

ILLINOIS POLLUTION CONTROL BOARD
January 21, 2021

JAMES FISER,)
)
 Complainant,)
)
 v.) PCB 18-084
) (Citizens Enforcement – Noise)
 JAMES L. MEADOR, an individual, and)
 HENRY’S DOUBLE K, LLC, an Illinois)
 limited liability company,)
)
 Respondents.)

CRAIG A. BROWN, LAW OFFICES OF CRAIG A. BROWN, APPEARED ON BEHALF OF
COMPLAINANT; and

STEVEN A. COX, SHOCKEY & COX, LLC, APPEARED ON BEHALF OF
RESPONDENTS.

INTERIM OPINION AND ORDER OF THE BOARD (by J. Van Wie):

In today’s matter, the Board decides whether the noise from a neighboring bar and live music venue unreasonably interfered with a nearby resident’s enjoyment of life. James Fiser (Fiser or complainant) brought this enforcement action against James Meador (Meador) and the restaurant, bar, and music venue Meador owns and operates, Henry’s Double K (Henry’s) (collectively with Meador, respondents). Henry’s hosts live music one to three times a week until closing time, approximately midnight - 1:00 am on weekends. Fiser alleges that respondents violated the Board’s noise regulations and the noise prohibitions of the Environmental Protection Act.

The Board finds that the noise emissions from Henry’s live music have unreasonably interfered with Fiser’s enjoyment of life, including disrupting the sleep of Fiser and his wife on numerous occasions. The Board therefore concludes that respondents violated the Act (415 ILCS 5/24 (2018)) and the Board’s noise pollution regulations (35 Ill. Adm. Code 900.102), which prohibit causing nuisance noise. However, the Board finds that the parties should be afforded a further opportunity to offer evidence regarding appropriate civil penalties or specific abatement measures. The Board directs the hearing officer to schedule a remedy hearing to take additional evidence in this matter.

In the following opinion, the Board first recounts the procedural history of the case before providing the relevant laws and regulations. The Board then sets forth the facts of the case and analyzes whether respondents violated the noise prohibitions. The Board then finds that the noise did in fact unreasonably interfere with complainant’s enjoyment of life. The Board

then reviews the record evidence regarding potential remedies. Finally, the Board directs the hearing officer to conduct an additional hearing to receive evidence regarding potential remedies.

PROCEDURAL HISTORY

Complainant brought this case on June 26, 2018, requesting the Board to: 1) order respondents to cease playing amplified sound or music outside Henry's building; 2) order respondents to cease playing amplified sound or music at Henry's after 11 p.m.; 3) order respondents to take measures within the Henry's building to dampen the sound emanating from the Henry's premises by fifty percent; and 4) such other relief as the Board deems just.

The Board denied respondents' motion to dismiss and accepted the complaint (Compl.) for hearing. On November 2, 2018, respondents filed their answer (Ans.) to the complaint. After unsuccessful settlement negotiations, a hearing was held on March 11, 2020. The hearing was held at the Mount Carroll Community House (Tr.; Exh.), with approximately thirty members of the public present and some public comments (PC) given. Complainant's post-hearing brief (Compl. Br.) was filed on April 14, 2020 and respondents' reply (Resp. Br.) was filed on April 30, 2020.

APPLICABLE LAWS AND REGULATIONS

The complainant bases his complaint on Section 24 of the Act, 415 ILCS 5/24 (2018), and Section 900.102 of the Board's regulations, 35 Ill. Adm. Code Section 900.102.

Section 24 of the Act states, "[n]o person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act." 415 ILCS 5/24 (2018).

Section 900.101 defines "noise pollution" as "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity." 35 Ill. Adm. Code 900.101.

Section 900.102 provides, "[a] person must not cause or allow the emission of sound beyond the boundaries of that person's property, as defined in Section 25 of the Environmental Protection Act, that causes noise pollution in Illinois or violates any provision of this Chapter." 35 Ill. Adm. Code 900.102.

