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STATE OF ILLINOIS
Pollution Control Board

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

IN THE MATTER OF:)

MICHAEL A. PETROSIUS and DARLA)
G. PETROSIUS)

Complainants,)

v.)

ILLINOIS STATE TOLL HIGHWAY)
AUTHORITY)

Respondent.)

No. PCB 04-36
(Citizen's Enforcement
Noise)

NOTICE OF FILING

TO: Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue
Springfield, Illinois 62794

Victor Azar
Special Ass't Attorney General
Illinois Tollway
2700 Ogden Avenue
Downers Grove, Illinois 60515

PLEASE TAKE NOTICE that on July 31, 2006, Mike and Darla Petrosious, through their attorney Scott Dworschak, filed with the Office of the Clerk of the Illinois Pollution Control Board, an original and ten copies of the attached Reply Brief, a copy of which is served upon you.

Mike and Darla PETROSIUS


By their Attorney

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COMPLAINANTS' REPLY BRIEF

Complainants, Michael and Darla Petrosius, files this reply brief with the Illinois Pollution Control Board ("Board") in support of their Complaint against the Respondent, Illinois State Toll Highway Authority (hereinafter referred to as the "Tollway").

I. OVERVIEW.

Noise analysis performed by Complainants' sound expert, and presented as evidentiary testimony at the December 2005 Hearing, confirms the existence of noise levels above standards promulgated by the Board and contained within the numerical standards set forth at 35 Ill. Admin. Code § 901.102. Noise analysis performed by the Tollway's sound expert also confirmed noise levels exceeding Board criteria.

The uncontested evidence proves that the Tollway is the source of the noise reaching the Complainants and their property. However, Respondent

Tollway unconvincingly argues that there is no noise violation because the provisions of the Illinois Environmental Act do not apply to the Tollway or the roadway that is the source of the noise violation. The Tollway also argues that the non-binding noise rules they have unilaterally adopted may supersede the Board's jurisdiction and authority.

The excessive noise levels also interfere with Complainants enjoyment of life creating a nuisance as prohibited by 35 Ill. Admin. Code § 900.102.

Complainants acknowledge the Tollway has attempted to reduce the noise interference. However, the Tollway's efforts are ineffective, inconsistent and incomplete, and not in compliance with law or Board requirements.

II. NOISE MEASUREMENTS BY THE COMPLAINANTS AND THE TOLLWAY PROVE VIOLATIONS OF NUMERICAL NOISE LIMITATIONS.

A. Noise Measurements Taken by Complainants Comply With All Procedural and Substantive Requirements.

In their brief, the Tollway argues that Complainants' sound expert (Greg Zak, hereinafter Mr. Zak) failed to correctly address the issue of ambient sound. It appears that the Tollway's assertion is partly based upon their belief that Complainants incorrectly determined the category under which the property in question was defined in accordance with The Board's Tables of Long-Term Background Ambient Noise ("Tables"). However, the Tollway's assertion is incorrect, and inconsistent even with their own analysis.

Title 35 defines “ambient” as:

the all-encompassing sound associated with a given environment without contributions from the noise source or sources of interest.

The Code also defines “Background ambient sound level” as:

the ambient sound level, measured in accordance with the procedures specified in 35 Ill. Adm. Code 910.

See 35 Ill. Adm. Code 900

The purpose of obtaining an ambient noise reading is to evaluate the existing noise conditions *but for* the noise source of concern or interest. Clearly the Tollway noise is the source of the Complainants' concern and interest. In the case at bar, Complainants' expert, Mr. Zak, properly employed procedures for obtaining and adjusting for the background ambient noise as recommended by the American National Standards Institute (ANSI), specifically S12.9/Part 3-1993. ANSI's terminology and procedures are relied upon throughout the Board's own rules and standards.

At the Hearing, Mr. Zak testified as to the predominant nature of the Tollway noise. (Tr. II at 119). He also explained the procedures he employed in order to attempt to determine the ambient noise level, and the difficulties he encountered. (Tr. II at 154). It is uncontroverted that the Tollway is the prime noise generator in the area in question.

