ILLINOIS POLLUTION CONTROL BOARD
February 25, 1993

THOMAS SNEED and BARBARA SNEED, Petitioners,	)	
v.	)	PCB 91-183 (Enforcement)
FRANK FARRAR, FIRST BANK & TRUST COMPANY, Respondents.	)	

THOMAS AND BARBARA SNEED APPEARED PRO SE;

JOHN WENDLER APPEARED ON BEHALF OF RESPONDENTS.

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

This matter is before the Board on a complaint filed October 3, 1991, by Thomas and Barbara Sneed ("petitioners", "the Sneeds" or "complainants"). The complaint alleges that respondents have violated section 24 of the Environmental Protection Act (415 ILCS 5/1 et seq.) ("the Act")[1] and section 900.102 of the Board's regulations (35 Ill. Adm. Code 900.102) in the operation of their air conditioning unit. The complaint alleges a "nuisance" violation. Hearings were held in Cairo, Illinois, on June 11, 1992, and July 24, 1992. No members of the public attended the hearings.

The complaint alleges that noise from the air-conditioning unit decreases the value of the apartments ("the building" or "the apartments" or "the Sneed building"). The Sneeds claim that they are unable to rent the apartments, or in the alternative, they are only able to rent to "bad" tenants. (Tr. at 292.)

FACTS

First Bank and Trust ("First Bank" or "bank"), located in the City of Cairo, Alexander County, Illinois, has been at its current location for over forty years. (Tr. at 199.) The air conditioning unit is situated at the rear of the bank, where it has been located since 1970. The unit was replaced in 1991.

---

[1] The Act was previously codified at 1991, Ill.Rev.Stat. ch. 111 1/2 par. 1001 et seq.

(Id.) Thomas and Barbara Sneed bought the building next to the bank on March 7, 1980. (Tr. at 157.) The Sneeds' building is a two-story structure with a beauty shop and electronic repair business on the first floor and two apartments on the second floor. The rear apartment faces out over the back of the bank where the air conditioning unit is located. The Sneeds do not use the building as their personal residence.

The bank and the Sneeds' building are located in a downtown commercial area of mixed business and residential buildings. It is common for buildings to have businesses on the ground floor and residences on the upper floors. (Tr. at 165-174.) Cairo, Illinois, is an economically depressed area with approximately forty percent of the population living below the poverty line. (Exh. BB) The average monthly rent in Cairo is $152 and units often stay vacant for six months or more. (Exh. BB)

PRELIMINARY MATTERS

At various times throughout the proceeding, respondents have challenged the jurisdiction of the Board and the validity of the proceedings. They have raised two objections concerning proper service and one objection concerning ownership. The objections were raised in respondents' October 31, 1991, joint answer and motions to dismiss and were raised again throughout the proceeding. The objections are summarized as follows:

1. Frank Farrar was not properly served because neither he nor his authorized agent signed the registered or certified mail receipt as required by 35 Ill. Adm. Code 103.123.

2. Even if properly served, Frank Farrar is not a proper party to this proceeding because he does not own the premises upon which the air conditioning unit is located.

3. First Bank was not properly served because service was attempted only upon Frank Farrar and he is not a proper agent of the bank.

Facts

Mr. Sneed wrote to Mr. Farrar concerning the air conditioner on three occasions prior to filing formal complaint. (Exh. 1,2,4) Unsatisfied with Mr. Farrar's response, Mr. Sneed filed a formal complaint with the Board on October 3, 1991. Mr. Sneed sent formal notice and a copy of the complaint by certified mail to Mr. Farrar in South Dakota. The return receipt was signed by a "Laura Scott." (Exh. 7)

On October 16, 1991, the Board received a letter from "R. Kipp Kreitzer, President" on First Bank and Trust stationary, which stated "[m]ay this letter serve as our response to the complaint by Thomas J. Sneed." Mr. Kreitzer characterized the complaint as frivolous, but did not raise any jurisdictional objections. On October 17, 1991, Mr. Farrar filed a letter with the Board which stated "[o]n behalf of myself and First Bank and Trust Company, please be advised that I received a copy of the formal complaint by Thomas J. Sneed."

