SPSO Scottish Public Services Ombudsman

The Scottish Public Services Ombudsman Act 2002

Investigation Report

UNDER SECTION 15(1)(a)

SPSO
4 Melville Street
Edinburgh
EH3 7NS

Tel **0800 377 7330**
SPSO Information **www.spso.org.uk**
SPSO Complaints Standards **www.valuingcomplaints.org.uk**

Scottish Parliament Region: South of Scotland

Case 201300245: South Ayrshire Council

Summary of Investigation

Category

Local government: planning/ handling of application

Overview

The complainant (Mr C) brought this complaint to the SPSO on 26 April 2013 on behalf of the owners of a nightclub, (Company A). He complained that Company A had been forced to spend a large amount of money on sound proofing and noise reduction measures at the nightclub because South Ayrshire Council (the Council) unreasonably imposed a potentially unenforceable planning condition when they granted consent for a planning application in 2000. The planning permission was for flats, to be built adjacent to the nightclub, which were built in 2001. Mr C has raised concerns that the flats were built without appropriate sound attenuation measures in their construction and that this led to complaints from residents, which ultimately meant that Company A had to make substantial changes to their property to allow them to continue operating as a nightclub.

Specific complaint and conclusion

The complaint which has been investigated is that the Council unreasonably imposed a potentially unenforceable planning condition on planning application X (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:	*Completion date*
(i) cover the full cost of works which Company A have incurred in undertaking sound proofing and noise reduction measures at their nightclub, based on Company A providing appropriate invoices; and	20 April 2015
(ii) apologise to Company A for the time, effort and expense which has resulted from the Council's maladministration.	18 March 2015

The Council have accepted the recommendations and will act on them accordingly.

Main Investigation Report

Introduction

1. The complainant (Mr C) complained to me on behalf of the management of a nightclub, (Company A). Company A had been required to put in a significant amount of sound proofing to their nightclub, as neighbours in adjacent flats had complained about noise from the nightclub. However, Company A felt that the flats should have been built with adequate sound proofing, as they were constructed after the nightclub was in place.

2. Mr C complained to South Ayrshire Council (the Council) that the planning condition that required the flats to be sound proofed had not been enforced; (this was the original complaint to the Council). The Council said it was impossible to conclude whether this condition had been breached. They added that the condition did not meet with the requirements of Government Circular 4/1998 in that it was not sufficiently precise and enforceable. The Council stated that it had properly exercised its planning enforcement duties and did not uphold the complaint. Mr C was not satisfied with this response, and brought the complaint to us to investigate on 26 April 2013.

3. The complaint of alleged maladministration from Mr C which I have investigated is that the Council unreasonably imposed a potentially unenforceable planning condition on planning application X (the Complaint).

4. The condition was applied to the planning consent relating to planning application X. The condition is referred to in this report as the planning condition.

Investigation

5. During our investigation of this Complaint, my complaints reviewers considered all the information provided by Mr C and the Council. This included information on the handling of the planning application, plans for the flats relating to the planning permission and building warrant and a list of the noise complaints received by the Council in relation to the nightclub. We also sought comments from the Council in relation to this Complaint.

6. My complaints reviewers also identified and reviewed planning and building regulations, environmental health guidance and local protocols on noise control.

7. In order to investigate the noise complaints in further detail, my complaints reviewers discussed the situation with staff from the agency that now manage the flats. This included consideration of the turnover in the flats and their standard approach to informing tenants of their rights and obligations in relation to noise issues.

8. Due to the nature of the Complaint and the role of environmental health in relation to noise issues, I sought independent advice from a planning adviser (Adviser 1) and an environmental health adviser (Adviser 2). They provided advice on the appropriate application of legislation, policies and procedures and on the standard practices at the time of the Council's involvement.

9. Both Mr C and the Council were given the opportunity to comment on a draft version of this report and identify factual errors prior to publication.

10. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and the Council were given an opportunity to comment on a draft of this report.

Complaint: The Council unreasonably imposed a potentially unenforceable planning condition on planning application X

11. This Complaint relates to the handing of a planning application in 2000, which led to the granting of planning consent, with conditions, for the development of two blocks of flats. The flats were constructed in 2001 and one block is directly adjacent to Company A's nightclub.

