

ILLINOIS POLLUTION CONTROL BOARD
April 27, 1989

WILLIAM E. BRAINERD,)
)
 Complainant,)
)
 v.) PCB 88-171
)
 DONNA HAGAN, DAVID BROMAGHIM,)
 and PHIL ROBBINS, d/b/a THE)
 GABLES RESTAURANT,)
)
 Respondents.)

MR. JAMES S. SINCLAIR APPEARED ON BEHALF OF COMPLAINANT;

MR. JAMES R. HEIL APPEARED ON BEHALF OF RESPONDENTS.

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board upon a complaint filed on October 21, 1988 by William E. Brainerd against Respondents Donna Hagan, David Bromaghim and Phil Robbins, doing business as The Gables Restaurant. Complainant alleges that operation of kitchen exhaust fans at a restaurant operated by Respondents is in violation of the Board's prohibition against noise pollution found at 35 Ill. Adm. Code 900.102. Complainant requests that Respondents be directed to cease and desist from further violations.

Hearing was held January 17, 1989 at the Jersey County Courthouse, Jerseyville, Illinois. Complainant presented five witnesses, including himself, and Mr. Phil Robbins as an adverse witness. Respondents presented no witnesses. In lieu of closing argument, the parties agreed to submit post-hearing briefs. Complainant's Opening Brief was filed on February 27, 1989, Respondents' Reply Brief was filed on March 20, 1989, and Complainant's Closing Brief was filed on March 24, 1989.

FACTS

Respondents are proprietors of a restaurant, The Gables Restaurant ("restaurant"), located in Grafton, Illinois. The restaurant, which is located in a building converted from a prior use, was opened for business on June 17, 1988 (R. at 10). In preparation for operation of the restaurant, two exhaust fans were installed at the rear of the restaurant building. The purpose of the exhaust fans is to remove air from the kitchen

area of the restaurant (R. at 11). Neither at their time of installation nor at present have the exhaust fans been fitted with any sound-suppression device (R. at 14-15).

The exhaust fans normally are started about one hour before the restaurant opens and continued in operation during the restaurant's business hours (R. at 23, 24). Although the restaurant's business hours have varied during its time in operation, they generally have been for three to four hours on week days, four to twelve hours on Saturdays, and eight to twelve hours on Sundays (Complainant's Exh. 1).

William E. Brainerd is owner, along with his wife, Amy C. Brainerd, and mother, Ora K. Brainerd, age 85, of a house ("Brainerd house") located at 21 West Clinton Street in Grafton (R. at 18). The Brainerd house has been occupied by Ora Brainerd as her primary residence since 1964 (R. at 19). William Brainerd takes care of all maintenance and improvements at the Brainerd house (R. at 22). Both William Brainerd and Amy Brainerd appeared as Complainant witnesses; Ora Brainerd had recently sustained an injury which prevented her from appearing at hearing (R. at 19).

The Brainerd house backs on the restaurant property (R. at 20). The separation distance between the rear of the restaurant where the exhaust fans are located and the rear of the Brainerd house is approximately 60 feet (R. at 21; Complainant's Exh. 6); the distance between the nearest portion of the Brainerd property and the exhaust fans is approximately 30 feet (Complainant's Exh. 6).

APPLICABLE LAWS AND REGULATIONS

The Illinois Environmental Protection Act ("Act") specifies at Ill. Rev. Stat. 1987 ch. 111¹/₂ par. 1024 that:

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.

The Board's regulations prohibit noise pollution pursuant to 35 Ill. Adm. Code 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.

Noise pollution is defined at 35 Ill. Adm. Code 900.101:

Noise Pollution: The emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity.

NATURE AND EFFECT OF THE SOUND EMISSIONS

William Brainerd characterized the sounds emitted by the exhaust fans as "persistent" and "monotonous" (R. at 24) and "continuous and loud, consistent and persistent" (R. at 37). He also characterized his response to the sound of the exhaust fans:

It seems like your ears are being attacked by this continuous sound. It puts you in a state of mental stress and annoyance and disturbance, and it is depressing, and you just want to escape from it but you can't. (R. at 24)

He noted that his mother's practice had been to keep her windows open during the summer months, but that now when the fans are operating she shuts her windows to keep out their noise (R. at 26). He also noted that the sound of the fans is "still very persistent and very loud and noticeable" even in the front yard of the house (R. at 26).

