

ILLINOIS POLLUTION CONTROL BOARD
May 9, 1991

JOSEPH B. STRATTON, and)
PAMELA J. STRATTON,)
)
Complainants,)
)
v.) PCB 90-108
) (Enforcement)
)
CHARLES M. ROCK, and LITTLE)
CAESAR'S PIZZA,)
)
Respondents.)

MR. JOSEPH B. STRATTON AND MRS. PAMELA J. STRATTON APPEARED PRO SE;

MR. CHARLES M. ROCK, ESQ., APPEARED ON BEHALF OF RESPONDENT,
CHARLES M. ROCK; AND

MR. CHARLES GVOZDICH APPEARED ON BEHALF OF RESPONDENT, LITTLE
CAESAR'S PIZZA.

OPINION AND ORDER OF THE BOARD BY (J. D. Dumelle):

This matter comes before the Board on a complaint filed on June 13, 1990, by Joseph and Pamela Stratton ("Complainants") of Morton, Illinois, against Charles M. Rock and Little Caesar's Pizza ("Respondents"). Complainants allege that a compressor unit and fan unit on the roof of the mall next door are in violation of the noise pollution provisions of the Illinois Environmental Protection Act ("Act") and Board regulations.

Hearing was held on August 30, 1990 in Pekin, Tazewell County, Illinois. Complainants presented three witnesses, including themselves and Mr. Gregory Zak of the Illinois Environmental Protection Agency (hereinafter "Agency"). Respondents presented two witnesses, Mr. Tim Shea and Mr. Gvozdich, owner of Little Caesar's. No post-hearing briefs were submitted.

Complainants allege violations of Section 24 of the Act and Section 900.102 of the Board's regulations. The applicable regulations are stated below.

Section 24: No person shall emit beyond the boundaries of his property any noise which unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulations or standard adopted by the Board under this Act.

Ill. Rev. Stat. ch. 111 1/2, para. 1024 (1989).

Section 900.102: 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 Illinois Environmental Protection 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: Noise Pollution: 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.

* * *

Birchwood Plaza is a mini-mall located on property immediately adjacent to Complainants and owned by the corporation, Charles Rock Associates, Inc.¹ The back of the mall faces the east side of Complainants' house and runs the length of the Complainants' property. The Complainants' property is the only property abutting the back of the mall. A six foot privacy fence along the property line divides the mini-mall from the Complainants.

The source of the noise emissions is located on the roof of Birchwood Plaza above a Little Caesar's Pizza (Little Caesar's) restaurant. The Complainants allege that the noise is emitted by an oven fan/air makeup vent and a refrigerator compressor unit² installed by and belonging to Little Caesar's. [R. at 101-103.] The roof units are on the back of the roof and approximately 79 feet from the east side of Complainants' house.³ [R. at 84-86.] The oven fan/air makeup vent exhausts the heat from the oven and intakes outside air. This unit begins to run at approximately 10:30 in the morning when the oven is turned on for the opening of business at 11:00. [R. at 69.] The compressor unit is attached to a walk-in cooler for the pizza dough. The compressor

¹ The complaint incorrectly names Charles M. Rock personally as a Respondent instead of the corporation. At hearing, the attorney for the corporation waived any objections for failure to name the proper party. [R. at 9.]

² Hereinafter "roof units" when referring to both.

³ Earlier in the hearing, the distance of seventy-nine feet was stated in the record by Mr. Stratton who at that time was not under oath. [R. at 29.] Mr. Stratton restated this distance, after being sworn in, during cross-examination by Respondent. [R. at 88.] This latter, sworn testimony is relied upon by the Board.

unit is thermostatically controlled, or on and off as needed, for twenty-three hours a day. It is turned completely off between 2 a.m. and 3 a.m. to defrost. [R. at 165-166.]

