

**BEFORE THE BOARD OF APPEALS
OF THE CITY AND COUNTY OF SAN FRANCISCO**
Appeal No. 14-141

FINDINGS

On October 8, 2014, November 19, 2014 and December 10, 2014, this Appeal, filed by Michiko Yamada of the issuance of a Noise Variance (the "Variance"), came before duly noticed hearings of the Board of Appeals. The Variance is regarding noise from the mechanical exhaust system and equipment used by Roostertail Restaurant at 1963 Sutter Street (the "Property").

Having heard all the public testimony and reviewed all the documents in the record on this matter (the "Record"), the Board of Appeals hereby grants the Appeal and denies the Variance based on the following Findings and subject to the following Conditions:

1. According to the Record, Appellant, Michiko Yamada, resides at 1959 Sutter Street, which is immediately adjacent to the Property. She has lived at this address for eight years and her family has owned this property for 28 years. On or about December 2011, Roostertail Restaurant ("Roostertail") began operating three newly installed commercial-grade exhaust fans with ducts (the "Equipment") located in the lightwell between the Property and the Appellant's residence. Appellant immediately began to experience new noise and vibration levels in her home. In an effort to mitigate this increased noise and vibration, Appellant had four double-pane windows installed in her home but without the desired effect.
2. The Board takes note of San Francisco Police Code Article 29 (the "Code"), which governs noise standards in San Francisco, and in particular Sections 2900(c) and 2909(b) of the Code. Section 2900(c) expresses the City's policy in adopting Article 29. It 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 World Health Organization's Guidelines on Community Noise.

Section 2909(b), which sets the noise standard for mixed residential and industrial uses at 8 dBA over ambient, states:

No person shall produce or allow to be produced by any machine or device, music or entertainment or any combination of same, on commercial or industrial property over which the person has ownership or control, a noise level more than eight dBA above the local ambient at any point outside of the property plane....

3. The Record reflects that in September 2012 the Appellant filed a noise complaint with the San Francisco Department of Public Health ("DPH"). In October 2012 she hired an acoustical expert who took exterior noise readings that found the noise level at the top floor of the lightwell between her residence and the Property, and on the

roof of the Property, exceeded ambient noise levels by 14 dBA. On or about December 5, 2012 a DPH inspector took noise readings that found the noise level in the lightwell to be 56 dBA, 11 dBA over ambient. A DPH Inspection Report was issued giving Roostertail 30 days to submit a plan on how it would reduce noise levels to 53 dBA or less. Instead of submitting such a plan, on or about December 26, 2012, Roostertail submitted a noise variance application.

4. According to the Record, on or about March 14, 2013, Dr. Rajiv Bhatia, then Director of the DPH Environmental Health Section denied the variance stating:

Many parts of San Francisco have outdoor noise levels that exceed optimal levels for community health. The outdoor standard is intended to both prevent noise impacts on neighbors as well as reduce contributions to cumulative noise levels. The Department generally has not granted variances for noise in residential or mixed-residential commercial areas where available alternate equipment or equipment installation would avoid a noise violation. Your variance application noted the fact of a significant recent renovation of your business that included the new equipment that contributes to the noise at issue. San Francisco's current noise standard has been in place since 2008. It is unclear why professionals guiding this renovation did not select and install the equipment to be compliance [sic] with the current applicable laws.

5. The Record shows that Roostertail appealed the denial of this variance to this Board and on June 4, 2013 the denial was upheld by the Board. Roostertail submitted another variance application on or about March 28, 2014 which was considered by DPH at an April 22, 2014 Abatement Conference. A letter dated April 26, 2014, from Richard Lee, the current Director of the DPH Environmental Health Section, acknowledged abatement work completed at the Property in January 2014 that consisted of partially wrapping the Equipment duct in the lightwell with acoustical duct lagging and noted that subsequent noise level readings found the sound in the lightwell and at the roof to be 57.7 dBA and 59.1 dBA, respectively. This letter informed Roostertail that the violation on the roof would be granted a variance if additional abatement work as described in the letter was performed. It also stated that the noise in the lightwell "is not an enforceable location for sound level measurements because it does not meet the standard set in Article 29, Section 2902."

Code Section 2902 reads:

A person measuring the outside noise level shall take measurements with the microphone not less than four feet above the ground, at least four and one-half feet distant from walls or similar large reflecting surfaces, and protected from the effects of wind noises and other extraneous sounds by the use of appropriate windscreens. A person measuring the inside noise level measurements shall take measurements with the microphone at least three feet distant from any wall, and the average measurement of at least three microphone positions throughout the room shall be used to determine the inside noise level measurement.

