ILLINOIS POLLUTION CONTROL BOARD
January 4, 2001

ROBERT and YVONNE GARDNER,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 01-86
	)	(Enforcement - Noise, Citizens)
TOWNSHIP HIGHSCHOOL DISTRICT 211, and GERALD CHAPMAN,	)	
	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by S.T. Lawton, Jr.):

On November 27, 2000, complainants, Robert and Yvonne Gardner (complainants), filed a complaint with the Board. The complaint alleges that the Township High School District 211 and its superintendent, Gerald Chapman, (respondents) operate air conditioning units on the roof of the school at 1100 Higgins Road in Hoffman Estates, Cook County, Illinois, in a manner that violates noise provisions of the Environmental Protection Act (Act) and Board regulations. Respondents filed a motion to dismiss the formal complaint with the Board on December 13, 2000, on the grounds that the complaint was duplicitous and frivolous. Complainants did not respond to the motion.

Section 103.212(a) of the Board's procedural rules directs the Board to determine whether a citizen's complaint is duplicitous or frivolous. 35 Ill. Adm. Code 103.212(a). Except as discussed below, the Board denies the respondents' motion to dismiss, finds the complaint is neither duplicitous nor frivolous, and accepts this matter for hearing.

BACKGROUND

Complainants, who resides at 1545 Fairfield Lane in Hoffman Estates, Illinois, is located approximately 350 feet from Hoffman Estates High School, which is the alleged source of noise in their complaint. On November 27, 2000, complainants filed a complaint with the Board alleging that air conditioning units or "chillers" were installed on the roof of Hoffman Estates High School during August 1999. Comp. at 3.[1] Complainants stated that respondents operate five banks of chillers on Monday through Friday from 6 a.m. to 9 p.m. and at various time on Sunday. The chillers allegedly cease operation in the winter months. Complainants said that, "[d]epending upon the outside temperature, some or all of the chillers may be running throughout the day." Comp. at 3.

Complainants state the chillers cause a low frequency hum similar to a low horn blowing, which results in an unreasonable interference with the use and enjoyment of their property.

[1] The complaint filed by Robert and Yvonne Gardner will be referred to as "Comp. at __."

Comp. at 3-4. They allege that the noise endangers their health and wellbeing, and wakes them from their sleep. Comp. at 4. Complainants said that they cannot enjoy their back yard when the units are running. *Id.* They also expressed concern that the noise will depress the value of their property. *Id.* Complainants attached a petition containing the signature of 34 nearby residents that called for the reduction of the noise level created by the chillers to a negligible level, as it was for the 26 years prior to 1999. See Comp. Exh. A.[2]

Respondents, in their December 13, 2000 motion to dismiss, refute the allegations in the complaint by stating that they are not in violation of the Act or Board regulations. Mot. at 3-4.[3] Respondents further allege that they have gone to great lengths, despite this fact, to dampen the sound of their air conditioning units. *Id.*

Respondents stated that complainants contacted them in September 1999 about noise generated by the chillers. Mot. at 2. The respondents allegedly reacted to the complaint by limiting the units' hours of operation and hiring an acoustical engineering firm to conduct sound level tests and make recommendations to the District. Mot. at 2-3. Respondents stated that the sound level tests done by the firm did not indicate any violations of local noise ordinances. Mot. at 3.

Respondents alleged that complainants also contacted the Cook County Department of Environmental Control (CCDEC) on September 1, 1999. Mot. at 3. Respondents stated the CCDEC subsequently measured the sound levels of the chillers at complainants' residence. *Id.* Respondent attached a field inspection report by Rudolph Trejo, an inspector from CCDEC, which alleged that noise level readings taken beyond the school property line were at 62 DB. Resp. Exh. D.[4] Trejo issued a memo on October 22, 1999, stating "at no time was an [exce]edance (sic) of noise levels determined at the Complainant's residence." Mot. at 3. In the attached memo, Trejo stated that complainant resides more than 350 feet from the chillers, and stated that a football field was between the complainant and the school. Resp. Exh. A.[5] Trejo alleged in his memo that CCDEC only received one noise complaint concerning the chillers. Resp. Exh. A.

Respondents stated in its motion that despite the measurements by CCDEC and the independent firm, they contracted with Industrial Noise Control, Inc. to install sound insulation curtains and jackets on the chillers at the cost to the District of $10,917.20. Mot. at 4. Respondents also alleged Harley Insulation, Inc. performed additional sound abatement work for $9,079.00. Mot. at 4. Respondents attached purchase orders dated October 25, 1999, and April 17, 2000, for such items. See Resp. Group Exh. B at 14-15.[6] Finally, the District allegedly hired

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[2] The exhibit attached to the complaint will be referred to as "Comp. Exh. A."
[3] Respondents' motion to dismiss will be referred to "Mot. at __."
[4] Respondents attached an exhibit marked "Exhibit D" to their motion to dismiss, which will be referred to as "Resp. Exh. D."
[5] Respondents attached an exhibit marked "Exhibit A" to their motion to dismiss, which will be referred to as "Resp. Exh. A."
[6] Respondents attached several documents marked "Group Exhibit B" to their motion to dismiss, which will be referred to as "Resp. Group Exh. B at __."

Arcon Associates Incorporated, an architectural firm, to design and install physical barriers to absorb and deflect noise from the chillers. Mot. at 4.

