ILLINOIS POLLUTION CONTROL BOARD
March 25, 1993

VILLAGE OF MATTESON,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 90-146
	)	(Enforcement)
WORLD MUSIC THEATRE	)	
JAM PRODUCTIONS, LTD. and	)	
DISCOVERY SOUTH GROUP, LTD.,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a motion for reconsideration filed by World Music Theatre et. al. (Theatre) on March 12, 1993, requesting the Board to reconsider its February 25, 1993 opinion and order. Theatre also filed a motion for stay pending appeal if the Board denies the motion for reconsideration. The Village of Matteson (Matteson) filed a reply to the motion which was stamped as received on March 22, 1993. On March 23, 1993, Matteson filed a motion to extend the date for filing of its reply. Matteson notes that the reply was delivered to the Board on March 19, 1993 but after the 4:30 p.m. deadline and was therefore date stamped as received the next working day. The Board grants the motion for extension of time and accepts the filing of the reply.

Theatre raises the following issues for reconsideration:

1) The Board does not have the power to impose 5 minute L_{eq} averaging on Theatre.
2) The Board's final order violates the Theatre's and artists' right to free speech.
3) The Board's decision relied on hearsay evidence which was erroneously admitted by the hearing officer.
4) The Board's findings are against the manifest weight of the evidence.
5) A fine is not appropriate in this matter.

Upon consideration of the issues presented by Theatre and a review of the record, the Board grants reconsideration and affirms its opinion and order dated February 25, 1993. The Board will first respond to the issues presented by Theatre in its motion for reconsideration and then consider the motion for stay.

5 Minute L_{eq} Averaging

Theatre argues that the Board does not have the power to apply an averaging period to Theatre that deviates from the

averaging period found in the Board's regulations. Theatre contends that in using a different averaging period the Board violated the Board's procedural rules for adopting new regulations and violated Theatre's rights to due process and equal protection.

The Board finds that the use of a 5 minute L_{eq} averaging period is within the Board's authority and is required by the nature of the noise source. As noted in the February 25, 1993 opinion and order, it is well established that the Board has the authority to impose specific controls on a case by case basis, certainly in an enforcement action to remedy a violation such as this. The expert testimony and data collected by Theatre clearly show that the one hour averaging period is inappropriate for measuring the sound generated by Theatre and that a shorter averaging period is required. The numerical standards imposed by the Board against Theatre are the same as those found in the Board's regulations.

Freedom of Speech

Theatre contends that the Board's order violates the right to freedom of speech by imposing standards of acceptable sound level and sound mix on the artists and imposes a chilling effect on the artists' performance.

The government may impose reasonable restrictions on the time, place, or manner of protected speech providing that the restrictions, are justified, do not reference content, are tailored to serve a governmental interest and leave open other channels for communications. (Ward v. Rock Against Racism (1989), 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661.) The Board finds that the restrictions placed on Theatre are justified. The Board's order does not prohibit any artist from performing at the theatre. However, the order does require Theatre to control the volume of any such performance so as not to create a nuisance in the surrounding community in violation of the Board's noise regulations. The Board's order is not directed at the content of the performance. The Board's order is intended to serve the governmental interest in preventing "noise which creates a public nuisance." (415 ILCS 5/23 (1992).)[1] The order does not affect other channels of communication. The Board finds that the restrictions placed on Theatre do not violate the right to freedom of speech. The case law cited by Theatre does not convince the Board its order is in error.

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[1] Previously codified at Ill. Rev. Stat. 1991, ch. 111½, par. 23.

Hearsay Evidence

Theatre contends that the hearing officer erred in admitting the compiled police reports from Matteson and Country Club Hills and the letters from Janet Munchik, City Manager of Country Club Hills, to counsel for Theatre. Theatre argues that these items contain multiple layers of hearsay and are not admissible under the business record exception. Theatre further argues that these items are not admissible under 35 Ill. Adm. Code 103.204(a) because they are not documents that "would be relied upon by reasonably prudent persons in the conduct of serious affairs." Theatre also contends that complainant failed to lay the proper foundation for the admission of computer generated records. Theatre contends that the Board's reliance on these documents was in error.

