

ILLINOIS POLLUTION CONTROL BOARD
May 21, 1992

VITO ZIVOLI AND)
STELLA PODCZERWINSKI,)
)
Complainants,)
)
v.) PCB 90-200
) (Enforcement)
SOMEBODY'S BAR AND RESTAURANT)
AND PROGRESS INV. II,)
)
Respondents.)

MR. VITO ZIVOLI APPEARED PRO SE ON BEHALF OF COMPLAINANTS

MR. ROBERT HOUSEHOLDER APPEARED PRO SE OF BEHALF OF SOMEBODY'S
BAR AND RESTAURANT

MR. HOWARD E. KAGAY APPEARED PRO SE ON BEHALF OF PROGRESS
INVESTMENTS II

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter is before the Board on the November 12, 1990 filing of a formal complaint by Vito Zivoli and Stella Podczerwinski against respondent Somebody's Bar and Restaurant, pursuant to Section 31(b) of the Environmental Protection Act (Act) (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1031(b)). Progress Inv. II was added as a respondent by hearing officer order. The complaint alleges that the noise emitted from respondents' property unreasonably interferes with complainants' enjoyment of life and lawful activity. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1024; 35 Ill. Adm. Code 900.102). Hearing was held in Chicago, Illinois on September 16, 1991, at which no members of the public attended.

BACKGROUND

Complainant Vito Zivoli lives in a duplex at 851 S. McKinley, Arlington Heights, Illinois; co-complainant Stella Podczerwinski lives in a duplex next door to Mr. Zivoli at 847 S. McKinley. Their buildings are separated by a dual front-to-rear driveway. It appears that Mr. Zivoli's duplex is co-owned with Ms. Podczerwinski, having been bought four years ago. The buildings are zoned residential for apartments. Somebody's Bar and Restaurant (Somebody's) is located at 858 S. Arthur Ave. in the Village of Arlington Heights (Village). The property has been owned since about 1975 by Progress Inv. II; within a year or two after the building was built, there was a restaurant and bar, having been approved for that use by the Village of Arlington Heights (Village) in an area zoned commercial. Somebody's has

been a tenant for five years. (Compl. pp. 1-3; Amend. Compl.; R. 8,9,75-77). Complainants' buildings include a rear garage with an apron facing the driveway. Somebody's building is behind the complainants' buildings, with a fence and then an easement that appears to be the width of an alley separating them. (Compl. Ex. 1, 3; R. 11).

The testimony was presented in narrative form; none of the parties were attorneys.¹ All witnesses, though, were sworn at the start of hearing. (R. 4.). Mr. Zivoli appeared on behalf of the complainant. Co-complainant Podczerwinski did not appear, having had an allergic reaction from a bee sting the day before; however, the parties agreed that Mr. Zivoli's testimony reflects the testimony his co-complainant would have given at hearing. (R. 5, 85). Mr. Howard E. Kagay appeared on behalf of Respondent Progress Investments II. Mr. Robert Householder appeared on behalf of Respondent Somebody's Bar and Restaurant. Mr. Howard R. Schecter, Director of Midwest Environmental Assistance Center in Chicago appeared at the behest of Respondent Mr. Householder.

THE HEARING ISSUES

The complaint involves an exhaust fan for the restaurant food service, which is mounted high enough on the back of Somebody's building to be visible to the complainants, but appears to be mostly behind Ms. Podczerwinski's back yard. (Compl. Ex. 3; R. 10). At hearing, however, Mr. Zivoli did not confine himself to the complaint at issue. The formal Complaint alleges that the fan is on 24 hours a day, 7 days a week, all year. However, at hearing Mr. Zivoli testified that he thinks the fan turns off about four or five a.m., but is sure it is on when he retires at ten or eleven. Mr. Householder stated, without rebuttal, that the fan comes on at eleven o'clock a.m. and shuts off at midnight. (R. 7, 10).

Mr. Zivoli testified that he can see the fan from his back door and is unable to enjoy his patio and back yard because of the noise. He said he cannot stand next to the fans; especially when parking cars it is hard to carry on a conversation in the parking lot.² Mr. Zivoli stated that, depending on how the wind blows, the noise goes directly in his and his children's bedroom

¹ The distinctions between opening statements and questions and testimony were not always made clear in the record. For example, opening statements became evidence as testimony and questions often became more of a debate. (R. 11, 75).

