

NEW

SUBMITTALS

1 MICHIKO YAMADA
1959 Sutter Street
2 San Francisco, CA 94115
Tel: (415) 775-0860

3 Complainant and Appellant
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8 **BOARD OF APPEALS**
9 **CITY AND COUNTY OF SAN FRANCISCO**
10

11
12 MICHIKO YAMADA,
13 Complainant and Appellant
14 v.
15 DEPARTMENT OF PUBLIC HEALTH,
16 Respondent
17

No. 14-141

SUPPLEMENTAL BRIEF IN SUPPORT OF APPEAL
FROM GRANT OF VARIANCE

Date: November 19, 2014
Time: 5:00 p.m.
Place: City Hall Room 416

18
19 Complainant and Appellant MICHIKO YAMADA respectfully submits the following
20 Supplemental Brief in support of her appeal from the variance from the San Francisco Noise
21 Ordinance issued to ROOSTERTAIL RESTAURANT by Respondent DEPARTMENT OF
22 PUBLIC HEALTH.
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Settlement Efforts. At the 10/8/14, Board of Appeals (BOA) hearing, this Board directed the parties to try to settle and resolve the problem. We have made every effort to reach a settlement. Even before that Board hearing, we had initiated a settlement conference with Roostertail and Charles Salter Associates (CSA) professionals Yee and Miyar on 9/23/14. We offered to pay 1/3 of the cost of an acoustical analysis report and mitigation design by CSA, which neither DPH nor Roostertail had done. Also, on 10/6/14, we granted Roostertail access to our home so that they could hear the noise firsthand. We have sent Roostertail 9 e-mails and 2 letters (one sent certified), and made 4 phone calls attempting to resolve this ongoing noise issue. Roostertail rebuffed our overtures, making no attempt to resolve the problem cooperatively. The night of the hearing, we sent Roostertail an e-mail, again inviting them to enter negotiations. Their ultimate reply: "We are not satisfied with any of the 6 points in your original settlement proposal." (Exhibit A: Communications with Roostertail.)

Noise Levels Remain Excessive and Unchanged. Sound readings taken in the light well and on the roof consistently show that Roostertail's fan exceeds the allowable noise limits. The noise is continuously audible throughout the day and evening and pervades our home, causing us to feel agitated, stressed, uneasy and tense in our own home. Public comment and written statements confirm the serious extent and oppressiveness of the noise and vibration problems Roostertail's fan and exhaust system is causing. (Exhibit B: Letters of Support.)

Variance Flawed. The variance is flawed and wrongly issued. 1) No studies or evaluative data support DPH's view that wrapping half or all of 1 of 3 ducts would remedy the noise problem. At the 10/8/14, hearing, the City Attorney materially misstated CSA's position, wrongly asserting it had determined that wrapping one of the ducts would be sufficient. 2) DPH granted the variance without taking any noise measurements to verify whether Roostertail had

become code compliant, thereby shirking its responsibility to enforce the Noise Ordinance.

3) The excessive noise Roostertail's exhaust system is generating is real and oppressive.

Variance Undermines Noise Ordinance Intent. DPH argues that the light well readings must be ignored because §2902 requires "outside noise level measurements" to be taken at least 4-1/2 feet distant from walls. The Board should reject this argument.

The SF Noise Ordinance is clearly intended to protect the public health from the recognized harmful effects of excessive noise. (Exhibit C: Noise Task Force Minutes, and SF Examiner Article and Exhibit F: Charles Salter & Eric Yee Statements.) §2900(c) states: *"In order to protect public health, it is hereby declared to be the policy of San Francisco to prohibit unwanted, excessive and avoidable noise. It shall be the policy of San Francisco to maintain noise levels in areas with existing healthful and acceptable levels of noise and to reduce noise levels, through all practicable means, in those areas of San Francisco where noise levels are above acceptable levels as defined by the WHO Guidelines on Community Noise."*

The 2008 amendments, based on the WHO's noise pollution standards, were intended to update and strengthen the City's ability to address and remedy excessive noise problems. (Exhibit C: SF Examiner Article). WHO has found that noise pollution, including low frequency noise, is an increasingly serious health problem worldwide, with restaurant ventilation systems called out as among the urban noise sources contributing to this problem. (Exhibit D: WHO Community Noise Guidelines Excerpts.)

DPH's January 2014 contention that §2902 nonetheless precludes light well measurements in this case (and most cases involving older buildings) conflicts with DPH's historical practice (Exhibit E: Charles Salter & Eric Yee Statements), and the WHO Community Noise Guideline goals and standards (Exhibit D), and blocks DPH's ability to enforce the SF

Noise Ordinance to serve its goals. As enacted in 1972 and amended in 2008, §2902 contained the same language DPH now argues that despite its past practice, precludes light well measurements to assess and remedy excessive noise. (See Ord. 274-72, 278-08.) DPH's new position constitutes an abrupt, radical, and conceptually absurd, change from its decades-long practice that is prejudicial not only to us in this case, but to the public and the public health that DPH is supposed to serve.

Roostertail Has Never Complied with the Noise Ordinance. To uphold the variance would be to reward Roostertail for flagrant noncompliance from the start with the Noise Ordinance, and the directives of DPH and this Board. Indeed, DPH issued a Permit to Operate without taking any noise readings to confirm whether Roostertail complied with the Noise Ordinance. Furthermore, over the past 15 years, DPH has *never* granted a variance in a mixed use neighborhood where a remedy was available.

Cost. Since the start of this dispute, we have spent over \$10,000 to address the noise problem, including our voluntary installation of 4 double pane windows to deaden the noise and our retention of CSA to provide expert technical assessments of the noise problem stemming from Roostertail's fan and exhaust system. This case has been ongoing for almost 3 years; our expenses continue to mount. (Exhibit F: Expenses.)

Conclusion and Remedy. This Board should reverse DPH's decision to grant Roostertail a variance from its conceded violation of the Noise Ordinance, and require Roostertail to comply immediately with the Noise Ordinance by reducing their fan equipment noise emissions to 53 dBA or less, as intended by the original Permit to Operate.

TABLE OF EXHIBITS

Communications with Roostertail.....Exhibit A

Letters of Support.....Exhibit B

Noise Task Force Minutes (Excerpts) and SF Examiner Article, August 13, 2008.....Exhibit C

World Health Organization Community Noise Guidelines (Excerpts).....Exhibit D

Charles Salter & Eric Yee Statements.....Exhibit E

Expenses.....Exhibit F

EXHIBIT A

BONACKER ASSOCIATES

17 Van Buren Street / San Francisco / CA / 94131
tel: 415.584.4300 / bruce@bonacker.com

October 27, 2014

Tracy and Gerard,

Thank you for your e-mail note responding to the Yamada's proposed re-engagement in the settlement process.

The Yamadas are disappointed in the apparent extent of your approach to a negotiated settlement. Unless we've misunderstood your proposal – an offer to talk with your landlord about providing possible access to the roof for the Salter team – it is unsubstantial and provides nothing useful for the Yamadas to respond to.

It's important to understand that the Board of Appeals indicated that they are not altogether accepting of the DPH's assertion that the only problem is at the roof level and that the light well readings are of no concern. They directed both sides to engage in settlement discussions to resolve the noise problem. As I've indicated before, we feel it would be in everyone's best interest to work out a mutually acceptable compromise that works to cure the actual noise problem so that the dispute can be resolved in a neighborly way.

Please understand that, despite the fact that the Yamadas are not causing the existing noise problems, they have incurred considerable expense to try to solve them, including replacing their windows with new noise resistant double glazed units and for expert consultants to analyze the problem, all of which inures to Roostertail's benefit, but none of which is deductible as a business expense. Nonetheless, they are willing to negotiate a settlement and are open to entertaining something substantive from you on this matter.

Again, I invite you to discuss this problem with us and I hope we can enter into useful negotiations to resolve the issues before us. We are prepared to work around your schedule.

Thank you.

Sincerely,



Bruce Bonacker

U.S. Postal Service™	
CERTIFIED MAIL™ RECEIPT	
(Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage	\$ 38.00
Certified Fee	16.00
Return Receipt Fee (Endorsement Required)	16.00
Restricted Delivery Fee (Endorsement Required)	16.00
Total Postage & Fees	\$ 86.00
Sent To Roostertail Restaurant Street, Apt. No., or PO Box No. 1963 Sutter Street City, State, ZIP+4 San Francisco, CA 94115	
PS Form 3800, August 2006 See Reverse for Instructions	

7014 0150 0000 5155 0840

Postmark Here
OCT 27 2014

BONACKER ASSOCIATES

17 Van Buren Street / San Francisco / CA / 94131
tel: 415.584.4300 / bruce@bonacker.com

16 September, 2014

Mr. Gerard Darien
Ms. Tracy Green
1963 Sutter Street

Regarding: DPH Noise Variance, BOA Case # is 14-141, 1963 Sutter Street

Mr. Darien and Ms. Green

Bonacker Associates is an architectural firm and I am assisting Ms Michiko Yamada and her father in their effort to resolve their concerns about the noise that they are experiencing in the contiguous light wells between your two buildings. As you know, they are of the opinion that the noise is being generated from your restaurant's new exhaust ducts. I believe you're also aware that they have secured acoustical readings from both the San Francisco Department of Public Health and from the acoustical consultant, Charles M. Salter Associates to indicate that the sound is being caused by the new ducts and is in excess of the City Health Code maximums.

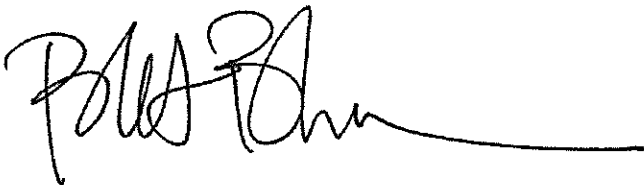
Since the noise concern has not yet been mitigated with the approaches that have been attempted so far, Ms Yamada has felt it was in their interest to request that the Board of Appeals review the current situation and make a determination on how the issue noise problem should be addressed.

I would like to attempt to do what I can to work together with both you and the Yamadas to develop a resolution to the situation before the Board of Appeals hearing. My experience has been that an amicably resolved resolution to disagreements between neighbors is better for all concerned. It maximizes the potential for neighbors to develop their own solutions, it avoids taking the time of the Board of Appeals and avoids the imposition of a decision by an external body. I've found that such mutual decision-making between the concerned parties results in the best long-term relations between neighbors and that's a very valuable factor.

I understand that you have requested a proposal for design services from the Salter firm to address the sound issues and I'd like to get together with them and you to discuss the alternatives by which we can most simply develop a solution to the problem. I expect that the Salter folks would be able to offer facilities for us all to meet. The Yamada's are very interested in this alternative approach but think it would be most productive if I were to represent them at the meeting.

Please let me know as soon as possible if this is an idea that you think is worth pursuing.

Sincerely,



Bruce Bonacker

RE: Roostertail Yamada negotiations



Bruce Bonacker via eigbox.net

3:50 PM

(

to gerard, me

Hi Gerard,

I received your attached message today.

As I have suggested in earlier initiatives and in responses to your replies, we would entertain your thoughts as to how this concern can be addressed and resolved in order to bring it to an end with a mutually satisfactory solution.

Further, I recommend that, as we continue, we meet face-to-face in order to communicate best regarding this effort to reach a negotiated settlement. As I indicated, we would be happy to accommodate your schedule.

Let me know your thoughts.

Bruce Bonacker
Bonacker Associates
17 Van Buren Street
San Francisco, CA 94131
ph: 415.584.4300
cell: 415.722.0167

From: gerard darian [mailto:jebirley@yahoo.com]

Sent: Wednesday, October 29, 2014 1:31 PM

To: bruce@bonacker.com

Subject: Roostertail

Bruce, '

We are not accepting a negotiated settlement of having us pay a minimum of 5K and the Yamada's paying \$ 750.00!

It simply does not make sense for us to have to keep struggling financially when the DPH is telling me there is no violation or harmful noise to the Yamada's. If there is any other ideas of compromise we are gladly here to listen.

