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Noise Nuisance: A New Twist on an Old Law

STATE AND MUNICIPALITIES SEEKS BEST WAY TO ENFORCE LAWS

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In recent years, noise nuisance as an issue in land development has emerged in new and interesting ways in Connecticut. While noise nuisance law has been around for a long time, recent cases have posed some peculiar noise measurement and compliance issues that may become more common in, and instructive for, the years ahead.

The law is clear that some level of noise in the use and enjoyment of one's property is to be expected; few people can reasonably expect to live in silent surroundings completely free from all interference. Nevertheless, noise impacts can still amount to a nuisance if they are irritating, disturbing or annoying. When they do, the noise "receptor"

a neighbor. Thus, where conduct unreasonably interferes with an individual's right to the use and enjoyment of her land, a private nuisance has occurred. An essential element in the analysis of a claim for a private nuisance hinges on the unreasonableness of the interference, which is based on the facts of each case; an unreasonable nuisance in one case can be completely reasonable, and thus, not a nuisance, in another.

On the other hand, public nuisance law is based on the interference of a right common to the general public, typically involving public health and safety. Common examples of a public nuisance include air pollution, the obstruction of waterways



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(the party allegedly suffering from noise nuisance) may be entitled to injunctive and monetary relief.

A nuisance can be characterized as either private or public. While there are some similarities between a private and a public nuisance, the two are distinct causes of action. Private nuisance law is based on the general premise that each person has a duty to use her property in a way that does not cause unnecessary damage or annoyance to

or other unsafe premises. Not surprisingly, noise can also constitute a public nuisance.

Noise is a form of pollution and is thus governed by our environmental protection state laws and regulations governing noise (see Connecticut General Statutes §§22a-67 et seq.; Regulations Connecticut State Agencies §§22a-69-1 et seq.). While the statutes and regulations establish minimum standards for background noise, measurements, decibel levels and types of noise, C.G.S. §22a-73 authorizes

municipalities to enact noise ordinances that are stricter than state law standards. Local noise ordinances that impose greater restrictions must be approved by the Department of Energy and Environmental Protection (DEEP) and many municipalities across the state have taken advantage of developing and implementing more stringent noise ordinances and regulations.

Key Experts, Key Issues

While a thorough understanding of the state and local laws on noise is vital in any noise nuisance action, the retention of an experienced, credible acoustical engineer is critical to evaluating what is and is not a nuisance. The science behind acoustic modeling and sound mitigation is tricky. Thus, working with a skilled expert who can help navigate the testing process and understand the results can make or break a claim for noise nuisance.

For example, last year the central issue in a Connecticut case was the proper “metric” to be used in determining whether a noise emitter complied with state and local noise levels. In that particular instance, the local noise ordinance mirrored the state DEEP regulation, C.G.S. §22a-69-3.1, in that it prohibited any property owner from emitting noise beyond its property line in excess of pre-established noise levels.

This particular municipality prohibited noise beyond an owner’s property line higher than 55 dBA during the daytime hours and 45 dBA during nighttime hours (dBA refers to “A-weighted” decibels, which reflect noise levels at frequencies audible to the human ear). The local noise ordinance was also stricter than the DEEP regulations, however, in that it did not allow “excursions,” meaning limited time periods where noise levels may be higher than the stated maximum.

In court, the debate between each side’s noise expert was based on which metric was appropriate: the “Lmax” metric, which measures the highest decibel level recorded at one-eighth-of-a-second intervals over a time period representative of the noise condition or emitter being evaluated, or the “Leq,” or the average sound emitted over a specified time period, applied in determining compliance with both the state and local noise limits. While the dBA levels using the Lmax metric reflected consistent noise violations in excess of the 55 dBA limit during daytime hours, the dBA levels using the Leq metric indicated that the subject property was in compliance with the local noise levels.

Ultimately, the court determined that the Lmax metric applied because the local noise ordinance was concerned with exceedances, or peak noise levels, which exceed the maximum decibels established in the noise ordinance. The court noted that the Lmax metric more accurately reflected human experience with noise; people do not hear noise averages. As a result, the court issued a temporary injunction prohibiting

operation of the offending facility until a noise mitigation plan was submitted and approved by the court.

Community Standards

Notwithstanding the fact that Lmax is the proper metric in determining compliance with established state and local noise limits, there are situations where use of the Leq metric is appropriate. One such example is the measurement of “community noise,” which the World Health Organization defines as noise emitted from all sources, other than from the industrial workplace. Sources of community noise can vary and can include everything from general neighborhood noise (such as the hustle and bustle from the local post office) and road traffic, to the use of appliances such as air conditioners.

Federal courts have consistently held that Congress has vested in federal agencies the authority to develop their own procedures and methodologies in conducting environmental analyses under the National Environmental Policy Act, which serves to ensure that each agency considers environmental concerns in its decision-making process, including noise concerns. See *Citizens Concerned About Jet Noise v. Dalton*, 48 F. Supp. 2d 582, 596 (E.D. Va. 1999) aff’d, 217 F.3d 838 (4th Cir. 2000).

Accordingly, in a line of cases having to do mostly with airport/airplane noise, numerous federal courts have upheld the use of the Leq metric in determining the overall or cumulative noise impact produced from a specific source. See, e.g., *Valley Citizens for a Safe Environment v. Aldridge*, 886 F.2d 458, 468-69 (1st Cir. 1989); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 578-79 (9th Cir. 1998).

In addition to the question of which metric to use, the type of noise being emitted is an important factor in evaluating a potential noise nuisance. Similar dBA levels of different types of noise can lead to markedly different levels of annoyance. For example,

heavy road traffic noise reflecting similar dBA levels to gunshots emitted from a neighboring gun range will generally affect noise receptors differently. Not surprisingly, road traffic is a more commonplace, steady stream of noise whereas gunshots are typically frightening bursts of sound. Ultimately, the type of noise being evaluated ties back to the question of reasonableness: is the noise interference beyond what the noise receptor should have to bear in the use and enjoyment of her property? If the answer is yes, then the noise receptor may be entitled to compensation.

Compliance

Ultimately, the key to choosing the right noise metric lies in the purpose of the noise analysis. Complaints of noise nuisance at the local level often focus on noise exceedances, or peak sound levels, which are properly captured by the Lmax metric. On the other hand, general evaluations of community noise standards, such as the cumulative noise emitted from an airport, are more appropriately measured by the Leq. Either way, the retention of an experienced engineer to help navigate the extraordinarily technical world of acoustics can be the key to successfully defending or prosecuting a noise nuisance case. ■

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