicial review of the Government's permissibility decision. In a later case a petition for judicial review of the Government's decision concerning the permissibility of a road, under similar circumstances, was accepted.[33] However, it is obvious, from this case and others that the right to a fair trial needs to be guarded not only by national courts but also by an external examiner such as the European Court of Human Rights.

[33] RÅ 2011 not 26.