6. According to the Record, Roostertail proceeded with the additional abatement work and without taking any additional noise level readings, on July 23, 2014, DPH granted the Variance. This Variance applies only to the rooftop fan noise and is based, in part, on the conclusion that there are no human receptors at the rooftop location and hence no public health hazard. On August 7, 2014, Appellant timely appealed to this Board.

7. The Record contains additional noise level readings taken by the Appellant's acoustical expert on or about July 31, 2014, which found the noise in the lightwell to be 60 dBA and the noise at the roof to be 59 dBA.
8. The Board finds credible evidence and testimony in the Record from the Appellant, the Appellant's acoustical expert and from members of the public who have been present in the Appellant's residence when the Equipment is both in operation and silent, that noise emanating from the Equipment does enter into the Appellant's residence, that this noise is significant and that it is disturbing to Appellant and to others who spend time in her residence. Additional testimony presented to the Board asserts that noise from the Equipment also negatively affects individuals in residential units located above Roostertail at the Property.
9. The Board finds evidence in the record that the noise at the roof from the Equipment violates Article 2909(b) by exceeding ambient noise levels by more than 8 dBA. The Board further finds that, despite reasonable efforts by the Appellant to mitigate the impact of noise from the Equipment, the Appellant continues to be disturbed by this noise. The noise generated on the rooftop and in the lightwell by the Equipment is unwanted and excessive, and the Board is not convinced that it could not be averted by additional abatement efforts by Roostertail. Given the weight of the evidence noted above regarding all of the noise generated by the Equipment and its effect on the Appellant, other persons in the Appellant's unit, and persons residing in units above Roostertail at the Property, the Board finds that the issuance of the Variance is not supported and that the Variance should be denied.

DETERMINATION

Based on the above Findings, the Board of Appeals grants the appeal, overrules the Department of Public Health, and denies the Variance.

The undersigned hereby certify that the Board of Appeals adopted the findings above at its regular meeting on December 10, 2014.

Ann Lazarus, President

Cynthia G. Goldstein, Executive Director



DENNIS J. HERRERA
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Comments on Draft Findings
Appeal No. 14-141
Yamada v. Dept. of Public Health

BOARD OF APPEALS
DEC 04 2014
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To The Honorable Members of the Board of Appeals:

The Department of Public Health would like to thank Executive Director Goldstein for her careful efforts to ensure that the facts recited in the Draft Findings (“Draft”) are materially correct. At the same time, the Department notes that factual accuracy, standing alone, is not enough to ensure that Draft accurately describes the matter now before the Board for decision, because a true statement can easily be misinterpreted if it is materially incomplete. The Department is concerned that this may be the case here, and it urges the Board to supplement the Draft with the material facts that have been omitted in regard to critical issues of sound measurements and the bases for the Director’s variance decision. Only by doing so can the Board assure the parties, the Department – and most importantly itself – that its decision flows from its full and fair consideration of all of the major issues and key facts before it.

1. Sound Measurements. The Draft reports all of the sound measurements taken in this matter with the material exception of the indoor noise levels that DPH measured on January 22, 2014. These measurements, taken in the middle of the day and with the window to the lightwell open, determined the sound levels in Appellant’s living room and bedroom to be 38.3 dBA and 40.6 dBA respectively. Declaration of Jonathan Piakis at ¶ 4 & Ex. A. These levels are roughly 15 dBA below the daytime interior residential noise limit, and even well below the nighttime limit that Section 2909(d) of the Noise Ordinance declares to be protective of public

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health. These measurements are undisputed, and Appellant has not sought to refute them as inaccurate or unrepresentative. Although Appellant's acoustical consultant, Charles M. Salter Associates ("Salter"), has repeatedly measured sound levels outside her apartment, Salter apparently never took indoor sound measurements – or, if it did, Appellant has not submitted them here.

The very low interior noise level is a material fact relevant to key issues presented in the Draft, and it should have been included. Reading paragraph 6, one would think that the Director made his public health determination solely in regard to the rooftop noise, without considering the impact of the lightwell noise on Ms. Yamada's living space. But including the omitted interior noise measurements makes clear that this is not true; the public health determination reflects both the fact that the rooftop noise entirely dissipated before anyone would hear it and the fact that Ms. Yamada's apartment remained very quiet despite the noise in the lightwell. Similarly, reading paragraph 7, one would think that a consulting acoustical expert provided conclusive evidence that Roostertail's kitchen exhaust system created "significant" noise inside Appellant's apartment. But including the omitted interior sound measurements makes clear that even if Salter did represent that Roostertail created significant noise inside Appellant's apartment, such evidence is disputed rather than conclusive, and at best a personal opinion, not a sound measurement.