Section 33(c) of the Act states:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:

1. The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

2. The social and economic values of the pollution source;
3. The suitability or unsuitability of the pollution source in the area in which it is located, including the question of priority of location in the area involved;
4. The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
5. Any subsequent compliance.

415 ILCS 5/33(c) (2018).

Section 42(a) of the Act authorizes the Board to impose upon any person who violates Section 24 of the Act or Section 900.102 of the Board's regulations "a civil penalty of not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day during which the violation continues." 415 ILCS 5/42(a) (2018).

Section 42(h) of the Act states that:

In determining the appropriate civil penalty to be imposed . . . the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including, but not limited to, the following factors:

1. the duration and gravity of the violation;
2. the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
3. any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
4. the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;
6. whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency;

7. whether the respondent has agreed to undertake a "supplemental environmental project", which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform; and
8. whether the respondent has successfully completed a Compliance Commitment Agreement under subsection (a) of Section 31 of this Act to remedy the violations that are the subject of the complaint.

In determining the appropriate civil penalty to be imposed . . . the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship. However, such civil penalty may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent.

415 ILCS 5/42(h) (2018).

Section 45(e) of the Act states, “[a] final order issued by the Board pursuant to Section 33 of this Act may be enforced through a civil action for injunctive or other relief instituted by a person who was a party to the Board enforcement proceeding in which the Board issued the final order.” 415 ILCS 5/45(e) (2018).

FACTS

Henry’s Double K, LLC, is an Illinois limited liability company which has been owned and operated by respondent James Meador since May of 2012. Tr. at 91. Henry’s has operated as a bar and live music venue since 2013 and a restaurant since 2014. Tr. at 91. The venue hosts live music one to three evenings a week. Tr. at 40, 92-94. The live music is played until approximately midnight - 1:00 am on weekends. Tr. at 27, 42. Complainant and his wife live approximately 300 feet south of Henry’s and the properties are separated by a vacant lot. Compl. Br. at 1. The Fisers have lived at that property since 2005, eight years before Henry’s began operation as a live music venue in 2013. Tr. at 34, 64-65.

The following sections will present complainant’s testimony, which consisted of five witness and five exhibits, followed by respondents’ testimony, which consisted of six witness and two exhibits.

Complainant’s Testimony

Complainant’s witnesses included Mr. Fiser, Mrs. Fiser, two acquaintances of the Fisers, and a Mount Carrol patrolman. The witnesses’ testimony described the noise levels in the home and the response to many of Fiser’s noise complaints by the police.

The Fisers have lived in their Mount Carroll home for over fifteen years. Tr. at 33. In 2013, Meador opened Henry's in an unused property neighboring the Fisers. Tr. at 34, 91. There is an undeveloped field between the Fiser home and Henry's. Tr. at 37, 100. Shortly after opening, Henry's began hosting live music upwards of three times a week, until about 1:00 am on weekends. Tr. at 40, 92.

Mr. Fiser testified that, when Henry's hosts live music, the noise would be so loud that they had to "sleep in another room to go to sleep." Tr. at 43. Fiser presented three different audio recordings, recorded from the couple's bedroom window which faces Henry's. Pet. Exh. 3, 4, 5. Mrs. Fiser stated that she now takes sleeping pills because of the noise and has cautioned her daughter, who has young children, not to come visit due to the noise. Tr. at 67.

In an attempt to mitigate the noise, Fiser installed new windows and purchased sound dampening trees which he placed along his northern property line. Tr. at 55-56. Fiser contacted Meador directly with his complaints "three or four times." Tr. at 97.

Two acquaintances of the Fisers also gave testimony to the noise level in and around the Fiser residence during Henry's live shows. Mark Chapman testified that the bass thumping could be felt and music heard inside the Fiser home with the doors and windows closed. Tr. at 19-20. He also stated that the music played until approximately midnight and impacted the ability of the Fisers to sleep in the house. Tr. at 20-21. Robert Sisler, a former city councilman, testified that he could hear the music inside the Fiser house with the doors and windows closed "like it was right next door and it was right next door with the -- with the valley between them being the avenue in which the sound traveled uninterrupted." Tr. at 11, 13.

