ILLINOIS POLLUTION CONTROL BOARD
July 18, 1996

DENNIS MANARCHY, MARY BETH MANARCHY, CHRIS MANDOLINE, and BEVERLY KAGY-MANDOLINE,	)	
Complainants,	)	
v.	)	PCB 95-73 (Enforcement - Citizens - Noise)
JJJ ASSOCIATES, INC., d/b/a THE GOTHAM NIGHTCLUB,	)	
Respondent.	)	

DAVID G. HARDING APPEARED ON BEHALF OF COMPLAINANTS;

JOSEPH FREEDOM APPEARED *PRO SE* ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board pursuant to a complaint filed on March 1, 1995 and an amended complaint filed on April 25, 1995, both of which were filed by Dennis Manarchy, Mary Beth Manarchy, Chris Mandoline, and Beverly Kagy-Mandoline (complainants). Complainants allege that respondent, JJJ Associates, Inc. d/b/a The Gotham Nightclub (Gotham) violated the prohibition of noise pollution set forth at Sections 24 and 25 of the Environmental Protection Act (Act) (415 ILCS 5/24 and 5/25 (1994)) and the Board's regulations set forth at 35 Ill. Adm. Code 900.102 and 901.102(b) in the operation of a nightclub located at 640 West Hubbard Street, Chicago, Illinois. Complainants request that the Board direct Gotham to cease and desist from further violations of applicable statutes and regulations, impose a penalty for past alleged violations, and assure correction of violations.

On May 18, 1995 the Board entered a stay on this matter due to concurrently pending cases in the First Municipal District, City of Chicago, Department of the Environment, and the Chicago Local Liquor Control Commission. On September 21, 1995 the Board denied a motion to dismiss and vacate filed by Gotham and lifted the stay. In ruling on the motion to dismiss and vacate, the Board found that the actions pending in two other jurisdictions were not duplicitous because the First Municipal District case was no longer pending and because the case before the Chicago Local Liquor Control Commission pertained to allegations of other nighttime hour violations. On March 12, 1996 Chief Hearing Officer Michael L. Wallace held a hearing in this matter at the Board's Chicago office located at 100 West Randolph

Street, Suite 11-500, Chicago, Illinois.[1] Gotham filed a post-hearing brief on April 2, 1996 and complainants filed a reply on April 4, 1996. For reasons more fully explained below, the Board finds that Gotham has violated Section 24 of the Act and 35 Ill. Adm. Code 900.102; therefore, we order Gotham to cease and desist from any further violations of Section 24 of the Act and 35 Ill. Adm. Code 900.102.

FACTS

JJJ Associates, Inc., is an Illinois corporation which has owned the Gotham Nightclub since its inception in 1994. (Tr. at 143.) Mr. Joseph Freedom is the sole principal and stockholder of JJJ Associates, Inc. Gotham is located on a corner at 640 West Hubbard Street and 444 North Des Plaines Avenue, Chicago, Illinois. Previous to becoming the Gotham Nightclub, the building housed several nightclubs under various titles. (Tr. at 63.) Originally, the building was owned by a tool and die company. (Tr. at 62.)

Gotham is surrounded by several different properties including those properties owned and occupied by complainants. Complainants Mr. and Mrs. Dennis Manarchy (Manarchys) live with their six-year-old daughter at 656 West Hubbard, Chicago, Illinois, in a three-story building which is used as a photography studio on the first and second floors and a residence on the third floor. (Tr. at 76-77.) The Manarchy property is located just west of Gotham on the same side of the street. The only separation between the Manarchy property and Gotham is a "regular street alley" situated between the two buildings and a "carport" area for loading and unloading in the back of the nightclub. (Tr. at 78.) The Manarchys have owned their building for 11 years.

Complainants Mr. Christopher Mandoline and Mrs. Beverly Kagy-Mandoline (Mandolines) live with their two daughters in an apartment complex located at 645 West Grand Avenue, Chicago, Illinois, approximately 120 feet from Gotham. The Mandolines own the eight-unit apartment complex located at 641, 643 and 645 Grand Avenue, Chicago, Illinois. (Tr. at 99-100.) Mr. Mandoline has owned the "string of properties" on Grand Avenue for approximately 18 years. (Tr. at 106.) The rear portion of the Mandoline property faces south toward Gotham. Between the Mandoline property and Gotham, a railroad embankment exists for the Union Pacific Railroad. (Tr. at 80-82.) This railroad embankment is about 25 feet tall and approximately 80-90 feet wide. Gotham can be seen over the embankment from the third level bedroom windows of the Mandoline property. (Tr. at 83.) The fourth level contains separate apartments housed by tenants in the Mandoline apartment complex. (Tr. at 84.) The area where complainants reside, and the location of the Gotham Nightclub, is zoned commercial. (Tr. at 95-96.)

