

1 ILLINOIS POLLUTION CONTROL BOARD

2

3

IN THE MATTER OF:)

4

MICHAEL R. PAWLOWSKI and)

5

DIANE K. PAWLOWSKI,)

6

Complainants,)

7

-vs-)

PCB 99-82

VOLUME I

8

DAVID JOHANSEN and TROY QUINLEY,)

individually and d/b/a)

9

BENCHWARMERS PUB, INC.,)

10

Respondents.)

11

12

13

14 The following is the transcript of a hearing
15 held in the above-entitled matter, taken
16 stenographically by Jennifer E. Johnson, CSR-RMR,
17 License No. 084-003039, a Notary Public in and for
18 the County of Tazewell and the State of Illinois,
19 before Amy Muran Felton, Hearing Officer, at the
20 Fairbury Fire Department, 320 West Locust Street,
21 Community Room, Fairbury, Illinois, on the 8th day
22 of November, A.D. 1999, commencing at approximately
23 10:00 a.m.

24

1 PRESENT:

2 HEARING TAKEN BEFORE:
3 ILLINOIS POLLUTION CONTROL BOARD
4 100 West Randolph Street
5 James R. Thompson Center, Suite 11-500
6 Chicago, Illinois 60601
7 (312) 814-7011
8 BY: MS. AMY MURAN FELTON

9 APPEARANCES:

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16 On Behalf of the Complainants.

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22 - and -

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28 (309) 637-5282
29 On Behalf of the Respondents.

30 ALSO PRESENT:

31 Michael and Diane Pawlowski
David Johansen
Troy Quinley

22

MEMBERS OF THE PUBLIC WERE ALSO PRESENT

23

24

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1 HEARING OFFICER FELTON: Good morning and
2 welcome. My name is Amy Muran Felton. I am the
3 Hearing Officer with the Illinois Pollution Control
4 Board. I have been assigned to preside over this
5 hearing today in the matter of Michael R. Pawlowski
6 and Diane K. Pawlowski versus David Johansen and
7 Troy Quinley, individually and doing business as
8 Benchwarmers Pub, Incorporated, docketed by the
9 Pollution Control Board as PCB 99-82.

10 Today is Monday, November 8th, 1999, and
11 it is approximately ten o'clock in the morning. I
12 note for the record that there do appear to be
13 members of the public and/or witnesses here today at
14 this hearing with us. This hearing was scheduled
15 and will be governed in accordance with the Illinois
16 Environmental Protection Act and the board's
17 procedural rules; specifically, Sections 101.220 and
18 101.221 of the board's procedural rules regarding
19 hearings will apply to these proceedings. In
20 addition, Sections 103.200, 103.202, and 103.203
21 regarding the conduct of hearings and enforcement
22 proceedings will also apply to this hearing.

23 This hearing is intended to develop a
24 record for review of this enforcement matter by the

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1 entire seven-member Pollution Control Board. While
2 you may already be aware, I remind you that I will
3 not be deciding this case. Rather, it is that
4 seven-member board that will be deciding this
5 matter. They will review the transcript of the
6 proceedings and the remainder of the record,

7 including any post-hearing briefs, and decide this
8 case. My job strictly is to ensure that an orderly
9 hearing and a clear record is developed so that the
10 board can have all the proper information before it
11 so that it can decide this matter. After the
12 hearing, the parties will have the opportunity to
13 submit post-hearing briefs. These, too, will be
14 considered by the board.

15 All witnesses will be sworn and subject to
16 cross-examination. The parties may ask a question
17 of any witness. Any question also may be asked by
18 the hearing officer for the sake of clarification.

19 Before we begin today, I would like to ask
20 if anyone has any questions?

21 MR. HARDING: Yes, I have one question.

22 HEARING OFFICER FELTON: Sure.

23 MR. HARDING: Have you determined -- David
24 Harding, for the record. Have you determined the

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1 timing for the trial briefs?

2 HEARING OFFICER FELTON: No. I thought what we
3 would do is at the end of this hearing, we'll go off
4 the record briefly and discuss if the parties want

5 to submit such briefs, and we can establish a
6 schedule that's reasonable. Usually the transcript
7 is available within seven to ten days after hearing,
8 depending on the length of this hearing, and we can
9 then schedule the post-hearing briefs to be
10 submitted.

11 Okay. Great. I guess now, can the
12 parties identify themselves, first starting with the
13 complainants?

14 MR. HARDING: My name is David Harding. I
15 represent the complainants, Michael and Diane
16 Pawlowski.

17 HEARING OFFICER FELTON: The respondents?

18 MR. SHIELDS: I'm Tom Shields, and I represent
19 Benchwarmers Pub, Illinois corporation, and David
20 Johansen, who's sitting immediately to my right, and
21 Troy Quinley.

22 HEARING OFFICER FELTON: Great. Before we
23 proceed with opening statements, I would like to
24 deal with any outstanding or prehearing motions at

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1 this time. To my knowledge, we do not have any

2 outstanding motions pending; but if the parties feel
3 that there's anything they need to discuss at this
4 time before we begin, please raise any of those
5 motions at this time.

6 MR. SHIELDS: Only with regard to the
7 videotape.

8 HEARING OFFICER FELTON: Okay. And that is?

9 MR. SHIELDS: That's considered to be an
10 outstanding motion, to exclude.

11 HEARING OFFICER FELTON: I think what we'll do
12 is deal with that, the question and issue of its
13 admissibility. Is that what you're raising?

14 MR. SHIELDS: Yes, uh-huh.

15 HEARING OFFICER FELTON: I think if that's your
16 concern, we will take that as we proceed with the
17 complainants' case, as I presume they'll be moving
18 to admit it at that time. Is there anything else?

19 MR. HARDING: No. There is an assumption
20 there, though, that I'm going to be able to figure
21 out the videotape machine and that is not ensured.

22 HEARING OFFICER FELTON: Okay. Well, we'll
23 have to deal with that as we proceed.

24 MR. HARDING: Okay. We have a slight change in

1 the representation of my client.

2 HEARING OFFICER FELTON: Okay.

3 MR. HARDING: I'll give you the new cards.

4 HEARING OFFICER FELTON: The change is noted of
5 your affiliation with Lopez and Harding.

6 MR. SHIELDS: Right. We are now a firm; same
7 location, same telephone, same fax.

8 HEARING OFFICER FELTON: So noted. Mr. Harding
9 is now affiliated with the firm Lopez and Harding,
10 with the same address and phone number.

11 MR. SHIELDS: And at my age, I think it's
12 appropriate to note that I am the junior partner.

13 HEARING OFFICER FELTON: Great. We can proceed
14 now with the complainants' opening statement.

15 MR. HARDING: Very briefly. In 1993, Michael
16 and Diane Pawlowski purchased 105 West Locust, and
17 between 1993 and 1998, they have rehabbed the second
18 floor of that building and turned it into a living
19 space, approximately 3300 square feet. They moved
20 in in March of 1998; all was quiet. In April of
21 1998, the property was purchased on contract by the
22 respondents here. The respondents commenced
23 renovation of -- I'm sorry. 101-103 West Locust was
24 purchased by the respondents on a contract, and they

1 proceeded to alter the building for the purpose of
2 installing a pub.

3 We'll get to all of the individual
4 transactions by way of testimony, but the salient
5 point and that which brings us here today is that
6 commencing with the opening on June 29th of 1998,
7 Benchwarmers became a nuisance, specifically a noise
8 nuisance. And that nuisance remains unabated, and
9 that is why the complaint in this matter was filed;
10 that is why we are here today for hearing.

11 We are proceeding under Sections 24 and 25
12 of the Environmental Protection Act, formerly cited
13 as 415 Illinois Compiled Statutes, 5/24 and 5/25,
14 under the standards set forth in Section 33(c) of
15 the act, formal citation 415 ILCS 5/33(c). And we
16 are seeking relief as set forth in Section 42 of the
17 act, formerly cited as 401 5 ILCS 5 -- 5/42.

18 There's very little more that I can say
19 that would be informative, so I believe it would be
20 appropriate for me just to go into bringing
21 witnesses before the hearing.

22 HEARING OFFICER FELTON: Okay. First, let's
23 have the respondents -- Mr. Shields would like to

24 give an opening statement. Then we'll proceed with

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1 the complainants' case in chief.

2 MR. SHIELDS: Thank you. I believe what this
3 case is going to come down to is verification of
4 facts. Of course, we're going to be dealing with a
5 search for the truthfulness with regard to the
6 allegations. I note just offhand that in the
7 interrogatories, the complainants have already
8 indicated that the date they first acquired an
9 interest in the building was March 17th, 1995, and
10 not in 1993. But the question at issue from our
11 standpoint is the reasonableness of this entire
12 matter that is before the hearing officer and before
13 the board: What reasonable expectations did the
14 Pawlowskis have in moving into a commercial zone;
15 what expectation of noise level did they have in
16 moving into a commercial zone?

17 They chose to develop a residence in a
18 commercial zone, one that had a long history of a
19 variety of uses by commercial enterprises. And I
20 believe this is an issue that is at the crux of --
21 it is significant in order to make a determination

22 whether or not there was, in fact, any noise
23 violation emanating in a commercial zone.

24 The search for truthfulness, as I say,

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1 will go to the specific allegations that have been
2 made by the Pawlowskis and basically what -- what
3 was their motive in making these allegations. We
4 intend to prove that this is a spite case, that
5 there really is no foundation for the allegations
6 that there is a noise violation under the code, and
7 that will be the basis of our case.

8 HEARING OFFICER FELTON: Thank you.

9 MR. SHIELDS: Thank you.

10 MR. HARDING: Very briefly, I stand corrected.
11 I checked the deed, and it was, in fact, 1995.

12 HEARING OFFICER FELTON: So noted.

13 MR. HARDING: It's Monday morning.

14 HEARING OFFICER FELTON: Now we will proceed
15 with the complainants' case in chief. Mr. Harding,
16 how many witnesses do you intend to call today?

17 MR. HARDING: Four.

18 HEARING OFFICER FELTON: Four. You can proceed

19 with your first witness.

20 MR. HARDING: I would like to call Al Snedden.

21 Mr. Snedden? Actually, Mr. Snedden, why don't you
22 stay right there for the moment, and I would like to
23 show you a videotape. Just a second.

24 HEARING OFFICER FELTON: I think what we'll do,

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1 Mr. Harding, is if you're going to be using the
2 videotape in any capacity, we should lay the
3 foundation and enter that into evidence.

4 MR. HARDING: The foundation -- well, let me
5 ask a preliminary question. Did you visit the
6 Pawlowskis on October 23rd?

7 MR. SNEDDEN: October 23rd of 1998, yes,
8 sir.

9 MR. HARDING: At that time were you videotaped
10 at the premises?

11 MR. SNEDDEN: Yes, I was.

12 MR. HARDING: Okay. I'm going to show you a
13 videotape, and I am going to ask you if that's a
14 videotape of yours.

15 MR. SHIELDS: At this time, I would object to
16 the usage of the videotape as evidence.

17 HEARING OFFICER FELTON: Mr. Harding, I'm going
18 to ask that you lay the foundation for admitting
19 this into evidence. Just by the mere fact that this
20 witness was videotaped -- I want you to establish
21 the foundation for admitting this and for use.

22 MR. SHIELDS: Can we have the videotape turned
23 off until --

24 HEARING OFFICER FELTON: Yes, please turn it

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1 off.

2 MR. HARDING: I'm sorry, is it -- I
3 inadvertently hit go.

4 HEARING OFFICER FELTON: I want to make sure
5 that this is properly admitted, if it can be. And
6 if so, you need to establish a chain of custody, who
7 developed the tape, all the proper questions before
8 we use it in this hearing, if at all.

9 MR. HARDING: Well, that being the case, I
10 would have to call Michael Pawlowski. And I would
11 ask that I call him for this limited purpose and
12 recall him later, if that would be okay.

13 HEARING OFFICER FELTON: That's fine.

14 MR. HARDING: Michael Pawlowski.

15 (Witness sworn.)

16 MICHAEL PAWLOWSKI,

17 having been duly sworn by the court reporter,

18 testified upon his oath as follows:

19 DIRECT EXAMINATION

20 BY MR. HARDING:

21 Q. Your name, sir?

22 A. Michael R. Pawlowski.

23 Q. And where do you reside?

24 A. 105 West Locust, Fairbury, Illinois.

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1 Q. Okay. Before you is a videotape machine.

2 There is a videotape in it?

3 A. There is a videotape in that machine; that
4 is correct.

5 Q. Did you place that videotape in there?

6 A. Yes, I did.

7 Q. And did you videotape all that is on that
8 machine?

9 A. I most certainly did.

10 Q. Or on that tape, rather. And I would like
11 to show you Complainants' Exhibit 15. Do you

12 recognize that document?

13 A. I most certainly do. It is a description
14 of what is contained on the videotape that is in the
15 machine.

16 Q. Okay. And has that videotape been in your
17 possession and control since the videos were taken?

18 A. That videotape has; yes, indeed.

19 Q. And was it taken -- what kind of video
20 camera was it taken with?

21 A. A JVC VHS C.

22 Q. And does that -- that takes an
23 eight-millimeter C or VHS C?

24 A. VHS C.

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1 Q. VHS C tape. And then was that
2 transferred --

3 A. Yes.

4 Q. -- for this purpose?

5 A. I transferred it onto the tape that's in
6 the machine.

7 Q. So that it would then work in a VCR?

8 A. Correct. For ease of use.

9 Q. And was that video camera equipped with
10 sound?

11 A. Yes, it was.

12 Q. Okay. And is there sound included in this
13 videotape?

14 A. Yes, there is.

15 MR. HARDING: At this point I would move
16 admission of the videotape.

17 MR. SHIELDS: I would continue with my motion
18 to exclude based on the fact that the videotape, as
19 I reviewed it, had been edited, which is in
20 violation of evidentiary rules. It is also a form
21 of posed photography, which is a form of hearsay.
22 And for both reasons, the tape should be excluded as
23 being inadmissible as evidence.

24 MR. HARDING: I have no problem with it, that

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1 -- the concept of editing. It was edited to put it
2 together so that it was all on one videotape because
3 it was taken on several VHS Cs.

4 BY MR. HARDING:

5 Q. Is that correct?

6 A. That's correct.

7 MR. HARDING: As far as the posed, it is a
8 videotape of an event, of several events. It is not
9 posed, it's not a recreation. It is a videotape of
10 the actual events as they occurred.

11 HEARING OFFICER FELTON: Do you have any other
12 comments, Mr. Shields?

13 MR. SHIELDS: Yes. If it's already been
14 admitted that the tape has been edited, that clearly
15 requires that the tape not be admitted into
16 evidence. It lacks authenticity. One portion of
17 the tape is supposedly shot in October, then a
18 December scene is shown; then we reverted back to
19 October. So it is clear that the tape has been
20 edited, that something has been taken out. We don't
21 know what that is.

22 We have no ability to cross-examine a
23 tape. The scene is posed; it is in the form of a
24 deposition. We were not present for the questioning

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1 of Mr. Snedden, as an example. The tape is clearly
2 inadmissible.

3 HEARING OFFICER FELTON: Mr. Harding, how long

4 is this tape?

5 MR. HARDING: All together, portions all taken
6 together it would be about 38 -- 38 minutes.

7 HEARING OFFICER FELTON: Okay. I think what I
8 would like to do is review the tape right now
9 without any questioning and make a decision after
10 taking a look at it.

11 MR. HARDING: Okay. Did you want to excuse all
12 the parties?

13 HEARING OFFICER FELTON: Yes, actually I
14 would. I really would like to take a look at this
15 right now. I don't want to use it in the hearing if
16 for some reason it's not --

17 MR. HARDING: We'll give you the room.

18 HEARING OFFICER FELTON: Everyone give me 38
19 minutes or so to review. We'll go off the record.

20 MR. SHIELDS: I not only have an objection to
21 the entire tape being allowed in, but then
22 specifically as to portions of it. So not only are
23 we going to have -- if you allow it in for any
24 reason, then I will have a continuing objection with

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1 regard to portions of the tape.

2 HEARING OFFICER FELTON: Okay. So noted.

3 (Whereupon, the proceedings were adjourned from
4 10:22 a.m. to 11:00 a.m.)

5 HEARING OFFICER FELTON: We'll proceed back on
6 the record. Thank you for your patience in allowing
7 me to take a look at the complainants' videotape
8 that they are attempting to admit into evidence.

9 I note for the record that it is separated
10 into several segments of time, and my concern with
11 admitting the whole tape wholeheartedly at this time
12 is that I want a foundation -- if it at all can be
13 established -- to be established for each segment.
14 Specifically, there seem to be a few -- at least one
15 or two segments with one of the party witnesses on
16 that and another witness in the videotape.

17 Then the rest of the segments are just --
18 are calibrations, alleged noise calibrations, and
19 there will need to be a foundation established for
20 each one of these segments in order for the board to
21 consider them.

22 We're belaboring this a little bit, but I
23 think that that's warranted in order for the board
24 to consider the segments in its record. So what I

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1 think we will do is if Mr. Harding wants to proceed
2 with his first witness and he wants to use the
3 segment that -- I believe in this case, one of your
4 witnesses is in the videotape, we would -- right now
5 what we have started to establish is that the party
6 witness, which is Mr. Pawlowski, was the
7 videographer; but we need to proceed with
8 establishing foundation that the witness in the tape
9 is, indeed, the witness.

10 And I need the foundation laid for us to
11 even admit this particular segment as it relates to
12 that witness. Then we can deal with this
13 piecemeal.

14 I also note that, Mr. Shields, you can
15 continue to maintain your objections and --

16 MR. SHIELDS: Yes, I do so.

17 HEARING OFFICER FELTON: -- so note those. But
18 we will start at least with seeing where the
19 complainants can lead us to in this tape, and just
20 proceed accordingly.

21 MR. HARDING: Call Al Snedden.

22 HEARING OFFICER FELTON: Mr. Harding, I also
23 ask that -- you referenced Complainants' Exhibit
24 15. I ask if you can establish a foundation, since

1 you'll be referring to this in these segments. Is
2 this what you'll be using as establishing the
3 various segments?

4 MR. HARDING: The document is simply an index
5 to Exhibit 15, which is the videotape, and submitted
6 as part of it.

7 HEARING OFFICER FELTON: Okay. Can you
8 establish who has prepared this and requested that
9 this be admitted at this time so we can use this as
10 a foundation, if at all?

11 MR. HARDING: I believe that Mr. Pawlowski
12 testified that he had prepared this. Is that
13 correct; did you prepare this?

14 MR. PAWLOWSKI: I prepared the timing. The
15 administrative, putting the times on that document
16 in our computer, was done by Diane.

17 HEARING OFFICER FELTON: I also note that,
18 Mr. Pawlowski, you're still under oath, and you will
19 be during this hearing.

20 MR. PAWLOWSKI: Okay.

21 MR. SHIELDS: Well, I would object to Exhibit
22 15 based -- based upon it being hearsay. The
23 parties who are shown on the tape are all present

24 and imminently available to testify. The statements

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1 made on the exhibit are self-serving, prejudicial,
2 and Exhibit 15 simply should not be allowed into
3 evidence.

4 MR. HARDING: I would note that all testimony
5 by a party is generally self-serving. It's not a
6 valid ground for an objection. It goes to proof of
7 a condition which existed at its time. I don't know
8 that it's prejudicial. I don't see any prejudice in
9 it, and no particular prejudice is alleged.

10 HEARING OFFICER FELTON: I will admit Exhibit
11 15 to the extent that it is going to be used as an
12 index for this videotape, if the videotape is
13 admitted. The comments on the right under
14 "Background" which, I believe, is providing some
15 sort of narrative as to the, the day, I -- those
16 will not be admitted. And what I will do is redact
17 those statements in there. Otherwise, the actual
18 description of the date and the alleged song that
19 was playing at that time.

20 MR. SHIELDS: We also have the complaints

21 immediately to the right of the date and time which
22 is also prejudicial and conclusionary, nature of
23 hearsay, lacking foundation, and obviously posed in
24 the form of evidence. Object to all those.

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1 HEARING OFFICER FELTON: Which particular --
2 I'm referring to the, the --

3 MR. HARDING: New York Legs?

4 HEARING OFFICER FELTON: The part under
5 "Background."

6 MR. SHIELDS: Well, as an example, Diane's
7 testimony shown on 12/20/98. It was Diane's
8 testimony; Diane should be testifying, and we should
9 not be dealing with any segment of the tape that is
10 considered to be her testimony. That's why I have a
11 continuing objection with regard to this entire
12 tape, is that you're allowing into evidence a tape
13 to which these three folks can testify to the facts
14 if they actually existed.

15 HEARING OFFICER FELTON: Do you have a response
16 to that, Mr. Harding?

17 MR. HARDING: We're talking about videotapes of
18 an event -- of a reaction to an event, and any

19 reaction to an event is a generally accepted
20 exception to the hearsay rule. And for that reason,
21 I don't believe that the objection is valid.

22 HEARING OFFICER FELTON: I'm going to again,
23 like I've stated, I will admit Complainants' Exhibit
24 Number 15, only for the sole purpose of using this

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1 as an index to this, to this videotape.

2 The only part that will be admitted into
3 evidence is the section on the left part that
4 includes the time segments beginning with 00 through
5 35, and the label -- the section underneath the
6 "Label" which includes the date and the time and
7 the -- just the description underneath "Label."

8 The section on the far right will not be
9 included and will be redacted from the exhibit and
10 will not be considered by the board at this time.
11 So we'll be using this solely as an index. And I
12 will ask the complainants to proceed with their
13 case.

14 (Witness sworn.)

15 M. ALAN SNEDDEN,

16 having been duly sworn by the court reporter,
17 testified upon his oath as follows:

18 DIRECT EXAMINATION

19 BY MR. HARDING:

20 Q. Your name is?

21 A. Alan Snedden.

22 Q. S-n-e-d-d-e-n?

23 A. Yes.

24 Q. It's actually M. Alan?

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1 A. Yes, is it.

2 Q. A-l-a-n?

3 A. M. Alan Snedden, S-n-e-d-d-e-n.

4 Q. Okay. And where do you work, sir?

5 A. I am with a firm called Management

6 Recruiters in Normal.

7 Q. Is that incorporated?

8 A. Yes, it is.

9 Q. Through that firm, are you associated with
10 Michael Pawlowski, one of the complainants here?

11 A. Yes, I am.

12 Q. And in what way are you associated with
13 him?

14 A. Michael works for -- with me and for me at
15 that place of business.

16 Q. And how long has he worked for you?

17 A. Approximately five and a half years.

18 Q. Continuously?

19 A. Yes.

20 Q. And what does Management Recruiters do?

21 A. We are a professional recruiting firm
22 whereby we recruit individuals, professionals for
23 our client companies that are principally Fortune
24 500, Fortune 1,000 companies located throughout the

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1 country, and -- but mostly in the Midwest.

2 Q. Now, are you -- in your capacity of
3 working with Michael, have you become familiar with
4 him? Do you socialize with him?

5 A. Absolutely. Yes.

6 Q. Okay. You pretty much know each other in
7 the sense that people do know each other who
8 converse?

9 A. Yes. Yeah, we do not socialize a lot, but
10 certainly at work I've come to know Mike quite well.

11 Q. Okay. You know, feel that you could
12 describe Michael?

13 MR. SHIELDS: Objection.

14 MR. HARDING: I haven't asked him to describe
15 Michael. I asked him --

16 MR. SHIELDS: It's a leading question when
17 you're going on to describe Michael in your
18 question.

19 MR. HARDING: I wasn't going on to describe
20 Michael in my question.

21 HEARING OFFICER FELTON: Please, Mr. Harding,
22 why don't you proceed with the question. Let's see
23 where you're going.

24 BY MR. HARDING:

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1 Q. Do you feel that you know Michael
2 adequately well to describe him by personality?

3 A. Yes.

4 Q. Okay. And you have a working knowledge of
5 Michael?

6 A. Yes.

7 Q. And that which is usual and normal about
8 Michael?

9 A. Absolutely.

10 Q. Now, have you ever had occasion to visit
11 the premises of 105 West Locust in Fairbury?

12 A. Yes, I have.

13 Q. And was that at the home of Michael and
14 Diane Pawlowski?

15 A. Yes.

16 Q. And when did you visit there?

17 A. I was first there in -- approximately two
18 to three years ago before they had actually moved
19 there when it was under construction --

20 Q. Okay.

21 A. -- was the first time.

22 Q. And what did you observe there at the time
23 when it was under construction?

24 A. Well, it was a -- an environment where the

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1 studs were basically up, the rooms were divided, and
2 he was working on the wiring at the time. And
3 seemed to be rather impressive, what he had started
4 there as a project, and very peaceful -- peaceful
5 visit for the twenty or thirty minutes that we were

6 there when Mike showed me around.

7 Q. Okay. Did you observe anything about the
8 neighborhood and surrounding area?

9 A. Not really. It was an afternoon. Seemed
10 to be very peaceful and quiet that particular
11 afternoon. Didn't notice anything unusual, no.

12 Q. And when did you next go to 105 West
13 Locust?

14 A. Approximately one year ago right now, in
15 late October of 1998.

16 Q. Okay. Approximately what time of day was
17 that?

18 A. That was on a Friday evening, later in the
19 evening. I arrived there 10:15 to 10:30, stayed for
20 about an hour.

21 Q. And at that time, what, if anything, did
22 you observe, first as to the construction?

23 A. Well, of course, they had -- were moved in
24 at the time so it was very nicely constructed,

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1 beautiful apartment, and so it was a place of
2 residence.

3 Q. And what did you observe, if anything,

4 about the surroundings?

5 A. I -- by surroundings, I gather you mean
6 anything in -- outside the apartment? It was a very
7 noisy environment.

8 Q. And in the apartment?

9 A. Yes. Very noisy in the apartment.

10 Q. Okay. And what did you hear?

11 A. A noise coming from the east wall of their
12 apartment, very loud music, incredibly loud
13 actually, and rather intolerable almost to even have
14 a conversation in the room.

15 Q. And at that time were you videotaped?

16 A. Yes, I was.

17 Q. And did you make comments in that
18 videotape?

19 A. Yes, I did.

20 Q. Now, were there any observations that you
21 recall that you made as to specific matters?

22 Do you recall any observations of the arms
23 of your chairs?

24 A. Yes. I was sitting at -- well, as I

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1 walked throughout the apartment, it seemed like it
2 didn't matter where you went in the apartment, the
3 noise level was still very loud.

4 As I sat in a chair in their kitchen area
5 with plush carpet in the particular dinette area
6 where I was sitting, I could feel vibrations in my
7 feet, obviously coming from this -- this wall and
8 whatever was next to it. And then the arms of the
9 chairs themselves, I could actually feel the
10 vibrations and the -- like the beat of the music in
11 the arms through the chair. I was amazed,
12 absolutely amazed that sitting on carpeted floor in
13 a chair like that with -- and I even remember, I
14 think the chairs had a small pad on the top of the
15 chair, that I was getting that kind of vibration
16 just in sitting there.

17 Q. What time was that again?

18 A. That was sometime between 10:30 and 11:00
19 that evening.

20 Q. Now, did you at any time -- did you at any
21 time go to Benchwarmers --

22 A. Yes.

23 Q. -- that evening?

24 A. Yes.

1 Q. About what time was that; do you recall?

2 A. It was right as I was leaving, 11:00 to
3 11:15, right in that time frame because I wanted to
4 be home by midnight; so I know it was somewhere
5 around there that I left.

6 When I went down to the street level, I
7 stepped into the -- into -- walked through the door
8 and went into Benchwarmers.

9 Q. And what did you observe?

10 A. Of course, some music was exceptionally
11 loud as I went in. And I basically stepped in maybe
12 six, eight, ten feet in the doorway, observed six or
13 eight individuals sitting around. It seemed to be a
14 very quiet evening as far as numbers of individuals,
15 and I guess this is really what -- what kind of
16 flabbergasted me was why all the loud music with
17 literally six or eight individuals in that
18 establishment. I turned around after standing there
19 maybe seven, eight, ten seconds at the most, and
20 left.

21 Q. Okay. Now, when you were in the
22 Pawlowskis' apartment, were you able to hear any of
23 the words to the songs?

24 A. Yes.

1 Q. And you could clearly hear the music?

2 A. If I -- I don't recall the name of the
3 song that was playing or songs that were playing
4 that evening while I was there, but I vividly
5 remember that I could have had a sing-along. I
6 could have sang along if I had known the particular
7 words to the songs.

8 Q. Now, have you observed any changes in
9 Michael Pawlowski in the last year and a half since
10 June 29th of 1998?

11 A. Yes, I have.

12 Q. And what changes have you observed?

13 A. Well, Mike, I know, has come to work on
14 Mondays with seemingly some type of exterior problem
15 on his mind.

16 MR. SHIELDS: Objection. Unless the witness is
17 a psychiatrist, how would he know what he had on his
18 mind?

19 MR. HARDING: Didn't say he knew what he had on
20 his mind. He said it appeared that he had something
21 on his mind. We'll get to subject matter.

22 HEARING OFFICER FELTON: It's sustained. Let's

23 see if we can't establish more clearly what you're
24 trying to elicit, Mr. Harding.

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1 BY MR. HARDING:

2 Q. Let's try and stay with just your
3 observations of Michael without any explanation of
4 those observations. What, if anything, have you
5 observed since --

6 A. Well, I've observed an individual who
7 seemingly is distracted, more distracted than what I
8 would care for an employee to be distracted. I've
9 seen an individual who seemingly is lacking sleep,
10 an individual who has other things on his mind than
11 -- than 100 percent of his work while he's there at
12 the office.

13 Q. And did you ever ask Mr. Pawlowski about
14 this?

15 A. Yes, on occasions I have.

16 Q. And why did you ask him about it?

17 A. Because, as an employer, I'm concerned
18 about individuals who come in that front door on a
19 Monday morning with distractions and don't seem to
20 be as focused on their work as a supervisor feels

21 they should be.

22 Q. Do you recall the first time that you
23 asked him about this?

24 A. Sometime probably a year and a half or so

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1 ago.

2 Q. And did he respond to your question?

3 A. Yes.

4 Q. And what was his response?

5 MR. SHIELDS: Objection. This is hearsay. The
6 complainant is here to testify. If he has problems,
7 he can so testify. But this is going to be
8 repetitive hearsay, very prejudicial.

9 MR. HARDING: Goes to the fact that it was
10 said. Doesn't go to the -- we can even not consider
11 it for the purpose of the conditions as they
12 existed, but simply for the fact that it was said by
13 Mr. Pawlowski at that time.

14 HEARING OFFICER FELTON: The objection is
15 overruled for the reason that it just goes to the
16 impact of that it was said, not to what was actually
17 said.

18 BY MR. HARDING:

19 Q. So, what was said?

20 A. Well, basically --

21 MR. SHIELDS: Well, then I object based upon
22 foundation. I don't believe there's any testimony
23 as to the date when the conversation took place.

24 BY MR. HARDING:

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1 Q. Do you recall the date when the
2 conversation took place, the exact date?

3 A. No, I don't.

4 Q. Can you place it by season?

5 A. Approximately spring of '98.

6 Q. Okay. And was anyone else present for the
7 conversation?

8 A. No.

9 Q. Just you and Mike Pawlowski?

10 A. Yes.

11 Q. And what was said?

12 A. No sleep through the weekend because of
13 the loud noise coming through the wall, couldn't get
14 to sleep, and very, very frustrated, he was, about
15 coming to work in the kind of shape that he was due

16 to lack of sleep.

17 Q. And, by the way, what time does
18 Mr. Pawlowski ordinarily start work on a weekday?

19 A. Well, our office hours are 8:00 that we
20 start, but Mike's usually there most often even
21 before I am, about 6:30, 6:45 in the morning.

22 Q. And why would that be?

23 A. That's just Mike. Mike is a very
24 motivated employee, a very motivated individual to

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1 get to work and get an early start on his morning.

2 Q. Now, I'm going to show you a segment of a
3 videotape.

4 HEARING OFFICER FELTON: Mr. Harding, can we,
5 for purposes of -- can you turn it off for just a
6 second?

7 MR. HARDING: Sure.

8 HEARING OFFICER FELTON: For purposes of the
9 videotape and your Exhibit 15, is there a way that
10 we can actually number these segments so we can
11 refer to them?

12 MR. HARDING: I don't have a problem with

13 that. Just number them one?

14 HEARING OFFICER FELTON: Yes. If you need --

15 MR. HARDING: We'll just go straight down.

16 HEARING OFFICER FELTON: Okay. Starting with
17 000, that would be segment number one.

18 MR. HARDING: Right.

19 HEARING OFFICER FELTON: Starting with -- I
20 believe these are minute segments?

21 MR. HARDING: Yes, those are minutes.

22 HEARING OFFICER FELTON: Starting with segment
23 1:50, that would be number -- segment two. Segment
24 three will be minute 4:02. Segment four would be

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1 minute 13:30. Segment five is minute 15:36.

2 Segment six is minute 19:31. Segment seven is

3 minute 22:09. Segment eight is minute 25:39. And

4 segment nine is minute 30:25. And if I'm not

5 mistaken, the last segment is segment ten, and that

6 is minute 35.

7 MR. HARDING: Right.

8 HEARING OFFICER FELTON: Good. I just want to
9 make sure we're clear on which segment you're
10 referring to. So, if you could please refer to it

11 by segments, then we can deal with its admissibility
12 at that time.

13 MR. HARDING: I would like to show you segment
14 three of the videotape.

15 MR. SHIELDS: Well, I would continue to object
16 and object specifically to the taped portion
17 regarding Mr. Snedden because it is posed, and it is
18 in the form of a deposition with Mr. Pawlowski
19 asking questions, Mr. Snedden responding to it, and
20 that is highly improper and should be excluded from
21 this hearing.

22 You have immaterial responses to
23 questions, and you have conclusions being made by
24 Mr. Snedden. But it continues -- to just back up to

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1 a reason for excluding the entire tape is because it
2 is -- it is edited, and it is posed. And for those
3 reasons this entire tape should not be allowed, but
4 the specific segment for the same reason should not
5 be allowed.

6 HEARING OFFICER FELTON: We --

7 MR. HARDING: Frankly, I can't deal with all of

8 this by way of an objection. I just don't see the
9 validity of the objection. I didn't see it before,
10 I don't see it now, I won't see it the next time
11 it's made.

12 But I would suggest an alternative, okay?
13 I'm going to move to admit the tape in its
14 entirety. I am also, as a subsidiary motion, going
15 to move to admit the tape -- if the sound is found
16 to be offensive, to admit it without the sound or
17 without -- I should say without the spoken words of
18 the people who appear on the tape.