Since Mr. Zak was unable to record the ambient noise level on the Complainant's property, he followed the standards as set forth by the ANSI regulations. Applying ANSI standards, which have been subsequently adopted by the Board in similar and substantial form, Mr. Zak determined that the property

in question would be considered a "Quiet commercial, industrial, and normal urban and noisy residential areas (Category 3)". ANSI S12.9/Part 3-1993 9.3.

It is clear that this determination is correct when the "source of interest" i.e. the Tollway noise is removed from the equation as per the Board's policy. The Tollway's assertion that Complainants property should be categorized as a Category 1 are incorrect when the Board's definitions are applied to the facts in this case. The proper method of accounting for the ambient noise has been correctly applied by Mr. Zak in this case. Corrections required due to the overwhelming noise source of interest have been obtained by applying proper measurement alternatives as prescribed by ANSI. As such, high noise levels originating from the Tollway exist, and continue to reach the Complainants, in clear violation of the Board's numeric noise levels.

The Tollway's attempt to cite to Roti v. LTD Commodities PCB 99-19 (February 15, 2001) in an effort to assert that they should not be subject to the Board's numeric standards fails. Their interpretation of the Roti ruling is incorrect. The Roti ruling (determining that a numeric violation was not present) was based upon a finding that a technical correction for background noise was improper, *and* that sound levels were not averaged in accordance with standards as set forth in 35 Ill. Adm. Code 901.103, Id. at 19.

The facts presented herein regarding the ambient noise are different than those found in Roti. In the case at bar, Mr. Zak's was unable to obtain an ambient rating for his noise analysis of the area. (Tr. II at 119) In order to obtain alternative measurement data, Mr. Zak applied the proper protocol.

(Complainants' Exhibit 18, pg. 4) In effect, Mr. Zak utilized the "category" system based upon the predominant land use of the area. This procedure is recognized by the Board, and properly accounts for the ambient noise.

III. NOISE FROM THE TOLLWAY CREATES A NUISANCE

A. The Tollway Noise Constitutes a Substantial and Unreasonable Interference

Complainants allege that the Tollway violates Section 24 of the Act and Section 900.102 of the Board Regulations. 35 Ill. Adm. Code 900.102; 415 ILCS 5/24 (2000). In order to determine whether noise emissions rise to the level of a noise pollution violation, the Board is required to perform a two-step analysis. First, the Board determines whether the noise constitutes an interference in the enjoyment of complainants' lives and second, determines whether the interference is reasonable. Charter Hall Homeowner's Association and Jeffrey Cohen v. Overland Transportation System, Inc., and D.P. Cartage, Inc., PCB 98-81 (Oct 1, 1998) at 19-21.

The Board has held that the following disturbances constitute interference: noise interfering with sleep and use of yard (Hoffman v. Columbia, PCB 94-146, (Oct. 17, 1996) (Hoffman) slip. Op. 506, 17); and, noise impacting sleep . . . and conversing (Thomas v. Cary Companies of Illinois, PCB 91-195 (Aug. 5, 1993), slip op. at 13-15).

In their brief, the Tollway attempts to diminish and downplay the degree to which their noise interferes with the Complainants' enjoyment of their lives. However, the level of noise interference is substantial and unreasonable. At the

Hearing, complainants testified as to the noise impact on their sleep (Tr. I at 32, 53, 62, 86), use of medically prescribed sleeping pills (Tr. I at 32), conversation impacts (Tr. I at 83) and use of their side yard (Tr. I at 86.) These negative impacts are similar to those already found by the Board to constitute interference as in Hoffman and Cary, *supra*.

Additionally, the Board held in Roti v. LTD Commodities, *supra*, that impacts such as difficulty in falling or awaking from sleep, loss of use of their outside deck, and affects on the Complainants' children, all constituted an interference with enjoyment of life. Roti Interim Opinion, at 23 (Feb. 15, 2001). The exact same type of interferences are present in the case at bar, and the Board has found in numerous cases that these types of impacts constitute an interference.