² The patio is not identified in the record or exhibits. It appears that Mr. Zivoli may be referring to the paved area near where the cars are parked in back near the fence.

window.³ Mr. Zivoli called the noise "annoying" and "irritable". (R. 7, 15). He stated that it does not go away, like the planes. He stated that they often go out in the morning to enjoy themselves and then, when the fans come on, they go into the house, close the windows and turn on the air conditioning. (R. 15, 25). He stated that, "A lot of times the fan might be very high or the wind might be blowing different. I noticed that when the wind blows there's different frequencies, what you call it." (R. 27). He testified that he could hear the fan noise even in the front yard. (R. 13). When asked about the nature of the noise, Mr. Zivoli appeared to say it made a fluctuating sound like "Voo-voo-voo-voo". (R. 23).

When Mr. Zivoli was asked by Mr. Kagay whether the problem might actually be bad blood, rather than actual inconvenience, and that he was trying to get back at Mr. Householder, Mr. Zivoli responded, "Well, I'll tell you what's going on. Let me go back there. When I first moved in I notified Michael Roger and I also confronted him with the door being opened [a back door] and then I confronted Robert Householder....As a matter of fact, I said 'Please close the door, people are bothering us, you know, drinking. God knows what's going on. I'd like that door closed for your sake and my sake'." (R. 16, 17). Mr. Zivoli stated that Mr. Householder cursed him and that there was no further communication, but that Mr. Zivoli had begged him to work this out. (R. 17, 18).

Mr. Zivoli further testified that he mailed two letters to Mr. Householder asking him to work out the problem. He stated that he remembers the first letter well, because the fan noise was "unbelievable". He was at his kitchen table with the window open and could "hear everything". At about 9:30-10:00 pm, there were a few people fighting and the police came. In his letter, which he read into the record, he complains about the noise, but also about trying to keep the neighborhood good and safe from all kinds of pollution, in this case noise pollution. (R. 18-21). Regarding the back door, Mr. Zivoli again talked about the back door even after being reminded that this was not the issue (R. 29, 30, 76). Later Mr. Zivoli referred to a neighbor further down getting robbed about two months earlier, but in answer to a police inquiry, he told them he didn't hear anything because the fan was on all night. (R. 54-55). At another point, Mr. Zivoli appeared to be bothered by another noise; he asked Mr. Householder whether the fan noise is responsible for his not hearing the noise he makes when dumping garbage in the dumpster. (Mr. Householder had testified that the door is now kept closed except for a half hour when he is taking out the garbage. (R. 28, 53)).

³ The record is unclear as to whether the bedrooms are on the first or second floor.

Mr. Zivoli asked that the Board take official notice of PCB 88-171, a case sent to him by Mr. Greg Zak of the Illinois Environmental Protection Agency. (Brainard v. Hagan et. al. (April 27, 1989), PCB 88-171, 98 PCB 247).

Mr. Schecter, who also stated that he was formerly Director of USEPA's Technical Assistance Center for Region 5, (R. 23), testified both as to noise measurements he had made and his own on-site observations. His conclusions are summarized below. He performed two noise measurements, in August and September, 1991, during evening and nighttime hours. He measured ambient noise alone, ambient with the exhaust fan operating, and the impact from a jet flyover, and compared them with the Board's standards. Regarding the August measurements, Mr. Schecter stated that with the exhaust fan turned off, the existing ambient noise is up to 18 dB above nighttime noise limits and is above in 6 of 9 octave bands, while the ambient corrected fan noise shows levels above in 7 of the 9 octave bands. Regarding the September measurements: during evening hours, the ambient levels are above the nighttime noise limits in 8 of 9 octave bands; the fan noise levels are above in 6 of the 9 levels, and are lower than the ambient levels in all but the 500 Hertz octave band. The impact of the aircraft flyover is 5-15 dB higher than the fan noise at the various octave band frequencies. The exhaust fan is 4-5 dB above the Board's daytime limits, while the ambient levels are 4 to 7 dB above in 6 octave bands. Mr. Schecter concluded that the ambient noises are from the Multigraphics plant, and that other business and residential ventilation units contribute as much to the noise as the exhaust fan. (Sept. 12 and 15, 1991 letters in Resp. Ex. 2, R. 31-41, 44-48, 50-73).