19 HEARING OFFICER FELTON: I -- like I've already
20 mentioned and ruled, we will deal with the tape in
21 segments, and I will ask that the complainants
22 actually deal with each segment -- because they are
23 separate, I want to deal with each one in a separate
24 fashion.

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1 Let's deal first with segment three as
2 you're offering it at this time. What I would like
3 to do is let's view it and see whether or not you
4 can establish -- further establish the foundation.
5 Then I'll make my ruling as to the segment at that

6 time.

7 MR. HARDING: If I may ask, I have not at this
8 time -- I have not yet moved to admit the tape or
9 any segments of the tape, and I would ask that any
10 objections be held until I do make such a motion.
11 Because otherwise every time we deal with the tape,
12 we're getting an objection and there still hasn't
13 been a motion.

14 HEARING OFFICER FELTON: We will note
15 Mr. Shields' objections at this time. And if we
16 can, I think that's fair, to refrain right now from
17 any further objections, which we will, of course,
18 allow you fully to object and, if you would like, to
19 cross-examine this witness at that time.

20 So let's proceed with segment three.

21 MR. SHIELDS: Just for purposes of clarifying
22 the ruling, it's my understanding I would be in a
23 position to object to each segment as it is --

24 HEARING OFFICER FELTON: Yes, that is clear, as

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1 to each segment as it's offered by the
2 complainants. And I -- if there's any other

3 objection you want to raise, it will be at that time
4 when it's officially offered by the complainants.

5 MR. HARDING: Bear with me for just a moment.

6 HEARING OFFICER FELTON: You're forwarding to
7 the segment, right?

8 MR. HARDING: I beg your pardon?

9 HEARING OFFICER FELTON: You're forwarding to
10 the segment?

11 MR. HARDING: No, we're actually in the segment
12 at the beginning of it.

13 HEARING OFFICER FELTON: Can you stop for a
14 second? If this is the beginning of the segment, I
15 myself have a concern with this -- what appears to
16 be some sort of a noise calibrator that is depicting
17 -- allegedly depicting the noise.

18 The foundation needs to be laid for that.
19 And if it can be established, then fine. If not,
20 we'll have to split this segment up even further.

21 MR. HARDING: Well, the problem that I have
22 with that is, as I say, I'm not moving even to admit
23 the segment as yet. I'm doing a part of the
24 foundation. I'm asking Mr. Snedden if he, in fact,

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1 is appearing on the tape. I'm going to have to do
2 another part of the foundation with another
3 witness. I'm going to have to do another part of
4 the foundation with yet another witness. And I
5 can't call them all three at the same time.

6 So, I would prefer just to get through
7 this part of the foundation, if we could, and then
8 we'll move on. This will be part of what we're
9 laying a foundation for, the observations with the
10 instruments.

11 HEARING OFFICER FELTON: That this witness can
12 testify to?

13 MR. HARDING: This witness cannot testify to
14 the instruments. He can testify to the fact. We'll
15 get to the instruments, I promise. Before we get to
16 the board itself, we will get to the instruments.

17 MR. SHIELDS: But to continue with my
18 objection, what we are ending up doing is publishing
19 the tape without admitting it first. We're
20 reviewing the tape without having a specific ruling
21 on whether or not it is admissible in evidence.
22 We're going to be reviewing it when it is clearly
23 against the evidentiary rules to allow it into
24 evidence and --

1 HEARING OFFICER FELTON: I think, Mr. Shields,
2 a videotape can be admitted if proper foundation is
3 laid; and in order for that to be even attempted to
4 be established, we need to give the complainants the
5 leeway here just to show us the tape.

6 I just wanted to point out to the
7 complainants that this -- I have a concern about the
8 noise calibration and whether or not that is
9 admissible.

10 MR. HARDING: Okay.

11 MR. SHIELDS: May I interject this? The
12 hearing officer has already reviewed the tape in
13 camera, and it should be clear to the hearing
14 officer then that the tape is not competent evidence
15 to be allowed into evidence based on the fact that
16 it has been edited.

17 HEARING OFFICER FELTON: That has been noted,
18 Mr. Shields, and we'll proceed right now with this
19 segment at this time.

20 MR. HARDING: And again, I would ask that any
21 objections be withheld until we get to the point
22 where we move admission on something because
23 otherwise we're just going to have this byplay over
24 and over and over.

1 HEARING OFFICER FELTON: All right. Please,
2 let's proceed now with no further objections
3 regarding the admissibility of this segment until it
4 has been offered into evidence.

5 (Whereupon, the videotape was commenced.)

6 MR. SHIELDS: May we note for the record we're
7 continuing to watch a segment which is not related
8 to the one which is numbered three of Exhibit 15.

9 HEARING OFFICER FELTON: Doesn't look like it.

10 MR. HARDING: No, this is related. If you
11 like, I can fast-forward through this.

12 HEARING OFFICER FELTON: That's what I would
13 prefer, actually, because this is not the point
14 that's relevant to this witness.

15 MR. HARDING: Okay.

16 HEARING OFFICER FELTON: And we will note the
17 time on the recorder, on this segment, that at which
18 time that the witness actually appears in the video
19 for purposes of demonstrating and ruling on whether
20 or not that segment is admissible.

21 MR. HARDING: The time verification from the
22 television. Move it back just a little.

23 HEARING OFFICER FELTON: This is the first time
24 that this witness appears in the tape?

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1 MR. HARDING: Right, that he appears in
2 continuous sequence.

3 HEARING OFFICER FELTON: We will note that the
4 time on this is 9:48.

5 MR. HARDING: I beg your pardon? No, no,
6 that's the meter. That's the meter.

7 HEARING OFFICER FELTON: Can you please stop
8 that for a second?

9 MR. HARDING: Certainly. The time --

10 HEARING OFFICER FELTON: These segments,
11 segment three starts at minute 4:02, right?

12 MR. HARDING: Yes. Time of day is at the
13 bottom, though.

14 HEARING OFFICER FELTON: No.

15 MR. HARDING: But you're at the meter.

16 HEARING OFFICER FELTON: Let's confirm this.
17 Segment three begins at 4.02, but this witness does
18 not appear in segment three until 9:48; is that
19 correct?

20 MR. HARDING: Yes, that's correct.

21 (Videtape commences.)

22 MR. HARDING: I'm going to stop the tape for a
23 moment.

24 BY MR. HARDING:

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1 Q. Mr. Snedden, is that you on the videotape?

2 A. Yes.

3 Q. And were you there at that time and place?

4 A. Yes.

5 Q. October 23rd, approximately eleven p.m. --

6 A. Yes.

7 Q. -- of 1998? And the comments that appear
8 on this tape are your comments?

9 A. Yes, they are.

10 Q. Okay. Have your comments on this tape
11 been truncated or expanded in any way?

12 A. No.

13 Q. Okay.

14 MR. HARDING: I am -- at this point, I am
15 finished with Mr. Snedden. I am not, at this point,
16 moving to admit this segment of the tape.

17 HEARING OFFICER FELTON: This segment.

18 Mr. Shields, do you have any cross-examination for
19 this witness?

20 CROSS-EXAMINATION

21 BY MR. SHIELDS:

22 Q. Well, with regard to what has already been
23 asked, you indicated that your employee was coming
24 in -- I believe it was on Monday mornings, he was

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1 what? What was his condition?

2 A. Typically, agitated.

3 Q. You found this unusual?

4 A. With Mike, absolutely unusual.

5 Q. And you say you know Mike well?

6 A. I believe I do after five and a half
7 years, yes.

8 Q. And if you were informed that on or about
9 July 12th, 1998, Michael Pawlowski made this
10 statement to a police officer, "Somebody will be" --

11 MR. HARDING: Objection.

12 Q. -- "writing a real fucking complaint
13 pretty" --

14 MR. HARDING: Objection. Objection.

15 HEARING OFFICER FELTON: Please state your
16 objection.

17 MR. HARDING: Hearsay. Pointless. Does not go
18 to cross-examination of this witness and was a
19 convenient opportunity only for an obscenity to be
20 uttered.

21 HEARING OFFICER FELTON: Mr. Shields, do you
22 have a response to that?

23 MR. SHIELDS: Yes. Mr. Snedden claims that he
24 knows Michael Pawlowski very well, that he was

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1 agitated on a Monday morning, and I think this
2 statement goes directly to the character of
3 Mr. Pawlowski, and to find out if Mr. Snedden is
4 aware of the fact that this is somewhat typical of
5 Mr. Pawlowski's character.

6 HEARING OFFICER FELTON: I think, Mr. Shields,
7 this is some sort of -- this information is
8 something you can elicit from the actual party
9 witness, Mr. Pawlowski, and I would ask you to
10 reserve doing that. At that time, I think, it would
11 be more easily worked into that particular witness.
12 BY MR. SHIELDS:

13 Q. Would you say that Mr. Pawlowski being in
14 an agitated state is unusual, except for Monday
15 mornings evidently?

16 A. Knowing Mike in the office, yes, it is --
17 that is unusual. I've never really observed Mike to
18 be in that sort of state other than when something
19 was weighing pretty heavily on his mind. But --

20 Q. Could it be a project that's weighing
21 heavily on his mind or --

22 A. Mike -- Mike has to handle some of the
23 heaviest, most important projects in my office,
24 including a recent implementation of a brand new

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1 computer system because he had more technical savvy
2 than I. And Mike took that project from beginning
3 to end like a true champion and --

4 Q. It's only on Monday mornings --

5 A. -- trained everybody.

6 Q. -- that he comes in and is agitated; is
7 that right?

8 A. Typically, it has been on Monday
9 mornings. And not every Monday morning; I never

10 said every Monday morning. But it typically was on
11 Monday mornings after a weekend.

12 There were -- there were cases I recall
13 when he came in during the middle of a week early in
14 the morning in an agitated state.

15 Q. And you indicated that you observed him in
16 the spring of 1998 in an agitated --

17 A. I was asked to estimate the time frame.

18 Q. That's your --

19 A. My estimation was spring.

20 Q. Best estimation was it was in the spring
21 of 1998? Do you recall the month of the year that
22 it was?

23 A. No, I don't recall the first time.

24 Q. Was it six months prior to the time that

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1 you were taped in their apartment?

2 A. I -- I would estimate it was approximately
3 a half a year before I was taped, yes.

4 Q. And were you in the apartment any time
5 prior to October 23rd, 1998?

6 A. Well, I testified that I was in that
7 complex before it was a finished apartment.

8 Q. And do you know when it was a finished
9 apartment?

10 A. Not exactly, no.

11 Q. Did they invite you up when they had
12 finished the apartment?

13 A. No.

14 Q. What was the purpose for you coming to
15 their apartment that --

16 A. My wife and I were -- my wife and I were
17 invited up to have a beer with Mike and Diane.

18 Q. You also indicated that it was difficult
19 to carry on a conversation; is that your testimony?

20 A. There was a distraction that made
21 conversation a little unusual.

22 Q. But when you say it's difficult, what do
23 you mean?

24 A. Difficulty whereas if the, if the Coke

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1 machine turned on right now, we would be speaking a
2 little louder back and forth than we are now.

3 Q. You clearly could hear the questions that
4 Mr. Pawlowski was asking you on the tape; is that

5 correct?

6 A. Yes.

7 Q. And in conversational tones, you had no
8 problem in hearing the conversation between yourself
9 and the Pawlowskis?

10 A. Well, the three of us were sitting -- at
11 that particular time when I taped, we were sitting
12 at a table together.

13 MR. SHIELDS: Nothing further.

14 HEARING OFFICER FELTON: Mr. Harding, do you
15 have anything further?

16 MR. HARDING: If I could have just a moment.
17 No, I have nothing further.

18 Thank you, Mr. Snedden.

19 HEARING OFFICER FELTON: Thank you very much,
20 Mr. Snedden.

21 MR. HARDING: Like to call John Yerges.

22 (Witness sworn.)

23 JOHN YERGES,
24 having been duly sworn by the court reporter,

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1 testified upon his oath as follows:

2 DIRECT EXAMINATION

3 BY MR. HARDING:

4 Q. Mr. Yerges, could you state your name?

5 A. My name is John Yerges, Y-e-r-g-e-s.

6 Q. And are you employed, sir?

7 A. I am.

8 Q. Self-employed?

9 A. I am self-employed.

10 Q. And what do you do for a living?

11 A. I'm an acoustical consultant.

12 Q. And what is an acoustical consultant?

13 A. We consult architects and engineers on
14 sound, noise, and vibration issues.

15 Q. Okay. And you were contacted by
16 Mr. Michael Pawlowski, one of the complainants in
17 this case?

18 A. Yes.

19 Q. And did you perform any services for him?

20 A. Yes.

21 Q. And what did you do?

22 A. Well, we -- I went to his residence and
23 looked at the construction of the residence and
24 listened to a noise problem that he had been having

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1 with an establishment next door.

2 Q. And did you note anything at that time,
3 anything call your attention?

4 A. Well, I noted that there was a substantial
5 amount of noise, music coming through the wall into
6 his bedroom space and the rest of the residence as
7 well.

8 Q. Okay. And did he show you any
9 sound-metering equipment?

10 A. Yes, he had a pair of little sound meters
11 on a tripod that he had been using to measure the
12 noise levels.

13 Q. Could you describe those meters?

14 A. Yes, they were small, relatively common
15 Type II instruments, Radio Shack models that are
16 typically used to measure dBa weighted levels,
17 B weighted levels, and C weighted levels.

18 Q. And they have controls on the front?

19 A. Yes.

20 Q. And those controls measure the hertz range
21 of what is heard or the sensitivity, or what?

22 A. Well, they change the sensitivity so that
23 you get it into the correct measurement range, and
24 they also change the scale on which you're

1 measuring. The A scale, for example, is designed to
2 mimic the frequency response of the human ear, so it
3 hears sounds essentially the way the ear does.

4 The C scale, for example, is a more linear
5 scale, the way a machine would hear without the
6 human frequency weighting characteristics.

7 Q. Okay. Is there a B scale?

8 A. There is a B scale, rarely used, but
9 similar weighting scale.

10 Q. Okay. And did you observe the base or
11 ambient noise levels in the area?

12 A. I did measure the ambient noise level in
13 the bedroom on one occasion when I was there, and
14 they -- in the absence of noise from next door or
15 traffic in the street, anything of that sort, the
16 typical levels in the bedroom were 25 to 26 dBa,
17 which is pretty quiet.

18 Q. Okay. Just to get a baseline on that --
19 and by way of your own knowledge and experience -- I
20 hear a little rocking coming from the television
21 over there, television stand, and there's a little
22 machinery going on around here?

23 A. Yeah.

24 Q. What might that measure?

1 A. Well, this would be -- you know, typically
2 we might be measuring something on the order of 35
3 or 40 dBa in here, something like this. It would be
4 substantially quieter than this in Mike's bedroom in
5 the absence of intruding noise.

6 Q. Now, did you take any sound readings at
7 Mr. and Mrs. Pawlowski's home?

8 A. I did take some in the bedroom.

9 Q. And do you recall when that was?

10 A. Yes. This was on September 25th of '99, a
11 Saturday night, between about 9:30 and roughly
12 midnight.

13 Q. Okay. And what did you find?

14 A. Well, I found that the music from the
15 establishment next door was clearly louder than the
16 ambient. The average levels were up on the order of
17 10 dB louder, and the louder portions of the music
18 spiked up to be about 20 dB louder than the ambient
19 in the bedroom.

20 Q. Okay. Now, when you say dBa, what does
21 that mean?

22 A. Again, the A scale is weighted.

23 Q. First, it means that -- the A at the end
24 is the A scale?

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1 A. Correct. Decibels on the A scale, I'm
2 sorry.

3 Q. Okay. So it's decibels?

4 A. Decibels.

5 Q. Now, is that tenth of a bel or 10 bels?

6 A. Right. It's a tenth of a bel.

7 Q. Tenth of a bel. Okay. And that -- what's
8 a bel?

9 A. We don't really need to get into an awful
10 lot of detail here, but basically the decibel is the
11 basic measuring unit of sound. It's been
12 established over many years that it's the standard
13 measure of a sound level.

14 Q. Okay. Now, what is the difference between
15 10 decibels and 20 decibels?

16 A. Let's start at the bottom of the scale
17 roughly. Zero decibels at about 1,000 hertz is
18 typically about the threshold of hearing. Every
19 time you increase that level by 10 dB, you've

20 actually increased the sound energy by a factor
21 of 10.

22 Q. 10 times?

23 A. 10 times as much sound energy. So there
24 is 10 times as much sound energy in a 10 dB level

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1 than there is in a zero dB level. And every time
2 you increase it by another 10 decibels, you have
3 increased the sound level by a factor of 10. 10
4 times as much. Now, to the --

5 Q. So, let me just get this correct. If
6 we're talking about at the zero level, is
7 essentially zero detectable noise to the human ear
8 on the A scale?

9 A. Correct. Roughly the threshold of
10 hearing.

11 Q. Okay. 10 decibels you run into baseline
12 of sound, where there's detectable sound, correct?

13 A. Well, you can hear 10 decibels. Most
14 people with normal hearing can hear at a level of 10
15 dBa. It would be a very faint sound, but, yes, it's
16 audible.

17 Q. Okay. Then 20 decibels would be 10 times
18 the noise energy of 10 decibels?

19 A. The energy. It doesn't sound that way to
20 the human ear.

21 Q. Well, we'll get to that.

22 A. But, yes, it would be 10 times the energy,
23 yes.

24 Q. Then 30 decibels is 100 times the energy?

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1 A. Compared to 10 or compared to zero?

2 Q. Compared to 10.

3 A. Compared to 10, 30 is 100 times the
4 energy, correct.

5 Q. So then 40 would be 1,000 times?

6 A. 1,000 times.

7 Q. 50 would be 10,000 times the energy?

8 A. Correct.

9 Q. And so on up the scale?

10 A. Correct.

11 Q. Now, what do we hear between 10 and 20?

12 What is the difference?

13 A. Every time you change by 10 dBa, 10
14 decibels, to the human ear it sounds about twice as

15 loud. So if you went from 10 decibels to 20
16 decibels, your subjective perception would be that
17 it sounds about twice as loud. If you went from 20
18 to 30, your subjective perception would be that it
19 sounds about twice as loud again.

20 Q. Twice as loud as from 20. 20 to 30 then
21 -- 20 sounds twice as loud as 10, and then 30
22 sounds twice as loud as 20?

23 A. As 20, correct.

24 Q. 40 sounds twice as loud as 30?

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1 A. Correct.

2 Q. Now, can you tell me a little bit about
3 the difference between low frequency sound and high
4 frequency sound?

5 A. Low frequency sound, the things that
6 people would be most familiar with would be like the
7 roar of a diesel engine, a truck exhaust. It's a
8 long wavelength, low frequency. Tends to be a
9 little bit harder to stop with barriers and
10 materials of that sort.

11 Higher frequencies would be things like

12 the jet of an air compressor, the hiss of air coming
13 out of a nozzle. Shorter wavelength's easier to
14 stop with a barrier.

15 Q. Okay. What do you have to do to disrupt a
16 wave?

17 A. Basically you have to put a nonporous
18 barrier of some sort, a massive barrier in front of
19 it to stop that wave and reflect it.

20 Q. At the low end, if we're talking about a
21 diesel, what kind of wavelength are we talking
22 about?

23 A. You get a lot of 63 hertz and 125 hertz.
24 So let's just pick 100 hertz there as being a

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1 typical average. The wavelength there would be
2 between -- would be about eleven feet long at 100
3 hertz typically.

4 Q. Okay. What would you have to do to
5 disrupt that wave, to cause it to block the sound?

6 A. You can put a barrier, a solid barrier, a
7 wall, something with fairly substantial mass to it
8 to stop the wavelength and reflect it.

9 Q. Something through which the wave will not

10 pass?

11 A. Correct. It can't be a porous material
12 like a screen where the air can literally pass
13 through. It has to be a nonporous material with
14 some mass.

15 Q. Okay. Now we're talking about higher
16 frequencies? Say, for instance, you mentioned the
17 air hose, I think?

18 A. Yes, nozzle -- jet nozzle of an air
19 compressor, for example, has a hiss to it that is up
20 toward the higher end of our human hearing.

21 Q. Okay. What kind of wavelength are we
22 talking about there?

23 A. Well, the wavelengths there could be
24 anywhere from a foot to a few inches.

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1 Q. Okay. And what would you then have to do
2 to block that?

3 A. Well, there again, you need mass, and you
4 need a nonporous barrier. But as you get to the
5 higher frequencies, it becomes more important to
6 have no gaps or leaks. Even a very small hole will

7 allow high frequency noise to penetrate.

8 Q. Okay. And does sound only express itself
9 by way of what you can hear?

10 A. No. Actually, there's a bit of a
11 misconception there. Sound and vibration are
12 actually the sound phenomena. It's a vibration and
13 elastic medium. When that vibration occurs in air,
14 we refer to it as sound. But when that same
15 phenomena or vibration occurs in a solid substance,
16 we refer to it as vibration. But it's the same
17 phenomena.

18 Q. Okay. We just hear it because it vibrates
19 our eardrums?

20 A. Correct. You can also feel it when it's
21 in a solid surface. What you're feeling, the
22 vibration in a solid surface is essentially the same
23 mechanical phenomena as sound, but we refer to it as
24 sound when the vibration is in the air and vibration

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1 -- or that same vibration is in a solid substance.

2 Q. Okay. And back to Mr. Pawlowski's
3 equipment, the two meters that he had, did you
4 compare those to your equipment?

5 A. Yes, I actually put a calibrator on those
6 two meters. I took a calibrator that I use just to
7 check and see whether or not his equipment appeared
8 to be calibrated correctly.

9 Q. What did you observe?

10 A. I found that the one unit that he was
11 using was right on the button, calibrated at 94 dBa
12 exactly, and the other one calibrated at 93. So
13 they were within one dB of each other.

14 Q. And have you had occasion to -- let me go
15 to a different subject. How does exposure to sound
16 affect people?

17 A. Well, obviously it depends on the level.
18 OSHA, for example, begins to -- OSHA suggests that
19 hearing damage can occur over long periods at levels
20 around 80 dBa or above, 85 dBa for --

21 HEARING OFFICER FELTON: Can you define OSHA
22 for purposes of the record?

23 THE WITNESS: Oh, I'm sorry. OSHA is the
24 Occupational Health and Safety Administration.

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1 HEARING OFFICER FELTON: Thank you.

2 BY MR. HARDING:

3 Q. Now, that's hearing damage?

4 A. Yes. If you're a factory worker, people
5 who are exposed to hearing damage. Now, obviously,
6 annoyance can occur at a much lower level than
7 that. This is actual damage to the hearing
8 mechanism that they're concerned about. But
9 annoyance can occur any time that a new noise source
10 creates noise that's higher than the ambient noise
11 to which you're used to.

12 That's essentially what -- when most
13 people complain is when they have an environment
14 that you're used to, and a new noise source creates
15 some sort of an intruding sound or a level that's at
16 that level or higher. That would be the typical
17 nuisance complaint.

18 Q. Okay. Is this entirely subjective, or is
19 there a level at which anyone would be affected?

20 A. Well, any -- obviously, there are levels
21 at which, you know, people become -- a greater and
22 greater percentage of people would object. It's,
23 you know, more of a statistical thing. The louder
24 the intruding noise gets, the larger percentage of

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1 people are going to object.

2 But the interesting thing you have to
3 remember is people really tend to compare nuisance
4 -- that they perceive nuisance as a comparison to
5 what the environment was without the sound. In
6 other words, what was the ambient without this
7 intruding sound, and how much louder does it become
8 with this sound?

9 For example, if you're in a very quiet
10 bedroom somewhere, and a clearly audible sound comes
11 through while you're trying to sleep, you would
12 perceive that as much more of a nuisance than if you
13 were in a noisy restaurant somewhere and the sound
14 of that same level occurred.

15 So it's really a question of what is the
16 typical ambient that you become used to in that
17 environment compared to the intruding or nuisance
18 noise.

19 Q. Did you have a chance to observe the
20 headboard of Michael and Diane Pawlowskis' bed?

21 A. I -- I did see it. It appeared as if
22 Michael had been attempting to do some noise control
23 on the headboard.

24 Q. And what -- could you describe it?

1 A. Well, it looked like he had added sort of
2 a barrier. I'm not sure what the construction was.
3 It appeared to be sort of a plywood barrier with
4 absorptive material on it in an effort to try to
5 stop the noise from bothering him while he was
6 sleeping.

7 Q. What was the absorptive material?

8 A. I'm not sure. I don't recall exactly.
9 Looked like a foam or articulated foam, but I don't
10 remember exactly.

11 Q. Okay. Could you assess, having observed
12 it and having observed the sound that was coming in,
13 what possibly could have been the effect of using
14 that headboard?

15 A. Well, the difficulty in a situation like
16 this is that the sound from the space next door is
17 literally driving the entire wall. And by placing a
18 small enclosure around part of the bed, you can't
19 get much noise reduction from that.

20 It's a -- it was a good try, but I
21 wouldn't expect, if we had done objective
22 measurements, to see a large difference there. It's
23 a few dB perhaps at the higher frequencies and not

24 much at the lows at all.

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1 Q. Okay. Because of the longer wavelengths?

2 A. The longer wavelength, and it tends to
3 diffract around it, the reverberant level in the room
4 reflecting off the other walls and such that you
5 probably wouldn't get much at low frequencies. You
6 might get a little at highs.

7 Q. Now, I neglected in the very beginning,
8 and I do apologize for this, sir, but could you tell
9 me a little bit about your educational background?

10 A. Oh. I degreed from the University of
11 Illinois in theoretical applied mechanics. I have a
12 bachelor's degree in engineering mechanics, master's
13 degree in theoretical applied mechanics.

14 Then I began my apprenticeship for my
15 father. He actually started the firm in 1964. I
16 began my apprenticeship with him in 1967 and have
17 worked in the field ever since.

18 Q. Okay. And what equipment did you use to
19 calibrate Mr. Pawlowski's equipment?

20 A. I used a standard Bruel and Kjaer.

21 Q. You're going to have to give spellings on

22 those.

23 A. That's a good one. B-r-u-e-l. I think
24 there's actually an umlaut over the "u." And Kjaer

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1 is capital K-j-a-e-r.

2 Q. Bruel and Kjaer, what is that?

3 A. It's a Bruel and Kjaer calibrator.

4 Q. Okay. Is there a model number?

5 A. Yes. If I could remember it, I'd tell you
6 off the top of my head, but I don't.

7 Q. Do they make more than one calibrator?

8 A. They make a whole line of acoustical
9 measuring instruments. They've been doing it for
10 many years and are considered the cream of the crop,
11 if you will, some of the best in the world.

12 Q. With those names, they would have to be.

13 Do you recall the last time prior to
14 calibrating Mr. Pawlowski's instruments that your
15 calibrator was calibrated?

16 A. Well, I essentially calibrate the
17 calibrator every time I use it, making sure that it
18 matches with my instrument. So, if there's a

19 discrepancy between the two, it's either the
20 calibrator or the instrument. If they both agree,
21 then they're both right.

22 Q. If they disagree, what is the process?

23 A. Then you would have to figure out which
24 one is wrong.

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1 Q. How do you do that?

2 A. Send them back to the factory, have them
3 checked.

4 Q. When was the last time this particular
5 piece of equipment was factory-checked?

6 A. Probably last year. I would have to check
7 my records. I'm not sure.

8 Q. Okay. At that time, which did it turn
9 out; was it the instrument or the calibrator?

10 A. Actually, I don't -- I just check them
11 once a year. Actually, I've never had them show a
12 discrepancy, has never required calibration, never
13 required anything but a battery change. But I do
14 send them back once a year for maintenance.

15 Q. But you do check them before each job to
16 check them against each other?

17 A. Oh, yes. In fact, before and after each
18 measurement.

19 Q. Okay.

20 HEARING OFFICER FELTON: Off the record.

21 (A discussion was held off the record.)

22 BY MR. HARDING:

23 Q. Have you, since commencing your
24 apprenticeship with your father, worked in any other

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1 field?

2 A. Yes. Actually, I was -- I worked for ten
3 years with a firm called Industrial Noise Control.
4 I was their -- essentially supervised their
5 engineering. They called me their manager of
6 technical services.

7 Then also, after that, for United McGills
8 Acoustical Product Division; I was their national
9 technical sales manager, served as technical back-up
10 to sales essentially is what that means.

11 Q. But your career has been in sound?

12 A. It's always been in sound, noise,
13 vibration, yes.

14 Q. Okay. And have you ever testified before
15 the Pollution Control Board before?

16 A. Yes.

17 Q. And when was that?

18 A. Oh, if you're going to ask me dates, I
19 don't recall. But it would have been a couple years
20 ago, back --

21 Q. How many times?

22 A. I can think of at least two other
23 instances where I've actually testified in a
24 hearing, but I've done many, many environmental jobs

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1 involving the Illinois Pollution Control Board
2 regulations.

3 Q. Okay. And as I understand it, you most
4 commonly come in from the other end, working with
5 potential respondents?

6 A. Usually when we're doing an environmental
7 job, our role is to work for the -- for the, for the
8 party that's causing the noise and try to help them
9 figure out how to reduce the noise level to meet the
10 code. For example, plant or a facility, a building
11 of some type would be emitting noise across a

12 property line that exceeded the code. I would go
13 measure it, find out how far above the code they
14 were, and then advise them as to how to reduce the
15 noise levels to meet the code. That would be more
16 typical.

17 Q. Okay.

18 A. But I also, obviously, will work for
19 either side, depending on which one retains us.

20 Q. Okay. You've never done any work for any
21 of the respondents here?

22 A. Not that I'm aware of, no.

23 MR. HARDING: Okay. I have no further
24 questions of this witness.

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1 HEARING OFFICER FELTON: Mr. Shields?

2 CROSS-EXAMINATION

3 BY MR. SHIELDS:

4 Q. Mr. Yerges, are you familiar with the
5 construction of the two buildings in question, the
6 Benchwarmers building and the Pawlowskis' building?

7 A. Only from what you can see. I haven't,
8 obviously, been into the walls or anything of that

9 sort. Simply the construction that you can see from
10 the outside.

11 Q. And what did you observe about the
12 buildings?

13 A. Appeared to be masonry construction of
14 relatively old brick. There is some areas in
15 Michael Pawlowski's space down below that he has
16 filled in with masonry block; and then on the inside
17 of his finished space it appears to be gypsum board
18 on studs is what it appears to be.

19 But, again, I haven't been inside, haven't
20 broken any walls to see what's really there.

21 Q. Upstairs there's gypsum board on studs?

22 A. That's what it appears to be.

23 Q. Okay. And do you have any idea what the
24 width of the brick wall is?

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1 A. I'm told -- again, now, I don't know this
2 for a fact, but I have been told that it is two
3 courses of brick on the Pawlowski side plus two
4 additional courses of brick on the other side.

5 Q. And, what, air space in between?

6 A. I'm not aware of any air space in between

7 at all. Again, I -- you're asking me questions that
8 I really can't answer because I have not been inside
9 that space to see it. This is what I have been
10 told.

11 Q. But you observed that there are two brick
12 walls?

13 A. It would appear so. Again, you really
14 can't see that from where I was, but it would appear
15 to be the case. Again, I don't know that for sure.

16 Q. And what would be the width of those
17 walls, approximately?

18 A. What's a course of brick? Is it about ten
19 inches or so? Double course of brick is perhaps ten
20 or eleven or twelve inches, something like that.

21 Q. And so there would be approximately 22
22 inches of brick?

23 A. Some -- somewhere on that order. If it
24 were, in fact, a double wall which, again, I haven't

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1 seen it; so I don't know.

2 Q. And is brick a porous or nonporous
3 material?

4 A. It's generally -- this type of brick is
5 relatively nonporous.

6 Q. And so that should serve as a barrier for
7 noise coming from one facility to the other; is that
8 correct?

9 A. Brick is a relatively massive barrier that
10 does a pretty good job on noise.

11 Q. And you mentioned that you had taken
12 measurements in the apartment unit; is that correct?

13 A. Apartment unit. Well, I was --

14 Q. The Pawlowskis'?

15 A. Pawlowski residence. Yes, I was in their
16 -- in their master bedroom.

17 Q. That's on the second floor?

18 A. Correct.

19 Q. Did you take any measurements on the first
20 floor?

21 A. I did not.

22 Q. Did you prepare a report?

23 A. I did not.

24 Q. And why didn't you?

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1 A. I wasn't asked for a report.

2 Q. With regard to the measurements to be
3 taken under appropriate code provisions, how is that
4 supposed to be done?

5 A. I'm sorry? You'll to have clarify.

6 Q. With regard to the measurements that you
7 took with regard to sound in the Pawlowskis'
8 residence --

9 A. Uh-huh.

10 Q. -- how did you go about -- how did you go
11 about that?

12 A. Basically what we did is moved to an area
13 at the foot of his bed and set up a microphone about
14 three feet high so it would be a little bit above
15 the bed, down at the foot of the bed, calibrated the
16 unit there, and took sound level measurements at
17 that point.

18 Q. You did what?

19 A. Took sound level measurements.

20 Q. Okay. Got you. Now, what are the
21 measurement techniques that are required under the
22 code?

23 A. Unfortunately, the measurement techniques
24 required under the code -- if, for example, you were

1 looking at the numerical limits, they are really
2 intended to be measured outdoors. The code is
3 written assuming that you will be taking
4 measurements outdoors at somebody's property line,
5 rather than indoors, so they really aren't written
6 -- the code, those particular provisions are not
7 really written for this kind of an application.

8 HEARING OFFICER FELTON: Can you clarify which
9 code you're referring to?

10 A. I'm sorry, the Illinois Pollution Control
11 Board noise regulations. There are -- there are
12 objective limits in there, but they are intended --
13 the measurement techniques are intended to be used
14 for noise being transmitted outdoors across the
15 property line and measured outdoors.

16 Q. I'm sorry. I didn't mean to interrupt
17 you.

18 And are there any standard measurement
19 techniques under the code available for this type of
20 circumstance with your measuring within a building?

21 A. What -- I had the same question,
22 obviously, and I called down to Springfield to the
23 EPA office there, to a gentleman who's the technical
24 advisor to the Illinois Pollution Control Board.

1 And he suggested that, yes, he was aware of the same
2 sort of limitations, but he suggested the
3 measurement technique that we used, come to a
4 location near the -- near the bed and away from the
5 walls and take measurements essentially the way we
6 did.

