

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Doug and Geri Boyer	)	
	)	
	)	
Complainant/Petitioner,	)	PCB #22-9
	)	
v.	)	
	)	
MRB Development, LLC d/b/a	)	
	)	
Copper Fire, et. al.	)	
	)	
Respondents.	)	

RESPONDENTS' POST-HEARING CLOSING BRIEF

Respondents' Post-Hearing Brief will not be long. Summary Judgment was granted in Respondents' favor that the noise emission standards established in 35 Ill. Adm. Code Section 901.102 were not violated. The Board allowed the Complainants' to proceed under a nuisance standard. At the hearing, it was established that the noise level in Complainant's loft never exceeds 39 decibels. Further, it was established that all of Respondents' efforts to turn down the volume and remediate noise, have allegedly made zero difference to the subjective complaints raised by Complainants. If the maximum sound level of 39 decibels is sufficient, this case also presents the question whether the noise inside the loft is between 34 and 37 decibels also constitutes a noise nuisance because Geri Boyer has complained about that sound level also. This Board knows how quiet these sound levels are and can rule on this objective fact alone that a maximum sound level of 39 decibels cannot constitute unreasonable interference with life.

There is no doubt that Geri Boyer alleged that daytime and night time noise levels between 34 decibels and a maximum 39 decibels interfered in her life. However, the U.S. Supreme Court has acknowledged that a law that determines a violation based on

subjective complaints of a third party is unconstitutionally vague. “Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.” *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). Therefore, this Board cannot rely on Complainants subjective complaints or it risks losing the nuisance standard that it has used for decades. This Board must look at the facts of this case and determine whether the subjective complaints of interference are reasonable. Sound between 34 and 37 decibels and at a maximum of 39 decibels cannot, under any reasonable person standard, constitute a nuisance. If these levels can constitute a nuisance than every neighbor in a suburban and urban environment can sue their neighbor for noise violations under the extremely vague nuisance standard.

More importantly, how can any Respondent defend themselves if they are proven to be in compliance with objective noise standards, yet a person still complains about interference with their life? This Board may not find the Respondents have created a nuisance under the established facts because such a finding would make the nuisance standard unconstitutionally vague and unenforceable. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 42-44 (2010); *US v. L. Cohen Grocery Co.*, 255 U.S. 81, 88-89 (1921); *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). *People v. Bossie*, 108 Ill. 2d. 236, 242 (1985). *People v. Law*, 93389 202 Ill. 2d 578 (2002). Complainants own brief proves how ridiculous their complaints are. Complainants allege Respondents have been a noise nuisance since the day they opened on March 17, 2018. (C. Brief, p. 30). The only

possible argument why Respondents were a noise nuisance on that day is the fact Geri Boyer complained. This is not the law, and it cannot be the law.

The facts in this case further support why this Board cannot find noise nuisance with sound levels between 34 decibels and a maximum of 39 decibels. Geri Boyer is telling this Board she cannot carry on a conversation with music at 34 to 39 decibels. Geri Boyer is telling this Board that she cannot listen to television with music at 34 to 39 decibels. (Day 1 TR. p. 164, Day 1 TR. p. 167). This Board knows this to be objectively untrue. If Geri Boyer believes this to be true, then she is one of the most sensitive persons to sound in the state of Illinois. Even Geri Boyer's husband admitted "it's not to the point where it's distracting from a regular conversation." (Day 1 Tr. p. 215). A law cannot regulate behavior based on the most sensitive person. It must be a reasonable person standard. Geri Boyer has even admitted that she is sensitive to noise. (Day 1 Tr. p. 181). It is unclear if there is anything Respondent can do that will cause Geri Boyer to end her complaints. Every attempt by Respondents' to control the level of sound in the bar, and thus lower the noise level in Complainants' loft has allegedly "not worked", according to Geri Boyer. (Day 1 TR. p. 184).

If this Board ignores all objectivity and simply accepts Complainants' testimony as sufficient to show an interference in Complainant's life, then the Board still must proceed to 415 ILCS 5/33(c) (hereinafter the Section 33 factors) to determine whether the interference is reasonable. The evidence at the hearing proved that all Section 33 factors are in favor of Respondents. Therefore, this Board should find in Respondents' favor and find no violation of the nuisance standard.

