

ILLINOIS POLLUTION CONTROL BOARD
December 16, 1993

KENNETH F. METIVIER)
AND CYNTHIA METIVIER,)
)
Complainant,)
)
v.) PCB 92-74
) (Enforcement)
)
DOUGLAS KENYON d/b/a DOUGLAS)
KENYON, INC.,)
)
Respondent.)

KENNETH F. METIVIER AND CYNTHIA P. METIVIER APPEARED PRO SE;

UVE R. JERZY, MANDEL, LIPTON AND STEVENSON, LTD., APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

On May 12, 1992, Kenneth and Cynthia Metivier (Metiviers) filed a complaint against Douglas Kenyon, doing business as Douglas Kenyon, Inc., an art gallery located in Chicago, Illinois. The complaint alleges violation of the noise nuisance provisions contained in Sections 23 and 24 of the Environmental Protection Act (Act) (415 ILCS 5/23 & 24 (1992)) and 35 Ill. Adm. Code 900.102. A hearing was held on August 5, 1992, in Chicago, Illinois before hearing officer Medard Narko. No members of the public attended the hearing. Each of the parties presented testimony on their own behalf but called no other witness in support of their respective claims. No briefs were filed in this matter.

BACKGROUND

The complaint alleges that a whining, whirring, humming sound similar to that produced by a vacuum sweeper creates a nuisance that destroys the Metiviers' ability to concentrate on and enjoy personal, social, recreational and business pursuits. The Metiviers contend that the sound comes from a machine at Douglas Kenyon Inc., a neighboring art gallery and art restoration business. The Metiviers live in a house located on the rear of a lot on West Schiller Street in Chicago, Illinois. The Metiviers have lived at this location for more than 16 years. (Tr. at 59.) The restoration area of the art gallery is located across the alley from the Metiviers' residence. The distance between the Metiviers' residence and the art gallery is approximately 22 feet, the width of the alley between the Metiviers' residence and the art gallery. (Tr. at 37.)

The Metiviers first noticed the noise in the fall of 1990. (Tr. at 13.) They have traced the noise to equipment at the art gallery that is located next to a window and is vented through an adjacent window. (Tr. at 13.) The equipment is operated at frequent and irregular intervals for up to thirty minutes. (Tr. at 14.) The equipment is operated between the hours of nine a.m. and five p.m., Tuesday through Saturday. (Tr. at 14.) Mr. Metivier described the noise as being similar to the noise from a vacuum sweeper. (Tr. at 14.) The noise can be heard throughout the Metiviers' residence and surrounding property. (Tr. at 15.) The noise can still be heard when windows are closed. (Tr. at 15.)

The Metiviers note that the noise has forced them to make adjustments in their normal living habits. (Tr. at 15.) They have been forced to close windows and doors to escape the noise. (Tr. at 15.) The noise has forced them to move to other parts of the house and at times to leave the house. (Tr. at 16.) They contend that even during periods of quiet, they experience tension and anxiety due to the anticipation of the reoccurrence of the noise. (Tr. at 16.) Mr. Metivier claims that the noise has destroyed their ability to concentrate on such activities as reading, writing, maintaining a conversation, entertaining, listening to music or relaxing. (Tr. at 16.)

The Metiviers submitted sketches and photographs to show the area and the relationship of the art gallery to their residence. (Comp. Exh. 1 - 3.) The Metiviers also submitted a tape recording taken from a window sill of their home. (Comp. Exh. 5.) The tape was offered to the show the quality of the noise but not necessarily the volume or quantity of the noise. (Tr. at 24.) The respondent objected to the submission of the tape due to an insufficient foundation. (Tr. at 108.) The Board accepts the admission of the tape recording but only to demonstrate the type of noise and not as evidence of the level of noise.

The Metiviers also provided testimony concerning noise and fumes from trucks in the alley making deliveries to the art gallery. However, such allegations were not included in the complaint nor have the Metiviers moved to amend the complaint. Therefore, these allegations will not be further considered by the Board.