12. In 2010, the Licensing Board restricted the nightclub's license due to complaints about noise, and this led Company A to carry out some work to reduce the noise escaping from the nightclub.

13. In 2011, the Council served a Noise Abatement Notice on the nightclub and Company A were obliged to carry out further works to reduce the level of noise from the nightclub. These actions both followed numerous complaints from residents at the adjacent flats, to the Council, in relation to noise nuisance from the nightclub.

14. One of the conditions on the planning permission was:

> 'That the proposed dwellings be constructed so as to attenuate existing noise levels from adjacent licensed premises, to the requirements of Environmental Health and to the satisfaction of the Director of Strategic Services.'

Mr C complained to the Council that, because this condition was never enforced Company A has had to carry out extensive, costly works on their premises. Mr C's Complaint to the SPSO is that the Council unreasonably imposed a potentially unenforceable planning condition on planning application X, and on the planning permission that was granted.

Key events

15. In 2000 the Council considered an application for planning permission for two blocks of flats to be built on a town centre site. The proposal was for one block to be built adjacent to, and as a continuation of, an existing row of buildings down a narrow side street off the main street. The other block would be built perpendicular to this block.

16. The building adjacent to the first block was, and still is, a nightclub owned by Company A. The then owner and manager of the nightclub and bar were among many people who objected to the planning application. They claimed that it was inappropriate to put a residential development beside a nightclub, and that noise complaints were bound to ensue and would put their licence at risk.

17. The Council consulted the Environmental Health Service (EHS) in their consideration of the planning application. The response to this consultation stated that the EHS had no objections to the application, but caveated their response with the following:

> 'As part of the licensing conditions pertaining to the operator of the [nightclub] premises, any amplified noise emanating from the licensed premises shall be inaudible at the nearest noise sensitive dwelling. The application shall therefore be required to show that the status quo is preserved and that amplified music noise from the licensed premises shall be inaudible in the flats.'

18. The architect of the flats wrote to the Council on 7 August 2000 to confirm that 'the structure of the flats will incorporate sound attenuation measures to reduce the nuisance of noise from adjacent discotheques to a level acceptable

to the Environmental Health Department'. There was no further correspondence in relation to noise attenuation within the flats, either from the Council or from the architect or developer.

19. The planning application for the erection of the two blocks of flats was granted approval with conditions on 25 September 2000. One of the conditions on the consent was:

> '(8) that the proposed dwellings are constructed so as to attenuate existing noise levels from adjacent licensed premises, to the requirements of Environmental Health and to the satisfaction of the Director of Strategic Services.'

20. My complaints reviewer examined the approved plans for the building warrant and found no evidence of any additional noise attenuation anywhere in either of the two blocks, beyond the standard expected for buildings constructed at that time. There was no difference between the walls that abut the nightclub and those on the far end of this block, or the other block of flats. The windows were also noted to be standard, double glazed windows.

21. In April 2003 the Council received the first complaint from a resident in relation to noise from the nightclub. Further complaints were received from residents in November 2004, August 2005, March, September and December 2008 and a further four were recorded in 2009. In 2010 the Council received a total of 34 complaints about noise from the nightclub; 17 of these complaints came from one flat. Between January and July 2011 another 12 noise complaints were received.

22. In April 2010 there was a meeting between the owner of the nightclub, a licensing standards officer from the Council and residents from the affected flats. The aim was to identify what the key issues were in terms of noise and try to find a suitable solution. I have seen a report prepared by the licensing standards officer which indicates a number of issues relevant to the noise complaints:

- Tenants said they had been experiencing noise issues for some time, but had been led to believe nothing could be done about the noise from the nightclub.
- The tenant in the top flat said he could sing along to the lyrics of tunes, he could hear them so clearly.
- Concerns were raised about noise in the street as well as music volume.

- A new tenant in the top floor flat was taking action in relation to the noise nuisance.
- A previous tenant had gone to stay with family at weekends, to avoid the noise.
- All parties at the meeting agreed that the noise problems arose due to the fabric of the building.