At hearing, the hearing officer allowed complainants leave to file the April 25, 1995 amended complaint. The amended complaint had been filed to clarify the status of respondent as the holder of all licenses, and to update the dates of the allegations in the original

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[1] The transcript of the March 12, 1996 hearing will hereinafter be referred to as (Tr. at ___.).

complaint. (Tr. at 5-6.) Additionally, Mr. Freedom, on behalf of Gotham, asked to renew his motion to dismiss and motion to vacate previously filed and denied by the Board. (Tr. at 7-8.) The hearing officer directed Gotham to file any further substantive motions with the Board. (*Id.*) No further motions were filed by Gotham subsequent to hearing.

Complainants' Testimony

Complainants presented the testimony of three witnesses: Mr. John Yerges, an acoustical consultant; Ms. Mary Beth Manarchy; and Mr. Christopher Mandoline. Complainants admitted three exhibits into evidence during complainants' case-in-chief.[2]

Mr. John Yerges, an acoustical consultant of Yerges Acoustics, testified as complainants' first witness. (Tr. at 12.) Mr. Yerges testified that his firm specializes in sound, noise, and vibration control engineering; he also elaborated on his 21 years of experience and qualifications in the sound and acoustical area. (Tr. at 12-13; Comp. Exh. 1.) Mr. Yerges was retained by complainants to take sound readings at the Manarchy property which abuts the Gotham property on the west side.

Mr. Yerges gave a detailed explanation of the effect of noise and its perception by the human ear. He explained that a decibel (dB) is a measure of loudness and that to express the range of human hearing it is necessary to use a logarithmic decibel. (Tr. at 15.) In describing the impact of sound on the human ear, Mr. Yerges indicated that a 10 decibel increase represents 10 times as much actual noise, but to the human ear, it only sounds twice as loud. (Tr. at 16.). Mr. Yerges testified about his familiarity with the Board's regulations on sound pressure level limits for sound transmitted from one type of property to another. (Tr. at 18.) He further stated that he was knowledgeable concerning the Board's regulations on measurement procedures.

On January 28, 1995 Mr. Yerges took sound measurements at the Manarchy property between 1:30 and 4:30 a.m. He used Bruel and Kjaer Type 1 equipment, including a 2144 real time analyzer, a 4165 Type 1 microphone with wind screen, and a 4165 sound level calibrator. (Tr. at 21.) The sound measurements were taken from the fire escape on the west wall of the Manarchy building which was located on the "second floor of the residential space."[3] (Tr. at 23-24.) Mr. Yerges further testified that his measurements were taken at the

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[2] Complainants' exhibits will hereinafter be referred to as (Comp. Exh. ___.). Complainants exhibits were labeled and admitted as follows: Comp. Exh. 1: the qualifications and curriculum vitae of Mr. John Yerges, of Yerges Acoustics; Comp. Exh. 2: a copy of the sound measurements taken by Mr. Yerges on January 28, 1995; Comp. Exh. 3: Christopher Mandoline's logged entries of noise emanating from the Gotham Nightclub from December 31, 1994 through March 9, 1995.

[3] Mr. Yerges measured sound from the Manarchy fire escape due to the requirement in 35 Ill. Adm. Code 901.102(b) which requires that noise be measured from "property-line-noise-source located on any Class A, B, or C land to any receiving Class A land . . . provided that no

following octaves as required by 35 Ill. Adm. Code 901.102(b): 31.5 hertz (Hz), 63 Hz, 125 Hz, 250 Hz, 500 Hz, 1000 Hz, 200 Hz, 4000 Hz, and 8000 Hz. The nighttime levels specified by the Code for receiving Class A Land from sound emitted by Class B Land are set at the following levels for the above-mentioned octaves: 63 dB, 61 dB, 55 dB, 47 dB, 40 dB, 35 dB, 30 dB, 25 dB, and 25 dB. On the date of the recordings, the readings were recorded at these respective levels as: 71 dB, 79 dB, 71 dB, 62 dB, 56 dB, 53 dB, 48 dB, 39 dB, and 28 dB. (Tr. at 24; Comp. Exh. 2.) These recordings represent the sound pressure levels at individual octave frequency bands. Mr. Yerges concluded that from Gotham as a Class B property, to the Manarchy property as a Class A property, the nighttime code limit at 31.5 hertz is 63 decibels compared to the measured recording of 71 decibels; at 63 hertz the code limit is 61 decibels compared to the measured recording of 79 decibels; at 125 hertz the code limit is 55 decibels compared to the measured recording of 71 decibels. (Tr. at 30.) Mr. Yerges testified that the music was originating from the Gotham Nightclub and was above ambient levels. (*Id.*)

Mr. Yerges testified that subjectively the ear will hear the low frequency back beat and will not hear much of the high frequency. (Tr. at 33.) He further stated that he designed a soundproofing plan for the Manarchy property at their request. One of the recommendations was the installation of heavy glazing with air space in between the glazing system. (Tr. at 36.) Mr. Yerges further offered that a double heavy masonry construction with air space between the layers for the walls and the roof, as well as no doors or windows would be the only possible solution to keep high-level noise from infiltrating the Manarchy building. (Tr. at 38.)