Prior to filing a formal complaint with the Board, the Strattons sent two letters to the Respondents describing the noise and requesting relief. [Exhs. 3 and 4.] One letter described the noise as a "nuisance" which interferes with family life because the roof units run almost uninterrupted during Little Caesar's business hours and interrupt and affect speech and communication both inside and outside of the house. The noise is also described as being worse in warmer weather when the windows are open but still loud enough to be disruptive in colder weather when the house is closed. Both letters state that the volume of speech must be considerably altered to overcome the noise from the roof units whether inside or outside the house.

The formal complaint states that the sound emissions are "loud, annoying and a nuisance" because the roof units "operate at all times" without any pattern, and "will run as early as 6:00 am and as late as 2:30 am." The roof units have interrupted "family life [because Complainants] cannot enjoy normal outside activities (gardening, entertaining, BarBQing [sic], working on or washing cars, children playing in side yard, or resting in the front porch swing." In addition, the roof units can be heard in the Complainants' son's bedroom and have disturbed his sleep and study habits.

At hearing, Pamela Stratton testified that "[t]he times are very rare when there's no noise emitted from the refrigeration compressor." [R. at 24.] She described the noise as "stressful, distracting and a nuisance" and noticeable even in winter with the windows closed. [R. at 25.] In addition, she stated that "[w]hen we're outside in our side yard or backyard we have to raise our voices to talk above the unit." [R. at 25.]

Joseph Stratton testified at hearing that the noise made communication in the yard very difficult, and called it distracting, distressing, and annoying. [R. at 70.] He described the exhaust fan as seeming to operate all the time and the compressor unit as operating intermittently with approximately ten minutes off out of every hour. [R. at 84.] He found the compressor unit noise more bothersome even though the exhaust fan noise was more constant. [R. at 72-73.] He also stated that the sound emissions interrupted the family's sleep. [R. at 181.]

Complainants introduced seven photographs at hearing which show the oven fan/air makeup vent, the refrigerator compressor unit, the wood privacy fence, the relationship of the mall to the house, the trees and shrubbery between the buildings, and the view of the roof units from the upstairs bedroom window and the kitchen. In these latter two views the compressor unit is fully

visible from the windows whereas the oven fan/air makeup vent is screened by trees or bushes from the house. [Exh. 1.]

Respondents' witness, Tim Shea, is employed by the property management company which manages the mall property for Charles Rock Associates, Inc. Mr. Shea testified that he had spent time listening to the units one at a time and together from the driveway of Complainants' property. [R. at 92.] He found that the noise created by the roof units was "not a disturbing noise" and that he "was talking in a normal voice" when the compressor unit was running. [R. at 90-105.] On cross-examination, Mr. Shea stated that he listened for only about fifteen minutes. [R. at 96-97.]

After considering the testimony on the type, severity, frequency and duration of the noise, the Board finds that the roof units above Little Caesar's interferes with the enjoyment of life by the Complainants. To determine if this interference is unreasonable, as required by Section 900.102, the Board must consider the facts of the case in light of the factors in Section 33(c) of the Act. Wells Manufacturing Co. v. PCB, 73 Ill.2d 226, 232-233, 383 N.E.2d 148, 150-151 (1978). See, also,, Ferndale Heights Utilities, 44 Ill.App.3d 967, 358 N.E.2d 1224 (1st Dist. 1976). Section 33(c) states:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:

- (1) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (2) the social and economic value of the pollution source;
- (3) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
- (4) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (5) any subsequent compliance.

Ill. Rev. Stat. 1989 ch. 111 1/2, par. 1033(c), as amended

by P.A. 86-1363, effective September 7, 1990.

The Section 33(c)(1) elements of character and degree of injury and interference from the roof units were discussed above. The record indicates that the noise emissions from the roof units frequently and substantially interfere with leisure and everyday activities inside and outside the house and with sleep. The unpredictable and lengthy periods of the noise emissions are also beyond mere annoyance or discomfort and require some adjustment in the regular habits of the Complainants. The noise emissions clearly interfere with Complainants' use and enjoyment of their property.

For Section 33(c)(2), the record developed at hearing shows that Little Caesar's has social and economic value by supplying a service and providing employment to the area. Charles Gvozdoch, part owner of Little Caesar's, described his business as a carry out pizza restaurant employing approximately fifteen people. According to the owner, the restaurant averages about seven hundred customers per week throughout the year. [R. at 172-173.]