Apart from the measurements, Mr. Schecter testified that, during the night of his September visit, he stood in the front street at the end of Mr. Zivoli's driveway, and then on the west side of Arthur Avenue in front of Somebody's; he believes that the sound, which is particularly annoying because of its discrete, fluctuating frequency comes not from the fan but from the company across the street from the restaurant which has four or five huge ventilators on top. One would hear them until four or five in the morning, and that when the wind is from the east, the noise level on Mr. Zivoli's property goes up from all sources. Mr. Schecter suggested that this might explain why Mr. Zivoli thought the exhaust fan might be on until four or five in the morning. (R. 42-44, 60, 61, 69.).

Mr. Schecter also testified that when he and his assistant were doing the measurements under the fan, they could plainly speak to each other at the conversational level of his testimony. (R. 48). He also testified that, although not performed, it was his "gut feeling" that if his data were plotted on the speech interference graphs generally recognized when surveying community noise, there wouldn't be interference in speech caused by the

fan, "speaking near it, meaning 25 feet or more back from it". (R. 49). Mr. Schecter testified that while measuring he could hear the fans, the airplanes, and, while he couldn't hear the "horrible" discrete tones at ground level at the property line, the discrete tone was "plainly audible on the tape" with the microphone raised up in the air. (R. 58).

Mr. Schecter further testified that the winds during his measurements were either calm or a slight breeze, and that the fan had only one speed - one on and off switch. (R. 62, 63).

Mr. Householder testified that the exhaust fan is required for food operations by city ordinance. (R. 10). He stated that from his back door to the dumpster, about 8-10 feet, he hears the fan and other noises, and over long periods of time it has never bothered him, nor have the airplanes or the traffic. Regarding the fan noise when he is dumping the garbage, Mr. Householder responded that he hears himself very well and carries on conversations there all the time. (R. 53).

Mr. Householder also testified that he has verification from several witnesses that it was Zivoli who was cursing and who threw rocks at the door. He stated that several times he tried to talk to Mr. Zivoli and that it was a swearing match. He asserted that Mr. Zivoli called the Village a couple of times and they told Householder to just try to ignore Mr. Zivoli. Mr. Householder asserted that in the five years he's been there, there were no complaints until Mr. Zivoli moved in. Mr. Zivoli disputed the last statement. (R. 75, 76). Mr. Householder testified that he had the fan overhauled, and that it was greased but there was nothing wrong with it. (R. 74, 75).

In a closing argument, Mr. Zivoli stated that he was not asking for "a condemnation or an operation", just asking for relief from the Board. He acknowledged Mr. Schecter's noise measurements and that "the surveyor said the noises are coming from another source." He then stated, "What I'm simply saying here is that I'm seeking relief here for some kind of help regarding the noise that's bothering us and it makes our back yards almost impossible to live." (R. 86-88).

The respondents did not make a closing argument. Mr. Kagay had concluded in his opening argument for the respondents that the apartment buildings were a multi-residential buffer between the commercial area and a single family residential area, so he thinks the owners should have known about that when buying their buildings.

STATUTORY AND REGULATORY FRAMEWORK

This is a "noise nuisance" action pursuant to Section 24 of the Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1024) and 35

Ill. Adm. Code 900.102. (Complaint at 12). Section 24 of the Act provides that "[n]o person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity... ." Accordingly, the Board's rules define noise pollution as "the emission of sound that unreasonably interferes with the enjoyment of life or lawful business or activity" and prohibit the emission of such noise pollution beyond the boundaries of one's property. (35 Ill. Adm. Code 900.101 and 900.102).

Although noise measurements were introduced as evidence in this case, it is well-established that the numerical noise standards set forth in Subtitle H of the Board's regulations are independent of, and do not themselves dictate the outcome of, a nuisance complaint. (Illinois Coal Operators Assoc. v. PCB, 59 Ill.2d 305, 319 N.E. 2d 782, 785 (1974); Annino v. Browning-Ferris Industries of Illinois, PCB 87-139 at 9 (August 18, 1988); Will County Environmental Network v. Gallagher Blacktop, PCB 89-64 at 8 (January 11, 1990).) The Board will accept as evidence the noise level test results only with respect to a finding of an unreasonable interference with the enjoyment of life. (Kaji v. R. Olson Manufacturing Co., Inc., PCB 80-46, 41 PCB 245 (April 16, 1981), aff'd 109 Ill. App. 3d 1168, 441 N.E. 2d 185).