23. The organisation that now manages the flats informed me that there had been issues with noise complaints for some time, but they were unable to inform me of when these started, due to staff changes. However, they were aware that the flats adjacent to the nightclub were most affected by the noise, and the top flat had experienced particular issues with noise escaping from air conditioning vents on the roof, which was then audible from this flat.

24. The organisation's officer told me about the tenants that had lived in one flat that was particularly affected by the noise from the nightclub. This flat had changed hands three times since 2001. Most notably, in 2010 a tenant had moved in who was considered to be particularly sensitive to noise. He moved out of the flat in 2012. This was the flat that was the source of at least 25 complaints in 2010 and 2011. The officer said that she was aware that other tenants had also moved from the flats because of the noise issues.

25. When I explored why tenants might have started to complain about noise, when they had not initially, the officer said that, when they took on the tenancy, they would have been informed of how to complain to the Council in relation to noise. However, they would also have been made aware that, due to the town centre location, they should expect to experience some noise, as this was an inevitable part of living so close to the centre of town. She said that many tenants appreciated the town centre location and accepted the consequences in terms of noise.

26. In May 2010 Company A commissioned acoustic consultants to identify what works would be required in order to relieve the noise nuisance for the inhabitants of the flats. This identified the noise levels within the nightclub, and in the bedrooms and lounges of two of the flats, with the windows open and closed. The consultants identified a range of works to the building that would, in their assessment, reduce the level of noise to the flats to an acceptable level.

27. The Licensing Board (the Board) sought to restrict the nightclub's licence on the basis of the noise complaints that the Council had received. The Board restricted the hours over which the nightclub could operate, requiring it to close at 00:30. Company A has reported that this meant that they could not realistically operate at all, as most of their patrons did not arrive until after midnight. In response to this, in June and July of 2010 the nightclub undertook a range of work to the ceiling and air conditioning ducts of the nightclub, based on the works recommended by the acoustic consultants. They combined this with an agreement to limit the volume of music within the nightclub. This was enough to satisfy the Board and Company A were allowed to resume their normal licensing hours after a period of closure of one month. However, Company A has claimed that the music was restricted to such a low volume that customers started to complain.

28. In August 2011 the Council served a noise abatement notice on the nightclub, requiring the owner of Company A to undertake further works to reduce the level of noise escaping from their premises.

29. Mr C reported that the total cost of the works in 2010 and 2012 was around £52,000. The implementation of the Noise Abatement Notice and subsequent works were what led Company A to complain to the Council about the Council's enforcement of the condition on the planning permission.

30. Company A has also reported that these costs were not the only costs that the company incurred as a result of the noise complaints. For example, the work had to be phased, in order to allow the nightclub to operate as normally as possible while the works were continuing. Company A took a range of measures to enable them to keep the nightclub operating as much as possible, whilst works were carried out. For example, works were undertaken from Monday until Thursday, when staff came in to clean up the venue before opening time on Thursday evening. However, this still meant that the nightclub was not open on Wednesdays and that extra staff time was needed for clean up each week. They also put in a new sound system which spread the noise around the venue, so that volumes could be kept as low as possible.

31. It is also relevant to note that the nightclub had considerable consistency in its licensing hours from 2002 to 2010. Its license enabled it to stay open until at least 02:00 daily, with an extension to 02:30 on Friday and Saturday nights.

As mentioned above, restrictions were placed on the nightclub's license in 2010. However, since 2012 the nightclub's licence has run to 02:30 daily.

The policy and legislative requirements

32. There are three significant areas of policy and legislation that relate to this situation. These are: the planning application process; the role of the EHS; and the building regulations in place when the flats were built.

33. At the time the planning application was considered, planning authorities had to take into consideration the Government Circular 4/1998 'The Use of Conditions in Planning Permissions' (the Circular) , which sets out government policy in this area. This stated that planning conditions should only be imposed where they are:

i. 'necessary;
ii. relevant to planning;
iii. relevant to the development to be permitted;
iv. enforceable;
v. precise;
vi. reasonable in all other respects.'