Thank you

Gerard Darian

Bruce Bonacker

From: Roostertailsf [roostertailsf@yahoo.com]
Sent: Monday, October 20, 2014 1:40 PM
To: Bruce Bonacker
Subject: Fwd: Board of appeals matter (DPH vs Yamada)

Sent from my iPhone

Begin forwarded message:

From: Gerard Darian <roostertailsf@yahoo.com>
Date: October 14, 2014 at 3:32:38 PM PDT
To: "Tracy K. Green" <tkgreen@sbcglobal.net>
Subject: Fw: Board of appeals matter (DPH vs Yamada)
Reply-To: Gerard Darian <roostertailsf@yahoo.com>

On Tuesday, October 14, 2014 3:31 PM, Gerard Darian <roostertailsf@yahoo.com> wrote:

Bruce, I can tell you that we are not satisfied with any of the 6 points in your original settlement proposal. After hearing and reading testimonies from the last Board of Appeals meeting, the only issue is on the roof. After being forced to spend 8K wrapping the duct. that was a big chunk of good will out of my pocket! We are simply financially not in the position to spend another 5-8K? to look at the possibility of the mitigation of detectable noise in the light well. We are more than happy to talk to the building owner to allow someone from Salter& assoc. to have access to the roof. I also pledge to have the rooftop equipment(motors, fans, current isolators. etc) checked by our current contractor who specializes in such equipment. If you feel we need to have another meeting, Tracy and I are more than happy to make this happen?

Thank you
Gerard Darian

— Original Message —

From: Jeanne Baum

To: roostertails@yahoo.com

Sent: Tuesday, October 14, 2014 9:15 AM

Subject: Michiko Yamada / Roostertail appeal from Bruce Bonacker

Hello Tracy and Gerard,

I haven't heard from you since my e-mail of Wednesday evening last week and thought I try to reconnect. The Yamadas are very interested in finding a settlement solution to the noise concern and we would like to hear your thoughts on that possibility. Would you like to respond to our settlement offer with a version of your own?

Please get in touch with me in any case to let us know your approach. If you're interested in pursuing a settlement, we should probably allow ourselves some time after a 2 way conversation begins to work out the details, etc.

Thanks,

Bruce Bonacker



This email is free from viruses and malware because avast! Antivirus protection is active.

Bruce Bonacker

From: Bruce Bonacker [bruce@bonacker.com]
Sent: Wednesday, October 08, 2014 8:09 PM
To: 'Roostertailsf'
Cc: 'Michiko Yamada'; 'Eric A. Yee'
Subject: RE: Board of Appeals case # 14-141
Attachments: Re: Board of Appeals case # 14-141

Hello Tracy and Gerard,

Well, it looks like we have more work ahead of us. Please give the suggestions of the BoA some thought and let us know if our proposal is satisfactory.

I'll be able to receive e-mails while I'm away. I plan to return late on Friday evening, 10/17.

Bruce Bonacker
Bonacker Associates
17 Van Buren Street
San Francisco, CA 94131
ph: 415.584.4300
cell: 415.722.0167

Bruce Bonacker

From: Roostertailsf [roostertailsf@yahoo.com]
Sent: Friday, October 03, 2014 9:48 AM
To: Bruce Bonacker
Subject: Re: Board of Appeals case # 14-141

Bruce , I do appreciate the phone conversation this morning. Tracy and I feel like we will wait the outcome of the hearing before we sign a settlement proposal

Regards
Gerard Darian

Sent from my iPhone

On Sep 30, 2014, at 5:24 PM, "Bruce Bonacker" <bruce@bonacker.com> wrote:

Tracy and Gerard,

I'm sending this message to let you know that the Yamadas are willing grant you access to visit the inside of their residence.

As I'm sure you're aware, the Yamadas personal privacy is important to them and this is a major concession on their parts. It's done in the interest of working toward resolving this problem in the best and most expeditious way possible. Out of respect for their privacy, no photos or videos are to be taken during your visit.

In recognition of this concession, we feel it's in everyone's best interest to first establish the terms of the settlement and agree to them in draft form beforehand in writing. This will provide a basis and justification for the Yamadas to open their home to you and establish a set of criteria for what is accomplished in the visit.

We presented our proposed approach to resolving the Yamadas concerns about the noise at our meeting at the office of Charles M. Salter Associates last week. To review, they are as follows:

A formal written agreement [effectively, a contract between parties] will be completed stipulating:

- Roostertail will hire the Salter firm to design and oversee construction of full mitigation of detectable noise above the maximum code level allowed.
- Roostertail will vigorously pursue and accomplishes mitigation of detectable noise, above the maximum code level allowed.
- Roostertail will allow the Salter firm access and the Salter firm will take readings immediately after the work is completed, 1 year later and 3 years after completion of mitigation to confirm compliance and maintenance. Salter may take readings in the light well at Yamada expense at other times as noise concerns arise. Remediation will be accomplished by Roostertail if readings are found to be in violation by the Salter firm.
- Yamada will pay 1/3 of the Salter firm's consulting fee to Roostertail up to \$2500 maximum from Yamada.
- Yamada will immediately receive copies to all documentation of noise mitigation designs and readings.

Bruce Bonacker

From: Roostertailsf [roostertailsf@yahoo.com]
Sent: Wednesday, October 01, 2014 3:55 PM
To: Bruce Bonacker
Subject: Re: Board of Appeals case # 14-141

Bruce , we simply want to hear what the Yamadas are hearing before we agree to any contract or stipulations . We do, and will respect their home and privacy and will not take any pictures, etc.

thank you

Gerard Darian

Sent from my iPhone

On Sep 30, 2014, at 5:24 PM, "Bruce Bonacker" <bruce@bonacker.com> wrote:

Tracy and Gerard,

I'm sending this message to let you know that the Yamadas are willing grant you access to visit the inside of their residence.

As I'm sure you're aware, the Yamadas personal privacy is important to them and this is a major concession on their parts. It's done in the interest of working toward resolving this problem in the best and most expeditious way possible. Out of respect for their privacy, no photos or videos are to be taken during your visit.

In recognition of this concession, we feel it's in everyone's best interest to first establish the terms of the settlement and agree to them in draft form beforehand in writing. This will provide a basis and justification for the Yamadas to open their home to you and establish a set of criteria for what is accomplished in the visit.

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- Roostertail will vigorously pursue and accomplishes mitigation of detectable noise, above the maximum code level allowed.
- Roostertail will allow the Salter firm access and the Salter firm will take readings immediately after the work is completed, 1 year later and 3 years after completion of mitigation to confirm compliance and maintenance. Salter may take readings in the light well at Yamada expense at other times as noise concerns arise. Remediation will be accomplished by Roostertail if readings are found to be in violation by the Salter firm.
- Yamada will pay 1/3 of the Salter firm's consulting fee to Roostertail up to \$2500 maximum from Yamada.
- Yamada will immediately receive copies to all documentation of noise mitigation designs and readings.

- Yamada will agree to allow 4 months for Roostertail's mitigation to be accomplished.

You sent me an e-mail message indicating that you're inclined to pursue such an agreement and we're all encouraged by that statement. We would be willing to add the provision for a visit to the Yamadas' home for you both if that is necessary to complete and have both parties sign the settlement in this endeavor. We do need to remember that the Board of Appeals will be dealing with the issue of the exterior noise levels but they translate to the problems that are experienced within the Yamada home.

Please let me know by 10:00 AM this coming Friday, 10/3/2004 how you wish to proceed. As we discussed at our settlement meeting, the Board of Appeals needs some advance warning if a request for an extension is to be entertained. We'll need to coordinate that among us and the DPH and that all has to be done by the EOB on 9/3. If I don't hear from you by 10:00 AM on this coming Friday, I'll assume that you have chosen not to proceed with the possibility of a settlement.

Bruce Bonacker
Bonacker Associates
17 Van Buren Street
San Francisco, CA 94131
ph: 415.584.4300
cell: 415.722.0167

<mime-attachment>

Bruce Bonacker

From: Bruce Bonacker [bruce@bonacker.com]
Sent: Tuesday, September 30, 2014 5:25 PM
To: 'Roostertails'
Subject: RE: Board of Appeals case # 14-141
Attachments: Re: Board of Appeals case # 14-141

Tracy and Gerard,

I'm sending this message to let you know that the Yamadas are willing grant you access to visit the inside of their *residence*.

As I'm sure you're aware, the Yamadas personal privacy is important to them and this is a major concession on their parts. It's done in the interest of working toward resolving this problem in the best and most expeditious way possible. Out of respect for their privacy, no photos or videos are to be taken during your visit.

In recognition of this concession, we feel it's in everyone's best interest to first establish the terms of the settlement and agree to them in draft form beforehand in writing. This will provide a basis and justification for the Yamadas to open their home to you and establish a set of criteria for what is accomplished in the visit.

We presented our proposed approach to resolving the Yamadas concerns about the noise at our meeting at the office of Charles M. Salter Associates last week. To review, they are as follows:

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- Roostertail will hire the Salter firm to design and oversee construction of full mitigation of detectable noise above the maximum code level allowed.
- Roostertail will vigorously pursue and accomplishes mitigation of detectable noise, above the maximum code level allowed.
- Roostertail will allow the Salter firm access and the Salter firm will take readings immediately after the work is completed, 1 year later and 3 years after completion of mitigation to confirm compliance and maintenance. Salter may take readings in the light well at Yamada expense at other times as noise concerns arise. Remediation will be accomplished by Roostertail if readings are found to be in violation by the Salter firm.
- Yamada will pay 1/3 of the Salter firm's consulting fee to Roostertail up to \$2500 maximum from Yamada.
- Yamada will immediately receive copies to all documentation of noise mitigation designs and readings.
- Yamada will agree to allow 4 months for Roostertail's mitigation to be accomplished.

You sent me an e-mail message indicating that you're inclined to pursue such an agreement and we're all encouraged by that statement. We would be willing to add the provision for a visit to the Yamadas' home for you both if that is necessary to complete and have both parties sign the settlement in this endeavor. We do need to remember that the Board of Appeals will be dealing with the issue of the exterior noise levels but they translate to the problems that are experienced within the Yamada home.

Please let me know by 10:00 AM this coming Friday, 10/3/2004 how you wish to proceed. As we discussed at our settlement meeting, the Board of Appeals needs some advance warning if a request for an extension is to be entertained. We'll need to coordinate that among us and the DPH and that all has to be done by the EOB on 9/3. If I don't hear from you by 10:00 AM on this coming Friday, I'll assume that you have chosen not to proceed with the possibility of a settlement.

Bruce Bonacker
Bonacker Associates
17 Van Buren Street
San Francisco, CA 94131
ph: 415.584.4300
cell: 415.722.0167

Bruce Bonacker

From: Roostertailsf [roostertailsf@yahoo.com]
Sent: Thursday, September 25, 2014 1:10 PM
To: Bruce Bonacker
Subject: Re: Board of Appeals case # 14-141

Bruce, Good afternoon. Tracy and I are not totally against some of your points in a settlement proposal. I think the next step for us is to be able to have access inside the Yamada residence to totally understand the issue of what they are hearing? You spoke earlier with Tracy about this and understand you need to confirm with the Yamadas about this. Thank you for your time in this matter

Sincerely
Gerard Darian

Sent from my iPhone

On Sep 24, 2014, at 10:34 AM, "Bruce Bonacker" <bruce@bonacker.com> wrote:

Hello Gerard and Tracy,

Did I misunderstand?

I thought I was going to hear from you @ 9:00 on the telephone.

Perhaps we can catch up another time.

Bruce Bonacker
Bonacker Associates
17 Van Buren Street
San Francisco, CA 94131
ph: 415.584.4300
cell: 415.722.0167

<mime-attachment>

Bruce Bonacker

From: Roostertailsf [roostertailsf@yahoo.com]
Sent: Tuesday, September 23, 2014 6:10 PM
To: Bruce Bonacker
Subject: Re: Board of Appeals case # 14-141

Bruce, I had some more questions I need answers to.

My wife Tracy would like to call you in the morning. 9am.

Also, I'm still having a hard time imaging the noise she hears. If the window is closed? What is heard. If you move to another part of the house, what's is heard. I can't believe she stands next to that window all day long and hears our fans.