On October 31, 1991, the Board received respondents' joint answer, a motion to dismiss Frank Farrar, and a motion to dismiss First Bank. These documents raised the second and third objections listed above. The motion to dismiss Frank Farrar states "Frank Farrar is not a proper party Respondent to this proceeding in that Frank Farrar does not own the premises upon which the air conditioning unit complained of is located." The motion to dismiss First Bank states "First Bank *** has never been served with a notice and Complaint *** Only the individual, Frank Farrar *** has been served." These arguments are repeated in respondents' joint answer.

The Board ruled on the motions to dismiss in a November 21, 1991 order. The order stated that it appeared that respondents were properly served. However, the order continued

> The Board finds that there are several issues in controversy in this case including the issue of proper service. The Board believes that these issues should be addressed more fully by the parties at a hearing on the merits of the case. Therefore, at this time, the Board denies both motions to dismiss and accepts this case for hearing.

In their April 27, 1992, amended joint answer and affirmative defenses, respondents re-raised the second and third objections. They alleged that Frank Farrar was not a proper party because he does not own the premises. However, they did not supply any supporting affidavit for this assertion. In addition, they asserted that the proceeding was invalid because the bank was not properly served.

At the June 11, 1992, hearing, respondent's attorney, Mr. John Wendler, complained that Ms. Scott is not Mr. Farrar's authorized agent and therefore service was improper. (Tr. at 73.) Mr. Wendler did not offer any witnesses or affidavits to support this assertion. The record indicates that Ms. Scott signed the receipt for the complaint but that her signature does not appear on any other document. (Tr. at 76.) This was the first and only time respondents raised this objection.

Finally, in their post-hearing brief and closing argument, respondents moved to dismiss Frank Farrar, stating "Respondent, Frank Farrar, should be dismissed from this action because of jurisdiction." Respondents do not provide a rationale for this motion and the subject is not addressed anywhere else in their closing brief.

Discussion

Board regulations governing service of process are found in 35 Ill. Adm. Code 101.141, 101.243, and 103.123 which provide in pertinent part as follows:

Section 101.141

A copy of all initial filings in any Board proceeding shall be served upon all persons, required by this Chapter to be served, or their registered agent. 35 Ill. Adm. Code 102 through 120 set forth more specifically who must be served in any given type of Board proceeding. Service of all initial filings shall be made personally, or by registered, certified or First Class mail, or by messenger service. However, initial complaints in enforcement proceedings pursuant to 35 Ill. Adm. Code 103 must be served personally, by registered or certified mail, or by messenger service.

Section 101.243(b),(c)

b) All motions challenging the jurisdiction of the Board shall be filed prior to the filing of any other document by the moving participant or party, unless the Board determines that material prejudice will result. (emphasis added) Such participant or party will be allowed to appear specially for the purpose of making such motion.

c) A person may participate in a proceeding without waiving any jurisdictional objection if such objection is timely raised pursuant to subsection (b).

Section 103.123

a) A copy of the notice and complaint shall either be served personally on the respondent or his authorized agent, or shall be served by registered mail with return receipt signed

> by the respondent or his authorized agent. Proof shall be made by affidavit of the person making the personal service, or by properly executed registered or certified mail receipt. Proof of service of the notice and complaint shall be filed with the Clerk immediately upon completion of service.

We shall address each objection separately.

1. Frank Farrar was not properly served because neither he nor his authorized agent signed the registered or certified mail receipt as required by section 103.123.

Pursuant to section 101.123, if a respondent wishes to contest jurisdiction he must do so "prior to" the filing of any document with the Board. This is essentially a "special appearance" provision which allows a party to challenge the Board's jurisdiction without submitting itself to the Board's jurisdiction. Once an objection is made, the party may participate in the proceeding while preserving the objection.

"Document" is defined in 35 Ill. Adm. Code 101.101 as a "pleading, notice, motion, affidavit, memorandum, brief, petition, or other paper or combination of papers required or permitted to be filed." The Board construes Mr. Farrar's letter of October 17, 1991, as a "document" and notes it was filed prior to any challenge to the Board's jurisdiction. In addition, the letter acknowledged that Mr. Farrar had received the formal complaint.

We find that Mr. Farrar's October 17, 1991, letter is a "document" as contemplated by section 103.123 and that it was filed prior to any objection to the Board's jurisdiction. Therefore, we find that respondent Frank Farrar has waived his right to challenge jurisdiction due to improper service.