34. This Circular stated that the Secretary of State (now Scottish Ministers) attaches 'great importance to these criteria being met so that there is an effective basis for the control and regulation of development'.

35. The Town and Country Planning (Scotland) Act 1997 enabled planning authorities to take enforcement action by way of service of a notice on developments where planning conditions have not been complied with.

36. A more recent circular (Scottish Government Circular 10/2009, 'Planning Enforcement') set out the expectations of planning authorities in relation to the enforcement of planning conditions. It specified that 'as a planning condition should only have been imposed out of necessity, it is likely that a failure to comply with it will be damaging and justify enforcement action'.

37. In relation to the application of environmental health legislation, the Environmental Protection Act (1990) (as amended) set out the Council's obligations and powers in relation to noise nuisances. It specified that the Council had a duty to inspect its area from time to time to detect any statutory nuisances which ought to be dealt with under this legislation. It also put a duty

on the Council to investigate complaints of noise nuisance made by a resident. However, it also specified that there must be a complainant in a noise sensitive dwelling, along with noise of a volume to constitute a nuisance for a person of reasonable sensibilities, for the Council to take action in relation to the noise.

38. These legislative requirements were reflected in the Council's Environmental Health Noise Complaint Protocol (the Protocol). Section 3 of the Protocol specified that the Council was required to inspect its area from time to time to detect nuisances; and that officers 'will intervene when they see any problems which might be a noise nuisance or result in a noise nuisance at a later date'. The Protocol goes on to state that, where investigation identifies a statutory nuisance, an 'Abatement Notice' should be served.

39. The Building Regulations 2000 Approved Document E – 'Resistance to the Passage of Sound' is also relevant to this case. It specified the sound insulation standard which applied in 2000. The airborne sound insulation minimum value for new buildings was 45 decibels. This set a standard for the level of sound insulation that could be expected to be incorporated in new buildings, to counter against external noise.

The Council's response

40. In October 2010 Company A made their first complaint to the Council in relation to the enforcement of the condition on the planning consent. This was followed by a further letter of complaint in November 2011, and a final letter of complaint on 3 May 2012, both from Mr C. In each of these letters Company A and Mr C complained about the lack of enforcement of the condition on the planning consent.

41. The Council wrote to Mr C with their final response to his complaint on 25 May 2012. In this letter the Council said that it was unfortunate that the planning condition dealing with noise was 'constructed' in a manner which left it impossible to show whether there had been a breach of condition. The Council could, therefore, not take enforcement action and it was, by that time, outwith the ten year timescales for such action.

42. In an appendix to the Council's letter of 25 May 2012, the Council provided a report by the Planning Manager. This report provided more detail of the Council's perspective on the planning condition and its enforcement. The report noted that the condition did not specify the noise level (in decibels) to which

noise was to be attenuated. It also said there were no records of the noise levels in 2000, to assess whether the condition had been breached. In this report, the Council 'acknowledge that condition 8 does not meet with all the criteria for ensuring robust planning conditions' and concluded 'that condition 8 does not meet the tests of Circular 4/1998 relating to precision and conditions being enforceable'.

43. The report went on to acknowledge that the condition did not meet the requirements of Government Circular 4/1998 (see paragraph 33), in that it was insufficiently precise. It said that 'it is not current practice ... to set planning conditions of an ambiguous or non-enforceable manner' and it confirmed that more recent planning conditions specify a set decibel level.

44. The report went on to say, however, that there was no evidence that the condition had not been met. It referred to the letter from the applicant of 7 August 2000, mentioned in paragraph 17. The report said that, as the condition did not require the submission of further information on construction or noise attenuation means, it was reasonable to conclude that the condition had been met. It went on 'however, there is no evidence to confirm that the requirements ... were met. Nor is it possible for any confirmation now to be forthcoming'.

45. The report said that no complaints were made to the Council from the residents of the flats until 2008, seven years after the development was completed. The Council suggested that noise attenuation measures had been effective at attenuating noise to the level required in 2000, but that changes in the operation of the nightclub led to increases in noise, which had caused the complaints to start in 2008.