Thank you

Gerard

Sent from my iPhone

On Sep 18, 2014, at 3:57 PM, "Bruce Bonacker" <bruce@bonacker.com> wrote:

Gerard,

Here you go:

Tuesday at 3:00 at the offices of Charles M. Salter,
130 Sutter Street, Floor 5, San Francisco, CA,
415.397.0442.

Eric or Cristina, please reserve the room as indicated.

If it's a problem, let me know.

Bruce Bonacker
Bonacker Associates
17 Van Buren Street
San Francisco, CA 94131
ph: 415.584.4300
cell: 415.722.0167

<mime-attachment>

Bruce Bonacker

From: Bruce Bonacker [bruce@bonacker.com]
Sent: Tuesday, September 16, 2014 12:35 PM
To: 'roostertailsf@yahoo.com'
Cc: 'cristina.miyar@cmsalter.com'; 'Eric A. Yee'
Subject: Board of Appeals case # 14-141
Attachments: scan - letter to Roostertail.9.16.14.JPG

Mr. Darien and Ms Green,

I'm sending this message as a representative of Michiko Yamada.

Attached is a letter from me about the possibility of a discussion about the current acoustical concerns in your light well.

Please let me know if you'd like to pursue my suggestion.

Thanks

Bruce Bonacker
Bonacker Associates
17 Van Buren Street
San Francisco, CA 94131
ph: 415.584.4300
cell: 415.722.0167

EXHIBIT B

October 28, 2014

Board of Appeals
1650 Mission Street, Suite 304
San Francisco, CA 94103

RE: Case # 14-141 Yamada vs. Department of Public Health

Dear Commissioners:

I am writing on behalf of Ms. Michiko Yamada. I have visited her home (more than once) and have heard the fan noise inside Ms. Yamada's apartment. It is clearly audible. It sounds like a humming vibration engine noise and it fills her entire apartment. The fan is on continuously every day, 7 days a week!

Please support Ms. Yamada's endeavors to have her next-door neighbor remedy the fan noise as soon as possible since this problem has been ongoing for close to 3 years.

Thank you,

Sincerely,

A handwritten signature in cursive script that reads "Lelani Chuck". The signature is written in black ink and is positioned below the word "Sincerely,".

Lelani Chuck
lelani_chuck@yahoo.com

October 27, 2014

Don Plansky
1670 Clayton Rd # 16
Concord, CA 94520

Board of Appeals
1650 Mission Street
Suite 304
San Francisco, CA 94103

RE: Case No. 14-141 Yamada v. Department of Public Health

Dear Commissioners:

I am writing on behalf of Ms. Michiko Yamada.

I recently visited Ms. Yamada at her home.

I noticed a persistent humming sound that was audible throughout her apartment. When Ms. Yamada opened a window to let in fresh air, the noise was quite noticeable.

I hope you will support her efforts to reduce the fan noise from the Roostertail Restaurant so that she can live comfortably and quietly in her home.

Sincerely,



Don Plansky

October 28, 2014

Board of Appeals
1650 Mission St., Suite 304
San Francisco, CA 94103

Re: Case # 14-141 Yamada vs. Department of Public Health

Dear Commissioners:

I am writing regarding Ms. Yamada's ongoing fan noise problem. I am aware that this persistent noise has distressed Michiko for several years. I recently visited her in the apartment and heard for myself the humming vibration that intrudes on an otherwise very serene living space.

Please encourage the next door restaurant to eliminate this fan noise as soon as possible.

Thank you,



Thelma Tucker
2205 Sacramento St., 101
San Francisco, CA 94115

2309 California Street
San Francisco, CA 94115

28 October 2014

Ms. Michiko Yamada
1963 Sutter Street
San Francisco, CA 94115

SUBJECT: Noise in your apartment

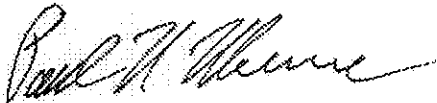
Dear Michiko,

I fully support your appeal of the DPH noise variance granted to Roostertail Restaurant.

I have visited your apartment. The background noise is both persistent and annoying. Closing the windows reduces the noise, but not enough to remove the annoyance.

This background noise is stressful and distracting. When I travel, I use noise cancelling earphones precisely to deal with this type of noise. That is clearly not a solution to the problem caused by the Roostertail's air handling systems.

Warmest regards,

A handwritten signature in black ink, appearing to read "Paul H. Wermer". The signature is fluid and cursive, with a long horizontal stroke at the end.

Paul H Wermer

EXHIBIT C

MINUTES BOARD OF SUPERVISOR'S NOISE TASK FORCE

Thursday, April 7, 2011
10-Noon, Room 910, Fox Plaza

Task Force Members Present:

City Attorney, Cecilia Mangoba
DBI, Laurence Kornfield
DPH, Thomas Rivard
DPH, Patrick Fosdahl
DPH, Michael Harris
DPH, Mary Freschet

DPW, Nancy George
Entertainment Com., Vajra Granelli
Planning, Jessica Range
Planning, Michael Jacinto
Police, Jim O'Meara
311, Scott Oswald

Broadband Back-Up Alarms:

Michael Harris reported that OSHA had recently approved broadband back-up alarms for non-construction site uses. Nancy George indicated that the PUC would be considered a "construction site use" and so the broadband back-up alarms could not be used on their sites. Michael further stated that Recology is looking at piloting the broadband alarms on garbage pick-up routes which have received the most noise complaints. It was suggested that Muni may want to explore using this type of alarm but may be reluctant to make any changes given the number of recent accidents.

Noise Guidelines For Restaurants:

Tom Rivard distributed copies of the draft Restaurant and Food Market Guidelines. Tom mentioned that the guidelines essentially require new restaurants to meet a 53 dBA at the property plane requirement unless the owner can prove that the local ambient noise level exceeds the 53 dBA standard. Laurence Kornfield suggested talking to Charlie Salter (acoustical engineer) regarding possibly having a pre-approved low noise equipment list for restaurants. Laurence also mentioned that while the intent was to capture new restaurants and new equipment during the plan check process we may be missing some of the new equipment installations. He went on to explain that some of the new equipment is installed to replace similar equipment and may not go through the plan check process. Laurence will review this item and get back to the group. Tom finished the discussion by stating that this was just a draft document and as such he was looking for comments. He encouraged the group to review the guidance and give him feedback.

Article 29 Ordinance Amendments:

Tom Rivard began the discussion by stating that while former Supervisor Maxwell and Supervisor Chui had taken an interest in the ordinance the amendments do not currently have a Board of Supervisor sponsor. Tom then walked the group through the ordinance and highlighted the areas we have agreed to amend.

SEC. 2901 Definitions:

- (a) Ambient – the main change here is that the ambient will now be based on a measured L90.
- (b) Commercial – this was changed to more clearly define the difference between commercial and residential property. Vajra asked how this section would apply to noise complaints involving commercial on the first floor and residential on the second floor. Tom responded that Sec. 2909 (b) addressed this mix use situation. The intent was to use the 8 dBA above ambient standard for mixed use and only apply the 5 dBA standard if the building was exclusively residential. Vajra stated that he will review this section with the Entertainment Commission and send some comments if necessary.

Michael Harris asked how the 45 dBA and 55 dBA standard would apply and which standard would hold preeminence. Michael indicated that it was easier to use the 8 dBA and 5 dBA property plane standard and that he would prefer to use it over the 45 dBA and 55 dBA standard. Tom suggested that Cecilia take a look at the language and see if changes needed to be made.

Scott Oswald suggested that Cecilia make the language regarding commercial and mixed use consistent throughout the ordinance.

- (g) Industrial Noise – Jessica Range suggested that we not incorporate zoning codes to this section. Michael Jacinto and Jessica agreed to review alternatives with the Planning Department and report back to the group.
- (i) Noise Level – Jessica Range suggested that this section include the definition of a repetitive peak.
- (j) Person – Tom mentioned that the definition had been redefined to exclude the City and County of San Francisco.
- (m) Property Maintenance – added to include loud landscaping equipment.
- (n) Property Plane – Laurence Kornfield suggested that this definition be reworded so the property plane does not extend indefinitely in the vertical direction but would end around the height of the receptor.

SEC. 2906 Electrical Generator Testing

Laurence Kornfield suggested that the idea of “Best Available Technology” for noise reduction be explored for this section. He felt Charlie Salter may be able to make some suggestions or help with generating a list.

SEC 2908 Construction Noise Times; Night Noise Permits; Property Maintenance

Laurence Kornfield told the group that the issue of changing construction times had been brought before the Board of Supervisors before and it was not approved. The reason it was not approved was because the Board did not want to do anything that impacted on new building construction and home owners wanted to be able to do construction after they arrived home from work in the evening. Jim O’Meara suggested that we leave the evening time alone but consider moving the morning start time back an hour. The group then discussed the problem and tried to evaluate the size and scope of the complaints

regarding construction noise. Tom suggested having the Scott Oswald's group (311) check their records for complaints and also contact the Neighborhood Services to see how big of a problem construction noise is in the early morning and evening. We agreed to revisit this issue once we had the requested information regarding noise complaints.

SEC 2909 Noise Limits

(c) Industrial Noise Limits - Jessica Range felt the 75 dBA standard was too high and we should consider a 10 dBA over ambient standard.

(e) Fixed Residential Interior Noise – Vajra suggested that we add a dBC standard. Tom agreed to come up with some draft language but suggested that the Entertainment Commission test the standard before adopting this section.

SEC 2912 (f) – Laurence Kornfield asked for the creation of a special inspector to ensure proper acoustical construction. He noted that it was essential to not only design buildings properly but to also ensure that the actual construction was done in accordance with acoustical standards. Laurence recommended that he and Tom set up a time to speak to the Code Advisory Committee in May to discuss this issue.

Other:

Cecilia Mangoba reminded the group that the Noise Task Force will sunset in November unless the group decides to continue. Tom asked the group think about whether or not they want to continue meeting and we would make a decision at our next meeting.

The meeting adjourned at 12:00 Noon.

MINUTES BOARD OF SUPERVISOR'S NOISE TASK FORCE

Thursday, July 15, 2010

10-11:30 AM, Room 278, City Hall

Task Force Members Present:

311, Tom Schedler
DBI, Laurence Kornfield
DPH, Thomas Rivard
DPH, Mohammed Malhi
DPH, Michael Harris
DPH, Jen McLaughlin
DPW, Nancy George
Entertainment Com., Jocelyn Kane
Planning, Jessica Range
Police, Jim O'Meara

Guests:

Rosen, Goldberg, Der and Lewitz, Alan Rosen

Noise Model Validation:

Tom Rivard discussed the work done to validate the citywide noise model. He said that SFDPH was satisfied with the model as it generally predicts the actual noise level within two decibels. Jessica Range added that Planning intends to move forward with the noise map approval process.

Jessica Range asked if SFDPH planned to run a projected noise model for the predicted future traffic noise. Tom Rivard responded that a future model could be run, but it could be inaccurate because it is unknown how much the adoption of electric vehicles will affect future traffic noise.

Jessica Range suggested further mitigation for housing in zones projected to be >75 dBA areas including: noise monitoring, more intense planning review and the consideration of the high ambient noise level in the design of the building.

Jocelyn Kane expressed concern that some places only get noisy at night (due to entertainment related noise) and that such areas would not be captured on the noise map.

Broadband Back-Up Alarms

Michael Harris discussed the Cal/OSHA Advisory Committee Meeting on Back-Up Alarms. The committee rejected the proposed amendments to the Construction Safety Orders that pertain to warning devices on construction vehicles. Because there was some ambiguity on whether or not garbage trucks are considered construction vehicles, Michael Harris is waiting on an official rule interpretation from Cal/OSHA. Jocelyn Kane asked what the next step would be if garbage truck were to be held to the same standard as construction vehicles. Nancy George responded that seeking a variance from Cal/OSHA would likely be easier than making an amendment to the regulations. Michael Harris said he would pursue a variance in the event that the rule interpretation states that garbage trucks are to be regulated in the same way as construction vehicles.