The gallery has been at its present location since 1985 and has been in operation since 1969. (Tr. at 152.) The art gallery specializes in the conservation and restoration of documents and works of art. (Tr. at 123.) Mr. Joel Oppenheimer has been employed by Kenyon for over fourteen years. (Tr. at 121.) On June 30, 1992, Mr. Oppenheimer purchased the art gallery from Mr. Douglas Kenyon. (Tr. at 122.) Mr. Oppenheimer notes that the Metiviers and the prior owner of the art gallery, Douglas Kenyon, had an antagonistic relationship. (Tr. at 132.)

The machine from which the noise is generated is called a cold suction vacuum table. (Tr. at 123.) The machine consists of a 30 x 40 inch table with a perforated stainless steel screen and a vacuum motor. (Tr. at 124.) The suction is channelled from the motor to the table on which the piece of art is placed. (Tr. at 124.) The machine is vented through the window with an accordion type hose. (Tr. at 125.) Usage of the machine depends on the type of projects in the art gallery, but the machine is usually used once a day. (Tr. at 126.) The machine can be set from zero to ten but is usually set at seven. (Tr. at 128.) The maximum amount of time that the machine is run is thirty minutes and usually it is operated for a period considerably less than thirty minutes. (Tr. at 129.) The windows near the machine are often open to provide ventilation and air circulation. (Tr. at 130.)

The respondent submitted copies of inspection reports from the City of Chicago. (Resp. Exh. 1.) These inspections were made in response to complaints received by the city concerning noise from the art gallery. The city inspected the site on four occasions between November 8, 1990 and March 10, 1992. (Resp. Exh. 1.) During one inspection the city performed sound measurements. (Resp. Exh. 1.) The reports from the inspection state that no excessive noise was detectable. (Resp. Exh. 1.) The city found no violation as a result of its inspections. (Resp. Exh. 1.)

Mr. Oppenheimer testified that two days prior to the hearing, the machine was relocated to an area opposite the alley. (Tr. at 141.) The machine was moved in response to the Metiviers' complaint but was not done until then due to Mr. Oppenheimer not having the authority to do so until he purchased the business. Other business concerns related to the operations of the art gallery also prevented the machine from being relocated sooner. (Tr. at 142.)

Mr. Metivier admits that the relocation of the machine should eliminate the noise problem. (Tr. at 33.) However, because the machine was moved only two days before the hearing and did not operate on one of those days, he does not know the effect of moving the equipment. Further, Mr. Metivier notes that they have endured the noise for almost two years. (Tr. at 34.) He is also concerned that the machine may be returned to the previous location and the noise will return. (Tr. at 34.)

DISCUSSION

Section 23 of the Act describes the finding of the General Assembly concerning excessive noise and the purpose of the title. As this section of the Act does not prohibit any activity, the Board cannot find a violation of this section.

Section 24 of the Act provides that "[n]o 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". Accordingly, the Board's rules define noise pollution as "the emission of sound that unreasonably interferes with the enjoyment of life or lawful business or activity" and prohibit the emission of such noise pollution beyond the boundaries of one's property. (35 Ill. Adm. Code 900.101 and 900.102.)

Thus, under the Act and Board regulations, a violation of the Board's "noise nuisance" regulation has occurred if the complainant has proven that the complained of noise pollution has unreasonably interfered with the complainant's enjoyment of life or with his pursuit of any lawful business or activity. If there is no interference, no "noise nuisance" violation is possible. (Zivoli v. Prospect Dive and Sport Shop (March 14, 1991), PCB 89-205 at 9.) Interference is more than an ability to distinguish sounds attributable to a particular source. Rather, the sounds must objectively affect the complainant's life or business activities. (Id.; Kvatsak v. St. Michael's Lutheran Church (August 30, 1990), PCB 89-182.) Sound does not violate the Act or Board regulations unless it causes unreasonable interference with the enjoyment of life or lawful business or activity.

