

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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CLERK'S OFFICE

OCT 07 2003

STATE OF ILLINOIS
Pollution Control Board

MICHAEL A. PETROSIUS AND
DARLA G. PETROSIUS,

Complainants,

v.

PCB 04-036
(Enforcement)

THE ILLINOIS STATE TOLL
HIGHWAY AUTHORITY,

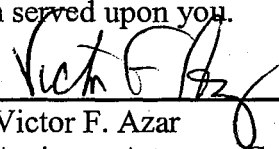
Respondent.

NOTICE OF FILING

TO: Michael A. Petrosius
7335 Maridon Road
LaGrange, IL 60525

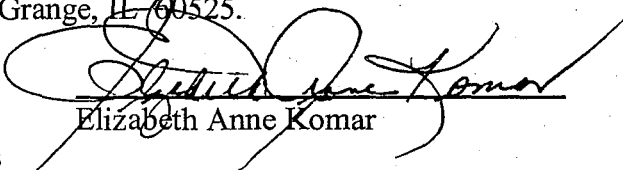
PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of Pollution Control Board the **MOTION TO DISMISS FRIVOLOUS COMPLAINT** of The Illinois State Toll Highway Authority, a copy of which is herewith served upon you.

By:


Victor F. Azar
Assistant Attorney General
Illinois State Toll Highway Authority
2700 Ogden Avenue
Downers Grove, IL 60515-1703
(630) 241-6800, extension 1540

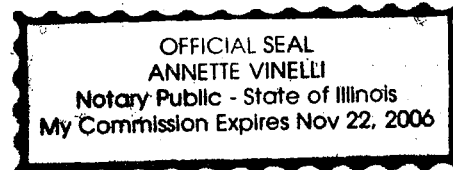
CERTIFICATE OF SERVICE

I, the undersigned, on oath, state that I have served on the date of October 7, 2003, the attached **NOTICE OF FILING** and **MOTION TO DISMISS FRIVOLOUS COMPLAINT** by causing a copy to be delivered via Messenger to the Office of the Clerk of Pollution Control Board and via U.S. Mail, postage prepaid, at 2700 Ogden Avenue, Downers Grove, Illinois 60515, upon Michael A. Petrosius, 7335 Maridon Road, LaGrange, IL 60525.


Elizabeth Anne Komar

SUBSCRIBED and SWORN to before me this
7th day of OCTOBER, 2003.


NOTARY PUBLIC



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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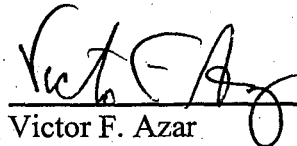
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Respondent.

APPEARANCE

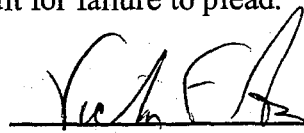
I hereby file my appearance in this proceeding, on behalf of the Respondent, THE ILLINOIS STATE TOLL HIGHWAY AUTHORITY.



Victor F. Azar
Assistant Attorney General

The Illinois State Toll Highway Authority
2700 Ogden Avenue
Downers Grove, IL 60515
(630) 241-6800, ext. 1540

I certify that a copy of the within instrument was served on all parties who have appeared and have not been found by the Court to be in default for failure to plead.



Victor F. Azar, Attorney for Respondent

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THE ILLINOIS STATE TOLL HIGHWAY AUTHORITY,

Respondent.