**FACTUAL SUMMARY**

On September 30, 2021, Complainants Doug and Geri Boyer filed the Complaint with 38 paragraphs and one prayer for relief. (See Complaint). On March 3, 2022, this Board struck as frivolous, paragraphs 33 through 38 because this Board has no authority to hear the alleged violations of local rules such as the Belleville City Code and the St. Clair County Zoning Code. (See March 3, 2022 order). Copper Fire opened on St. Patrick's Day, March 17, 2018. (Day 2 Tr. at 119). On day 1, Geri Boyer complained about noise, and is alleging in this lawsuit that there has been a noise violation every day since the first day. (Complainant's Brief, P. 31). Factually, this is untrue. Doug Boyer testified "So there was a time when it was not too bad or not noticeable even, is a better way to put that." (Day 1 Tr. p. 212).

The undisputed evidence is Copper Fire has live music for three hours on Wednesday, three hours on Thursday, three hours on Friday evening, six hours on Saturday and three hours on Sunday. (Day 2 Tr. p. 107). Geri Boyer is arguing Copper Fire never turns the volume down, but the undisputed testimony is Copper Fire has a policy and enforces its policy to keep the decibel levels in the bar below 88 decibels on Wednesday evening, Thursday evening, and Sunday from 2 to 5. (Day 2 Tr. p. 208). On Friday evening and Saturday evening, the bar has a policy and enforces its policy to keep the decibel levels in the bar below 92 decibels. (Day 2 Tr. p. 208). This necessarily means that Copper Fire turns the volume down on Wednesday, Thursday and Sunday. The policy on Wednesday evening, Thursday evening and Sunday from 2 to 5 is to keep the decibels in the bar between 85 and 88 decibels. (Day 2 Tr. p. 208).

Notwithstanding the fact that the music inside Copper Fire is often at or near 85 decibels, Geri Boyer still complains that she can hear music five days a week. (Day 1 Tr. p. 62). Notwithstanding the different decibels levels inside Copper Fire, Complainants are arguing to this Board that the “constant intrusive noise ‘never stops’ and has frequently and consistently interfered with Complainants’ enjoyment of life for six years.” (Complainants’ Brief p. 19 citing Day 1 Tr. at 65, 69, 107, 200 and 220). There is no recognition by Complainants that COVID shut down bars and restaurants for substantial periods during this timeframe. Renae Eichholz testified that COVID affected Copper Fire because they could only be open outside and they could only have two musicians at one time. (Day 2 Tr. p. 109).

It is undisputed that the noise level in Complainants’ loft does not exceed 39 decibels. (Day 2 Tr. p. 26, p. 29 and p. 74). Mike Biffignani was hired by Complainants’ as an expert. (Day 2 Tr. p. 6). Mike Biffignani testified that the sound level in the Complainants’ loft was 38 decibels on a Friday evening while he performed sound testing. (Day 2 Tr. p. 26). Mike Biffignani testified that the sound level in Complainants’ loft was 39 decibels on a Saturday evening while he performed sound testing with live music being performed at Copper Fire. (Day 2 Tr. p. 29). He also testified that the sound level in Complainants’ loft was 33 to 37 decibels during a Saturday afternoon while he performed sound testing with live music being performed at Copper Fire. (Day 2 Tr. p. 74). No evidence was produced at trial showing that the sound level in Complainants’ loft was above 39 decibels at any time. To put this in context, Mr. Biffignani admitted that daytime ambient noise levels are typically around 45 decibels, human speech is typically around 60 decibels, and a TV is typically played at 65 or 70 decibels. (Day 2 Tr. 27).

Mike Biffignani testified that ambient level of sound in the hearing room on day 2 inside the Illinois Pollution Control Board offices was 46 decibels. (Day 2 Tr. 53-54).