7 Q. But that technique is not in accordance
8 with the regulations?

9 A. No. You really can't measure according to
10 those numerical limits. If, for example, you were
11 arguing numerical limits, you would have a hard time
12 trying to do measurements according to those
13 procedures because they just don't really apply to
14 this kind of a situation.

15 Q. And the reason for that is that you are
16 taking measurements inside a building with
17 reflective surfaces?

18 A. Correct.

19 Q. And the code also requires that the
20 measurement be made on a set tripod; is that
21 correct?

22 A. Well, normally you would measure --
23 according to the code, you'd set up on a tripod at

24 some distance, 25 feet away from a -- from a noise

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1 source, as a minimum that they typically use for
2 outdoor measurements, on a tripod four to five feet
3 high. Those regulations are typically right in the
4 code.

5 Q. And that was not followed in this
6 circumstance?

7 A. There really wasn't any way -- there
8 really isn't a way to measure indoors according to
9 those regulations. It isn't really applicable.

10 Q. And -- correct. And is the problem a
11 practical one in that you have so many reflective
12 surfaces, as an example, in the Pawlowskis' unit
13 that the readings then would be distorted?

14 A. Oh, no. No, no, you misunderstand. The
15 readings are not distorted. The readings are quite
16 accurate. What you can't do is try to apply the
17 limits under the numerical limits in the code to
18 those readings. They simply weren't written for
19 that purpose. There's nothing distorted about the
20 measurements that are taken in the space.

21 Q. And what limits then are applicable to
22 this circumstance when you are in a
23 commercially-zoned area?

24 A. I -- I don't know about commercially-zoned

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1 areas. The limits that are applicable in a
2 situation like this are basically nuisance. This is
3 essentially a nuisance case.

4 Q. Okay. Explain to me how this is a
5 nuisance case without any reliance upon any of the
6 standards that are established in the code.

7 A. Those particular standards that you're
8 referring to, there are two sections in the Illinois
9 Pollution Control Board regulations. You can argue
10 simple nuisance basically, or you can argue
11 violation of the numerical limits.

12 Well, it would be nice to try to measure
13 according to the numerical limits, but they're not
14 that -- that procedure doesn't work. It was never
15 intended to be used this way. So you simply have to
16 argue it under the nuisance provision.

17 Q. What you're saying is that this frees you
18 up from any numerical limits; that you are simply

19 able then to say that there is a nuisance based upon
20 what I am hearing?

21 A. Yes. It becomes a subjective issue,
22 correct. That you can --

23 Q. And so any readings that you would have
24 taken would have no relevance to this hearing; is

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1 that correct?

2 A. No. They are relevant in that it tells
3 you what the ambient noise levels are in that room
4 without the nuisance source and what they are with
5 the nuisance source. And with the nuisance source,
6 the levels are significantly higher than they were
7 without the nuisance source.

8 Q. But on the occasion that you took a
9 reading, it was not in accordance with the code
10 provisions? It was not taken at ground levels;
11 taken at second-story level?

12 A. It was taken in the master bedroom,
13 correct.

14 Q. It was taken within 25 feet of a
15 reflective source; there were, in fact, walls and a

16 bed and so on --

17 A. Correct.

18 Q. -- within that structure? And tell me how

19 you -- how you apply those standards --

20 A. You don't. We've been through that.

21 Q. -- to a nuisance.

22 A. Oh, to a nuisance?

23 Q. Yes.

24 A. You can't apply those standards or those

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1 procedures in the code to this kind of measurement.

2 We've already established that.

3 The purpose of the measurements was to
4 say, without the nuisance noise source, this is what
5 the ambient level is, on the order of 20 to 25 dBa.

6 With the nuisance source, the peak levels
7 during the louder music go up to about 46 dB, about
8 20 dB above ambient, which means that they're
9 clearly audible, very much louder than the ambient
10 noise that you're accustomed to, and I would expect
11 someone to consider that annoying.

12 Q. If you took these readings, what was the
13 purpose in taking the readings if they are invalid

14 for purposes under the code?

15 A. They're not invalid for purposes under the
16 code. They are not according to the procedures of
17 establishing whether a numerical violation occurred
18 under the code. They are very relevant to
19 establishing whether or not a subjective nuisance
20 has occurred.

21 Q. Okay. What you are telling me is that the
22 subjective level for nuisance is different than what
23 we have established under the code with regard to
24 specific decibel readings?

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1 A. The code limits are considered absolute
2 maximum levels for measurements being outdoors. In
3 other words, if you exceed those levels in the code,
4 it is taken as prima facie evidence of nuisance
5 outside your house. We're not talking about levels
6 inside your house. We're saying even outside in
7 your yard, if you exceed those levels, that is
8 considered prima facie evidence of nuisance.

9 Q. And you took no measurements outside?

10 A. No.

11 Q. And why was that?

12 A. The complaint -- the problem was inside,
13 inside the bedroom.

14 Q. Does sound travel through a pane of glass
15 more effectively than it does through a 22-inch
16 brick wall?

17 A. A brick wall is generally a better barrier
18 than a -- than a typical window. If that's the
19 question, yes.

20 Q. And based upon your readings -- and I
21 believe, if I understood what you said, 10 dBa, 20
22 dBa louder than -- than what?

23 A. I don't understand that question. I'm
24 sorry.

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1 Q. What were the readings that you obtained
2 on 9/25/99?

3 A. Ambient levels without music playing in
4 the -- in the space next door or without any
5 obviously loud traffic out on the street, ambient
6 noise in the bedroom was on the order of 25 to 26
7 dBa. The music routinely, over a long period of
8 time, averaged about 36 dBa. And during its noisier

9 portions, when it got louder, was about 46 dBa,
10 during those -- you know, brief loud parts of the
11 music; the spikes, if you will. So it averaged
12 about 10 dB over ambient. And the loud portions of
13 the music which occurred briefly were about 20 dB
14 over ambient.

15 Q. Now, did you take any readings when the --
16 there are train tracks behind the building?

17 A. Uh-huh.

18 Q. Did you take any readings when the train
19 was going by?

20 A. No trains came by while I was there on
21 either occasion.

22 Q. And how long were you there?

23 A. Oh, on the first occasion, I was probably
24 there for about two and a half or three hours during

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1 the middle of the day over the lunch hour.

2 The second occasion I was there from nine
3 till sometime after -- nine p.m. till sometime after
4 midnight.

5 Q. Is this the same day or --

6 A. No, these were -- the first time was on
7 8/28, and the second was 9/25. I didn't notice any
8 trains either time.

9 Q. You -- I don't believe you've testified to
10 8/28, have you?

11 A. No. You haven't asked me any questions
12 about that.

13 Q. What occurred on 8/28?

14 A. I went down there just to simply see the
15 spaces and see what the layout of the spaces were.

16 Q. You took no measurements then?

17 A. Took no measurement or readings.

18 Q. And you indicated that it was 25 to 26
19 without traffic. What was it with traffic?

20 A. Well, with traffic -- I mean, for example,
21 if there was, at one point, a loud motorcycle
22 outside that was making a lot of noise, you know,
23 very obviously noisy, much -- noisy engine source,
24 much more so than a typical car; that got up to

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1 about 48 dBa coming through the closed windows.

2 Q. And how often did that happen during the
3 time that you were there?

4 A. That happened only on a couple of
5 occasions, and only on the one particularly loud
6 occasion did I keep that measurement just to show
7 how loud the noise out in the street got. It got up
8 to about 48 dBa inside the bedroom.

9 Q. That was louder than the music range?

10 A. Just about the same level as the music. A
11 very loud traffic noise outside was about the same
12 noise level as that 46 dBa that the music peaked up
13 to.

14 Q. The difference between the 46 and the
15 48?

16 A. Is pretty small.

17 Q. But the difference between the 36 and the
18 48?

19 A. That's big, correct.

20 Q. And that happened at least a couple of
21 occasions during that two-hour period that you were
22 testing?

23 A. Yes. Now, this, again, appeared to be --
24 as I looked out the window to see what was going on,

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1 this appeared to be people coming and going to
2 Benchwarmers. There was a number of people on
3 motorcycles and that sort of thing, and they were --
4 the motorcycles appeared to be patrons of
5 Benchwarmers, so --

6 Q. And traffic in the street?

7 A. Traffic in the street was minimal at that
8 hour other than what appeared to be coming and going
9 to the Benchwarmers facility.

10 Q. Now, with regard to this calibrator, when
11 did you last have it checked?

12 A. Again, I don't have any records with me
13 here, but I traditionally check that once a year.

14 Q. And would that have been checked by the
15 factory in 1998?

16 A. I believe so. Again, I'd have to
17 double-check, but --

18 Q. And it could have been in the summer of
19 1998?

20 A. Again, I don't know the answer. I'd have
21 to look.

22 Q. You don't know. Was there any other sound
23 that you heard during the time that you were testing
24 there on the one evening that went higher than the

1 36 dBa?

2 A. Well, the music I had up at around 46 on
3 the loud spikes, and I had that one traffic pass at
4 48.

5 Q. Now, the loud spikes, how often did that
6 happen?

7 A. Well, it happens rather continuously as
8 the music's playing. If you envision an average
9 level of the music, if you were to average it over
10 time, that would be about the 36. But music has
11 loud portions and quiet portions, so the level's
12 going up and down the whole time, the average being
13 in the middle of that, would be the 36. The loud
14 portions, the spikes, would be at about 46.

15 Q. And you're saying that there was no other
16 noise outside that interfered with your
17 measurements?

18 A. None that I'm aware of.

19 Q. Were the windows closed?

20 A. The windows were closed, yes.

21 Q. And did you make any direct observation of
22 the Benchwarmers facility? Did you go inside?

23 A. I had lunch there on 8/28, just to see
24 what the inside of the facility looked like. The

1 first time I went down, I went over and had lunch in
2 the restaurant portion, walked in through the bar
3 and had lunch over there.

4 Q. Was there music on at that time?

5 A. No.

6 Q. Did you take note of the location of the
7 jukebox and the speakers at that time?

8 A. I did not because I was told that the
9 problem essentially was partly that, but more often
10 it was involved with a deejay bringing his own
11 equipment in.

12 Q. Were you measuring a night when there was
13 a deejay present?

14 A. Yes.

15 Q. And you did not take any measurements on
16 any other night?

17 A. No.

18 Q. You did not measure the jukebox?

19 A. No.

20 MR. HARDING: May I ask at this point who the
21 gentleman behind Mr. Shields is?

22 MR. O'DAY: I'm Dan O'Day. I'm an attorney

23 from Peoria.

24 MR. HARDING: Thank you.

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1 MR. O'DAY: May I ask who you are? I wasn't
2 here when everybody was introduced.

3 MR. HARDING: Do you want to go through it
4 again?

5 HEARING OFFICER FELTON: Yes, that's
6 fine.

7 MR. HARDING: Dave Harding. I represent the
8 Pawlowskis.

9 MR. O'DAY: Thank you.

10 BY MR. SHIELDS:

11 Q. Would the noise from the traffic coming
12 and going have come from the public right of way?

13 A. Public right of way. Meaning? Help
14 clarify for me.

15 Q. The street out front.

16 A. Yes, it appeared to be in the street out
17 front.

18 Q. Were you aware of the fact that the
19 building that the Pawlowskis have -- the first story
20 of their building and also the first story of the

21 Benchwarmers building was formerly a printing
22 press?

23 MR. HARDING: Objection, relevance. And how
24 does it go to this witness's knowledge, and how is

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1 this witness's knowledge relevant to it?

2 HEARING OFFICER FELTON: Do you have a response
3 to that, Mr. Shields?

4 MR. SHIELDS: I want to bring out the fact this
5 is a commercial zone, and the prior usage -- the
6 noise that would have existed in that, these folks
7 would have been subjected to in moving in.

8 MR. HARDING: Can I assume that we're going to
9 hear about this again and again? I mean, we have
10 fourteen witnesses for the respondents, and I'm
11 assuming this is going to come in on direct.

12 I don't think it's necessary for Counsel
13 to testify now.

14 HEARING OFFICER FELTON: I'm going to overrule
15 your objection. I think Mr. Shields can attempt to
16 elicit this information. I'll let him -- give a
17 little leeway on this one.

18 BY MR. SHIELDS:

19 Q. Were you aware of the fact that there was
20 a printing press called the Fairbury Blade that was
21 located on the first floor of the building that both
22 Benchwarmers and the Pawlowskis are in?

23 A. No.

24 Q. And would you have any idea what the noise

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1 level of the -- of an ongoing printing press would
2 be?

3 A. I'm sorry, I wasn't familiar with that
4 operation.

5 Q. You have no experience with that?

6 A. Yeah. I do modern presses. But, again, I
7 have no idea what was here.

8 Q. And what about the noise that would come
9 from a train on the track behind the house?

10 A. Varies drastically with the speeds. I
11 just don't have enough information to tell you. I
12 don't know how fast or how often the trains come
13 through or what their makeup is.

14 Q. And what about a train whistle that is
15 sounded at intersections?

16 A. Well, obviously, that's pretty noisy. I
17 don't know where those are with respect to this
18 particular location so I couldn't give you a
19 number.

20 Q. You're familiar with the intersection at
21 the corner where Benchwarmers is located, Third and
22 Locust?

23 A. Not terribly familiar. Obviously, most of
24 my time was spent inside Mr. Pawlowski's residence.

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1 Q. You know that there's an intersection at
2 Third and Locust?

3 A. If -- if that's the intersection, okay,
4 I'll take your word for it.

5 Q. Okay.

6 MR. HARDING: I have no problem with this going
7 on, but I have to object if we're going to hear the
8 same thing again from people who have competent
9 testimony to make on this subject.

10 HEARING OFFICER FELTON: Mr. Shields, where are
11 you proceeding?

12 MR. SHIELDS: This is a sound expert, and I

13 headed straight for what the decibel level would be
14 with a train whistle sounding at that intersection.

15 THE WITNESS: I haven't studied the geometry of
16 it. I don't know.

17 HEARING OFFICER FELTON: Hold on. First of
18 all, let me -- I'm going to overrule your objection,
19 and let's proceed again with your question.

20 BY MR. SHIELDS:

21 Q. The train tracks behind the Pawlowskis'
22 residence which also runs behind Benchwarmers and is
23 parallel with Locust Street, which is the street out
24 front of --

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1 A. Okay.

2 Q. -- the buildings has trains coming through
3 town. Are you familiar with the sound that a
4 whistle would make from a train?

5 A. I'm familiar with it, yes.

6 Q. Okay. And would you say that is louder
7 than the 46 dBa?

8 A. Inside Mr. Pawlowski's? I can't say. I
9 simply don't have enough information. I don't know
10 how far away the train tracks are, I don't know

11 where they blow the whistle, and I don't have any
12 data to indicate what kind of noise level that would
13 cause inside. I don't know what the construction is
14 out the back of his unit or any of those details. I
15 can't answer the question.

16 MR. SHIELDS: I have nothing further.

17 HEARING OFFICER FELTON: Mr. Harding, do you
18 have anything on redirect?

19 MR. HARDING: Yes.

20 REDIRECT EXAMINATION

21 BY MR. HARDING:

22 Q. Mr. Yerges, how does sound dissipate over
23 distance, sound energy?

24 A. If we're talking about outdoors where

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1 there aren't --

2 Q. Unobstructed?

3 A. -- unobstructed, essentially it dissipates
4 according to what's called the inverse-square law,
5 essentially the same way as light, in that it
6 decreases at about 6 dB per doubling of distance.
7 So if you start 100 feet away and move 200 feet

8 away, the sound level decreases 6 dB. If you start
9 10 -- 10 feet away and move 20 feet away, it
10 decreases 6 dB. So it's a -- again, what's called
11 inverse-square law.

12 Q. Okay. Pretty much the square of the
13 distance?

14 A. Exactly.

15 Q. Okay. Now, the instrument that you used
16 to measure and come to the 46 dB through the wall
17 and 48 for the motorcycle, what did you use?

18 A. I used a Bruel and Kjaer 2144 real-time
19 analyzer.

20 Q. That was compared against the calibrator
21 before use?

22 A. Oh, yes.

23 Q. Now, how long did you hear the motorcycle
24 for when you heard it?

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1 A. Well, it appeared to pull away, travel --
2 let me get my directions right now. It appeared to
3 pull away from somewhere out in front of the
4 Benchwarmers facility and went west. And I had
5 about, oh, perhaps five seconds of loud --

6 relatively loud noise as it went by Mr. Pawlowski's
7 windows.

8 Q. Okay. Then it dissipated?

9 A. Yes.

10 Q. How long did the music go on for?

11 A. Well, the music went on the whole time I
12 was there. I was there from -- I started measuring
13 exactly around 9:30, and I was there till about
14 midnight. So there was music for most of that
15 entire period.

16 Q. Now, if a train came by, again, that would
17 be transient?

18 A. Oh, yes. I mean, obviously, for whatever
19 length of time the train was there.

20 Q. And if somebody parked a diesel behind a
21 home and left it running, might you expect to see
22 some sort of an enforcement action?

23 A. Yeah, I would think so.

24 Q. Different events, correct?

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1 A. Correct.

2 Q. Okay. Do you know of any difference which

3 is based upon the zoning which would cause excessive
4 noise levels to be allowable?

5 A. To --

6 Q. Based on zoning under state law, do you
7 know of any difference?

8 A. It's my understanding that if you read the
9 Illinois Pollution Control Board regulations, all of
10 their regulations are based on actual usage of the
11 property, not zoning. They don't even consider
12 zoning. They consider the actual usage of the
13 property.

14 Q. So if Benchwarmers is a tavern, a place of
15 entertainment would be a Class B under the
16 S.L.U.C.M. codes?

17 A. Yes.

18 Q. Either -- I've always just called them the
19 SLUCM codes, 58.582, 58.20, right? Class B?

20 A. B, correct.

21 Q. But by their use, the Pawlowskis live in a
22 Class A area; is that not the correct?

23 A. Correct. That's a residence; it would be
24 a Class A.

1 Q. SLUCM 11.110 or 1100, depending on who's
2 looking at it?

3 A. Correct.

4 Q. Now, in your experience with people who
5 have been subjected to noise nuisance, have you run
6 into a phenomenon of noise personality?

7 MR. SHIELDS: Objection. This goes beyond the
8 scope of direct.

9 MR. HARDING: Oh, no, it goes directly to the
10 scope of cross.

11 HEARING OFFICER FELTON: I'll --

12 MR. SHIELDS: I raised no health issue. This
13 is not a cross-examination. This is his own
14 witness, and he failed to raise this on direct.

15 HEARING OFFICER FELTON: Mr. Harding, why do
16 you want to raise this point?

17 MR. HARDING: I asked about the effect.

18 HEARING OFFICER FELTON: Effect of what?

19 MR. HARDING: The effect of the sound.

20 HEARING OFFICER FELTON: On who?

21 MR. HARDING: On the Pawlowskis.

22 HEARING OFFICER FELTON: And what you're trying
23 to elicit now?

24 MR. HARDING: Noise personality.

1 HEARING OFFICER FELTON: I'm going to allow
2 him --

3 MR. SHIELDS: This is on redirect. It was not
4 asked on direct.

5 HEARING OFFICER FELTON: I'm going to overrule
6 your objection and allow this to proceed.

7 BY MR. HARDING:

8 Q. Have you ever heard the phenomenon noise
9 personality?

10 A. I -- I'm going to have to explain
11 something again. I'm an engineer by training. I
12 don't have a medical training. So, it -- I'm not
13 going to be of much use to you in that area.

14 MR. SHIELDS: Object to any further response.
15 Lack of expertise.

16 BY MR. HARDING:

17 Q. Do you have any further response to make?

18 A. I'm not -- no, I'm not familiar with noise
19 personality, that term.

20 HEARING OFFICER FELTON: It appears --

21 MR. HARDING: Then the question has been
22 answered.

23 HEARING OFFICER FELTON: It appears that this
24 witness doesn't have anything to report on this

1 particular topic, so why don't we proceed?

2 BY MR. HARDING:

3 Q. Okay. Do you know what a nodal line is,
4 n-o-d-a-l?

5 A. Yes.

6 Q. How does it apply to sound waves?

7 A. Well, node -- any sort of vibration means
8 a point which there is no motion. There are other
9 terms, I suppose, that -- I mean, other applications
10 that you can use for that phrase. But if, for
11 example, you had a beam vibrating in a sinus wave,
12 but there was a point on that which wasn't moving,
13 that would be called the node of the vibration.

14 I don't know where you're going with this,
15 but --

16 Q. Well, I'm just kind of curious. When you
17 do a noise reading and you have reflected sound, can
18 the reflected sound reflect back into the basic
19 sound and block a portion of it from being read?

20 A. It's possible, yes, you can get what's
21 called a standing wave or a node of a standing wave,
22 a quiet area.

23 Q. Okay. And if you have sound and reflected
24 sound which is detectable and which would,

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1 therefore, interfere with the readings of the direct
2 sound, is not the reflected sound audible?

3 A. Yes, both the -- both the direct and the
4 reflected is audible.

5 Q. So, someone standing in a room where
6 there's reflected sound would be hearing both the
7 sound and the reflected sound?

8 A. Yes, it would be a combination of the
9 sound that came directly through the wall and the
10 sound that reflected off the surfaces in the room.

11 MR. HARDING: No further questions.

12 HEARING OFFICER FELTON: No further questions
13 for Mr. Yerges. You're done. Thanks, Mr. Yerges.

14 MR. HARDING: At this point I would call
15 Michael Pawlowski.

16 HEARING OFFICER FELTON: First of all, let's
17 note that Mr. Michael Pawlowski has been sworn in.

18 MICHAEL PAWLOWSKI,
19 having been previously duly sworn by the court

20 reporter, testified upon his oath as follows:

21 CONTINUED DIRECT EXAMINATION

22 BY MR. HARDING:

23 Q. Where do you live, Mr. Pawlowski?

24 A. Currently reside at 105 West Locust,

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1 Fairbury, Illinois.

2 Q. Okay.

3 Q. When did you purchase 105 West Locust?

4 A. I believe it to be the middle of March of
5 1995.

6 Q. Okay. I would like to show you what I
7 have marked Complainants' Exhibit 5. Do you
8 recognize that document?

9 A. Yes, I do.

10 Q. What is that?

11 A. This is a copy of a warranty deed issued
12 by Livingston County, dated March 20th, 1995.

13 Q. And duly recorded?

14 A. Duly recorded, I believe.

15 Q. Is that the deed to your home?

16 A. Yes, sir, it is.

17 Q. Lot 2 and the east 10 feet of Lot 3 in

18 Block 18 in the original town of Fairbury,
19 Livingston County, Illinois?

20 A. I believe that to be accurate.

21 Q. Okay. Is that a condominium?

22 A. No, it is not.

23 Q. Okay.

24 HEARING OFFICER FELTON: Are you moving?

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1 MR. HARDING: Yes, move to admit exhibit --
2 Complainants' Exhibit 5.

3 HEARING OFFICER FELTON: Mr. Shields?

4 MR. SHIELDS: No objection.

5 HEARING OFFICER FELTON: All right. Exhibit
6 Number 5, complainants' warranty deed, is admitted.

7 BY MR. HARDING:

8 Q. And at the time that you purchased 105
9 West Locust, was it occupied? At the time that you
10 first saw it, I should say.

11 A. No, it was not.

12 Q. Okay. What about 103 and 101; were they
13 occupied?

14 A. Not when we first saw them, no.

15 Q. Were they occupied when you purchased the
16 building?

17 A. There may have been an arcade in 103 West
18 Locust at the time.

19 Q. Like a video game arcade?

20 A. Yeah.

21 Q. Okay.

22 A. Couple pool tables maybe.

23 Q. And at that point, what did you do with
24 105?

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1 A. Well, we completely took the structure
2 down to its bare bones, stripped out all of the
3 electrical that was in the building. We completely
4 took off the roof and put a new roof on the
5 structure and began to renovate the second floor of
6 105 West Locust with the intent of taking and
7 establishing permanent residence there.

8 Q. That commenced in 1995?

9 A. That started in 1995; that is correct.

10 Q. Okay. And when did you finish the rehab
11 of the second floor?

12 A. We moved in in March of 1998. Believe the

13 middle part of the month.

14 Q. Okay. Do you have or did you have any
15 plans for the first floor?

16 A. We continue to have plans for the first
17 floor, to open up an antique mall --

18 Q. Okay.

19 A. -- under the operation of Diane, my wife.

20 Q. Okay. And when you first visited the
21 area, looked at the place before you bought it, and
22 after that while you were doing the construction,
23 did you notice anything about the sounds in the
24 area?

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1 A. Well, the one thing that I -- I would
2 notice, it was appreciably quieter than where we
3 were living at the time, which was at 207 East Oak,
4 which is Highway 24 going right through Fairbury.

5 Q. Okay.

6 A. I'm sure everybody traveled on Highway 24
7 to get in here at some point.

8 Q. Okay. Now, Highway 24 passes through?

9 A. Highway 24 is a through street, yes.

10 Q. Okay. Does Locust pass through?
11 A. Not directly, no. You have to make turns
12 to get in or out of town off of Locust Street.
13 Q. Okay. So there's -- have you ever
14 observed much in the way of through traffic on
15 Locust?
16 A. Through traffic, it's impossible.
17 Q. Now, you are employed?
18 A. Yes, sir.
19 Q. By whom?
20 A. I'm employed by Management Recruiters of
21 Bloomington. The office is in Normal, Illinois.
22 Q. And your supervisor is Al Snedden?
23 A. He most certainly is.
24 Q. Alan, who was here today?

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1 A. Yeah.
2 Q. Okay. And did you record him on segment
3 -- it's going to end up being the second half of
4 segment three, I believe, of the videotape that we
5 saw.
6 HEARING OFFICER FELTON: The portion that began
7 at 9:48?

8 MR. HARDING: Well, yes. You subdivided me
9 after we numbered.

10 HEARING OFFICER FELTON: Right, right. Let's,
11 for clarification, note for the record that that's
12 when Mr. Snedden --

13 A. So the question is did I?

14 HEARING OFFICER FELTON: -- was on the tape.

15 BY MR. HARDING:

16 Q. Did you videotape that?

17 A. Yes, I did.

18 Q. You videotaped that on the VHS C?

19 A. That's right.

20 Q. Then transferred it?

21 A. Transferred it from the VHS C to a VHS
22 that's in the recorder.

23 Q. Okay.

24 A. Or player.

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1 Q. Okay. And what we saw there is what
2 occurred?

3 A. Yes.

4 Q. Okay.

5 MR. SHIELDS: Well, I would object to that
6 leading type of question. The fact is it only
7 represents what occurred during those specific
8 minutes on the tape. It has been edited. It has
9 been edited.

10 HEARING OFFICER FELTON: Do you have any
11 response?

12 MR. HARDING: Don't disagree at all.

13 HEARING OFFICER FELTON: I think that's
14 sustained, that objection. Let's try and --

15 MR. HARDING: I don't think it's grounds for
16 objection. We're just talking about the minutes
17 that we're seeing.

18 HEARING OFFICER FELTON: Okay. Well, let's see
19 if we can't proceed without -- I think what
20 Mr. Shields is raising is that this particular tape
21 does only -- it has been edited, at least the
22 segments have been put together; and insofar as it's
23 been edited, it is only representing piecemeal
24 points, I think that's -- if I'm correct --

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1 MR. SHIELDS: Yes.

2 HEARING OFFICER FELTON: -- what he's objecting

3 to.

4 MR. HARDING: I don't have a problem with it
5 being taken as that.

6 HEARING OFFICER FELTON: Okay. Let's proceed
7 then and see kind of where we're going on this line
8 of questioning.

9 MR. HARDING: I apologize for the leading, but
10 I am dealing with somewhat of a been-there-done-that
11 situation.

12 BY MR. HARDING:

13 Q. Now, did you -- when did you first learn
14 that the building, 101-103, had been sold -- 101-103
15 West Locust?

16 A. On, I'm not sure exactly when I learned it
17 was being sold. I wasn't aware of sold, leased, you
18 know. No knowledge of that, but --

19 Q. Conveyed?

20 A. Okay. I learned of that on the first
21 weekend in April of 1998.

22 Q. And what was your initial reaction to
23 learning of that?

24 A. I thought it was a wonderful thing for

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1 Fairbury.

2 Q. At that location, what is the zoning; do
3 you know?

4 A. To my knowledge, every building on Locust
5 Street in the downtown area is zoned commercial.

6 Q. Is there a letter, number designation?

7 A. I'm not sure if there is. I'm not that
8 familiar with the zoning, to tell you if there's a
9 letter designation or not. I had a copy of the
10 zoning ordinance from Fairbury at home, but --

11 Q. Okay. When did you first meet any of the
12 respondents here?

13 A. I was first introduced to Mr. Dave
14 Johansen on the 10th of April of 1998.

15 Q. How do you recall that?

16 A. I recall that date, number one, because I
17 had the afternoon off. It was a beautiful, sunny
18 Good Friday afternoon. And in my business, if I
19 can't get people on the phone, there's no sense me
20 being at the office. And I was not able to reach
21 many people because many companies that I do
22 business with have that day off.

23 So Al, being the kind of individual he is,
24 he told everybody, "Hey, disappear." I came home

1 and --

2 Q. How many times did he tell you to
3 disappear that day? Was it once or twice?

4 A. His way of saying that is, "Anybody that's
5 here after twelve o'clock is here at their own
6 risk."

7 Q. Okay.

8 A. That's just -- that's just Al.

9 Q. Okay. Now, you say you met one of the
10 respondents at that time?

11 A. Right. When I came home, I pulled up
12 behind the -- my residence, and a gentleman by the
13 name of Bob Nusbaum, who was a vendor of mine, prior
14 owner of 103 and 101, was there. And I began a
15 conversation with Bob. I don't know exactly what
16 time it was, but Dave Johansen and, I believe, his
17 wife Kathy pulled up. And Bob introduced me to
18 Mr. Johansen and his wife.

19 And Bob expressed to them at that point
20 that I had some potential concerns about noise.

21 Q. It was Bob that said this?

22 A. Yes, it was.

23 Q. And was there any response; and who
24 responded, if anyone?

1 A. Mr. Johansen responded to me, "Oh, there's
2 going to be noise." That comment sticks out in my
3 mind. His subsequent comment was, "You have to
4 expect that kind of thing when you're in a
5 commercial district."

6 And, after those comments, left Bob, his
7 wife Kathy, and myself standing there, me wondering
8 what the heck that was all about.

9 Q. Okay. Was there any further conversation?

10 A. No.

11 Q. Okay. Now, let's go back a little bit.
12 You live in Fairbury, right? You live at 105 West
13 Locust?

14 A. Yes.

15 Q. You lived at 207 East Oak?

16 A. 207 East Oak, that's correct.

17 Q. East Oak. For how long?

18 A. We lived at 207 East Oak for approximately
19 five years.

20 Q. Okay. Now, did you have occasion -- did
21 this -- these comments cause you any concerns?

22 A. Yes. Truthfully, it was like a warning
23 shot fired over my head. That's the way I took that
24 kind of response.

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1 Q. And what did you then do?

2 A. Well, number one, I went to the
3 Association of Commerce and found out what, if
4 anything, they might be able to tell me about this
5 organization.

6 I also, at that point, began to
7 investigate how the city went through the process of
8 issuing a liquor license because I hadn't heard
9 anything about it.

10 Q. Okay. So you were dealing with other
11 agencies?

12 A. Yeah.

13 Q. Okay. Did you visit Benchwarmers?

14 A. Diane and I had visited -- after the --
15 after the 10th of April -- I can't recall exactly
16 what date; it was within a week or so -- we visited
17 both of their establishments, other establishments
18 in Cooksville and Colfax, Colfax being the first one
19 we went to.

20 Q. Okay. And what did you observe in Colfax
21 about the sound?

22 A. We went there kind of at the tail end of
23 dinner hour, you know, late afternoon, early
24 evening, and it was a typical restaurant

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1 environment.

2 Q. Did you eat there?

3 A. Yes, we did.

4 Q. Did you drink?

5 A. Yes, I did.

6 Q. Okay. Did --

7 A. I had a steak and a Bud Lite, if you need
8 to know.

9 Q. Okay. Did Diane eat?

10 A. I think she had the same.

11 Q. Okay. And did you meet any of the
12 respondents there?

13 A. Dave Johansen was there that day and came
14 over and talked to us, both Diane and I, and Jack
15 Senate, who was with us.

16 Q. Who is Jack Senate?

17 A. Jack Senate is an individual who currently
18 manages the clothing/retail store across the street
19 from us, the Stage.

20 Q. Oh, okay.

21 A. And known Jack for quite awhile.

22 Q. Okay. And what did you converse with
23 Mr. Johansen about?

24 A. In general, some typical chitchat. I

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1 believe Diane asked a question based on information
2 that was on our table about bands and deejays that
3 were up and coming, and asked if that was part of
4 the plan for Fairbury.

5 Q. And what was Mr. Johansen's response?

6 A. The response indicated that bands and
7 deejays were not necessarily planned. And it was
8 kind of a situation where the expense that you
9 outlay for the band or the deejay is oftentimes not
10 recouped with the actual increase in business for
11 that night. So he was hoping he didn't have to have
12 bands and deejays in Fairbury.

13 Q. Was there any other conversation?

14 A. Not to my recollection.

15 Q. What was the noise level like in there
16 when you were there?

17 A. When I was there for dinner, it was
18 typical; what you'd find in any restaurant.

19 Q. Okay. And did you ever have occasion to
20 go back to Colfax?

21 A. Well, I went back there that evening after
22 10:00.

23 Q. And what did you observe on your return?

24 A. What I observed on my return was, in one

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1 directon on the street in Colfax, I could hear the
2 music --

3 MR. SHIELDS: Ma'am, is this in Coalifax now
4 we're talking about?

5 MR. HARDING: Yes, we're in Colfax.

6 MR. SHIELDS: I would object. Has no relevance
7 to what occurs at the Benchwarmers in Fairbury.

8 MR. HARDING: Actually, it has a great deal of
9 relevance with what we're going to be hearing later
10 and to what we've already heard a part of with
11 regard to Mr. Snedden in terms of comments made by

12 Mr. Pawlowski and the nature of those comments and
13 what he said.

14 We've already heard some of it. We're
15 going to hear more of it. This is part of where
16 it's coming from.

17 MR. SHIELDS: It still has no relevance to the
18 Fairbury location, site that is the basis of the
19 complaint.

20 MR. HARDING: I will have no problem with not
21 going into this if it is the case that the
22 respondents are not going to go into any dealings
23 with any other people outside of among the
24 respondents and the complainants here.

