ILLINOIS POLLUTION CONTROL BOARD
September 17, 1992

JOHN ZARLENGA and JEAN ZARLENGA, Complainants,	)	
v.	)	PCB 89-169 (Enforcement)
PARTNERSHIP CONCEPTS, HOWARD EDISON, BRUCE MCCLAREN, COVE DEVELOPMENT COMPANY, THOMAS O'BRIEN, BLOOMINGDALE PARTNERS, an Illinois Limited Partnership, and GARY LAKEN, Respondents.	)	

ORDER OF THE BOARD (by J. Anderson):

On August 24, 1992, John and Jean Zarlenga (Zarlenga) filed a motion requesting the Board to reconsider and modify its July 30, 1992 opinion and order in this matter. On August 31, 1992, Partnership Concepts, Howard Edison, Bruce McClaren, Cove Development Company, Thomas O'Brien, Bloomingdale Partners, an Illinois Limited Partnership, and Gary Laken (respondents) filed a response in opposition to the Zarlenga's motion.

As previously stated, the Zarlenga's motion comes in response to the Board's July 30, 1992 opinion and order in this matter. In that order, the Board granted respondents' July 7, 1992 motion to amend the Board's February 27, 1992 final opinion and order. Specifically, the Board ordered respondents to:

1. remove and relocate the Zephyr unit and the clubhouse air conditioner to the other side of One Bloomingdale Place as proposed within 20 days from the date of the order;

2. replace the chassis and compressors on the individual air conditioners servicing the apartment units at One Bloomingdale Place that face the Zarlenga's town home within 90 days from the date of the order;

3. furnish the Zarlengas all of the data generated by Shiner & Associates in the preparation of the proposed plan;

4. implement the complete noise abatement program by October 30, 1992; and

5. cease and desist from violations of Section 24 of the Environmental Protection Act, Ill. Rev. Stat. 1991, ch. 111½, par. 1024, and 35 Ill. Adm. Code 900.102 effective upon attainment of compliance, but in no case later than October 30, 1992.

In addition, in response to a comment by the Zarlengas that the parties would proceed with further measures if the modifications failed to reduce or eliminate the noise problem, the Board stated that, although it would not object to any agreement between the parties, the Zarlengas would have to file another complaint if they believed that the noise problem persisted and the respondents did not agree.

In its current motion, the Zarlengas argue that they agreed to the above-mentioned remedy only if certain conditions would be met. Specifically, the Zarlengas state that, during a four-way phone conversation between their attorney, Mr. Greg Zak from the Illinois Environmental Protection Agency (Agency), respondents' attorney, and respondents' engineering expert, the parties agreed that, as part of the proposed remedy, Mr. Zak would take readings to determine if the new remedy was acceptable to the Zarlengas and to assure that the noise levels were in compliance with the Board's noise pollution regulations. The Zarlengas also argue that the respondents agreed to supply them and Mr. Zak with the data generated by Shiner & Associates (Shiner). The Zarlengas assert, however, that as of August 20, 1992, respondents had not supplied all of the information. Specifically, the Zarlengas request that respondents tender certain drawings and data to substantiate the finding by Superior Mechanical Industries, Inc. (SMI) that the remedy initially proposed by respondents (i.e., the installation of silencers) is not feasible. The Zarlengas next argue that the parties agreed that, if respondents' amended proposal (i.e., to replace the chassis and compressors) was not acceptable to the Zarlengas and Mr. Zak, respondents would take steps to remedy the problem. Thus, the Zarlengas ask that respondents be required to comply with Board's February 27, 1992 order if the new remedy does not alleviate the noise problem. Finally, the Zarlengas argue that they should not have to file, as the Board stated in its July 30, 1992 opinion, another complaint if the noise from One Bloomingdale Place persists.

In response, respondents argue that the Zarlengas' motion is predicated on a mischaracterization of the agreement reached between counsel for the parties during the telephone conference call in which the Zarlengas did not participate. In fact, respondents argue that they specifically refused to accept any resolution which would leave the final determination concerning remedial actions to the Zarlengas' subjective evaluation. Respondents add that they would not have proposed their alternative plan if they had not received assurances from their consultants that the alternative plan would eliminate the noise

that disturbed the Zarlengas. In fact, respondents state that their interest in achieving a final resolution was evidenced by their motion to amend the Board's February 27, 1992 order in which they requested the Board to find that the implementation of the alternative plan "...will constitute [a] complete resolution of this matter". Finally, respondents argue that the Zarlengas' request ignores the fact that respondents presented evidence of their engineering consultants indicating that the installation of silencers was not feasible.

As for the issue of the data, respondents state that their attorney directed Shiner to provide the Zarlengas with all of the noise data collected during its June 9 and June 19, 1992 field testing events. Respondents also assert that Shiner provided the data to Mr. Zak on July 27, 1992, and that, on August 3, 1992, their attorney wrote a letter to the Zarlengas' attorney confirming that respondents had complied with the Zarlengas request for data. Respondents add that the Zarlengas, in their response to respondents' motion to amend the Board's February 27, 1992 order, did not request any documentation prepared by SMI, and that the Board, in its July 30, 1992 order, did not direct respondents to provide such data. Respondents also argue that the engineering evaluations prepared by SMI do not have any bearing on whether respondents' alternative noise reduction measures will reduce the noise. Respondents add that, in any event, they have supplied the Zarlengas with a copy of SMI's engineering opinion concerning the infeasability of installing silencers on the individual air conditioners and are unaware of the existence of the engineering drawings referred to the Zarlengas' motion.

The Board hereby grants the Zarlengas motion for reconsideration, but denies the relief requested therein. The Board in this instance is presented by two opposing views of what was agreed to. On the one hand, the Zarlengas state that the parties agreed that Mr. Zak would take readings to determine if the new remedy was acceptable to the Zarlengas and to assure that the noise levels were in compliance with the Board's regulations and that, if the new remedy was not successful, respondents would take further steps to remedy the noise problem. Respondents, on the other hand, argue that they would not have accepted a resolution that would leave the final determination concerning remedial actions to the Zarlengas' subjective evaluation.

Although an agreement between parties is desirable, it is not dispositive regarding the Board's determination of an appropriate remedy. In reviewing noise cases, the Board examines the record and analyzes factors found in Section 33(c) of the Environmental Protection Act (Act), Ill.Rev.Stat. 1991, ch. 111½, par. 1033(c), to determine if a noise violation based on unreasonable interference has occurred and to then decide what actions are appropriate to remedy the problem. This is exactly

what was done in this case. On February 27, 1992, and again on July 30, 1992, the Board ordered a remedy after evaluating the evidence before it at those times. The Zarlengas, however, are asking the Board to retain jurisdiction in this matter until they have evaluated and are satisfied with the remedy. The Board will not permit one party to be the sole determiner of the effectiveness of a remediation, and thus contravene the finality of a Board order, if the party believes that a noise problem persists. Rather, a party would be expected to file another complaint because any finding of a continuing noise problem would have to be based on the Board's evaluation of new facts.

As for the Zarlengas' request for engineering drawings from SMI, we remind the Zarlengas that they did not request, nor did the Board order, any such documentation. In any event, it appears that respondents have supplied the Zarlengas with a copy of SMI's engineering opinion concerning the infeasability of installing silencers on the individual air conditioners and that respondents are unaware of the existence of the engineering drawings referred to the Zarlengas' motion.

For the foregoing reasons, the Board grants the motion for reconsideration, but reaffirms its July 30, 1992 opinion and order in this case.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1991, ch. 111½ par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 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 order was adopted on the 17th day of September, 1992, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board