

ILLINOIS POLLUTION CONTROL BOARD  
July 1, 1993

DALE DETTLAFF and )  
DEBORAH DETTLAFF, )  
 )  
Complainants, )  
 )  
v. ) PCB 92-26  
 ) (Enforcement)  
 )  
EDUARDO P. BOADO and )  
EPB PARK SERVICES, INC., )  
 )  
Respondents. )

HOWARD M. LANG AND IRENE DAVID APPEARED ON BEHALF OF THE  
COMPLAINANTS;

PAUL K. VICKERY OF HOPKINS & SUTTER APPEARED ON BEHALF OF  
RESPONDENTS.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a complaint filed by Dale and Deborah Dettlaff (Dettlaffs) on February 14, 1992. The complaint alleges that noise and air pollution are generated from the respondents' property. The complaint alleges violations of Sections 9(a), 23 and 24 of the Environmental Protection Act (415 ILCS 5/9(a), 23 & 24 (1992)). Hearings were held on June 30, August 3, and September 2, 1992 in Lake Zurich, Illinois. Members of the public attended the hearings. The Dettlaffs submitted their final brief on October 9, 1992. The respondents presented their final brief on November 6, 1992. On November 30, 1992, the Dettlaffs filed a reply brief.

BACKGROUND

The Dettlaff family consists of Dale and Deborah Dettlaff and their three daughters ranging in age between eight and fifteen. (Tr. at 69.) The Dettlaffs reside in Lake Zurich on a parcel of land located on Lake Zurich that is owned by Deborah Dettlaff, her mother and Deborah's sister. (Tr. at 63.) The parcel of land is comprised of 6.2 acres of which approximately 2.2 acres is in the water. (Tr. at 63.) Improvements on the property consist of the Dettlaff residence, the residence of Deborah Dettlaff's sister, and a three car garage. (Tr. at 63.) The Dettlaffs moved into the residence in June of 1975. (Tr. at 63.) In the time that the Dettlaffs have lived in this house they have made several improvements to the property. (Tr. at 65.) When the Dettlaffs moved into the home in 1975, it was a small three bedroom, one bath almost summer-type home. (Tr. at 64.) The Dettlaff home now has four bedrooms, three baths, family room and a finished basement. (Tr. at 63.)

0144-0015

Nestlerest Park (Park) is a picnic area and amusement park owned by Eduardo P. Boado and operated by EPB Park Services. (Tr. at 345.) The Park has been in operation as an amusement park since before 1955. (Tr. 179.) Mr. Boado purchased the property and business in 1986. (Tr. at 345.) The following attractions and activities are in operation at the Park: Lake Zurich Queen (Show Boat), putt-putt golf, ferris wheel, whip ride, skeetball, dunk tank, skill games, T-Bone's trailer (clown act), two volleyball courts, softball diamond, horseshoe pits, pingpong tables, disc jockey, swing set, teeter-toter and bingo. (Tr. at 363.)

The Dettlaff property is bounded by Robertson Road on the south, Lake Zurich to the north and a residential area to the east. Nestlerest Park is located to the west of the Dettlaffs' property. (Comp. Exh. 12 & 13.) The distance from Robertson Road to Lake Zurich or the length of the boundary between the Dettlaff property and Nestlerest Park is approximately 530 feet. (Comp. Exh. 12.) The shoreline of Nestlerest Park runs approximately 240 feet. (Comp. Exh. 12.) The frontage of the Park along Robertson Road runs approximately 539 feet. (Comp. Exh. 12.) The Dettlaff residence is located in the northwest corner of the property. (Comp. Exh. 12.) The putting green is located directly west of the Dettlaff's residence. (Comp. Exh. 12.) The whip ride is located south of the putting green, and the barbecue area is south of the whip ride. (Comp. Exh. 12.) The trailer for the clown act is located near the center of the western edge of the park and is across from the bingo area. (Comp. Exh. 12.) The picnic area is located near the lake. (Comp. Exh. 12.) The ballfield and parking area are located towards Robertson Road. (Comp. Exh. 12.)

