

IN THE ILLINOIS POLLUTION CONTROL BOARD

JAMES FISER,)	
)	
Complainant,)	
)	
v.)	PCB 2018-084
)	(Citizens Enforcement - Noise)
JAMES L. MEADOR and HENRY'S)	
DOUBLE K, LLC,)	
)	
Respondents.)	

COMBINED RESPONSE OF RESPONDENTS TO PLAINTIFF'S POST-TRIAL BRIEF

NOW COME Respondents, **James L. Meador and Henry's Double K, LLC** (hereinafter collectively referred to as "Respondents"), by and through their attorneys, Shockey & Cox, LLC (Steven A. Cox), and for their Combined Response to the Post-Trial Brief filed herein by Complainant, **James Fiser** (hereinafter referred to as "Complainant") in the above-captioned cause, hereby states as follows:

STATEMENT OF FACTS

Respondents rely upon the evidence presented at the hearing as their statement of facts in this case, and provide citations to the record where relevant in their argument. However, as an initial matter, Respondents would point out two significant points from the evidence presented which form a key basis for the understanding of Respondents' position set forth herein.

First, despite Complainant's protestation and attempts to cast doubt upon the matter, the sole competent evidence in the case, in the form of a certified zoning map from the City Clerk of Mount Carroll, Illinois, indicates that Complainant's property is situated in a commercial zoning district. While it is undisputed that Complainant's property is being utilized as a residential dwelling, the underlying district is relevant to the reasonableness of use for surrounding activities and community expectations.

Secondly, testimony was provided in the form of in-person testimony as well as affidavits, from the remaining surrounding residential property owners, many of whom actually reside closer to Respondents' establishment ("Henry's Double K") than does Complainant. This testimony shows that the remaining neighbors are not only unbothered by the volume of performances at Henry's Double K, but also shows that they in fact value the establishment as a welcome addition to their community.

ARGUMENT

As a threshold issue, Respondents would point out that while the Complainant provided some audio recordings at the the hearing, there was no competent evidence as to the actual sound levels present at the time of the recording, either from actual measurement data nor from qualified experts, which would support a determination of a violation of established property line noise source regulations. It is clear that in cases alleging a violation of these regulations, the Board requires strict adherence to applicable measurement requirements. See Charter Hall v. Overland, PCB 98-81 (1998), citing Discovery South Group, Ltd. v Pollution Control Board, 275 Ill. App.3d 547 (1st Dist. 1995). For this reason, the analysis as to whether there has been any violation of Title VI of the Illinois Environmental Protection Act (415 ILCS 5/1 *et seq.*, hereinafter referred to as the “Act”) is made under Section 24 thereof, which provides simply:

Sec. 24. No 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, so as to violate any regulation or standard adopted by the Board under this Act.

The Act further clarifies that when making a determination of reasonableness under Section 24 of the Act, it should take into consideration the factors enumerated in Section 33(c) of the Act, specifically:

- (i) The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) The social and economic value of the pollution source;
- (iii) 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;
- (iv) The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (v) Any subsequent compliance.

The burden of showing the unreasonableness of any alleged pollution under Section 33(c) is placed on the Complainant. See Wells Mfg. Co. v. Pollution Control Board, 73 Ill.2d 226 (1978).

For the sake of ease of analysis, each of the Section 33(c) factors is considered separately in the following sections. The discussion below will also address the differences between the circumstances present in the current case and the situation addressed in Manarchy v. JJJ Associates, Inc. PCB 95-73 (1996) which is principally relied upon by Complainant.

SECTION 33(c)(i)

The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people

The overwhelming testimony of adjacent landholders was that the sound emanating from Henry's Double K does not interfere with their use and enjoyment of their property. See Testimony from Pam Heisler (Hearing Transcript Page 73):

Q. Okay. And does [the sound from live music] interfere with your enjoyment of your property in any way?

A. Oh, no, not at all.

Q. To your knowledge, have the sound levels at your residence ever been offensive or, in your opinion, dangerous to you?

A. Oh, no. Not at all.

Q. So they -- they rise above the background noise on some occasions, but not enough to bother you?

A. No, not at all. My bedroom window is right there and I can sleep through it. I don't have any problems. No issues.

See also Testimony from Elizabeth Hartman (Hearing Transcript Page 77):

Q. Have you been present on your property when Henry's Double K is playing live music? Have you heard live music from Henry's at your house?