Among other things, Mr. Yerges testified on cross-examination by Mr. Freedom that he took measurements from the proper location of the Manarchy building. He stated that he measured from the fire escape because he believed the property line was adjacent to the wall. (Tr. at 47.) He stated that "the fire escape is built right onto the Manarchy building and that is where we had to do measurements." (*Id.*)

Ms. Mary Beth Manarchy testified as the second witness during complainants' case-in-chief. She stated that the noise from the club is penetrating and "literally shakes [the] building." (Tr. at 64.) Ms. Manarchy testified that the noise is worse Wednesday through

Sunday when the noise reaches unbearable levels causing an impossibility to sleep. Both her husband and daughter have been awakened by music from the club on several occasions. (Tr.

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measurement of sound pressure levels shall be made less than 25 feet from such property-line-noise-source." In this matter, Mr. Yerges determined the property type of the Manarchy property as Class A residential due to the actual usage of the Manarchy property as a residence. Mr. Yerges determined the Gotham Nightclub to be a Class B property due to the commercial usage of Gotham as a nightclub. Therefore, the noise emissions were measured from a Class B property to a Class A property. (Comp. Exh. 2, page 2.)

at 65.) As a result of sleepless nights, Ms. Manarchy testified that her husband "built a room within our loft that's totally soundproofed, a small bedroom that just has a bed in there. When it gets loud, he goes in there." (Tr. at 68.) She also stated that the noise interfered with other activities besides sleep: ". . . it came on as early as 9:00 or 10:00 p.m. If we were watching a movie, . . . you felt that. . . it became just a thorn. It just became totally -- there it is again, and now what do we do?" (Tr. at 65.) Ms. Manarchy stated that they have spent between $15,000 and $25,000 installing air-lined windows and an additional $5,000 on the soundproofed sleeping area. (Tr. at 68.)

Mr. Christopher Mandoline testified as the final witness on behalf of complainants. Mr. Mandoline testified that the noise from the club began in the fall of 1994. Several calls were made to the police as well as a conversation with the police district commander. (Tr. at 85.) As a result of the noise, Mr. Mandoline began to keep a log of dates and times during which the noise was intrusive and when calls were made to the police. (Tr. at 87.) Mr. Mandoline logged 21 occasions of noise disturbances dating from December 31, 1994 to March 10, 1995. (Tr. at 90; Comp. Exh. 3.) He recalled that on December 3, 1994 and January 1, 1995 three calls were made to 911 each night. (Tr. at 85.) Mr. Mandoline testified: "[g]oing from '94 into '95, I called 911 three times that night; and I couldn't sleep, I'd put a pillow over my head -- your body would feel like it was thumping. First time when I woke up and heard it, I thought I was having a heart attack." (*Id.*) During his testimony, Mr. Mandoline further explained what he experienced from the noise: ". . . you can feel it in your body. It's sort-of like when you pull up to a stoplight and somebody's sitting behind you with one of them (sic) boom boxes. All of a sudden your body starts trembling." (Tr. at 94.) In addition to the sleepless nights experienced by the Mandoline family, Mr. Mandoline has also received several complaints from his tenants. (Tr. at 93.)

Regarding the area zoning, Mr. Mandoline stated that the Manarchy building was originally an "M" class with an allowance for a watchman's residence and that the area was now rezoned for commercial allowing residential usage. (Tr. at 158.) Mr. Mandoline also stated that, though the area of his building is zoned commercial, it allows for residential usage. (Tr. at 95.) He further explained that the loudness of the music would go up and down depending on whether the police stopped at the nightclub after a complaint was made to the police department. (Tr. at 102.) In response to Mr. Freedom's questions concerning whether or not any of the litigation was out of spite, Mr. Mandoline testified that the complaint was not filed out of spite. (Tr. at 104.)

Respondent's Testimony

Mr. Joseph Freedom testified on behalf of Gotham; he entered five exhibits into the record.[4] Mr. Freedom stated his disbelief that sound traveled through an 80 foot railroad barrier between the Gotham Nightclub and the Mandoline property. (Tr. at 136.) He further believed Mr. Mandoline's testimony against Gotham was out of spite because Mr. Freedom did not rent an apartment from Mr. Mandoline. (*Id.*) Mr. Freedom testified about his attempts to implement sound insulation at the Gotham nightclub: he filled in the two back windows and a garage door which faces the Mandoline property with cement bricks. (Tr. at 130.)

Mr. Freedom stated he never made any attempt to lower the sound levels during operation of Gotham after receiving complaints. (Tr. at 150.) Mr. Freedom testified that his reasoning in keeping the volume turned up was to maintain the nightclub's clientele. He stated that when the volume was turned down, Gotham's clientele would depart from the nightclub. (Tr. at 151.) Mr. Freedom further indicated the Manarchy building was in the "M" class for zoning and is now in the "C" class which allows for residential use. (Tr. at 156.)

