ILLINOIS POLLUTION CONTROL BOARD
October 3, 1996

DOROTHY FURLAN and MICHAEL FURLAN,	)	
Complainants,	)	PCB 93-15
v.	)	(Enforcement -Noise)
UNIVERSITY OF ILLINOIS SCHOOL OF MEDICINE,	)	
Respondent.	)	

DOROTHY FURLAN AND MICHAEL FURLAN APPEARED PRO SE;

JAMES P. DEVINE APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by E. Dunham):

This matter comes before the Board on a complaint filed January 29, 1993 by Dorothy and Michael Furlan (complainants). The complaint alleges that the air conditioners at the University of Illinois School of Medicine (Respondent or School) in Rockford, Illinois emit noise in violation of Sections 23 and 24 of the Environmental Protection Act (Act) (415 ILCS 5/23 and 24).

In April 1994, both parties filed status reports stating that noise monitoring was to be performed during the air conditioning season of 1994. In a further status report of July 1, 1994, complainant stated that the monitoring was scheduled for the first week of July, 1994. Results of tests performed by the Illinois Environmental Protection Agency (Agency) were filed with the Board on July 14, 1994. According to the test results, there were no exceedences of the numerical standards for noise found at 35 Ill. Adm. Code 901. Respondent filed a "Motion for Summary Judgment" on August 8, 1994, arguing that the noise level testing indicated that there were no violations of the numerical standards. No response to the motion for summary judgment was filed by the complainants. The Board granted summary judgment to respondents with regard to the numerical standards by order dated September 1, 1994.

The nuisance noise allegations were ordered to hearing by the Board on October 6, 1994. A hearing was held before Board Hearing Officer Deborah Frank on July 29, 1996. Post hearing briefs were filed by both parties on September 4, 1996.

On September 12, 1996 respondent filed a motion to strike an attachment to complainant's brief consisting of signatures of neighbors claiming to have heard "…invasive

noise levels interrupting use of our home and property" on the basis that the statements are inadmissible hearsay. No response to the motion to strike was filed. The motion to strike on the basis that the statements constitute hearsay is granted.

For the reasons stated below, the Board finds that the complaints have not shown that the noise emitted from the School's air conditioning units constitutes an unreasonable interference with the Furlans' enjoyment of life or use of their property.

BACKGROUND

A hearing was held on the limited issue of the alleged nuisance noise violations on September 29, 1996. Complainants called as witnesses Mrs. Dorothy Furlan, Mr. Tim Ferguson (a neighbor), Mr. Joe Seger (a friend of complainants), Dr. Salafsky (Regional Dean of the College of Medicine, University of Illinois), Mr. Scott Jensen (Coordinator of Physical Plant Services, University of Illinois), and Mr. Greg Zak (Noise Technical Advisor, Illinois Environmental Protection Agency (Agency)). Respondent recalled as a witness Mr. Scott Jensen.

The Furlans' residence is located on the east border of the School's property. (Tr. at 17.) The Furlans contend that they cannot use the west bedroom in their house for sleeping and that the noise interferes with conversation and reading in that room. (Tr. at 20.) The Furlans contend that the noise makes the west bedroom and the deck of their house unusable. (Tr. at 22.) The Furlans also contend that they are unable to open windows in their living room due to the noise. (Tr. at 22.) The Furlans are bothered by the noise at all times of the day and night. (Tr. at 32.)

The School is set on approximately 20 acres with the buildings occupying one or two acres and the rest of the acreage consists of parking areas and border areas of trees and bushes. (Tr. at 88.) The School maintains that it has spent thousands of dollars in response to the Furlans' complaints and have improved the situation. (Tr. at 17.) The School believes that the Furlans are seeking complete quiet. (Tr. at 17.) The School argues that the complainants have failed to show that the noise interferes with the enjoyment of life and even if there is an interference it is not unreasonable. (Res. Br. at 9.)

APPLICABLE STATUTES AND REGULATIONS

The specific sections of the Act and the Board regulations on which the complainants base their complaint are Sections 23 and 24.

