ILLINOIS POLLUTION CONTROL BOARD
September 6, 2018

JAMES FISER,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 18-84
	)	(Citizens Enforcement - Noise)
JAMES L. MEADOR and HENRY'S DOUBLE K, LLC,	)	
	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by B.K. Carter):

On June 29, 2018, James Fiser filed a citizens complaint (Comp.) against James L. Meador and Henry's Double K, LLC (collectively, respondents). The complaint alleges that respondents violated the Board's noise regulations by emitting disruptive sounds from their bar and restaurant located at 834 South Jackson Street in Mt. Carroll, Carroll County. On August 1, 2018, Meador filed a motion alleging that the complaint is frivolous and requesting that the Board not accept it (Mot.).

For the reasons below, the Board denies the motion and accepts the complaint for hearing. The Board sets a deadline of November 5, 2018, for respondents to answer the complaint. Also, because nothing in the record indicates that Meador is an attorney licensed and registered to practice law, the Board directs Henry's Double K, LLC to have an attorney file an appearance at or before the time it answers the complaint. In addition, the Board directs Fiser's attorney to file an appearance by September 27, 2018.

In this order, the Board first summarizes the allegations in the complaint before summarizing respondents' motion. The Board then discusses and decides the motion before directing the parties to file appearances and providing direction on the procedure of the case.

COMPLAINT

Under Section 31(d)(1) of the Environmental Protection Act (Act) any person may bring an action before the Board to enforce Illinois' environmental requirements. 415 ILCS 5/31(d)(1) (2016); *see* 35 Ill. Adm. Code 103.

Fiser alleges that Meador owns Henry's Double K, LLC (Henry's Double K). Comp. at 1. He further alleges that "Henry's Double K is a bar, restaurant, and live music venue." *Id*. Fiser states that he purchased his residence in 2005 and that it is approximately 350 feet from respondents' bar and restaurant. *Id*. at 2. According to Fiser, most of the space between the two buildings is an undeveloped field. *Id*. He also alleges that his master bedroom is the room nearest to the bar and restaurant. *Id*.

Fiser alleges that, from 2005 to 2013, no commercial business existed at respondent's location. Comp. at 2. He further alleges that respondents purchased the bar and restaurant in 2013 and have hosted live music performances there since that year. *Id*. According to Fiser, performances are more frequent during the summer than the winter and "music is played as late as 1 a.m." *Id*. Fiser alleges that, based on "a simple decibel meter" on his property line more than 300 feet from respondents' business, "[t]he music is frequently between 60 and 70 decibels" and "occasionally exceeds 70 decibels." *Id*. He adds that "[t]he level of noise became unbearable over Memorial Day weekend of 2018." *Id*.

Fiser alleges that he clearly hears the music inside his house, which "causes great stress" and interferes with activities such as watching television and sleep. Comp. at 2. He further alleges that he has a heart condition and high blood pressure, which the live music aggravates. *Id*. According to Fiser, respondents' amplified live music "has significantly interfered" with the "reasonable comfort and enjoyment" of his residence. *Id*.

Fiser alleges that the music audible at his residence violated Section 900.102 of the Board noise pollution regulations. Comp. at 1; *see* 35 Ill. Adm. Code 900.102. Section 900.102 provides that "[n]o person shall cause or allow the emission of sound beyond the boundaries of his property . . . so as to cause noise pollution in Illinois. . . ." 35 Ill. Adm. Code 900.102, citing 415 ILCS 5/25 (2016). "Noise pollution" is "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.

Fiser asks the Board to order respondents to cease playing amplified sound or music outside their building and to cease playing it after 11:00 PM. Comp. at 2. Fiser also requests that the Board order respondents to take measures to dampen sound emitted from their business by 50 percent. *Id*. The complaint also seeks "such other relief as the Board deems just." *Id*.

MOTION TO NOT ACCEPT COMPLAINT AS FRIVOLOUS

Section 31(d)(1) 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)(1) (2016); *see also* 35 Ill. Adm. Code 103.212(a). 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." 35 Ill. Adm. Code 101.202. A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." *Id*.