Post-Hearing Briefs

Gotham filed its post-hearing brief on April 2, 1996 and complainants filed a response brief on April 4, 1996. Gotham's brief alleges that the complaint had been withdrawn and that Gotham was not given enough time to prepare for its case. The brief further alleges that Gotham was not given time to retain an attorney or to prepare for the hearing. Gotham's brief contains additional evidence pertaining to the factual background of the dispute that was never introduced at hearing.

Complainants' reply brief requests that the Board disregard Gotham's brief in its entirety. Complainants argue that much of the matter presented by Gotham in its post-hearing brief is simply not related to any allegation of complainants' amended formal complaint. Complainants further state that the new material discussed in Gotham's brief is conclusory, ill-timed, ill-presented, and unpersuasive.

Complainants' brief is correct; Gotham has attempted to place into the record evidence that is unsupported and evidence which could have been presented at hearing and subject to cross-examination. The Board will not strike Gotham's brief in its entirety; however, to the extent the brief discusses additional evidence and facts not introduced at hearing, the Board will disregard such argument and facts. The Board notes that Gotham was previously represented by counsel for several months following the filing of the complaint; however, Gotham's attorney withdrew from the case on October 20, 1995. The Board further notes that Gotham knew of the pending hearing due to the fact that either Mr. Freedom or Gotham's former attorney was served with a notice of hearing on February 6, 1996. The Board finds

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[4] Gotham's exhibits will hereinafter be referred to as (Resp. Exh. ___.). Gotham's exhibits were labeled and marked as follows: Resp. Exh. 1: various documents; Resp. Exh 2, 3, 4, and 6 include photographs depicting the area around Gotham.

that Gotham had ample time to prepare for hearing; therefore, Gotham's argument that it was not given enough time to prepare for hearing is not valid.

APPLICABLE LAWS AND REGULATIONS

The specific sections of the Act and Board regulations on which complainants base their complaint are: Sections 24 and 25 of the Act, and 35 Ill. Adm. Code Sections 900.102 and 901.102(a) and (b) of the Board's regulations.

Section 24 of the Act states, "[n]o 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 (1994).)

Section 25 of the Act states, "[t]he Board, pursuant to procedures prescribed in Title VII of the Act, may adopt regulations prescribing limitations on noise emissions beyond the boundaries of the property of any person and prescribing requirements and standards for equipment and procedures for monitoring noise and the collection, reporting, and retention of data resulting from such monitoring." (415 ILCS 5/25 (1994).)

Section 900.102 provides, "[n]o 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 has defined noise pollution to be "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity."

Section 901.102(a) and (b) of the Board's regulations provide the limits of allowable noise levels, measured no less than 25 feet from any property-line-noise-source, during daytime hours and nighttime hours, respectively. (35 Ill. Adm. Code 901.102.) Section 901.101 defines "property line noise-source" as any equipment or facility or combination thereof which operates within any land use as specified by 35 Ill. Adm. Code 901.101. Such equipment or facility or combination thereof, must be capable of emitting sound beyond the property line of the land on which operated.

Section 33(c) of the Act states, "[i]n 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 values of the pollution source;

3. The suitability or unsuitability of the pollution source in 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."

(415 ILCS 5/33(c) (1994).)

Section 42(h) of the Act states, "[i]n determining the appropriate civil penalty to be imposed, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

1. The duration and gravity of the violation;

2. The presence or absence of the due diligence on the part of the violator in attempting to comply with the requirements of this Act and Regulations thereunder or to secure relief therefrom as provided by this Act;

3. Any economic penalty accrued by the violator because of delay in compliance with requirements;

4. The amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and

5. The number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator."

(415 ILCS 5/42(h) (1994).)

ARGUMENT

Complainants contend that the evidence demonstrates numerous and substantial violations by Gotham. Complainants assert there are at least 21 nuisance violations, as well as one violation of numeric standards. Complainants argue in the amended complaint that noise emanating from Gotham, primarily of a deep bass character of 31.4 Hz, 63 Hz and 125 Hz octave bands, is so loud that it unreasonably interferes with the enjoyment of life and lawful activities. They further state that since February 1994, the unabated noise pollution has been consistent Thursdays through Sundays and, occasionally, Sundays through Wednesdays. Complainants state that it is impossible to concentrate during the waking hours and that the noise interferes with sleep.

Complainants seek an order directing Gotham to cease and desist from causing further emission of sound that unreasonably interferes with the enjoyment of life beyond the boundaries of the Gotham Nightclub and an order directing Gotham to cease and desist from the emission of sound exceeding allowable octave band sound pressure levels from the property line source at the Gotham Nightclub. Complainants further seek civil penalties in the amount of $640,000[5] and a requirement imposed upon Gotham to post a bond to insure future compliance.