When asked to play an example of 39 decibels, he admitted he could not get to 39 decibels inside the hearing room. (Day 2 Tr. p. 55)

After Respondents' received a copy of the report from Mike Biffignani , Respondents began taking steps to reduce the sound level of music being played at Copper Fire. (Day 2 Tr. p. 195). Renae Eichholz testified that after receiving the report she wanted to always be below the allowed limits of the Illinois EPA regulations. (Day 2 Tr. 195). She was serious and still is serious about providing great live music for her guests and to minimize the sound on Geri's side. (Day 2 Tr. p. 195). Even though Renae felt she was in compliance, she still worked to keep lowering and lowering the sound level. (Day 2 Tr. 196). Renae Eichholz hired her own expert who confirmed that she was in compliance with the Illinois EPA regulations. (Day 2 Tr. p. 197). However, she still continued to make changes to lower the sound level. Renae Eichholz has attempted to comply with the law and not be nuisance by complying with the objective numbers in the law. (Day 2 Tr. p. 198). She has no idea how to be compliant if the law is she must satisfy Geri Boyer. (Day 2 Tr. p. 198).

The first step to reduce the sound level inside Copper Fire was to use a phone app to monitor the sound inside the restaurant. (Day 2 Tr. p. 202). Respondents wanted a baseline to judge the difference in sound from night to night. (Day 2 Tr. p. 203). Respondents' also tried moving the bands from one side of the bar to the other, but then Geri Boyer complained more. (Day 2 Tr. p. 204). Respondents' tried installing a few sound panels against the wall. (Day 2 Tr. p. 205). Respondents' had the bands sign

contracts acknowledging that they will comply with rules established by Copper Fire. (Day 2 Tr. p. 206). Respondents' instituted a sound level policy and have updated that policy as the case has proceeded. (Day 2 Tr. p. 207). All bands playing at Copper Fire must keep their sound level below an established limit, which is now a maximum of 92 decibels on Friday and Saturday night and a maximum of 88 on Wednesday, Thursday and Sunday afternoon/early evening. (Day 2 Tr. p. 208). Respondents have even installed a decibel reader in the ceiling of Copper Fire so the bands can see the sound levels they are creating.

Complaints have requested that this Board establish an 85 decibels limit on Copper Fire, but Renae Eichholz testified that Geri Boyer has complained when the sound was below 85 inside Copper Fire. (Day 2 Tr. p. 209 – 213). In other words, even if Complainants get what they are requesting for relief, there is evidence they will still complain.

The evidence at the hearing also confirmed that the police believe Copper Fire is compliant. The police have visited Copper Fire after noise complaints were made and Copper Fire was informed they were in compliance with the law. (Day 2 Tr. 214). Chief Matt Eiskant testified at the hearing. (Day 1 Tr. p. 130 - 154). He is the Chief of Police for Belleville. (Day 1 Tr. p. 130). He testified that Big Daddy's, Benny's and Mariachis are basically identical to Copper Fire with respect to sound levels. (Day 1 Tr. p. 132). These are bars on Main Street near Copper Fire. (Day 1 Tr. p. 132). Chief Eiskant purchased decibel readers for his officers to monitor sound levels 25 feet away from bars and restaurants. (Day 1 Tr. p. 135). He called the Illinois EPA to determine what standards he should follow with the decibel readers. (Day 1 Tr. p. His officers have tested

the sound outside of Copper Fire and never found the sound to be non-complaint. (Day 1 Tr. p. 136). Chief Eiskant disagreed with the suggestion that sound is unreasonable merely because someone complains. (Day 1 Tr. p. 143). Chief Eiskant used his brother as an example why an inability to sleep cannot be considered to determine what is reasonable. (Day 1 Tr. 145). Chief Eiskant's brother works midnights with a railroad. (Day 1 Tr. 145). He sleeps during the day and his neighbors often cut the grass during that time. Chief Eiskant also testified that a subjective laws cause compliance issues because people do not know how to comply. (Day 1 Tr. p. 152).