Siren Noise:

Tom Rivard explained that the siren noise project was completed and shared some of the results. At one of the sample sites, there were 60 events over 75 dBA recorded in a single night. Thirty of the events were sirens.

Noise Ordinance Revisions:

Tom Rivard discussed the need to change the noise ordinance to make it easier to use and possibly more protective. He and Michael Harris were seeking input from the group on some of the proposed changes.

Alan Rosen expressed the need for more specific metrics when it comes to taking noise measurements as the measurement methodology is not well defined in the current ordinance. He went on to say that excluding developments covered under Title 24 from the Article 29 noise levels, may not be protective enough, particularly if a new noise source goes in after a project is completed. Michael Harris told the group that the proposed change was made in response to new residential buildings going in next to existing noise sources, then asking that the owner of the existing noise source pay to mitigate the noise. Alan Rosen suggested that some of the onus be put on Planning to account for preexisting fixed noise sources prior to building construction.

Alan Rosen agreed with the proposed change of having the “property plane” boundaries determined by what was within the line of site of potential noise receptors.

Jocelyn Kane asked if there was a way to enforce the noise levels outlined in the ordinance without the use of a sound meter. Tom Rivard responded that if a noise is audible at 50 feet after 10 PM, it would be a violation. However, in order to enforce the sections based on specific decibel levels, sound level measurements are required.

Michael Harris brought up the introduction of a standard for groundskeeping equipment. The levels used for this standard would be the same as those for construction equipment. However, both Nancy George and Lawrence Cornfeld suggested that groundskeeping equipment have its own section, separate from construction equipment to avoid confusion.

With regards to the construction equipment standards, Nancy George asked if we should start enforcing muffler use for concrete cutting/breaking equipment. She suggested that DPH work with DPW to do some before and after studies to determine the effectiveness of mufflers.

Michael Harris brought up the addition of a section that would limit the hours that sporting event venues could operate. Nancy George said that noise from Giants games routinely lasted beyond the proposed 10 PM limit. Michael Harris responded that the proposal was aimed more at venues like school soccer fields which are often in close proximity to residences. Jocelyn Kane added that special cases such as AT&T Park could be handled by issuing variances.



Supe seeks to heighten the hush

By Joshua Sabatini

The rattling roar of a car without a muffler, the booming bass from a nightclub or construction workers who begin too early are all sounds residents in The City may know — and hate.

The City, however, is looking to bring relief to residents' eardrums by cracking down on noise polluters.

Proposed legislation would make it easier for The City to penalize those who exceed the noise limits and impose stricter noise controls. Under the proposal, The City could charge someone with an infraction of \$100 for a first offense and up to \$300 for three or more offenses in a year.

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The noise-control ordinance was introduced Tuesday by Supervisor Tom Ammiano, who said the legislation grew out of the “many, many constituents’ calls” complaining about loud noises bothering them or waking them up from sleep. Not since 1973 has The City updated its noise standards, and advancements in technology make sound level measuring much simpler, Ammiano said.

Ammiano said that residents of Bernal Heights have called in to complain about the noise from stadium rock concerts, while others have complained about construction noise and

“certain motor vehicles without the mufflers that are really loud. It’s really annoying.”

Dr. Rajiv Bhatia, director of occupational and environmental health with the Department of Public Health, said excessive noise can result in a number of health problems, including an increase in the risk of high blood pressure and heart disease.

Bhatia said the department receives “a lot of calls” from residents complaining about the noise of exhaust fans used by restaurants or other businesses. Bhatia said that a properly maintained exhaust fan would emit an allowable noise level.

The law also specifically addresses the complaints of residents who live near nightclubs and say the noise disturbs their sleep. The law would create a new frequency measurement for bass and drum sounds.

Enforcement would remain divided among various departments depending on the type of noise. For example, the Entertainment Commission would enforce noise controls when it comes to nightclubs. But the Public Health Department would have oversight control of all noise enforcement and report annually to the Board of Supervisors about The City’s noise problems. The department would also designate an employee to act as a noise prevention and control officer.

The law would establish a task force that would regularly meet and ultimately recommend amendments to the noise-control ordinance. The task force will also recommend to the Planning Department how to better locate development based on The City's acoustic levels.

jsabatini@sfexaminer.com

Common noise complaints

- Construction
- Restaurant exhaust vents
- Bass and drums at nightclubs
- Motor vehicles without mufflers
- Stadium rock concerts

Source: Department of Public Health, Supervisor Tom Ammiano's office

EXHIBIT D

EXHIBIT D

EXCERPTS FROM THE WORLD HEALTH ORGANIZATION (WHO)

COMMUNITY NOISE GUIDELINES

<http://www.who.int/iris/handle/10665/66217>

The San Francisco Noise Task Force and the Board of Supervisors in creating and passing legislation which created and modified the existing noise code were using the following points from the WHO:

- “Effects of noise are widespread and there are long term consequences for health. Adverse health effects of noise include but are not limited to: hearing impairment; interference with speech communication; disturbance of rest and sleep; psychological, mental-health and performance effects; effects on residential behavior and annoyance; and interference with intended activities.”
- “Low-frequency noise from ventilation systems can disturb rest and sleep even at low sound pressure levels.”
- “Noise from fixed installations such as... heat pumps and ventilation systems on roofs, typically affect nearby communities. Reductions may be achieved by encouraging quieter equipment... Requirements for passive (sound insulating enclosures) and active noise control, or restriction of operation time, may also be effective.”
- “Typical neighborhood noise comes from premises and installations related to the catering trade (restaurant, cafeterias...etc.)”
- “Practical application to limit and control the exposure of environmental noise are essential.”

EXHIBIT E

Acoustics
Audiovisual
Telecommunications
Security

27 October 2014

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Subject: **Yamada Case**
CSA Project No. 12-0478

Dear Mr. Bonacker and Ms. Yamada:

You have asked me to review and comment on the briefs prepared by officials in the City of San Francisco regarding this matter.

As an acoustical engineer, I have been dealing with the San Francisco Noise Ordinance for over 40 years. The intent of this noise ordinance is to protect people from excessive noise generated by their neighbors.

Section 2902 of the Ordinance specifies a 4½ foot distance between a measurement microphone and sound reflecting wall surface. City officials argue in their beliefs that they are prohibited from measuring sound levels in a light well because it is not large enough to achieve the minimum 4½ foot distance.

As an acoustical engineer I object to this argument. This light well provides ventilation to unair-conditioned residence. In my view, it is more important to measure disturbing noise in a light well than be limited by the 4½ foot distance specified in the ordinance.

The State of California Model Noise Ordinance states that measurements should not be made closer than 3 feet from a reflective wall surface. I am not aware of any ordinance (other than San Francisco's) that uses a 4 ½ foot measurement distance.

Noise ordinances require measurements at property lines. Having guidelines to measure a minimum distance from reflecting surfaces is a good idea. However, not allowing acoustical measurements in light wells (because the 4 ½ foot distance criteria is not achieved) is a bad idea in my opinion. This measurement rule does not provide for adequate protection for health and welfare.

In addition to the noise ordinance consideration, there is the structure borne energy transfer problem caused by the restaurant's kitchen exhaust fan and other equipment. This problem can only be solved by the restaurant.

This completes my comments on the subject matter. I would be glad to answer any questions or provide any additional commentary as needed.

Sincerely,

CHARLES M. SALTER ASSOCIATES, INC.



Charles M. Salter, PE
President

Charles M. Salter, PE
David R. Schwind, FAES
Eric L. Broadhurst, PE
Philip N. Sanders, LEED AP
Thomas A. Schindler, PE
Anthony P. Nash, PE
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Lloyd B. Ranola
Alexander K. Salter, PE
Jeremy L. Decker, PE
Rob Hammond, PSP, NICET III
Andrew J. McKee
Paul R. Billings
Valerie C. Smith
Steven A. Woods
Benjamin D. Piper
Elisabeth S. Nelson
Joshua J. Harrison
Brian C. Wourms
Shanna M. Sullivan
Amanda G. Higbie
Ryan G. Raskop, LEED AP
Diego Hernandez
Ryan A. Schofield
Jamal Kinan
McLean H. Pierce
Alex T. Schiefer
Abner E. Morales
Brian J. Good
Heather A. Salter
Dee E. Garcia
Catherine F. Spurlock
Marva De Year - Noordzee
Elizabeth F. Trocker
Jennifer G. Palmer
Jodessa G. Cortez
Susan E. Lonergan
Courtney H. Vineys
Erin D. Gorton
Megan C. Santos
Tish Patel

28 October 2014

Bruce Bonacker
Bonacker Associates
17 Van Buren Street
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Email: bruce@bonacker.com
michikoyamada5@gmail.com

Subject: **Yamada Case**
CSA Project: 12-0478

Dear Mr. Bonacker and Ms. Yamada:

You have asked me to review and comment on the briefs prepared by the officials in the City of San Francisco regarding this matter.

As an acoustical consultant, I have over 15 years of experience dealing with the San Francisco Noise Ordinance. The overarching policy of the SF Noise Ordinance is to protect public health from unwanted, excessive, and avoidable noise. The DPH's reinterpretation of the SF Noise Ordinance to preclude light well measurements is inconsistent with our previous project experience. In the past, I have seen health inspectors measure within 4-1/2 feet of reflective surfaces because that location is where the homeowner was affected by the noise.

In my professional opinion, the noise in the Yamada light well is as excessive as the rooftop location. The light well is acoustically shielded from other noise sources providing light and fresh air while minimizing Ms. Yamada's exposure to noise. Roostertail's equipment dominates the noise in the light well which significantly increases Ms. Yamada's exposure to noise.

Our measurements at Ms. Yamada's home indicate the problem stems from the restaurant's inadequately isolated mechanical equipment and/or ductwork rigidly connected to the fan and the building.

During the appeals hearing on 22 April 2014, I was shown a picture of the exhaust duct that had been wrapped one third up the duct. In response, I said that in order for the wrap to effectively reduce noise from the exhaust duct, the entire duct needed to be wrapped.

We have not yet been granted access to Roostertail's roof and equipment to properly analyze the noise and vibration issue. We have not reviewed the equipment nor duct mounting details to see if they comport with industry design standards.

In the past, I have successfully solved similar noise situations in San Francisco, Campbell, and Mountain View. I am confident that with adequate study, a solution can be reached to reduce the noise and vibration of Roostertail's mechanical equipment in Ms. Yamada's home.

This completes my comments on the subject matter. I would be glad to answer any questions or provide additional commentary as needed.

Acoustics

Audiovisual

Telecommunications

Security

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Sincerely,

CHARLES M. SALTER ASSOCIATES, INC.



Eric A. Yee
Principal Consultant

2014-10-24 1959 Sutter Street EAY response to DPH brief

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EXHIBIT F

EXPENSES AS OF OCTOBER 30, 2014

Noise Problem Mitigation

Charles Salter Associates \$7,874.69

Healthy Building Science \$600.00

4 Windows Replaced to Double-Pane Windows \$1,294.00

Noise Problem Appeal

Board of Appeals Application Fee \$300.00

Photocopying/Scanning \$476.27

Kings Courier Services \$40.00

Stationery Materials \$109.57

TOTAL \$10,694.53

NOV 13 2014

APPEAL # 14-141

November 13, 2014

By Messenger

President Ann Lazarus and Commissioners
San Francisco Board of Appeals
1650 Mission Street, Room 304
San Francisco, CA 94103

Re: Opposition to Appeal No. 14-141

Dear President Lazarus and Commissioners:

On behalf of Gerard Darien, the owner of Roostertail Restaurant ("Variance Holder"), located at 1963 Sutter Street ("Property"), we are writing to oppose the appeal filed by Michiko Yamada ("Appellant") against the San Francisco Department of Public Health ("DPH") relative to a Noise Variance issued to Mr. Darien by DPH.

A. GERARD DARIEN'S JOINDER WITH CITY'S BRIEF

Gerard Darien hereby joins with and incorporates herein by reference the brief of Respondent San Francisco Department of Public Health in opposition to the appeal and the three Declarations filed on October 2, 2014 by City Attorney Dennis Herrera and Deputy City Attorney Sherri Sokeland Kaiser.