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1 HEARING OFFICER FELTON: I think to the extent
2 that it might have some weight with regard to
3 conversations between the parties, we'll allow this
4 line for a little bit, a little while.

5 A. I parked my vehicle and paced off how far
6 away from the front door of the establishment I
7 could still hear the music. And in one direction,
8 it was 150 paces, approximately 150 yards; and in
9 the other direction, it was 110 paces or about 110

10 yards.

11 Q. And do you recall your reaction to that?

12 A. Well, my reaction was sheer panic. When I
13 came home that evening, I told Diane what I had
14 found and heard. And I said, We'd best prepare
15 ourselves to handle this situation.

16 Q. Okay. And you went to Cooksville?

17 A. Yes, we did.

18 Q. And what did you observe there?

19 A. We had probably a lighter meal there in
20 Cooksville. It was a little bit smaller
21 establishment than Colfax. But, clearly, both of
22 these establishments, in my opinion, were bars that
23 served food and not restaurants that served liquor.

24 Q. Okay. Anything about the sound in

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1 Cooksville get your attention?

2 A. No. There was not much sound other than
3 your typical dining room type of sound on the day on
4 which we visited Cooksville.

5 Q. Okay. Have you ever met Troy Quinley
6 before today?

7 A. I have never been personally introduced to
8 Mr. Quinley.

9 Q. Have you met his father?

10 A. Yes, I have.

11 Q. Do you recall when you met his father?

12 A. I met Troy's father, it would have been
13 the first Sunday in April of 1998.

14 Q. Okay. And what was he doing, where was
15 he, whatever?

16 A. Well, Diane and I were weekend warriors in
17 terms of our construction on our property. And that
18 Sunday morning, about seven o'clock, we had heard
19 some construction type noises and kind of noted to
20 each other that should be us. We were a little lazy
21 that morning. And normally at seven o'clock, we'd
22 have been up and at it already.

23 I took the opportunity to go out the back
24 of my building, walk into an open door at 101 West

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1 Locust where Mr. Quinley was engaged in demolition
2 activities on the building. That was the first time
3 I met him.

4 Q. Did you have a conversation with him?

5 A. I had a brief conversation with him. I --
6 you know, small town curiosity says, you know, what
7 the heck's going to go on here. And he indicated at
8 that point that his son was going to open up a
9 restaurant.

10 Q. Okay. And what was your response to that?

11 A. Well, my response was, "Outstanding." I
12 mean, the community could use a good, quality
13 restaurant in the downtown area. Been a focal point
14 of the Association of Commerce for years.

15 Q. Okay. Have you been a member of the
16 Association of Commerce?

17 A. I am a former member of the Association of
18 Commerce, that's correct.

19 Q. And was there any further conversation
20 between you and Mr. Quinley's father?

21 A. Yes, there was. It being a Sunday, it
22 being Fairbury, Illinois, where there isn't very
23 much open, self-admittedly I probably have every
24 tool known to man -- at least I'm accused of that by

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1 my wife.

2 I offered at that point in time to
3 Mr. Quinley, hey, if you find yourself breaking a
4 saw blade or in need of a tool, we're here every
5 weekend. Just wander on next door and be glad to
6 help you out if I can.

7 Q. Now, do you recall when Benchwarmers
8 opened?

9 A. Yes, I do.

10 Q. When was that?

11 A. June 29th of 1998.

12 Q. And what did you observe on the evening of
13 June 29th, 1998?

14 A. I observed some extremely loud music that
15 was penetrating the wall between our structures into
16 my residence.

17 Q. And what did you do when this happened?

18 A. Well, I did exactly as I had been
19 instructed by the city to do in case I had a problem
20 with noise, which was to call the police. I tried
21 to call the police several times. Obviously, I was
22 using the wrong number. Left a couple of messages
23 on the answering machine there, and then finally
24 flagged an officer down late in that evening.

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1 Q. And what was the result of that?

2 A. Well, I told the officer at that point
3 that I would like to file a complaint under
4 Fairbury's liquor control ordinance 8.24, which has
5 language in there that governs disruption of the
6 peace and quiet of the neighborhood under the liquor
7 ordinances.

8 Q. And what was the officer's response?

9 A. The officer's response was, "I will note
10 your complaint in my log."

11 Q. Okay. And to your knowledge, are the
12 proprietors of Benchwarmers, Mr. Quinley and
13 Mr. Johansen, is Benchwarmers a full-time job for
14 them?

15 A. I'm not exactly sure.

16 Q. Okay. Do you know if it was at the time?

17 A. No. I have no knowledge of whether it's
18 their full-time or part-time endeavor.

19 Q. Okay. Now, did you keep a log of your
20 experiences with Benchwarmers?

21 A. After my initial conversation with
22 Mr. Dave Johansen, I was instructed by an attorney
23 to get and keep a log and record every incident that
24 could be significant.

1 Q. The conversation with Mr. Johansen, was
2 that alarming?

3 A. Absolutely.

4 Q. I'd like to show you what has been marked
5 as Complainants' Exhibit 1. Hold on to the book for
6 a moment; trade you back.

7 Please take a look at Complainants'
8 Exhibit 1. Is that your log?

9 A. Yes, sir, I believe it to be.

10 Q. Okay. Are there any entries in that log
11 that you did not make?

12 A. There is one entry that, due to my
13 handwriting, was tried to be corrected by my wife,
14 Diane, which is 6/12/99. She added the word "not"
15 because she could not read my handwriting.

16 But other than that, there is no other
17 entry in this book that is not my handwriting.

18 Q. And when did you make those entries?

19 A. I made these entries most often when I was
20 disturbed by noise coming from next door, either as
21 I was kept awake or the next morning after I had
22 been disturbed, or no later than when I got home
23 from work the following day.

24 MR. SHIELDS: I would like to interject an

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1 objection at this time to Exhibit 1 and any
2 reference back to Exhibit 1. This document has been
3 presented to us for the first time today. Attorney
4 Harding supposedly had provided us with all reports
5 and so on during the discovery period, and this
6 clearly would have been covered under discovery.

7 MR. HARDING: I am ever so slightly amazed. No
8 document request was ever received. We did receive
9 interrogatories. We were asked for the sound
10 report, and we responded that no such report exists,
11 but we were not asked for documents.

12 HEARING OFFICER FELTON: Mr. Shields, is that
13 correct?

14 MR. HARDING: We did, in fact, give a synopsis
15 of this document as it existed up through the date
16 of response in response to exhibit -- or in response
17 to interrogatory number six. But the document
18 itself was not requested or it would have been
19 turned over.

20 HEARING OFFICER FELTON: Mr. Shields, my
21 records reflect on our internal -- the board's

22 internal docket sheet that the only propounding of
23 discovery the respondents did were interrogatories
24 on July 19th, 1999, and I believe those -- were

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1 those responded to, Mr. Harding?

2 MR. HARDING: Yes, Your --

3 HEARING OFFICER FELTON: That's what you're
4 referring to?

5 MR. HARDING: Yes.

6 HEARING OFFICER FELTON: No need to call me
7 that.

8 MR. HARDING: I almost slipped. Didn't quite
9 get it out.

10 HEARING OFFICER FELTON: That's all right. I
11 know.

12 MR. HARDING: Habits. Presumably, though, you
13 have that.

14 MR. SHIELDS: With regard to interrogatory
15 number six, we made the specific inquiry with regard
16 to each alleged incident of noise pollution, and
17 that certainly would be very much in line with the
18 log that was maintained.

19 We asked for the date and time of any such
20 alleged incident, the exact nature, whether you
21 complained of the incident to the respondents,
22 approximate decibel level, et cetera, and we did not
23 receive this information at that time.

24 MR. HARDING: Again, no response -- no request

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1 was made for documents. However, each such incident
2 as it existed through that date of response, couple
3 weeks before the date of response, was included as
4 an attachment. It was actually filed three days
5 after the main -- after the main response.

6 HEARING OFFICER FELTON: The only --

7 MR. HARDING: It was a supplemental.

8 HEARING OFFICER FELTON: I have discovery
9 response of December 18th, 1998, under which the
10 complainants had different counsel.

11 Are there any other responses that you
12 made to interrogatories?

13 MR. HARDING: I think I was counsel at the time
14 that we made the responses.

15 HEARING OFFICER FELTON: Jay Reese, attorney
16 for Michael Pawlowski and Diane Pawlowski, signed

17 these interrogatories on December --

18 MR. HARDING: Oh, that's our request, isn't
19 it?

20 HEARING OFFICER FELTON: I think.

21 MR. HARDING: These are our interrogatories,
22 not responses to interrogatories. I believe.

23 HEARING OFFICER FELTON: Okay. I'm having
24 trouble locating your responses.

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1 MR. HARDING: Let me see if I have them.
2 Answers to interrogatories and supplemental answers
3 to interrogatories. We excluded initially, on
4 August 2nd, the grid, and we included it on
5 August 9th. I'll need those back.

6 HEARING OFFICER FELTON: That's fine. This
7 grid and Attachment A to your responses, are they
8 the same dates that are in this Exhibit 1 that you
9 were attempting to admit?

10 MR. HARDING: Yes, except for the subsequent
11 ones.

12 HEARING OFFICER FELTON: I think that the
13 responses that the complainants made to respondents'

14 interrogatories, particularly interrogatory number
15 six and the Attachment A, seem to be adequate in the
16 sense that it highlighted dates that the
17 complainants have also articulated in more detail in
18 this Exhibit 1 before us at this moment, despite the
19 fact that the -- it is not in the same detail as
20 this Exhibit 1.

21 In light of the fact that the respondents
22 didn't request for production of documents, I would
23 only hope in good faith that the parties would have
24 adhered to that request, and I would hope that that

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1 would have been the case.

2 But in light of the fact that there were
3 no requests to produce such documents or any
4 documents, I think this should -- I think thus far
5 the foundation has been laid. And if there's -- do
6 you have any other objections you need to make
7 before I officially -- actually, Mr. Shields, I
8 don't think Mr. Harding had even offered this into
9 evidence yet.

10 So let's see if he's completed with his
11 questioning and officially offer it, and then we can

12 proceed.

13 MR. HARDING: Move to admit Complainants'

14 Exhibit 1.

15 MR. SHIELDS: I'm sorry?

16 HEARING OFFICER FELTON: He --

17 MR. HARDING: I moved to admit Complainants'

18 Exhibit 1.

19 MR. SHIELDS: I would object based upon the
20 exhibit being rendition of hearsay. It is obvious
21 from the testimony an attorney requested the
22 preparation of the log, it was prepared in view of
23 litigation, and it is not a business record, and it
24 is clearly hearsay and not within -- within any

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1 hearsay exception.

2 MR. HARDING: The log exception, if you will,
3 runs to the extent that the notation at the time is
4 significant as a temporal event in and of itself.

5 MR. SHIELDS: It does not fall within a hearsay
6 exception.

7 MR. HARDING: Yes, it does. Contemporaneous
8 statement.

9 HEARING OFFICER FELTON: I think --

10 MR. SHIELDS: This is not a dying declaration,
11 and the witness is present in court to testify.

12 HEARING OFFICER FELTON: I think that this is
13 -- your objection is overruled. I think the
14 Complainants' Exhibit 1 is -- the foundation seems
15 to have been laid that this is a depiction of the
16 events, and the witness seems to have testified to
17 the fact that this is his handwriting and his
18 recollection of events. So it will be admitted for
19 that purpose, and the board will determine what
20 weight to assign it.

21 MR. HARDING: Okay. The only other question I
22 have is I have an original handwritten log, and I
23 provided photocopies to the hearing officer and to
24 the opposing counsel. Your preference would be to

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1 have the handwritten log or the photocopy?

2 HEARING OFFICER FELTON: Our preference would
3 be to have the original.

4 MR. HARDING: Okay. I'm going to mark on the
5 inside page, take it back and photocopy it if that's
6 all right.

7 HEARING OFFICER FELTON: That's fine. Whenever
8 the board can have an original of any such document,
9 they would --

10 MR. HARDING: I would think.

11 HEARING OFFICER FELTON: -- prefer.

12 MR. SHIELDS: May I point out to the hearing
13 officer that the log contains prejudicial
14 conclusionary statements? It clearly is not an
15 admissible document.

16 HEARING OFFICER FELTON: I believe the fact
17 that this is the complainants' case in chief right
18 now, they, of course, are going to be making
19 statements that they are alleging in favor of their
20 case, and I believe the respondents will have the
21 same opportunity to do this as well when they
22 present their case in chief.

23 I think that this is -- the proper
24 foundation has been laid for admittance of this

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1 particular log, and this does not go to -- I'm not
2 making a determination as to weight or relevancy of
3 this. I'm just saying that it may be relevant to

4 the outcome of this case and, therefore, it will go
5 into evidence, and the board will decide as to how
6 much weight it will assign this particular log.

7 BY MR. HARDING:

8 Q. I would like to show you what has been
9 marked Complainants' Exhibit 3. Do you recognize
10 that document? And if not the top part, can you go
11 through it and find -- yes, I know -- go through it
12 and find anything that you do recognize?

13 A. I recognize these as copies.

14 Q. Let me -- the question was a yes or no
15 question. Do you recognize anything there?

16 A. Yes.

17 Q. Okay. Did you type either of those
18 documents? There's two halves, I think.

19 A. Yes, I did.

20 Q. And what part or all of it did you type?

21 A. I typed what at the bottom right-hand
22 corner would be denoted as Mike's log, page 1 of 10
23 through Mike's log, page 10 of 10.

24 Q. Commencing after page eight of the

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1 document itself?

2 A. That's correct.

3 Q. And what is typed there?

4 A. What is typed here is as accurate a
5 representation of what's included in my logbook for
6 ease of reference.

7 Q. Okay. So you deciphered your own
8 handwriting and typed it?

9 A. I -- I was able to decipher my own
10 handwriting.

11 Q. Now, we're going to get to this so I might
12 as well ask you: What other attempts did you make
13 to work with the police besides what you've already
14 told us here?

15 A. On several occasions we called the police
16 and asked them to become involved in stopping the
17 noise that was coming from next door under Section
18 8.24 of the Fairbury Liquor Code.

19 Q. Okay. And what was the reaction? Was
20 there ever a ticket written?

21 A. No, not to my knowledge, there was never a
22 citation issued.

23 Q. Okay. Was there ever an arrest made?

24 A. No. To my knowledge, there was never an

1 arrest made.

2 Q. Okay. And did you complain to the city
3 council of Fairbury?

4 A. Yes, I did, on several occasions.

5 Q. And what was done?

6 A. A public hearing was held, I believe it
7 was August 4th of 1998, by the Fairbury Liquor
8 Control Commission.

9 Q. And, in fact, the Fairbury Liquor Control
10 Commission, mayor of Fairbury is the commissioner;
11 is that correct?

12 A. That is correct. Yeah.

13 Q. Now I would like to show you what has been
14 marked both Complainants' Exhibits 11 and 13, and
15 I'll do that as soon as I stop fumbling.

16 Do you recognize those documents?

17 A. Yes, I do.

18 Q. And what are they?

19 A. It is the order of the --

20 Q. Let's look at 11 first.

21 A. Okay. Exhibit 11 is the minutes that were
22 compiled of the public hearing held August 4th,
23 1998.

24 Q. Okay. And are those an official record?

1 A. I believe them to be.

2 Q. Where did you receive them?

3 A. That was received in the mail by us from
4 the City of Fairbury shortly after the hearing was
5 held.

6 Q. Okay. The hearing was held on August 4th,
7 1998?

8 A. That's correct.

9 Q. And Exhibit 13, do you recognize that?

10 A. Yes, I do.

11 Q. Was that in the same envelope?

12 A. Yes, it was.

13 Q. And what is that?

14 A. This is the order of the liquor
15 commissioner of the City of Fairbury.

16 MR. HARDING: At this point, I would move to
17 admit both Complainants' Exhibit 11 and
18 Complainants' Exhibit 13.

19 HEARING OFFICER FELTON: Do you have any
20 objection, Mr. Shields?

21 MR. SHIELDS: No objection.

22 HEARING OFFICER FELTON: Complainants' Exhibit
23 Number 11 entitled Public Hearing and Complainants'

24 Exhibit 13, Order of Liquor Commissioner, are so

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1 admitted.

2 BY MR. HARDING:

3 Q. I would like you to look at the fourth
4 full paragraph of Exhibit 13. Could you read that,
5 please?

6 A. "Because there are not set standards, it
7 is difficult to determine if a violation has
8 occurred. It is the judgment of the liquor
9 commissioner listed below that no violation occurred
10 on the above-stated dates. Therefore, this matter
11 is dismissed."

12 Q. Okay. Now at the hearing of August 4th,
13 do you recall anyone using the words "constitutional
14 issue"?

15 A. Yes, I do.

16 Q. And who was that?

17 A. Mr. Shields raised the potential for what
18 was going on to be a violation of his clients'
19 constitutional rights.

20 Q. Okay. Now, what attempts, if any, have

21 you made to soundproof your space?

22 A. There were three things that I have done
23 to try and minimize the impact of the noise on my
24 personal life. The first was to repair

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1 penetrations, four one-inch holes that were in the
2 walls which abut that penetrated completely through
3 those. I filled those with an acoustical type of
4 foam.

5 I also insulated a chimney penetration
6 which reduced the effective, you know, density of
7 the wall there because there was a hole cut in for a
8 chimney to go up. And I blocked that off.

9 I also constructed an acoustical headboard
10 which, you know, Mr. Yerges said it wasn't very
11 effective. I can attest to that. And also
12 insulated a former opening that was between the
13 walls.

14 Q. Okay. Did any of that do anything?

15 A. Actually, repairing those four small holes
16 that were direct penetrations between the two
17 buildings did more than all of the rest of them
18 combined. There was a relative reduction in the

19 amount of noise after doing that, but that was done
20 very, very early on.

21 Q. And did the noise subside at all at any
22 time?

23 A. Yes, it did, subsequent to the public
24 hearing.

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1 Q. You mean after the public hearing, right?

2 A. Yeah.

3 Q. Okay.

4 A. After the public hearing, there was a
5 period of time in which the noise was almost
6 nonexistent.

7 Q. How long?

8 A. Couple months.

9 Q. And then what happened?

10 A. It went right back to square one. As I
11 noted in my log, I believe it was October 3rd or 4th
12 that will -- I don't know. Comment might have been,
13 "Here we go again."

14 Q. And were you given to believe during that
15 period that it was going to stay -- the noise was

16 going to stay down?

17 A. We had all hoped that it would.

18 Q. Okay. And what did you do when it came
19 back up?

20 A. Well, when it came back up, we -- we
21 notified an individual that at that point in time
22 was representing us in this matter that, indeed, we
23 -- we did need some additional services from him.

24 There was a period of time in September

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1 where we settled up our account with him and thought
2 it was all done. And shortly after that, when it
3 started up again, we called him and said, "Well,
4 unfortunately, we're going to have to go further
5 with this."

6 Q. Now, you purchased a couple of noise
7 meters at one point, sound meters?

8 A. Yes, I did.

9 Q. Are those the same two sound meters you've
10 used throughout this ordeal?

11 A. Yes. Originally I had one, and then I
12 purchased a second one.

13 Q. Okay. And are those the sound meters that

14 we see in the videotapes?

15 A. They most certainly are.

16 Q. Okay. And the same two sound meters all
17 the time?

18 A. Yes.

19 Q. And are those the same two sound meters
20 that Mr. Yerges calibrated in your presence on
21 September 25th?

22 A. Yes, they are.

23 Q. And those -- the adjustments on the front
24 of them, could you describe how they adjust on the

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1 front?

2 A. There is a large dial which gives you a
3 general tune-in of the range that the sound level
4 meter is supposed to operate.

5 Q. Now, when you say -- what range?

6 A. Well, there are ranges that a meter is
7 capable of reading sound at, to my understanding,
8 and you have to get it in the ballpark for it to be
9 effective, within 10 decibels on your setting.

10 Q. I see.

11 A. Otherwise, it would indicate it's either
12 higher or lower and not give you a reading.

13 Q. Outside of the range --

14 A. Outside of the range, it doesn't operate.

15 Q. Okay. Is there another dial?

16 A. No other dials. There are several push
17 buttons.

18 Q. What are those for?

19 A. The push buttons being the response, the
20 weighting.

21 Q. Weighting, w-e-i-g-h-t-i-n-g?

22 A. I believe that's how that's spelled.

23 Q. Well, there's the other one that's
24 standing around.

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1 A. Right. Right. As well as a response
2 which is fast or slow, and a difference of maximum
3 or average reading button that's on there.

4 Q. Okay.

5 A. Got them in my briefcase.

6 Q. Now, the videotapes -- the videotape
7 that's in the VCR right now --

8 A. Yes.

9 Q. -- which is the point of contention here
10 today, you took the individual videotapes?
11 A. Yes.
12 Q. You photographed these?
13 A. Yes, I did.
14 Q. Okay. And you compiled them onto this one
15 tape?
16 A. Yes, I did.
17 Q. Okay. What did you edit out, if anything,
18 or what did you edit in, if anything?
19 A. Well, "edit" is a relative term. I
20 transferred segments of the videotape from VHS C
21 format to VHS format. I don't have the capabilities
22 to edit in the term in which it would be referred to
23 as alter. I transferred them from one format to
24 another. You put a cable between --

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1 Q. The video camera?
2 A. -- between the video camera and the video
3 recorder, and you hit "Play" and "Record," and it
4 transfers.
5 Q. That's what you did?

6 A. Yes.

7 Q. You left out parts?

8 A. Yes, I did.

9 Q. Why did you leave out parts?

10 A. Well, if we had to watch the entire
11 videotape compilations, it would exceed three hours
12 in length.

13 Q. Okay. Did you add anything?

14 A. No.

15 Q. Okay. And the times shown on there --

16 A. The times shown on there are accurate
17 within a few minutes. I either time and date
18 stamped it on the program channel or the Weather
19 Channel, depending on which was on when I did it.
20 Some of those things you don't see because they're
21 not on the segments.

22 MR. HARDING: Okay. At this point, I move to
23 admit the videotape in toto, Exhibit 15.

24 HEARING OFFICER FELTON: You're referring to

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1 the videotape as Exhibit 15 as well?

2 MR. HARDING: Yes. This is just the index to
3 Exhibit 15.

4 HEARING OFFICER FELTON: Right. We'll have to
5 renumber it if it is admitted.

6 MR. HARDING: That's fine. Do you want me to
7 call the videotape Exhibit 16?

8 HEARING OFFICER FELTON: Yes, let's do that.
9 Mr. Harding -- okay. That Exhibit 16 is so titled.

10 Mr. Shields, do you have any -- do you
11 want to articulate your objections at this time?

12 MR. SHIELDS: I will renew my objection to the
13 videotape. It should be excluded in its entirety.
14 The testimony has clearly shown that the tape was
15 edited, altered. It has been reduced down to a
16 38-minute segment from a three-hour segment. It
17 includes provisions that are not material. There
18 are conclusionary statements made.

19 With regard to the mere videotaping of the
20 Radio Shack meters, at some portion it's a single
21 meter; at other portions, it is two meters. These
22 were not performed by an expert, were not performed
23 in an unobstructed manner, were not performed 25
24 feet from the property line. You can clearly see

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1 reflective surfaces near the meter or meters. The
2 measurements were not taken at ground level, they
3 were not taken on a tripod three feet, eight inches
4 to four feet, ten inches from the ground. They were
5 taken on a second-story level.

6 And we -- it was my understanding we had
7 agreed that we would proceed with this segment by
8 segment as per your prior instruction, but now we
9 are dealing with it as a whole.

10 As I mentioned before, part of this, if
11 not all of it, is posed photography which is a
12 violation insofar as hearsay. And, also, the
13 persons who are on the tape have been or are also
14 present to testify directly, so it would be
15 duplicitous testimony.

16 So for all those reasons, I move again to
17 exclude the entire videotape.

18 HEARING OFFICER FELTON: Mr. Harding, do you
19 have any response to that?

20 MR. HARDING: Yeah. The characterization of
21 this as posed, I understand the characterization,
22 but it doesn't relate to anything that is relevant
23 here. If there's some allegation that we turned on
24 the music in Benchwarmers and then did this, you

1 know, let's hear it. But we're not talking about
2 this. This is actual noise coming from
3 Benchwarmers. That testimony is in by way of
4 foundation. It is a real-time videotape of an
5 event. It is not hearsay to the extent that it is a
6 real-time videotape of an event, and it is extremely
7 relevant to what we're talking about here as an
8 event which is not something which has -- we're not
9 just talking about something that people are talking
10 about. We have real, tangible evidence that this
11 occurred at the time that it occurred, and this is
12 invaluable evidence, and it is the least prejudicial
13 evidence that is being presented here or will be
14 presented here today.

15 HEARING OFFICER FELTON: I still -- I still
16 want to deal with each one of these segments
17 separately.

18 MR. HARDING: Could we do that then because I
19 have -- I have -- my motion stands as to the whole,
20 but --

21 HEARING OFFICER FELTON: Like --

22 MR. HARDING: There is a segment that we have
23 all heard here and seen, commencing at 000, segment
24 one. Okay? That is the meter reading, that is the

1 sound audible on the tape. And we're moving to
2 admit it.

3 HEARING OFFICER FELTON: Is -- Mr. Harding, you
4 had previously offered to admit this without the
5 sound.

6 MR. HARDING: Well, not without the sounds.
7 Without the words of the people speaking. The sound
8 is significant. It tells a tape-recording of the
9 event. We could ask the board to simply ignore the
10 words of the people speaking. That would be -- even
11 though I think it's a present-sense impression and,
12 therefore, a hearsay exception, I don't want to bog
13 down in it. I think the board is sharp enough to
14 figure out what's the words and what's the music and
15 what's the video display.

16 HEARING OFFICER FELTON: All right. Well,
17 we'll proceed with each segment as is with your
18 objections noted. I'm going to admit the segment.

19 While it is noted that this is a tape that
20 includes several segments, it seems that the
21 foundation has been laid that both this witness
22 created the tape and Mr. Yerges as well had a chance

23 to calibrate the particular monitoring system,
24 albeit at a later date. I believe that this does at

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1 least establish, you know, an event; and we will
2 take it as that. It will be admitted for that
3 reason.

4 I also note that these -- the tape that
5 shows the sound meter level, a numerical level, does
6 not in and of itself establish a violation of the
7 board's procedural -- board's rules or the
8 Environmental Protection Act. The -- this only
9 comes in to establish whether or not this is
10 unreasonable, and that will be for the board to
11 determine.

12 MR. HARDING: I would also further note here,
13 we're not proceeding -- we are expressly not
14 proceeding under numerical violation.

15 HEARING OFFICER FELTON: I think that's
16 apparent from your pleadings.

17 MR. HARDING: Okay.

18 HEARING OFFICER FELTON: Only alleges violation
19 of the Environmental Protection Act. So we will
20 take each one of these piecemeal. If you can

21 proceed with segment number two?

22 MR. HARDING: Well, to get the controversy out
23 of it, I would then move to admit segments two,
24 four, five, six, seven, and nine.

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1 HEARING OFFICER FELTON: Those particular
2 segments are segments only with the numeric
3 monitoring, sound monitoring systems, and there's no
4 testimony by any parties?

5 MR. HARDING: Right. There may be an
6 occasional comment, but, again, we're not interested
7 in having the comments registered or commented upon
8 or treated as evidence.

9 HEARING OFFICER FELTON: With your objections
10 noted, Mr. Shields, I'm going to admit segment two
11 which begins at 1 minute and 50 seconds and ends at
12 approximately 4 minutes and 1 second.

13 Mr. Harding, if you can proceed, I'm
14 sorry, to make that clear, which segments are or are
15 not permitted.

16 MR. HARDING: Dividing that portion that begins
17 at 4:02 and that portion that begins at 9:40 as

18 segments 3 and 3A, I would move to admit segment
19 three commencing at 4:02.

20 HEARING OFFICER FELTON: Segment three
21 beginning at 4 minutes and 2 seconds and ending at
22 approximately 9 minutes and 47 seconds.

23 MR. HARDING: We can end it at 9:46 if you
24 want.

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1 HEARING OFFICER FELTON: We'll go with 9:47 is
2 admitted.

3 MR. SHIELDS: Over my objection.

4 HEARING OFFICER FELTON: Over objection,
5 yes.

6 MR. SHIELDS: All the objections that I have
7 made heretofore.

8 HEARING OFFICER FELTON: Yes.

9 MR. HARDING: Also move to admit segment four.

10 HEARING OFFICER FELTON: Segment four which
11 begins at 13:30?

12 MR. HARDING: Right.

13 HEARING OFFICER FELTON: And ends at
14 approximately 5:35 -- excuse me, 15:35?

15 MR. HARDING: Right. 15:35, 36, somewhere in

16 there.

17 HEARING OFFICER FELTON: Again, notwithstanding
18 Mr. Shields' objections, which he can continue to
19 maintain, and I believe he does?

20 MR. SHIELDS: Yes.

21 HEARING OFFICER FELTON: I will admit based on
22 the foundation that's been established here and the
23 fact that this, again, is seemingly relevant to this
24 matter.

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1 MR. HARDING: Okay. At this point I would move
2 to admit segment five.

3 HEARING OFFICER FELTON: Again, with
4 Mr. Shields' objection, segment five beginning at
5 approximately 15:36 and ending at approximately
6 19:30 is admitted.

7 MR. HARDING: And I move to admit segment six.

8 HEARING OFFICER FELTON: With Mr. Shields'
9 objections being fully noted, segment six, beginning
10 at 19:31 and ending at approximately 22:08, is
11 admitted.

12 MR. HARDING: And move to admit segment seven.

13 HEARING OFFICER FELTON: Segment seven,
14 beginning at 22:09 and ending at approximately
15 25:38, with Mr. Shields' objections, is admitted.

16 MR. HARDING: Move to admit segment eight.

17 HEARING OFFICER FELTON: I thought you said
18 only segment nine? Seven, then nine.

19 MR. HARDING: Oh, I'm sorry, we're going to
20 bypass eight for the moment. Move to admit segment
21 nine.

22 HEARING OFFICER FELTON: Segment nine, with
23 Mr. Shields' objections noted, beginning at 30:20
24 and ending at just about 35 minutes, is admitted.

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1 MR. HARDING: And move to admit segment ten.

2 HEARING OFFICER FELTON: Segment ten I didn't
3 think you were moving into evidence.

4 MR. HARDING: Give me just a moment. Well, I'm
5 going to move to admit it, segment ten.

6 HEARING OFFICER FELTON: On what basis are you
7 moving to admit segment ten?

8 MR. HARDING: Same basis. Part of this was the
9 December 4th and December 5th. Night of the 4th,
10 morning of the 5th.

11 HEARING OFFICER FELTON: Again, with
12 Mr. Shields' objections, I will admit segment ten,
13 beginning at 35 minutes and ending at about 38
14 minutes, into evidence.

15 MR. HARDING: At this point I would move to
16 admit segment 3A. And as to the hearsay objection
17 which has already been made, I would note that this
18 is the present-sense impression of a person who is
19 witnessing an event and, therefore, I believe it is
20 a valid exception to the hearsay rule.

21 HEARING OFFICER FELTON: Mr. Shields?

22 MR. SHIELDS: I would renew the objections
23 which I have made in total to the tape and to each
24 segment of the tape. I would renew my objection to

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1 this specific segment with regard to it being
2 hearsay, conclusionary. I think I had a list at one
3 point. It's not material, prejudicial, and the fact
4 that the gentleman was obviously posed for the
5 segment of the tape with regard to location and
6 comments elicited from him, and clearly violative of
7 evidentiary rules to allow that segment into

8 evidence.

9 HEARING OFFICER FELTON: I'm going to sustain
10 Mr. Shields' objections. I find that given that
11 this witness was available here to testify in some
12 detail as to the occurrence of the events on that
13 day in which he was allegedly taped that that is
14 sufficient, so segment three will not be
15 admitted.

16 MR. HARDING: If that's the case, then it also
17 stands as a separate example of everything else, and
18 I would ask that it be admitted with an express
19 finding that -- well, I realize you work for the
20 board, so you can't order the board not to do
21 something, but with an express finding that the
22 statements of the witness in the tape are
23 nonadmissible evidence but that the event itself,
24 the background is.

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1 HEARING OFFICER FELTON: So admitting it how,
2 without the statements of the witness?

3 MR. HARDING: Without the statements of the
4 witness.

5 HEARING OFFICER FELTON: So you're asking --

6 MR. HARDING: Request to the board to simply
7 ignore the statements of the witness who they will
8 already have on the record here.

9 HEARING OFFICER FELTON: So admitting it solely
10 for the noise, right?

11 MR. HARDING: For the occurrence, yes.

12 HEARING OFFICER FELTON: For the occurrence.
13 Mr. Shields?

14 MR. SHIELDS: I would simply again renew my
15 objections to the entire tape, to that specific
16 segment for all purposes.

17 And I see no additional relevance or can
18 conceive of how you can have that portion of the
19 tape made with the voice edited out and leaving the
20 music in. There -- there is no sound reading taken
21 as in the other segments, and it would be subject to
22 distortion with regard to the location of the
23 microphone.

24 But, all in all, it is still hearsay,

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1 lacks authenticity, has been edited, obviously, with
2 the fade in, fade out. Continue to object with

3 regard to the admissibility of that entire segment.

4 HEARING OFFICER FELTON: I'm going to sustain
5 Mr. Shields' objection.

6 MR. HARDING: Very well then. I'm going to
7 make the same motion as to segment eight, move to
8 admit. And if admission -- if the hearing officer
9 finds admission is not proper, given the statements
10 on the tape, then I ask that it be admitted with a
11 request to ignore the statements of the people in
12 the tape, in that segment.

13 MR. SHIELDS: And I would have the same
14 objections as to, I believe it was 3A.

15 HEARING OFFICER FELTON: That's correct. I
16 think in light of the fact that Miss Pawlowski is
17 here to testify, along the same lines with regard to
18 3A, I will sustain Mr. Shields' objections.

19 MR. HARDING: Okay. May I ask a question on
20 the record but slightly out of procedure?

21 Have your clients seen the tape?

22 MR. SHIELDS: Yes.

23 MR. HARDING: The hearing officer has seen the
24 tape, I've seen the tape, Pawlowskis have seen the

1 tape. The only person here who hasn't seen the tape
2 is the court reporter.