The Draft also creates a misimpression when it recites the amount by which the measured outdoor sound levels exceed ambient sound levels in Paragraph 3, but not in Paragraph 4. Adding that material information to Paragraph 4 would have revealed that DPH measured the rooftop noise as 8.5 dBA over ambient – that is, only 1/2 decibel above the permissible limit –

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and accordingly that the rooftop violation for which Roostertail sought a variance was de minimus.

2. The Variance Decision. The Draft also omits almost all of the considerations that led the Director to issue the variance. Paragraph 6 explains only that the variance “is based, in part, on the conclusion that there are no human receptors at the rooftop location and hence no public health hazard.” While once again a true statement, this partial description creates the misimpression that this was the Director’s only noteworthy consideration, and therefore the only rationale for the Board to review. In fact, however, the Director also considered: 1) the lightwell is not an enforceable location under the Noise Ordinance; 2) Roostertail, a small business, had nonetheless invested \$8000 to dampen the lightwell noise (also nowhere revealed in the Draft though Appellants’ efforts are discussed); 3) Roostertail creates at most very low levels of noise inside Appellant’s residence that are not a public health concern; and 4) requiring Roostertail to mitigate rooftop noise would further financially burden Roostertail but benefit no one.

In every variance decision, the legal violation is clear, and the real question boils down to a judgment call about whether, under the particular circumstances, it is better to enforce or to waive a one-size-fits-all legal standard. To make that judgment call fairly, the Board must fully consider all of the issues and material facts before it, and be able to explain why it made its decision without avoiding key questions or selectively presenting only certain facts.

Accordingly, the Department urges the Board to amend the Draft to include the omitted facts and considerations and conduct final deliberations that weigh and balance all of the competing interests, not just some. That way, the stakeholders can have confidence that the Board’s final decision is fair and truly represents its best judgment, whether they themselves would have reached the same decision or not.

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Very truly yours,

DENNIS J. HERRERA
City Attorney

/s/ Sherri Kaiser

Sherri Kaiser
Deputy City Attorney

cc: Michiko Yamada
David Silverman

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 December 4, 2014, I served the following document(s):

7 **1) Letter to Board re Proposed Findings**

8 on the following persons at the locations specified:

9 **Paul Wermer, Esq.** **Attorney for: Michiko Yamada**
10 Michiko Yamada (Appellant)
11 Docs. to be dropped off
12 at following location:
13 Board of Appeals
14 1650 Mission Street
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 December 4, 2014, at San Francisco, California.

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LILY KANG

Goldstein, Cynthia (PAB)

From: Gwyneth Borden <gwyneth@ggra.org>
Sent: Thursday, December 04, 2014 12:28 PM
To: Goldstein, Cynthia (PAB)
Cc: Kaiser, Sherri (CAT); dsilverman@reubenlaw.com
Subject: Board of Appeals Case No. 14-141

BOARD OF APPEALS

DEC 04 2014

APPEAL # 14-141

Dear President Lazarus & Commissioners,

The Golden Gate Restaurant Association is deeply concerned by the precedent that could be set in overruling the Department of Public Health's noise Variance for Roostertail Restaurant. The implications could be vast, as restaurants all over the City could be forced to incur cost prohibitive expenses to abate unattainable noise levels, or worse yet, be forced to shut down because they cannot comply.

As you know, restaurants are the backbone of our neighborhoods, where people convene daily to be nourished, meet their neighbors and friends, and celebrate their life milestones. Additionally, tourists from all over the world identify our restaurants as a top driver for their visit. Throughout San Francisco, restaurants are located in mixed use corridors, often immediately below and adjacent to housing. Neighborhood Commercial (NC) corridors, were designed to accommodate commercial activity, particularly restaurants, with NC-3 (Neighborhood, Moderate Scale) Zoning Districts allowing broader types and sizes of commercial uses.

Restaurants must have exhaust systems which do generate noise and sometimes vibration, which masquerades as noise. As you know, the code deals with noise but not vibration, and it is possible that the Roostertail Restaurant issue may be related to vibration not noise.

Variances were created to deal with exceptional and extraordinary circumstances, which this case clearly is, as the light well (the alleged main source of noise) is too small for accurate sound readings to be taken, compromising noise level measurements. Even still, Roostertail spent \$8,000, to perform work at the direction of the Department of Public Health to abate the light well noise, since the rooftop noise was neither the issue nor priority for the complainant. Had Roostertail done the rooftop work instead of the light well work, the noise identified by the complainant would not have been mitigated at all.

There are rooftop exhaust systems all over the City and their noise is rarely the source of public nuisance. Denying a Variance related to the rooftop noise, establishes a new standard and opens up the specter of rooftop noise issues. This denial creates a cost prohibitive new standard for roof top noise and in its intent, rewrites the code standard for light well noise measurements.

I urge the Board to reconsider its decision and consider the greater impact denying this Variance will have across the City.

Sincerely yours,
Gwyneth Borden

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