Officer Dennis Asay, patrolman for the Mount Carroll Police Department, stated that after personally responding to approximately a dozen noise complaints from Fiser, Asay found on one occasion that the noise from Henry's exceeded the limit set forth in the city ordinance. Officer Assay issued a violation. Tr. at 25. Officer Asay also stated that the noise level inside the Fisers home was prominent with windows and doors closed, and that the bands at Henry's would play up until 1:00 am. Tr. at 26-27.

Complainant testified regarding a zoning map indicating that his property might be zoned for "limited agricultural" use, but also testified that the tax office told him that his property was residential. Tr. 38, 39.

Respondents' Testimony

Respondents' presented five witnesses, all neighbors of Henry's who testified to the noise levels at their own property (Pam Heisler, Elizabeth Harman, Lawrence Haas, Bonnie Haas, Richard Frey), as well as Mr. Meador. Each of the witnesses reside closer to Henry's than Fiser, but all reside north of the Henry's property whereas the Fiser residence is south of Henry's. Tr. at 74, Y, Z. None of the respondents' witnesses testified to the noise level at the Fisers. Respondent also admitted a zoning map of the area as Respondents' Exhibit 1 (Resp. Ex. 1).

Ms. Heisler lives northeast of Henry's, to the east of the Henry's the parking lot. Tr. 74, *see also* Resp. Ex. 1. She states that, although her bedroom window is also "right there" she "can sleep through it" with "no issues." Tr. at 73. Elizabeth Harman asserted that she lives next to Ms. Heisler, also northeast of Henry's, and can only hear the noise from Henry's "if [she's] outdoors." Tr. at 78-79, *see also* Resp. Ex. 1. Mr. and Mrs. Haas, who live north and west of Henry's across Henry's parking lot, both testified that any noise from Henry's was "no problem." Tr. at 82, 86, *see also* Resp. Ex. 1.

Richard Frey, who lives approximately 100 yards northeast of Henry's, testified that he did have an instance where the noise from Henry's interfered with his enjoyment of his property. Tr. at 87-88. Similar to the Fisers, Mr. Frey stated that the "bass was just pounding." *Id.* When this was brought to Meador's attention, both parties asserted that Meador did address the situation by closing the back door of Henry's to dampen the sound. Tr. at 88, 96.

In his testimony, Mr. Meador states that Henry's would host "open mic" "Show Ups" on Thursdays and larger bands on Friday and Saturday nights. Tr. at 93-94. Meador also clarified that he does not have "in-house sound" or amplification. Tr. at 92. The bands hosted at Henry's range from a single acoustic guitar player to six-piece bands. Tr. at 94. He states that "regardless of the size of the band, they bring their own amplification" and that he has started to include more guitar performances and less of the full bands. *Id.*

Mr. Meador addressed the steps he has taken to minimize the noise impact on Henry's neighbors. Tr. at 96-97. In addition to "walking the perimeter of [the] property . . . throughout the night" to assess the sound levels, Meador also has wooden dormers on the south-facing windows which he closes to keep the sound and heat in. *Id.*

The zoning map shows Henry's Double K and the Fisers' property zoned as commercial with the field between the properties zoned as residential. Resp. Ex. 1. Mr. Meador testified that he had not received notice of a zoning change since owning the property. Tr. at 102. Respondents argue that Henry's is bound to "the standards which are reasonable in a commercial district" and that the sound levels were reasonable for a commercial setting. Tr. at 111-13, Resp. Bf. at 7.