46. Finally, the report went on to explain the changes in Council procedures which have been implemented since 2000, which would mean that this situation could not recur. They noted changes in enforcement regulations which meant they now had systematic ways of monitoring compliance with planning conditions.

47. When Mr C brought this Complaint to us, the Council were given the opportunity to comment on the Complaint. They wrote to us on 24 June 2013, to explain that they considered that we should not investigate this complaint, as the condition dated back well over 12 years and the Complaint should,

therefore, be time-barred. They also said that they had responded to the original complaint to the Council that the planning condition had not been enforced, rather than the Complaint that I have considered, that the Council unreasonably imposed a potentially unenforceable planning condition in respect of planning application X.

48. We explained our decision to investigate this Complaint in an email to the Council on 22 January 2014 and the Council provided further comments on 10 February 2014. They said that it was their view that the planning condition had been enforceable at the time that planning permission was granted, but that it was unenforceable now, given the lapse of time and lack of information in relation to noise levels. The Council said that the situation could have been monitored at the time and the development could have been found to have been in breach of the condition. This was in contradiction to the Council's letter of 25 May 2012 and attached report sent, to Mr C in response to his complaint as set out in paragraph 44.

49. The Council also provided the SPSO with a list of the noise complaints that they had received from tenants of the flats. This included complaints dating back to April 2003, four years earlier than their response to Mr C had identified. However, the Council highlighted the 'step change' in the number of noise complaints in 2008/10, which, they said, indicated some changes in background noise levels around that time. Furthermore the Council said that the planning condition could not take into account changes in noise level after the point when the planning condition was implemented and met (ie the time of construction of the flats).

Planning Advice

50. I sought advice from Adviser 1 on the planning elements of this case. I wanted advice both in relation to the wording of the planning condition in question, and in relation to its subsequent enforcement.

51. In relation to whether the planning condition had met the requirements set out in Government Circular 4/1998, Adviser 1 was clear in his assessment that the condition was necessary, relevant to planning and to the development. However, he noted that the condition did not indicate any requirement to provide details of existing noise levels which were to be attenuated, the extent of the attenuation to be achieved or the location from which the noise measurements should be taken. There was also no requirement to provide any

proposals in terms of noise attenuation to the Council for approval prior to the flats being built. Adviser 1, therefore, considered that the condition did not provide the applicant for planning permission with any clear criteria by which it could be ascertained what was required. Adviser 1 concluded that the condition was not sufficiently precise and, therefore, could not be enforced. However, Adviser 1 went on to clarify that the final arbiter in whether a condition was enforceable or not was the court.

52. Adviser 1 went on to say that, whilst the EHS had commented on the planning application, this comment had not provided enough information for planning officers to draw up a suitably worded planning condition. He said that further consultation with the EHS would have been required to achieve this. Alternatively, he advised, the planning officer could have used (but did not) a standard wording that required proposals for noise attenuation to be approved by the Council prior to the development being commenced. This standard wording is to be found in the Addendum Model Planning Conditions to the Circular 4/1998.

53. Adviser 1 stated that the condition, imprecise though it was, still required a positive action by the developer and that the Council should have checked for compliance with the condition either prior to, or during, the construction of the flats. Adviser 1 considered that the condition could not have been deemed to have been discharged without any evidence that the flats had been built as required by it. He clarified that a letter of intent, predating the condition, and an absence of any evidence to the contrary did not provide a compelling argument that the condition was complied with and could, therefore, be considered discharged.

54. Adviser 1 went on to discuss the likely need for noise attenuation measures in the flats, given the proximity to a nightclub. He advised that an inspection of the approved building warrant files and plans would have revealed what additional sound proofing measures, if any, were incorporated in the final design. He found no evidence of any attempt by the Council to examine the more detailed plans of the proposed development provided in relation to the building warrant. These plans would have indicated what additional sound proofing measures, if any, had been incorporated in the building specifications. Adviser 1 considered that this would have provided some form of check as to whether the developers had made any attempt to fulfil the condition.

