

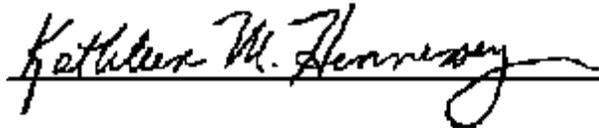
ILLINOIS POLLUTION CONTROL BOARD  
August 5, 1999

LUCILLE WATHEN, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 99-30  
 ) (Enforcement - Citizens, Noise)  
 ROBERT and WENDY STRYKER, )  
 )  
 Respondents. )

CONCURRING OPINION (by K.M. Hennessey):

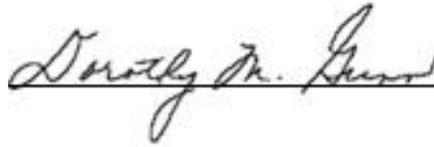
I respectfully concur with the Board's August 5, 1999 order that denies respondents' motion to dismiss. I write separately, however, to note two points. First, respondents' motion relies upon their claim that they have eliminated the nuisance noise. While the Board may consider new factual allegations on a motion to dismiss (assuming the Board treats the motion as a Section 2-619 motion under the Illinois Code of Civil Procedure), the new factual matter must be verified by a sworn affidavit. See 735 ILCS 5/2-619(a) (1998). Respondents did not verify their claim with an affidavit.

Second, and more importantly, dismissal would not be warranted even if respondents had supplied an affidavit. In Shelton v. Crown (May 2, 1996), PCB 96-52, for example, the Board denied a motion to dismiss a nuisance noise complaint arising out of noise from an air conditioner. Respondents moved to dismiss on the grounds that complainants had moved away. The Board stated, "[a]lthough the complainants no longer reside next to the air conditioner, complainants may still be able to prove that an unreasonable interference occurred." Shelton, PCB 96-52, slip op. at 2. Here too, respondents are potentially liable for past unreasonable interference, even if they have in fact eliminated the nuisance noise.



K.M. Hennessey  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above concurring opinion was submitted on the 23rd day of August 1999.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board