B. ABSENT A CLEAR ABUSE OF DISCRETION, DPH'S DETERMINATION SHOULD BE UPHELD.

Absent a clear abuse of discretion by an agency, courts will avoid interfering with an administrative agency's exercise of discretion [*Spanner v. Rancho Santiago Community College Dist.*, 119 Cal. App. 4th 584 (4th Dist. 2004)]. The general rule is that a court will compel an agency to exercise its discretion [*Common Cause v. Board of Supervisors*, 49 Cal. 3d 432 (1989)], but will not control it [*Robbins v. Superior Court*, 38 Cal. 3d 199 (1985)],

James A. Reuben | Andrew J. Junius | Kevin H. Rose | Daniel A. Frattin
Sheryl Reuben¹ | David Silverman | Thomas Tunny | Jay F. Drake | John Kevin
Lindsay M. Petrone | Melinda A. Sarjapur | Kenda H. McIntosh | Jared Eigerman^{2,3} | John McInerney III²

1. Also admitted in New York 2. Of Counsel 3. Also admitted in Massachusetts

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unless the law clearly establishes the petitioner's right to such action [*Miller Family Home, Inc. v. Department of Social Services*, 57 Cal. App. 4th 488 (3d Dist. 1997)], or the agency clearly abused that discretion. [*Los Angeles City etc. Employees Union v. Los Angeles City Bd. of Education*, 12 Cal. 3d 851 (1974)]

Rarely, if ever, will an administrative agency determination be disturbed on review unless the petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts. [*Mason v. Office of Administrative Hearings*, 89 Cal. App. 4th 1119 (4th Dist. 2001)] Trial courts must uphold an agency action unless it is arbitrary, capricious, lacking in evidentiary support, or was made without due regard for the petitioner's rights. [*Environmental Charter High School v. Centinela Valley Union High School Dist.*, 122 Cal. App. 4th 139, (2d Dist. 2004), as modified on denial of reh'g, (Sept. 10, 2004)].

Where no such issues exist, administrative determinations of fact are conclusive on the courts [*McDonough v. Goodcell*, 13 Cal. 2d 741 (1939)], as are determinations made in the proper exercise of discretionary administrative, legislative, executive, or adjudicative functions. [*Ferrante v. Fish & Game Commission of Cal.*, 29 Cal. 2d 365 (1946)]

C. CONCLUSION

Mr. Darien has spent more than \$8,000 to dampen noise from the exhaust fan by wrapping it with Model LAG 10 Acoustical Pipe Duct Lagging (noise baffling material), as specifically recommended by the Department of Public Health. *See* Exhibit A, Noise Suppression Technologies, Inc. data sheets for Model LAG 10 Acoustical Pipe Duct

Lagging. Mr. Darien has taken all reasonable and appropriate steps both to comply with the law and to address the concerns expressed by Ms. Yamada. No one has claimed that there is a better material to use than Model LAG 10 Acoustical Pipe Duct Lagging, which meets and exceeds all industry standards, or that a better material even exists. While many people prefer to live within a silent space when possible, a busy urban environment does not provide such a luxury.

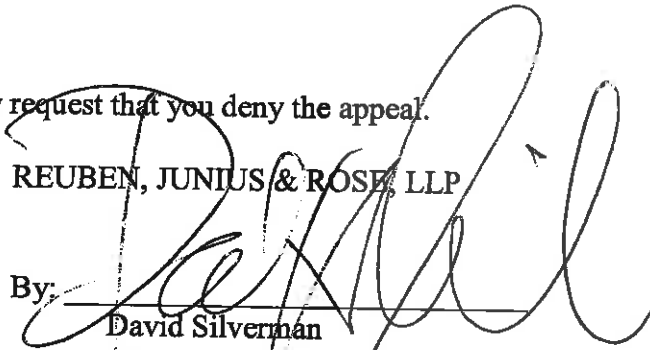
While as a general rule it is preferable to resolve a dispute about noise levels between or among neighbors by way of voluntary mediation, in this instance the serial demands of the Appellant for additional mitigation measures above that and beyond those already installed, and which Appellant has failed to show even exist, in order to remedy what the City experts have conclusively determined to be a non-problem (as evidenced by three expert Declarations entered into the administrative record), cannot be justified. *See* Declaration of Department of Public Health Acting Director Richard H. Lee. dated Oct. 2, 2014 (attached as Exhibit B).

Accordingly, we respectfully request that you deny the appeal.

REUBEN, JUNIUS & ROSE, LLP

Dated: November 13, 2014

By:


David Silverman
Attorneys for the Permit Holder
Gerard Darien and Roostertail Restaurant

cc: Michiko Yamada, Appellant
Deputy City Attorney Sherri Sokeland Kaiser, on behalf of the
San Francisco Department of Public Health

EXHIBIT A

EXHIBIT A

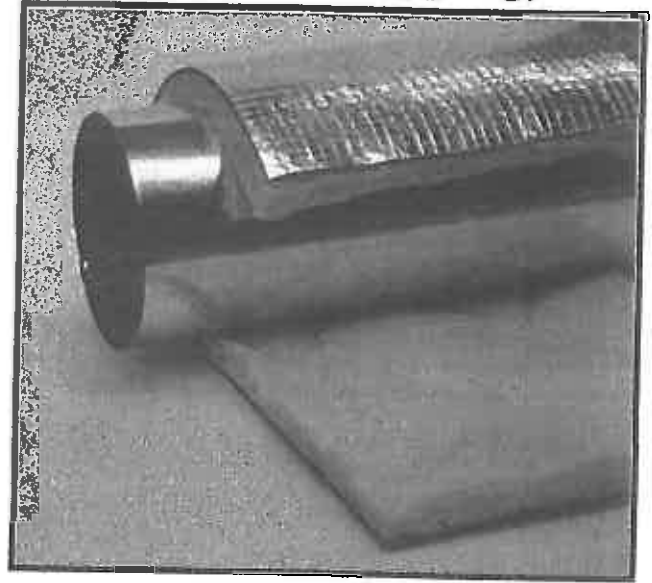


Model LAG 10 (Acoustical Pipe/Duct Lagging)

Model LAG 10 Acoustical Pipe/Duct Lagging, as manufactured by NSTI, combines a loaded vinyl with a reinforced aluminum foil facing on one side.

The vinyl provides mass and flexibility while the aluminum foil adds increased mechanical strength, weatherability, an attractive appearance and improved fire retardancy.

Lag 10 is available with a nominal 1" thick quilted fiberglass decoupler which allows the vinyl barrier to float independently of the noise source thus maximizing performance.



Benefits:

- ◆ **STC** - Up to 27.
- ◆ **Wide Temperature Ranges** - From -40° to 220°F. Optional high temperature facing up to 550°F is available.
- ◆ **Environment Safe** - Lead and asbestos free.
- ◆ **No Down Time** - Can be installed during normal equipment operation. No shut down required.
- ◆ **Durable** - Tear and puncture resistance. Offers oil and chemical resistance. Will not rot, shrink, or cause metal corrosion.
- ◆ **Fire Safe** - Meets Class 1 when properly installed. Low smoke and flame spread.
- ◆ **Easy Installation** - Using bands, matching lag tape or mechanical fasteners.
- ◆ **Cleanable** - Steam cleanable.
- ◆ **Moisture Resistant**

Applications:

- ◆ **Process Piping**
- ◆ **Duct Work**
- ◆ **Heat Exchangers**
- ◆ **Valves**
- ◆ **Mixing Boxes**
- ◆ **Material Transfer Lines**
- ◆ **Petro-Chemical and Wastewater Treatment Plants**
- ◆ **Gas Utility Pressure-Reducing Stations**



NSTI designs custom noise control solutions for your specific applications.

Noise Suppression Technologies, Inc.
Model LAG 10 (Acoustical Pipe/Duct Lagging)
Performance Data

Model LAG 10 has an operating temperature of -40° to 220°F. The barrier component is available in 54" x 60' rolls. The composite is available in 54" x 30' rolls. The composite incorporates a 1" quilted fiberglass decoupler which allows for a one step installation process. This significantly reduces installation labor and enhances noise reduction properties. Simply cut to length and secure in place using FSK tape, duct tape, bands or mechanical fasteners.

Product Properties:

Sound Transmission Loss

Frequency, Hz.	TL, dB
125	15
250	19
500	21
1000	28
2000	33
4000	37
STC	27

Service Temperature: -40° to 220°F

Flammability Per Fed. Test Std. No. 191-5903

Flame Out: 0 Seconds
 Afterglow: 0 Seconds
 Char Length: 0.2 Inch

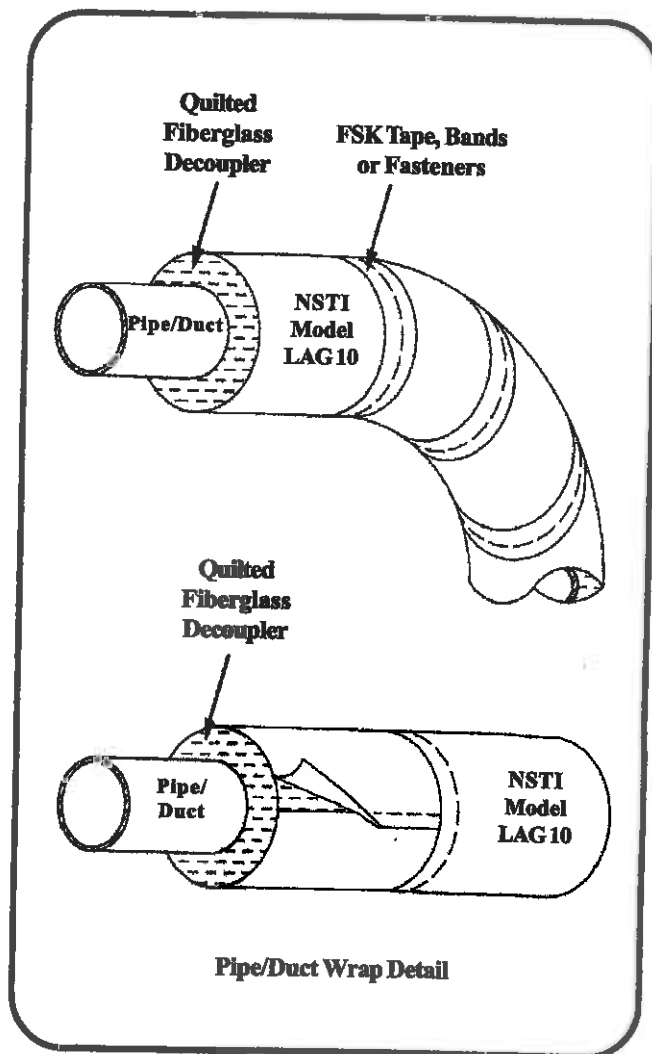
Corrosion Resistance: Excellent for most oils, grease, acids, and mild alkalis.

Material Thickness: 0.10" Barrier, 1.0" Composite

Material Roll Size: 54" x 30' Composite
 54" x 60' Barrier Only

Surface Burning Characteristics per ASTM E84

Flame Spread Index: 10
 Smoke Developed Index: 40



NSTI believes the information contained herein to be accurate as of the publication date. Actual product performance may vary based on specific application conditions.

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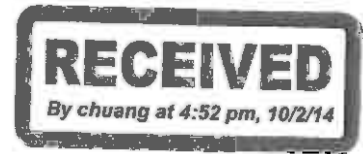
LAG 10
 Rev 9/99

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EXHIBIT B

EXHIBIT B

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7 Attorneys for Respondent,
DEPARTMENT OF PUBLIC HEALTH
8

9 SAN FRANCISCO

10 BOARD OF APPEALS

11 1650 Mission Street, Room 304
12 San Francisco, California 94103

13 MICHIKO YAMADA,

14 Appellant,

15 vs.

16 DEPARTMENT OF PUBLIC HEALTH,

17 Respondent.
18
19
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Appeal No. 14-141

DECLARATION OF RICHARD J. LEE
IN SUPPORT OF RESPONDENT SAN
FRANCISCO DEPARTMENT OF PUBLIC
HEALTH

21 I, RICHARD J. LEE, declare as follows:

22 1. I have personal knowledge of the facts set forth herein, except for those facts set forth
23 on information and belief, which I also believe to be true. If called upon to testify, I could and would
24 testify competently to the matters set forth below.