The Park is used for corporate picnics on weekends during the summer months. (Tr. at 348.) Approximately 20 picnics are held at the Park each year. (Tr. at 349.) The average attendance at a picnic is less than 1,000 people. (Tr. at 356.) The Park opens at 11:00 a.m. for picnics. (Tr. at 149.) When the Park opens the grills are started. (Tr. at 149.) The rides start when the Park opens and continue to run until about 1:00 p.m. (Tr. at 151.) At about 1:00 p.m. the clown show begins and lasts about an hour. (Tr. at 152.) After the clown show, games and races (i.e. foot races and egg toss) are held for both the children and the adults. (Tr. at 161.) When the races are finished there may be a deejay and the rides would continue. (Tr. at 162.) The Park begins to wind down around 5:00 p.m. and actually closes at 6:00 p.m. (Tr. at 165.)

The Park is also used for a day camp. The day camp operates 4 days per week for 8 weeks, from the middle of June until the middle of August. (Tr. at 357.) The hours of the day camp are from 9:00 a.m. to 3:00 p.m. Approximately, 80 to 100 children

attend the day camp. (Tr. at 373.) The Park employs between 10 and 30 part-time employees. (Tr. at 382.)

The property was zoned for commercial use when it was purchased by Mr. Boado in 1986. (Tr. at 592.) However, since that time the zoning has been changed from commercial to residential. (Tr. at 593.)

At the time Mr. Boado purchased the party, the facility was involved in litigation with the Village of Lake Zurich concerning noise complaints. (Tr. at 560.) The parties entered a settlement agreement from that litigation that required Mr. Boado to make certain modifications to the Park's operations and limited sound emissions to 62 dB(A). (Resp. Exh. 3.) The agreement also prohibits operation of the Park after 6:00 p.m. (Resp. Exh. 3.) The Dettlaffs were not a party to this settlement agreement but the action was brought by the Village as a result of the complaints received from the Dettlaffs.

#### HEARING

Deborah Dettlaff described several of the noises that are emitted from the Park. She testified that people walking on the pier cause the loose boards of the pier to hit against the metal framing creating a clunking sound. (Tr. at 81.) She further testified to hearing the cheering and hollering of the crowds around the dunk tank. (Tr. at 75.) She also hears announcements made throughout the day, the calling of bingo numbers and the clown act which are transmitted through the speaker system. (Tr. at 87.) She also testified that she hears the grinding of the wheels on the whip ride and that the ride rattles and whirs and shakes. (Tr. at 106.) She also testified to being annoyed by the sound of the children's screaming voices from the day camp. (Tr. at 123.) She also noted that she hears noises from vehicles, especially buses and motorcycles, as people are arriving or leaving the Park. (Tr. at 148.)

She contends that she is unable to carry on normal daily activities due to the noise. (Tr. at 125.) She stated that the noise from the Park can be heard over the telephone. (Tr. at 125.) She notes that she has to close the windows and doors to her house to escape the noise. (Tr. at 125.) She also contends that due to the noise she is stressed out, short tempered, and nervous. (Tr. at 154.) She also can't sleep at night knowing that the noise will continue. (Tr. at 155.) She further contends that the noise has placed a strain on her family. (Tr. at 157.)

Several of the Dettlaffs' friends also testified to being disturbed by the noise from the Park while they were guests at the Dettlaff home. They stated that the noise sometimes made it hard to carry on a conversation. (Tr. at 35, 54, 226 and 241.)

They also found some of the noises to be aggravating or annoying. (Tr. at 225 and 238.) They noted that the noises from the Park could be heard inside the Dettlaffs' home. (Tr. at 36, 53 and 226.) They also testified that the Dettlaffs had complained about the noise and that they have noticed that Deborah appears nervous and upset. (Tr. at 229 and 244.)