The next step of analysis requires the Board to address whether the noise from the Tollway has unreasonably interfered with Complainants enjoyment of life pursuant to factors set forth in 415 ILCS 5/22(c). When properly evaluated, these factors weigh against the Tollway. Complainants stand by their Hearing testimony and the facts as presented in their initial Brief. However, Respondents Response Brief presented some allegations and assumptions that cannot go unchallenged.

The Tollway criticizes Complainants for converting their garage into a family room, and adding an enclosed porch, and not spending any money near the bedrooms. (Respondent's Brief pg. 23) Respondents further allege these actions "indicate a different priority" Id. While Complainants need not defend

their actions in improving their residence, their testimony clearly addresses these issues. First, Complainants were starting a family and required additional space. (Tr. I at 55, 68) Second, Complainants contacted a window company regarding their bedroom windows, however, they were advised that new windows would “help but not solve” their noise problem. (Tr. I at 57) Complainants explored several options regarding improvements to their home. They should not be subjected to the Tollway’s speculative and self-serving improvement list as it pertains to Complainants’ home.

Finally, Respondents somehow regard the appreciation of the Complainants home as a factor the Board should consider against the Complaint. (Respondents Brief pg. 24) There are numerous factors that affect the value of residential property. Complainant testified that he invested \$40,000 into expanding his home for his growing family. (Tr. I at 74) Second, while the home’s value did increase, testimony was presented regarding the overall increase in homes in the Chicago market since 1995. (Tr. I at 74) Ultimately, the Board should not consider any appreciation in the home’s value against Complainants. Experts from both parties testified the installation of a noisewall is the preferred, and most effective means, of reducing roadway noise from reaching adjacent residential areas. (Tr. II at 107, 183-4) Unfortunately, the cost of an effective noisewall is beyond the financial resources of the Complainants.

B. Complainants Noisewall Recommendation is Practical and Reasonable.

It is agreed by both parties that a noise barrier wall is the most effective means of reducing highway noise. Based upon the recommendation of their sound expert, Complainants request the installation of a noise barrier wall approximately eighteen feet in height, extending a quarter mile adjacent to the property. (Tr. II at 112-13). In determining a mitigation request, the Board evaluates several factors including the technical practicability and economic reasonableness.

In Roti v. LTD Commodities PCB 99-19 (July 24, 2003) the complainants also requested a noise barrier wall. In Roti, the Board compared the expenditures of the respondents in purchasing and improving their facility to that of the noise barriers cost. (Roti at 10-11) The Board found that the respondent spent \$12.6 million to acquire and improve their facility. (Id. at 9) The cost of the recommended noisewall was estimated between \$600,000 to 1.5 million. (Id. at 11) Based upon this comparison the Board found the wall to be economically reasonable. (Id.)

For the case at bar, the noisewall cost has been estimated between \$800,000 and \$1.3 million. (Tr. II at 207) The cost of widening and renovating a portion of the Tri-State Tollway over ten years ago was approximately \$500 million. (Tr. II at 6) The cost of the concrete noisewalls (excluding design costs & noisewall fabricated from other materials) installed in conjunction with this toll road project was approximately \$11.3 million. The Tollway's budget for 2005 was \$650 million. (Tr. I at 160, Complainants Exhibit 13)

The Tollway attempts to argue that the noisewall's cost exceeds their own policies and per residence guidelines. (Respondent Brief pg. 31) This argument fails for two reasons. First, the Tollway has made alterations to other sections of the noisewall *after* its original installation. (Tr. II at 58, Complainant's Exhibit 14) These additional noisewall sections reveal that the Tollway has been willing and able to make modifications to their original noisewall when needed. Second, the Tollway's per residence guidelines were unilaterally adopted, and are not controlled by any statute or court ruling.

The Board should rely on previous rulings regarding the economic factor. The proper analysis would be in applying the Roti test to the facts as presented. By utilizing this standard, the proposed noise wall should be considered economically reasonable in relation to the Tollway's overall resources compared to the cost of the additional noisewall. Therefore, this factor should be weighed in Complainants' favor.