The documents which Theatre contends are inadmissible include a listing of the noise complaints received on a particular day. Evidence of this nature was first submitted as Exhibit G at the December 10, 1990 hearing. (Tr. 1 at 220.)[2] Theatre objected to the admission of this document as being inadmissible hearsay. (Tr. 1 at 220.) Matteson argued that the document was admissible under the public records and reports exception to the hearsay rule. (Tr. 1 at 221.) (See People v. Lacey (3rd Dist. 1968), 93 Ill. App.2d 430, 235 N.E. 2d 649.) This exception allows the submission of any

> records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law to which matters there was a duty to report . . . or (C) in civil actions and proceedings or against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority or granted by law, unless the sources of information or other circumstances indicate a lack of trust worthiness.
> (Fed. R. Evid. 803(8))

The hearing officer admitted the document under this exception and also found the document to be admissible under 35 Ill. Adm. Code 103.204(a), which allows the admission of evidence "relied upon be reasonably prudent persons in the conduct of serious affairs." The reasonably prudent person standard is the same standard applied to administrative hearings by the

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[2] Tr. 1 references the transcript from the hearing held on December 10, 1990.

Administrative Procedure Act. (5 ILCS 100/10-40 (1992).)[3] (See Starkey v. Civil Service Commission, etc (1st Dist. 1982), 105 Ill. App. 3d 904, 435 N.E.2d 687.)

Similar documents were submitted by Matteson at subsequent hearings. (Comp. Exh. 2, 5 & 6 from January 1993, Comp. Exh. 6 from July 1992.) Theatre continued to object to the submission of the documents but noted that the hearing officer had previously allowed such exhibits.

The Board affirms the hearing officer's ruling that the documents are admissible under the public records exception to the hearsay rule and the Board's procedural rules pertaining to the admission of evidence. The documents were prepared by the village administrator from police records of complainants received by the police department. The police department has a duty to make a record of all complainants received. The village administrator is concerned with the activities of the police department and relies on the records that the department generates. The records from the police department would also be used by the village administrator to investigate the noise complaints.

A proper foundation for computer generated reports is established when it is shown that:

> the equipment which produced the record is recognized as standard, the entries were made in the regular course of business at or reasonably near the happening of the event recorded and the source of information, method and time of preparation were such to indicate their trustworthiness and to justify their admission. (citations omitted).
> Riley v. Jones Bros. Construction (1st Dist. 1990), 198 Ill. App. 3d 822, 556 N.E. 2d 602.

Theatre did not raise an objection to the admission of the documents for lack of proper foundation at hearing. Theatre does not present any facts to show that the documents qualify as computer generated reports. However, the Board finds that the record does contain information on the police dispatch operation, how entries where made and how the information from the police department was used to create the reports submitted. The Board finds that evidence submitted concerning the preparation of the documents is sufficient to "indicate their trustworthiness and to justify their admission."

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[3] Previously codified at Ill. Rev. Stat. 1991, ch. 127, par. 1012.

The Board notes that Theatre presented a similar exhibit showing dates and locations of complaints, based on the same police reports, to support their argument that the number of violations had decreased. (Resp. Exh. 2 & 3 from January 1993). When asked if Theatre's tabulated information was the same as the information already presented (which Theatre now challenges as improperly admitted), Mr Mickelson stated, "Yes. They are taken exactly from the documents that have already been submitted to this hearing." (Tr. 9 at 234). Theatre submitted its documents asserting the truth contained therein to show that actual noise complaints had been reduced over time. Theatre contests the admissibility of documents presented by Matteson but relies on similar documents containing the exact same information to support its arguments. The Board finds Theatre's objections without merit.

The Board notes that Theatre did not appeal any of the hearing officer rulings regarding admission of the evidence, nor did Theatre identify the specific documents and portions thereof which are purported to contain hearsay. Even if the Board were to strike the tabulated results from Matteson, the Board would reach the same conclusions, based upon the same facts, only relying on the 237 identified complaints from Theatre's evidence (Resp. Exh. 2 & 3 from January 1993) rather than the 250 noise complaints asserted by complainant.