Gotham argues that the Manarchys were living in a building zoned for manufacturing. Gotham further contests the manner in which Mr. Yerges conducted his sound tests stating that because the tests were conducted from the fire escape, the tests were not made from the property line as required by the Board's regulations.

Complainants reply that the Manarchys' property was zoned for residential use. Though the area was once zoned for manufacturing, complainants argue that the Manarchy property is now zoned commercial which allows for residential use of any character.

ANALYSIS

Complainants allege a nuisance violation pursuant to Section 24 of the Act, Section 900.102 of the Board's regulations and numeric violations of Sections 901.102(b) of the Board's regulations. Complainants claim they are unable to enjoy the use of their properties due to the excessive noise caused by the Gotham nightclub and that Gotham was in violation of the Board's numeric limitations on January 28, 1995.

Numeric Violation

In addition to the nuisance violations, complainants allege that Gotham violated the numeric limitations set forth at 35 Ill. Adm. Code 901.102(b) on January 28, 1995. Mr. Yerges testified generally that his readings were done in an appropriate manner and that they demonstrate an exceedence of the Board's regulations. Mr. Yerges stated that the tests taken on January 28, 1995 were measured as close as possible to the specific guidelines of the Board. (Tr. at 41.) During the measurement of noise levels, Mr. Yerges took into consideration the ambient noise of the area, as required by Board regulations, and accounted for the ambient noise accordingly. Mr. Yerges further explained that the readings were based on Leq averaging with a reference time of one-hour intervals as required by the Board's

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[5] The Board notes a discrepancy between the penalty amount requested in the pleadings and at hearing. On page four of complainants' April 25, 1996 amended complaint, complainants seek civil money penalties of $50,000 for the first violation and $10,000 for each subsequent violation found by the Board to have occurred for a total of $640,000. However, at hearing during closing statements, complainants argue they seek $260,000 in total civil penalty. (Tr. at 166.) Neither on the record nor in the pleadings have complainants explained the change made in the request for penalty amount.

regulations. Mr. Yerges also stated that when he took measurements from Class B to Class B properties,[6] he left the double doors behind the gate open to minimize reflections. (Comp. Exh. 2 at 3.) Mr. Yerges said that he took measurements from the fire escape location because he was measuring from Class B to Class A properties.

When determining a noise pollution case, the Board follows Parts 900 and 901, the general provisions and sound emission standards and limitations for property-line-noise-sources. (35 Ill. Adm. Code 900 and 901.) For the measurement of sound, the Board follows the provisions in Part 951 (35 Ill. Adm. Code 951.100 et al.), the measurement procedures for the enforcement of 35 Ill. Adm. Code 900 and 901. The measurement procedures adopted in Part 951 are in substantial conformity with the standards and recommended practices established by the American National Standards Institute, Inc. (ANSI). The Board strictly adheres to the requirements listed in Part 951 when measuring sound for the enforcement of Parts 900 and 901.

The procedures in Part 951 specifically prescribe the requirements for site selection, instrumentation, data acquisition, limiting procedures, and application of correction factors. In particular, Section 951.105(a)(4) requires that for sound measurement sources with no audible discrete tones, the microphone should not be set up less than 25 feet from any reflective surface.[7] Also, Section 951.105(b) requires that the microphone be set up on a tripod on the ground at a height between three feet, eight inches and four feet, ten inches.

In addition to ambient noise, Mr. Yerges failed to include in his report or at hearing whether or not reflective sound was an issue during measurement at the fire escape. Mr. Yerges set up the sound monitoring instrumentation on the second floor fire escape which was in very close proximity to the east side wall. We find that this wall acted as a reflective surface within 25 feet of the measurements. As required by Section 951.105(a)(4), corrections should be made to the measured sound levels for reflective sound. Additionally, because the microphone in this case was set up on the second floor fire escape, the levels of noise were measured at a higher level than the ground requirements listed in Section 951.105(b). Neither the record nor Mr. Yerges' report (Comp. Exh. 2) discussed any effect of reflective sound or any effect of sound measurements taken at higher elevations than the allowed limits set forth in Part 951. Mr. Yerges did, however, state in his report that the double doors behind the gate were left open to minimize reflections during the measurements taken at the loading gate. Yet Mr. Yerges failed to mention whether or not reflection was an issue at the fire escape. As a result, we find that due to the flaws made during the measurement of sound on January

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[6] A measurement of Class B property to Class B property is a measurement between commercial properties. Measurements were taken at the ground level of the loading gate since the ground level of the Manarchy property was used for commercial purposes.

[7] 35 Ill. Adm. Code 951.103 describes reflective surface as "any building, hillside, or similar object (other than flat ground surface) that reflects sufficient sound to affect the sound pressure level readings obtained from a noise source."

28,1995, complainants failed to meet the requisite burden of proof showing Gotham violated the Board's numeric limitations set forth at 35 Ill. Adm. Code 901.102(b).