2. Even if properly served, Frank Farrar is not a proper party to this proceeding because he does not own the premises upon which the air conditioning unit is located.

35 Ill. Adm. Code 101.242(a) requires that "all motions shall state clearly the reasons for and grounds upon which the motion is made and shall contain a concise statement of the relief sought. Facts asserted which are not of record in the proceeding shall be supported by affidavit." (emphasis added) Mr. Farrar claims he is not an owner of the premises or the air conditioning unit and therefore is not a proper party to this

proceeding. However, Mr. Farrar fails to support this statement either by affidavit, testimony at hearing, or appropriate document. Thus, Mr. Farrar's claim that he does not own the premises is unsupported by the record.

The Board finds that respondents' motion to dismiss Frank Farrar is defective as to the requirements of section 101.242(a). The facts underlying the motion are not contained in the record and respondents failed to supply supporting affidavits. Therefore, the motion to dismiss Mr. Farrar is denied.

3. First Bank was not properly served because service was attempted only upon Frank Farrar and he is not a proper agent of the bank.

As discussed above, pursuant to section 101.123, if a respondent wishes to challenge jurisdiction he must do so prior to the filing of any document with the Board. Because First Bank's October 16, 1991, "response" was filed with the Board prior to raising any jurisdictional objection, the Board finds that all jurisdictional objections are waived.

In summary, the Board denies all three motions to dismiss and finds that respondents Frank Farrar and First Bank and Trust Company are proper parties to this proceeding and are properly within the jurisdiction of the Board in this matter.

TESTIMONY

At hearing, complainants presented the testimony of Mr. Michael Rundles and Mr. Terry Franklin. Mr. Rundles and Mr. Franklin inquired into renting the Sneed apartments but ultimately did not rent the apartments due to the noise of the air conditioner. Mr. Sneed testified on his own behalf. Respondents presented eight people who testified that they had rented from the Sneeds in the past. Respondents also presented expert witnesses in the areas of construction, real estate appraisal, and noise and vibration. In addition, Mr. Ralph Taake, Jr., a former employee of the bank testified for respondents, as did Mrs. Sneed, who testified for respondents as a hostile witness.

Petitioners' primary complaint is that the noise from the air conditioner decreases the value of their property by deterring people from renting the apartments in their building. The petition states "Our attempts to rent and keep rented the apartments to no avail (sic). When apartments rented and air conditioning unit turns on, they move." (Complaint at 3.) At hearing Mr. Sneed stated "They (the apartments) have been in bad shape because I have had poor renters. They are poor, and that

is part of my complaint, in the original complaint, that it is reduced in value. The renters, there has not been a renter that came in here today that paid all of the rent." (Tr. at 288.)

The parties executed a stipulation of facts received by the Board on May 18, 1992. The parties stipulated that no income was reported by the Sneeds on their income tax returns for the past ten years with regard to the apartments in the building at issue. The parties also stipulated that apartments have not been rented in the past ten years. (Stip. at 2-5.) The parties later amended the agreement to reflect that the Sneeds had rented the apartments to two families for a short time.

At hearing, Mr. Sneed likened the sound of the air conditioning unit to "an airplane engine *** such as a Cub *** [i]t has a whining noise. It is extremely loud" and it is as loud as a "jack hammer in a street breaking up the cement or tar." (Tr. at 89-90.) He said the air conditioning unit emits a "sudden" noise that "comes at you all at once" and "if you are sitting and talking to someone in that immediate area *** there is no way you can have a conversation." (Tr. at 89-93.) Mr. Sneed also testified that the unit runs "seven days a week, twenty four hours a day *** it starts in April (and) *** most of November it will continue to run." (Tr. at 94.) Mr. Sneed is present at the apartment building only as needed, which he described as one day a month on the average. (Tr. at 300.)

Complainants' witness, Michael Rundles, testified that he had recently looked into renting one of the Sneed apartments. He looked at both apartments and concluded that the noise from the air conditioner was "more noise than you would care to live around *** because I have children" and even with the storm windows down, the noise was "a little too extreme". (Tr. at 20-23.) Mr. Rundles testified that Mr. Sneed was unwilling to rent the apartments because "there was too much noise." (Tr. at 25.) On cross examination, Mr. Rundles admitted that he and Mr. Sneed had never discussed rent or utilities. He stated that even given the apartment's apparent fire and safety code violations, he would have rented the apartment but for the noise. (Tr. at 39.)