Section 23 of the Act states that:

> [t]he General Assembly finds that excessive noise endangers physical and emotional health and well-being, interferes with legitimate business and recreational activities, increases construction costs, depresses property values, offends the senses, creates public nuisances, and in other respects reduces the

> quality of our environment. It is the purpose of this Title to prevent noise which creates a public nuisance.
> (415 ILCS 5/23 (1994).)

Section 23 of the Act describes the findings of the General Assembly concerning excessive noise and the purpose of the title. As this section of the Act does not prohibit any activity, there can be no finding of a violation of this section.

Section 24 of the Act states that:

> [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 (1994).)

Section 25 of the Act states that:

> [t]he Board, pursuant to procedures prescribed in Title VII of the Act, may adopt regulations prescribing limitations on noise emissions beyond the boundaries of the property of any person and prescribing requirements and standards for equipment and procedures for monitoring noise and the collection, reporting and retention of data resulting from such monitoring.
> (415 ILCS 5/25 (1994).)

A violation of Section 24 of the Act can only be found where there is a violation of the Board's regulations or standards. The Board has adopted regulations relating to noise which can be found at 35 Ill. Adm. Code Subtitle H. Section 900.101 defines noise pollution to be "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity", or so as to violate any other provisions of this chapter. Section 900.102 of the Board regulations states that "[n]o person shall cause or allow the emission of sound beyond the boundaries of his property, as property is defined in Section 25 of the Act, so as to cause noise pollution in Illinois"

Sections 901.102(a) and (b) of the Board's regulations provide the limits of allowable noise levels during daytime hours and nighttime hours. Noise levels are to be measured no less than 25 feet from any property-line-noise-source. Section 901.101 defines "property line-noise-source" as any equipment or facility or combination thereof which operates within any land use as specified by 35 Ill. Adm. Code 901.101. Such equipment or facility or combination thereof, must be capable of emitting sound beyond the property line of the land on which operated."

Complaints have not specifically alleged any violations of the Board's regulations in the complaint. However, complainants did allege violations of Sections 900.101 and 900.102 at hearing. (Tr. at 13.) The Board will consider this as an amendment to the complaint. The

Board will look to these regulations to determine if respondent is in violation of Section 24 of the Act. If respondent is in violation of the noise regulation in Section 900.102, there is a violation of Section 24.

Section 33(c) of the Act states that:

> [i]n 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.

DISCUSSION

The threshold issue in any nuisance noise enforcement proceeding is whether the sounds have caused an interference with the complainants' enjoyment of life or lawful business activity. Interference is more than an ability to distinguish sounds attributable to a particular source. Rather, the sounds must objectively affect the complainants' life or business activities. (See e.g., Village of Matteson v. World Music Theatre Jam Productions, LTD. and Gierczyk Development, Inc. (April 25, 1991), PCB 90-146, Katsak v. St. Michael's Lutheran Church (August 30, 1990) PCB 89-182; Zivoli v. Dive Shop (March 14, 1991) PCB 89-205.)

The Board finds that the testimony presented at hearing demonstrates an interference. Complainants are unable to use a portion of their residence and the noise is audible at their residence. Complainants presented testimony from Mr. Zak, who stated that the noise from the air conditioners was audible, but did not interfere with normal conversation inside the Furlan home. (Tr. at 157.)

Once the Board determines that interference is caused by respondent’s activity the Board must determine if that interference is unreasonable. The "reasonableness" of the noise pollution must be determined in reference to statutory criteria in Section 33(c). (Wells

Manufacturing Company v. Pollution Control Board (l978), 73 Ill.2d 226, 383 N.E.2d l48; Mystic Tape, Div. of Borden, Inc. v. Pollution Control Board (1975), 60 Ill.2d 330, 328 N.E.2d 5; Incinerator, Inc. v. Pollution Control Board (1974), 59 Ill.2d 290, 3l9 N.E.2d 794; City of Monmouth v. Pollution Control Board (1974), 57 Ill.2d 482, 3l3 N.E.2d 161.) However, complainants are not required to introduce evidence on these criteria. (Processing & Books v. Pollution Control Board (1976), 64 Ill.2d 68, 35l N.E.2d 865.)