Mr. Freedom also raised an argument regarding the zoned area within which both complainants and Gotham are situated. Because the Board does not find a numerical violation, and because the type of zoned area is not a factor when determining a nuisance violation, we need not decide whether the Manarchy property was zoned for manufacturing or residential.

Nuisance Violation

Interference with Use or Enjoyment. The threshold issue in any noise enforcement proceeding is whether the sounds have caused some type of interference with complainants' enjoyment of life or lawful business activity. Interference is more than an ability to distinguish sounds attributable to a particular source. Rather, the sounds must objectively affect the complainants' life or business activities. (Village of Matteson v. World Music Theatre Jam Productions, LTD. and Gierczyk Development, Inc., (April 25, 1991), PCB 90-146; Katsak v. St. Michael's Lutheran Church, (August 30, 1990), PCB 89-182; Zivoli v. Dive Shop, (March 14, 1991), PCB 89-205.) Testimony to the effect that the sound constitutes an interference solely because it could be heard is insufficient to support a finding beyond a "trifling interference, petty annoyance or minor discomfort." (Wells Manufacturing Co. v. Illinois Pollution Control Board, 73 Ill. 2d 226, 383 N.E.2d 148, 150 (1978).) Based on the testimony, the Board finds that sound emanating from the Gotham Nightclub caused an interference with the complainants' enjoyment of life on numerous occasions.

First, the testimony of Ms. Manarchy and Mr. Mandoline demonstrates that an interference occurred. Ms. Manarchy stated that noise reaches unbearable levels causing many nights of sleeplessness. She explained that her husband sleeps in a soundproofed room built specifically to sleep in on loud nights. Also, the testimony of Mr. Mandoline shows that the noise has caused great interference with his family's lifestyle. Mr. Mandoline explained that the sound caused his body to tremble to the point where he felt as if he was having heart problems. Mr. Mandoline also testified to the sleepless nights incurred by himself and his family. As a result of complainants' testimony regarding sleepless nights and the effect of those sleepless nights, the Board finds that Gotham was interfering with complainants' enjoyment of life and use of their property. Therefore, the Board finds that the sound constituted interference beyond a "trifling interference, petty annoyance or minor discomfort."

Reasonableness of the Interference. In determining when the level of interference becomes "unreasonable", the Board considers several factors in arriving at its decision. The "reasonableness" of the noise pollution must be determined in reference to statutory criteria in Section 33(c). (Wells Manufacturing Company v. Illinois Pollution Control Board, 73 Ill. 2d 226, 383 N.E.2d l48 (l978); Mystic Tape, Div. of Borden, Inc. v. Illinois Pollution Control Board, 60 Ill. 2d 330, 328 N.E.2d 5 (l975); Incinerator, Inc. v. Illinois Pollution Control Board, 59 Ill. 2d 290, 3l9 N.E.2d 794 (l974); City of Monmouth v. Illinois Pollution Control Board, 57 Ill. 2d 482, 3l3 N.E.2d l6l (l974).) However, complainants are not required to

introduce evidence on these criteria. (Processing & Books v. Pollution Control Board, 64 Ill. 2d 68, 351 N.E.2d 865 (1976).)

In addition, the Illinois Court of Appeals has held that the Board's regulations sufficiently protect a petitioner's constitutional rights. Sections 900.101 and 900.102, which apply here, were given judicial interpretation by the First District of the Illinois Court of Appeals which held that the regulatory language in Section 24, the Board's regulations, and the guidelines for enforcement cases found in Section 33(c) of the Act contained "sufficient standards to accord a petitioner its constitutional rights." (Ferndale Heights Utilities Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 41 Ill. App. 3d 962, 358 N.E.2d 1224 (1st Dist. 1976).) The Court affirmed the Board's finding of unreasonable interference with the enjoyment of life, in light of adequate testimony describing the noise, testimony explaining the type and severity of the interference caused by the noise, and testimony indicating the frequency and duration of the interference.

The Illinois Supreme Court has directed the Board to consider the facts of a "nuisance" case in light of the factors outlined by Section 33(c) of the Act to determine unreasonableness. (Wells Manufacturing Co. v. Illinois Pollution Control board, 73 Ill. 2d 226, 232-33, 383 N.E.2d 148, 150-51 (1978).) Therefore, we will discuss the factors of Section 33(c) with relation to the interference pursuant to the nuisance. Section 33(c) requires that the Board, in making its orders and determinations, to take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved. The discussion of the aforementioned Section 33(c) factors are as follows.

Character and Degree of the Injury or Interference. Section 33(c)(1) directs the Board to consider the character and degree of any interference caused by the noise emitted from the respondent's nightclub. The standard to which the Board refers is whether the noise substantially and frequently interferes with a lawful business activity, beyond minor trifling annoyance or discomfort. (Brainerd v. Hagen, (April 27, 1989) PCB 88-171, 98 PCB 247.) As stated above, complainants presented evidence at hearing as to the character and degree of injury or interference. Complainants stated that the main interference or injury is that the noise prohibits them from sleeping through the night. Complainants' Exhibit 3 demonstrates that complainants are affected by the music emanating from the nightclub on a consistent basis and at least on the days specified by Mr. Mandoline.