IV. THE EXISTING NOISEWALL IS INEFFECTIVE

A. The Tollway Failed to Abide by its Own Expert Recommendation

The Tollway continues to stress their voluntary compliance with Federal Highway Administration regulations, hoping that this adherence would somehow exempt them from the jurisdiction of the Illinois Pollution Control Board.

(Respondent Brief pg. 6) The Tollway employed a consultant to assist them in planning and designing noisewall in conjunction with the roadway widening program they initiated in mid-1990s. (Tr. I 200-1) Following a complete analysis of the area, the Tollway's consultant recommended that noise mitigation of at

least *eighteen feet in height*, be installed adjacent to Complainants property. (Tr. II at 45, Complainants Exhibit 17). It is not contested by either party that the wall height in the area *is not* eighteen feet. (Tr. I at 21)

According to the Tollway's own Traffic Noise Study prepared by Respondent's sound expert, wall heights in the area range from a maximum of thirteen feet stepping down to eight feet. (Respondent's Exhibit 17). In their brief, Respondents argue that the actual wall height differs from the recommended height due to the wall designer's inclusion of other factors including topology, hydrology, and drainage along the road. (Respondent Brief pg. 6) However, only speculative testimony was presented at the Hearing as to why the installed noisewall differs substantially from the recommended height. If there was a problem with drainage, or an issue as noted above, the noisewall could have been installed closer to the roadway, such as the edge of pavement. If maintenance of the drainage area was an issue, the Tollway could construct an overlapping noise wall which would allow access and still mitigate the tollroad noise reaching Complainants. The Tollway has previously installed these types of noisewall alternatives along numerous sections of the tollroad system. Clearly, the Tollway could have employed alternative installations to comply with their consultants recommendations.

Clearly, the existing noise barrier wall was not constructed in accordance with the Tollway's own consultant's recommendation. As stated in detail in Complainants Brief, the current noisewall is deficient and ineffective.

CONCLUSION

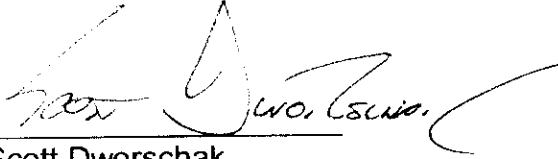
Complainants have established that the property in question is subjected to noise from the Tollway exceeding Board numerical standards. Complainants also presented uncontested evidence demonstrating the effects of the noise on their lives. When applying the facts of this case to the standards set by previous Board decisions and applicable law, the noise creates a substantial and unreasonable effect on Complainants. Combined with other criteria reviewed by the Board, the Complainants have met their burden in proving that a nuisance violation clearly exists.

Complainants have established that a numeric noise violation exists. Complainants' expert performed a noise test in strict accordance with Board and ANSI criteria. As discussed in detail supra, the Tollway noise is the source of interest. In his report, the Complainants noise expert performed the proper adjustment for the Tollway noise by applying recognized ANSI criteria.

Complainants have requested the installation of additional noise barrier wall to reduce the noise generated from the Tollway. The additional noisewall is based upon the recommendations of the Tollway's own noise expert and consultant used in the noisewall's original installation. After applying the proper analysis, the Board should find for the Complainant's in that their request is reasonable and practical.

Therefore, Complainants respectfully move the Board to find in their favor and order the Tollway to install the requested noisewall.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott Dworschak", written over a horizontal line.

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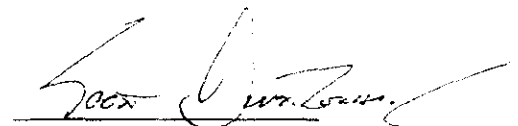
CERTIFICATE OF SERVICE

I, Scott Dworschak, an attorney, hereby certify that on July 31, 2006, I caused a copy of the attached Complainant's Reply Brief to be served by U.S. Mail, properly addressed and postage affixed, on the following parties:

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