Complainants' witness Terry Franklin testified that he also inquired into renting an apartment from Mr. Sneed. Mr. Franklin testified that Mr. Sneed was not willing to rent the apartment due to concerns about the noise. (Tr. at 41-42.) On cross examination, Mr. Franklin testified that he had never actually been up in the apartments and had not heard the noise first-hand. (Tr. at 47.) On redirect, Mr. Franklin testified that there was nothing unusually dangerous about the apartments (for that price range) and that he would have been willing to make any necessary repairs. (Tr. at 58.)

Respondents' witness Pamela Ice testified that she had rented the front apartment from June to September of 1985 and paid $150 a month in rent. (Tr. at 102-103.) She moved out of the apartment because the ceiling fell down three times while she was there. Neither she nor her children were bothered, annoyed or disturbed in any way by noise from the air conditioner. (Tr. at 103.)

Charlotte Franklin testified that she rented the rear apartment from the Sneeds beginning in 1985 and continued living there for a year and a half. She paid $110 or $125 a month in rent. (Tr. at 110.) She testified that she left the apartment because the "kitchen wall was falling in next to the stove and the ceiling leaked" and that they "outgrew" the apartment. (Tr. at 111.) She could not think of any way that the air-conditioner bothered her or her children and that the unit never kept them awake at night. (Tr. at 112.) Charlotte Franklin's husband, Roy Franklin, also testified. He stated that neither his wife nor his children suffered any ill effects from the noise of the air-conditioner. (Tr. at 125.) They left because "the kitchen plaster was coming off the walls. It took an act of God to get a light bulb up the stairs". (Tr. at 125.) Darrall Gene Gore testified that he lived in the rear apartment with the Franklins and was not disturbed by the bank's air-conditioner. (Tr. at 238.)

Holly Harrell testified that she and her family rented the front apartment in the Sneed building about ten years ago. They lived there for approximately a year and a half and paid $150 a month in rent. (Tr. at 115-116.) She stated "I never really noticed the air conditioner. I never really noticed any noise. That's not why we left." (Tr. at 117.) Holly Harrell's husband, Wesley Allen Harrell, testified that they moved out of the apartment because they wanted a bigger place for their children. He could not remember any problems, impact, or interference from the noise of the air conditioning unit. (Tr. at 122.)

Terri Lee Alexander testified that she and her family rented the front apartment from the Sneeds in 1988 for about a year. (Tr. at 208.) Rent receipts showed they paid $125 to $150 a month in rent. (Exh. MM, LL, KK) They left the apartment because "[w]e could not keep the furnace lit in the winter because of wind coming through there in the ceiling, and so we just could not afford the utilities. They were eating us up. We had to leave." (Tr. at 209.) She testified that the Illinois Home Weatherization Assistance Program, a low income program, came in and put up storm windows and would have insulated the ceiling if Mr. Sneed would have repaired the roof. (Tr. at 209-210.) She testified that the noise from the air-conditioner did not bother her or impair her tenancy. (Tr. at 213.) Terri Alexander's husband, James Lee Alexander, testified that he could not hear the bank's air conditioner in their apartment, although he could

hear it when he was out in the hall. (Tr. at 231.) He testified that he could hear the beauty shop's air conditioning unit in their apartment. (Tr. at 231.)

Respondents called Mrs. Sneed as a hostile witness. Mrs. Sneed is present at the building four days a week during the day to run her beauty shop. (Tr. at 226.) She testified that they purchased the building for her beauty shop business and they had not intended to rent the two second-floor apartments. She stated that she and her husband had not made any effort to rent the apartments in the last ten years. (Tr. at 221-224.) However, she did recall renting the apartment on two occasions during that time. (Tr. at 224.) In addition, she testified that she had allowed her granddaughter to stay in the apartments "off and on" for the last five years. (Tr. at 221.) She stated that the noise from the air conditioning unit had remained unchanged in the last ten years. (Tr. at 225.)