Decision Against the Evidentiary Standard

Theatre has incorrectly asserted that the evidentiary standard is the manifest weight of the evidence. In an enforcement proceeding before the Board, the burden of proof is a preponderance of the evidence. Goose Lake Association v. Robert J. Drake, et. al. (February 25, 1993) PCB 90-170 at 11, __ PCB ___; Lefton Iron & Metal Company, Inc. v. City of East St. Louis (April 12, 1990), PCB 89-53 at 3, 110 PCB 19, 21; Bachert v. Village of Toledo Illinois, et al. (November 7, 1985), PCB 85-80 at 3, 66 PCB 279, 281; Industrial Salvage Inc. v. County of Marion (August 2, 1984), PCB 83-173 at 3-4, 59 PCB 233, 235-236, citing Arrington v. Water E. Heller International Corp. (1st Dist. 1975), 30 Ill. App. 3d 631, 333 N.E.2d 50. 58. A proposition is proved by a preponderance of the evidence when it is more probably true than not. Industrial Salvage at 4, 59, 233, 236, citing Estate of Ragen (1st Dist. 1979), 79 Ill. App. 3d 8, 198 N.E.2d 198, 203. It is complainant's burden to prove a proposition by a preponderance of the evidence. The Board employed the preponderance standard in deciding this case.

While the Board has determined that the evidence considered in its final decision was properly admitted by the hearing officer, the Board finds that even if the contested evidence was not considered, there is sufficient evidence in the record to

support the Board's finding. Testimony from residents concerning noise violations was admitted at each set of hearings. Expert testimony was provided to support the resident's testimony.

The expert testimony presented by Theatre's expert, Joel Lewitz, concluded that vibrations and sound would not be experienced by the residents in their homes at the specified noise levels. Mr. Lewitz conclusions were based on several assumptions. Several residents testified to experiencing vibrations and sound in their homes on certain nights when concerts were taking place. The Board found against the testimony presented by Mr. Lewitz on the issue of vibrations and audibility of sound inside the home. However, the Board fully considered Mr. Lewitz's testimony.

Penalty

Theatre contends that a fine is not appropriate because the number of violations have decreased over time. In addition Theatre argues that unrebutted evidence shows that 3 of the 5 violations in 1992 were due to abnormal weather conditions. Theatre also argues that additional physical modification to Theatre will not affect sound emissions and Theatre should not be penalized for not pursuing such measures. Theatre notes that it has performed sound monitoring and hired experts in accordance with prior Board orders. Theatre contends that it has made a good faith effort to collect data to conform with Board orders.

The Board finds that the factors presented by Theatre were considered by the Board in deciding to impose a monetary penalty in this matter. While the number of found violations have decreased from season to season, Theatre has not presented any evidence that indicates that the decrease is due to any measures taken by Theatre or that future violations will not occur. Other factors could explain the decrease in found violations or complaints against the Theatre, such as weather conditions, different performing artists, the pending action before the Board, ongoing monitoring, extent of evidence presented by Matteson and frustration by residents.

While adverse weather conditions are a contributing factor to the propagation of sound into the surrounding community, it does not alleviate the violation. The standards imposed by the Board's noise regulations are applicable under all weather conditions.

Theatre's claim of a good faith effort to collect data still contains no explanation of the failure by Theatre to provide the Board with one year's worth of monitoring data.

Stay Pending Appeal

The Board denies Theatre's request for a stay from the monitoring requirements as specified by the Board's order. The Board has found that the evidence clearly demonstrates that violations have occurred and that the provisions of the final order are necessary to prevent additional violations. Granting a stay of the final order would allow Theatre to continue its operation in a manner that violates the noise standards and creates a nuisance in neighboring areas. In addition, the Board concludes that it is possible to obtain an appropriate sound level for the performance to be enjoyed by all patrons in the Theatre without transmitting an inappropriate amount of sound onto the surrounding community. The Board further maintains that this can be obtained with no or minimal effect on the artist and performance.

As an additional matter, the Board notes that even if it were inclined to grant a stay on some matters, it would specifically not be inclined to grant a stay of the sound monitoring obligations. Those requirements will for the first time settle the debate about how loud the music is at the mix and in the community from concert to concert, as well as from minute to minute. Should future noise complaints arise, those measurements would provide the only analytical characterization of the nature of the problem. Theatre has not objected to the cost or technical practicability of that monitoring. Therefore the Board would be specifically not inclined to grant a stay of those provisions.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 25th day of March, 1993, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board