Chief Eiskant also offered testimony about the economic value of Copper Fire and its suitability to the area. (Day 1 Tr. p. 130-131). Downtown Belleville has improved with the addition of more bars and restaurants making it a go-to location. (Day 1 Tr. p. 131). It has absolutely been a benefit to Belleville to have more bars and restaurants on Main Street in downtown Belleville. (Day 1 Tr. p. 131). Copper Fire is a restaurant/bar and it fits in the area on Main Street in downtown Belleville where there are other restaurant/bars. (Day 1 Tr. p. 132). Chief Eiskant has not noticed a difference in noise levels between Copper Fire and the other restaurant/bars on Main Street in downtown Belleville. (Day 1 Tr. p. 132). He believes the sound is identical between Copper Fire, Bid Daddy's Benny's and Mariachis. (Day 1 Tr. p. 132).

Renae Eichholz also testified about economic value of Copper Fire and its suitability to the area. (Day 2 Tr. generally). There are other restaurants and bars that all got together to agree to have live music on Main Street in downtown Belleville. (Day 2 Tr. p. 191). All of these bars offer live music and the music is loud. (Day 2 Tr. p. 192). This has made Main Street in downtown Belleville a destination place for entertainment.

(Day 2 Tr. p. 192). The City of Belleville uses Main Street in downtown Belleville as a place to have large City events such as the St. Patricks' day celebration, the Chili Cook-off, the Art and Wine Walk, the Margarita Walk, and the Bloody Mary walk. (Day 2 Tr. p. 199). Renae Eichholz testified that Copper Fire has become the music place to go in the St. Louis metropolitan area for people that want to hear live music. (Day 2 Tr. p. 196).

### **LEGAL STANDARD**

The Illinois Environmental Protection Act (the "Act") states that "no person shall emit beyond the boundaries of his property noise that UNREASONABLY interferes with the enjoyment of life or with any business activity, SO AS TO VIOLATE ANY REGULATION OR STANDARD ADOPTED BY THE BOARD UNDER THIS ACT." (Emphasis added). 415 ILCS 5/24. Section 900.102 of the Board's regulations in a very consistent fashion bars "noise pollution" which is defined as "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business activity." 35 Ill. Adm. Code 900.101 and 35 Ill. Adm. Code 900.102. This Board has interpreted these regulations to prohibit nuisance noise pollution. However, the word unreasonable appears in the above citations, which demands a reasonable person standard, not a subjective standard based on the complainant's sensitivity level.

### **ARGUMENT**

This is a unique case in the history of this Board. Certainly, this Board has found nuisance noise violations in the past based on testimony at trial about interference in the complainant's life. However, this Board has never been presented with a complainant alleging noise at 39 decibels and below constitutes a nuisance. Moreover, Respondents have been unable to find a single reported decision from this Board where the alleged

noise polluter was found to be compliant with the objective noise standards in 35 Ill. Adm. Code Section 901.102 and the Board still found a nuisance noise violations.

Respondents are proposing that this Board cannot and must not find a violation of Illinois law because 1) there is objective evidence that the noise level is minimal, and 2) finding a nuisance violation under the facts of this case would make the nuisance noise test unconstitutionally vague and unenforceable for all future cases. If a subjectivity is enough for a violation, this Board must consider the Section 33 factors, which are all in favor of Respondent.

**I. OBJECTIVELY 39 DECIBELS CANNOT CONSTITUTE A NUISANCE.**

Summary Judgment was granted in Respondents' favor that the noise emission standards established in 35 Ill. Adm. Code Section 901.102 were not violated. The Board allowed the Complainants' to proceed under a nuisance standard. At the hearing, it was established that the noise level in Complainant's loft never exceeds 39 decibels. Further, it was established that all of Respondents' efforts to turn down the volume and remediate noise, have allegedly made zero difference to the subjective complaints raised by Complainants. If the maximum sound level of 39 decibels is sufficient to constitute a noise nuisance, then this Board is also presented with question whether the noise inside the loft between 33 and 37 decibels also constitutes a noise nuisance. This Board knows how quiet these sound levels are and can rule on this objective fact alone that a maximum sound level of 39 decibels cannot constitute unreasonable interference with life. Geri Boyer's testimony that her life has been unreasonably interfered with simply does not pass a reasonable person standard. This Board cannot ignore the fact that the law and the

regulations require a finding of unreasonableness. See 415 ILCS 5/24 and 35 Ill. Adm. Code 900.101 and 35 Ill. Adm. Code 900.102.