Public Comments

The hearing took place at the Mount Carroll Community House and had approximately thirty members of the public in attendance. At the hearing, Hearing Officer Halloran received nine public comments. Three of the commenters corroborated the testimony presented by respondents that the noise from outside Henry's was not as loud as Fiser stated. Tr. at 114-122. Public comments were also given by Gene Fisher, who arrived late and elected to offer public comment instead of testimony. Tr. at 122-23. Mr. Fisher commented on a possible source of the noise issue. A consultant on similar sound issues, Mr. Fisher stated that he believed the sound was an issue for Mr. Fiser but none of the other neighbors because of the location of the Fiser's bedroom windows and the windows at Henry's. Tr. at 123. Based on visiting Henry's and the outside of the Fiser house, Mr. Fisher commented that the sound could be a transmission issue

rather than acoustic and may be solved by blocking the area of travel between the buildings. Tr. at 124.

DISCUSSION

Complainant has alleged that respondent violated Section 24 of the Act, 415 ILCS 5/24 (2018), and Section 900.102 of the Board's regulations, 35 Ill. Adm. Code Section 900.102. These regulations constitute a prohibition against "nuisance noise" pollution. Charter Hall Homeowner's Association and Jeff Cohen v. Overland Transportation System, Inc., and D. P. Cartage, Inc., PCB 98-81 (October 1, 1998) (Charter Hall), *citing* Zivoli v. Prospect Dive and Sport Shop, Ltd., PCB 89-205 (March 14, 1991) (Zivoli) slip op. at 8

Nuisance Violation

The Board follows a two-step inquiry to determine whether noise emissions rise to the level of a nuisance noise pollution violation: (1) whether the noise constitutes an interference in the enjoyment of complainant's life; and (2) whether the interference is unreasonable considering the factors outlined in Section 33(c) of the Act. *See* Charter Hall slip op. at 19-21.

Based upon the record, the Board finds that the noise from Henry's does interfere with complainant's use of his property. After considering each of the factors below, the Board further finds that the noise from Henry's has unreasonably interfered with Mr. Fiser's enjoyment of life.

Interference with Use or Enjoyment

The Board has stated that if there is no interference, there can be no nuisance noise violation. Zivoli slip op. at 9. Accordingly, the Board must first determine whether the sounds have interfered with the enjoyment of life. Furlan v. University of Illinois School of Medicine, PCB 93-15 (October 3, 1996), (Furlan) slip op. at 4. The Board has held that the following disturbances constitute interference: sleeplessness from nightclub noise (Manarchy v. JJJ Associates, Inc., PCB 95-73, (July 18, 1996) (Manarchy) slip op. at 10); noise interfering with sleep and use of yard (Hoffman v. Columbia, PCB 94-146, (October 17, 1996) (Hoffman) slip op. at 5-6, 17); and, trucking operation noise impacting sleep, watching television and conversing (Thomas v. Carry Companies of Illinois, PCB 91-195 (August 5, 1993), slip op. at 13-15).

Complainant alleges that the noise from Henry's has "significantly interfered with [the] reasonable comfort and enjoyment" of his residence. Comp. at 2. The Fisers both testified that they have trouble sleeping on nights when Henry's hosts live music. Tr. at 43, 67. Mrs. Fiser takes sleeping pills and Mr. Fiser stated that they now sleep in another room in their house in order to sleep on these nights. *Id.* Based on these facts, the Board finds that the noise from Henry's does interfere with complainant's use of his property. The Board now must consider whether the noise unreasonably interfered with complainant's enjoyment of life.

Reasonableness of the Interference

The Board now must consider whether the noise emissions from Henry's unreasonably interfered with Mr. Fiser's enjoyment of life. Whether an interference is unreasonable is determined by examining the factors set forth in Section 33(c) of the Act, 415 ILCS 5/33(c) (2018). The Board need not find against respondent on each factor to find a violation. See Wells Manufacturing Company v. Pollution Control Board, 73 Ill. 2d 226, 233, 383 N.E.2d 148, 151 (1978) (Wells Manufacturing). After weighing each of the factors below, the Board finds that the noise from Henry's has unreasonably interfered with Mr. Fiser's enjoyment of life.