3 HEARING OFFICER FELTON: Right.

4 MR. HARDING: Can we waive the showing of the
5 tape here? I think it -- I don't see that it serves
6 any particular purpose other than to eat up another
7 38 minutes.

8 MR. SHIELDS: Yeah, I don't have any --

9 HEARING OFFICER FELTON: Do you have any
10 objection to that, Mr. Shields?

11 MR. SHIELDS: No objection. No.

12 MR. HARDING: Let's turn off the monitors so
13 they don't explode.

14 HEARING OFFICER FELTON: Mr. Harding?

15 MR. HARDING: Yes, ma'am.

16 HEARING OFFICER FELTON: The videotape with the
17 segments that we have identified as exhibits will be
18 identified as exhibit -- Complainants' Exhibit
19 Number 16.

20 MR. HARDING: Exhibit 16, yes.

21 MR. HARDING: Now, do you have a copy of the
22 videotape?

23 HEARING OFFICER FELTON: I do not. You'll be
24 giving me a copy.

1 MR. HARDING: Here's the videotape.

2 HEARING OFFICER FELTON: This will go into the
3 board's record.

4 MR. HARDING: As Exhibit 16?

5 HEARING OFFICER FELTON: Correct, Exhibit 16.

6 MR. HARDING: Complainants' Exhibit 16. I'm
7 sorry.

8 BY MR. HARDING:

9 Q. Now, this all started June the 29th of
10 1998; is that correct, Mr. Pawlowski?

11 You're still on the stand, as it were.

12 A. The noise problem itself started on
13 January -- excuse me, June 29th, 1998.

14 Q. Okay. And have you -- how has this
15 affected you specifically? What about your life has
16 this affected?

17 A. This has had an impact on numerous facets
18 of my life.

19 Q. Okay. What about your sleeping?

20 A. It has disrupted my sleep on many
21 occasions.

22 Q. Absent the presence of Benchwarmers, what
23 time do you normally rise in the morning?

24 A. Between 5:00 and 5:15.

1 Q. And what time do you usually go to bed at
2 night?

3 A. Between 10:00 p.m. and 10:30.

4 Q. By the way, how old are you?

5 A. I am 43 years old.

6 Q. So do you go to sleep appreciably later on
7 the weekends than you do during the week, or are you
8 a middle-aged man of constant habit?

9 A. We go to bed at the same time on the
10 weekends because on the weekends we dedicate our
11 days to renovation of our building. So, it's a
12 normal day for us. Has been since we purchased the
13 building in March of '95.

14 Q. Okay. And how has that changed? How has
15 your sleep changed since Benchwarmers opened?

16 A. Numerous occasions, I could not get to
17 sleep in the master bedroom that I designed and
18 built. I'd have to retreat to another room just to
19 try and escape the noise. On some nights when the
20 front door of the bar is left open, I can't sleep in
21 any room in my house.

22 Q. Okay. And what about recreation in your

23 home? Has it affected that at all?

24 A. Recreation, no, not appreciably.

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1 Q. Television, listening to the radio?

2 A. It has interfered with our ability to
3 watch television on several occasions.

4 Q. Okay. You can play cards, anything like
5 that, board games? Do you do that?

6 A. It hasn't really affected our ability to
7 do that because we don't often do those things.

8 Q. Okay. How many guests have you had in
9 your home, would you say, since June 29th of 1998?

10 A. What are you referring to as far as
11 guests? Overnight guests?

12 Q. Guests. Evening guests.

13 A. Evening guests? 75.

14 Q. Okay. And has anyone ever commented to
15 you about the noise?

16 MR. SHIELDS: Objection, hearsay.

17 MR. HARDING: The fact of the comment is not
18 hearsay.

19 MR. SHIELDS: Objection, hearsay.

20 HEARING OFFICER FELTON: I'm going to sustain
21 the objection. If you've got witnesses,
22 Mr. Harding, to produce or to elicit the response
23 you want, I think that you can call them to testify
24 as to what they heard.

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1 BY MR. HARDING:

2 Q. Okay. How has this affected your
3 relationship with your wife?

4 A. This has been the most stressful time in
5 our 21-year marriage.

6 Q. Okay. And has it changed those activities
7 you enjoy with her?

8 A. Absolutely.

9 Q. And do you have any plans with which this
10 constant exposure to noise has interfered?

11 A. Yes, they -- it has interfered with our
12 ability to pursue the retail venture on the first
13 floor due to financial constraints.

14 It also -- for years, my wife and I have
15 pointed to when we finally get into a place and
16 settle down and have a place that's not a rental
17 that we can call our own, we are going to, because

18 we are childless couple, look at adoption and/or
19 foster parenting. And I couldn't in good conscience
20 bring a child into that home.

21 Q. Okay. Now, what do you do when the noise
22 is up and it's bedtime?

23 A. I make an assessment as to whether I can
24 just go into my guest room and sleep. And if I can,

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1 that's what I do.

2 Q. Okay. Then what if you can't?

3 A. Well, if I can't, I might surf the
4 Internet, I might stay awake and watch television.
5 I might just sit in a chair and get aggravated,
6 which is usually the case.

7 Q. Okay. What time does Benchwarmers
8 normally close?

9 A. 1:00 is the time at which closure is
10 required by law.

11 Q. That's Monday through Saturday?

12 A. Monday through Saturday, correct.

13 Q. Well, actually Tuesday morning through
14 Sunday morning?

15 A. Yeah.

16 Q. There is no Monday morning, though,
17 because Benchwarmers is required to close at 10:00
18 on Sunday night?

19 A. That's correct.

20 Q. That's by ordinance?

21 A. That's by the liquor ordinance. And thank
22 God, we get one night to sleep.

23 Q. Now, do you know what the walls -- what
24 the construction of the walls are between 103 and

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1 105 West Locust?

2 A. Yes, I do.

3 Q. How are they constructed?

4 A. It is four courses of pre 1900 vintage red
5 brick.

6 Q. Okay. And when you say four courses, is
7 it four rows of bricks?

8 A. There are four rows of brick, correct.

9 Q. Okay. And do the walls touch each other?
10 I mean, is there a separation between the wall of
11 the one building and the wall of the other?

12 A. It's difficult to say where one ends and

13 where one starts.

14 Q. Okay. I would like to show you what's
15 been marked as Complainants' Exhibit 6. And
16 actually we're going to do this.

17 HEARING OFFICER FELTON: We can go off the
18 record.

19 (A discussion was held off the record.)

20 BY MR. HARDING:

21 Q. Like to show you Exhibits 6, 7, 8, 9. Did
22 you take those photographs?

23 A. Either I took them or my wife Diane did.
24 One of the two of us.

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1 Q. Okay. Exhibit 6, does that accurately
2 describe the rear of your premises?

3 A. Right. The -- in the foreground of that
4 shot is the southeast corner of 101 West Locust.

5 Q. So it's taken essentially on a westbound
6 view?

7 A. Correct.

8 Q. Okay. And that's 101?

9 A. 101. 103 between the two gutters, and

10 then 105 west of what appears to be the light pole.

11 Q. Okay.

12 A. Power pole.

13 MR. HARDING: Move to admit Complainants' --
14 Complainants' Exhibit 6.

15 HEARING OFFICER FELTON: Mr. Shields?

16 MR. SHIELDS: Could I see the original photo?

17 HEARING OFFICER FELTON: Certainly. Can you
18 clarify -- I myself am a little confused. What is
19 that first building in the forefront?

20 MR. HARDING: That's 101 towards you. It's
21 taken facing west.

22 HEARING OFFICER FELTON: Then the next building
23 is 103 and then 105?

24 THE WITNESS: Correct.

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1 HEARING OFFICER FELTON: Mr. Shields?

2 MR. SHIELDS: No objection.

3 HEARING OFFICER FELTON: Seeing as there's no
4 objection, Complainants' Exhibit Number 6 is
5 admitted.

6 BY MR. HARDING:

7 Q. Like you to take a look at 7,

8 Complainants' Exhibit 7. What am I looking at?

9 A. You're looking at a shot from the north
10 side of Locust Street.

11 Q. Eastbound?

12 A. This is an eastbound shot. The area
13 between the two easternly and westernly most white
14 poles is 105 West Locust where I reside.

15 Q. Okay. Then beyond that going further down
16 the picture towards the left is Benchwarmers?

17 A. The building where the bay window is
18 located is 103 West Locust. That is where the
19 tavern portion of the establishment is. And then
20 101 West Locust is the portion of the establishment
21 where I believe the restaurant is located.

22 MR. HARDING: Okay. Move to admit
23 Complainants' Exhibit 7.

24 MR. SHIELDS: No objection.

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1 HEARING OFFICER FELTON: Okay.

2 MR. HARDING: Complainants' Exhibit 8 --

3 HEARING OFFICER FELTON: Hold on.

4 Complainants' Exhibit Number 7, showing an eastbound

5 view of the front of the property in question, is
6 admitted. Thanks.

7 BY MR. HARDING:

8 Q. Do you recognize Complainants' Exhibit 8?

9 A. Yes, I do.

10 Q. And what is it?

11 A. It's a shot from the --

12 Q. Looks like the northeast?

13 A. -- the northeast corner of Third and
14 Locust in Fairbury.

15 Q. So it's southwest angle shot?

16 A. Southwest angle shot.

17 Q. Okay. Right at the foreground is the
18 Benchwarmers canopy over the door?

19 A. Correct.

20 Q. Okay. And is that an accurate view of the
21 building?

22 A. Yes.

23 Q. Any distortion?

24 A. Not to my knowledge.

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1 MR. HARDING: Okay. Move to admit
2 Complainants' Exhibit 8.

3 MR. SHIELDS: No objection.

4 HEARING OFFICER FELTON: Complainants' Exhibit
5 Number 8, depicting the corner of Third and Locust,
6 the property in question, is admitted.

7 BY MR. HARDING:

8 Q. Like you to look at Complainants'
9 Exhibit 9. Do you recognize that?

10 A. Yes, I do.

11 Q. Did you take that picture?

12 A. I believe I did.

13 Q. Okay. Did you use any kind of special
14 lens or anything, or is it just a straight up --

15 A. No, no. No special lens.

16 Q. Okay. And what am I looking at?

17 A. You're looking at what I classified as my
18 acoustical headboard.

19 Q. Okay. And what is that headboard
20 constructed of?

21 A. Oh, starting from what you're seeing in
22 the --

23 Q. Appears to be like a band shell; is that
24 correct?

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1 A. That's correct. Two 45-degree angles off
2 on each side, a canopy, as well as a portion that
3 goes towards the wall. And what you're looking at
4 in the foreground, if I were to take a
5 cross-section, that first piece is half-inch carpet
6 foam, standard carpet foam purchased --

7 Q. Foam padding?

8 A. Foam padding for under the carpet.

9 Q. Okay.

10 A. It is bonded to half-inch plywood. On the
11 other side of the half-inch plywood is a material
12 that is a polymeric ice and water dam barrier, like
13 rubber. It's 1/64ths of an inch thick or so.
14 Bonded to that is about a half inch of fiberglass
15 from ceiling tiles, and then bonded to that is
16 another layer of carpet foam. So it's a multilayer,
17 my best attempt.

18 Q. Okay. Did it have any audible effect on
19 the noise?

20 A. Nominal.

21 MR. HARDING: Okay. Move to admit
22 Complainants' Exhibit 9.

23 HEARING OFFICER FELTON: Mr. Shields?

24 MR. SHIELDS: Could we have further

1 foundation? Not familiar with the location. Are we
2 on a west wall, east wall, north wall?

3 HEARING OFFICER FELTON: I agree with
4 Mr. Shields. Let's see if we can't establish a
5 little more foundation.

6 A. As you're looking at that headboard --

7 Q. In Exhibit 9?

8 A. -- in Exhibit 9, the photograph is taken
9 in an eastwardly direction. That wall that the
10 headboard is on abuts 103 West Locust on the second
11 floor.

12 MR. HARDING: Renew my motion to admit.

13 MR. SHIELDS: No objection.

14 HEARING OFFICER FELTON: Complainants' Exhibit
15 Number 9, which depicts the complainants' bed and
16 acoustical headboard as it has been referred to, is
17 admitted.

18 BY MR. HARDING:

19 Q. Like to show you Complainants'
20 Exhibit 14. Do you recognize that?

21 A. Yes, I do.

22 Q. And what is it?

23 A. It is a computer-generated floor plan of
24 our residence at 105 West Locust.

1 Q. Do the measurements match the true
2 measurements of the place?

3 A. Without questioning my craftsmanship,
4 yes.

5 Q. I wouldn't question your craftsmanship,
6 sir.

7 At the bottom left as depicted, this says
8 north is up in this; is that correct?

9 A. That's correct. That is a fairly accurate
10 northerly representation.

11 Q. Okay. So, Benchwarmers would be on the
12 right of this picture?

13 A. That's correct. Along the master bedroom,
14 bath, dining room, kitchen, yes.

15 Q. Okay. And was all of this completed prior
16 to Benchwarmers opening?

17 A. Yes, it was.

18 Q. So this is in existence as of -- what are
19 we talking, April -- no, March 1998?

20 A. Mid March 1998, correct.

21 Q. When you moved in?

22 A. Right.

23 Q. Okay. There's a big open space; would be
24 a square if it didn't have a flat side at the upper

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1 right corner. What is that?

2 A. That is an unheated, unfinished portion of
3 the second floor which serves as storage, workshop,
4 and my personal indoor driving range.

5 Q. Are we talking about approximately 900
6 square feet?

7 A. Yes.

8 Q. Okay. And the rest of it is about 3300
9 square feet?

10 A. Our residence occupies about 3300 square
11 feet of the second floor, correct.

12 Q. And the whole footprint (sic) is about
13 4200 square feet?

14 A. Give or take, yeah.

15 MR. HARDING: Okay. At this point, I would
16 move to admit Complainants' Exhibit 14.

17 MR. SHIELDS: No objection.

18 HEARING OFFICER FELTON: Seeing as there is no
19 objection, Complainants' Exhibit Number 14 depicting

20 the floor plan of the complainants' residence is
21 admitted.

22 BY MR. HARDING:

23 Q. When did your dog die?

24 A. Specifically, the date I noted in my log,

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1 but it was summertime of this year.

2 Q. Okay. Did anything happen that evening in
3 relation to Benchwarmers?

4 A. Well, yes, it did. Diane and I were
5 sitting at the dining room table with the -- the
6 question before us as, you know, how do we deal with
7 the loss of a cherished pet, and --

8 Q. How long had you had her?

9 A. Eight years.

10 Q. And what happened?

11 A. Well, during an emergency surgery to try
12 to save her life, the dog was coming out of
13 anesthetic and had a cardiac arrest and died.

14 Q. And what happened that evening?

15 A. Well, that evening, as we were trying to
16 deal with the loss of our cherished pet, we had to

17 do so with the thumping music from our neighbors
18 blaring through our walls.

19 Q. How long did that go on?

20 A. It seemed like it was an eternity.

21 Q. Is there anything else that you want to
22 tell the board or that you think the board needs to
23 know?

24 A. I don't believe so.

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1 MR. HARDING: Then I have no further questions
2 of you, sir.

3 HEARING OFFICER FELTON: Mr. Shields, would you
4 like to proceed with cross-examination right now, or
5 I'll give you the option to proceed now or take a
6 break.

7 MR. SHIELDS: Could we take a break at this
8 point?

9 HEARING OFFICER FELTON: That would be fine.
10 While we're on the record, it's about two o'clock.
11 I think the parties would like to proceed as soon as
12 we can return.

13 Do you need more than 45 minutes, or would
14 you prefer not?

15 MR. HARDING: Absolutely not. Not a problem.

16 HEARING OFFICER FELTON: We'll proceed back on
17 the record at 2:45 with cross-examination of
18 Mr. Michael Pawlowski. Thank you.

19 (A recess was taken from 2:02 to 2:50 p.m.)

20 HEARING OFFICER FELTON: Back on the record.
21 It's 2:50 p.m. We're going to proceed with the
22 cross-examination of Michael Pawlowski.

23 However, Mr. Shields, you have a request
24 you would like to make?

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1 MR. SHIELDS: Yes. I have a witness, the mayor
2 of Fairbury, Bob Walter, and he's also a principal
3 at a local school district and has a series of
4 meetings and conferences that he needs to get back
5 to. And I was requesting that, if possible, we go
6 out of order and take his testimony at this time and
7 then come back for cross-examination.

8 HEARING OFFICER FELTON: Of Mr. Pawlowski?

9 MR. SHIELDS: Yes.

10 HEARING OFFICER FELTON: Then we would finish
11 up with the complainants' case in chief which would

12 still include --

13 MR. HARDING: What time does school let out?

14 MR. SHIELDS: Pardon?

15 MR. HARDING: What time does school let out?

16 I'm assuming he wants to be back for dismissal?

17 MR. SHIELDS: No. Is it meetings that you
18 have?

19 MR. WALTER: It's parent-teacher conferences.

20 MR. HARDING: Oh. Commencing what time?

21 MR. WALTER: Three until six.

22 MR. HARDING: Well, I don't see any reason why
23 we can't try and get rid of him in seven minutes.

24 HEARING OFFICER FELTON: All right. Seeing

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1 that there doesn't seem to be an objection, we'll
2 proceed right now. We'll postpone Mr. Pawlowski's
3 cross-examination.

4 MR. HARDING: Do you want the witness here, or
5 do you want him over there?

6 HEARING OFFICER FELTON: If you want to call,
7 Mr. Shields, this one witness for the purpose of
8 direct and then obviously the opportunity for
9 Mr. Harding to cross, and then we'll proceed again.

10 Off the record.

11 (A discussion was held off the record.)

12 MR. SHIELDS: If there is no objection, I would
13 have Mr. O'Day question Mayor Walter.

14 HEARING OFFICER FELTON: Is Mr. O'Day
15 affiliated with your firm?

16 MR. SHIELDS: We are associated together for
17 the purposes of this case.

18 HEARING OFFICER FELTON: Okay. So Mr. O'Day
19 will be -- are you asking to enter an appearance on
20 behalf of the respondents in this case?

21 MR. O'DAY: Yes, yes.

22 MR. HARDING: Street address and telephone in
23 the record would be sufficient for me.

24 HEARING OFFICER FELTON: Yes. Could you

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1 formalize your name and where you're practicing?

2 MR. O'DAY: Daniel G. O'Day. 124 Southwest
3 Adams, Suite 520, Peoria, Illinois, 61602.

4 HEARING OFFICER FELTON: Mr. O'Day, will you be
5 participating in any of the other examinations of
6 your witnesses?

7 MR. O'DAY: Possibly.

8 HEARING OFFICER FELTON: Okay.

9 (Witness sworn.)

10 ROBERT WALTER, JR.,

11 having been duly sworn by the court reporter,

12 testified upon his oath as follows:

13 DIRECT EXAMINATION

14 BY MR. O'DAY:

15 Q. Would you state your name for the record,
16 please?

17 A. Robert P. Walter, Jr.

18 Q. And, Mr. Walter, do you hold a public
19 office?

20 A. Yes, I do.

21 Q. What is your public office that you hold?

22 A. Mayor of the City of Fairbury.

23 Q. How long have you lived in Fairbury?

24 A. 48 years.

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1 Q. And how old are you?

2 A. 48 years.

3 Q. You're a native?

4 A. Yes.

5 Q. Have you been familiar, since a young age,
6 with the layout of the downtown area of Fairbury?

7 A. Yes.

8 Q. And has much changed in the way of
9 buildings in terms of their outward appearance in
10 downtown Fairbury in the area of Benchwarmers since
11 you were a lad?

12 A. Yes.

13 Q. And may I have the exhibits about the
14 pictures of the buildings?

15 HEARING OFFICER FELTON: The photographs?

16 MR. O'DAY: Yes.

17 HEARING OFFICER FELTON: Sure.

18 BY MR. O'DAY:

19 Q. I'm showing you what's been admitted as
20 Exhibit 7. In Exhibit 7, do you see the green
21 awning --

22 A. Yes.

23 Q. -- in the left part of the photo?

24 A. Yes.

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1 Q. Is that Benchwarmers?

2 A. Yes.

3 Q. And then do you see sort of a white awning
4 sticking out all the way over the sidewalk in that
5 photograph?

6 A. Yes.

7 Q. And does that go from the left towards the
8 right?

9 A. Yes.

10 Q. Whose building is that where you see that
11 sticking out?

12 A. Mr. and Mrs. Pawlowski.

13 Q. What kind of material is that made of?

14 A. I think it's -- well, it was a wooden
15 frame. Metal.

16 Q. And is there metal above to sort of
17 deflect rainwater and things like that?

18 A. There's some surface up there. I'm not
19 sure if it's metal now or if it's --

20 MR. HARDING: I would object to the relevance.

21 MR. O'DAY: It's relevant. It talks -- it's
22 going to relate to where sound could be conducted up
23 to the upward windows of their
24 establishment.

1 MR. HARDING: Okay.

2 HEARING OFFICER FELTON: I'm going to overrule
3 the objection.

4 BY MR. O'DAY:

5 Q. Then you see the windows above that
6 structure that we've just talked about?

7 A. Yes.

8 Q. And are those the windows -- have you been
9 in the apartment or --

10 A. No.

11 Q. -- up there?

12 A. No, I haven't.

13 Q. Do you know where it's located?

14 A. Yes.

15 Q. Is it located up in that area where you
16 see those windows above this white structure we've
17 been discussing?

18 A. Yes.

19 Q. How long has that white structure been
20 there?

21 A. The white meaning the supports?

22 Q. Yes.

23 A. A number of years. I couldn't guess how
24 long.

1 Q. Do you know where the front door of the
2 bar is for Benchwarmers?

3 A. Yes.

4 Q. Where is that?

5 A. (Indicating.) Right there, I think.

6 Q. Are you pointing just to the left in this
7 photograph of where this white structure is that
8 we've been talking about that goes out over the
9 sidewalk?

10 A. Yes.

11 Q. In that area of downtown Fairbury, what
12 kinds of establishments do you find at the ground
13 level?

14 A. There is a dentist's office, there's an
15 attorney's office in that particular block.

16 MR. HARDING: I'm going to object to the
17 relevance again.

18 MR. O'DAY: We're going to show it's a
19 commercial district.

20 MR. HARDING: It's a commercial district. So
21 stipulated.

22 HEARING OFFICER FELTON: I'm going to overrule
23 and just allow a little more of this line of

24 questioning, if the party is wishing to elicit some

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1 sort of information. Let's do that.

2 BY MR. O'DAY:

3 Q. Is there a department store across the
4 street?

5 A. Yes, there is.

6 Q. Are deliveries made in the downtown area
7 of Fairbury at night in your experience?

8 A. At night meaning?

9 Q. In the evening.

10 A. I don't know for sure.

11 Q. All right. Is there traffic in downtown
12 Fairbury in the evening hours and even into the
13 midnight, 1:00 in the morning hours?

14 A. Yes.

15 Q. When you see some cars parked in these
16 photographs --

17 A. Uh-huh.

18 Q. -- and the cars on the opposite side of
19 the street appear to be parking so that their fronts
20 are towards the curb?

21 A. Correct.

22 Q. And then on the side of Benchwarmers and
23 the structure with the white awning in front,
24 they're parked just regular parallel parking; is

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1 that correct?

2 A. Yes.

3 Q. Is there traffic to park in downtown
4 Fairbury during these hours of the night in your
5 experience?

6 MR. HARDING: Objection. No specification of
7 what hours.

8 BY MR. O'DAY:

9 Q. Let's say the hours of ten at night until
10 one in the morning, are there people parking in this
11 area -- these areas?

12 A. Yes.

13 Q. Is that the right of way? In other words,
14 is that land owned by the city or the -- or whoever
15 the road district is as opposed to the building
16 owners?

17 A. Yes, it is. It's city property.

18 Q. If there was sound coming from that

19 towards a building, would it be emanating from
20 Benchwarmers, or would it be emanating from the area
21 of the city right of way?

22 A. I don't know that. I don't understand
23 your question. Sound coming from --

24 Q. From the area of a parked car or whatever

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1 is happening with respect to a vehicle in that area?

2 A. It would be coming from the vehicle, I
3 would assume.

4 Q. In your years of living in Fairbury, have
5 there been times when you've heard music and other
6 noises coming from vehicular traffic in the downtown
7 area?

8 A. Yes.

9 Q. And loud music sometimes?

10 A. Yes.

11 Q. Have you heard a steady level of noise at
12 times in downtown Fairbury from the traffic?

13 A. I'd say more intermittent than steady.

14 Q. Sort of valleys and peaks sometimes?

15 A. Uh-huh. Uh-huh.

16 Q. Have you heard -- are there teenagers and

17 other young people with vehicles with loud stereos
18 in this area?

19 A. Yes.

20 Q. And do they travel the streets of downtown
21 Fairbury?

22 A. Yes.

23 Q. And park their vehicles in these areas
24 that are designated as parking areas?

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1 A. They could.

2 Q. In terms of what's allowable --

3 Is this marked?

4 MR. SHIELDS: No, it has not been marked.

5 BY MR. O'DAY:

6 Q. What's allowable in this commercial
7 district that you say these buildings are in, in
8 downtown Fairbury, in terms of your zoning
9 ordinances?

10 A. Any commercial establishment.

11 Q. And what could that include?

12 A. Private offices, restaurants; I suppose
13 any type of business.

14 HEARING OFFICER FELTON: I can mark it,

15 Mr. Shields. That's fine.

16 MR. HARDING: What have we got?

17 HEARING OFFICER FELTON: Why don't you --

18 MR. O'DAY: The zoning map of the City of
19 Fairbury.

20 MR. HARDING: Do you have the zoning
21 ordinance?

22 MR. O'DAY: We have the articulation of what's
23 allowable in a commercial district.

24 HEARING OFFICER FELTON: Are you asking us to

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1 mark this?

2 MR. O'DAY: Yes.

3 HEARING OFFICER FELTON: City of Fairbury
4 zoning map as Exhibit Number 1?

5 MR. O'DAY: Yes.

6 HEARING OFFICER FELTON: Show that to
7 complainants' counsel and --

8 MR. HARDING: Am I going to get copies?

9 MR. O'DAY: We can ask the mayor.

10 HEARING OFFICER FELTON: Exhibit Number 2 is
11 entitled Article 9, C, Commercial District. These

12 are Respondent's Exhibits 1 and 2.

13 Just note that you make sure -- make
14 available for the complainants copies of those
15 exhibits.

16 MR. O'DAY: Right.

17 BY MR. O'DAY:

18 Q. I'm showing you what's been marked as
19 Exhibit 1. Does that truly and accurately depict
20 the zoning for the City of Fairbury as it's been
21 approved by the city council and other governmental
22 bodies needed to approve a map of that kind?

23 A. Yes, is it.

24 Q. And have there been any significant

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1 changes in that over the last two years?

2 A. No.

3 MR. O'DAY: I offer Exhibit 1 into evidence.

4 MR. HARDING: Now, Exhibit 1 was which one, the
5 map?

6 MR. O'DAY: The map.

7 MR. HARDING: Certainly.

8 HEARING OFFICER FELTON: Okay. Exhibit

9 Number 1 is admitted. It's the City of Fairbury
10 zoning map.

11 BY MR. O'DAY:

12 Q. The city map is color-coded; is that
13 correct?

14 A. Yes, it is.

15 Q. And the city map is color-coded for
16 commercial district. What color would you call that
17 that is color-coded to be?

18 A. Red.

19 Q. And then there are two color-codings for
20 different kinds of residential districts. And would
21 you agree with me that those are green and pink?

22 A. Yes.

23 Q. Does the City of Fairbury have a lot of
24 land that's zoned purely for residential

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1 construction and living?

2 A. Yes.

3 Q. Would you -- how would you characterize --

4 MR. HARDING: Objection. What's "a lot"?

5 HEARING OFFICER FELTON: Yes.

6 BY MR. O'DAY:

7 Q. Well, how would you characterize the
8 percentage of land in the city limits available just
9 for people who want to live only near residences
10 versus the commercial district?

11 A. Strictly R1 residence would -- the R1 and
12 R2 combined?

13 Q. Yes.

14 A. I'd say probably 80 percent.

15 Q. So, if someone wants to live in Fairbury
16 and they want to be just by residences, 80 percent
17 of the town or the city is available for that kind
18 of living; is that correct?

19 A. That's an estimate.

20 Q. You can live within the zoning -- can you
21 live within the zoning laws and live in a commercial
22 district if you have a residence there?

23 A. Yes.

24 Q. That's not a violation of the commercial

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1 zoning to have a residence there, is it?

2 A. No, it isn't.

3 Q. Would it be a violation of the zoning laws

4 to have a commercial establishment in the
5 residential areas?

6 A. Yes, it would, unless a variance had been
7 applied for and approved.

8 Q. Exhibit 2, what is that?

9 A. It's identified Article 9, C, Commercial
10 District.

11 Q. Are those the permissible uses within a
12 commercial district in the City of Fairbury?

13 A. Yes, they are.

14 Q. There's a date down at the bottom of
15 3/28/97. Is that true?

16 A. Yes.

17 Q. And is that the date that these were last
18 amended?

19 A. Yes.

20 Q. Have those been in effect the whole time,
21 1998 and 1999, that's involved in this case?

22 A. Yes.

23 MR. O'DAY: I offer Exhibit 2 into evidence.

24 MR. HARDING: No objection.

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1 HEARING OFFICER FELTON: The Exhibit Number 2,

2 the commercial -- permissible commercial uses is
3 admitted.

4 MR. HARDING: That's Respondents' Number 2.

5 HEARING OFFICER FELTON: Yes.

6 MR. HARDING: Okay.

7 HEARING OFFICER FELTON: Thank you.

8 BY MR. O'DAY:

9 Q. With regard to these specific buildings
10 that were involved, were you here this morning when
11 there was testimony about the buildings that are
12 depicted in Exhibit 2?

13 A. No.

14 Q. Okay. I want you to look at Exhibit 2
15 which is the -- I'm sorry, their Exhibit 2 which
16 is --

17 HEARING OFFICER FELTON: Whose exhibit? Make
18 sure you're clear, Mr. O'Day.

19 BY MR. O'DAY:

20 Q. Complainants' Exhibit -- I'm sorry,
21 Exhibit Number 7. At one time was the building that
22 has the white awning on it and also the green
23 awning, was that owned by one establishment?

24 A. Yes.

1 Q. What establishment was that?

2 A. It was a carpet shop at one time.

3 Q. Okay. And was there ever a newspaper
4 there or a printer?

5 A. They did -- yes. The newspaper was
6 actually from the end building through the white
7 awning building. They used the entire.

8 Q. And were you living here when that
9 newspaper was here?

10 A. Uh-huh.

11 Q. Did you ever go inside?

12 A. Yes.

13 Q. Would you tell us --

14 MR. HARDING: Objection, relevance.

15 MR. O'DAY: We're establishing the character of
16 the neighborhood and how this has been used forever
17 in this --

18 HEARING OFFICER FELTON: Objection is
19 overruled.

20 MR. HARDING: The character -- if I may?

21 HEARING OFFICER FELTON: No. Actually, we'll
22 proceed.

23 MR. HARDING: Go ahead.

24 HEARING OFFICER FELTON: Proceed with

1 Mr. O'Day's question. He needs this time to
2 direct-examine his witness.

3 BY MR. O'DAY:

4 Q. Were you ever inside there when it was an
5 operating printing press?

6 A. Yes.

7 Q. And did you go all over the building?

8 A. Uh-huh. I -- I had been in all the
9 building.

10 Q. All right. Had you been in the part
11 that's towards the corner on the left-most part of
12 the photograph?

13 A. Yes.

14 Q. Had you been in the part to the right-most
15 part of the photograph?

16 A. Yes.

17 Q. And was it all used for one printing press
18 operation?

19 A. Yes.

20 Q. When the printing presses were going
21 there, could you hear them out on the street?

22 A. Yes.

23 Q. Would you tell us how they sounded?

24 A. A constant repetitive pounding, thumping

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1 noise as the presses would hit together.

2 Q. Do you have personal knowledge about the
3 hours of the day that those operated?

4 A. I can remember them -- depending upon
5 newspaper delivery time and when it was -- their
6 press time, it varied.

7 Q. Okay. About when would they have had
8 their printing presses going?

9 A. They could have been going from all
10 afternoon into the evening and even into early
11 morning hours.

12 Q. And are you sure of that?

13 A. Yes.

14 Q. When did they stop using that building for
15 a printing press?

16 A. I don't know the date.

17 Q. Was it approximately ten years ago?

18 A. I suppose.

19 Q. Would you -- if you were to put a -- some
20 adjectives on this particular area of town

21 historically since you've been here -- and you're a
22 native, your last 48 years -- what kind of
23 adjectives would you use to describe the downtown
24 part of Fairbury as opposed to the parts that are

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1 color-coded as being solely residential areas?

2 A. Probably noisy. Those might be
3 adverbs.

4 MR. HARDING: Pardon? I didn't catch the
5 comment.

6 HEARING OFFICER FELTON: Could be some adverbs
7 describing also, as well as adjectives.

8 BY MR. O'DAY:

9 Q. I've forgotten that I was dealing with a
10 principal.

11 Please proceed.

12 A. It would be loud, a lot of activity,
13 noisy, busy.

14 Q. What is the nearest other town or city of
15 any significant size to Fairbury?

16 A. Pontiac.

17 Q. How far away is that?

18 A. Fifteen miles.

19 Q. All right. Is it fair to say that -- what
20 kind of area separates Fairbury from Pontiac and
21 other cities that might be of any significant size?
22 Is it agricultural?

23 A. Yes.

24 Q. Is it fair to say that this small area

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1 that's color-coded commercial in downtown Fairbury
2 has historically been a draw for people to come in
3 from those quieter areas to congregate?

4 A. Yes.

5 Q. Are there other bars and restaurants in
6 downtown Fairbury on Locust Street besides
7 Benchwarmers?

8 A. Yes.

9 Q. And what are the names of those
10 establishments?

11 A. Rathbun's Tap, the VFW, Wild Willie's.

12 Q. Do you know whether there were ever any
13 establishments on the second floor of this building
14 that's shown in Complainants' Exhibit 7?

15 A. Yes.

16 Q. What kind -- was there ever an
17 establishment that sold alcohol in the second floor
18 of this building?

19 A. Yes.

20 Q. When was that?

21 A. I'm not -- a number of years ago.

22 Q. And what was it?

23 A. The American Legion.

24 Q. All right. When the American Legion was

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1 up there on the second floor, was it on the part
2 that's got the green awning or the part that's got
3 the white awning out in front that goes over the
4 whole sidewalk?

