

ILLINOIS POLLUTION CONTROL BOARD

November 6, 2003

LYNN ERICKSON,)	
)	
Complainant,)	
)	
v.)	PCB 04-26
)	(Citizens Enforcement - Noise)
CHARLESTON CLASSIC HOMES, INC.,)	
and LAWRENCE E. VAN SOMEREN, JR.,)	
)	
Respondents.)	

ORDER OF THE BOARD (by T.E. Johnson):

This citizens enforcement action was brought by an individual alleging illegal noise emissions from a building demolition and construction project. The project is located in Wheaton, and complainant resides next door. Today the Board accepts the complaint for hearing and denies respondents' motion to dismiss. Below, the Board describes the procedural history before turning to the complaint, the motion to dismiss, and the hearing.

PROCEDURAL HISTORY

On September 2, 2003, complainant Lynn Erickson (Erickson) filed a complaint against respondents Charleston Classic Homes, Inc. (Charleston) and Lawrence E. Van Someren, Jr. (Van Someren). Charleston and Van Someren filed a motion to dismiss on September 29, 2003. Erickson filed a response to the motion on October 16, 2003.¹

COMPLAINT

Erickson alleges that noise from respondents' building demolition and construction project violates Sections 23, 24, and 25 of the Environmental Protection Act (Act) (415 ILCS 5/23-25 (2002)) and Sections 900.101 and 900.102 of the Board's rules (35 Ill. Adm. Code 900.101, 900.102). Comp. at 3. Erickson complains specifically that since mid-July 2003, from 7:00 a.m. to 5:00 p.m. every day except Sundays, "[t]here is constant bulldozing, hammering, pounding and excessive banging" approximately six feet from her home. *Id.* Erickson states that the noise has caused her family to lose enjoyment of their home, adding that her family was "forced to move out due to noise." *Id.* at 4. Erickson seeks a Board order requiring that Charleston and Van Someren "stop the noise! (or pay for us to live elsewhere – builder's expense)." *Id.*

¹ The Board cites the complaint as "Comp. at _," the motion to dismiss as "Mot. at _," and the response as "Resp. at _."

Under Section 31(d) of the Act, any person may file a complaint with the Board. *See* 415 ILCS 5/3.315, 31(d) (2002); 35 Ill. Adm. Code 103. The Board finds that Erickson's complaint meets the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(c), (f). Section 31(d) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d) (2002); *see also* 35 Ill. Adm. Code 103.212(a).

A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. No evidence before the Board indicates that Erickson's complaint is duplicative. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Several aspects of Erickson's complaint are frivolous.

Erickson alleges that respondents violated Sections 23 and 25 of the Act. However, the former section simply sets forth legislative findings about noise and the latter section merely authorizes the Board to adopt noise rules. Erickson also alleges a violation of Section 900.101 of the Board's noise rules, which only provides definitions of terms used in the rules. Erickson fails to state a cause of action concerning these provisions because none of them can be violated.

The remaining provisions allegedly violated are Section 24 of the Act and Section 900.102 of the Board's rules. These provisions constitute the nuisance noise prohibition and can be violated. These allegations accordingly are not frivolous.

Erickson asks, as an alternative remedy, that the Board order respondents to pay for Erickson and her family to live elsewhere, away from the alleged noise pollution. Though the Board can order her requested cease and desist remedy if a violation is proved, the Board lacks the authority to award damages. The Board therefore strikes Erickson's alternative request for relief from the complaint.

Within 30 days after being served with a complaint, a respondent may file a motion to dismiss the complaint. *See* 35 Ill. Adm. Code 101.506, 103.212(b). Charleston and Van Someren have done so here. The Board now turns to their motion to dismiss.

MOTION TO DISMISS

Charleston and Van Someren move the Board to dismiss Erickson's complaint, arguing that their activities are exempt pursuant to Section 901.107(d) of the Board's noise rules (35 Ill. Adm. Code 901.107(d)). Mot. at 2. That provision states:

Sections 901.102 through 901.106 inclusive shall not apply to sound emitted from equipment being used for construction.

Charleston and Van Someren also argue in their motion to dismiss that their demolition and construction activities have been "normal" and "routine," attaching an affidavit of a resident living on the other side of the project site affirming that the "construction activities have not been disruptive of our family activities." Mot. at 2, Affidavit of Jean Van Wyk. Respondents also

assert that they comply with the Municipal Code of the Village of Naperville, which, according to respondents, exempts “between the hours of 7:00 a.m. and sunset, noises customarily resulting from construction work.” *Id.* at 2-3.

The Board notes that Section 901.107(d), by its terms, provides an exemption just from Sections 901.102 through 901.106 (35 Ill. Adm. Code 901.102-901.106). These sections set forth only numeric limits on sound emissions, as Erickson notes in her response. Resp. at 1. In her complaint, Erickson does not allege that respondents have violated any of the numeric limits, but rather that they have violated the nuisance noise prohibition of Section 24 of the Act and Section 900.102 of the Board’s rules by unreasonably interfering with the enjoyment of life. The Board finds that the Section 901.107(d) exemption is therefore inapplicable here. Accordingly, the Board need not make any ruling on whether the noise complained of comes from “equipment being used for construction” as provided in Section 901.107(d).

Regarding the additional arguments Charelstan and Van Someren make for dismissal, the Board notes that respondents may introduce evidence in the form of testimony of neighboring residents, but an affidavit of someone affirming that the noise is not disruptive is not a ground for dismissal. Nor is the respondents’ purported compliance with a local noise ordinance. The Board expresses no opinion interpreting the municipal code provision respondents rely upon. Respondents are free to argue the legal import of the local exemption and introduce related factual evidence, but the Naperville ordinance does not exempt Charleston and Van Someren from complying with State law—that is, the prohibition on nuisance noise under Section 24 of the Act and Section 900.102 of the Board’s rules.

For the reasons above, the Board denies respondents’ motion to dismiss.

HEARING

The Board accepts for hearing Erickson’s complaint, as amended in this order. *See* 415 ILCS 5/31(d) (2002); 35 Ill. Adm. Code 103.212(a). The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer’s responsibilities is the “duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board.” 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2002). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

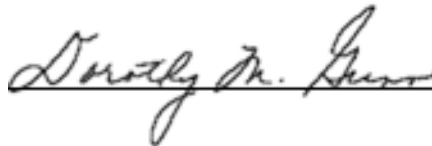
Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any, including whether to impose a civil penalty, and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any, including a specific dollar amount, and supporting its position with facts and arguments that address any or all of the Section 42(h) factors.

CONCLUSION

The Board denies respondents' motion to dismiss and accepts Erickson's complaint, as modified above, for hearing. A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider respondent to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d). Respondents' timely filing of their motion to dismiss, however, stayed this 60-day period. *See* 35 Ill. Adm. Code 103.204(e). Charleston and Van Someren therefore each have 60 days from their respective receipt of this order to file an answer.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 6, 2003, by a vote of 6-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board