Social or Economic Value of the Source. With respect to Section 33(c)(2), there is no evidence in the record regarding the social and economic value of the Gotham Nightclub to the area. However, the Board recognizes that small businesses such as bars, nightclubs, restaurants and other clubs generally have both some social and economic value to an area.

Suitability or Unsuitability of the Source, Including Priority of Location. Section 33(c)(3) focuses on the pollution source in the area and the priority of the location in the area involved. The record demonstrates that the location of the nightclub is suitable to the area. Though the area has been a manufacturing area in the past, it is presently zoned as a commercial area which allows for residential use. The Board notes that the area has been used

in a residential capacity for several years prior to the inception of the Gotham Nightclub. Ms. Manarchy testified that she and her husband have owned their building for 11 years; Mr. Mandoline testified that he has owned the properties on Grand Avenue for 18 years. As a result, the establishment of a nightclub in this area is suitable so long as the residential aspect of the zoned area is taken into consideration and recognized by the commercial use of the area.

Technical Practicability and Economic Reasonableness of Control. The focus of Section 33(c)(4) into the technical practicability and economic reasonableness of control requires an examination concerning the type of action which can be taken about the purportedly offensive sounds. The record offers little information regarding the technical feasibility or economic reasonableness of controlling the noise at Gotham. There was little testimony presented on the most technically practical and economically reasonable control options for containing the noise within Gotham. Mr. Yerges' testimony presented a recommendation in order to solve the noise problem. He stated that the installation of a glazing system with air space, a double heavy masonry construction with air space, and no doors or windows would be the solution to keep noise outside of the Manarchy building. Ms. Manarchy testified as to her family's efforts to block out noise emanating from Gotham by building a soundproof bedroom and installing air-lined windows. Mr. Freedom testified as to steps he has taken to abate the noise by filling in two back windows and one garage door with cement brick.

The Board suggests that a reduction in the noise level would be the most technically practicable in this situation. Mr. Freedom stated that when the volume was turned down, clientele would depart from the nightclub; yet Mr. Freedom further stated that he never made any attempt to turn down the sound in the Gotham Nightclub as a solution. Mr. Freedom did not make any attempt to reduce the music level to a point where both the Gotham clientele and neighbors of Gotham would be simultaneously content. However, the Board views this option as the most technically practicable and economically reasonable since it is the simplest and least expensive method to reduce noise levels.

Subsequent Compliance. Section 33(c)(5) involves the issue of subsequent compliance. The record does not reflect that Gotham has subsequently come into compliance with the alleged violations. Gotham has taken steps to try to alleviate the noise emanating from the nightclub by filling in the rear windows and door with cement brick. However, the record indicates that the noise remains at a high level to a point where neighbors continue to be bothered. Gotham has neither attempted to reduce the noise level of its music nor has Gotham taken any further measures so as to come into compliance with the Act or Board regulations. As a result, Gotham continues to be in violation.

Summary of the Section 33(c) Factors. Based on the finding that the noise emitted from the Gotham Nightclub interferes with complainants' enjoyment of life, and after consideration of the factors listed in Section 33(c) of the Act, the Board finds that the interference is unreasonable and constitutes a violation of Section 24 of the Act and 35 Ill. Adm. Code 900.102. Based upon the record, the Board finds that the Gotham Nightclub has caused an unreasonable interference in the enjoyment of complainants' lives. Although Mr.

Freedom has taken steps to fill in the Gotham Nightclub's rear windows and garage door, Gotham's neighbors continue to hear the noise at when the music is being played loudly. Residents are not new to the area; contrarily, these residents have lived in the area for several years. Based on the record, the Board finds that a technically practicable and economically reasonable solution to reduce the noise to a level where it does not unreasonably interfere is to reduce the sound level of the music. Therefore, for all of the above reasons, the Board finds that the noise generated by Gotham has created noise pollution in violation of 35 Ill. Adm. Code 900.102 and that the noise created a "nuisance" as defined by Section 24 of the Act.

PENALTY AND REMEDY

Complainants request that the Board direct Gotham to cease and desist from further violations of the applicable statutes and Board's regulations; specifically, that the Board order Gotham to effectively and permanently reduce the noise by abating the noise pollution source, pay for violations, and issue a cash bond to assure the correction of such violations. In addition to any relief requested by complainant, pursuant to Section 42 of the Act, the Board may assess civil penalties.