5 A. It's in the part that's the green awning,
6 farthest to the right.

7 MR. HARDING: Excuse me, is that indicating
8 101?

9 BY MR. O'DAY:

10 Q. Is that indicating where Benchwarmers is?

11 A. Yes.

12 MR. HARDING: Thank you.

13 HEARING OFFICER FELTON: Mr. Harding, it's fine

14 -- I would prefer if you raise it in the form of an
15 objection as opposed to questioning.

16 MR. HARDING: I'm sorry. I didn't understand
17 his testimony.

18 HEARING OFFICER FELTON: That's fine.

19 MR. HARDING: I don't have color over here
20 anymore.

21 BY MR. O'DAY:

22 Q. Is it -- would you characterize the
23 surrounding areas to Fairbury as being almost
24 exclusively agricultural?

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1 A. Yes.

2 Q. Would you characterize the outer edges of
3 Fairbury going in towards this commercial area as
4 being a mixture of industrial and residential for
5 the most part?

6 A. Yes.

7 Q. And then sort of at the heart of this
8 whole area where you've got this agricultural moving
9 into residential, moving into commercial, there's
10 the name of a street that is the main drag of

11 Fairbury; is that correct?

12 A. Yes.

13 Q. What is the name of the street that's the
14 main drag of Fairbury?

15 A. Locust.

16 Q. And what street is Benchwarmers on?

17 A. Locust.

18 Q. What street are these other bars on?

19 A. Locust.

20 Q. And are having taverns, establishments on
21 Locust Street consistent, in your opinion, with good
22 zoning practices and making good use of land
23 planning insofar as it concerns Fairbury and the
24 surrounding agricultural lands?

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1 A. Yes, it is.

2 Q. Have you had any conversations or meetings
3 with Mr. Pawlowski, the complaining witness in this
4 case?

5 A. One-on-one you mean, individually?

6 Q. Yes.

7 A. No.

8 Q. All right. Do you recall conversations in

9 meetings with him in -- with others present?

10 A. Yes.

11 Q. When is the first such meeting or
12 conversation that you recall with him?

13 A. Prior to August 4th, I don't know a
14 specific date.

15 Q. Let me -- I forgot to ask you something.
16 How long have you been the mayor?

17 A. Since '97. April of '97.

18 Q. Were you on the city council before that?

19 A. Yes.

20 Q. How long were you on the city council?

21 A. Sixteen years.

22 Q. Sixteen years before 1997 you were on the
23 city council. And in 1997 you became the mayor?

24 A. (Witness nods head.)

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1 Q. You were elected?

2 A. Yes.

3 Q. On August 4th, 1998, did you have a
4 conversation with Mr. Pawlowski?

5 A. We had a hearing --

6 Q. All right.

7 A. -- he was involved with.

8 Q. How did that hearing come about?

9 A. He had questioned the violation of a
10 possible ordinance.

11 Q. Do you wear another hat besides being
12 mayor here in Fairbury?

13 A. Yes.

14 Q. What other hats do you wear?

15 A. The liquor commissioner for the city.

16 Q. And is that automatic? Does that come
17 with being mayor?

18 A. Yes.

19 Q. Did you have any kind of disability to
20 serve as liquor commissioner in that particular
21 case; in other words, did you feel you had any kind
22 of conflict of interest or anything like that?

23 A. No.

24 Q. Did you feel that you could be fair and

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1 impartial in being -- in hearing that case?

2 A. Yes.

3 Q. Would you tell us what you heard from

4 Mr. Pawlowski at that hearing?

5 A. I heard from he and his wife both their
6 concerns about the noise level and the disruption to
7 their, their life-style.

8 Q. And do you have anything against them
9 personally?

10 A. No.

11 Q. All right. And do you have anything
12 personally in favor of the owners of Benchwarmers?

13 A. No.

14 Q. Did you try to be fair and impartial when
15 you were hearing about this issue?

16 A. Yes, I did.

17 Q. And do you feel you were fair and
18 impartial?

19 A. Yes, I do.

20 Q. Tell us what you recall about some of
21 their concerns.

22 A. Well, basically it was the concern
23 regarding the noise. They had filed some complaints
24 with the police department, and they were concerned,

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1 I think, basically about the disruption of their
2 life-style.

3 Q. Did you convene a public hearing?

4 A. Yes.

5 Q. And did you find that they, in fact, felt
6 the way that they felt, that they were telling the
7 truth when they said that they felt that way?

8 A. Definitely.

9 Q. Why was it then that you decided not to do
10 anything about it? Would you tell us your reasons
11 in the record, please?

12 A. The existing ordinance didn't specify
13 acceptable or nonacceptable sound levels. Our
14 ordinance did not differentiate between residential
15 sound levels versus commercial sound levels.

16 The three reports -- two reports that I
17 had read from the police officers didn't indicate
18 that -- through their personal evaluation that the
19 noise levels were excessive. And then the fact that
20 it was a commercially zoned area.

21 Q. Did it -- in your opinion, as a person who
22 had been here for 48 years in this community and
23 somebody who had been on the city council for
24 sixteen years, was it?

1 A. Uh-huh.

2 Q. Before you were elected mayor, then been
3 mayor or since 1997, was it out of character for
4 this particular area for there to be some music,
5 noise within an establishment?

6 A. It's not out of character at all.

7 Q. Did you -- do you have an opinion
8 regarding whether it was unreasonable for
9 Benchwarmers to have these sounds within its
10 premises that, on occasion, might be heard outside?

11 A. Do I think it's unreasonable?

12 Q. Right.

13 A. Realizing the nature of the business, no.

14 Q. Would you characterize this Locust Street
15 as the focal point of a number of square miles
16 around it in terms of where business is conducted?

17 A. Yes.

18 Q. Have you had any complaints from the R1 or
19 R2 districts in town about noise from Benchwarmers?

20 A. No.

21 Q. Have your only complaints concerning noise
22 from Benchwarmers come from the adjacent commercial
23 building used as a residence by the Pawlowskis on
24 the second floor?

1 A. Yes. That's been the only source.

2 Q. Is it true that the residents of Fairbury
3 have not come to you except for the Pawlowskis and
4 asked for this to be abated?

5 A. That's correct.

6 Q. Have you been at other meetings attended
7 by the Pawlowskis?

8 A. The city council meetings.

9 Q. And has the city council discussed this
10 issue, the city council of Fairbury?

11 A. Yes, they have, on a number of occasions.

12 Q. So is it fair to say that you've
13 considered it as liquor commissioner and as mayor,
14 and the city council members have considered it as
15 well as a city council?

16 A. Yes.

17 Q. And would you put into the record what
18 your unseen analysis has been by way of city council
19 acclamations or affirmations?

20 MR. HARDING: Are we asking for an opinion?

21 Objection, opinion.

22 MR. O'DAY: Well, I think the statutory factors

23 for what's to be considered for a nuisance can call
24 into question the character of the community and

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1 reasonableness and things like that. There's four
2 or five of them, and that's what I'm going after
3 here. And here you have an on-the-scene, by the
4 people who are the city fathers, making a
5 determination. I think it would probably be
6 relevant.

7 HEARING OFFICER FELTON: Objection is
8 overruled. Actually, to the extent that Mr. Walter
9 can give his own personal knowledge and opinion, we
10 will allow the questioning to proceed.

11 MR. HARDING: Well, then the other thing, I
12 have to object as to the hearsay because it's asking
13 for the opinions of others as well.

14 MR. O'DAY: Well, I will break it down between
15 his own personal opinion and what's been decided at
16 meetings.

17 HEARING OFFICER FELTON: Let's see how that
18 proceeds. We'll make a determination at that time.

19 BY MR. O'DAY:

20 Q. Have you been at city council meetings

21 where this matter has been discussed and where city
22 council members have given either their vote or
23 their input as to what should be done?

24 A. Yes, I have.

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1 Q. And do you recall approximately when those
2 meetings would have occurred?

3 A. On or before August 4th and some after.

4 Q. Before August 4th, was there a consensus
5 that there should be a public hearing?

6 MR. HARDING: Objection. Best evidence rule.
7 Whatever has been done by the council is going to be
8 reflected documentarily.

9 MR. O'DAY: I think if somebody is at a city
10 council meeting, they can say what happened there at
11 that meetings. That's not the best evidence.

12 HEARING OFFICER FELTON: The objection is
13 overruled. I think Mr. Walter can testify as to
14 what occurred at the meetings if he was there.

15 BY MR. O'DAY:

16 Q. Were you there?

17 A. Yes.

18 Q. All right. Would you tell us what
19 happened?

20 A. Well, the discussions among the council
21 members have been regarding the, the sound level and
22 whether or not being in a commercial area it was
23 inappropriate. And I don't know --

24 Q. Have there been any dissenters about --

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1 A. No.

2 Q. -- reaching a consensus on this?

3 A. No.

4 Q. What has been the consensus?

5 MR. HARDING: Objection, hearsay.

6 BY MR. O'DAY:

7 Q. At these meetings that you've -- only to
8 the extent you've attended and heard what it was.

9 HEARING OFFICER FELTON: Objection is
10 overruled. Only to the extent that you can
11 personally offer your knowledge.

12 A. The comments? The comments I've heard was
13 that the noise level was not out of line. It was a
14 commercial zoned area, and it was not inappropriate.

15 Q. Approximately how many of these city

16 council meetings have you been at where that kind of
17 a consensus has been reached?

18 A. I -- I don't know. I can't give a
19 number. I'm not --

20 Q. More than three?

21 A. Yes.

22 Q. Less than ten?

23 A. Probably less than ten.

24 Q. How large a city is Fairbury? How many

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1 people live here?

2 A. 3,663 roughly.

3 Q. Do you know approximately how many people
4 live in the surrounding agricultural areas? Do you
5 have a figure for, say, a metro area of Fairbury
6 approximately?

7 A. No, I don't.

8 Q. Is there any other area in the adjacent
9 six-mile radius all the way around Fairbury where
10 people can go to congregate and have a good time and
11 have noise other than Locust Street in downtown
12 Fairbury, Illinois?

13 A. Yes. There would be some opportunities, I
14 think, in Forrest.

15 Q. All right.

16 A. But that would be it, within six miles'
17 radius.

18 Q. How about within a five-mile radius?

19 A. Not within five.

20 Q. All right. This Locust Street in downtown
21 Fairbury, this is the place within a five-mile
22 radius around; is that right?

23 A. Yes.

24 Q. It's the focal point of the town square,

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1 if you will; is it fair to call it?

2 A. Yes. Yes.

3 MR. O'DAY: Those are my questions.

4 MR. HARDING: Do you mind?

5 HEARING OFFICER FELTON: Yes, please.

6 CROSS-EXAMINATION

7 BY MR. HARDING:

8 Q. Do you know what a roadhouse is, sir?

9 A. Pardon me?

10 Q. Do you know what a roadhouse is?

11 A. No.

12 Q. Never heard of a roadhouse? Tavern
13 located on a public highway, away from housing, away
14 from cities?

15 A. No, I haven't.

16 Q. Never seen one?

17 A. I'm sure I've seen one.

18 Q. What's the county seat of Livingston
19 County?

20 A. Pontiac.

21 Q. Is there anyone else living in any
22 commercial areas in Fairbury?

23 A. Yes.

24 Q. About how many people out of the 3,363

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1 residents live in commercial areas?

2 A. Five to seven percent of the population.

3 Q. And to your knowledge, who is the next
4 nearest residential neighbor after the Pawlowskis to
5 Benchwarmers?

6 A. I know there are apartments above the
7 dental office, and I think the attorney's office,

8 but I don't know who lives there.

9 Q. Do you know the address of the dental
10 office?

11 A. No.

12 Q. Do you know the address of the attorney's
13 office?

14 A. No.

15 Q. Attorney's office, is it a higher number
16 than 105; 107, 109, 111, something like that?

17 A. Yes.

18 Q. So it has the --

19 A. The attorney's office would come closer.

20 Q. It has the Pawlowskis' office between it
21 and Ben-- the Pawlowskis' home between it and
22 Benchwarmers?

23 A. Yes.

24 Q. Now, point of fact, Locust -- you cannot

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1 go through town on Locust -- into town, through
2 town, and out of town on Locust, can you? You have
3 to go down to 24 and come up, across the tracks,
4 take a left, whatever?

5 A. You can enter Locust from the east, but it

6 would dead-end on the west edge of town.

7 Q. Where does it end out on the east?

8 A. Back around on 24. It curves around to
9 24.

10 Q. So you have to take a turn off of 24?

11 A. Yes.

12 Q. To your knowledge, when did the Blade
13 press close its operation at 101 to 105 West Locust?

14 A. I think ten years was mentioned. That
15 would be a guess. I'm not honestly sure.

16 Q. The Blade's a weekly, right?

17 A. Yes.

18 Q. Always been a weekly?

19 A. Yes.

20 Q. Do you know the next nearest tavern to the
21 Pawlowskis' after Benchwarmers?

22 A. East or west of theirs?

23 Q. Either way.

24 A. Yes.

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1 Q. What is that?

2 A. West would be Wild Willie's, and east

3 would be the VFW.

4 Q. Okay. Where is the VFW now?

5 A. It would be about a block and a half east
6 of their house.

7 Q. Okay. And where is Wild Willie's in
8 relation to them?

9 A. A block, probably a total block west.

10 Q. Okay. Now, the Pawlowskis' use of their
11 premises for a residence is allowed under the zoning
12 code, is it not?

13 A. Yes.

14 Q. Any use allowable in a R1 or R2?

15 A. Uh-huh.

16 Q. So, that plus the commercial is allowed,
17 right?

18 A. Right.

19 Q. Have you been privy to any of the
20 discussions between any of the respondents,
21 particularly Mr. Quinley and Mr. Johansen, and the
22 Pawlowskis?

23 A. Privy to them meaning have I heard them?

24 Q. A party to them.

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1 A. Not direct conversations.

2 Q. Okay. Have they been related to you?

3 A. Yes.

4 Q. By whom?

5 A. Mr. Johansen, I believe.

6 Q. When was that?

7 A. Prior to August 4th.

8 Q. Was it at a meeting?

9 A. It was in a conversation when I walked
10 through the facility as it was being built.

11 Q. Okay. And what was said?

12 A. He gave me an overview of what they were
13 doing in the building and the structure itself, what
14 their plans were.

15 Q. What did he say about his conversations
16 with Mr. Pawlowski?

17 A. I think that he had attempted to talk with
18 him about his concerns.

19 Q. And --

20 A. And he was not willing to talk with him.

21 Q. That was how Mr. Johansen characterized it
22 in conversation to you?

23 A. Yes. Yes.

24 Q. Do you have any way of knowing whether

1 that was true or not?

2 A. No.

3 Q. Did you have any other conversations with
4 any of the respondents here?

5 A. No.

6 Q. Have you had any conversations with their
7 attorneys?

8 A. Just prior to today's meeting when I was
9 given the summons or --

10 Q. Were you subpoenaed, sir?

11 A. Pardon me?

12 Q. Were you subpoenaed?

13 A. Yes.

14 Q. Oh. Sorry. I wasn't aware of that.

15 Now, you essentially, along with the city
16 council -- and you have a city manager, I assume,
17 something?

18 A. City superintendent.

19 Q. City superintendent. You are the city
20 mayor?

21 A. Uh-huh.

22 Q. City of 3,363 people, you service others
23 outside the community as well; you have people
24 outside of the community that come into the

1 community?

2 A. Yes.

3 Q. You said there are certain things you do
4 annually, do you not, as a mayor?

5 A. Yes.

6 Q. One of the things is sign a budget?

7 A. Yes.

8 Q. You float a levy?

9 A. Yes.

10 Q. And you depend upon -- is this a home rule
11 unit?

12 A. Yes.

13 Q. It is. So you also have both levy, sales
14 tax, and so on, right?

15 A. Yes.

16 Q. You have a portion of the state sales tax
17 that you get?

18 A. Uh-huh.

19 Q. But in any event, what you get is roughly
20 close to the same amount of money every year, right?

21 A. Roughly.

22 Q. Might get maybe three or four in these

23 noninflationary times, maybe 3 or 4 percent

24 additional each year?

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1 A. Depending on sales.

2 Q. Have you ever been a party to a

3 constitutional fight in the courts?

4 A. No.

5 Q. Do you want to be?

6 A. Do I want to be?

7 Q. Do you want to be?

8 A. Not particularly.

9 Q. Okay. Would that be costly for the city?

10 A. Yes.

11 MR. O'DAY: Objection. Relevance on this?

12 HEARING OFFICER FELTON: Mr. Harding, what is

13 the point you are trying to make out of that

14 question?

15 MR. O'DAY: If he's trying to threaten the

16 witness, that's not relevant.

17 MR. HARDING: No, I'm not trying to threaten

18 the witness. I'm trying to ask the witness a nice

19 question, if that has ever been mentioned to the

20 witness.

21 HEARING OFFICER FELTON: Okay. We'll overrule
22 the objection for the purposes of obtaining that
23 information, if the witness can respond to that. If
24 not, that's fine.

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1 BY MR. HARDING:

2 Q. At the August 4th meeting, was it
3 mentioned to you that the ordinance which was being
4 sought to be employed against the liquor license to
5 the Benchwarmers Pub might have been considered
6 unconstitutionally vague?

7 A. I don't recall that term.

8 Q. Was there any indication on -- at that
9 time that the decision in the other direction,
10 should there have been a decision against the liquor
11 license, might have led to further action?

12 A. A comment made to me?

13 Q. Yes.

14 A. No.

15 Q. Either in the meeting or after?

16 A. No.

17 Q. In your opinion as liquor commissioner,

18 you stated that the ordinance was too vague in terms
19 of noise limits to be enforced?

20 A. It didn't -- yes.

21 Q. And have you had any discussions as
22 regards the Pawlowskis and Benchwarmers with any of
23 the city's employees?

24 A. Yes.

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1 Q. Okay. Have you sought legal counsel?
2 Have you asked for the opinion of your attorney on
3 these subjects?

4 A. Prior to talking to the city employees --

5 Q. No.

6 A. -- you mean?

7 Q. Not necessarily. I'm asking you now, have
8 you talked to the city attorney about it?

9 A. Yes.

10 MR. O'DAY: I don't know if the city has an
11 attorney-client privilege, but I would think that
12 would be something he might -- that the hearing
13 officer may want to -- may want to instruct the
14 witness on.

15 I'm not the city's attorney, but before
16 anybody blurts out any confidential, attorney-client
17 privilege advice in executive session of a city
18 council meeting, I would think that a nonlawyer
19 witness would be instructed on that.

20 HEARING OFFICER FELTON: So noted.

21 Mr. Harding, you can ask this witness whether or not
22 he's had a conversation with you.

23 You have the right not to respond to any
24 of those, speak with your own attorney or the city's

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1 attorney about that as it relates to this matter
2 because that is an attorney-client privilege.

3 THE WITNESS: Okay.

4 HEARING OFFICER FELTON: But you can answer
5 that question whether or not you've had any
6 conversations.

7 So, please proceed.

8 BY MR. HARDING:

9 Q. Specifically, I am not asking you for the
10 content of your conversations with the city
11 attorney. Please do not respond with the content of
12 the conversations.

13 Other than as to the general subject
14 matter, have you had conversations with the city
15 attorney as regards Benchwarmers and the Pawlowskis?

16 A. Yes.

17 Q. And do you recall the first such occasion?

18 A. No, I don't.

19 Q. Do you recall whether you approached the
20 city attorney about this or whether the city
21 attorney approached you?

22 MR. O'DAY: I object. At this time, it's come
23 way far afield of what would become relevant or
24 material.

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1 HEARING OFFICER FELTON: I'm going to actually
2 sustain the objection. I'm not sure -- I don't see
3 the relevance here and, you know, it is getting kind
4 of on the cusp of Mr. Walter's potential
5 conversations with any city attorney.

6 MR. HARDING: Well, the need for advice. If he
7 felt the need for advice, that would impact his
8 decision.

9 HEARING OFFICER FELTON: Well, he's already

10 testified to the fact that he consulted his
11 attorney.

12 MR. HARDING: Right. I want to know how many
13 times.

14 HEARING OFFICER FELTON: I've sustained the
15 objection.

16 MR. HARDING: Okay.

17 HEARING OFFICER FELTON: I don't see the
18 relevance there.

19 BY MR. HARDING:

20 Q. Are there any bars near your home, sir?

21 A. No.

22 Q. Where do you live?

23 A. Five -- south side of town.

24 Q. South side of town? Is that a

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1 residentially zoned area?

2 A. Yes.

3 Q. R1-R2?

4 A. Yes. R1.

5 Q. R1. And if a bar moved in next door to
6 you and proceeded to send noise into your home, you
7 would object?

8 A. In an R --

9 MR. O'DAY: Object. That's a hypothetical
10 based on facts that aren't in evidence and, based on
11 the way the drawing is, what could never be in
12 evidence.

13 HEARING OFFICER FELTON: Mr. Harding, do you
14 have a response to that?

15 MR. HARDING: There's nothing wrong with a
16 hypothetical as I know.

17 MR. O'DAY: Well, it has to be based on --

18 MR. HARDING: I don't know of a hypothetical
19 being objectionable.

20 HEARING OFFICER FELTON: If Mr. Walter -- I'm
21 going to actually overrule the objection. If
22 Mr. Walter can, based on his personal knowledge, in
23 some way respond to your question or your
24 hypothetical as you've stated, then we'll allow

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1 that. But if not, then we won't.

2 BY MR. HARDING:

3 Q. Do you recall the question?

4 A. Restate it, please.

5 Q. If a bar moved in next door to you and
6 started sending sound waves into your home and
7 disturbed you, would you make objection to that?

8 A. Yes.

9 MR. HARDING: Thank you. I have no further
10 questions, sir.

11 HEARING OFFICER FELTON: Anything on redirect,
12 Mr. O'Day?

13 MR. O'DAY: Yes.

14 REDIRECT EXAMINATION

15 BY MR. O'DAY:

16 Q. If a bar located in an R1 area of Fairbury
17 where you lived, would you object to that?

18 A. Yes.

19 Q. Why would you object to that?

20 A. Because the purpose for zoning and
21 identification of specific areas is to control where
22 they're located.

23 Q. The Blade that was in these buildings
24 depicted in Complainants' Exhibit 7 some years

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1 ago --

2 A. Yes.

3 Q. -- did that organization print just the
4 Fairbury weekly newspaper?

5 A. No.

6 Q. How many newspapers did it print?

7 A. At one time, I think, seven different
8 small papers. And then they did commercial printing
9 also.

10 Q. So is it fair to characterize that
11 printing operation as being one night a week?

12 A. No. It would be more than one night a
13 week.

14 MR. O'DAY: Those are my questions.

15 HEARING OFFICER FELTON: Okay. Mr. Walter is
16 excused. Thank you very much for your time.

17 THE WITNESS: Thank you.

18 MR. HARDING: If I could take a quick break?

19 HEARING OFFICER FELTON: Yes. Take a
20 five-minute break. Be back at quarter to.

21 (A recess was taken from 3:41 p.m. to 3:45
22 p.m.)

23 HEARING OFFICER FELTON: Mr. Harding, if you
24 can raise your question.

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1 MR. HARDING: Yes. My question is, I now have
2 been given to understand that there are subpoenas
3 that have been issued here, and I have not received
4 copies. A, I would like to get copies within the
5 next couple of days; and B, I would like to know
6 now, if I could, who has been subpoenaed.

7 HEARING OFFICER FELTON: Mr. Shields, would you
8 please respond to that question? I think it's fair
9 that you can provide -- it's a fair request, if you
10 can provide Mr. Harding those copies by -- I would
11 say by the end of this week, by Friday, the 12th.

12 MR. HARDING: Well, if we're back tomorrow, can
13 I get them tomorrow?

14 HEARING OFFICER FELTON: Well, let's just make
15 this -- Mr. Shields can at least respond to your
16 question, and then we'll address the issue.

17 MR. SHIELDS: I don't believe it's required
18 under the rules, and I have complied with the rules
19 by forwarding the subpoenas to the clerk and to the
20 hearing officer.

21 MR. HARDING: Filed document need not be
22 served?

23 HEARING OFFICER FELTON: And the witnesses who
24 you have subpoenaed are, if you wouldn't just mind

1 identifying those?

2 MR. SHIELDS: Yeah.

3 MR. HARDING: Am I going to get copies?

4 HEARING OFFICER FELTON: We're going to address
5 that question in a second, sir.

6 MR. SHIELDS: Subpoenas were served on Michael
7 Frickey, Kevin Ryan, Sharon Walter, Mike White.

8 MR. HARDING: Michael Frickey. What was the
9 next one?

10 MR. SHIELDS: Kevin Ryan.

11 HEARING OFFICER FELTON: If I'm not mistaken,
12 Mr. Shields, aren't these listed in your fourteen
13 witnesses?

14 MR. SHIELDS: Yes, they're all listed in the
15 witnesses.

16 MR. HARDING: All right. Sharon Walter.

17 HEARING OFFICER FELTON: They're listed in the
18 fourteen witnesses, just to clarify, Mr. Harding,
19 that Mr. Shields provided, after a prehearing
20 conference.

21 MR. HARDING: They're on the witness list. Who
22 is the fourth one? I have Frickey, Ryan, Walter.

23 MR. SHIELDS: Mike White. And the mayor and
24 the city clerk.

1 MR. HARDING: And the city clerk's name?

2 MR. SHIELDS: Brenda DeFries.

3 MR. HARDING: Brenda DeFries.

4 MR. SHIELDS: Also on the list.

5 MR. HARDING: I don't contest they are all on
6 the list.

7 HEARING OFFICER FELTON: I wanted to make sure
8 the record was clear that these aren't a surprise,
9 in a sense, to the complainants.

10 MR. HARDING: The only surprise is the fact of
11 the subpoenas.

12 HEARING OFFICER FELTON: As for the copies,
13 Mr. Shields is correct. Section 103.163 does not
14 specifically require a copy to be served on the
15 opposing party, although if he has no objection, if
16 he can make the reasonable -- it's not an
17 unreasonable request of Mr. Harding. It's an issue
18 I think the parties should resolve themselves. If
19 they want to take it up before me right now, then I
20 can hear your motions.

21 MR. HARDING: I would just like copies of

22 them.

23 HEARING OFFICER FELTON: Do you have an
24 objection to that? If so, I'll deal with

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1 Mr. Harding.

2 MR. SHIELDS: I guess I feel that I have
3 complied with the rules, and there's no additional
4 requirement. I have no strong objection.

5 I'm sorry. If I may just explain, I've
6 had the flu for the last week, and I am considerably
7 weakening down at this point. So I have no specific
8 objection to giving Mr. Harding the copies. I have
9 not made those copies yet.

10 HEARING OFFICER FELTON: In light of the fact
11 that the Section 103 does not specifically require
12 it, however, Mr. Shields is amenable to providing
13 you with copies, I would just ask that he -- that he
14 mail those so that they are received by this Friday,
15 November 12th.

16 MR. HARDING: Thank you.

17 HEARING OFFICER FELTON: We will now proceed
18 with Mr. Shields' cross-examination of Michael
19 Pawlowski whenever you're ready.

20 MR. O'DAY: If Your Honor please, Mr. Shields
21 had planned to cross-examine this witness. I think
22 he is wearing down. I just offered to cross-examine
23 the witness.

24 If Your Honor please, I would like to do

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1 that even though it was Mr. Shields who made
2 objections during this direct testimony. Your Honor
3 is here, and it won't show on the transcript, but I
4 think that people who are here can see that
5 Mr. Shields is noticeably becoming somewhat --
6 someone with less than the energy than he had
7 earlier in the day.

8 HEARING OFFICER FELTON: Mr. Harding, do you
9 have any objection to that?

10 MR. HARDING: No, of course not.

11 HEARING OFFICER FELTON: I see no objection.

12 MR. O'DAY: Thank you.

13 HEARING OFFICER FELTON: Let's proceed.

14 MICHAEL PAWLOWSKI,
15 having been previously sworn by the court reporter,
16 testified upon his oath as follows:

17

CROSS-EXAMINATION

18 BY MR. O'DAY:

19 Q. Mr. Pawlowski, would you look at

20 Exhibit 7, your Exhibit 7, please?

21 HEARING OFFICER FELTON: Any of the other

22 exhibits, will you be using those?

23 MR. O'DAY: Possibly.

24 BY MR. O'DAY:

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1 Q. In Complainants' Exhibit 7, there is a
2 white awning on the front of the building, is that
3 correct, your building?

4 A. That is, indeed, correct.

5 Q. And that white awning has wooden posts
6 that come all way out to the curb or near the curb;
7 is that correct?

8 A. That is not correct.

9 MR. O'DAY: May I approach the witness?

10 HEARING OFFICER FELTON: Yes, you may.

11 BY MR. O'DAY:

12 Q. There's a -- there are some white posts
13 that are on the street side of that awning in front
14 of your building; is that correct?

15 A. Correct.

16 Q. And how far away would you say that those
17 posts are from the edge of the curb where the street
18 surface begins?

19 A. Approximately 18 to 24 inches.

20 Q. All right. And how far away from the
21 building are those white posts?

22 A. Approximately 10 feet.

23 Q. And is it fair to say that there is a
24 ten-foot awning that protrudes from your building

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1 over to where those white posts are?

2 A. Yeah, and has since 1900.

3 Q. And what is the material that is -- that
4 that awning is made of at the top, the majority of
5 the surface of it?

6 A. Well, the entire surface is manufactured
7 out of a polyvinylchloride material which is exactly
8 the same material as the awning of my neighbor's. I
9 believe that to be a PVC awning as well.

10 Q. All right. And this PVC awning that you
11 have --

12 A. Yes.

13 Q. -- it's hard to the touch?

14 A. Depends on the temperature.

15 Q. All right. And it can vary according to
16 the temperature?

17 A. Sure.

18 Q. And sometimes it's hot, and sometimes it's
19 harder?

20 A. As is anything, yes.

21 Q. All right. Did you ever take any noise
22 measurements below that awning or above that awning?

23 A. Below or above the awning?

24 Q. Right.

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1 A. So you're referring to the sidewalk?

2 Q. Yes. Either on the sidewalk, below the
3 awning, or right above the awning in between the
4 awning and your windows of your second floor?

5 A. No, I did not.

6 Q. Did these windows that are shown on
7 Complainants' Exhibit 7 above that white awning,
8 were those white -- you see those four white posts?

9 A. These?

10 Q. Yes.

11 A. Uh-huh.

12 Q. Those are the posts that you say are 18 to
13 24 inches from the curb?

14 A. Uh-huh.

15 Q. And then there's a -- so it doesn't rain
16 on somebody walking underneath there on that
17 sidewalk, right?

18 A. Right.

19 Q. Because this material, this plastic
20 material covers that whole surface; is that correct?

21 A. It's not continuous. There's a cutout for
22 the tree in the center.

23 Q. All right. Yes. There's a tree that --
24 there's a hole in this awning?

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1 A. Not a hole. It's a cutout.

2 Q. All right. How much space is there around
3 the tree that's not either awning or tree but it's
4 just air?

5 A. Oh, I couldn't tell you. I wouldn't even
6 hazard a guess.

7 Q. What are -- would you tell us on
8 Exhibit 7, your Exhibit 7, which are the windows of
9 this master bedroom that you've been talking about
10 where the noise becomes what you say is not
11 tolerable?

12 A. What was the question?

13 Q. Which windows in this picture are those of
14 your master bedroom?

15 A. They would be the two at the far east side
16 of the building.

17 Q. All right. Do you see where -- there is a
18 point, sir, where there is a window that comes out
19 of -- I don't know if they would call that a
20 cantilevered window or bay window. It's a
21 second-floor window that is a white structure that
22 has several windows built into it. Do you see that?

23 A. Yes.

24 Q. And approximately 25 percent across the

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1 photograph moving left to right?

2 A. Sure, I see it.

3 Q. And then are you saying that moving to the
4 right that it would be the next two windows that we

5 see on the second floor?

6 A. They would be the first two windows in the
7 red brick building from the eastern side.

8 Q. All right.

9 A. Because that window is not part of the bay
10 window, but these two windows are a part of my
11 master bedroom.

12 Q. And then, sir, when you move further
13 towards the rear of your structure, is it fair to
14 say that the noise levels are not as noticeable?

15 Let me --

16 A. How far?

17 Q. Let me ask, where is the guest bedroom?

18 A. The guest bedroom is on the far west side
19 of our building.

20 Q. All right. Where is your kitchen?

21 A. The kitchen is on the southeast corner.

22 Q. And where would that be in relation to
23 these two windows that represent your master bedroom
24 windows?

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1 A. These two windows represent the front of

2 the building. The kitchen is actually a -- it's not
3 on the back of the building.

4 Easier if we took a look at my drawing.

5 Q. All right.

6 A. I don't know what exhibit that
7 is.

8 MR. HARDING: Complainants' 14.

9 HEARING OFFICER FELTON: That would be
10 Exhibit 14.

11 MR. O'DAY: May I, Your Honor?

12 A. Yes. The kitchen is not the perfect
13 southeast corner of our building, but there's a
14 laundryroom in the back end of our building, and the
15 kitchen's slightly north of that laundryroom.

16 Q. Directing your attention to Complainants'
17 Exhibit 14, in the upper right corner, we see
18 something marked "Master Bedroom"; is that correct?

19 A. Correct.

20 Q. And there are two windows shown up towards
21 the upper margin of that piece of paper; is that
22 correct?

23 A. That's correct.

24 Q. And those are the two windows that are

1 depicted that you've testified to in Complainants'
2 Exhibit 7 as being the first two windows right above
3 that white awning; is that correct?

4 A. Yes, sir.

5 Q. And then when you move across or in back
6 of the building towards the rear of your building
7 along that same wall that adjoins Benchwarmers,
8 that's when you come to this kitchen area; is that
9 correct?

10 A. Correct.

11 Q. And you have video footage taken in the
12 kitchen area in that video that you admitted; is
13 that correct?

14 A. Actually, the dining room.

15 Q. All right.

16 A. That's where the people were sitting.

17 Q. And is that marked "Dining Room, Kitchen"
18 on Complainants' Exhibit 14?

19 A. Yes, it is.

20 Q. Is the sound on the video as noticeable in
21 the kitchen area as it is in the master bedroom
22 area?

23 A. No.

24 Q. Now, isn't it fair to say, sir, that you

1 didn't take any noise measurements either down
2 further under that awning and above it moving
3 further down away from Benchwarmers?