Sections 900.101 and 900.l02, which apply here, were given judicial interpretation in Ferndale Heights Utilities Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency (lst Dist. l976), 4l Ill. App. 3d 962, 358 N.E.2d 1224. The First District Court held the regulatory language to be constitutional since sufficient standards could be comprehended from reading Section 24, the Board's regulations, and the guidelines for enforcement cases found in Section 33(c) of the Act. The Court affirmed the Board's finding of unreasonable interference with the enjoyment of life, in light of adequate testimony describing: (1) the noise, (2) explaining the type and severity of the interference caused by the noise, and (3) indicating the frequency and duration of the interference.

As stated above, the Illinois Supreme Court has directed the Board to consider the facts of a "nuisance" case in light of the factors outlined by Section 33(c) of the Act to determine unreasonableness. (Wells Manufacturing Co. v. PCB (1978), 73 Ill.2d 226, 232-33, 383 N.E.2d 148, 150-51 ("nuisance" air pollution; first four factors only).) Furthermore, the Board in making its determinations and orders must consider the factors outlined in Section 33(c) of the Act. Therefore, Section 33(c) factors are examined below.

Character and Degree of the Injury or Interference

Section 33(c)(1) directs the Board to consider the character and degree of any interference caused by the noise emitted from the respondent’s air conditioner. The standard to which the Board refers is whether the noise substantially and frequently interferes with a lawful business activity, beyond minor trifling annoyance or discomfort. (See (Wells Manufacturing Co. v. PCB (1978), 73 Ill.2d 226, 232-33, 383 N.E.2d 148, 150-51.)

Mrs. Furlan testified that the noise from respondent’s property is equally noticeable and bothersome at all times. (Tr. at 32.) Mr. Zak, complainants expert, however, identified only one source from respondent’s property that was clearly audible. That source was a 60 ton Carrier air conditioning unit. Mr. Zak testified that face to face conversation was possible without interference. (Tr. at 157.) Mr. Zak estimated the distance between the Carrier unit and the Furlan house at 500 feet. (Tr. at 110.) He stated that a wooded area would alleviate noise, but 100 to 200 feet of trees would be needed for significant noise reduction. (Tr. at 248.)

Respondent’s witnesses said that a perceptible noise could be heard in the Furlan home (Tr. at 97), that conversation in normal tones was possible (Tr. at 177), and that the noise with the air conditioner on was 3 decibels (db) greater than the noise without the air conditioner. Exhibit #7 entered by respondent describes a 3 db increase overhead as noticeable, but not

annoying. Mr. Jensen testified that the 60 ton Carrier air conditioning unit operated less than 1209 hours in 1994, or the equivalent of 50 days. (Tr. at 193.)

Mr. Jensen of the School stated, based on an aerial photograph entered as respondent's Exhibit 5, that the distance from the 60 ton Carrier unit to the Furlan house was 800 feet. (Tr. at 198.) The Board notes that, between the Furlan home and the facility there is a band of trees about 200 feet, though there is a significant treeless path to the south of the Furlan home. (Tr. at 203.)

<u>Social or Economic Value of the Source</u>

The Board acknowledges the social and economic value of the School and its facilities dedicated to education and medical research. Testimony indicates that climate control is essential to the conduct of research at the facility, and air conditioning is essential to climate control in warm months. (Tr. at 85.)

<u>Suitability or Unsuitability of the Source, Including Priority of Location</u>

From testimony, we learn that the Furlans purchased their house in 1986 or 1987. (Tr. at 23.) The School was first built as a TB Sanitarium in 1916, with construction in 1946, 1975 and 1976. (Tr. 188.) The School consists of 1 or 2 acres of building footprint on a 20 acre, partly wooded site. The Board holds that the facility is suitable to the area, and that the School has priority of location over the Furlans. Mr. Zak of the Agency testified that the location of the respondent's air conditioner could cause amplification of the noise, and he recommended the air conditioner be moved.