Toni Christensen stayed at the Dettlaffs' home for ten days in 1991 while the Dettlaffs were on vacation. (Tr. at 250.) She characterized the sound as a "continual noise punctuated by loud noises." (Tr. at 256.) She testified that she was irritated by the noise and she shut herself up in the house or moved to the other end of the house. (Tr. at 255.)

Sheryl Grever is the sister of Deborah Dettlaff and has lived to the east of the Dettlaffs for the last 10 years. (Tr. at 452.) She is also a one-third owner of the property adjoining the Park. (Tr. at 451.) The property has been in the family for 50 years. (Tr. at 458.) She testified that due to the noise from the Park, she has not used her patio the last two summers. (Tr. at 453.) She has also noticed that Dale and Deborah appear to be under tension due to the noise. (Tr. at 458.) In July of 1988 and 1989 she complained to the police about loud noise from the Park. (Tr. at 462 and 463, Resp. Exh. 8 and 9.)

Olivia Grossi has lived across the street from the entrance to the Park for 10 years. (Tr. at 732.) She testified that she hears noises from the traffic, the PA system and baseball games. (Tr. at 735.) She finds these noises to be annoying and the noise affects her enjoyment of her property. (Tr. at 735.) She also has noticed smoke from the barbecue around her property. (Tr. at 738.) However, she has never complained about the smoke or the noise to Park personnel or to the police. (Tr. at 740.)

Anthony Mizdrak has lived directly across from the driveway entrance to the Park for about a year and a half. (Tr. at 492.) He does not find the noise from the Park to be excessive or annoying and is not even aware of all the activities in the Park. (Tr. at 493.) Nancy Stephens has lived across from the ballfield of the Park for 6 years. (Tr. at 501.) She finds the noise from the day camp to be a happy noise and does not find it excessive or annoying. (Tr. at 502.) She also does not find the noise from the picnics to be excessive or annoying and stated that the noise doesn't interfere with her weekend activities. (Tr. at 503.)

Several officers from the Village of Lake Zurich police department testified concerning complaints involving the Park and the Dettlaffs. The officers also took sound measurements pursuant to the settlement agreement from the Dettlaffs' property. Exhibit 24 contains police reports relating to noise from the Park. Some of the reports contain printouts from the

sound measurements taken by the police pursuant to the settlement agreement.

Mr. Boado testified that since purchasing the Park in 1986, he has made several improvements to the property. Pursuant to the settlement agreement, he has removed the bumper car ride and replaced it with the putt-putt golf area. (Tr. at 559.) He has installed a 7 foot high solid cedar fence between the Park and the Dettlaffs' property running about 270 feet. (Tr. at 563.) He has replaced the speaker system hanging from trees with a subterranean system. (Tr. at 559.) He has asphalted the driveways and replaced the pier. (Tr. at 559.) He sound insulated the skeetball building. (Tr. at 562.) Mr. Boado eliminated the steel rail that the whip ride traveled on and replaced the steel wheels with rubber wheels. (Tr. at 565.) Mr. Boado states that the rides are maintained (greased and oiled) to reduce the noise. (Tr. at 567.)

As part of the settlement agreement with the Village of Lake Zurich, Mr. Boado hired a sound consultant. (Tr. at 571.) Mr. Boado received a letter noting a violation of the settlement agreement but has received no other notices of violations of the settlement agreement. (Tr. at 577.)

#### DISCUSSION

Respondent argues that the settlement agreement entered between the Park and the Village of Lake Zurich should control. The Board finds that the agreement is not controlling in this matter. The incidents alleged in the complaint occurred after the settlement agreement was entered and the Dettlaffs were not a party to the action that resulted in the settlement agreement. Further, the Board does not have the authority to enforce the agreement or find violations of the settlement agreement. The settlement agreement does not preclude the Dettlaffs from bringing this action. Further, the settlement agreement does not prohibit the Board from enforcing the provisions of the Act.