25 2. I am the Acting Director of Environmental Health for the San Francisco Department of
26 Public Health ("DPH"). I have a Bachelor of Arts degree in Bacteriology and a Masters in Public
27 Health, with a specialty in Environmental Health, both from the University of California at Berkeley.
28

1 I have been a Certified Industrial Hygienist for the past 29 years, a Certified Safety Professional for 20
2 years, and a Registered Environmental Health Specialist for the last seven years.

3 3. I have evaluated numerous noise complaints throughout the 27 years I have been
4 working as an Industrial Hygienist in various capacities at DPH. I held the position of Senior
5 Industrial Hygienist for the first 20 years of my tenure. In 2007, I became the Director of
6 Environmental Health Regulatory Programs, including the Noise Program. In 2013, I became the
7 Acting Director of Environmental Health. For the seven years I have spent in these capacities, I have
8 supervised the DPH inspectors who monitor compliance with the San Francisco Noise Ordinance,
9 codified as Article 29 of the San Francisco Police Code.

10 4. In my current role as Director of Environmental Health, I serve as the Hearing Officer
11 designated by the Director of Public Health to hear and decide cases of non-compliance with the Noise
12 Ordinance. I am also charged with the discretionary authority to decide whether to grant a variance.

13 5. On March 14, 2013, my predecessor, Dr. Rajiv Bhatia, denied a request from Gerard
14 Darien, the owner of Roostertail Restaurant, for a variance from outdoor noise limits for commercial
15 sources. See Yamada Exhibit F. Dr. Bhatia denied the variance on the ground that Roostertail had
16 failed to install adequate noise dampening equipment sufficient to ensure compliance with the Noise
17 Ordinance during a recent renovation, noting that the noise standards in the Ordinance predated the
18 renovation by several years and should have been taken into account. Mr. Darien appealed the denial
19 to this Board, which reviewed and upheld the denial. See Yamada Exhibit H.

20 6. After his March 2013 request for a variance was denied, an enforcement process began
21 during which Mr. Darien undertook two rounds of mitigation projects, DPH took further noise
22 measurements and engaged in additional deliberations, and the parties continued to confer. These
23 events are recited in detail in paragraphs 3-18 of the declaration of DPH Noise Officer Jonathan
24 Piakis, filed concurrently with this declaration. For the sake of brevity, I refer the reader to those
25 paragraphs, which I believe to be a true and correct recitation of events.

26 7. On July 23, 2014, I granted a renewed application by Mr. Darien for a variance based
27 on the considerations set forth in the procedure governing the DPH Noise Variance Process. See
28 Yamada Exhibit T.

1 8. I concluded that Mr. Darien had made reasonable efforts to mitigate the source of the
2 complained-of noise in the lightwell outside Ms. Yamada's hallway window. After Mr. Darien was
3 originally denied a variance because no mitigation work was proposed, DPH ordered him to either
4 address the noise at the property plane or address the noise by insulating the ductwork in the lightwell.
5 At first, Mr. Darien only partially insulated the main ductwork. We then required that all of the main
6 ductwork be insulated. That work was completed.

7 9. I also considered the physical characteristics and geography of the noise violation, and
8 concluded that this factor also weighed in favor of a variance. The rooftop fan responsible for the
9 enforceable noise violation is above the roof levels of nearby buildings, dissipates before reaching
10 human receptors, and therefore has little effect if any on neighbors. Further, the physical
11 characteristics of the lightwell preclude it from being the site of a violation, because the sound level in
12 the small, reflective space cannot be measured in a manner that complies with the measurement
13 requirements in Section 2902 of the Noise Ordinance.

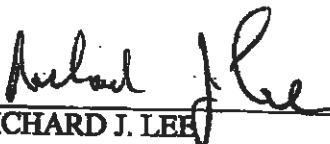
14 10. I also considered whether the public health, safety and welfare is affected by the noise
15 violation, and concluded that it is not. The primary public health consideration in this case is the
16 residential interior noise levels in Ms. Yamada's living and sleeping space. Those noise levels remain
17 below 45 dBA when measured in the middle of the day, with the kitchen exhaust operating and the
18 window to the lightwell open. These measurements indicate that there is no public health issue in Ms.
19 Yamada's living space, as they remain well below the residential noise limit in Section 2909(d) of 55
20 dBA from 7:00 am -10:00 pm (when the fan may be operating) and 45dBA from 10:00 pm to 7:00 am
21 (when the fan is not operating).

22 11. I also considered whether compliance with the provision from which the variance is
23 sought would result in hardship or cost to the owner without equal or greater benefit to the public. I
24 concluded that this factor also weighed strongly in favor of granting the variance. As the only actual
25 violation of the Noise Ordinance occurred on the rooftop, and the excess noise at that location did not
26 reach individual receptors, it made no sense to require Mr. Darien to go to substantial expense to
27 mitigate the rooftop noise. Instead, Mr. Darien complied with our condition for a variance that he
28 install acoustical insulation around the full length of the exhaust duct in the lightwell, despite the fact

1 that the noise in the lightwell did not violate the Noise Ordinance. Mr. Darien submitted
2 documentation demonstrating that he spent approximately \$8000 on that project. In my opinion,
3 requiring further investment in mitigating the sound at a location other than the site of the violation
4 would be unduly burdensome. Moreover, as demonstrated by the low interior noise measurements in
5 Ms. Yamada's residence, I concluded that further investment in mitigation measures was not needed to
6 address public health concerns. In sum, requiring additional investment in mitigation would create a
7 financial burden on the owner without providing any further benefit to the public, much less a benefit
8 of corresponding value.

9 12. For all of these reasons, and with the concurrence of the Manager of the Noise Program
10 and the Noise Officer handling the case, I granted the requested variance. I did not and do not
11 consider myself bound by my predecessor's decision to deny a variance in March 2013 based on
12 different facts and circumstances.

13 I declare under penalty of perjury under the laws of the State of California that the foregoing is
14 true and correct and that this document was executed on the 2nd of October 2014 in San Francisco,
15 California.

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18 RICHARD J. LEE
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1 DENNIS J. HERRERA, State Bar #139669
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7 Attorneys for Respondent
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9 SAN FRANCISCO

10 BOARD OF APPEALS

11 1650 Mission Street, Room 304
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13 MICHIKO YAMADA,
14 Appellant,
15 vs.
16 DEPARTMENT OF PUBLIC HEALTH,
17 Respondent.
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Appeal No. 14-141

SUPPLEMENTAL BRIEF OF RESPONDENT
DEPARTMENT OF PUBLIC HEALTH

Date: November 19, 2014
Time: 5:00 p.m.
Location: City Hall Room 416

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INTRODUCTION

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2 Nothing in Appellant Yamada's supplemental filing alters the two most basic considerations
3 before this Board. First, the Department of Public Health has fully and correctly exercised its duties
4 under Police Code Article 29 (the Noise Ordinance) and has no further role to play in the ongoing
5 dispute between Appellant and her neighbor. And perhaps even more important, overturning the noise
6 variance would do nothing to resolve that dispute. This Board should uphold the noise variance and
7 allow DPH to step out of what is now a dispute between private parties.

ARGUMENT

8 I. APPELLANT MISAPPREHENDS THE FUNCTION OF THE NOISE VARIANCE 9 AND THE CONSEQUENCES OF OVERTURNING IT.

10 In section 2910 of the Noise Ordinance, the Board of Supervisors expressly granted DPH the
11 power and discretion to grant variances to noise requirements under its jurisdiction. This provision
12 assumes that there may be circumstances in which it serves no public purpose to impose the
13 requirement. This is just such a case: the noise violation at issue consists of an extra .5 dBA
14 emanating from a rooftop exhaust fan, and no one residing in the nearby buildings can even hear the
15 fan, much less the extra half-decibel, in the first place. It would be non-sensical to require
16 Roostertail's owners to take mitigation measures to muffle that half-decibel. The variance process
17 gives DPH the means to excuse strict compliance with the Noise Ordinance when it would otherwise
18 impose meaningless and oppressive requirements, particularly where, as here, the excess noise has no
19 potential to adversely impact public health.¹ Once a variance has been granted, DPH retains the power
20 to monitor the circumstances for material changes, but otherwise it has no further role to play.

21 Moreover, the only effect of overturning Roostertail's variance will be to require DPH to
22 enforce the noise limits that apply to the rooftop fan against Roostertail, which in turn would require
23 Roostertail to invest in mitigating a fraction of a decibel that absolutely no one can hear. In no way
24

25 ¹ Appellant describes Roostertail's variance as a "reward for flagrant non-compliance from the
26 start with the Noise Ordinance" (App. Suppl. Br. at 3), but that it an obvious mischaracterization.
27 Roostertail was not granted a variance for outlasting the compliance process; rather, as it explained at
28 length in its opening papers, DPH concluded that requiring mitigation of the rooftop noise violation
would serve no meaningful public purpose. Appellant's further assertion that DPH should not have
issued the variance without first taking measurements to confirm compliance (*id.* at 1-2) does not even
make sense. A variance excuses compliance; compliance is not a prerequisite to a variance.

1 will reduce Appellant's exposure to noise, nor will it address any of her concerns about the lightwell.
2 To the contrary, to the extent that Roostertail is willing to invest further resources in mitigating noise,
3 those resources will necessary go to the rooftop rather than the lightwell. Further, Roostertails rooftop
4 variance is conditioned on its continued maintenance of the current configuration of the ventilation
5 equipment. See Declaration of Jonathan Piakis, Ex. F. Absent that obligation, Roostertail will be free
6 to reconfigure its system, both on the rooftop and in the lightwell. It might even choose to remove the
7 acoustic insulation it has applied to lightwell duct and reuse it to mitigate the noise on the rooftop.

8 The variance serves an important and legitimate public purpose. Overturning it would serve no
9 purpose.

10 **II. DPH HAS FULLY AND CORRECTLY PERFORMED ITS DUTIES IN THIS**
11 **MATTER.**

12 Appellant creates a red herring when she argues about the merits of § 2902 and claims –
13 entirely counterfactually – that DPH has been ignoring its distance requirements for decades and
14 should be required to continue to do so now so that it will find an actionable noise violation in the
15 lightwell. This is plainly wrong: DPH is required to follow the law, regardless of whether Ms.
16 Yamada considers it to be “conceptually absurd” (Supp. Br. at 3) or whether her consultant thinks the
17 law is a “bad idea” (Supp. Ex. E, letter of Charles M. Salter). Those arguments are better addressed to
18 the Board of Supervisors, the body with the power to change the law.

19 Ms. Yamada also claims that DPH should disregard the requirements of § 2902 because
20 following it would be an “abrupt” and “radical” change from its “decades-long practice” of conducting
21 “light well measurements to assess and remedy excessive noise.” Ms. Yamada provides no support for
22 her expansive claim, and, in fact, her claim is not only unsupported – it is fundamentally false. June
23 Weintraub, Acting Manager of the Noise Program, investigated this claim of past practices after Ms.
24 Yamada's representatives first made it at the last hearing. As detailed in ¶¶ 4-5 in her accompanying
25 Supplemental Declaration, Ms. Weintraub determined that at least as far back as 2007, it has been
26 DPH's uniform practice to follow the requirements of § 2902, with only one known exception: the
27 early proceedings in this case. See *id.* at ¶ 5. But even if Ms. Yamada were right that DPH has
28 consistently been wrong, DPH still would not be at liberty to diverge from the requirements of § 2902

1 in this matter. Even decades-long wrongs do not make a right when it comes to government's
2 obligations to abide by the law.