55. Adviser 1 also commented on the proposition by the Council that a lack of any complaints in the first seven years of the development indicated that the condition had been complied with. He said that any change in volumes from the nightclub may have exposed the lack of adequate sound proofing measures undertaken during construction.

56. In conclusion, Adviser 1 said that neither Company A, nor the subsequent occupiers of the flats, had been well served by the Council's imprecise and inappropriate wording of the planning condition, or by its subsequent failure to pursue or monitor the extent of any compliance with the (flawed) condition.

Environmental Health Advice

57. Following receipt of planning advice, I sought advice Adviser 2 on the role of the EHS in this case. I was keen to establish what role the EHS should have had at the time of the planning application, and also what evidence there was in relation to the need for sound proofing of the nightclub at the time of the Noise Abatement Notice.

58. Adviser 2 started off by reviewing what role the EHS had in the initial planning application. He noted that the EHS had highlighted the potential for noise nuisance at the flats, as a result of their proximity to the nightclub. He said that, on this basis, the Council should have requested a Noise Impact Assessment from the developer. This would have been needed to determine the ambient noise level and the 'character' of the noise being produced by the nightclub. With this information, the acoustic specialist would have been able to determine what level of attenuation was needed to reduce internal noise to acceptable levels.

59. With this information, the EHS would have been able to impose an appropriate condition that reflected the report's findings in terms of sound proofing requirements, or lodge an objection to the planning application if it became evident that limiting noise levels in the flats could not reasonably be achieved.

60. Adviser 2 went onto say that the Council should also have carried out a noise survey of the area. He said that a detailed analysis of the noise source would have:

- provided a baseline assessment of the background levels and the characteristics of the noise from the nightclub; and

- provided a comparator for any Noise Impact Assessment provided by the developer and for any future assessment of the noise environment.

61. Adviser 2 went on to clarify that it may have been possible to draft an enforceable noise condition to be applied to the development, provided there was sufficient information concerning existing noise levels. However, he noted it would have been better for the Council to specify a 'noise rating curve', rather than an absolute value, as a noise rating curve could have taken greater account of the types of noise that were coming from the nightclub. Noise rating curves are a way of measuring sound across a range of frequencies, to assess whether the level of noise is excessive, given the use of the room.

62. Adviser 2 went on to note that, without a reliable Noise Impact Assessment by the developer and verification of the noise environment by the Council, there would be no reasonable or reliable way of determining what sound proofing measures would be necessary, or whether an acceptable level of internal noise could reasonably be achieved. Furthermore, he said it would not be possible to determine if the noise environment had significantly changed at a later date.

63. Adviser 2 reviewed the plans relating to the building warrant, and concluded that, based on his interpretation of the plans, the development met the sound insulation standard for the time of the application and construction. However, he did not find any evidence of sound insulation beyond this standard level. Furthermore, he said there was no evidence of any special attenuation measures in the design or construction of the building to deal with airborne sound from the nightclub entering through open windows.

64. Adviser 2 reviewed the acoustic consultant's report from May 2010 and noted that the sound level measurements taken by the consultants were below those measured by the local authority around the same time. He noted that this indicated the variability of the noise generated by the nightclub. He also noted the high levels of ambient noise identified through these measurements (for example, from air conditioning units), particularly when windows were open. He said that, to overcome this problem, alternative design and engineering solutions would have been needed to enable ventilation without opening windows.

65. However, Adviser 2 went onto say that, had appropriate sound measurements been taken at the time the flats were built, and based on the noise levels in 2010, he considered that it would have been possible to design and build the flats in such a way as to attenuate the noise to a reasonable level. He clarified that the main issues would have been in relation to low frequency sounds (which would not be attenuated by the standard forms of building insulation) and providing alternative ventilation to avoid the need to open windows.

66. Adviser 2 noted that bass noise was highlighted as an issue in several of the complaints and that this concurred with his interpretation of the plans. He considered that, when windows were closed, the building as it was constructed should have attenuated higher frequency noises. He noted that noise between 100 Hertz and 250 Hertz is not readily attenuated by the structure of the flats as they were built (ie with walls of 0.33 meters thick). He said that the walls would need to have been roughly three times their current thickness (0.9 meters) for sounds of 100 Hertz to be attenuated, while sounds of 250 Hertz could have been attenuated by a much smaller increase in thickness (0.4 meters).