Character and Degree of Injury or Interference. In considering the character and degree of interference that the noise caused, we ask whether the noise interferes with Mr. Fiser's enjoyment of life "substantially and frequently . . . beyond minor or trifling annoyance or discomfort." Charter Hall, slip op. at 21, citing Kvatsak v. St. Michael's Lutheran Church, PCB 89-182 (August 30, 1990), slip op. at 9.

Complainant testified that he had filed complaints with the local police department approximately thirty times. Tr. at 57. Complainant's witness, Officer Asay, also testified that he had personally responded to Mr. Fiser's complaints approximately a dozen times and issued a city noise ordinance violation to Mr. Meador on one of those occasions. Tr. at 24-25. Additionally, as previously discussed, Mr. and Mrs. Fiser both testified to the noise levels and the impact it has consistently had on their sleep.

Complainant also presented testimony of Mr. Chapman who supported the Fisers' description of the noise levels. All three witnesses testified that the music continued until midnight or later and that music, specifically the bass, was audible inside the Fisers' home. Tr. at 20. Officer Asay also testified that the bass was audible inside the property with the doors and windows closed and that the music continued until about 1:00 a.m. Tr. at 27.

In response, respondents offered testimony from five neighbors of Henry's to refute Mr. Fiser's claims. Although each of the respondents' witnesses testified that they were not disturbed by the noise in their homes,¹ they all live on the northern side of Henry's. They did not testify regarding the noise at the Fisers' property which is located on the south side of Henry's. Respondents also argue that the Fisers may only expect what is reasonable in a commercial district. Resp. Bf. at 7.

Complainant demonstrated that he and his wife have trouble sleeping "on a consistent basis" due to the music emanating from Henry's. Manarchy, slip op. at 11. Thus, the Board finds that the sound emanating from Henry's substantially and frequently interferes with complainant's life.

Social or Economic Value of the Source. In assessing this factor, the Illinois Supreme Court has looked to the number of persons that the respondent employed and whether respondent

¹ One of these witnesses did call Mr. Meador to complain about the noise once but the parties were able to resolve the matter. Tr. at 88.

is an important supplier to a particular market. Wells Manufacturing, 73 Ill. 2d at 235-36. The Board has similarly looked to such factors as the number of employees at a facility and the total wages and taxes that a respondent paid. Charter Hall at slip. op. 23-24.

There is no evidence in the record regarding the number of employees at Henry's or the wages and taxes paid by Henry's. However, the Board has previously acknowledged that "small businesses such as bars, nightclubs, restaurants and other clubs generally have both some social and economic value to an area." Manarchy, slip op. at 12. Respondent also offered testimony that Henry's offered a unique value to the area by serving as an event space. Tr. at 92. Thus, the Board finds that Henry's does provide social and economic value to the area.

Suitability or Unsuitability of the Source. Section 33(c)(3) focuses on the pollution source and the priority of the location in the area involved. Although the parties offered conflicting testimony on the zoning of Mr. Fiser's property, respondents have demonstrated that Henry's is presently zoned for commercial use. Tr. at 100. The zoning map shows that the Fiser house is zoned commercial, but the land between Henry's and the Fiser home is zoned residential. Tr. at 38-39. Further, complainant has shown that he has resided in his property and used it in a residential capacity since before Henry's began operation next door. Tr. at 65. Therefore, Henry's is a commercial enterprise operating in a commercial zone, but complainant has priority of location.

Respondents argues that the standard should be based on what is reasonable in a commercial district, and that the sound levels were reasonable for a commercial setting. Tr. at 111-13, Resp. Bf. at 7. However, Henry's is not emitting the noise at issue during the standard commercial hours of 9 a.m.-5 p.m. Rather, Henry's is emitting noise until midnight or 1 a.m. on weekends. Even under the commercial reasonableness advocated by respondents, the noise emitted by Henry's is unreasonable.

Technical Practicability and Economic Reasonableness of Control. In considering this factor, the Board looks to whether "technically practicable and economically reasonable means of reducing or eliminat[ing] noise emissions" were available to respondents. Manarchy, slip op. at 9.