DUPLICITOUS/FRIVOLOUS DETERMINATION

Section 103.212(a) of the Board's procedural rules implements Section 31(d) of the Act, providing that the Board shall schedule a hearing upon receipt of a citizen's complaint, unless it determines that the complaint is duplicitous or frivolous. 35 Ill. Adm. Code 103.212(a).

Duplicitous

A matter is duplicitous if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. The Board has not identified any other cases, identical or substantively similar to this, pending in this or any other forum. Respondents alleges in their motion to dismiss that this case is duplicitous because the CCDEC previously handled the same matter and did not find that respondents violated Cook County noise ordinances. The investigation conducted by CCDEC does not render this matter duplicitous before the Board.

Frivolous

An action before the Board is frivolous if the complaint 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. Complainants allege respondents run air conditioning units on the roof of their school in a manner which violates Sections 23 and 24 of the Act (415 ILCS 5/23 and 24 (1998)) and Section 900.102 of the Board's regulations (35 Ill. Adm. Code 900.102). Complainants request that the Board directs respondents to: move the chillers to the front of the building; enclose them in a sound proof cabinet; or replace the new chillers with units that do not emit noise which interferes with the complainants' use and enjoyment of their property.

Section 23 Allegation is Stricken as Frivolous

The Board finds the alleged violation of Section 23 of the Act is frivolous. Section 23 of the Act only contains legislative objective as opposed to prohibitions on activity. See 415 ILCS 5/23 (1998); Walsh v. Koplas (September 23, 1999), PCB 00-35, slip op. at 2. Respondent correctly stated in its motion to dismiss that the Board has found a person can not violate Section 23 of the Act. *Id.*; see Mot. at 6. Complainants, in alleging violations of Section 23 of the Act, fail to state a claim upon which relief can be granted. Therefore, the Board grants the respondents' motion to dismiss in part, finds the allegations concerning Section 23 of the Act are frivolous, and orders such allegations to be stricken from the complaint.

Section 24 and Section 900.102 Allegations are Not Frivolous

As to the alleged violations of Section 24 of the Act, respondents argue they are frivolous because complainant failed to state a cause of action. Respondents state that the Board must

consider factors set forth in Section 33(c) of the Act to determine "unreasonableness" when considering nuisance violations alleging noise pollution. 415 ILCS 5/33(c); Wells Manufacturing Co. v. PCB, 73 Ill. 2d 226 (1978). Respondent claims that the Board, in a similar case, weighed evidence under 33(c) and found that a medical school, which undertook several steps to reduce noise levels, did not have to take further action to dampen noise from air conditioning units. See Furlan v. University of Illinois School of Medicine (Furlan) (October 3, 1996), PCB 93-15, slip op. at 16.

In Furlan, the Board accepted the case for hearing, weighed all evidence against the criteria established in Section 33(c) of the Act, and determined that the interference caused by the air conditioning units at the medical school, were not unreasonable. *Id.* The Board only made such a determination after allowing both sides to present evidence at hearing. Similarly, the Board accepts this case for hearing, and will weigh the evidence presented in the record in accordance with the Act and precedent.

The Board notes that a nuisance claim under Section 24 of the Act and Section 900.102 of the Board's noise rule can be valid even if the sound does not violate the numeric noise limits established in other portions of the Board's regulations. Section 24 of the Act states that:

> No 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 a to violate any regulation or standard adopted by the Board under this Act. 415 ILCS 5/24 (1998).

Respondent argued in its motion that the noise in this matter "does not reach the level constituting a violation of any applicable noise ordinance or statute." Mot. at 7. Even if the evidence supports this allegation, complainants may still show the noise from the chillers is a nuisance if they can prove interference with their enjoyment of life is caused by respondents' activity and such interference is unreasonable in light of statutory criteria under Section 33(c) of the Act. See 415 ILCS 5/24 (1998); Furlan, PCB 93-15, slip op. at 8.

Conclusion

As noted, the Board accepts the matter concerning violations of Section 24 of the Act and Section 900.102 of the Illinois Administrative Code are neither duplicitous nor frivolous, and accepts such for hearing. The Board finds the allegation that respondents violated Section 23 of the Act is frivolous, and strikes it from the complaint. The Board denies respondents' motion to dismiss on all grounds except for arguments regarding Section 23 of the Act.

The Board directs that this matter proceed to hearing as expeditiously as practicable. The Board will assign a hearing officer to conduct hearings consistent with this order and Sections 101.600 and 101.612 of the Board's rules. See 35 Ill. Adm. Code 101.600 and 101.612.

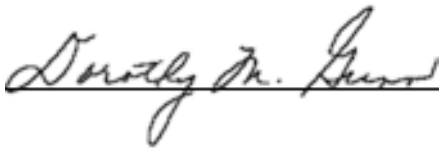
The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days within advance of the hearing so that a 21-day public notice of the hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a

statement regarding credibility of witnesses, and all actual exhibits to the Board within five days of the hearing.

Any briefing schedule shall provide for final filings as expeditiously as possible. It is the responsibility of the hearing officer to guide the parties toward prompt resolution or adjudication of this matter, through whatever status calls and hearing officer orders he determines are necessary and appropriate.

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 4th day of January 2001 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control