Amy Brainerd characterized the sound of the exhaust fans as "disturbing" (R. at 43). She also noted that:

It is very loud. It sounds like a very very loud motor. It is consistent. It keeps running. You hope maybe it will stop, but it does not. (R. at 43)

She also noted that when the fans are operating "it would be very hard to sit out in the back yard and enjoy the yard and hear the fans running constantly" (R. at 43).

Ms. Evelyn Laux, who lives near the Brainerd house and who appeared as a witness for Complainant, described the sound of the exhaust fans as "annoying" (R. at 47, 52-53). She further characterized the sound as:

.. a mechanical sound, a motor running, whirr, whirr. It is continuous, a droning quality to it" (R. at 47)

Complainant submitted tape recordings of sounds emitted by the exhaust fans (Complaint's Exh. 7). The recordings were made on two occasions during the summer of 1988, with one recording made from the immediate rear of Brainerd house and the second

from a position lateral to the Brainerd house at a comparable distance from the exhaust fans (R. at 27-28; Complainant's Exh. 6). William Brainerd characterized the recordings as accurately depicting the sounds of the exhaust fans (R. at 29).

Complainant also presented Mr. Gregory T. Zak as a witness. Mr. Zak has been employed for the past sixteen years by the Illinois Environmental Protection Agency ("Agency"), with the title for the past two years of Noise Technical Advisor (R. at 58; Complainant's Exh. 8). During his time with the Agency Mr. Zak has evaluated or investigated "several thousand" noise-related cases (R. at 59).

Mr. Zak noted that, as a general proposition, exhaust fans generate noise in their operation (R. at 61). Mr. Zak was also furnished a copy of Complainant's tape recordings prior to hearing (R. at 64). Based on his review of these tapes, Mr. Zak concluded that people whom he has encountered in his experience with noise cases would be "generally irritated" by sound emissions of the type produced by restaurant fans (R. at 65).

Mr. Zak further concluded that in his opinion the sounds emitted by the exhaust fans constitute noise pollution under the Act and the Board regulations (R. at 79, 84, 86).

Finally, the Board notes the following passage from the installation instructions for the exhaust fans:

These fans exhaust directly away from the building, therefore, their location in placement should be analyzed. Proximity to nearby buildings and people must be considered to avoid problems. (Complainant's Exh. 1; emphasis added)

It is clear from this passage that the manufacturer of the exhaust fans itself contemplated the possibility that placement of the fans could present problems, presumably including the effects of the sound of the operating exhaust fans on people.

The Board finds that operation of the exhaust fans interferes with the enjoyment of life by the Brainerds, and that this interference is substantial and frequent and beyond minor annoyance. The testimony indicates that the sounds affect the mental state of both William and Amy Brainerd, as well interfering with the normal use of the property including leisure activities.

SECTION 33(c) FACTORS

The Board is charged with reviewing certain factors bearing on the reasonableness of the emissions, pursuant to Section 33(c) of the Act. These are:

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;
5. any economic benefits accrued by a noncomplying pollution source because of its delay in compliance with pollution control requirements; and
6. any subsequent compliance.

The testimony as noted above discloses that the noise substantially and frequently interferes with the Brainerds' use and enjoyment of life and property, and that this interference is beyond minor annoyance or discomfort. Therefore, regarding the first of the 33(c) factors, the Board finds that there is a substantial interference with the general welfare and use of the physical property of the complainant.

Concerning the second of the Section 33(c) factors, the Board finds that the restaurant has social and economic value as restaurants generally provide services and employment to people.

The third Section 33(c) factor concerns suitability of the pollution source to the area in which it is located and priority of location. The record contains little description of the area beyond the restaurant and the Brainerd property. There is no information on the type of zoning of the area. However, some photographs and a map were submitted which show that there are other houses and possibly other businesses in the area. From the limited information available, the area appears to be primarily residential (Respondents' Exh. 1; Complainant's Exh. 3, 5, 6). Since there is nothing in the record to indicate otherwise, the Board finds that the restaurant is suitable for the area in which it is located provided that the noise can be reduced to acceptable levels.