Mr. Boado also alleges that Mr. Dettlaff has engaged in conduct of a harassing nature toward Mr. Boado, his family and patrons of the Park. In particular, Mr. Boado notes that Mr. Dettlaff waived a chain saw in a threatening manner, left a lawn mower running and photographed activities at the Park. While the Board would not condone such actions, if true, these allegations are not at issue before the Board.

The complaint alleges that the Park has violated Section 9(a) of the Act in the emission of smoke from its cooking area. The complaint also alleges that the respondents have violated Sections 23 and 24 of the Act with noise generated from the operation of the Park.

With regards to air pollution, Section 9(a) of the Act provides:

No person shall cause or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act.

(415 ILCS 5/9 (1992).)

Section 3.02 of the Act defines "Air Pollution" as:

the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property or to unreasonably interfere with the enjoyment of life or property.

(415 ILCS 5/3.03 (1992).)

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 noise or air violation has occurred if the complainant has proven that the complainant has complained of noise or air pollution has unreasonably interfered with the complainant's enjoyment of life or with his pursuit of any lawful business or activity. The Board will first address the alleged violations relating to air pollution.

The Board finds that the complainants have not established that the alleged air pollution has unreasonably interfered with their enjoyment of life or with their pursuit of any lawful business or activity. While the evidence shows that smoke is emitted from the cooking area of the Park, the Dettlaffs have not

presented adequate evidence of an unreasonable interference due to the smoke.

Noise enforcement cases previously decided by the Board include: Kaji v. R. Olson Mfg. Co., Inc. (1981) PCB 80-46, aff'd, (1982), 109 Ill. App. 3d 1168, 441 N.E.2d 188; Citizens of Burbank v. Clairmont Transfer Co. (1986), PCB 84-125; John W. Eirlich v. John Smith (1987), PCB 85-4; Thomas & Lisa Annino v. Browning-Ferris Industries (1988) PCB 97-139; Anthony Kochanski v. Hinsdale Golf Club (1989), PCB 88-16, rev'd, (1990), 197 Ill. App. 3d 634, 555 N.E.2d 31; William Brainerd v. Donna Hagen et al. (1989), PCB 88-171; Brian J. Peter v. Geneva Meat and Fish Market (1990), PCB 89-151; Will County Environmental Network v. Gallagher Asphalt (1990), PCB 89-64; Kvatsak v. St. Michael's Lutheran Church (1990), PCB 89-182; Zivoli v. Prospect Dive and Sport Shop (1991), PCB 89-205; Village of Matteson v. World Music Theatre (1991 and 1993), PCB 90-146; Christianson v. American Milling (1991), PCB 90-59; Zarlenga v. Bloomingdale Partners (1991 and 1992), PCB 89-169; Curtis v. Material Service Corp. (1993), PCB 91-30.

Section 900.103(b) of the Board's noise regulations sets forth measurement procedures and provides that "[a]ll measurements and all measurement procedures to determine whether emissions ... comply with 35 Ill. Adm. Code 901 shall be in conformity with ANSI ... and shall, with the exception of measurements to determine whether emissions ... comply with 35 Ill. Adm. Code 901.109, be based on  $L_{eq}$  averaging, as defined in 35 Ill. Adm. Code 900.101, using a reference time of one hour." (See also, In the Matter of: General Motors Corp. Proposed Amendments to 35 Ill. Adm. Code 900.103 and 901.104 (January 22, 1987), R83-7; Village of Matteson v. World Music Theatre (September 12, 1991), PCB 90-146.) The measurements conducted by the Lake Zurich police department were not conducted in compliance with the Board regulations. The measurements are not based upon  $L_{eq}$  averaging using a reference time of one hour and the meter used was not of a type specified by the Board's regulations.