4 A. I took no exterior measurements
5 personally.

6 Q. Did anybody, to the best of your
7 knowledge, take any exterior measurements of noise?

8 A. No.

9 Q. Did anybody station themselves outside
10 while noise measurements were being taken and push
11 any kind of a pause button on the equipment when
12 vehicles were coming by?

13 A. No.

14 Q. Did anybody look to see what the traffic
15 was -- as opposed to loud motorcycles, but any
16 traffic at all -- when noise measurements were being
17 taken and pause the equipment?

18 A. No.

19 Q. Did anybody account, to the best of your
20 knowledge, for noise levels of traffic outside the
21 building except to possibly notice a loud
22 motorcycle?

23 A. What I can tell you is that on videos of

24 taping the sound level readings, if there was a loud

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1 noise caused by traffic, it is clearly audible on
2 the tape.

3 Q. In terms of the regular decibel levels,
4 without regard to a noisy motorcycle or other kind
5 of vehicle, have those been excluded from the
6 readings that we see on the tape, to the extent that
7 they're coming into the residence?

8 A. I -- I don't believe there to be any
9 instance in which there was traffic noise that was
10 audible on any of the segments that were submitted
11 as evidence.

12 Q. So, is it fair to say that nothing was
13 done because you didn't think it was necessary to
14 exclude any decibel levels or sound levels from your
15 readings based on outside noise? Is that fair to
16 say?

17 A. Based on my ambient readings, there wasn't
18 a significant input from outside noise.

19 Q. And there were no calculations done,
20 whether by logarithmic calculations or otherwise, to
21 exclude noise from the outside; is that correct?

22 Rightly or wrongly, that's correct, isn't it?

23 A. I didn't do any calculations outside of my
24 area of expertise.

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1 Q. And did you commission anyone to perform
2 any calculations with respect to your decibel
3 readings to exclude noise from other sources besides
4 next door?

5 A. No.

6 Q. Did you perform any tests in the street
7 that we see or in the area of the sidewalk that we
8 see in Complainants' Exhibit Number 7 to determine
9 whether your awning area was acting as a diaphragm
10 and a speaker to magnify noise as it came out on the
11 sidewalk?

12 A. No, I did not.

13 Q. Did you or anyone on your behest make any
14 tests or other inquiries into why it was that the
15 area of these windows seemed to be noisier than
16 other areas along the common wall between your area
17 and Benchwarmers?

18 A. No. I -- the general understanding as I

19 see it for noise --

20 MR. O'DAY: Well, I would ask that the witness
21 just be instructed to answer my questions. And his
22 counsel can ask him questions on redirect, Your
23 Honor.

24 HEARING OFFICER FELTON: Mr. Pawlowski, please

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1 just respond, first, in answer to his question.

2 THE WITNESS: And the question is?

3 (The preceding question was read back by
4 the court reporter.)

5 A. No.

6 Q. Did you notice when you opened these
7 windows that the noise was louder in the master
8 bedroom?

9 A. I -- I never opened those windows when I
10 was experiencing noise to see whether it made a
11 difference or not.

12 Q. Would you say that this awning, this white
13 awning in Complainants' Exhibit Number 7, is that at
14 the property line?

15 A. At which interface are you referring to?
16 I'm not sure --

17 Q. Well, in Exhibit 7, the green awning of
18 Benchwarmers ends; is that correct?

19 A. Right.

20 Q. And then is there any kind of overlap
21 between your white awning and their green awning,
22 like at any point if you were walking on the
23 sidewalk --

24 A. They're probably within an inch of each

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1 other.

2 Q. All right. And did you at any point below
3 that awning attempt to measure outside the noise as
4 it was emitting beyond the property line?

5 MR. HARDING: Objection, asked and answered
6 four times now.

7 MR. O'DAY: It's asked a little bit different
8 this time and in the statutory language.

9 MR. HARDING: He's already answered four times
10 that he didn't do any outside measurements in
11 response to the same question.

12 HEARING OFFICER FELTON: You have been going on
13 the same train of thought. I'm going to overrule

14 this objection and allow this one more question, but
15 you're kind of exhausting this train of thought.

16 A. No.

17 Q. Did you actually ever do anything to
18 determine where the property line was other than to
19 assume that it was where one building ended and the
20 next one began?

21 A. I never had a survey taken, no.

22 Q. Okay. The area across the street from
23 where your building is, is that an area of two-story
24 buildings?

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1 A. Some of it.

2 Q. Did you ever do anything inside or outside
3 to determine whether any noise was coming from those
4 buildings?

5 A. No.

6 Q. Did you ever do anything to determine
7 whether any noise that was located outside was
8 reflecting off those buildings and coming into
9 yours?

10 A. I believe that the videotape from the
11 night of October 17th or 18th depicts that exact

12 scenario, sir.

13 Q. That there was noise bouncing off the
14 building across the street and coming over to yours?

15 A. That is, indeed, correct.

16 Q. Was any effort made to determine what the
17 noise level was of wherever that noise source was
18 that was bouncing off of a building, what the noise
19 level was as it left a property line?

20 A. I took measurements inside my building
21 only.

22 Q. Did you take measurements in the kitchen
23 area of your building as depicted on Complainants'
24 Exhibit Number 14?

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1 A. I took some sound level measurements
2 exactly where this red dot is on Exhibit 14. Not
3 part of the kitchen. It's just part of a hallway.

4 Q. And are those recorded in the video?

5 A. Yes, indeed, they are. They're the ones
6 that are at the tail end of the video.

7 Q. All right. What were those noise levels?

8 A. Those noise levels there, easiest to

9 characterize them in excess of 50 dBa.

10 Q. All right.

11 HEARING OFFICER FELTON: Which segments, do you
12 know, are you referring to?

13 THE WITNESS: The final two. Or the final one
14 actually.

15 MR. HARDING: It's ten.

16 HEARING OFFICER FELTON: Ten. Thank you.

17 BY MR. O'DAY:

18 Q. And when you took that reading that's
19 noted by the red dot on this diagonal line, that's
20 just to the left of the dining room and kitchen?

21 A. That's correct.

22 Q. Did the dining room and kitchen area have
23 a refrigerator in it?

24 A. Yeah.

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1 Q. How many people were there when you did
2 that?

3 A. Let me see. On one night, there were two
4 additional individuals besides myself, Mr. Alan
5 Snedden and my wife, Diane. And I believe on the
6 other night I was there alone.

7 Q. Does your video camera make noise when you
8 use it?

9 A. I imagine it does.

10 Q. Was anything done to account for the noise
11 made by the video camera when were you making your
12 noise measurements?

13 A. No.

14 Q. That was never excluded, was it?

15 A. That's correct.

16 Q. And there was never any logarithmic
17 calculations or other calculations done to exclude
18 the noise from the video camera?

19 A. That would be out of my area of
20 expertise. So the answer is no.

21 Q. And was there any effort made to record
22 the noise or to at least take into account, by
23 calculations, the noise and subtracting from the
24 noise levels shown by the equipment, noise for other

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1 people who were there or equipment that you had
2 inside your home?

3 A. No.

4 Q. Do you yourself ever get involved with
5 stereo equipment, or do you have some stereo
6 equipment?

7 A. I do possess some stereo equipment.

8 Q. Do you use it on occasion?

9 A. Yes, sir, I do.

10 Q. Have you seen stereo speakers, parts
11 moving when sound comes through?

12 A. Yes.

13 Q. And do you know what that's called? Is it
14 called a diaphragm within the speaker that moves?

15 A. I'm not familiar with the technical term.

16 Q. Did you ever consider whether that awning
17 could be working as a diaphragm just above those two
18 -- just below those two windows, sir, in your
19 master bedroom?

20 A. No, I did not.

21 Q. Do you have any reason to think that it's
22 not acting like one?

23 A. Other than the fact that it's an awning
24 and not a diaphragm, no.

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1 Q. Do the rules of physics apply?

2 A. Yes.

3 Q. When you were home and there was a problem
4 with the noise, did you try to make a video when
5 that happened?

6 A. On several occasions.

7 Q. How did you decide whether you were going
8 to make a video on that occasion or not make a video
9 on that occasion?

10 A. Early on in the process, I would try and
11 document, via videotape, when I believed the noise
12 to be overly excessive.

13 Q. All right. And then did you keep on doing
14 that?

15 A. Up until a certain period of time in which
16 it became more painful for me to actually stand
17 there and watch the sound level meters and record
18 them as it was to just escape to my guest room and
19 try to get some sleep.

20 Q. How many minutes of total footage did you
21 come up with of videos since August of 1998?

22 A. I think I stated at one point that there
23 was over three hours of videotape.

24 Q. So is it fair to say --

1 A. 180.

2 Q. That's 180 minutes over approximately,
3 what, fifteen months of time?

4 MR. HARDING: Objection, mischaracterizes the
5 evidence. It's pretty clear that the first video is
6 around October 18th, the last on December 5th of the
7 same year.

8 HEARING OFFICER FELTON: Let's clarify here.
9 It does look like this was only over a three-month
10 period.

11 MR. O'DAY: All right. I'll re-ask the
12 question in light of that.

13 HEARING OFFICER FELTON: Thanks.

14 BY MR. O'DAY:

15 Q. Over a -- did you record these three hours
16 of video over a three-month period?

17 A. Approximately, yes.

18 Q. And was it an hour a month, or how much
19 did you record?

20 A. I would have to refer back to my logs to
21 determine how much time and look at the videotapes
22 for every day to give you an answer to that, sir. I
23 don't know.

24 Q. How many times did you record people in

1 the kitchen area?

2 A. Once. The night of October 23rd. That
3 was in the dining room.

4 Q. All right. The area marked "Kitchen,
5 Dining Room" on your -- is it Exhibit 14?

6 A. Yes, it is.

7 Q. All right. Did you ever take a video or
8 do readings in your guest bedroom?

9 A. No, I did not.

10 Q. Do you know how many beams separate or are
11 underneath that awning heading from those four posts
12 to -- and attaching to the building?

13 A. No.

14 Q. Do you know how many breaks there are --
15 well, do you know how many times the material
16 changes in terms of the sheets that were used to
17 build it between the area of your master bedroom and
18 the area of the awning underneath your guest
19 bedroom?

20 A. Let's see. There are 24-inch sheets, it's
21 about a 60-foot wall. I would say there are 30
22 breaks.

23 Q. So between the first 24-inch plastic

24 sheeting that's by Benchwarmers, there are

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1 approximately 30 breaks through until the guest
2 bedroom and at the end of the guest bedroom?

3 A. Yeah.

4 Q. And then there are also some beams that go
5 across, too, from the area of -- near the curb and
6 attaching to the building to hold that material up;
7 is that correct?

8 A. Yeah.

9 Q. And this material is not flat, is it?

10 A. No.

11 Q. It undulates?

12 A. It is corrugated.

13 Q. Okay. And have you ever been out on it?

14 A. I'm not a fool. I weigh 285 pounds, and I
15 would go through that faster than I could say
16 "ouch."

17 Q. Has anyone ever been out on it, to the
18 best of your knowledge?

19 A. Not onto the PVC, no.

20 Q. All right. When you first met with the

21 future proprietors of Benchwarmers or with
22 Mr. Johansen, did you then go to meet with the
23 Fairbury Association of Commerce?

24 A. Yes, I did.

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1 Q. And were you a member of the Fairbury
2 Association of Commerce at that time?

3 A. Yes, I was.

4 Q. Did you meet with them prior to the
5 opening of Benchwarmers?

6 A. Yes, I did.

7 Q. And did you go to a regularly scheduled
8 meeting that they had?

9 A. I most certainly did.

10 Q. And will you tell us about that meeting?
11 What did you do, and what was your purpose in going,
12 et cetera?

13 A. My purpose in going to that meeting was to
14 try and ascertain what the Association of Commerce
15 may have known about the operation that was coming
16 into town. This is after I had been warned by
17 Mr. Johansen that there was going to be noise and
18 that I could expect it because I was in a commercial

19 district. And, naturally, my concern at that point
20 in time was to determine how big of a problem I had.

21 Q. Did the -- do you have any reason to
22 believe that the proprietors of Benchwarmers -- had
23 they been residents of Fairbury or members of the
24 Fairbury Association of Commerce before this?

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1 A. To my knowledge, they were not residents
2 of Fairbury.

3 Q. They were outsiders coming in?

4 A. As was I.

5 Q. You had been -- when did you -- let me ask
6 you this: When did you first pay your first dollars
7 for garbage pickup here in Fairbury?

8 A. That would have been April of 1993, as I
9 recall.

10 Q. For your regular garbage pickup that any
11 other residential citizen uses?

12 A. Well, I rented a home at 207 --

13 Q. Okay.

14 A. -- you know.

15 Q. At your new location, when did you first

16 start paying for garbage pickup for residential
17 garbage pickup?

18 A. I believe that starts when you have the
19 water turned on. And I'm not exactly sure when we
20 had the water turned on to our premises, but I
21 believe it to be -- it had to be before March of
22 1998 because we were living there in March of 1998.

23 Q. So, is it your testimony that you were
24 already having residential garbage picked up there

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1 in March of 1998?

2 A. I -- I paid an invoice for my water bill
3 which I believe it to include pickup of refuse.

4 Q. Did you rent at your former residence?

5 A. Yes, I did.

6 Q. And when was your last month of rental
7 there?

8 A. I believe it to be April of 1998.

9 Q. All the way through the end of April 1998?

10 A. I think it -- I think so.

11 Q. Was that a month-to-month lease?

12 A. At that time, yes.

13 Q. And you had to give a month's notice

14 concerning when you wanted to leave there?

15 A. It was a pretty loose relationship with my
16 landlord. I don't recall if I had to give them any
17 notice.

18 Q. And when did you officially switch your
19 address from your former rented residence to your
20 new residence in downtown Fairbury?

21 A. Well, you see, I never had to officially
22 switch my address because we use a post office box.

23 Q. Well, when did you stop paying for garbage
24 pickup at your old address and start paying for it

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1 at your new address?

2 MR. HARDING: Objection, relevance.

3 MR. O'DAY: In terms of who's there first and
4 somebody living there or somebody not living there.

5 HEARING OFFICER FELTON: Okay. I'll let that
6 in. We'll overrule the objection.

7 A. I can't answer that. I don't pay the
8 bills.

9 Q. If we look at those records, will that
10 tell us when that happened, when that switch

11 occurred?

12 A. It may or it may not. I don't know.

13 Q. What was the reaction of Fairbury
14 Association of Commerce to your complaints about the
15 fact that you didn't think it was right that this
16 new business was going to come in and locate on the
17 main street in downtown Fairbury?

18 A. I never complained to the Association of
19 Commerce opposing a new business coming into
20 Fairbury. What I complained to the Association of
21 Commerce was -- was the lack of flow of information
22 from their organization to a member of their
23 organization, which was myself and my wife.

24 Q. Did you request permission to address the

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1 board on April 11th, 1998?

2 A. No, I did not.

3 Q. Did you address the board on April 11,
4 1998?

5 A. No, I did not.

6 Q. When did you first address the board of
7 the Association of Commerce?

8 A. That would have been Monday, the 13th of

9 April, 1998, sir.

10 Q. Did you request on April 13th permission
11 to address the board?

12 A. Yes, I did.

13 Q. Did you inform the board of your concern
14 of a recent amendment to a municipal ordinance in
15 Fairbury to expand the liquor license variance to
16 add one additional license?

17 A. I expressed my concern about the process
18 that the city used in order to establish that new
19 license, sir.

20 Q. Did you say that you were concerned that
21 the business was requesting a -- that was requesting
22 a license is located in a building adjacent to
23 yours?

24 A. Yes.

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1 Q. And did you tell them you had constructed
2 a condominium on the second floor for your private
3 residence?

4 A. No.

5 Q. What did you tell them you had constructed

6 on the second floor for your private residence?

7 A. An apartment.

8 Q. You called it an apartment?

9 A. Yeah.

10 Q. And did you tell them that you were
11 worried that it would produce an excessive amount of
12 noise?

13 A. I was told it would produce an excessive
14 amount of noise. And, yes, I did convey that to
15 them.

16 Q. Other than that appearance in front of the
17 Association of Commerce, did you have any others at
18 formal meetings?

19 A. No.

20 Q. Off the record, have you made comments to
21 any other members of the Association of Commerce
22 about Benchwarmers?

23 A. Yes.

24 Q. To whom?

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1 A. I had conversations with several people
2 that are members of the Association of Commerce.

3 Q. About Benchwarmers?

4 A. Yes.

5 Q. And was that before Benchwarmers even
6 opened?

7 A. I can't recall exactly when they were.

8 Q. Did you tell them you were worried that
9 there was going to be too much noise?

10 A. I may have.

11 Q. Did you resign from the Association of
12 Commerce?

13 A. Yes.

14 Q. What was the response of the Association
15 of Commerce to your -- the concerns that you
16 expressed?

17 A. They didn't give me a response.

18 Q. Is that why you left the organization?

19 A. Yes.

20 Q. Did anyone else leave the organization in
21 protest over their lack of response that you know
22 of?

23 A. I have no knowledge of that.

24 Q. Is the Association of Commerce an

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1 organization that includes a number of businesses
2 along Locust Street in downtown Fairbury?

3 A. I believe it to be.

4 Q. Did you join the Association of Commerce
5 because you had some retail plans in your building?

6 A. That's correct.

7 Q. Is it fair to say that you were
8 dissatisfied with the response of the Association of
9 Commerce to your concerns?

10 A. Yes.

11 Q. And you felt, didn't you, that the
12 Association of Commerce regarded your concerns as
13 not being founded with respect to your complaints of
14 sound within this downtown commercial district?

15 A. Could you repeat that?

16 Q. Yes. You felt that they weren't
17 responding to you favorably. You thought they were
18 responding to you unfavorably; is that correct?

19 A. I couldn't characterize their actions as a
20 response at all.

21 Q. And that's why you quit?

22 A. I resigned from the Association of
23 Commerce because I didn't feel it was serving a
24 useful purpose for me.

1 Q. Did you meet with Sharon Walter of the
2 Association of Commerce before Benchwarmers ever
3 opened?

4 A. Yes, I did.

5 Q. And who is Sharon Walter?

6 A. Sharon Walter is the -- I believe her
7 official title is the secretary of the Association
8 of Commerce.

9 Q. And what -- where did you meet with her?

10 A. In her office.

11 Q. And was it just you and her?

12 A. I believe so.

13 Q. What did you and -- you say and she say?

14 A. I can't recall the specifics of what was
15 said in that conversation.

16 Q. None of them?

17 A. With Sharon? No.

18 Q. How many times have you ever met with
19 Sharon Walter in your life?

20 A. I don't -- I couldn't tell you.

21 Q. Did you also meet with Mike White of the
22 Association of Commerce?

23 A. Mike White was present at an informal
24 meeting of the Association of Commerce, yes.

1 Q. When you say an "informal meeting," what
2 do you mean by that?

3 A. It wasn't an official meeting. Darren
4 Bray, who was a board member of the Association of
5 Commerce, was at the meeting; Mike White; gentleman
6 whose name escapes me right now from one of the
7 local automotive dealerships, Ganis, I believe, was
8 there; Sharon Walter; and myself.

9 Q. Was this the meeting in her office?

10 A. It was a meeting in the conference room at
11 the Association of Commerce, yes.

12 Q. Were you satisfied with the response in
13 that informal meeting of these persons at the
14 chamber -- or the Association of Commerce?

15 A. There was either no satisfaction to be
16 gained or lost in the course of that meeting.

17 Q. Is it fair to say that you are unaware of
18 any complaint besides yours by anyone along Locust
19 Street in Fairbury, Illinois, with respect to noise
20 by Benchwarmers?

21 A. That would be correct.

22 Q. Did you file a complaint with the city

23 clerk regarding noise caused by Larry Quinley the
24 day after you spoke with him?

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1 A. No, I did not.

2 Q. You didn't make a complaint or file one?

3 A. I didn't think that there was any noise
4 problem.

5 Q. Who's Larry Quinley, for the record?

6 A. I believe him to be the father of Troy
7 Quinley, but correct me if I'm wrong.

8 Q. Was he the one doing the remodeling work?

9 A. I believe that's -- yeah.

10 Q. Did you ever make any kind of a complaint
11 about his using a hammer to do remodeling --

12 A. No.

13 Q. -- in terms of the noise that it caused?

14 A. No.

15 Q. Have you ever stated to anyone that you
16 were going to try to put Benchwarmers out of
17 business?

18 A. No.

19 Q. Did you ever look into buying the space
20 that's occupied by Benchwarmers?

21 A. Yes.

22 Q. When did you look into buying the space
23 that's occupied by Benchwarmers?

24 A. Prior to March of 1995.

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1 Q. And what did you -- had you already
2 purchased your property --

3 A. No.

4 Q. -- next door?

5 A. No.

6 Q. All right. Did you ever look at the space
7 occupied by Benchwarmers after that in terms of a
8 possible purchase to get a price?

9 A. No.

10 Q. Did you ever consider acquiring the
11 property occupied by Benchwarmers after you bought
12 yours?

13 A. No.

14 Q. Have you made any correlation in terms of
15 the time, the amount of time since June 29, 1998,
16 out of all the hours and weeks and months since
17 then, of when the noise has been excessive from

18 Benchwarmers?

19 A. I haven't done a calculation, no.

20 Q. In your living quarters, in the second
21 floor, how is that heated?

22 A. It is heated with hot water baseboard
23 heat.

24 Q. How is it -- is it air-conditioned?

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1 A. Yes, it is.

2 Q. During the period that you made the
3 videotapes which was, what, sir, about August
4 through October of 1998?

5 A. I think it's October through December.

6 Q. Okay. October through December.

7 A. Uh-huh.

8 Q. Did you make any efforts to measure noise
9 from any of your mechanical systems in the home?

10 A. My meters that were used in taking noise
11 level readings are not sensitive enough to read
12 anything under 50 dBa. So, I couldn't get any
13 baseline readings because, as John Yerges testified,
14 my ambient readings were, what, 26 dBa. My machine
15 isn't capable of reading those.

16 Q. So your machine couldn't read anything
17 under 50 dBa?

18 A. Correct.

19 Q. Well, didn't you hear him testify when he
20 was here that the ambient level was around 30 or 35
21 dBa?

22 A. That's based off his machine, yes.

23 Q. All right. Did you ever, in any of your
24 readings, record any kind of an ambient level?

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1 A. It's impossible for those meters to record
2 an ambient noise level, so the answer is no.

3 Q. And when was he there doing those
4 readings?

5 A. John took the ambient readings on the
6 night of September 25th, 1999.

7 Q. Is that the only time that you have
8 ambient readings to compare to total readings?

9 A. Yes.

10 Q. And there's no other occasion other than
11 that one when you have the ability to say that there
12 was a 10- or a 20-decibel differential between the

13 ambient level and the level that was actually
14 measured for overall noise within that master
15 bedroom; is that correct?

16 A. That's correct.

17 Q. Do you believe that the excessive noise
18 levels that you've talked about, that those have
19 been on a daily basis since Benchwarmers opened
20 until last night, with the exception of those two
21 months after the liquor committee meeting when you
22 say that they dissipated for a couple months?

23 A. You asked me if that was a daily?

24 Q. Yes.

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1 A. The answer to that question is no.

2 Q. Isn't it true that Benchwarmers on Sunday
3 nights isn't even open?

4 A. I don't believe they're open after 10:00.

5 Q. And you said during your direct
6 examination that it's Sunday night when you feel you
7 get a good night's sleep?

8 A. Correct.

9 Q. And would you agree that Monday mornings
10 when you go into work, that's after that good night

11 of sleep on Sunday night?

12 A. Yes.

13 Q. Have you ever thought about just going
14 next door and asking them to turn the noise down?

15 A. I thought about that on several occasions,
16 yes.

17 Q. Did you ever do it?

18 A. No, I did not.

19 Q. Did you ever -- were you ever offered by
20 the proprietors of Benchwarmers that they wanted to
21 meet with you to talk about ways to solve the
22 problem?

23 A. I believe that there were letters
24 exchanged between my attorneys and the respondents'

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1 attorneys that suggested a meeting.

2 Q. Well, how about just the proprietors
3 asking you if you wanted to meet with them and try
4 to solve the situation without attorneys? Did that
5 ever happen?

6 A. Not to my knowledge.

7 Q. Did you respond to those letters that you

8 say existed to the efforts to try to resolve the
9 situation?

10 A. My attorneys --

11 MR. HARDING: Objection. We're talking about
12 negotiation with lack of negotiation; that is never
13 admissible.

14 HEARING OFFICER FELTON: Do you have a basis
15 for allowing this in, Mr. O'Day?

16 MR. O'DAY: Only in terms of what would be
17 reasonable in the situation in terms of, you know,
18 if it's episodic that these noise levels occur that,
19 you know, to go ask somebody to turn their stereo
20 down or to turn down the music.

21 HEARING OFFICER FELTON: I'm going to sustain
22 the objection. I'm not sure if I see the relevance
23 in going into that any further.

24 BY MR. O'DAY:

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1 Q. Does Stage across the street from you,
2 what kind of a store is that?

3 A. Clothing/retail.

4 Q. Do they get deliveries there of
5 merchandise?

6 A. I would imagine they do.

7 Q. And how are those delivered?

8 A. I couldn't tell you.

9 Q. Do you think there are semis that come?

10 A. I -- I don't know.

11 Q. Is it a pretty big store?

12 A. It's a big store.

13 Q. In the buildings across the street from

14 you and adjacent to you, are there air-conditioning

15 units on top of the roofs?

16 A. I can't recall if they're on the roofs or

17 not.

18 Q. Are there other -- do you know whether

19 there are other mechanical systems in this

20 commercial district in each and every one of the

21 buildings for air conditioning and heating?

22 A. I would assume there are, yes.

23 Q. And other things that would be exterior?

24 A. Yes.

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1 Q. Have you seen them from time to time as

2 you go down the street?

3 A. I've noticed them.

4 Q. Then is there an alley in back of you?

5 A. Yes.

6 Q. Are there any mechanicals back there like

7 air conditioners or anything like that?

8 A. Yes.

9 Q. And was anything done to account -- in any

10 of your readings inside your residence to exclude by

11 calculation or measurement noise from those kinds of

12 mechanical systems in the neighborhood?

13 A. No.

14 Q. You have a hot water heater?

15 A. Not technically.

16 Q. Do you have a boiler?

17 A. Yes.

18 Q. And was anything done to exclude noise

19 from your boiler in any of your calculations or, I'm

20 sorry, in any of your readings?

21 A. No.

22 Q. Were any calculations done in any manner

23 whatsoever -- do you have a dishwasher?

24 A. No.

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1 Q. Do you have a stove and oven that make
2 noise?

3 A. Only when the door slams.

4 Q. Do you have clocks that make noise?

5 A. No.

6 Q. You have only electronic clocks and no
7 other kinds of clocks?

8 A. Right. That is correct.

9 Q. All right. Do you have a computer?

10 A. Yes.

11 Q. Does your computer make noise?

12 A. I have two.

13 Q. You have two computers. Do they make
14 noise?

15 A. We rarely turn the speakers on.

16 Q. Do they have fans?

17 A. Yes.

18 Q. Do the fans make noise inside the
19 computers?

20 A. When they're turned on, yes.

21 Q. Do you have a printer?

22 A. Yes.

23 Q. Do you have a fax machine?

24 A. No.

1 Q. Does your printer make noise?

2 A. Yes.

3 Q. Did you do anything at all to exclude
4 noises from those devices?

5 A. None of those were -- devices were
6 operating during these periods, sir.

7 Q. None at all?

8 A. The computers, no. We do not leave them
9 on. Printers only run when the computer's on.

10 Q. When the police would come to respond to
11 your complaints -- did that happen?

12 A. On three occasions, I believe.

13 Q. That they actually came and responded?

14 A. That is correct.

15 Q. Okay. So it wasn't that you would call
16 and leave a message, and they wouldn't respond?
17 They came out there three times at your behest; is
18 that correct?

19 A. I believe that to be correct.

20 Q. Did the police tell you that they didn't
21 regard the noise as excessive?

22 A. No.

23 Q. What did they say?

24 A. The police officers did more listening

1 than they did saying. I couldn't recall what the
2 police officers actually said on those nights.

3 Q. Did you observe these police officers
4 carefully listening to the sound outside the
5 buildings?

6 A. No, I did not.

7 Q. Did you -- were you out there with them?

8 A. No, I was not.

9 Q. So if they -- if they say that they
10 listened to it carefully outside the building, you
11 wouldn't contradict that because you weren't out
12 there with them; is that correct?

13 MR. HARDING: Oh, objection. Are we planning
14 our examination of another witness here?

15 MR. O'DAY: Yes, I am. And I'm asking him for
16 his -- to cut him off that he would have any
17 observations to the contrary.

18 HEARING OFFICER FELTON: Yes, I'm going to
19 overrule the objection. I think that's not
20 unreasonable. So you can go ahead with the
21 question.

22 BY MR. O'DAY:

23 Q. Okay. You have no testimony to offer
24 about how careful the police officers were in

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1 listening outside the building; is that correct?

2 A. That is correct.

3 Q. Did you have them inside the building?

4 A. They were inside my building, that's
5 correct.

6 Q. Were they on the second floor?

7 A. No, they -- they always declined to come
8 up to the second floor and either look at the meters
9 or to hear the noise in my residence.

10 Q. Did they listen on the first floor of your
11 building?

12 A. Yes, I believe they did.

13 Q. And that would have been at the ground
14 level?

15 A. Yes.

16 Q. When they listened on the first -- did you
17 ever take any readings on the first floor of your
18 buildings?

19 A. Yes, I have.

20 Q. And are those in the videotape?

21 A. No.

22 Q. That would be below the awning, too, that
23 we're talking about, that white awning in
24 Complainants' Exhibit Number 7, the first floor of

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1 your building; is that correct?

2 A. Below the elevation, yes.

3 Q. Are you aware of any other resident of
4 Fairbury, Illinois, besides you and your wife, in a
5 residential area or in a residence in a commercial
6 building in Fairbury, Illinois, who feel they are
7 disturbed by this business called Benchwarmers?

8 A. I have no knowledge of other people's
9 thoughts on the issue.

10 Q. Have you talked to the residents on the
11 other side of you, in the building next to you?

12 A. The residents. You mean the attorneys?

13 Q. Well, did somebody say during your
14 testimony or otherwise during your case that there
15 was a residence up above the attorney's?

16 A. If they were, they were on the --

17 MR. HARDING: Objection. That was to the --

18 that was in the respondents' case in chief.

19 HEARING OFFICER FELTON: Actually, that was. I
20 believe it was elicited by your witness.

21 MR. O'DAY: Elicited by him, I think, wasn't
22 it, during cross maybe?

23 MR. HARDING: Mr. Walter.

24 HEARING OFFICER FELTON: Yes. I'm not sure. I

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1 mean if Mr. --

2 MR. HARDING: He can answer the question.

3 HEARING OFFICER FELTON: He can answer the
4 question.

5 A. I answered the question. No one lives
6 above the lawyer's office. I have been in the
7 attorney's second floor, which is a storage room,
8 which is directly west of my property.

9 Q. That would be directly west of your guest
10 bedroom?

11 A. Yes.

12 Q. And that white awning would end before it
13 got to that building; is that correct?

14 A. That's correct. That is correct.

15 MR. O'DAY: Those are my questions.

16 HEARING OFFICER FELTON: Okay. Mr. Harding,
17 any redirect?

18 MR. HARDING: Yeah, a little bit. A little
19 bit.

20 REDIRECT EXAMINATION

21 BY MR. HARDING:

22 Q. In your seven and a half hours of
23 undisrupted sleep on Sunday night, do you completely
24 forget about Friday and Saturday nights?

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1 A. No.

2 Q. Oh. And when the ambient levels were
3 taken in your home on September 25th, did you switch
4 off the boiler?

5 A. No.

6 Q. Did you switch off the water heater or the
7 furnace?

8 A. No.

9 Q. Switch off the electrical?

10 A. No.

11 Q. Switch off anything that was ordinarily
12 running?

13 A. No.

14 Q. Street lights outside?

15 A. No.

16 Q. Now, as to the awning outside, you
17 testified that that is in 24-inch sections of hard
18 PVC?

19 A. Hard is a relative term. Yes.

20 Q. Okay. Hard, soft, medium. Are they just
21 laid on?

22 A. No, they are screwed into the roof purlin
23 I believe the proper term is.

24 Q. Okay. But separately?

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1 A. Separately.

2 Q. Thirty of them? Yes?

3 A. Yes.

4 Q. Are they stretched?

5 A. No.

6 Q. Now, as to the reflection of 10/18/1998,
7 the reflected sounds that you testified you believed
8 them to have been reflected, what was the original
9 source of that reflected sound?

10 A. The front door of the bar portion of
11 Benchwarmers was propped open with a rock.
12 Q. And --
13 A. And the sound --
14 Q. You didn't -- please answer my question.
15 A. Pardon me?
16 Q. Please answer my question.
17 A. They were emanating from 103 West Locust.
18 Q. Benchwarmers?
19 A. Benchwarmers.
20 Q. Coke machine is running. Can you hear it?
21 A. Yes.
22 Q. Does your video camera make that much
23 sound, that much noise?
24 A. I don't believe so.

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1 Q. And the Association of Commerce meeting
2 that was bandied around here, that occurred on a
3 Monday evening?
4 A. It was Monday at lunch.
5 Q. Lunch on Monday?
6 A. Yeah, twelve o'clock.
7 Q. Okay. And that was the Monday following

8 Good Friday?

9 A. That is correct.

10 Q. To your knowledge, is there a -- on the
11 north side of Locust, is there an alley behind the
12 buildings on the north side of Locust in the 100
13 block?

14 A. Yes, I believe there is.

15 Q. Okay. Who is your nearest residential
16 neighbor?

17 A. I honestly couldn't answer that question.

18 Q. Are you saying that you don't know?

19 A. I just don't know.

20 Q. Okay. Have you ever received a citation
21 from the City of Fairbury for your illegal use of
22 105 West -- yes, 105 West Locust as a residence?

23 A. No.

24 MR. O'DAY: Objection, there is no foundation

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1 that it would be illegal to use that as a
2 residence.