A. Some, yeah.

Q. Okay.

A. But only if I'm outdoors.

Q. Okay. So when there is live music, you don't hear it indoors at your home?

A. No, I don't.

Further, Testimony from Bonnie Haas (Hearing Transcript Page 82):

Q. You've never noticed any of the music performances to be offensive or dangerous in terms of sound levels at your property?

A. I have never had any problem, no.

Q. Can you hear any of the performances indoors?

A. You can hear it, yes, but it's no problem.

And Lawrence Haas (Hearing Transcript Page 85):

Q. Okay. And has live music performed at Henry's Double K ever interfered with your use of your property?

A. No.

Q. Okay. Have you ever, in your opinion, observed the sound levels to be offensive or dangerous?

A. The sound level?

Q. Yes.

A. Not since Henry has owned it.

Finally, Richard Frey, whose home is located within 300 feet of Henry's Double K (Hearing Transcript Pages 87-88):

Q. Okay. Have you ever heard live music played at Henry's Double K from your house?

A. Yeah.

Q. Have the sound levels ever been offensive or dangerous, in your opinion?

A. No.

In addition to the testimony offered by the witnesses at the Hearing, each of them signed an Affidavit to the effect that sound emanating from Henry's Double K has not interfered with their use or enjoyment of their property. Affidavits were also provided from two other persons not able to attend the hearing, namely Bill Walters and Carol Frey. All Affidavits are included in Respondents' Group Exhibit 2.

The foregoing serves to establish that the neighboring community is not adversely impacted by sounds emanating from Henry's Double K. Further confirming the community's acceptance of the sound levels, the record indicates that no persons have made any official complaints about sound emanations, except for Complainant. See Testimony of Officer Dennis Asay (ret.) at page 28 of the Hearing Transcript:

Q. During the timeframe that you stated you received ten, maybe a dozen complaints

A. My estimate, sir.

Q. Understood. And by the same -- during that same general timeframe, did anybody else call in a noise complaint?

A. No one.

It is clear from the testimony that by an objective community standard comprised of the opinions of multiple similarly situated and directly adjoining neighbors, the sound emanating from Henry's Double K is in no way interfering with their use or enjoyment of their property, much less unreasonably so. True "interference" is more than just an ability to distinguish sounds attributable to a particular source. See Manarchy, supra., citing Village of Matteson v. World Music Theatre Jam Productions, LTD and Gierczyk Development, Inc. PCB 90-146 (1991).

Worth noting in terms of the relationship between the present case and the Manarchy case, is that in Manarchy, the only testimony from neighbors concerning the sound levels confirmed that the sound levels were unbearable and that multiple calls from neighbors and their tenants had been received by the police. In short, everyone who testified indicated there was a problem. In the present case, we have an entire group of witnesses who live at similar proximity to Henry's Double K as does Complainant, and who have indicated there are no issues with sound levels. The sole person presenting a complaint is, and has always been, Complainant and Complainant alone. As such, the Board is presented with quite the opposite situation as existed in Manarchy, where the testimony presented directly contradicts, rather than supports, the protestations of the Complainant.

The testimony of the witnesses shows that, despite the protestations of Complainant, there has been no injury to, nor interference with, the health, general welfare and physical property of surrounding landowners by reason of the conduct of Henry's Double K.

Section 30(c)(ii)
The social and economic value of the pollution source

Henry's Double K is a large venue by community standards. It consists of a restaurant and bar which can accommodate up to 175 persons for weddings, funeral luncheons, fundraisers and other gatherings (Hearing Transcript, Page 92). It is handicap accessible with ample parking. Id. The facility serves approximately 275 patrons during a typical week. (Hearing Transcript, Page 102). Henry's Double K is an establishment licensed to sell liquor and pays sales tax. Id.

As such, Henry's Double K serves a unique role in the community as a gathering place and social hub. There are no locations which serve similar purposes for a significant distance beyond the borders of Mount Carroll. Accordingly, the social and economic value of Henry's Double K is significant for purposes of this analysis.