Civil Penalties and Cost

In determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act. (People v. Berniece Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park, PCB 92-164 (April 20, 1994); Illinois Environmental Protection Agency v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71, 111 PCB 11 at 72 (May 10, 1990).) The Board must take into account the factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. (Wells Manufacturing Company v. Illinois Pollution Control Board, 73 Ill. 2d 226, 383 N.E.2d 148 (1978).) The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. In addition, the Board must bear in mind that no formulae exist, and all facts and circumstances must be reviewed. (Kershaw, *supra* at 14; Barry, *supra* at 62-63.)

The Board has stated that the statutory maximum penalty "is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts." (Barry, *supra* at 72.) The formula for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act (415 ILCS 5/42(a) and (b) (1994)). Section 42(a) provides for a civil penalty not to exceed $50,000 for violating a provision of the Act, or Board regulations and orders, and an additional civil penalty not to exceed $10,000 for each day during which the violation continues. The aforementioned factors of Section 42(h) are applied only in cases when the Board is determining the appropriate penalty amount.

The Board will not assess any civil penalties for these violations as we do not believe that the imposition of a penalty will aid in enforcement of the Act. The Board believes that the more appropriate remedy is to issue the cease and desist order which complainants seek in this

case. In a situation when the Board orders a civil penalty, the civil penalty is payable to the Environmental Protection Trust Fund in accordance with Section 42(a) of the Act and, complainants receive no individual benefit from such a civil penalty. The Board believes that any costs associated with a civil penalty in this case may be better used to mitigate the noise problem.

Remedy

Mr. Yerges testified that the only effective way to eliminate the noise would be solid masonry construction. Mr. Freedom testified briefly to certain efforts he has undertaken, which included filling in two windows and a garage door facing the Manarchy building with cement bricks. Another simple alternative would be to keep the sound levels at or below the prescribed Board standards. Mr. Freedom testified that he would lose clientele if he turns the volume down. However, the Board notes this alternative is possibly the simplest and cheapest remedy because it involves no added construction costs at the present time. This reduction of the noise level may be the most technically practicable and economically reasonable alternative at this time. Section 33 of the Act authorizes the Board to issue an order as it deems appropriate under the circumstances. Though other control options may exist to remedy the instant situation rather than the simple act of noise level reduction, the record lacks sufficient information for the Board to consider any specific control options. As a result, the Board can and will only order Gotham to immediately cease and desist from all violations pursuant to Section 24 of the Act and Section 900.102 of the Board's regulations.

The Board has, in previous noise violation cases, entered into interim orders to allow the respondent time to examine and present the Board with the economic reasonableness and technical feasibility of any control options. (Village of Matteson v. World Music Theatre, Jam Productions, Ltd. and Discovery South Group, Ltd. (April 25, 1991) PCB 90-146; Scott and Karen Thomas v. Carry Companies of Illinois (August 5,1993) PCB 91-195; Ronald and Susan Tex v. S. Scott Coggeshall and Coggeshall Construction Company et al (October 29, 1992) PCB 90-182; Carl and Alice Madoux, Glenn and Margaret Moody v. B & M Steel Service Center, Inc. (December 2, 1993) PCB 90-148.) In the above-cited noise cases, the Board was typically presented in the record with an outline of suggested control options which would demonstrate the possibility, practicability and feasibility of a control option plan. The Board would ensuingly order the respondent in such a case to report back to the Board after respondent has examined the potential applicability of such a control option plan. In this matter, Mr. Freedom did not present the Board with any testimony demonstrating the possibility of a potential control option plan. Based on the record before us, we believe the examination of a control option plan would be futile since such a plan may be an economically unreasonable and impractical solution for the Gotham Nightclub at this time.

CONCLUSION

According to Title VI: Section 24 of the Act, complainants have a right to the enjoyment of their lives and property. Upon reviewing the evidence presented we have

determined that Gotham's actions caused an unreasonable interference with the use of complainants' property not just some petty annoyance or minor discomfort. For the reasons stated above, we find that the respondent violated the Board's regulations set forth at 35 Ill. Adm. Code 900.102 and Section 24 of the Act.

In summary, we find Gotham in violation of a "nuisance" as set forth at Section 24 of the Act; we also find Gotham in violation of 35 Ill. Adm. Code 900.102 in that Gotham allowed the emission of sound beyond the boundaries of its property. Finally, we find that complainants failed to show Gotham violated the numerical limitations set forth at 35 Ill. Adm. Code 901.102(b).

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

ORDER

For the foregoing reasons, the Board hereby orders the respondent, JJJ Associates, Inc., d/b/a The Gotham Nightclub to undertake and perform the following actions:

1. The Board finds that the respondent, JJJ Associates, Inc., d/b/a The Gotham Nightclub is in violation of Section 24 of the Environmental Protection Act and 35 Ill. Adm. Code 900.102.

2. JJJ Associates, Inc., d/b/a The Gotham Nightclub shall immediately cease and desist from violations of Section 24 of the Environmental Protection Act and 35 Ill. Adm. Code 900.102.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the _____ day of ___________, 1996, by a vote of ______________.

____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board