It is undisputed that the noise level in Complainants' loft does not exceed 39 decibels. (Day 2 Tr. p. 26, p. 29 and p. 74). Mike Biffignani was hired by Complainants' as an expert. (Day 2 Tr. p. 6). Mike Biffignani testified that the sound level in the Complainants' loft was 38 decibels on a Friday evening while he performed sound testing. (Day 2 Tr. p. 26). He admitted that daytime ambient noise levels are typically around 45 decibels, human speech is typically around 60 decibels, and a TV is typically played at 65 or 70 decibels. (Day 2 Tr. 27). Mike Biffignani testified that the sound level in Complainants' loft was 39 decibels on a Saturday evening while he performed sound testing with live music being performed at Copper Fire. (Day 2 Tr. p. 29). He also testified that the sound level in Complainants' loft was 33 to 37 decibels during a Saturday afternoon while he performed sound testing with live music being performed at Copper Fire. (Day 2 Tr. p. 74). No evidence was produced at trial showing that the sound level in Complainants' loft was above 39 decibels at any time.

Mike Biffignani testified that ambient level of sound in the hearing room on day 2 inside the Illinois Pollution Control Board offices was 46 decibels. (Day 2 Tr. 53-54). When asked to play an example of 39 decibels, he admitted he could not get to 39 decibels inside the hearing room. (Day 2 Tr. p. 55). In other words, when the room was silent it was at 46 decibels. If a silent room is at 46 decibels, then how can 39 and less decibels be found to be nuisance?

**II. FINDING 39 DECIBELS TO BE A NOISE NUISANCE MERELY BECAUSE GERI BOYER CLAIMS IT INTERFERES IN HER LIFE WOULD MAKE THE NUISANCE STANDARD UNCONSTITUTIONALLY VAGUE.**

This Board may not find the Respondents have created a nuisance under the established facts because such a finding would make the nuisance standard unconstitutionally vague and unenforceable. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 42-44 (2010); *US v. L. Cohen Grocery Co.*, 255 U.S. 81, 88-89 (1921); *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). *People v. Bossie*, 108 Ill. 2d. 236, 242 (1985). *People v. Law*, 93389 202 Ill. 2d 578 (2002). The U.S. Supreme Court has acknowledged that a law that determines a violation based on subjective complaints of a third party is unconstitutionally vague. “Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.” *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). In the *Coates* case, the law at issue made it a criminal offense for three or more people to assemble on a sidewalk and “conduct themselves in a manner annoying to persons passing by.” *Id.* The U.S. Supreme Court struck the law down as unconstitutionally vague.

In *U.S. v. L. Cohen Grocery Co.*, the law at issue made it unlawful “to make any unjust or unreasonable rate of charge in handling or dealing in or with any necessities.” 255 U.S. 81, 88-89 (1921). The U.S. Supreme Court struck the law down because it left open “the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.” *Id.* The same is true in

this case. How can Respondents control the level of sound when the standard is the level of sound that does not bother Geri Boyer?

In *People v. Bossie*, 108 Ill. 2d. 236, 242 (1985), the Illinois Supreme Court was addressing the Illinois Public Demonstration Law, which was struck down because the term “principal law enforcement officer” was unconstitutionally vague. The Court noted that people are free to steer between lawful and unlawful conduct, and the State must allow a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Id.* at 241. “Vague laws may trap the innocent by not providing fair warning.” In this case, the Illinois EPA has established objective standards as to what constitutes noise pollution and Respondents are compliant with those numbers. The evidence is clear that Respondents want to comply with the law. The evidence is clear that Respondents have taken action to further reduce the sound level even after they learned they were in compliance. If 39 decibels is sufficient to be a noise nuisance, how will anyone in Illinois know what else might constitute a noise nuisance.

