ILLINOIS POLLUTION CONTROL BOARD
December 6, 2001

ROBERT and YVONNE GARDNER,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 01-86
	)	(Citizens Enforcement - Noise)
TOWNSHIP HIGHSCHOOL DISTRICT 211 and GERALD CHAPMAN,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by S.T. Lawton, Jr.:

On October 12, 2001, the Township High School District 211 and its superintendent, Gerald Chapman (respondents) filed a motion for summary judgment. Robert and Yvonne Gardner (complainants) filed their response to the motion on October 25, 2001. This matter involves allegations that respondents' air conditioning units on the roof of Hoffman Estates High School cause noise pollution in violation of the Environmental Protection Act (Act) and Board regulations. The Board denies respondents' motion for summary judgment for the reasons explained below.

STANDARD OF DECISION

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998); People v. City of Waukegan (Waukegan), PCB 01-104, slip op. at 2 (Aug. 23, 2001). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370; Waukegan, PCB 01-104, slip op. at 2.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, *citing* Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, the party opposing a motion for summary judgment may not rest solely on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994); Waukegan, PCB 01-104, slip op. at 2.

BACKGROUND

Complainants reside at 1545 Fairfield Lane in Hoffman Estates, approximately 350 feet from Hoffman Estates High School. Complainants alleged in their November 27, 2000 complaint that respondents installed five banks of air conditioning units or "chillers" on the roof of Hoffman Estates High School during August 1999, and operate the units on Monday through Friday from 6 a.m. to 9 p.m. as well as various times on Sunday. Comp. at 3.[1] The chillers allegedly cease operation in the winter months. Complainants said that, "[d]epending upon the outside temperature, some or all of the chillers may be running throughout the day." Comp. at 3. Complainants allege that chillers cause noise pollution in violation of Section 24 of the Act (415 ILCS 5/24 (2000)) and the noise nuisance provision in Section 900.102 of the Board regulations (35 Ill. Adm. Code 900.102).

APPLICABLE STATUTES AND BOARD REGULATIONS

Section 24 of the Act provides that:

> 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 (2000).

Section 900.102 of the Board regulations provides that:

> No person shall cause or allow the emission of sound beyond the boundaries of his property, as property is defined in Section 25 of the [Act], so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter. 35 Ill. Adm. Code 900.102.

Section 900.101 of the Board regulations defines noise pollution as:

> [T]he emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity. 35 Ill. Adm. Code 900.101.

Section 101.516 of the Board's procedural rules provides that:

> If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment. 35 Ill. Adm. Code 101.516.

RESPONDENT'S ARGUMENTS

Respondents allege that the Board should grant its motion for summary judgment on two grounds. First, respondents contend that they are entitled to summary judgment because they allegedly did not violate any applicable numerical standards. Respondents point out that two

[1] The complaint filed by Robert and Yvonne Gardner will be referred to as "Comp. at __."

separate and unrelated organizations conducted sound level testing at or near the complainants' property line and adjacent to the school, and concluded that the sound from the chillers did not violate applicable sound level standards. Mot. at 6.[2] Respondents included test results and an accompanying affidavit by Mr. Rudolph Trejo of the Cook County Department of Environmental Control (CCDEC), which allege that respondents were not in violation of the Cook County Environmental Control Ordinance. Mot. at 6; Mot. Exh. F. Additionally, respondents retained Mr. Clete Davis of Kirkegarrd & Associates, who also conducted sound level tests. Mr. Davis concluded that "the levels measured at the time the measurements were taken did not constitute a violation of the Cook County noise ordinance requirements." Mot. Exh. C. Respondents assert that, based on the results of these two tests, the Board should grant its motion for summary judgment.

Respondents also argue that, even if the lack of numeric violations does not provide a defense to this matter, any possible interference with complainants' use of their property is not unreasonable. Respondents weigh the evidence currently on record against factors set forth in Section 33(c) of the Act in an attempt to show that, as a matter of law, the interference by the chillers is not unreasonable. Section 33(c) of the Act includes five factors that the Board must consider when determining whether interference from alleged noise pollution is unreasonable. *See* 415 ILCS 5/33(c) 2000; Young v. Gilster-Mary Lee, PCB 00-90, slip op. at 10 (Sept. 6, 2001).

Respondents allege that the Board has previously found a similar situation was not unreasonable in light of Section 33(c) factors, in a case involving a residential property owner that sought relief for noise pollution caused by air conditioning units at the University of Illinois School of Medicine in Rockford. *See* Furlan v. University of Illinois School of Medicine, PCB 93-15, slip op. at 16 (Oct. 3, 1996). Respondents allege that the facts currently on record in this matter are less severe and do not allow for a finding of unreasonableness because complainants can hold a normal conversation with the windows of their house both closed and open, and complainants did not indicate that they could not use any portion of the household. Mot. at 9.

COMPLAINANT'S ARGUMENTS

Complainants contend that the Board should deny respondents' motion for summary judgment on two grounds. First, complainants challenge the accuracy and evidentiary weight of the sound measurements taken in this matter. The complainants point out that neither the CCDEC nor Kirkegarrd & Associates certify that their methods in taking sound measurements were in accordance with Board regulations. Complainants also state that the corresponding reports by these groups do not indicate the number of chillers that were operating during the sound measurements, or describe other factors such as weather conditions that could affect the readings.