The Dettlaffs have not asserted any violations of the Board's numerical standards. Although noise measurements were introduced as evidence in this case, it is well-established that the numerical noise standards set forth in Subtitle H of the Board's regulations are independent of, and do not themselves dictate the outcome of, a nuisance complaint. (Illinois Coal Operators Assoc. v. PCB, (1974), 59 Ill.2d 305, 319 N.E. 2d 782, 785; Annino v. Browning-Ferris Industries of Illinois, (August 18, 1988), PCB 87-139 at 9; Will County Environmental Network v. Gallagher Blacktop, (January 11, 1990), PCB 89-64 at 8.) The Board will accept as evidence the noise level test results only with respect to a finding of an unreasonable interference with

the enjoyment of life. (Kaji v. R. Olson Manufacturing Co., Inc., (April 16, 1981) PCB 80-46, 41 PCB 245 , aff'd 109 Ill. App. 3d 1168, 441 N.E. 2d 185, Zivoli v. Somebody's Bar and Restaurant (May 21, 1992), PCB 90-200.)

The issue in any noise enforcement proceeding is whether the noise has unreasonably interfered with the enjoyment of life and lawful 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, 150-01; 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 Park, 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.) Here, the record establishes that noise is emitted from picnics at the Park on approximately 20 occasions during weekends throughout the summer. The hours of the picnics are between 11:00 a.m. and 6:00 p.m. While the noise varies throughout the day and from picnic to picnic, the evidence shows that there is continuous noise from a picnic. The noise includes crowd noise, noises from rides and attractions and noise transmitted through the speaker system.

Noise is also emitted on four days of the week for a 8 week period from the day camp. The day camp operates from 9:00 a.m.

to 3:00 p.m. with 80 to 100 children in attendance. The noise from the day camp consist primarily of the voices of the children and the camp counselors.

From the testimony, it is evident that there is constant noise from the Park while it is in operation. Considering the periods that the Park is in operation, the Board finds that there is a frequent interference.

Mrs. Dettlaff complained of physical effects due to the noise. The record indicates that noise interferes with the activities of the Dettlaffs. However, there is also evidence that the Dettlaffs are able to use and enjoy their property. The evidence shows that the Dettlaffs regularly entertain friends at their residence and swim in the lake. Many of the improvements that the Dettlaffs made to the property were made to increase their use and enjoyment of the property.

The sound measurements taken by the police department show that the measurements have consistently remained under the 62dB(A) level set in the settlement agreement. (Exh. 24.)

#### Social or Economic Value of the Source

The record establishes that the Park has economic and social value. The Park employs 10-30 part time employees. The Park is used by children during the week as a day camp facility. On weekends, up to a 1,000 people visit the Park for company picnics. Mr. Boado allows the Village to use the Park for community events, permits the fire department to practice emergency ice diving and allows little league teams to use the ballfield.

#### Suitability or Unsuitability of the Source, including the question of priority of location

The Park is located in an area that is zoned as residential. However, the zoning was recently changed and the Park is considered as a non-conforming use. At the time that Mr. Boado purchased the property it was zoned commercial. Other than the zoning, there is nothing in the record to indicate that the Park is unsuitable for its present location.

It is not clear from the record what the conditions of the surrounding area were at the time that the Park first commenced operation over 40 years ago. However, the record indicates that the Dettlaffs have resided next to the Park for 17 years and that Mr. Boado purchased the Park in 1986. The Board finds that the Park has clear and undisputed priority of location over the Dettlaffs because the Park was in operation at the time the Dettlaffs began to reside at the property and at the time Mrs. Dettlaff acquired an ownership interest. Further, there has been

no substantial change in the operation of the Park in the time that the Detlaffs have resided next to the Park which would have resulted in increased noise emissions. Also, when the Detlaffs moved into the property it appears the area was zoned as commercial.

Mr. Boado purchased the property after the Detlaffs had moved to the area but has made no substantial changes in the operation of the Park that would increase the noise emitted from the Park. If anything the changes made were intended to reduce the noise levels. The Dettlaffs stated that there has been no noticeable increase in the noise from the Park in the time they have lived there. (Tr. at 201 & 664.) There is substantial testimony from Mr. Trost (Tr. at 45.), Mrs. Detlaff (Tr. at 201), and Mr. Boado (Tr. at 443-447, 567-569), that the noise levels have decreased since Mr. Boado purchased the property.