3 Appellant also criticizes DPH for failing to conduct studies or gather evaluative data to support
4 "DPH's view" that wrapping the kitchen exhaust duct would "be sufficient." (Appellant's Supp. Br. at
5 2). Ms. Yamada does not say what it would "be sufficient" for, but presumably she means sufficient
6 to mitigate her current concerns, which, as her representatives identified for the first time at the last
7 hearing, largely consist of low-spectrum noise and structure-borne vibration. These supposed
8 omissions by DPH rest on a flawed assumption that DPH has duties under the Noise Ordinance that
9 simply do not exist. Section 2916 of the Noise Ordinance charges DPH to enforce the sound limits in
10 §§ 2904 and 2909. These sound limits are all stated in dBA, a sound measure that captures sound
11 pressure from all frequencies as weighted to account for the characteristics of human hearing; DPH
12 has no responsibility to measure or otherwise address low-spectrum sound, measured in units denoted
13 as dBC. See §§ 2901(f), (n), 2904, 2909. Nor does the Noise Ordinance address structural vibration
14 in any way. Moreover, DPH's duty is to determine compliance by measuring sound levels in
15 conformance with the requirements of the ordinance and comparing those sound levels to the
16 permissible standards. DPH has no duty to conduct studies or gather additional evaluative data, nor is
17 it charged with designing or approving mitigations. Appellant is wrong to complain that DPH has
18 failed in duties it does not have.

19 **CONCLUSION**

20 For all of these reasons, the Board should deny this appeal and uphold the Noise Variance as
21 granted by the Director.

22 Dated: November 13, 2014

DENNIS J. HERRERA
City Attorney
JULIE VAN NOSTERN
Chief Attorney
SHERRI SOKELAND KAISER
Deputy City Attorney

26 By: /s/ Sherri Kaiser
SHERRI SOKELAND KAISER
Attorneys for Respondent
DEPARTMENT OF PUBLIC HEALTH

1 **PROOF OF SERVICE**

2 I, Lily Kang, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the
4 above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza
5 Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

6 On November 13, 2014, I served the following document(s):

- 7 **1) Supplemental Respondent's Brief; and**
- 8 **2) Supplemental Decl. of June M Weintraub in Support Thereof**

9 on the following persons at the locations specified:

10 **Michiko Yamada (Appellant)**
 11 (Michiko personally picked up above-stated
 12 pleadings at the following location:
 13 Board of Appeals
 14 1650 Mission Street – Lobby Level
 15 San Francisco, CA 94103

16 in the manner indicated below:

17 **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed
 18 envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional
 19 messenger service.

20 I declare under penalty of perjury pursuant to the laws of the State of California that the
21 foregoing is true and correct.

22 Executed November 13, 2014, at San Francisco, California.

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24
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26
27
28



LILY KANG

1 DENNIS J. HERRERA, State Bar #139669
City Attorney
2 JULIE VAN NOSTERN, State Bar #103579
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13 MICHIKO YAMADA,
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Appeal No. 14-141

SUPPLEMENTAL DECLARATION OF
JUNE M. WEINTRAUB IN SUPPORT OF
RESPONDENT SAN FRANCISCO
DEPARTMENT OF PUBLIC HEALTH

21 I, JUNE M. WEINTRAUB, declare as follows:

22 1. I have personal knowledge of the facts set forth herein, except for those facts set forth
23 on information and belief, which I also believe to be true. If called upon to testify, I could and would
24 testify competently to the matters set forth below.

25 2. I am Acting Manager of Regulatory Programs for Air, Noise, Smoking, Water, and
26 Radiation in the Environmental Health Branch of the San Francisco Department of Public Health
27 (“DPH”). Since mid-2013, when I assumed management responsibilities for the noise regulatory
28 program, I have worked with Acting Director of Environmental Health Richard Lee, DPH health

1 inspectors, and Noise Control Officer Jonathan Piakis to resolve the ongoing dispute about noise levels
2 at 1963 Sutter Street.

3 3. In my review of Ms. Yamada's supplemental brief and its exhibits, I have identified a
4 number of material misrepresentations regarding DPH's past practices in regard to the distance
5 requirement in Police Code section 2902; DPH's history of granting noise variances in mixed-use
6 neighborhoods; and the World Health Organization Community Noise Guidelines. I explain each of
7 these concerns below.

8 4. Ms. Yamada wrongly asserts in her supplemental brief that it has been DPH's
9 longstanding, historical practice to disregard the requirement in Police Code section 2902 that outside
10 sound measurements must be taken at least 4-1/2 feet away from walls when determining a noise
11 violation. This is factually false. Since the October 8 hearing in this matter, when Ms. Yamada's
12 representatives first made this claim, I have reviewed noise inspection reports from 2008 to 2011 and
13 interviewed current and former noise inspectors with experience dating back to 2007 about this
14 assertion. I did not find any noise inspection reports that involved a lightwell or measurements made
15 contrary to the distance requirements specified in Section 2902. And all of the inspectors uniformly
16 reported that they were aware of and consistently applied the 4-1/2 foot distance requirement for
17 outdoor sound measurements. In fact, this matter is the sole instance that any of the inspectors could
18 identify in which DPH has considered an outdoor measurement taken less than 4-1/2 feet from a wall
19 as a violation.

20 5. Michael Harris, CIH, served as Noise Control Officer at DPH from 2007 until early
21 2013. He is the inspector who took the measurement in the lightwell outside Ms. Yamada's hallway
22 window. When I interviewed him about DPH's past measurement practices, he reported that during
23 his entire tenure, he had not been involved in any other investigations where noise measurements were
24 taken in a lightwell or where a measurement that did not comply with the distance requirement was
25 considered a violation. Mr. Harris indicated that he departed from that consistent practice in this case
26 and took measurements in a small lightwell because the former Director of Environmental Health
27 directed him to do so, despite Mr. Harris' stated concern that the measurement would not satisfy the
28 distance requirement. At the site, Mr. Harris tried to make the measurements compliant with the

1 requirements of the law by opening the window to Ms. Yamada's residence and holding the sound
2 level meter in a spot where it was furthest from all reflective surfaces, but the configuration of the
3 lightwell made it impossible for him to take a valid measurement where the sound level meter
4 microphone was far enough away from the reflective surfaces of the lightwell walls and windows.

5 6. Ms. Yamada also asserts that following the Section 2902 distance requirement in her
6 case disserves the purpose of Article 29 to protect public health. This is also untrue. Ms. Yamada's
7 contact with the sound in the lightwell is from inside her residence, a location that receives the greatest
8 protection under the noise ordinance because interrupted sleep at night and excessive noise in the
9 living area during the day are likely to lead to adverse public health consequences. Accordingly,
10 Section 2909(d) provides that "to prevent sleep disturbance [and] protect public health," noise levels in
11 a living room or bedroom must not exceed 55 dBA between 7:00 a.m. and 10:00 p.m., and 45 dBA
12 during typical sleeping hours between 10:00 p.m. and 7:00 a.m. In this case, the sound level
13 measurements taken midday on January 14, 2014, with the hallway window open and Roostertail's
14 kitchen and ventilation system in full operation, indicated noise levels of 38.8 dBA in Ms. Yamada's
15 living room and 40.6 dBA in her bedroom, well below the 55 dBA daytime limit in place to protect
16 public health, and even below the 45 dBA nighttime limit. Given that Roostertail closes at 10 p.m., it
17 is reasonable to assume that nighttime sound levels in Ms. Yamada's residence drop even further
18 below the 45 dBA nighttime limit. Thus, regardless of whether the sound level in the lightwell would
19 violate the outdoor noise limit in the absence of the distance requirement in Section 2902, the sound in
20 the lightwell clearly does not raise any public health concern inside Ms. Yamada's residence, the place
21 where she hears it. Obeying the law in Section 2902 does not frustrate DPH's ability to safeguard
22 public health, particularly here, where there are no public health concerns to begin with.

23 7. Ms. Yamada's brief also contains the false assertion that "over the past 15 years, DPH
24 has *never* granted a variance in a mixed use neighborhood where a remedy was available." She does
25 not provide support for her assertion. In fact, however, DPH has granted a noise variance in a
26 situation that is nearly identical to the situation with Roostertail – and it did so at the explicit urging of
27 Ethan Salter of Charles M. Salter Associates, Ms. Yamada's own consulting firm.

1 8. On June 24, 2014, DPH granted a noise variance to Momo's restaurant, located at 760
2 2nd Street, for its rooftop exhaust fans. Momo's location is zoned as "Mixed Use-Office." As the SF
3 Property Information website explains for Momo's address:

4 The Mixed Use-Office (MUO) runs predominantly along the 2nd Street corridor
5 in the South of Market area. The MUO is designed to encourage office uses and
6 housing, as well as small-scale light industrial and arts activities. Nighttime
7 entertainment and small tourist hotels are permitted as a conditional use. Large
8 tourist hotels are permitted as a conditional use in certain height districts.
9 Dwelling units and group housing are permitted, while demolition or conversion
10 of existing dwelling units or group housing requires conditional use
11 authorization. Family-sized housing is encouraged. Office, general commercial,
12 most retail, production, distribution, and repair uses are also principal permitted
13 uses. Adult entertainment and heavy industrial uses are not permitted.
14 ([http://ec2-50-17-237-182.compute-
15 1.amazonaws.com/PIM/#BookmarkOtherInformation](http://ec2-50-17-237-182.compute-1.amazonaws.com/PIM/#BookmarkOtherInformation))

16 9. Attached hereto as Exhibit A is a true and correct copy of the June 24, 2014 letter from
17 Acting Director of Environmental Health Richard Lee granting the noise variance to Momo's
18 Restaurant. The letter indicates that Director Lee granted the variance based on his review of Momo's
19 application and a supporting memorandum prepared by consultant Ethan Salter, PE, LEEP AP, of
20 Charles M. Salter Associates and dated May 27, 2014. A true and correct copy of the May 27 Salter
21 Memorandum is attached hereto as Exhibit B.

22 10. In his Memorandum, Mr. Salter provides support for a variance for the rooftop fans on
23 the ground that noise from Momo's fans is directed away from residential receptors and will have no
24 foreseeable adverse impact on public health. He explains that Momo's has located its fans along the
25 roofline that is farthest away from residential noise receptors, and it has also pointed the fan outlets,
26 which create the most noise, away from the nearby residential uses. Based on these facts, Mr. Salter
27 concludes that there is little potential that the rooftop fans will have an impact on public health, which
28 is the controlling consideration in the Noise Ordinance. In reliance on the Memorandum, Director Lee
concluded that Momo's request had "sufficient merit" to support a noise variance. See Exhibit A.

 11. DPH granted a noise variance to Roostertail for its rooftop fan on July 23, almost
exactly one month later. As it had for Momo's, DPH concluded that Roostertail's rooftop fan had no
potential adverse public health impact because its location made it inaudible to residential receptors.
But in contrast to the situation for Momo's, DPH had *also* required Roostertail's owner to spend

1 nearly \$8,000 to wrap a duct with acoustic insulation to mitigate noise that was *not* in violation of
2 Article 29.

3 12. I find it difficult to credit the current opinion of Charles M. Salter Associates that DPH
4 should have imposed additional conditions on Roostertail rather than grant a rooftop noise variance,
5 given that it had taken the position just one month earlier that a rooftop noise variance was warranted
6 when the noise from the fan would have no human receptor and, consequently, no public health effect.

7 13. Exhibit D to Ms. Yamada's brief contains selected quotations from the World Health
8 Organization (WHO) Community Noise Guidelines, assembled in an undisclosed manner by an
9 unidentified person and presented as direct source materials used by the San Francisco Noise Task
10 Force and the Board of Supervisors when amending Article 29 in 2008. After my own review of the
11 WHO report, I have concluded that these quotations are being presented in a selective and misleading
12 fashion.

13 14. I could not find the first offered quotation in the document at all. And even if it does
14 exist in the report, it merely stands for the unremarkable proposition that there can be a wide range of
15 adverse public health effects from excessive noise. The quotation has very little relevance to this
16 matter because, in my professional opinion, the statement refers only to the potential impacts of noise
17 at the individual level which, depending on numerous variables, may or may not rise to the level of a
18 public health concern.