<u>Technical Practicability and Economic Reasonableness of Control</u>

The focus of the Section 33(c)(4) inquiry is the technical practicability and economic reasonableness of control concerning about the purportedly offensive sounds. "Should the Board decide that .... [there] is a problem" Mr. Zak made three recommendations for control of the noise emissions. (Tr. at 121.) The first solution was to move the carrier unit to the northwest side of the building complex. Mr. Zak stated that the unit would then be twice as far from the closest home, or about 1000 feet, and should not be audible. (Tr. at 132.) Mr. Zak provided his best estimate of the cost of this option based on costs of moving seven similar units three years ago at a cost of $18,000.

The Board notes that the aerial map conflicts with Mr. Zak's testimony. Mr. Zak was estimating the distances based on physical observation and not actual measurements. The Board will rely on the measurements from the aerial map. Scaling distances from the aerial map provided as respondent's Exhibit 5, the Board notes that the closest home to the northwest of the facility is about 150 feet away, or 650 feet closer to the air conditioning unit than the Furlan home. Moving the air conditioning unit in near proximity of other residences may result in a greater noise interference for other neighbors of the school. Reducing the noise for

the Furlans cannot be accomplished at the expense of creating a much greater noise for another neighbor.

Mr. Zak's second option is to enclose the Carrier unit in an acoustical housing at a cost of $13,000 to $20,000. (Tr. at 153.) Mr. Jensen testified that the facility has spent in excess of $22,000 in improvements to reduce the noise from the air conditioners. (Tr. at 215.) He stated that the reduction in noise was "noticeable". (Tr. at 217.) The Furlans noted no reduction in the noise whatever. Mr. Jensen further stated that the 60 ton Carrier unit only operated for a maximum of 1209 hours in 1994, or 14% of the year. (Tr. at 193.) The Furlans complain of noise all of the time. (Tr. at 32.)

Enclosure of the Carrier unit at a cost of $13,000 to $20,000 is not economically feasible when that unit constitutes only one source of noise 14% of the time especially considering that the complainants are constantly aware of noise from the facility.

Mr. Zak's third recommendation was replacement of the 60 ton Carrier unit with a new ground source unit, which Mr. Zak describes as "totally noiseless". (Tr. at 123.) Mr. Zak claims the cost of replacement would be $30,000 to $60,000, but would have a 6 to 10 year payback period based upon relative utility efficiencies of the new to old units. (Tr. at 123.)

This third suggestion only reduces air conditioner noise. Although unrefuted testimony indicates that the unit will pay for itself in time, the investment decision of the School will not be made by the Board. At some point in the future, the existing air conditioning equipment will reach the end of its useful life. At that point, if not before, the Board suggests, but does not mandate, that the School consider replacement with equipment that is as noiseless as practical.

Subsequent Compliance

Section 33(c)(5) involves the issue of subsequent compliance. Complainants argue that measures taken to date have had no effect on the noise level. Respondent notes that $22,000 has been spent on noise reduction, and the reduction in noise level was "noticeable". The record on this issue is inconclusive.

CONCLUSION

Based on the testimony in the instant case, the Board finds that sound emanating from the respondent's air conditioners caused an interference with the complainants' enjoyment of life on numerous occasions. Having found that the noise emitted from the respondent's air conditioners interferes with the complainants' enjoyment of life, and after consideration of the factors listed in Section 33(c) of the Act, the Board finds that the interference is not unreasonable and fails to constitute a violation of Section 24 of the Act and 35 Ill. Adm. Code 900.102. Based on the totality of the evidence in this case, the Board finds that the character and degree of interference with the enjoyment of life or use of the Furlan property is not unreasonable.

The foregoing constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

Considering the record before the Board, the Board finds that the noise emitted from the air conditioning units at the University of Illinois School of Medicine interferes with the Furlans' enjoyment of life and use of their property but the Board does not find this interference to be unreasonable. Based on an evaluation of the evidence and the factors enumerated in Section 33(c) of the Environmental Protection Act, the Board finds that the Furlans did not prove that the University of Illinois School of Medicine has violated Section 24 of the Act.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the _____ day of ___________, 1996, by a vote of ______________.

____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board