A respondent's motion alleging that a complaint is frivolous or duplicative "must be filed no later than 30 days following the date of service of the complaint on the respondent." 35 Ill. Adm. Code 103.212(b). Attached to the complaint were a certificate of service and affidavit indicating that respondents were personally served with the complaint on June 26, 2018. *See* 35 Ill. Adm. Code 101.300(c)(1). Accordingly, July 26, 2018, was the deadline for either respondent to file a motion alleging that Fiser's complaint was frivolous or duplicative. The Board received Meador's motion on August 1, 2018. Even if the motion is deemed to have been filed on July 27, 2018, when it was provided to the U.S Postal Service (35 Ill. Adm. Code 101.300(b)(2)), it was not filed within the 30-day deadline.

Furthermore, the Board's procedural rules require that documents generally must be filed electronically. *See* 35 Ill. Adm. Code 101.302(h), 101.1000(c). The limited exceptions to this general requirement (35 Ill. Adm. Code 101.302(h)(3), 101.302(h)(4), 101.302(j)) do not appear to apply to Meador's motion. Meador filed his motion by U.S. Mail, and neither the motion nor the certificate of service indicates that the Clerk or a hearing officer provided approval to do so. *See* 35 Ill. Adm. Code 101.302(h). Although the motion has failed to comply with these requirements, the Board briefly summarizes the motion in the following paragraphs and decides the motion in the following section of this order.

The motion argues that the complaint fails to state a cause of action because it does not provide verified information on noise levels or specific evidence about the accuracy of noise measurements. Mot. at 2, 3. It further argues that the only specific date on which Fiser complains of noise is "Memorial Day Weekend of 2018." *Id*. at 2. The motion also argues that the complaint does not describe how respondents are violating any laws. *Id*. at 3. It concludes that the complaint "fails to state a cause of action by being insufficient as to facts." *Id*.

Meador attached five exhibits to his motion. First, he submitted copies of the noise ordinance for the City of Mount Carroll and a "special permit" issued to Henry's Double K, LLC, to conduct events on the Memorial Day weekend of 2018. Mot., Exh. 1.

Second, the motion includes a map of the area including Fiser's residence and respondents' business. Mot., Exh. A. The motion acknowledges that the residence is approximately 350 feet from the bar and restaurant, but it argues that Fiser's property is approximately 100 feet northwest of a large grocery store. Mot. at 2-3; Exh. A. The motion states that respondents' business does not have doors opening to the south toward Fiser's residence. Mot. at 3. The motion also argues that there are neighbors who reside closer to the business than Fiser but who have not complained about noise. *Id*.; Exh. A.

Third, the motion includes a warranty deed (Mot., Exh. B) and states that Meador and his wife purchased their property in 2012. Mot. at 2. Fourth, the motion includes a quit claim deed (Mot., Exh. C) and states that Fiser's wife acquired the residence in 2005 and then quit claimed it to herself and her husband in 2006. Mot. at 2.

Fifth, the motion includes a zoning map of the City of Mount Carroll. Mot. at 2; Exh. D. The motion argues that the lots on which both respondents' business and the Fiser's residence are located are zoned as commercial property. Mot. at 2.

DISCUSSION

The Board first addresses whether the complaint is duplicative. As noted above, 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. Respondents' motion notes that the Board previously dismissed a noise complaint filed by Fiser. Mot. at 3; citing Fiser v. Meador, PCB 15-93 (Apr. 2, 2015). However, the record does not now show that a complaint alleging a noise

violation by respondents' business is being adjudicated before the Board or in another forum. The Board therefore finds that this complaint is not duplicative.