At the time that the Detlaffs moved into the area, they were or should have been aware of the possibility of a nuisance from the operation of the Park. The Dettlaffs contend that at the time they moved into the property, they were not aware of the noise generated by the Park. However, Mrs. Dettlaff resided in Lake Zurich as a child and was aware of the Park's activities. Further, at the time that the Dettlaffs moved in, the property was owned by Mrs. Dettlaff's grandmother.

While the Dettlaffs have filed numerous complaints against the Park with both the Village and Park employees, they have continued to reside in the residence for 17 years and have made substantial improvements to the property.

#### 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 noises complained about by the Dettlaffs are primarily from three sources: the rides, the sound system and the crowd.

The Dettlaffs request the following relief: elimination of the whip ride, elimination of the above-ground speakers and bullhorns, elimination of the amplification of the clown act, relocation of the dunk tank to another area of the Park away from the Dettlaff property and the addition of sound buffers or barriers which would not obstruct the Dettlaffs' view of the lake. (Comp. Br. at 21.) The Dettlaffs claim that the expense to accomplish these changes would be minimal but have not provided any cost estimates. The Board notes that these recommendations were not raised at hearing but were presented in the complainants final brief. The Dettlaffs had requested similar forms of relief in the initial complaint.

Respondent claims that the removal of the whip ride would be a life-threatening blow to the Park. The respondent claims that this ride is for small children and makes visits to the Park by families a pleasurable experience. The respondent asserts that this would jeopardize the economic viability of the Park. The respondent also asserts that in relocating attractions they must consider the overall layout of the Park, crowd control and other factors. Mr. Boado also contends that the settlement agreement prohibits him from making any changes to the Park without approval by the Village.

While the Board does not find any language in the settlement agreement that prohibits changes to the Park, it is not clear from the record if the Park's non-conformance status with the zoning ordinance limits changes to the Park's operation.

It would appear to be impossible to totally eliminate the noise emissions without ordering that the facility be closed. The Board further notes that pursuant to the settlement agreement with Lake Zurich, Mr. Boado has taken certain measures to reduce the noise from the Park.

While the Dettlaffs have requested the Board to require the installation of sound barriers, it has provided no indication of the type of sound barriers, the location of the sound barriers, the effects of the sound barriers or costs for sound barriers. Without this type of information the Board cannot determine the feasibility of installing sound barriers.

The Dettlaffs have also suggested the removal and relocation of some of the attractions, elimination of above-ground speakers and elimination of the amplification of the clown act. Yet, they have not presented evidence on the effects on the operation of the Park or the emission of noise from the Park. The Board also notes that the relocation of an attraction may only result in the noise being directed at another neighboring property. The record contains inadequate information for the Board to order the removal or relocation of any of the attractions. Further, the Dettlaffs have not presented any evidence to support that the removal of certain rides will substantially alleviate the noise emissions. In addition, the Dettlaffs have not provided a timetable for the completion of the requested changes.

Mr Boado has already spent between \$100,000 and \$200,000 to improve the Park, approximately half of it was spent on sound control. (Tr. at 568.)

#### Subsequent Compliance

Mr. Boado has made several modifications to the Park since he purchased it in 1986. Some of these changes were in response to the settlement agreement between the Village of Lake Zurich

and the Park. Mr. Boado testified that the rides are maintained to minimize the noise.

Conclusion on Unreasonable Interference

Historically, the common law courts have provided relief to private litigants where someone's use of the land unreasonably interferes with another's use and enjoyment of property. Much of this private nuisance tort theory is embodied in the "unreasonable interference" language of the Act. At least since the 17th century, the common law courts have recognized an exception to the nuisance theory may be made where the complaining party has moved to the location where the nuisance already exists.<sup>1</sup> The Environmental Protection Act's recitation of "priority of location" in Section 33(c)(3), parallels the "coming to the nuisance" concept. Indeed most of the Section 33(c) factors reflect common law nuisance theory exceptions or interpretations.