MOTION TO DISMISS FRIVOLOUS COMPLAINT

Respondent, THE ILLINOIS STATE TOLL HIGHWAY AUTHORITY ("Tollway"), through its attorney, LISA MADIGAN, Attorney General of the State of Illinois, moves the Pollution Control Board to dismiss the Complainants' Formal Complaint because it is frivolous. In support thereof, the Tollway states the following:

1. That the Michael A. Petrosius and Darla G. Petrosius filed their Private Enforcement Action on September 25, 2003.
2. That the Tollway is an instrumentality and administrative agency of the State of Illinois. 605 ILCS 10/3.
3. That the I-90 tollway was completed in 1958. The Tollway installed the sound wall by Complainants' home in 1993-1994. That the sound wall was pre-existed Complainants moving into the home. The Complaint seeks to have the Tollway add to the current 18-foot wall, which is alleged to be "four feet below tollroad" to "18 feet above the road." This would result in a 40-foot wall.
4. A complaint is frivolous if "a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202.
5. That the Federal Highway Administration has established Noise Abatement Criteria for federally funded highways, which sets decibel levels to be achieved. 23 CFR 772.1 *et seq.* However, the rules are for proposed highway projects. 23 USC 109.

6. That the complaint alleges that the noise complained of comes from the "Toll collection/entrance ramp, running northbound along property line onto I-294."
7. That pursuant to the *Standard Land Use Coding System* the Tollway's roads are Code-45 and Category-"Highway and street right-of-way." The Tollway's roads fall under Code-452 (4520) Expressways. "'Expressways' are divided highways for through traffic with full control of access and no cross traffic at grade." The Land Class is therefore, "U". 35 I.A.C., Ch. I, Part 901, Ap. B, footnote 10.
8. That the Complainants' property is classified as Code-11; Category-"Household units" and therefore, Class A. 35 I.A.C., Ch. I, Part 901, Ap. B.
9. That Section 901.102 of the noise regulations prohibits emission of sound that exceed specified levels from any source located on any Class A, B or C land to any Class A.
10. That sounds emitted from Class U properties, such as expressways, are not regulated. The Board has not established any limits on the sound level from Class U properties like the tollway, expressways, freeways and street.
11. That the Board has limited its regulations to the sounds emitted from vehicles and not from roads.
12. Therefore, the Tollway has not violated any provisions of the ACT or of provisions of Chapter I of Subtitle H (noise) of Title 35 sections 901.102 - 901.106.
13. That like the State, the Federal Highway Administration has established a Noise Abatement Criteria for federally funded highways which set decibel levels to be designed for. 23 CFR 772.1 *et seq.* That the Noise Abatement Criteria is for planning and designing highways.
14. That the regulations and statutes regulating noise are similar to those regulating air pollution. In *Illinois State Toll Highway Authority v. Karn*, the Appellate Court ruled that the Tollway does not need to get permits because the Tollway does not cause the air pollution, rather the vehicles driving on it cause the air pollution. 9 Ill. App.3d 784, 293 N.E.2d 162. Similarly, the Board regulates the sound levels from cars but not from roads.
15. That the impact of noise pollution on adjoining property is part of the design of highway project and noise is to be considered prior to construction and not regulated after construction. The Board's silence on Class "U" type property is

obviously due to the realization that sound control from highways is a function of design and planning and not post construction noise regulation.

16. Based upon the above, the Complaint fails to state a cause of action upon which the Board can grant relief. The regulations recognize that noise pollution from right-of-way is to be considered in the design and planning of highway projects. Once right of way is constructed, the regulations omit them but regulate the sound levels emitted by vehicles. Therefore there is no legal basis for the Board to act.
17. Additionally, the Complaint fails to allege what regulatory criteria that was violated. The Board established sound levels which must be complied. Since no sound levels are applicable to the Tollway, no violation can occur. The Complaint alleges subjective criteria for the Board to act upon. The relief sought is to maximize the wall height to minimize the sound level. The Board has the authority to order the Tollway to meet the Board's sound level regulations for sounds emitted from "U" type properties to "A" type properties. Since no such standard exists, the Complaint fails to allege a cause of action from which the Board can grant relief.

WHEREFORE, Respondent, Illinois State Toll Highway Authority, prays that the Complaint be dismissed.

Illinois State Toll Highway Authority

By: Victor F. Azar
Victor F. Azar
Assistant Attorney General