67. He went on to explain that windows are the 'weak point' and attenuate sound less than other building materials. He noted the level and type of noise coming from the nightclub and that this included significant noise from the air conditioning ducts. He said it was likely (although not certain) that, whether noise volumes had increased over the years or not, sound proofing measures would have been needed within the nightclub once the flats were constructed so close by and without sufficient sound attenuation measures. For example, the poor acoustic design of the nightclub meant that noise was escaping from air conditioning ducts at the roof. This was not a problem until the flats were built adjacent to the nightclub. Adviser 2 noted similar issues in relation to the lack of double doors, the siting of speakers in the toilets and the opening of windows during operation of the venue.

68. In relation to changes in noise volumes between 2000 and 2010, Adviser 2 noted the nature and volume of complaints to the Council in relation to noise, and the information relating to tenants. He considered that, once it was clear that the Council would accept and investigate noise complaints, it would follow that complaint levels from tenants would rise whenever noise levels were excessive. He said that this was a reasonable explanation for the rise in noise complaint levels, although he also noted that there was insufficient evidence to

either confirm or refute the Council's assumption that noise volumes had increased.

Conclusion

69. I will firstly consider my acceptance of this Complaint for investigation. I am aware of the Council's concerns that we should not have investigated this Complaint, because they had not yet had a chance to respond to it. However, the Complaint that I have investigated arose from the Council's own admission that the planning condition was imprecise, potentially unenforceable and did not meet the requirements of Government Circular 4/1998. This admission was made by the Council at the conclusion of its own Stage 3 Complaint Procedure into the original complaint made to the Council.

70. The Complaint considered here is a new complaint, distinct from the original complaint to the Council. However, I am satisfied that it is not a matter that requires to be raised in the first instance with the Council, because it is they who raised the issue of unenforceability during the conclusion of their own internal investigation into the original complaint, which then gave rise to this Complaint.

71. The issue of unenforceability was identified to Mr C in the Council's letter of 25 May 2012. Mr C then brought his complaint to the SPSO on 26 April 2013, which was within the 12 months we normally allow for complainants to bring a complaint to us.

72. In taking this Complaint, I have acted under the discretionary powers provided by the SPSO Act (2002), which allows me to consider any complaint that is brought to the SPSO, even if it has not yet been considered by an authority. I considered that in this case it would not be reasonable or proportionate to require Mr C to take this new Complaint through the Council's own complaints procedures, in light of the Council's own decision on the situation. My decision was explained to the Council in an email on 22 January 2014 and the Council were given the opportunity to comment on the new Complaint.

73. Section 7(8) of the SPSO Act (2002) provides the Ombudsman with the power to exercise his discretion to accept a complaint for investigation, even when an alternative court remedy is available. In accepting such a complaint, the Ombudsman needs to be satisfied that it would not be reasonable to expect

a complainant to use the alternative remedy available to them. In this case, I considered the likely costs for Company A of pursuing an alternative remedy, such as a judicial review, and noted that the cost would be considerable. I therefore decided that it would not be reasonable for Company A to resort to such a remedy.

74. Moving to the substance of the Complaint, the advice I have received from Adviser 1, that the planning condition was unenforceable due to lack of precision, is consistent with the Council's own opinion that the condition did not meet the criteria of Circular 4/1998 relating to precision and enforceability. I accept the advice of Adviser 1 and am in no doubt the Council were (or should have been) fully aware of the terms of Circular 4/1998 and the requirement to impose planning conditions that meet all of the six criteria set out in paragraph 33. From the advice I have received, it is clear that there was maladministration in the way the Council drafted the planning condition. On that basis, I am upholding the complaint of maladministration that the Council unreasonably imposed a potentially unenforceable planning condition on planning application X.

75. The Council have accepted that, once the flats were built, it would have been impossible for them to enforce the planning condition. This is further clarified by Adviser 2, who suggested that the measures that would have been required may have involved increasing the width of the adjoining wall and amendments to ventilation systems to ensure windows did not open. Such measures (had they been applied) would have been readily visible on the plans submitted to the Council for the building warrant.