On the priority of location issue, the Board finds that complainant has the clear priority. It is uncontested that Ora K. Brainerd has been occupying the house as her primary residence since 1964. The restaurant opened for business in June 17, 1988. The only information in the record of any prior uses of the restaurant property is that it contained a funeral home (R. at 7).

Concerning the fourth Section 33(c) factor, the record indicates that there are technically practicable and economically reasonable methods for making some reduction in the noise that is generated by the fans. Gregory Zak testified that the noise generated from the fans can be controlled (R. at 61-62). He further noted that silencers are available for fans of the type used at the restaurant, and that such silencers do not significantly hamper the operations of a fan (R. at 66).

Mr. Zak made recommendations regarding the amount of silencing advisable for the exhaust fans:

From my experience of fans in the past, in looking at the Section 27 of the Act and the technical feasibility and economic reasonableness of the solution, I felt a reduction in the neighborhood of 30 decibels is a reasonable goal. (R. at 67)

Mr. Zak investigated the cost of silencers sufficient to accomplish his recommended sound-level reduction. One estimate places the purchase price of silencers at \$831.20 to \$1,057.60 per fan, depending on the actual size of the fan (R. at 69); the record does not reflect the magnitude of any additional possible costs, such as installation costs.

Mr. Zak also noted that he found no other practical noise-abatement alternative to installation of silencers, short of relocating the exhaust fans (R. at 69-71, 82).

Respondents argue that there was no testimony in the record as to the exact cost of the silencers or whether the owners of the restaurant could afford to install silencers. However, once Complainant has shown that there is an unreasonable interference caused by the noise, as is shown here, the burden is on Respondents, as part of their defense, to introduce evidence that they cannot afford such silencers, if in fact that is the case. (See, Section 31(c) of the Act). Here, Respondents did not refute evidence presented by Complainant that technically practicable and economically reasonable methods exist for making the necessary reductions in emissions, nor did they show that "compliance with the Board's regulations would impose an arbitrary or unreasonable hardship" (Id.).

The Board therefore finds that there are technically practicable and economically reasonable means of reducing the emissions.

Concerning factor five, the Board finds that the economic benefits accrued by the restaurant and its owners because of delay in compliance with pollution control requirements were those benefits of a delay in expenditure of funds for installation of noise abatement devices sufficient to achieve compliance.

Concerning factor six, the Board finds that the record indicates there has been no subsequent compliance.

Based on the Board findings of substantial interference with the enjoyment of life and after consideration of the factors listed in Section 33(c), the Board finds that the sound emissions during operation of the exhaust fans at The Gables Restaurant are unreasonable and 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. Although, as the Board's discussion of the factors indicates, the restaurant has social and economic value and may in fact be suitable to the area in which it is located, these factors are outweighed by the substantial interference with the health and general welfare of the Brainerds, and particularly by the apparent ease with which the noise emissions may be reduced.

Consequently, and upon consideration of the factors set forth in Section 33(c) of the Act, the Board will order Respondents to cease and desist from violations of the Act and Board regulations and to install noise abatement devices as a means for Respondents to maintain continued compliance.

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

ORDER

1. The Board finds that Respondents Donna Hagan, David Bromaghim, and Phil Robbins, d/b/a The Gables Restaurant, have violated Section 24 of the Environmental Protection Act and 35 Ill. Adm. Code 900.102.
2. Respondents shall cease and desist from violations of the Act and Board's regulations, and shall take immediate steps to prevent additional violations.
3. On or before June 27, 1989, Respondents shall have in functional operation noise abatement devices sufficient to prevent future violations of the kind alleged by complainant.

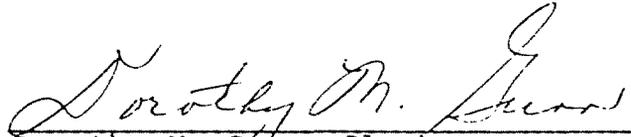
4. On or before July 11, 1989, Respondents shall notify the Board and Complainant in writing as to whether it has complied with the provisions of paragraphs 2 and 3 of this Order.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111 $\frac{1}{2}$ 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.

J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 27th day of April, 1989, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board