It is undisputed that priority of location is in favor of the Strattons. Complainants have resided at 204 West Birchwood, Morton, Illinois since July of 1987 when the lot immediately east of Complainants was vacant. Complainants attended the zoning board hearing on proposed construction of the mall. [R. at 38-39.] Construction of the mall ended in late October 1988.

Section 33(c)(3) also requires the Board to consider the suitability of a pollution source. Little Caesar's is located in a small, new commercial development in a completely residential area. The zoning for the mall was not indicated in the record and only one other restaurant operates nearby. [R. at 173.] Because of the predominantly residential neighborhood, Little Caesar's suitability may be questioned only because of the negative impact of noise emissions on neighboring property.

Section 33(c)(4) requires consideration of any technically practicable methods for reducing the noise emissions. Gregory Zak, Noise Technical Advisor at the Agency, testified for the Complainants as to the availability of mechanisms for reducing the noise emissions from the compressor unit. Mr. Zak provided information on a muffler/silencer system for the compressor unit. The cost of such a system was estimated at approximately \$2,500.00. [R. at 142.]

In addition, a letter from respondent Rock's counsel, dated August 17, 1990, states,

"Although that [sic] I maintain that my client is not in violation of any applicable noise emission standards, I do have a proposal to rectify the

situation. My client, at its own expense, is prepared to construct a wooden "fence" on the roof of the building between the refrigeration unit and your residence. I suspect that the wooden barricade would be sufficient to deflect most of the noise emitted from the unit away from your residence. Again, I have indicated that the fence should be around the refrigeration unit rather than the exhaust fan since it is my opinion that the exhaust fan is substantially quieter than the refrigeration unit." [Exh. 10.]

The Complainants have requested that a noise barrier or muffler be installed that would redirect the noise away from their home. The testimony at hearing supports a finding that, when properly designed, either of these options is technically feasible method for reducing the noise emissions onto Complainants' property. No evidence as to economic reasonableness of reducing or eliminating the emissions was entered into the record.

The Board is unaware of any subsequent compliance in this case. (Section 33(c)(5).)

After consideration of these factors and the facts of this case, the Board concludes that the noise emissions from the roof units on the Little Caesar's at Birchwood Plaza constitute an unreasonable interference with the Complainants' use and enjoyment of their property. The emissions therefore constitute noise pollution pursuant to 35 Ill. Adm. Code 900.101 and violate 35 Ill. Adm. Code 900.102 and Section 24 of the Act.

The Board finds that several actions are required to remedy the noise pollution and these actions shall be ordered. Failure to comply with a Board's Order could subject the Respondent to further complaint proceedings and a civil penalty pursuant to Section 42(h) of the Act. Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1042(h), as added by P.A. 86-1363.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

- 1) The Board finds that Respondents have violated Section 24 of the Act (Ill. Rev. Stat. 1989 ch. 111 1/2, par. 1024) and 35 Ill. Adm. Code 900.102.
- 2) Respondent shall initiate a program to attain compliance with all applicable Board regulations. The compliance program shall require that:
 - a) Respondent erect either a noise barrier or a noise

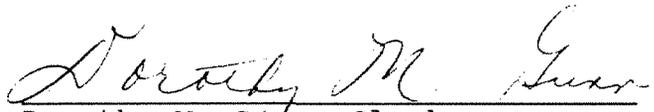
muffler around the noise sources.

- b) The noise barrier or muffler be designed by a qualified consultant.
 - c) The barrier(s) or muffler(s) must affect both noise sources either individually or together.
 - d) The noise barrier or muffler must be in place and finished by July 31, 1991.
- 3) Respondent shall cease and desist from violations of Section 24 of the Act and 35 Ill. Adm. Code 900.102 of the Board's regulations effective upon attainment of compliance, but not later than July 31, 1991.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989 ch. 111 ½ 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.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 9th day of May, 1991, by a vote of 7-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board