The doctrine of "coming to the nuisance" is well established<sup>2</sup> and could be considered to bar the granting of relief to the damaged party. (David Curie, Pollution (1975).)<sup>3</sup> In the "coming to the nuisance" cases, the courts have held that the residential landowner who has been damaged may not have relief if he knowingly came into a neighborhood reserved for industrial or agricultural endeavors. (Spur Industries Inc. v. Del E. Webb Development Co. (1972), 108 Ariz. 178, 494 P.2d 700.) Courts are concerned with protecting the operator of a lawfully, albeit noxious, business from the result of a knowing and willful encroachment by others near his business along with protecting the interests of the public. (Id.)

The Board finds that the above analysis is applicable to the matter before the Board. The Board notes the above principles apply to common nuisance matters raised in a court of equity, while the matter before the Board is an action brought pursuant to statutory rights established by the Act. However, the Board

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<sup>1</sup> 2 W. Blakstone, "Commentaries on the Laws of England" (17th Ed. 1830, 402-3).

<sup>2</sup> "Coming to the Nuisance: nor shall private property be taken without...", John D. Ingram, 5 Northern Illinois University Law Review Spring 85, p. 181-200; "First come, first served: an economic analysis of "coming to the nuisance"", Donald Wittman, 9 Journal of Legal Studies, June 1980 p. 557-568; 42 ALR 3d 344; 8 ALR 2d 419 §3.

<sup>3</sup> The Board notes that David Curie was instrumental in the writing of the Environmental Protection Act.

finds that these provisions of the Act are analogous to a nuisance action and that the same type of analysis should be applied in weighing the factors in Section 33(c) of the Act.

Priority of location does not achieve the level of an absolute defense (City of Mommouth v. IPCB (1974), 57 Ill.2d 482, 485, 313 N.E.2d 161) but it is to be considered with the other factors. Our Supreme Court has stated that when complainants move to the nuisance, they "were on notice of the possibility that some of the annoyances present could affect them, and this fact considerably diminishes the potency of their complaints." Wells Manufacturing Co. v. Pollution Control Board, 73 Ill. 2d 226, 383 N.E.2d. 148 (Ill. 1978). The Board finds that the consideration of the priority of location is significant in this matter. The Dettlaffs should have been aware of the possibility of noise from the Park when they moved into the area. A further influencing factor is that the property was zoned for commercial activity at the time they moved into the property. There has been no increase in the level of noise emitted from the Park in the 17 years they have resided next to the Park. If anything the noise has decreased due to the modifications made to the Park as a result of the settlement agreement. The Dettlaffs have made substantial improvements to their property despite the presence of noise from the Park.

Mr. Boado has made substantial and expensive modifications to the operations of the Park including the removal of two rides in response to the noise complaints. From the record it is not clear that additional modifications are economically reasonable or technically feasible. While there are further modifications that can be made to reduce the noise, it is not evident what effect these modifications may have on the operation of the Park or the noise level.

The Board is also influenced by the fact that at least two adjacent neighbors of the park do not find the noise excessive. (Tr. at 492-493, 501-503.)

The Board finds that, based upon the facts of this case in light of the Section 33(c) factors, the Park's operations do not constitute an unreasonable interference with complainants' enjoyment of life and lawful activity. Therefore, the Board holds that respondent has not violated Section 24 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,

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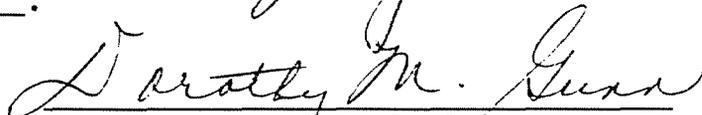
the Board finds that neither Eduardo P. Boado nor EPB Park Services, Inc. have violated Sections 9, 23 or 24 of the Act. This matter is dismissed.

IT IS SO ORDERED.

J. Theodore Meyer concurred.

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 1<sup>st</sup> day of July, 1993, by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board