Complainants additionally argue that the respondents cannot rely on the numeric data as a defense to an alleged noise nuisance violation. Complainants quote the Board's finding in

[2] The motion for summary judgment filed by respondents on October 12, 2001, will be referred to as "Mot. at ___." Exhibits attached to the motion will be referred to as "Mot. Exh. __."

Zarlenga v. Partnership Concepts, that "[i]t is inappropriate . . . to use numerical data to show compliance with the noise nuisance regulatory standard." Resp. at 2,[3] quoting Zarlenga, PCB 89-169, slip op. at 8 (May 9, 1991).

Second, complainants challenge respondents' allegation that the interference with the complainants' use of their property is not unreasonable. Complainants allege that the chillers cause a low frequency hum similar to a low horn blowing, which results in an unreasonable interference with the use and enjoyment of their property. Comp. at 3-4. Complainants maintain that the noise interferes with their sleep. Mr. Gardner stated in his deposition that he woke up earlier on week-days due to the chillers, and cannot sleep when they are running. Resp. at 2-3. Complainants rely on a previous Board finding to support their premise that "[d]eprivation of sleep constitutes one of the most serious injuries short of trauma." Zarlenga v. Partnership Concepts, PCB 89-169, slip op. at 10 (May 9, 1991).

Complainants further allege that they purchased their home in 1989, prior to the installation of the chillers in 1999, and would not have bought the home if they had heard the noise at the time of purchase. Resp. at 3. Complainants state that they cannot enjoy their back yard when the units are running. Resp. at 3. Complainants attached a petition to their complaint containing the signature of 34 nearby residents that called for the reduction of the noise level created by the chillers to a negligible level, as it had been for the 26 years prior to 1999. See Comp. Exh. A.[4] Complainants allege that some of these neighbors plan to testify about the noise from the chillers. Resp. at 4.

DISCUSSION

The Board first discusses whether it should grant summary judgment based on respondents' allegations that the chillers do not violate numeric noise limits under the Act or Board regulations. The Board next addresses whether it should grant summary judgment on the grounds that, as a matter of law, any interference that complainants experience from the noise generated by the chillers is not unreasonable.

Respondents contend that they are entitled to summary judgment because they have not allegedly violated any applicable numeric standards. Respondents previously raised this argument in their December 13, 2000 motion to dismiss. The Board rejected it in its January 4, 2001 order in this case. The Board reiterates its holding that compliance with numeric noise emissions values does not present an absolute bar to a finding of violation of general noise nuisance prohibitions. Gardner v. Township High School District, PCB 01-86, slip op. at 4 (Jan. 4, 2001); *see also* Zarlenga, PCB 89-169, slip op. at 8-9, citing Will County Environmental Network v. Gallagher Blacktop, PCB 89-64, slip op. at 8 (Jan 11, 1990). A nuisance claim under Section 24 of the Act and Section 900.102 of the Board's noise rule can be found to exist even if the sound does not violate the numeric noise limits established in other portions of the Board's

[3] Complainants filed a response to the motion for summary judgment on October 25, 2001, which is referred to as "Resp. at ___."
[4] The exhibit attached to the complaint will be referred to as "Comp. Exh. A."

regulations. Gardner, PCB 01-86, slip op. at 4. The Board accordingly denies summary judgment as respondent has not proven it is entitled to judgment as a matter of law.

The Board next addresses whether it should find as a matter of law that any interference from respondents' chillers to complainants' enjoyment of life or lawful business activity is not unreasonable. The Board cannot grant summary judgment on these grounds for two reasons. The Board cannot grant summary judgment to a party if a genuine issue of material fact exists. *See* Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370. The extent of the noise from the chillers and the impact that it has on the complainants are still at issue in this matter. Complainants, among other things, plan to have neighbors testify about the severity of the noise from the chillers. The testimony by complainants' neighbors would be directly relevant to the question of whether the chillers cause unreasonable interference.

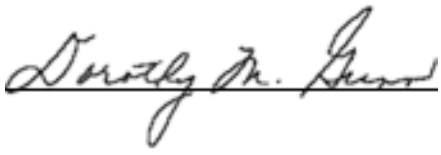
Since there is a genuine issue of material fact, the Board cannot grant summary judgment as a matter of law. The analogies drawn to Board precedent by both complainants and respondents further demonstrates that the severity of the noise caused by the chillers is still in dispute. Respondents believe that the facts in this case are analogous to Furlan, which found that interference from university air conditioning units was not unreasonable despite allegations that complainants could neither sleep in nor use part of their residence. Furlan, PCB 93-15, slip op. at 16. Complainants allege that they experience the type of sleep deprivation that the Board previously found amounted to unreasonable interference. *See* Zarlenga, PCB 89-169, slip op. at 10; Will County Environmental Network, PCB 89-64, slip op. at 8. The Board decided the cases cited by both parties upon fully developed hearing records. The record in this case must also be complete before the Board can determine whether the chillers cause unreasonable interference.

CONCLUSION

The Board accordingly denies respondents' motion for summary judgment and directs the parties to proceed to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 6, 2001, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control