Worth also noting is that not only did neighbors, other than Complainant, fail to support the allegations in Complainant's Complaint, but they took time out of their days to attend a public hearing and testify on behalf of Respondent, without subpoena. The Board can of course make what it will of this gesture, but Respondents would simply observe that the vast majority of people are reluctant to become involved in this sort of dispute at all, particularly where they are subjecting themselves to formal legal proceedings. The fact that nearly all of the neighboring land owners appeared in person to testify on behalf of Respondents speaks forcefully to the value placed on the establishment by the community, perhaps even more than the objective statistics set forth above.

The nightclub in the Manarchy case does not appear to have distinguished itself within the community. From the opinion, it would appear that the owner's testimony was limited to simple denial of any problem, and no neighbors spoke on his behalf. There is similarly no evidence that the nightclub at issue was any different than any other nightclub in the neighborhood, nor that there were any specifically redeeming qualities about that particular club.

Section 30(c)(iii)

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

The suitability of the use of Henry's Double K *vis-a-vis* the location in which it is located is quite clear. The property is zoned as commercial, and is currently used as a restaurant and bar. There are commercial properties directly adjacent to Henry's Double K, including Complainant's property. There is no dispute that Henry's Double K's use is appropriate given the zoning laws of the Village of Mount Carroll, and conversely there is no such evidence that Complainant's use is conforming.

In conjunction with the analysis of any nuisance complained of, it is worth quoting a general statement from Gardner v. International Shoe, 386 Ill. 418, 54 N.E.2d 482 (1944):

The principle to be derived from these authorities is that the unlimited and undisturbed enjoyment which one is entitled to have of his own property must be qualified to this extent, that trifling inconveniences resulting from the useful employment of a neighbor's property must be submitted to when what is complained of arises from and is suitable to the locality and when the employment of one's premises under the circumstances is reasonable.

Placed into context here, this ruling would indicate that Complainant's rights to a sound-free property are lessened based upon his location in, or at the very least proximity to, a commercial district, as opposed to if his property were located in the countryside away from active businesses. Respondent on the other hand is not bound to residential standards, but rather the standards which are reasonable in a commercial district.

Interestingly, when reviewing the Manarchy case relied upon by Complainant, there is reference to both the allowance of residential uses in the commercial district at issue there, as well as a statement that a conforming use would be suitable "so long as the residential aspect of the zoned area is taken into consideration and recognized by the commercial use of the area". Manarchy, supra, at page 13. In this case, it would appear from the acceptance and lack of complaints from the neighboring surrounding residential owners that Respondents are in fact taking into account, and successfully, the residential character of the surrounding property. The irony presented in this circumstance is that the sole complainant is in fact situated on property which is itself located within a commercial zone.

Worth noting as well, although not specifically mentioned one way or another in Manarchy, is that the expectation of persons residing in a commercial zone, or in fact adjacent thereto, must necessarily be that there will be increased levels of sound, traffic and other activity. As the zoning of either parcel has not changed since Complainant purchased his home, he should be presumed to have purchased the property knowing that he was either in, or directly adjacent to, a commercial zone.

Section 30(c)(iv)

The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source

Of course, sound emissions can always be lessened. The problem in the present case is that the evidence indicates there is not, in fact, a sound “problem”; rather, there is simply “sound”. It is also similarly clear that what Complainant wants is for no sound to be audible at his residence whatsoever. This particular feat is in fact technologically impractical without stopping all live and recorded music. This would result in significant lost revenues for Respondents, not only in the form of direct loss of patrons on evenings where bands play, but also in terms of loss of the ability to serve as an event center for wedding receptions, reunions, and other similar functions where live or recorded music may be desired. Such a limitation would significantly impact a fundamental purpose of the facility as presently operated and as such is not “economically reasonable”.

Section 30(c)(v)

Any subsequent compliance

It is clear from the record that Respondents have undertaken significant steps to reduce any sounds emanating from Henry's Double K in an attempt to appease Complainant. For live performances, they have “dialed back” on having larger bands, and are focusing predominantly on minimally amplified acoustic performances which do not include drums. (Hearing Transcript, Pages 94-95). They have installed large wooden dormers which are closed during performances to reduce sound propagation. (Hearing Transcript, Page 97). If bands are playing too loudly, Mr. Meador will ask them to turn down, and has in fact called police himself to ensure compliance. (Hearing Transcript, page 96). And on the *single* occasion pointed out where another adjoining resident called to complain, Mr. Meador immediately and satisfactorily remedied the situation. (See Hearing Transcript Page 96 and Pages 88-89).