76. There is no evidence to indicate that the Council made any attempt to enforce the planning condition at the time, or to investigate whether it had been met when Mr C first complained to them.

77. Given my finding of maladministration in respect of this Complaint, my next concern is to identify what injustice this has led to, and how this might be remedied.

78. Company A had to carry out substantial sound proofing works, which they state cost them around £52,000. The question remains as to whether this cost was a consequence of the flats being built adjacent to the nightclub and without sufficient sound attenuation measures. It is, therefore, important for me to

consider the relationship between the requirement for the nightclub to undertake sound proofing works and the absence of sufficient sound attenuation measures in the flats, taking account of my finding of maladministration.

79. The Council have stated that the nightclub only needed to undertake sound proofing works because noise volumes increased after the flats had been built. However, there is no evidence in relation to the noise volumes in 2000. Such evidence would have been available had the Council required a Noise Impact Assessment from the developer and a background noise survey as explained in paragraphs 56 and 60. The Council's argument rests on the evidence from residents' complaints. This evidence is mixed and it could be argued that changes in tenants, and an awareness of their right to complain, could have accounted for all or most of the change in volume of complaints, as noted by Adviser 2.

80. Adviser 2 also noted that the lack of sufficient sound attenuation measures within the flats meant that even the noise of the air conditioning units was sufficient to create a noise nuisance. This was due to the existing acoustic design of the nightclub. Adviser 2 considered that, given the lack of sufficient sound attenuation measures within the flats. It was, therefore, likely that the nightclub would have had to carry out sound proofing measures, even if the noise volumes from music systems were less than their 2010 level.

81. In conclusion, Adviser 1 identified failings in the way the planning authority drafted the planning condition and the subsequent lack of enforcement. Adviser 2 also identified failings on the part of the EHS in relation to their input to the planning process, which meant that no noise measurements were taken in 2000, either by the developer or by the Council. Had the Council not failed in this regard, they would have had the evidence of noise levels at that time, and would be in a position to establish if the noise from the nightclub had increased since the planning permission for the development was granted.

82. As it was the Council's maladministration that led to this situation, it is reasonable for me to recommend in my report on the Complaint that the Council should reimburse Company A for the costs of the sound proofing works at the nightclub that have had to be undertaken by Company A.

Recommendations

83. I recommend that the Council:

(i) cover the full cost of works which Company A have incurred in undertaking sound proofing and noise reduction measures at their nightclub, based on Company A providing appropriate invoices; and — 20 April 2015

(ii) apologise to Company A for the time, effort and expense which has resulted from the Council's maladministration. — 18 March 2015

84. The Council have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Council notify him when the recommendations have been implemented.

Annex 1

Explanation of abbreviations used

Mr C	the complainant
Company A	the owners of the nightclub
the Council	South Ayrshire Council
planning application X	the planning application for the development of two blocks of flats adjacent to Company A's nightclub
the Complaint	the complaint brought to the SPSO, that the Council unreasonably imposed a potentially unenforceable planning condition on planning application X
Adviser 1	planning adviser
Adviser 2	Environmental health adviser
EHS	Environmental Health Service
the Board	The Licensing Board
the Circular	Government Circular 4/1998 'The Use of Conditions in Planning Permissions'
the Protocol	South Ayrshire Council's Environmental Health Noise Complaint Protocol

Annex 2

Glossary of terms

noise/ sound attenuation	a reduction in the intensity of noise or sound
Noise Abatement Notice	a legal notice served on the owner of a property, requiring the reduction of noise to a certain level
noise rating curve	a way of measuring sound across a range of frequencies

Annex 3

List of legislation and policies considered

Government Circular 4/1998

Town and County Planning (Scotland) Act 1997

Scottish Government Circular 10/2009

Environmental Protection Act (1990) (as amended)

South Ayrshire Council's Environmental Health Noise Complaint Protocol

Building Regulations 2000 Approved Document E – Resistance to the Passage of Sound