We next note that, in determining whether a violation has occurred, the Board must take into consideration the five factors listed in Section 33(c) of the Act, as well as other facts and circumstances bearing upon a determination of unreasonable interference. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1033(c); Wells Manufacturing Co. v. PCB, 383 N.E. 2d 148, 150-01 (1978); Ferndale Heights Utilities Co. v. PCB, 358 N.E.2d 1224 (1st Dist. 1976)).

The five factors in Section 33(c) are: (1) the character and degree of injury to, or interference with, the protection of the health, general welfare and physical property of the people; (2) the social and economic value of the pollution source; (3) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; (4) the technical practicability and economic reasonableness of reducing or eliminating the emissions...resulting from such pollution source; and (5) any subsequent compliance. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1033(c)).

BOARD DISCUSSION

In this case, we are faced with the question as to whether Mr. Zivoli has carried his burden of identifying, and identifying with sufficient specificity, that it is the exhaust fan noise that is at the heart of his complaint. This question has particular

relevance to the first "33(c)" factor, the character and degree of injury.

Mr. Zivoli did call the fan noise "annoying" and "irritating". He did testify that his children and he cannot enjoy his patio except in the morning when the exhaust fan is off, after which they go inside, close the windows and turn on the air conditioning. We are persuaded here that the fan noise does emanate beyond the boundary line at levels sufficient to affect Mr. Zivoli's enjoyment. The record establishes, though, that the condition exists for limited periods during the day, depending on wind speed and direction. Mr. Zivoli also testified that when parking cars he cannot carry on a conversation. Here, we believe that his testimony was persuasively contested by the respondents insofar as it relates to the fan.

It is of particular concern that Mr. Zivoli had difficulty clearly identifying sounds that were irritating and annoying him, certainly in the evening and at night. He first alleged that the fan was running all the time, then stated that he thought it was on until four or five a.m., and then did not dispute Mr. Householder's statement that the fan went on at eleven a.m. and went off at midnight. He said that the fan ran at different speeds, which it didn't, and that he could hear it from the street in front. When asked directly whether bad blood, rather than actual inconvenience, was the problem, his response focused not on the fan noise but on sights and sounds from an open door, an issue he kept returning to during the hearing even after being cautioned not to do so and even though the offending open door was now closed. It was Mr. Zivoli's repeated focus on issues not before us that raises a question as to the role these issues played in raising the level of Mr. Zivoli's distress about the exhaust fan noise. Also, at hearing and in his closing argument, he did not dispute Mr. Schecter's testimony that the sound that annoyed him was from another noise source.

Regarding the next two "33(c)" factors, Somebody's is a viable business concern whose operations have the approval of the Village and is suitable to the area. While there are mixed uses in that portion of the Village, Somebody's is in a commercially zoned area and appears to be only one of a number of businesses in the area. The record shows that Somebody's was there before Mr. Zivoli moved in, although it is not as clear regarding the co-complainant, or how long the duplexes have been there. The record indicates that the building had a restaurant as a tenant for many years.

Regarding "33(c)" factors four and five, the record is devoid of evidence to show what can be done about the exhaust fan noise. All we have is that, in response to Mr. Zivoli's complaints, Mr. Householder had the fan overhauled and it was found to be operating properly. Beyond that, we decline to

speculate whether there are ways to reduce the fan noise, and to do so safely, given that it is an exhaust fan for an establishment where food is cooked and is required by Village ordinance. Finally, the record contains no evidence regarding subsequent compliance.

Based on the facts and circumstances and in light of the Section 33(c) factors, the Board finds that the exhaust fan noise does not constitute an unreasonable interference with the Complainants' enjoyment of life and lawful activity in violation of Section 24 of the Act and 35 Ill. Adm. Code 900.102. Therefore, the Board will dismiss this case. ⁴

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

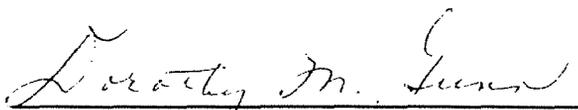
For the foregoing reasons, having found no violation in this matter, this case is hereby dismissed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1991, ch. 111½, par. 1041, provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of May, 1992, by a vote of 6-1.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board

⁴ Regarding Mr. Zivoli's request that the Board take notice of PCB 88-171, a noise case involving exhaust fans on a restaurant in Grafton, Illinois, the record in that case is significantly different from that found here and does not serve to establish precedence for the case here.