3 MR. HARDING: Thank you. I'll accept the
4 stipulation.

5 I have no further questions of this
6 witness.

7 MR. O'DAY: You testified that --

8 MR. HARDING: I object to recross.

9 HEARING OFFICER FELTON: Yes. Do you have a
10 basis for your recross?

11 MR. O'DAY: Yes, some new things he brought
12 up.

13 MR. HARDING: I stayed with cross.

14 HEARING OFFICER FELTON: What new things? Can
15 you please state them?

16 MR. O'DAY: That he remembers things while he's
17 sleeping on Sunday night that happened on Friday and
18 Saturday night.

19 MR. HARDING: That was brought up on cross.

20 HEARING OFFICER FELTON: I think that was
21 brought up by you.

22 MR. O'DAY: Yes, but I -- I never asked him the
23 question about does he, on Sunday night, remember
24 what happened on Friday and Saturday night.

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1 HEARING OFFICER FELTON: What's the other?

2 MR. O'DAY: That the ambient readings made in

3 September, that he had his -- would have had his
4 boiler and all that working at this time of the
5 ambient readings.

6 MR. HARDING: It was raised on cross.

7 HEARING OFFICER FELTON: That the -- go ahead.

8 MR. O'DAY: That the front door -- well, I can
9 recall him during our case, too, I guess, but I
10 think it would be more efficient to do it right now.

11 HEARING OFFICER FELTON: I would say that the
12 two points that you've raised right now -- I would
13 overrule or deny your right right now to recross
14 based on the fact that it does appear that the door
15 was opened earlier by you and, therefore,
16 complainant had a right to redirect with regard to
17 those two points.

18 MR. O'DAY: Well, then if I raise them anew,
19 though, then how do I get my redirect unless I get
20 my recross?

21 MR. HARDING: Hmm?

22 HEARING OFFICER FELTON: But generally the way
23 our proceedings work is we allow for a direct, a
24 cross, and then a redirect.

1 MR. O'DAY: All right. Then the other thing is
2 who his nearest residential neighbor is. I think
3 that was new.

4 HEARING OFFICER FELTON: Okay. I will allow it
5 with regard to who your nearest residential neighbor
6 is.

7 RE-CROSS-EXAMINATION

8 BY MR. O'DAY:

9 Q. Take the residence where somebody lives
10 that you know about that's closest to you -- whether
11 there's any closer or not that you don't know about,
12 but the one that you know about that's closest to
13 you where somebody actually lives, how many blocks
14 away is that?

15 A. I'm thinking because -- one.

16 Q. One whole block away? In which direction?

17 A. You're asking me to guess. I don't know
18 where people live.

19 Q. No. My question is, take the residence
20 where you're aware somebody actually lives. And if
21 you don't know, you know, where people live in this
22 town, just say so.

23 But take the residence where you know
24 someone lives that you think is closest to you and

1 tell us how many blocks away that is.

2 A. One.

3 Q. One block away. In which direction?

4 A. Probably every.

5 Q. In every direction.

6 MR. O'DAY: Okay. Those are my questions.

7 HEARING OFFICER FELTON: Thank you.

8 Mr. Pawlowski, you're excused. Thank you.

9 MR. HARDING: Call Diane Pawlowski.

10 HEARING OFFICER FELTON: Okay.

11 (Witness sworn.)

12 DIANE PAWLOWSKI,

13 having been duly sworn by the court reporter,

14 testified upon her oath as follows:

15 DIRECT EXAMINATION

16 BY MR. HARDING:

17 Q. Please state your name and spell your last
18 name.

19 A. Diane Pawlowski, P-a-w-l-o-w-s-k-i.

20 Q. Are you a party to this matter?

21 A. Yes, I am.

22 Q. You're one of the complainants?

23 A. Yes.

24 Q. Where do you reside?

1 A. 105 West Locust.

2 Q. And where did you reside before that?

3 A. 207 East Oak.

4 Q. When did you move?

5 A. We moved in March of '98.

6 Q. You moved from Oak to 105 West Locust?

7 A. That's correct.

8 Q. Building you bought when?

9 A. In March of '95.

10 Q. And since '95 you've been rehabbing?

11 A. Yes.

12 Q. Completed in March, moved in?

13 A. Right.

14 Q. When you first looked at the place, did

15 you make any observations?

16 A. Of our place?

17 Q. Yes.

18 A. It was a large building, older building,

19 needed a lot of work. But we thought that it was

20 going to be -- it was going to be a good use of our

21 plan.

22 Q. And your plan was for a commercial and
23 residential space?

24 A. Right.

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1 Q. Did you make any observations regarding
2 the neighborhood?

3 A. Well, at the time, the downtown district
4 was kind of -- there were vacant buildings on the
5 main street, pretty much -- I wouldn't say every
6 block, but there was a few vacant buildings on the
7 main street.

8 Q. Okay. And do you recall, would you
9 describe the neighborhood as raucous?

10 A. I don't know what that means.

11 Q. Loud, obnoxious?

12 A. Oh. No.

13 Q. Was it quiet?

14 A. Yes.

15 Q. After you moved in, did you -- by the way,
16 have you been to the other -- any of the other bars
17 in Fairbury?

18 A. Yes, we have.

19 Q. Which of the other bars in Fairbury have

20 you been to?

21 A. We have been to Rathbun's Tap, we have
22 been to Wild Willie's, we've been in the VFW, we've
23 been to J & D's. We were up to Westgate before it
24 was J & D's. I think that about covers them all.

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1 Q. Okay.

2 (A discussion was held off the record.)

3 BY MR. HARDING:

4 Q. What was your observation of those places?

5 A. They were bars. You go, you have a drink.

6 Q. Okay. Could you hear them from outside?

7 A. Not on the nights we were there.

8 Q. Okay. Now, fast-forward to April 1998.

9 You've moved into your place last month. You find
10 out that the building next door was sold, 101-103.

11 What was your reaction?

12 A. Well, somebody would be improving a vacant
13 building.

14 Q. Okay. And on April 10th, did you have a
15 conversation with your husband?

16 A. Yes.

17 Q. That's April 10th of 1998?

18 A. Right.

19 Q. As relates to a conversation that he had
20 with Mr. Johansen?

21 A. Yes.

22 Q. And do you recall what your husband told
23 you?

24 A. That he had met the person who owned the

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1 building next door and that -- through an
2 intermediary party who had introduced them, and the
3 intermediary party had voiced that, that we -- that
4 Mike was concerned about the noise. Mike lived next
5 door, was concerned about the noise.

6 And that that new property owner had
7 basically turned his back on him after responding
8 that, "Oh, there's going to be noise," and turned
9 his back and kind of walked away.

10 Q. And were you concerned then?

11 A. Yes.

12 Q. And what did you do in response to that
13 concern?

14 A. We undertook kind of an information

15 finding direction. We tried to find out as much as
16 we could to see if there really was a potential
17 threat or if there was nothing to worry about.

18 Q. What did you do?

19 A. We visited the -- I think we contacted the
20 city council. We contacted people who knew, had
21 information about the organization. And we learned
22 that they had two locations, Cooksville and Colfax;
23 so we thought we'd go and see what they were like.

24 Q. And what did you discover?

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1 A. We went to Colfax first, and we had
2 dinner. And it was a good meal and went away -- I
3 wasn't that concerned. We had -- I had talked to --
4 we had talked to Dave Johansen at that location
5 during the course of dinner.

6 Q. Okay. And was there anything that
7 occurred that made you less concerned?

8 A. Well, actually, there was a point during
9 the conversation -- or during the conversation with
10 Mr. Johansen that caused me to be less concerned
11 because I asked him, based on a flier that was on

12 the table that we were eating at, it kind of noted
13 that there was deejays and -- deejays and bands
14 that, I think, played at the current locations.

15 And when Mr. Johansen came over to the
16 table, I specifically asked him, "Well, do you have
17 plans to have deejays and bands at Fairbury?"

18 And his response was, We hope we don't
19 have to because it's an outlay of money that doesn't
20 really incur more income for them.

21 So I thought well, maybe he won't -- you
22 know, maybe it won't be as bad.

23 Q. And you also went to the Benchwarmers in
24 Cooksville?

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1 A. Yes.

2 Q. What did you observe there?

3 A. We had dinner there also. And we had sat
4 in a -- kind of an open area where -- the restaurant
5 area, and there was -- all the -- we were like the
6 only ones in the place having a meal at that time.

7 And all the other tables were pushed
8 aside, and there was kind of a setup for either --
9 some kind of entertainment, like amplifiers and, you

10 know, little stage and things like that.

11 Q. And were you still there when the
12 entertainment started?

13 A. No.

14 Q. What time did you leave?

15 A. Probably left about -- it was a later
16 dinner that night. I think we probably were out of
17 there by eight.

18 Q. And did you ever go back?

19 A. No.

20 Q. And do you recall June 29th -- pardon me.
21 Was it June 29th, Benchwarmers opened -- June 29th,
22 1998, next door to you?

23 A. Yes.

24 Q. And what did you then first notice?

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1 A. That it was a -- there was people and
2 noise.

3 Q. Okay. Were you able to sleep?

4 A. That first night, yes.

5 Q. Was Michael able to sleep?

6 A. No.

7 Q. And did you ever have occasions after that
8 when you were not able to sleep?

9 A. Oh, yes.

10 Q. I would like to show you what has been
11 marked Complainants' Exhibit 2; actually, the
12 original has not yet been marked.

13 Do you recognize that document?

14 A. Yes.

15 Q. And did you write the entries that are
16 written in there?

17 A. Yes, I did.

18 Q. Anyone else write anything in there?

19 A. No.

20 Q. Has anything been added out of date, or
21 were the entries made at their dates?

22 A. They were made within 24 hours of each
23 event.

24 Q. Okay. And does it correctly and

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1 accurately reflect what did occur at those times?

2 A. Yes.

3 Q. And you have kept that in your control at
4 all times?

5 A. Yes.

6 Q. And does that commence -- when does that
7 commence?

8 A. It starts on Monday, June 29th.

9 Q. Okay. And when does it end?

10 A. It ends October 29th.

11 Q. 1998, 1999?

12 A. Excuse me. It begins June 29th, '98, ends
13 October 29th, '99.

14 MR. HARDING: Okay. At this time, the
15 complainants move to admit Complainants' Exhibit 2.

16 MR. O'DAY: Again, I reiterate the objections
17 that were made by Mr. Shields with respect to the
18 other logs.

19 May I just make some specific observations
20 about this one that coincide with the same ones he
21 made about the other ones so that it's clear for the
22 record?

23 HEARING OFFICER FELTON: Yes, that's fine.

24 MR. O'DAY: You know that this is the same kind

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1 of thing. For example, this isn't based solely on

2 her personal knowledge or observations. This would
3 be based on hearsay. For example, she'll write down
4 here what her husband told her.

5 He'll say -- she'll say, for example, on
6 Tuesday, June 30th, you know, information about what
7 her husband tells her at that time, not just about
8 what she's observing or anything like that. And it
9 goes on and on where -- like even at the bottom,
10 Tuesday night, she hears some kind of an interchange
11 between her husband and a police officer. And then
12 she -- now -- now she's repeating the city council
13 meeting in terms of what she heard people say
14 there.

15 It's all -- it's not just recording events
16 that she's observing so that she could remember like
17 the temperature or what the sound level was or, you
18 know, what was happening. This is really pretty
19 much a hearsay editorial of all that she's thinking
20 and what other people are telling her at those
21 times.

22 And so, it's not competent, just as
23 Mr. Shields objected earlier, based on her personal
24 knowledge because she's recording all kinds of other

1 people's personal knowledge in here in terms of
2 what, you know, they told her. So I have the same
3 objections he made earlier.

4 HEARING OFFICER FELTON: Do you have any
5 response to that, Mr. Harding?

6 MR. HARDING: Among other things, a statement
7 is an event. And the fact that a statement was made
8 in her presence is an event which is recordable and
9 the documentation of that event occurring.

10 MR. O'DAY: Well --

11 MR. HARDING: The hearsay -- we, frankly, don't
12 care whether anything that she heard or was said to
13 her is taken by the board as being true or not true
14 based upon that fact that it appears here. It is
15 simply here as a recording of her observations at
16 the time.

17 HEARING OFFICER FELTON: I'm actually going to
18 admit this to the extent that this is a present
19 sense -- present impression of the witness as this
20 -- during this time frame, not for the truth of the
21 matter asserted in terms of what exactly her
22 conversations may or may not, or her impressions of
23 conversations with other parties, but to the extent
24 that this is a recollection of events that occurred

1 over time, I'm going to admit it.

2 So let's proceed.

3 BY MR. HARDING:

4 Q. I would like you to look at Complainants'
5 Exhibit 3. First eight pages of that document, do
6 you recognize them?

7 A. Yes.

8 Q. Okay. And what are they?

9 A. They are my typewritten transcripts of
10 what I have handwritten.

11 Q. Okay. So is it, word for word --

12 A. Yes.

13 Q. -- the same as Exhibit 2?

14 A. Right.

15 MR. HARDING: Okay. At this time, move to
16 admit Complainants' Exhibit 3.

17 MR. O'DAY: May I ask one voir dire question
18 about this?

19 HEARING OFFICER FELTON: Yes, you may.

20 VOIR DIRE EXAMINATION

21 BY MR. O'DAY:

22 Q. Was this Exhibit 3, Complainants' Exhibit
23 3, in transcribing Exhibit 2, like Exhibit 2,

24 prepared with a view towards litigation and

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1 admitting it in court or some kind of proceeding?

2 A. Well, it was a matter of if something ever
3 happened to that log, the handwritten log, we'd have
4 it on computer. Little bit easier to read.

5 MR. O'DAY: Okay. I make the same objections
6 that I made with respect to Exhibit 2, only that
7 this is in typewritten form.

8 HEARING OFFICER FELTON: I don't see the
9 relevance in admitting Exhibit 3. I think that we
10 can -- the board can adequately decipher the weight
11 of the other logs that have been previously admitted
12 by both complainants, so I'm going to deny this
13 request to admit Exhibit 3.

14 MR. HARDING: Okay. We ask that it be included
15 in the record as a denied exhibit.

16 HEARING OFFICER FELTON: Yes, it certainly will
17 be.

18 CONTINUED DIRECT EXAMINATION

19 BY MR. HARDING:

20 Q. Are you employed, ma'am?

21 A. Yes, I am.

22 Q. Where are you employed?

23 A. I work for RR Donnelly and Sons in
24 Pontiac, Illinois.

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1 Q. Pontiac?

2 A. Yes.

3 Q. Ah. And what do you do there?

4 A. I work in the salaried support position
5 for the prepress department.

6 Q. And are you essentially an administrative
7 assistant?

8 A. Well, it's probably more than that. It's
9 assisting the whole department of 135 people that
10 goes 24 hours a day, almost seven days a week, and
11 specifically working on things like purchasing,
12 procuring items that are needed for production,
13 personnel type items, and then also some special
14 projects.

15 Q. Okay. And has this -- what you've
16 observed with Benchwarmers, what you've been party
17 to, has this affected you in any way?

18 A. Oh, yes.

19 Q. Has it affected your work?

20 A. A little bit, yep.

21 Q. Okay. I would like to show you what's
22 been marked Complainants' Exhibit 4. Do you
23 recognize that document?

24 A. Yes, I do.

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1 Q. And when did it first come into your
2 possession?

3 A. When I spent the night in Pontiac at the
4 Comfort Inn.

5 Q. Do you recall what night that was?

6 A. It was the night of December 4th.

7 Q. Do you remember what night of the week
8 that was?

9 A. That would have been a Friday night.

10 Q. Okay. And so December 4th, and then it
11 shows checkout December 5th?

12 A. Uh-huh.

13 Q. Comfort Inn in Pontiac?

14 A. Uh-huh.

15 Q. Why did you stay at a motel, what, twelve
16 miles from your home?

17 A. About fifteen.

18 Q. Fifteen?

19 A. Uh-huh.

20 Q. That's not even a good commute in
21 Chicago. Why did you stay at a motel fifteen miles
22 from your home?

23 A. Well, through the course of my employment,
24 I had been assigned a special project, which was

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1 coordinating a lot of details regarding the movement
2 of a 20,000 square foot facility, trying to make it
3 a one-day move without -- just one day of shutdown.

4 And so I was involved with a lot of
5 contractors, the moving company, logistics of floor
6 plans of where equipment goes, mechanical
7 considerations of equipment, things like that. It
8 was over the course of like maybe two and a half
9 months of preparation.

10 And then on the night of December -- I
11 should say on -- this move was to occur on December
12 5th. And it would be an all-day move with like
13 seven semis running a good majority of the day back

14 and forth, back and forth, between the two
15 locations.

16 On December 4th, I came home from work in
17 anticipation of a big day tomorrow, and I decided I
18 was going to relax a little bit. I went to my
19 bowling league, and then I came home about, oh,
20 between maybe 9:00 and 9:30. I judged that there
21 was a lot of noise coming from Benchwarmers. I was
22 talking to Mike about, you know, how am I gonna do
23 this? How am I going to go there tomorrow and be
24 competent and have people calling, Hey, Diane, this,

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1 Hey, Diane, that, making decisions all day long if I
2 get like three hours of sleep?

3 So I sat -- I stayed home for about a half
4 an hour, be like 9:30, 10:00, kind of pondering. I
5 went and sat on the bed in the guest room for a few
6 minutes, kind of evaluating what the guest room was
7 like. And I said, there's no way. There is no way
8 I can stay here.

9 So, I packed a bag. I called the Comfort
10 Inn and made sure they had a room, packed a bag. I
11 went to Pontiac to sleep.

12 MR. HARDING: Move to admit Complainants'
13 Exhibit 4.

14 HEARING OFFICER FELTON: Do you have any
15 objection, Mr. O'Day or Mr. Shields?

16 MR. O'DAY: I object to it. What is it offered
17 to prove? All it -- is she seeking damages for this
18 hotel bill?

19 MR. HARDING: This is not a damages trial.

20 MR. O'DAY: I object to it. It doesn't add
21 anything to her testimony.

22 HEARING OFFICER FELTON: What is the relevancy
23 of this?

24 MR. HARDING: The fact that she did stay in a

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1 motel room fifteen miles from her home.

2 HEARING OFFICER FELTON: I think the foundation
3 has been laid. I will overrule the objection to the
4 extent that it shows she stayed at a hotel one
5 night. Whether or not the board assigns a weight to
6 it, that will be determined at a later time.

7 So, Complainants' Exhibit Number 4, a
8 receipt from the Comfort Inn, is admitted.

9 BY MR. HARDING:

10 Q. Now, have you attempted to work with the
11 police, or was that more Michael?

12 A. I never made any of the phone calls to the
13 police.

14 Q. Okay. And did you ever have any
15 conversations other than the one at the Colfax
16 Benchwarmers with any of the respondents?

17 A. I've never talked to Troy and only talked
18 to Dave, I think, once.

19 Q. Have you been present at the city council
20 meetings?

21 A. Yes.

22 Q. Have you addressed the city council?

23 A. I think on maybe two occasions.

24 Q. Was anything effective done about the

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1 problems that you've been having?

2 A. No.

3 Q. Okay. How has the noise from Benchwarmers
4 affected your life?

5 A. It's caused great disruption, not only to
6 sleep but just the general enjoyment of our own

7 home.

8 Q. Okay. And has it affected the decision as
9 to whether or not to have guests in?

10 A. Yes, it has.

11 Q. And what impact has it had?

12 A. Well, at the -- as we completed this
13 project, the three-year construction, renovations,
14 and we were so proud of our home, we thought, you
15 know, okay, now we can have our open house. You
16 know, we can kind of share this with friends. And
17 that's been permanently postponed.

18 Q. And did you have any plans for the
19 building in addition to what you've already done?

20 A. Yes. We are undergoing the first floor
21 renovation now.

22 Q. Okay. And the first floor renovation has
23 what end point in mind?

24 A. An antique mall.

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1 Q. And do you have any personal plans as far
2 as your own family?

3 A. Yes. At the point in time where we open

4 the store, I will leave my present position. We had
5 hoped that that would be a time where we would start
6 a family.

7 Q. By natural birth or --

8 A. Probably adoption or foster parenting.

9 Q. Okay. Is that plan still in effect?

10 A. We are not sure about that.

11 Q. Why?

12 A. Well, the disruption that has been caused
13 by Benchwarmers has caused a lot of friction between
14 my husband and myself. The fact that we're
15 bed-hopping, you know, going from room to room, how
16 could you bring a child into that? And so we don't
17 know what's going to happen with that.

18 Q. Has this affected your relationship with
19 your spouse?

20 A. Yes.

21 Q. The noise from Benchwarmers?

22 A. Oh, yes.

23 Q. And in what ways?

24 A. Probably most, most ways. I mean, the

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1 communication, you know, is -- suffers when you're

2 both irritable, when you're lacking sleep.

3 Q. Let me be blunt. Are you avoiding going
4 into scandalous material here?

5 A. Yes.

6 Q. Okay. Thank you. I am not going to ask
7 for scandalous material because this all goes to the
8 merits.

9 I have no further questions of this
10 witness.

11 HEARING OFFICER FELTON: Do you have cross,
12 Mr. O'Day?

13 MR. O'DAY: Yes.

14 CROSS-EXAMINATION

15 BY MR. O'DAY:

16 Q. On December 4th, 1998, did you go over to
17 Benchwarmers and talk to anyone about your special
18 circumstances the next day?

19 A. No.

20 Q. Did you prepare Exhibit Number 2 with a
21 view towards using it some day to support a claim in
22 some kind of court or other tribunal?

23 A. It was just a -- kind of a little diary of
24 what was going on.

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1 Q. What were you trying to record when you
2 made Exhibit 2?

3 A. When I made it?

4 Q. Yes. Were you trying to record everything
5 that you thought was important with respect to this
6 issue?

7 A. Well, there -- there are things in there
8 that probably aren't important to this issue.

9 Q. Did you just sort of keep it as a diary of
10 what you wanted to write at the time, what you
11 thought was important at the time to write?

12 A. Yes.

13 Q. Do you know whether the sound is going
14 from a commercial building to your commercial first
15 floor and then from your commercial first floor up
16 to your residential second floor, or do you know
17 whether it's going from commercial space in the
18 building next to you right over to your residential
19 space without going through your commercial space
20 first?

21 A. I don't know. It appears that the
22 majority of the noise is right at the wall in the
23 bedroom, not that it's coming up.

24 Q. That's the same wall, though, that comes

1 up from below; is that correct?

2 A. Yes.

3 Q. Have there been -- have the loud noises
4 from Benchwarmers continued unabated from June 29,
5 1998, until last night?

6 A. No.

7 Q. There was a discussion about a couple
8 months when the noise was abated; do you remember
9 that testimony?

10 A. Yes.

11 Q. Do you agree with that?

12 A. Yes.

13 Q. Was there any other time besides that
14 two-month period after that liquor control
15 commission hearing that the noise was abated?

16 A. Period of time? We've had stretches of
17 days, you know, three days, two days, where it's
18 like, okay, we're sleeping in our bedroom for three
19 days in a row, you know. So there's been periods of
20 time. It's intermittent.

21 Q. And has that -- has that continued for
22 three days, and then all of a sudden you'll start
23 hearing it again?

24 A. Yes.

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1 Q. Do you check to see what -- why the three
2 days without it happening?

3 A. No. Just thankful that it's quiet.

4 Q. Do you check to see if there are people
5 going into Benchwarmers during those times and
6 whether there's any kind of a peculiar position --

7 A. No.

8 Q. -- or condition?

9 Do you know whether -- on the nights that
10 you reflect as problem dates in your diary here, do
11 you know whether on all those nights Benchwarmers
12 even had a band or a deejay?

13 A. Some nights I think I do reflect if I am
14 aware that they have -- that they advertised a
15 deejay or a band. No, they've never had a band, I
16 don't think.

17 Q. And have you tried to track the dates when
18 they had a deejay with the dates that you feel that
19 the music's coming from there?

20 A. Have I tried to track them?

21 Q. Yes. And make sure that it's -- that
22 there is even a deejay at Benchwarmers when you say
23 that you're hearing the music coming from there?

24 A. Well, we hear deejays -- deejays

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1 announcing things over microphone. I believe it's a
2 deejay.

3 Q. And you say that you don't think they've
4 ever had a band there. Why do you say that?

5 A. I don't know. I -- I don't think that --
6 it's usually a deejay who is advertised, so I'm
7 assuming that, based on other advertisements, it was
8 a deejay and not a band.

9 Q. Your log ends on 10/29; is that 10/29/99?

10 A. That's correct.

11 Q. Did you decide not to keep a log after
12 that?

13 A. No.

14 Q. Has it -- has it been the case that you
15 haven't made any log entries since then?

16 A. That's correct. I have not made any log
17 entries since October 29th.

18 Q. And why is that?

19 A. Because there has been nothing
20 significant.

21 Q. With regard to -- you said that you might
22 -- you were thinking about starting a family?

23 A. Yes.

24 Q. And you -- you were thinking about doing

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1 that by either adoption or by becoming foster
2 parents?

3 A. Right.

4 Q. Are you intending by that to start with
5 young infants?

6 A. No.

7 Q. But children who are already somewhat
8 grown?

9 A. School-aged. Uh-huh.

10 Q. And do you know what kind of things
11 children of that age do with their radios and/or
12 televisions or other devices in that -- that could
13 make noise when they go to bed or when they wake up
14 or, for that matter, while they're asleep at night?

15 A. In some homes.

16 Q. Do you know whether children can sleep
17 through a television running or a radio going or a
18 stereo going?

19 A. Sure.

20 Q. They do that, don't they?

21 A. Sure.

22 Q. And you know that that happens in some
23 homes, that children can sleep through -- some
24 children go to sleep with the radio on, some go to

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1 sleep with the television on?

2 A. I've seen children sleep through
3 fireworks.

4 MR. O'DAY: All right. Those are my
5 questions.

6 HEARING OFFICER FELTON: Mr. Harding, anything
7 on redirect?

8 MR. HARDING: Oh, no, nothing. Thank you.

9 HEARING OFFICER FELTON: All right.

10 MR. HARDING: As a matter of fact, the
11 complainant rests -- complainants rest, pardon me.
12 I want to get the grammar in right.

13 HEARING OFFICER FELTON: Complainants rest.

14 MR. O'DAY: Would this be the right time to
15 make a motion, or should I wait till they've
16 completed their case?

17 HEARING OFFICER FELTON: I think they've
18 completed their case in chief so you want to move
19 for what, some kind of --

20 MR. O'DAY: Directed finding and dismissal.

21 MR. HARDING: That's not going to happen here.

22 HEARING OFFICER FELTON: If you're prepared to
23 argue it, we can take the argument right now. And I
24 can either take it under advisement or decide

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1 tonight and let you know my ruling tomorrow.

2 MR. O'DAY: Yes. The statutory provision in
3 question here talks about noise emitting beyond a
4 property line.

5 HEARING OFFICER FELTON: Can you refer to which
6 statute and provision?

7 MR. O'DAY: Yes. I'll refer to regulations.
8 Section 900.102 in prohibiting noise pollution
9 references the emission of sound beyond the
10 boundaries of property. I believe that nuisance is

11 defined in terms of the same emitting sound beyond
12 the boundaries of property, and that they have made
13 no showing as to specifically what sound emitted
14 beyond boundaries of property versus other sounds,
15 whether they're sounds that get amplified after they
16 leave property, or sounds that are reverberated back
17 from somewhere else after they leave a property
18 line, or sounds that in some manner are contributed
19 to by sounds inside a structure or reverberations of
20 sound inside a structure.

21 And there's a very good reason why, under
22 the statute and the regulations -- as their expert
23 testified -- there's no provision for doing what
24 they've done, which is to measure inside a structure

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1 adjoining another structure. And that's because
2 you're not measuring what the statute and the
3 regulations talk about, and that's sound emitting
4 beyond a property line as opposed to sound in a
5 particular location other than as it comes across a
6 property line. That's why all of the regulations
7 talk about measuring outside; they talk about when
8 you -- when you have somebody like Mr. Yerges or

9 somebody else who performs the calculations, they
10 omit calculations -- or they do calculations that
11 omit data that could come from other possible
12 sources, and they get exact as to what is being
13 emitted beyond a property line. They even show
14 their diagrams showing that it's happening outside
15 which is apparently, you know, what their expert
16 says happens.

17 Here, they're trying to make brand-new
18 law. We're trying to be trailblazers here and are
19 getting into a situation that was not covered by the
20 statute to begin with and isn't covered by the
21 regulations, and isn't even covered by the usual way
22 of doing things. We're trying to be trailblazers.

23 There was -- there's a reason why there's
24 no regulations when an agency is charged with making

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1 judgments about how things should be measured at a
2 location other than a sound goes across a property
3 line. I assume an administrative agency would do
4 that. That's not what's been -- what's been asked
5 for here by the legislature, and it's not what's

6 been done by the agency.

7 I don't think we can say that the agency
8 has been remiss or negligent or careless or anything
9 of the kind in not addressing the situation we have
10 here. The agency knew what it was doing when it
11 made its regulations and when it set forth
12 procedures about how measurements were to happen
13 because it knew what it was charged with doing. And
14 if it wanted to measure what was happening across a
15 wall into another structure or into the same
16 structure for that matter, it could have done so and
17 certainly was aware, with conditions in Chicago and
18 all over the state, that, you know, there are common
19 law -- common wall buildings all over the state. If
20 they had wanted to address something like that, they
21 could have. But they didn't.

22 That's why we move for a directed finding
23 for dismissal at this time.

24 HEARING OFFICER FELTON: Do you have a

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1 response?

2 MR. HARDING: Yes. First of all, there's no
3 showing that there's a common wall. There are two

4 walls. It's just difficult to determine where one
5 ends and where one begins. One wall of two courses
6 of brick, and one wall of two courses of bricks.

7 Secondly, we are not proceeding -- and I
8 think I've made this abundantly clear. We are not
9 proceeding under Section 25 of the act. We're
10 proceeding under Section 900.102. And we are
11 pursuing noise as defined -- noise pollution as
12 defined in 35 Illinois Administrative Code, Section
13 900.101.

14 I would also note that in the Gotham case
15 -- and I don't have the citation here, but I
16 believe it was 96-73, the noise measurements -- the
17 measurements themselves, under very similar
18 circumstances, were thrown out because they could
19 not have been done outside, and this case still
20 stood as a nuisance.

21 What we have is unreasonable
22 interference. All Section 33 -- of the five
23 elements under Section 33, we are prima facie on all
24 five of those elements for a nuisance case. There

1 is unreasonable interference with the Pawlowskis'
2 life. It is coming -- the direct testimony is that
3 it is coming from the Benchwarmers. The fact that
4 some inert object -- we had an expert here, and
5 there was no question raised with that expert, and
6 it could have been raised, but now we have a
7 lawyer's supposition with no expertise whatsoever
8 that this can then be amplified by inert objects or
9 amplified in reflection when the testimony has
10 already been that the traveling of sound causes its
11 dissipation.

12 I think we have a very clear case on the
13 code, on the nuisance, and I don't believe there's
14 any basis whatsoever for any kind of a motion in
15 arrest of this proceeding.

16 MR. O'DAY: I believe that the answer was that
17 they have filed under 900.101?

18 HEARING OFFICER FELTON: My understanding. --

19 MR. HARDING: 900.101 is the definition, noise
20 pollution defined.

21 HEARING OFFICER FELTON: What section of the
22 act?

23 MR. HARDING: Of 900.102. Oh, what section of
24 the act? Section 24.

1 HEARING OFFICER FELTON: My understanding from
2 your original complaint, Sections 23 and 24 of the
3 act as well as 900.102 of the board's rules on
4 noise.

5 I'm actually going to resolve this issue
6 right now in the sense that I will not rule on this
7 motion, the reason being, as a hearing officer, I
8 note your objections and your response. This is
9 something that will be taken by the board. The
10 reason being is, again, my job, as a fact finder, is
11 only to allow the evidence in.

12 And it seems that the board made an
13 initial finding -- when this case was first accepted
14 for hearing, they do a duplicitous/frivolous
15 finding, and their first order of January 21st,
16 1999, they accepted it. And based on the fact that
17 there -- relief could be awarded under the sections
18 that the complainants had alleged at that time. I,
19 as only a fact finder, cannot make a dispositive
20 ruling in this case, but your motion as well as your
21 response are noted. And these are issues that when
22 we're completed with the case here, both cases, we
23 can set forth a briefing schedule where you can make
24 those arguments to the board.

1 MR. O'DAY: Well, then just beyond that, as I
2 understand it, they're proceeding solely under the
3 part of noise pollution and nuisance that relates to
4 unreasonably interferes with enjoyment of the
5 property, not with respect to any specific noise
6 standards. And I move to dismiss all of those other
7 claims that they made formally in their complaint
8 with regard to specific noise standards, so that the
9 only thing that's left in the case is the part of
10 nuisance and noise pollution that deals with
11 nonnumbered questions.

12 HEARING OFFICER FELTON: I refer you just to
13 the board's January 21st, 1999, order, that at that
14 time -- and that's the only time that I believe this
15 has been set forth by the board in any sort of sense
16 -- that the violations are clear, they're Sections
17 23 and 24 of the act -- the alleged violations, I
18 stand corrected there, and the alleged violations of
19 the board's noise regulations at 35 Illinois
20 Administrative Code 900.102.

21 Those are the three violations that the
22 board allowed to proceed as of January 21st, 1999.

23 If there are any challenges to that either by either
24 party, I again recommend you take that up with the

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1 board at your post-hearing briefs.

2 Just so you know, when we organize our
3 schedule for post-hearing briefs, I will allow the
4 complainants first the right to file and then the
5 respondents can respond. So -- and then there will
6 be -- we can discuss whether or not a reply will be
7 necessary and warranted. But that will be something
8 that, again, will be taken with the board and with
9 my understanding and our understanding based on the
10 board's January 21st, 1999, order.

11 Let's go off the record for a second.

12 (A discussion was held off the record.)

13 HEARING OFFICER FELTON: Do you want to -- in
14 light of that, I presume what we'll do is we'll
15 defer starting the respondents' case in chief unless
16 you would like to use the next half an hour to
17 start?

18 MR. O'DAY: No, we're not that way.

19 HEARING OFFICER FELTON: That's all right. In
20 light of that fact, what we're going to do is start

21 at 9:00 tomorrow. The notice said 10:00, but I
22 don't think there's any prejudice by starting an
23 hour earlier. We'll start straight up with the
24 respondent's case in chief. And they have

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1 represented that there are eleven remaining
2 witnesses that they will be calling at that time.

3 Anyone have any other questions? Thank
4 you. Have a good day.

5 This hearing is adjourned until tomorrow
6 at 9:00, same location.

7 (The proceedings were adjourned at 5:35 o'clock
8 p.m.)

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