Mr. Meador testified to "walking the perimeter of [the] property . . . throughout the night" to assess the sound levels, and closing wooden dormers on the south-facing windows which he closes to keep the sound and heat in. Tr. at 96-97. In one instance, Richard Frey testified that Mr. Meador was able to address his noise complaint by closing the back door of Henry's to dampen the sound. Tr. at 88, 96. Mr. Meador also testified "I've added more of the guitar type performances and really dialed back on the bands in particular." Tr. at 94. The record does not provide a timeframe of any of these actions or whether they were effective in reducing noise emissions at the Fiser house.

There is no expert testimony in the record regarding the technical practicability or economic reasonableness of any action to reduce or eliminate noise emissions. Mr. Fisher

offered comments² regarding sound controls and opined that the sound may be transferred between the windows of Henry's and parallel windows in the Fiser home. Tr. at 123. Mr. Fisher described a similar circumstance in "Machesney Park or Loves Park across from Second Cousins." *Id.* Mr. Fisher suggested the solution "would be to just block the area of travel between the two buildings." Tr. at 124. He did not offer any comment regarding the technical practicability or economic reasonableness of blocking the area of sound travel.

While there is some evidence in the record for the Board to consider this factor, the Board finds that there is insufficient evidence for it to weigh this factor for or against either party.

Subsequent Compliance. The record does not reflect that respondents have subsequently come into compliance with the alleged violations. Mr. Meador testified "I've added more of the guitar type performances and really dialed back on the bands in particular." Tr. at 94. However, there was no agreement in the record to limit the type of bands playing at Henry's going forward. Meador also testified that he would ask bands to turn down the volume if he felt they were getting too loud and would shut doors and dormers. Tr. at 96. However, the noise continues to bother Mr. Fiser.

Applying these factors, the Board finds that the noise emissions from Henry's live music unreasonably interfered with Fiser's enjoyment of life, including disrupting the sleep of Fiser and his wife. The Board therefore concludes that respondents violated the Act (415 ILCS 5/24 (2018)) and the Board's noise pollution regulations (35 Ill. Adm. Code 900.102), which prohibit causing nuisance noise.

Numerical Violation

Respondents argue that there can be no violation since "there was no competent evidence as to the actual sound levels present at the time of the recording, either from actual measurement data nor from qualified experts, which would support a determination of a violation of established property line noise source regulations." Resp. Br. at 2. The Board may consider such evidence, however, complainant's allegations are for nuisance noise, which does not require noise readings for a finding of nuisance. *See Charter Hill*, PCB 98-81 at 21, 25.

Remedies

The Board has considered the Section 33(c) factors and found that the respondents have violated Section 24 the Act (415 ILCS 5/24 (2018)) and Section 900.102 of the Board's noise pollution regulations (35 Ill. Adm. Code 900.102). Having found respondents in violation, the Board must again consider the Section 33(c) factors in determining the appropriate remedy. (See *Forty-Eight Insulations, Inc.*, PCB 74-480, slip op. 8, 13.) Where, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, the Board then considers the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. 415 ILCS 5/42(h) (2018).

² The Board's rules indicate that such public comments are given less weight than evidence subject to cross-examination. 35 Ill. Adm. Code 101.628(b).

Section 33(c) Factors

The Board's findings regarding character and degree of interference, social and economic value, suitability of location and subsequent compliance are the same for the remedy as for the determination of a violation. The above analysis for these factors applies equally in a remedy context. For technical practicability and economic reasonableness of reducing or eliminating emissions, however, the question in fashioning a remedy, in contrast to determining a violation, is not what *could* respondents have reasonably done to reduce emissions, but rather what is reasonable *to require* respondents to do now to reduce their noise emissions to stop the unreasonable interference. See Gott, et. Al. v. M'Orr Pork, Inc., PCB 96-68 (Feb. 20, 1997) interim op. at 20.