In *People v. Law*, 93389 202 Ill. 2d 578 (2002), the Illinois Supreme Court was addressing the Illinois Liquor Control Act which required people to take unknown actions to prevent a person under 21 from leaving their residence after possessing or consuming alcohol. The Illinois Supreme Court found the law to be unconstitutionally vague because it failed to provide any notice that would enable an ordinary person to understand what he must do to avoid violating the law. *Id.*

In *City of Lincoln Ctr. V. Farmway Co-Op, Inc.*, 298 Kan. 540 (2013), the Supreme Court of Kansas found a noise ordinance to be unconstitutionally vague as applied to a grain elevator facility. The noise ordinance at issue provided:

Section 1. DISTURBING THE PEACE. It is unlawful for any person to make, continue, maintain or cause to be made or continue any excessive, unnecessary, unreasonable or usually loud noise which either annoys, disrupts, injures or endangers the comfort, repose, health, peace or safety of others within the City.

*Id. at 546.* Following the U.S Supreme Court precedence and its own, the Kansas Supreme Court found the above ordinance to be unconstitutionally vague because it allowed arbitrary and discriminatory enforcement. Certainly, this arbitrary and discriminatory enforcement is at issue here. How many people in the state of Illinois hear sound from their neighbor which is 39 or less decibels? How many other business on Main Street in Downton Belleville expose their neighbors to sound levels at 39 or less decibels? Is it fair that one person's alleged annoyance means Copper Fire has to change its business model?

This Board cannot rely on Complainants subjective complaints or it risks losing the nuisance standard that it has used for decades. This Board must look at the facts of this case and determine whether the subjective complaints of interference are reasonable. Sound between 34 and 37 decibels and at a maximum of 39 decibels cannot, under any reasonable person standard, constitute a nuisance. If these levels can constitute a nuisance than every neighbor in a suburban and urban environment can sue their neighbor for noise violations under the extremely vague nuisance standard.

### **III. THE SECTION 33 FACTORS ARE ALL IN RESPONDENTS FAVOR.**

Factor 1 is the character and degree of injury. Geri Boyer's alleged injury is 34 to 37 decibels during the day and at most 39 decibels on Friday and Saturday night until 11 p.m. This is extremely low.

Factors 2 and 3 are the social and economic value of the pollution source and the suitability of the pollution source. Bars and restaurants are an important part of Main

Street in downtown Belleville. Chief Eiskant offered testimony about the economic value of Copper Fire and its suitability to the area. (Day 1 Tr. p. 130-131). Downtown Belleville has improved with the addition of more bars and restaurants making it a go-to location. (Day 1 Tr. p. 131). It has absolutely been a benefit to Belleville to have more bars and restaurants on Main Street in downtown Belleville. (Day 1 Tr. p. 131). Copper Fire is a restaurant/bar and it fits in the area on Main Street in downtown Belleville where there are other restaurant/bars. (Day 1 Tr. p. 132). Chief Eiskant has not noticed a difference in noise levels between Copper Fire and the other restaurant/bars on Main Street in downtown Belleville. (Day 1 Tr. p. 132). He believes the sound is identical between Copper Fire, Bid Daddy's, Benny's and Mariachis. (Day 1 Tr. p. 132).

Renae Eichholz also testified about economic value of Copper Fire and its suitability to the area. (Day 2 Tr. generally). There are other restaurants and bars that all got together to agree to have live music on Main Street in Downtown Belleville. (Day 2 Tr. p. 191). All of these bars offer live music and the music is loud. (Day 2 Tr. p. 192). This has made Main Street in Downtown Belleville a destination place for entertainment. (Day 2 Tr. p. 192). The City of Belleville uses Main Street in Downtown Belleville as a place to have large City events such as the St. Patricks' day celebration, the Chili Cook-off, the Art and Wine Walk, the Margarita Walk, and the Bloody Mary walk. (Day 2 Tr. p. 199). Renae Eichholz testified that Copper Fire has become the music place to go in the St. Louis metropolitan area for people that want to hear live music. (Day 2 Tr. p. 196).

Complainants' argument that Copper Fire is different from the other businesses based on alleged very specific factual distinctions ignores the actual analysis. The question is whether Copper Fire offer economic value to the area and is suitable. Under

no standard can it be denied that Copper Fire offers economic value to the area and fits on Main Street in Downtown Belleville.

Factor 4 looks at the technical practicability and economic reasonableness of reducing or elimination the noise. In this case, the noise level is already 39 decibels and below. How much lower can it get. Further, there is no evidence that any further reduction will do anything to satisfy Complainants, who want no sound. No state in the United States has a law suggesting that any sound heard by a neighbor is a nuisance. However, Complainants want this Board to find that 33, 34 37, 38 and 39 decibels at different hours of the day constitutes a noise nuisance.