19 15. While the second quotation offered in Exhibit D -- "*Low-frequency noise from*
20 *ventilation systems can disturb rest and sleep even at low sound pressure levels*" -- actually appears in
21 the report, it seems particularly unlikely to have served as a basis for the Board of Supervisors'
22 deliberation of Article 29, as Exhibit D represents. Article 29 does not regulate low-frequency noise
23 (measured as dBC). Rather, it regulates sound pressure levels, or dBA. Indeed, regulating low-
24 frequency noise would be very difficult for a number of physical and logistical reasons.

25 16. The third quotation -- "*Noise from fixed installations such as ... heat pumps and*
26 *ventilation systems on roofs, typically affect nearby communities. Reductions may be achieved by*
27 *encouraging quieter equipment ... Requirements for passive (sound insulating enclosures) and active*
28 *noise control, or restriction of operation time, may also be effective*" -- is an outright

1 misrepresentation to the extent that it is presented as having any relevance to this case. The use of
2 ellipses disguises the fact that the excerpt appears in the section on “Industrial Noise,” which
3 addresses the intense noise that can be generated by industrial machines, not the much milder noise
4 generated by restaurant ventilation systems. The second paragraph of the following excerpt is the
5 source of the quotation, with the omitted text highlighted in bold:

6 2.2.1. Industrial noise. Mechanized industry creates serious noise problems. It
7 is responsible for intense noise indoors as well as outdoors. This noise is due to
8 machinery of all kinds and often increases with the power of the machines.
9 Sound generation mechanisms of machinery are reasonably well understood.
10 The noise may contain predominantly low or high frequencies, tonal
11 components, be impulsive or have unpleasant and disruptive temporal sound
12 patterns. Rotating and reciprocating machines generate sound that includes tonal
13 components; and air-moving equipment tends also to generate noise with a wide
14 frequency range. The high sound pressure levels are caused by components or
15 gas flows that move at high speed (for example, fans, steam pressure relief
16 valves), or by operations involving mechanical impacts (for example, stamping,
17 riveting, road breaking). Machinery should preferably be silenced at the source.

18 Noise from fixed installations, **such as factories or construction sites**, heat
19 pumps and ventilation systems on roofs, typically affect nearby communities.
20 Reductions may be achieved by encouraging quieter equipment **or by zoning of**
21 **land into industrial and residential areas**. Requirements for passive (sound
22 insulating enclosures) and active noise control, or restriction of operation time,
23 may also be effective.

24 17. The fourth quotation offered in Exhibit D -- “*Typical neighbourhood noise comes from*
25 *premises and installations related to the catering trade (restaurant, cafeterias, discotheques, etc.)*” –
26 suggests that WHO has singled out restaurants as sources of unwanted noise in residential
27 neighborhoods. This is misleading. In fact, the quotation is selectively drawn from a passage in the
28 report that seeks to create a comprehensive list of the many typical sources of community noise,
without highlighting any one of them. In context, the reference to restaurants conveys a very different
impression:

 Community noise (also called environmental noise, residential noise or
domestic noise) is defined as noise emitted from all sources, except noise at the
industrial workplace. Main sources of community noise include road, rail and
air traffic, industries, construction and public work, and the neighbourhood.
**Typical neighbourhood noise comes from premises and installations related
to the catering trade (restaurant, cafeterias, discotheques, etc.);** from live or
recorded music; from sporting events including motor sports; from playgrounds
and car parks; and from domestic animals such as barking dogs. The main
indoor sources are ventilation systems, office machines, home appliances and
neighbours.

1 18. The final quotation offered in Exhibit D -- "*Practical application [sic] to limit and*
2 *control the exposure of [sic] environmental noise are essential*" – seems to have been included to
3 impart a sense of urgency to controlling environmental noise, including, presumably, in the situation
4 now before this Board. But again the quotation is taken out of context, and taken on its own terms, it
5 does not rightly apply to Article 29. Rather, it appears in a passage making the case that taking action
6 to control and limit noise is as important in developing countries as in developed ones:


7 In comparison to other pollutants, the control of environmental noise has been
8 hampered by insufficient knowledge of its effects on humans and of dose-
9 response relationships as well as a lack of defined criteria. While it has been
10 suggested that noise pollution is primarily a "luxury" problem for developed
11 countries, one cannot ignore that the exposure is often higher in developing
12 countries, due to bad planning and poor construction of buildings. The effects of
13 the noise are just as widespread and the long term consequences for health are
14 the same. **In this perspective, practical action to limit and control the**
15 **exposure to environmental noise are essential.** Such action must be based
16 upon proper scientific evaluation of available data on effects, and particularly
17 dose-response relationships. The basis for this is the process of risk assessment
18 and risk management.

19 Of course, I do not disagree with the basic proposition that noise control regulation is important in
20 every country. Nonetheless, I take issue with the pervasive misrepresentations of the actual content of
21 the WHO report, of which this is also one.

22 19. Finally, there is no indication that either the Noise Task Force or the Board of
23 Supervisors relied on the quotations assembled as Exhibit D, as its introduction asserts. The
24 quotations are not referenced in the Noise Task Force minutes that Ms. Yamada submits as Exhibit C.
25 And while Section 2900, the declaration of policy with which Article 29 begins, does generally
26 reference the WHO, it is only with two general statements: first, that the WHO has determined, along
27 with the EPA, that "persistent exposure to elevated levels of community noise is responsible for public
28 health problems" (§ 2900(a)); and second, that it is City policy to reduce noise levels in areas where
the noise levels exceed the standards set in the WHO Guidelines on Community Noise (§ 2900(c)).
This does not indicate that the Task Force or the Board or anyone else relied on Ms. Yamada's list of
selective quotations.

1 20. Finally, I note that the pervasiveness of unsupported, misleading, and outright false
2 statements in Ms. Yamada's written materials counsels great caution when evaluating the reliability of
3 any new assertions she may make at the upcoming hearing.

4 I declare under penalty of perjury under the laws of the State of California that the foregoing is
5 true and correct and that this document was executed on the 13th of November 2014 in San Francisco,
6 California.

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JUNE M. WEINTRAUB



City and County of San Francisco
DEPARTMENT OF PUBLIC HEALTH
ENVIRONMENTAL HEALTH

Edwin M. Lee, Mayor
Barbara A. Garcia, MPA, Director of Health
Richard J. Lee, MPH, CIH, REHS
Acting Environmental Health Director

June 24, 2014

Aaron Thornton, Senior Associate
Gould Evans Architecture
95 Brady Street
San Francisco, CA 94103

Re: Noise Variance Application – Momo's Restaurant (760 2nd Street)

Dear Mr. Thornton,

The San Francisco Department of Public Health ("SFDPH") has reviewed the variance application and supplemental materials for Momo's Restaurant dated May 27, 2014. We find that your request has sufficient merit and therefore grant Momo's Restaurant a noise variance for the south property line (along King Street) under the conditions set forth below. Failure to implement the following conditions may result in revocation of this variance and the institution of enforcement penalties:

- Perform and document regular maintenance of the rooftop exhaust fans in accordance with the manufacturer's recommendations
- Inform SFDPH prior to the addition, relocation, or substitution of any rooftop equipment

This variance applies only to the equipment configuration on the design plan provided to SFDPH dated May 20, 2014 and only to the south property line. The variance will be effective upon receipt of a signed copy of this letter and subject to any appeals filed in the 15 days following. At our discretion, SFDPH may rescind this variance if it is determined that Momo's Restaurant has violated the above terms. Please direct any questions or concerns to Jonathan Plakis (Jonathan.Plakis@sfdph.org).

Sincerely,

Richard J. Lee, MPH, CIH, REHS
Acting Environmental Health Director

Momo's Restaurant understands and agrees to comply with the terms of this variance.

Signature

06.24.2014
Date



MEMORANDUM

date: 27 May 2014 **pages:** 2

name: Aaron Thornton **company:** Gould Evans **email:** aaron.thornton@gouldevans.com

from: Ethan Salter, PE, LEED AP

subject: **Momo's Rooftop Exhaust Fan Replacement – Noise Ordinance Variance Discussion for South Property Line (King Street)**
CSA project number: 13-0001

After the City of San Francisco's Department of Public Health (DPH) measured noise from the new kitchen exhaust fans on 8 May 2014 and in their final inspection found them to be in compliance with the Noise Ordinance, we understand the owners have elected to apply for a Variance to the City Noise Ordinance for the south property line on King Street. This memo provides further acoustical information in support of this application.

VARIANCE DISCUSSION

Provide a detailed description of why a variance from the Noise Ordinance is necessary for this source of noise. The description should include any actions taken to mitigate the source of noise or its impact on people or residences located in this area.

The replacement kitchen exhaust fan systems for the subject restaurant have been designed and installed to significantly reduce noise transmission to the closest residential and commercial properties surrounding the project rooftop. A summary of the system features is as follows:

1. **Evaluation of Site:** The site is bordered on the south by King Street, a large thoroughfare with six lanes of car and truck traffic. MUNI light rail trains in the median of King Street also produce significant noise. Across King Street to the south is AT&T Park, which is intermittently occupied, non-residential, and also can be a significant neighborhood noise source during much of the year (e.g., baseball, concerts, events, etc.) Ambient noise levels (as defined by the City Noise Ordinance) are higher in the vicinity than in many other parts of the City.
2. **Noise Ordinance Policies:**
 - A. Section 2916 of the San Francisco Police Code (Noise Ordinance) states that "The Director of Public Health may enforce the provisions of Section 2904, 2909, and 2912 of this Article". Section 2909 is the Section responsible for establishing property line noise limits, which are based on a site's ambient noise level plus an allowable increase in noise (up to 5 dBA¹ for residential property lines and 8 dBA for commercial property lines). Section 2900, Declaration

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¹ dBA – A-Weighted sound pressure level (or noise level) represents the noisiness or loudness of a sound by weighting the amplitudes of various acoustical frequencies to correspond more closely with human hearing. A 10-dB (decibel) increase in noise level is perceived to be a doubling of loudness. A-Weighting is specified by the U.S. EPA, OSHA, Caltrans, and others for use in noise measurements.

of Policy, states "In order to protect public health, it is hereby declared to be the policy of San Francisco to prohibit unwanted, excessive, and avoidable noise."

- B. Section 2912.d of the Ordinance states, "The Department of Public Health may investigate and take enforcement action on any noise complaint resulting in human health impacts."
- 3. **Placement of the fans:** The units were located on the roof as close to the King Street façade as was feasible. The goal was to reduce potential impacts on nearby residential neighbors consistent with the Noise Ordinance policy language: 88 King Street to the east and 750 2nd Street to the north. However, the new fans were also situated such that passers-by on King Street's sidewalks, as well as patrons on the Momo's patios, were protected from fan noise emissions by the parapet of the building acting as an acoustical barrier.
- 4. **Type of fans:** Axial-flow fans were selected based on their noise levels and also how they produced noise. These fans are directional; this means that a majority of their noise emissions are produced by the outlet of the fan. By orienting the fan outlet towards the least-sensitive property line, potential impacts from the project were further reduced.
- 5. **Fan operational adjustments:** After initial installation, it was determined that the loudest fan had a malfunctioning bearing which needed replacement. Additionally, this fan was balanced and adjusted by the mechanical contractor after confirming that the fan speed could be reduced with no impacts to the cooking operations in the kitchen. After these adjustments, fan noise emissions were significantly reduced and met the Noise Ordinance requirements at the King Street façade/south property line.
- 6. **Conclusion:** The Noise Ordinance is meant to protect public health. The project systems were designed with this in mind, as stated above. The loudest parts of the fans (i.e., the outlets) were oriented towards the property line that was the least sensitive (south towards King Street).

In our experience, the City Noise Ordinance considers future growth and changes to neighborhoods (e.g., higher-density, taller buildings) by enforcing a "property plane" ordinance. In many parts of the City, this approach can be beneficial because what exists today can change in the future, and potentially could expose future residents to excessive noise impacts from existing sources. However, in the case of Momo's kitchen exhaust fans there is little likelihood of significant changes to King Street or AT&T Park. Ambient noise levels on the south property line are also the highest of any at the project. As such, potential noise impacts to human health are minimized by the project.

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This concludes our current comments on the subject project. Please call with any questions.

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ES/es
2014_05_27 760 2nd Street Momo's (13-0001) Noise Ord Variance Application Acoustics Language Input Memo