Charles Mattheson is an assistant professor in the School of Engineering, Department of Construction, Southern Illinois University in Edwardsville, Illinois. Professor Mattheson testified as an expert witness in the area of construction. He testified that he inspected the Sneeds' apartments and observed water markings, exposed wiring, a lack of fan or window in the bathroom, rusted hall light fixture, large holes in the plaster work, general deterioration to ceilings and halls, and a lack of general service electrical outlets in the kitchen. (Exh. D) He reported fourteen conditions which he believed would constitute fire or safety code violations (Exh. E) and he estimated the cost of repair of the building at $3000. (Exh. D)

John H. Dowling testified as an expert witness in the area of real estate appraisal. He placed the fair market value of the Sneed building at between $5200 and $6300. (Tr. at 168.) Upon cross examination, Mr. Dowling conceded that if both apartments were rented year round, and if they brought in $200 to $250 a month each, the property would be worth more than he had earlier estimated. Under one formula, and assuming facts supplied by Mr. Sneed, the value of the building could be as high as $95,100. (Tr. at 194.) Mr. Sneed later testified that all of the facts he supplied Mr. Dowling were true. (Tr. at 293-294.)

Mr. Ralph N. Taake, Jr., a long time employee of the bank, testified that he walked by the bank's air-conditioning unit nearly every day for forty-one years. (Tr. at 199.) He testified that a new unit was installed in the last year or two and that he had not noticed any difference in the noise level. (Id.) Mr. Taake admitted that he uses a hearing aid but contended that it was very sensitive to sound. (Tr. at 200.) Mr. Taake did not find the sound made by the unit "unreasonable". (Tr. at 203.)

Mr. Kenneth E. Tempelmeyer is a professor of mechanical engineering at Southern Illinois University in Carbondale, Illinois, and testified as an expert in the field of noise and vibration. Professor Tempelmeyer took measurements around the air conditioning unit, in the bank's parking lot, in the passageway between the Sneed building and the building next to it, and in the front and rear Sneed apartments. (Tr. at 246.) The tests he performed are commonly used as a measurement of noise as the human ear perceives it. (Tr. at 248.) He testified that all measurements were made in accordance with 35 Ill. Adm. Code 900.103, which regulates measurement procedures. (Exh. CC)

Professor Tempelmeyer's report showed the sound level pressures in the apartments exceeded the noise standard found in 35 Ill. Adm. Code 901.103. (Tr. at 272.) 35 Ill. Adm. Code 901.103 regulates the emission of sound from any property-line-noise-source for certain classes of property. According to Professor Tempelmeyer, under the Illinois Guidelines For Noise, conversational speech is also in excess of the standards found in 35 Ill. Adm. Code 901.103. (Tr. at 276.)

Professor Tempelmeyer testified that the predominant noises in the front apartment came from the beauty shop's air conditioner and street traffic. (Tr. at 248.) He termed the noise from the bank's air conditioner as "insignificant" in the front apartment. (Tr. at 261.) In the rear apartment, he placed the sound level meter approximately twelve inches from the window in the kitchen. (Tr. at 250.) He selected this room because he believed the noise was the loudest there and because Mr. Sneed requested that the test be performed there. (Id.) Professor Tempelmeyer estimated that the air conditioning unit was approximately eight to ten feet from the window. (Tr. at 251.) For comparison purposes, Professor Tempelmeyer performed a similar test in a hotel room at the Holiday Inn in Carbondale, Illinois. He performed the tests with the hotel room's air conditioner on "low" and "high." In the rear apartment, the noise level was slightly above the noise level in the hotel room when the hotel's air-conditioning unit was on low, and slightly below the noise in the hotel room when the hotel unit was on high. (Id.)

Professor Tempelmeyer described the area surrounding the air conditioner as "acoustically complex" with "significant" echoing reverberations. (Tr. at 253-254.) He refuted Mr. Sneed's earlier contention that the air conditioner is as loud as a jet engine or a jack hammer. (Tr. at 255.) Professor Tempelmeyer thought the windows were down when the tests were performed but could not recall whether the storm windows were down. (Tr. at 256.) He conceded that the sound in the room would be louder with the windows open than with the windows closed. (Tr. at 269.)

In addition to the testimony presented at the hearing, the parties entered an agreement into evidence concerning the condition of the apartments. The parties agreed that the apartments violated numerous fire and safety code provisions and that the front apartment was habitable but the rear apartment was not. Mr. Sneed asserted that he had intended to fix-up the apartments before renting them. (Tr. at 136-137.)

