

ILLINOIS POLLUTION CONTROL BOARD
September 28, 1989

DANIEL LORDEN AND HELEN LORDEN,)
)
 Complainants,)
)
 v.) PCB 89-19
) (Enforcement)
)
 SHERIDAN SOUTH CONDOMINIUM)
 ASSOCIATION,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Marlin):

This matter comes before the Board upon the September 5, 1989 referral to it by the Hearing Officer of complainants' June 30, 1989 motion to compel discovery. The facts and circumstances surrounding the motion are best discussed after a review of the history of this proceeding.

This action is a citizens' enforcement action filed January 31, 1989. Complainants Daniel and Helen Lorden ("the Lordens") allege that the 100 South Boulevard Sheridan South Condominium Association ("Association") has violated Section 900.102 of the Board's noise pollution rules by its operation of five central air conditioning units located "right up against and next door to" the Lorden's home. Section 900.102 does not establish a numerical noise standard but is instead a general noise nuisance prohibition which states that "no person shall cause or allow the emission of sound beyond the boundaries of his property...so as to cause noise pollution in Illinois, or so as to violate [Board regulations]".

The Lordens are represented by an attorney. The Association is represented by its president.

In response to the Lordens' request, on April 20 the Hearing Officer set a tentative hearing date of June 15. On June 12, the Lordens requested continuance of hearing on the grounds that:

Not enough of the air conditioning units in question have been in operation long enough during the day to allow for a proper reading of the noise. In fact it takes at least one week for the readings

to be transcribed and ready for presentation at any hearing.

On June 19, the Hearing Officer entered an Order which, among other things, granted a continuance and set a pre-hearing conference for June 23, a discovery completion date of August 1, and new hearing date of August 10. By Order of June 26, among other things the Hearing Officer directed the Lordens to file any "motion to compel exemplars of noise outputs" on or before June 30, and the Association to file any response thereto on or before July 14.

The Lordens filed a motion to compel on June 30. On July 14, the Association filed a motion for "continuance" seeking an extension of time to file a response until August 14 to allow it to engage an attorney to represent it and prepare a response. By Order of July 19, the Hearing Officer granted the Association's motion, directing

[the Association is] to obtain an attorney in this matter and the attorney is to file his appearance herein on or before August 14, 1989 or the Association, will be held in default herein.

The time within which the Association may reply to the motion to compel exemplars of noise output is enlarged to September 8, 1989 and Petitioner may reply thereto on or before September 29, 1989.

No appearance or response has ever been filed on behalf of the association.

On September 5, 1989 the Board received a letter from the Hearing Officer referring this situation to it for action. The Hearing Officer noted that the Association, by its president, had refused to turn on its air conditioning units to allow complainants' experts to obtain appropriate noise level readings. The Hearing Officer stated that the Association was in default under the terms of its Order, and further observed that:

I realize that it may not be appropriate for me to hold the condominium association in default, but I feel that the enforcement proceeding will go nowhere unless some action is taken to compel the condominium association to respond appropriately in this proceeding.

By Order of September 13, 1989, the Board found the

Association in violation of the Hearing Officer's July 19 Order. The Board nonetheless allowed the Association 10 days in which to file an appearance by an attorney and to respond to the motion to compel, noting that the filings must be received by September 25. Again, nothing has been filed by the Association.

The Board will now address the motion to compel. The complainants have been diligent in the pursuit of their case, including attempting to bring the matter to hearing and in responding to the Association's discovery requests. In August 18 responses to interrogatories, the complainants, among other things, state that they have made numerous noise complaints to the Association and local officials. They state that they have been diagnosed as suffering from bruised ear drums as a result of wearing two sets of ear plugs to filter noise. They state that they have had some noise measurements made by two noise/acoustical experts (including one employed by the Illinois Environmental Protection Agency) but that these are incomplete because of the Association's refusal to turn on the five air conditioning units. They state that the noise prevents them from keeping windows open, using the back yard and sleeping at night during the cooling season, and state a willingness to negotiate possibilities to alleviate the situation.

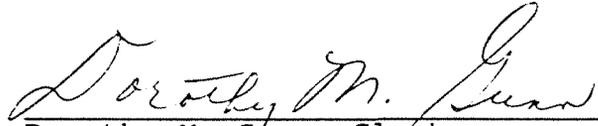
These interrogatory answers are unsworn and not evidence in this case, and at this point the Board considers only that the statements have been made. While noise measurements are not necessary to prove violation of the noise nuisance standard, the Board appreciates the Lordens' desire to quantify the Association's noise output to provide objective support for their personal observations and experiences. The Association, by its failure to respond to a legitimate discovery request, and a Hearing Officer Order, has successfully prevented complainants from taking noise readings during the heat of the summer of 1989. The Board believes that to grant the motion to compel at this point, when the cooling season is over, could further frustrate the progress of this litigation. The motion to compel is therefore denied.

However, the Board on its own motion will impose sanctions against the Association for its willful refusal to respond to the Lordens' June 30 legitimate discovery request, the July 19 Order of the Hearing Officer and the September 13 Order of the Board. Pursuant to 35 Ill. Adm. Code Section 101.280, the Association is hereby barred from filing any pleading, making any claim, and presenting any testimony or other proof going to the issue of whether it has caused or allowed violation of Section 900.102. The Hearing Officer is directed to expeditiously schedule a hearing in this matter at which complainants may present evidence in support of their noise nuisance allegations and suggested remedy, including penalty. The Association may present evidence only as it relates to remedy, including penalty.

IT IS SO ORDERED.

Board Member J.D. Dumelle concurs.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 28th day of September, 1989, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board