Further to this point, the dates of the complained-of noise violations are, at the most recent, more than 18 months past. In fact, the incidents complained of by Complainant which were observed by his witness, Mr. Sisler, occurred in late 2014 and early 2015, more than 5 years ago (Hearing Transcript, Page 15), and the instance related by Mr. Chapman occurred in 2015 (Hearing Transcript, Page 22).

Respondents' response to the complaints here are a night and day difference from the reaction of the nightclub owner in Manarchy, who, while making some minor structural alterations, did nothing to ensure compliance with local noise ordinances or otherwise accommodate requests by neighbors to reduce sound levels inside the facility. Respondents have gone out of their way to attempt to accommodate all *reasonable* requests for sound reduction, and from the testimony presented, have accomplished and maintained that goal.

Subjective Factors

It is also clear, and must be mentioned here, that there is ample evidence to suggest that Complainant's sensitivity to hearing sounds from Henry's Double K, and his reaction thereto, may be affected by his personal fixation upon this issue and adversarial relationship with Mr. Meador personally. The unsolicited testimony of community members speaks directly to this.

We heard from Ron Brashaw, who stated (see Transcript Pages 114-115):

I'm not happy being up here, I don't want to be up here, but I have an opinion. I know Jim Fiser for many years. We got to be friends and then him and his wife drove me away as being friends because of this being bombarded with Henry. All we heard was Henry. All we heard was Henry. I don't know Henry that well. But I think I know right from wrong.

One summer night my wife and I were walking the dogs. We have four boxers. We went down to listen to the music at Henry's and we walked up by Jim Fiser's house with our butts up against his wall listening to the music. It is not nothing like what you heard [on the recordings]. What you heard over here the acoustics are bad. It makes it sound louder than it is.

I know Jim for a long time, but unfortunately he drove me away because we got tired of hearing about Henry, Henry, Henry at our meetings. One afternoon Jim was at my house and Dave Cutler wrote an article in the paper about Jim that Jim did not like and Jim told me "Whenever I ride my motorcycle by his house, I rev up the motor." So there is a little bit of vindictiveness here.

Testimony was also offered by Alderman Mike Risko, who related the repeated nature of complaints by Complainant to the Village Board, and the Village Board's efforts to address these complaints. Mr. Risko concluded by saying:

I just want to say the city has been beat up a little bit here, but we have tried to accommodate Mr. Fiser's situation and we think Henry is doing a great job here and no one else is complaining and I think it's an unwarranted complaint.

While individual sensibilities may vary, and Complainant's sensibilities may honestly be offended, the subjective nature of an alleged offense is to be separated from the *reasonableness* of the alleged offense. "Testimony to the effect that the sound constitutes an interference solely because it could be heard is insufficient to support a finding beyond a "trifling interference, petty annoyance or minor discomfort". Wells Manufacturing, supra.

CONCLUSION

It is clear from the testimony that Henry's Double K provides a unique and valuable role in the community as a live music venue. It is equally clear that the community as a whole values Henry's Double K, as evidenced by the witnesses and commenters who provided statements and testimony, and that with the sole exception of Complainant, no one's use and enjoyment of their property is negatively impacted by the operation of Henry's Double K as it is currently operated.

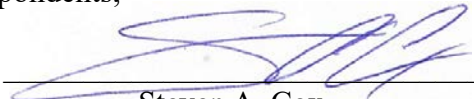
Stated another way, Complainant's allegations of a violation of the Illinois Environmental Act are not substantiated by the testimony presented, and the requirements of Section 33(c) can not be met.

WHEREFORE, Respondents, James L. Meador and Henry's Double K, LLC, hereby respectfully request that the relief requested by Complainant, James Fiser, be denied, that this cause be dismissed with prejudice, and that this Board grant such other and further relief as may be deemed just.

Dated this 30th day of April, 2020.

SHOCKEY & COX, LLC, Attorneys for
Respondents,

By: _____


Steven A. Cox

Prepared by: Steven A. Cox
SHOCKEY & COX, LLC
Attorneys for Respondents
208 West Stephenson Street
Freeport, IL 61032
Phone: (815) 235-2507
Facsimile: (815) 235-4597
E-mail: steve@shockeyandcox.com
ARDC Number: 6224722