ANALYSIS

The complaint alleges a "nuisance" violation pursuant to section 24 of the Act (415 ILCS 5/24) and section 900.102 of the Board's regulations (35 Ill. Adm. Code 900.102). The Board construes the pleading as making two alternative claims. First, they claim they are unable to rent the apartments at all due to the air conditioner's noise; second, they claim they are only able to rent to "bad" tenants due to the air conditioner's noise.

Section 24 of the Act prohibits noise pollution as follows:

> No person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act.
>
> 415 ILCS 5/24.

The Board's noise pollution control rules similarly prohibit "nuisance noise". Board rule 900.102 provides as follows:

> No person shall cause or allow the emission of sound beyond the boundaries of his property *** so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter.
>
> 35 Ill. Adm. Code 900.102 (1991).

The rules define "noise pollution" as "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity." 35 Ill. Adm. Code 900.101 (1991).

Thus, under the Act, the respondents have violated the nuisance noise provisions if the noise has unreasonably interfered with the complainants' enjoyment of life or with their pursuit of any lawful business or activity. Unreasonable interference is more than an ability to distinguish sounds attributable to a particular source. It is also more than "annoyance" due to the sounds, which is too subjective. Rather, the sounds must objectively effect the complainant's life or business activities. See Kvatsak v. St. Michael's Lutheran

Church, (Aug. 30, 1990), PCB 89-182, 114 PCB 765, 773 ; Kochanski v. Hinsdale Golf Club, (July 13, 1989), PCB 88-16, 101 PCB 11, 20-21, rev'd on other grounds, 197 Ill.App.3d 634, 555 N.E.2d 31 (2d Dist. 1990).

Unreasonable Interference

The Illinois Supreme Court has directed the Board to consider the facts of a "nuisance" case in light of the factors outlined by section 33(c) of the Act to determine unreasonableness. Wells Manufacturing Co. v. PCB, 73 Ill.2d 226, 232-33, 383 N.E.2d 148, 150-51 (1978) ("nuisance" air pollution; first four factors only); see Ferndale Heights Utilities, 44 Ill.App.3d at 967-68, 358 N.E.2d at 1228. The section 33(c) factors are as follows:

(i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

(ii) the social and economic value of the pollution source;

(iii) 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;

(iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions *** resulting from such pollution source; and

(v) any subsequent compliance.

415 ILCS 5/33(c).

The Board now turns to consideration of each of these factors in determining whether the interference was unreasonable.

Character and Degree of the Injury or Interference

Section 33(c)(1) directs the Board to consider the character and degree of any interference caused by the noise emitted from First Bank's air conditioner. The standard to which the Board refers is whether the noise substantially and frequently interferes with a lawful business activity, beyond minor trifling annoyance or discomfort. See, e.g., Brainerd v. Hagen, (April 27, 1989) PCB 88-171, 98 PCB 247. There is no loss of revenue estimate in the record. This information is especially important where, as here, the injury complained of is purely economic.

Where economic injury is the sole complaint, loss of revenue figures are an important aid in distinguishing between "substantial" interference and "trifling" interference.

The parties stipulated that the Sneeds have not reported any income on their tax returns for the past ten years with regard to the apartments in the building at issue and that the apartments have not been rented in the past ten years. The Sneeds contend that due to the noise from the air conditioner, they have been unable to rent the apartments. However, there is substantial evidence in the record to dispute this claim. Respondents presented eight past tenants. These tenants paid between $110 and $150 a month in rent. Two families rented the apartments for a year and a half. Therefore, the Sneeds' contention that they have been unable to rent the apartments is undoubtedly false. Moreover, the tenants testified that they moved out of the apartment for a variety of reasons including leaking ceilings, the size of the apartments and high utility bills. Not a single tenant reported being bothered or affected by the noise from the bank's air conditioner in any way. In addition, Mrs. Sneed testified that they have not tried to rent the apartments.

Professor Tempelmeyer testified that the noise from the bank's air conditioner was insignificant in the front apartment and that other noises were dominant. This was supported by one witness who stated that he could not hear the bank's air conditioner, but could hear the beauty shop's unit. Professor Tempelmeyer's report indicated that the noise may constitute a violation of 35 Ill. Adm. Code 901.103, the section establishing numerical noise standards. Evidence of a possible numerical violation does not, in itself, automatically result in a finding of a nuisance violation. Rather, in determining a nuisance violation, the Board must examine the factors set out in section 33(c) of the Act.