The Board may craft various remedies to address a nuisance. See e.g. Discovery South Group, Ltd. v. Pollution Control Bd., 275 Ill.App.3d 547, 559-60, 656 N.E.2d 51, 59-60 (1st Dist. 1995) (Board ordered a venue to monitor its sound emissions and stay within sound emission limitations already adopted by the Board); Roti, et al. v. LTF Commodities PCB 99-19 (July 24, 2003) slip op. at 10-11, 14-15 (Board directed respondent to cease and desist noise violations and build a noise wall if it continues night-trucking operations); Young and Young v. Gilster-Mary Lee Corp., PCB 00-90 interim opinion (September 6, 2001) at 19 (Board directed respondent to file a report detailing a plan for reducing the noise emissions reaching the complainants' residence); Pawlowski v. Benchwarmer's Pub, PCB 99-82 (September 21, 2000) slip op. at 3 (Board prohibited using a jukebox and speakers in bar next to complainant).

As noted above, the record provides some evidence relevant to this factor, however, the Board finds that there is insufficient evidence for the Board to determine what, if any, noise control measures would be technically practical and economically reasonable for respondents to use to address the noise violation.

Section 42(h) Factors

Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. 415 ILCS 5/42(h) (2018). These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent agreed to undertake an "environmentally beneficial project" in settlement. *Id.* Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id.* Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id.*

Duration and gravity of the violations. The record contains testimony that, starting in 2013, noise from Henry's disrupted the Fisers' sleep and enjoyment of their property. The Fisers

filed up to 30 noise complaints and contacted Mr. Meador at least three times regarding the noise. Tr. at 97-98.

Due diligence in attempting to comply. Mr. Meador testified that he closed wooden shutters and walked the perimeter of his property during music events. Tr. at 96-97. Meador also testified that he would ask bands to turn down the volume if he felt they were getting too loud and would shut doors and dormers. Tr. at 96. The record does not indicate when or how often he took these actions.

Economic benefits accrued by the respondent because of delay in compliance. With the exception of general testimony regarding the weekly number of patrons, the record does not contain any evidence of the economic benefits accrued by respondents while not addressing this nuisance. Tr. at 102.

Amount of monetary penalty which will serve to deter further violations by the respondent. There is no evidence in the record relating to this factor.

Environmentally beneficial project. There is no evidence in the record relating to any such project.

In all, the Board finds insufficient evidence to weigh the Section 42(h) factors in favor of a civil penalty or not.

For these reasons, the Board directs the hearing officer to schedule a remedy hearing to take additional evidence in this matter relating to the Section 33(c) factors and the Section 42(h) factors. The Board retains jurisdiction until it issues a final order in the matter. *See, e.g., Scott and Karen Thomas v. Carry Companies of Illinois*, (August 5, 1993), PCB 91-195, slip op. 19 and (May 19, 1994), PCB 91-195, slip. op. 3.

CONCLUSION

As discussed above, the Board concludes that respondents violated the Act (415 ILCS 5/24 (2018)) and the Board's noise pollution regulations (35 Ill. Adm. Code 900.102), which prohibit causing nuisance noise. The Board make no findings regarding civil penalties or specific abatement actions, pending additional hearings and evidence in this matter.

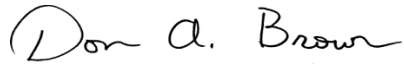
ORDER

1. The Board finds that James L. Meador and Henry's Double K, L.L.C have unreasonably interfered with complainant's enjoyment of life in violation of the nuisance noise prohibitions of Section 24 of the Act, 415 ILCS 5/24 (2018), and Section 900.102 of the Board's noise pollution regulations, 35 Ill. Adm. Code 900.102.
2. The Board directs the hearing officer to schedule a remedy hearing to take evidence relating to the Section 33(c) and the Section 42(h) factors and such other

evidence as may assist the Board in determining the appropriate remedy in this matter.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 21, 2021, by a vote of 4-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above a horizontal line.

Don A. Brown, Clerk
Illinois Pollution Control Board