Next, the Board turns to whether the complaint is frivolous. As noted above, 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." 35 Ill. Adm. Code 101.202. Fiser's alleged violation of the Board's noise regulations is a cause of action upon which the Board can grant relief. Regarding relief, Section 33(b) of the Act provides that the Board's final order may include an order to cease and desist from violations of the Act and regulations. 415 ILCS 33(b) (2016). In addition, the Board after finding a violation can order respondent to develop and implement a noise abatement plan. *See, e.g.*, Gill v. CHS, Inc. – Carrollton Farmers Elevator, PCB 16-68, slip op. at 3 (Jan. 21, 2016), citing McDonagh and Fishbaum v. Michelon, PCB 08-76, slip op. at 4 (July 10, 2008); Pawlowski v. Johansen and Quinley, individually and d/b/a Benchwarmers Pub, Inc, PCB 99-82 (Apr. 4, 2000 and Sept. 21, 2000). Fiser's request that the Board order noise mitigation as an element of abatement may be considered under Section 33 of the Act if a violation is proven. The Board finds that the complaint is not frivolous.

Meador's motion argues in large part that the complaint is factually insufficient. When deciding a motion to dismiss, the Board takes all well-pleaded allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004). Complainant need not set out its evidence, but only the ultimate facts to be proved. *See* Schilling v. Hill, PCB 10-100, slip op. at 7 (Mar. 15, 2012). The complaint alleges that throughout the year since 2013, specifically including Memorial Day weekend of 2018, amplified music from respondents' performances has continued as late as 1:00 AM at levels sometimes exceeding 70 decibels. The complaint alleges that this sounds has been audible at Fiser's residence where it has resulted in stress, disrupted activities including sleep, and aggravated medical conditions.

Respondents' motion included a number of exhibits relating to issues including city ordinances, zoning classifications, and other properties near Fiser's residence. These issues may be relevant to the reasonableness of the circumstances alleged in the complaint and to any remedy if the Board finds that a violation occurred. However, they do not demonstrate that the complaint is insufficient. Taking all well-pled allegations of the complaint as true and drawing all reasonable inferences from them in favor of Fiser, the Board denies respondents' motion. The Board finds that the complaint meets the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(c).

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2014); 35 Ill. Adm. Code 103.212(a). 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 by that deadline 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 that respondent to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d). The Board found above that Meadors' motion was not timely filed. Only a timely-filed motion stays the 60-day deadline to file an answer to a complaint. *See* 35 Ill. Adm. Code 103.2121(b). However, as Meador appears to have attempted to timely file the motion, and as the motion shows that this complaint is

contested, the Board directs respondents to answer the complaint within 60 days of the date of this order, by Monday, November 5, 2018.

ATTORNEY APPEARANCES

Meador can represent himself as an individual in this proceeding, but Henry's Double K as a limited liability company must be represented by an attorney. 35 Ill. Adm. Code 101.400(a). The record does not indicate whether Meador is an attorney licensed and registered to practice law and authorized to represent Henry's Double K. The Board directs Henry's Double K to file an appearance by an attorney authorized to represent it before or at the time it answers the complaint. *See* 35 Ill. Adm. Code 101.400(a)(4). The Board also directs Fiser's attorney to file, by September 27, 2018, an appearance that complies with the Board's procedural rules. *See* 35 Ill. Adm. Code 101.400(a)(4).

PROCEDURAL DIRECTION

The Board directs the hearing officer to proceed expeditiously to hearing. Upon its own motion or the motion of any party, the Board or the hearing officer may order that the hearing be held by videoconference. In deciding whether to hold the hearing by videoconference, factors that the Board or the hearing officer will consider include cost-effectiveness, efficiency, facility accommodations, witness availability, public interest, the parties' preferences, and the proceeding's complexity and contentiousness. *See* 35 Ill. Adm. Code 101.600(b), 103.108.

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) (2016). 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.

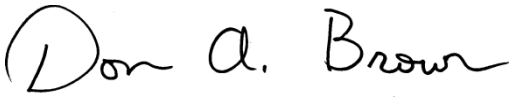
If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-

disclosed" the violation. 415 ILCS 5/42(h) (2014). Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id*. Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id*.

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 total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 6, 2018, by a vote of 5-0.



Don A. Brown, Clerk
Illinois Pollution Control Board