In the alternative, the Sneeds claim they are only able to rent to "bad" tenants. At hearing Mr. Sneed stated "They (the apartments) have been in bad shape because I have had poor renters. They are poor, and that is part of my complaint, in the original complaint, that it is reduced in value. The renters, there has not been a renter that came in here today that paid all of the rent." (Tr. at 288.) In their closing brief, petitioners state "the respondents have no way of knowing how many people that did refuse to rent these apartments nor did I keep a record." (Pet. at 1) Other than Mr. Sneed's testimony the record contained no support for this contention.

Complainants presented two witnesses who would have rented the apartments but for the noise. These tenants appear to be "good" tenants, in that they have subsequently become homeowners (Tr. at 29 and 52) and one witness stated he was willing to make repairs to the apartment. (Tr. at 44.) However, it was Mr. Sneed

who ultimately decided he could not rent the apartment to the first witness due to the noise. The second witness did not go up into the apartments and his knowledge of the noise was based entirely on what Mr. Sneed told him. Therefore, while the testimony of these witnesses supports the contention that the noise had some negative affect on potential tenants, their testimony does not support a finding that the noise had a substantial affect.

The evidence indicates that there are factors other than the noise which act to discourage potential renters. For instance, the parties agree that the rear apartment is uninhabitable, the front apartment needs substantial repair, and that the apartments violate numerous fire and safety code provisions. This is consistent with the testimony of the past tenants who complained that the walls and ceilings were falling in. Furthermore, the record indicates that due to the poor economic conditions in Cairo, apartments such as the Sneeds' often stay vacant for long periods of time. (Exh. BB)

Social or Economic Value of the Source

With respect to section 33(c)(2), there is no evidence in the record regarding the social and economic value of First Bank or the air conditioning unit to the area.

Suitability or Unsuitability of the Source, Including Priority of Location

With respect to section 33(c)(3), it appears from the record that the bank and the air conditioning unit are appropriately located in the downtown business district. Moreover, both the bank and the air conditioning unit occupied the area prior to the Sneeds' acquisition of their building.

Technical Practicability and Economic Reasonableness of Control

The focus of the section 33(c)(4) inquiry into the technical practicability and economic reasonableness of control is what can be done about the purportedly offensive sounds. The record offers no information regarding the technical feasibility or economic reasonableness of controlling the noise of the air conditioning unit.

Subsequent Compliance

Section 33(c)(5) involves the issue of subsequent compliance. The record does not suggest that the alleged

violation has been cured, and therefore, this factor is inapplicable.

CONCLUSION

In light of the evidence presented in the record and in consideration of section 33(c) of the Act, the Board finds that the character and degree of injury to, or interference with, the Sneeds' physical property is not unreasonable. The interference in this case, if it exists at all, is not significant. The evidence directly contradicts petitioners' claim that they have been unable to rent their apartments due to noise from the air conditioning unit. The record indicates that at least eight people have rented the Sneeds' apartments and that none of these tenants were disturbed by the noise from the air conditioning unit. In addition, even if the noise from the air conditioning unit was eliminated, it is unlikely that the Sneeds would be able to rent their apartments year round. The parties agree that the rear Sneed apartment is currently uninhabitable and the front apartment would require substantial work before it could be rented. Moreover, Cairo apartments typically remain vacant on the average of six months a year. Lastly, section 33(c)(3)'s focus on the suitability of the alleged pollution source to its locale and priority of location does not support a finding of a violation given that both the bank and the air conditioning unit occupied the area prior to the Sneeds' acquisition of their building.

Therefore, First Bank and Trust Company and Frank Farrar are not in violation of section 24 of the Act, 415 ILCS 5/24, or of 35 Ill. Adm. Code 900.102.

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

ORDER

For the foregoing reasons, the Board finds that respondents First Bank and Trust Company and Frank Farrar are not in violation of section 24 of the Environmental Protection Act and of 35 Ill. Adm. Code 900.102. This matter is dismissed.

IT IS SO ORDERED.

Board Member B. Forcade dissented.

Section 41 of the Environmental Protection Act, 415 ILCS 5/41, provides for the appeal of final orders of the Board within

35 days. The rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 25th day of February, 1993, by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board