Factor 5 looks at subsequent compliance. To be clear, Respondents are already compliant with 35 Ill. Adm. Code Section 901.102. Even after this was established Respondents took efforts to further reduce the sound level. The first step to reduce the sound level inside Copper Fire was to use a phone app to monitor the sound inside the restaurant. (Day 2 Tr. p. 202). Respondents wanted a baseline to judge the difference in sound from night to night. (Day 2 Tr. p. 203). Respondents' also tried moving the bands from one side of the bar to the other, but then Geri Boyer complained more. (Day 2 Tr. p. 204). Respondents' tried installing a few sound panels against the wall. (Day 2 Tr. p. 205). Respondents' had the bands sign contracts acknowledging that they will comply with rules established by Copper Fire. (Day 2 Tr. p. 206). Respondents' instituted a sound level policy and have updated that policy as the case has proceeded. (Day 2 Tr. p. 207). All bands playing at Copper Fire must keep their sound level below an established limit, which is now a maximum of 92 decibels on Friday and Saturday night and a maximum of 88 on Wednesday, Thursday and Sunday afternoon/early evening. (Day 2

Tr. p. 208). Notwithstanding all of this effort, Complainants want this board to believe that Respondents have failed to turn down the volume. This is not credible. Respondents are compliant and keep trying to take efforts to further reduce the sound.

This Board should not find a violation of the noise nuisance standard.

**IV. THIS BOARD DOES NOT HAVE THE AUTHORITY TO ISSUE THE CEASE AND DESIST ORDER REQUESTED BY COMPLAINANTS.**

Complainants have requested an order enjoining Respondents from playing live music which can be heard from inside Complainants loft or business. There is nothing in the statute or regulations at issue that allow Complainants to have no noise from Copper Fire. The noise must unreasonably interfere with a reasonable person's life.

Complainants are requesting far more than the law allows. One reason why they are making this request is there is no other alternative. Are they going to keep the sound level at 35 decibels? If yes, there already is evidence that the sound level in Complainants' loft has been at this level (and below) and they still complain. If there is an interim order, this Board must inform Respondents what level of sound is acceptable in the Complainants' loft so, Respondents can work to get that standard.

**V. NO CIVIL PENALTY IS APPROPRIATE**

Complainants have suggested that Respondents have violated the nuisance standard 1,200 times. How? Are Complainants honestly asking this Board to fine Respondents 50 dollars for each day Wednesday and Thursday night when the sound level in their apartment was 33 to 37 decibels? What about Sundays when the sound level was comparable. If this Board finds a violation, the Board should follow its own precedence in *Pawlowki v. Benchwarmers*, PCB 99-82, and give Respondents 60 days to do whatever

this Board order Respondents to do. In *Roti v. LTF Commodities*, PCB 99-19, the Board ordered a trucking company to build a sound wall. If a violation is found, Respondents ask that the Board make the remedy very specific because Respondents expect Complainants to continue to complain after any attempt by them to further reduce the sound level.

**VI. THE COMMENTS DELIVERED AFTER COMPLETION OF THE HEARING MUST BE STRUCK.**

There are no regulations, laws or statutes that allowed Complainants to submit comments (allegedly from the public) after the hearing was complete. All comments should have been submitted during the hearing. Section 101.110 specifically states that public remarks should be made during the hearing. Post hearing comments are generally only allowed for hearings about new regulations. Complainants attempt to sneak in witness testimony without cross-examination was patently unfair.

**VII. CONCLUSION**

This Board should find in favor of Respondents in this matter because Respondents are in compliance with the objective standards, Respondents have taken multiple steps to continue to reduce the sound level, and the objective evidence is the sound level in Complainants' loft is at most 39 decibels and is often between 33 and 37 decibels.

Dated January 27, 2025

/s/ Paul E. Petruska

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**CERTIFICATE OF SERVICE**

It is hereby certified true and correct that the foregoing was served via email on January 27, 2025 upon the following:

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