The "reasonableness" of the noise must be determined in light of the factors set forth in Section 33(c) of the Act (415 ILCS 5/33(c) (1992)). (See Wells Manufacturing Co. v. PCB (1978), 383 N.E.2d 148, 150; Ferndale Heights Utilities Co. v. PCB (1st Dist. 1976), 358 N.E.2d 1224.) The relevant factors 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 ... resulting from such pollution source; and (5) any subsequent compliance. (415 ILCS 5/33(c) (1992).)

Character and Degree of Injury

In assessing the character and degree of the injury or interference caused by the noise emissions from the vacuum table, the Board looks to whether the noise substantially and frequently interferes with the use and enjoyment of life and property, beyond minor trifling annoyance or discomfort. (Kvatsak, PCB 89-182 at 9.)

The art gallery operates from Tuesday through Saturday from

9:00 a.m. to 5:00 p.m. The vacuum table is operated at irregular intervals on an as needed basis. The duration of the operation of the table varies but does not exceed thirty minutes and is usually for much shorter periods of time. While Mr. Metivier testified that the noise interfered with many activities, he did not provide specifics of how the activities were interrupted or the extent of the interference.

The testimony supports a finding that the noise creates an annoyance. However the Board finds that the noise does not substantially and frequently interfere with the use and enjoyment of life and property.

Social and Economic Value

There is no evidence in the record regarding the social and economic value of the art gallery. However, the Board recognizes the social and economic value associated with an established business which has been in operation for 24 years and at the same location for 8 years.

Suitability or Location

The record indicates that both the Metiviers and the art gallery are appropriately located. The art gallery has presented documentation from an architect that indicates that the vacuum table at the art gallery is not in violation of any zoning requirements. (Resp. Exh. 2.) The Metiviers have lived at this location for more than 16 years, while the art gallery has been in its present location for 8 years. The area is mixed zoning with both residential and commercial properties. (Comp. Exh. 1.)

Technical Practicability and Economic Reasonableness of Control

The focus of inquiry into the technical practicability and economic reasonableness of control measures is on what can be done about the allegedly offensive noise. (Zivoli, PCB 89-205 at 12.) The only testimony concerning control measures involves relocation of the machine. Relocation of the machine was the relief requested in the complaint. The Board finds this method of control to be technically practical and economically reasonable, because the art gallery has relocated the machine.

Subsequent Compliance

The vacuum table has been moved to a location on the opposite side of the building. The machine is now vented through a window that opens to a courtyard of the art gallery. The parties believe that the relocation of the machine should eliminate the noise problem.

CONCLUSION

The Board finds that the alleged noise does not constitute a violation of the Act. The Board finds that the noise does not present an unreasonable interference with the enjoyment of life or lawful business or activity. The Board notes that the only noise readings presented were taken by the City of Chicago and demonstrated no detectable excessive noise. The noise is confined to daytime hours and is for a limited duration. The art gallery is suited to its location. The new owner of the art gallery has responded to the complaint by relocating the machine, which the parties believe will eliminate the noise transmitted to the Metiviers' property.

Based on an evaluation of the evidence and the factors enumerated in Section 33(c) of the Environmental Protection Act, the Board finds that the record does not support a finding that Doug Kenyon, d/b/a Doug Kenyon Inc. has caused noise pollution in violation of the Act.

The foregoing constitutes the Board's findings of fact and conclusions of law in this matter.

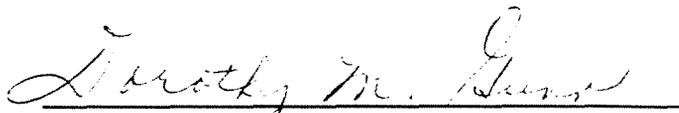
ORDER

Based on an evaluation of the evidence and the factors enumerated in Section 33(c) of the Environmental Protection Act, the Board finds that Doug Kenyon, d/b/a Doug Kenyon Inc. has not operated in violation of Sections 23 and 24 of the Act and 35 Ill. Adm. Code 900.102. The complaint is accordingly dismissed.

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. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 16th day of December, 1993, by a vote of 7-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board