



October 13, 2023

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Via Email and Regular Mail

Hon. Kevin Conero and  
Planning Board Members  
Village of Montgomery Planning Board  
133 Clinton Street  
Montgomery, New York 12549

Re: Supplemental Response by The Noise Consultancy LLC  
KSH Warehouse Facility  
Our File No. 15761-001

Dear Chair Canero and Members of the Board:

I am submitting this letter to supplement the comprehensive response from the applicant's noise expert Mike Bontje, Senior Scientist, B. Laing Associates Inc., to the August 17, 2023, letter from the Planning Board's noise consultant Stephen Szulecki.

This response letter addresses solely the issue of the appropriate noise level standard for the Village and Planning Board to utilize in the review and ultimately enforcement of the Villages noise ordinance included in Chapter 77 of the Village Code.

Under New York State law governing statutory construction as it pertains to the review and interpretation of the Village noise ordinance, it is clear that the sound level standard used would be represented by the metric LAeq or Leq dBA (Leq) and not the metric Lmax or Lmax dBA (Lmax) standard as suggested by Mr. Szulecki as an option in his letter.

In support of our position, I submit the following summary of relevant law:

1. All parts of a statute or legislative act are to be construed as a whole and all parts of such act are to be read and construed together to determine the legislative intent. *See* McKinney's Consolidated Law of New York "Statutes" Section 97.

The table contained in Section 77-5(B) provides limits of noise that could emit beyond the boundaries of a property owners premises shall not exceed the levels as set forth for industrial, business and residential uses both day and night. These limits are set forth as

maximum (dBA). The code is silent as to whether the Leq or Lmax standard is to be utilized. However, if you read down immediately in the next subsection (Section 77.5(C)) this section provides standards for background noise levels and impulse noise which provides for a standard, depending on the location, of either 80dB (peak sound) or 100dB (peak sound). If the table in 77.5(B) above was meant to imply a max or peak sound level (Lmax), section 77.5(C) would not be needed since the peak or max sound would be the level listed in the 77.5(B) table. Therefore, applying the rules of statutory construction to give meaning to all sections of the code and reading it as a whole, it would be clear that the only way to read the table above is as providing limits for Leq and not Lmax. Further, I note that as provided in Mr. Szulecki's letter, the guidance for determining the significance of possible noise impact, on the Leq standards, which is demonstration that this is the usual accepted standard.

2. The Villages noise ordinance impacts the ability of a property owner to use its property and therefore any ambiguity in the law must be construed in favor of the property owner. *See Allen v. Adami*, 39 NYS2d 275 (1976). *See also Huntington v. Barracuda Transp. Co.*, 80 AD2d 555 (2<sup>ND</sup> Dept. 1981).

Since the table is silent as to whether the Leq or Lmax standard is used at very best it could be considered ambiguous (although as discussed above we believe it is clear that the Leq standard is what was intended when reading the statute as a whole). An interpretation that the table was intended to use the Lmax standard would result in the Village reading into the statute the most restrictive interpretation which would be in clear contravention of the law in New York State, and unduly restrict this applicant/property owner's use of this property.

3. Statutes are to be construed in a manner to avoid absurd results. *See McKinney's "Statutes" Section 145.* (*See also* Mr. Bontje's response Items 1.3, IX and X.

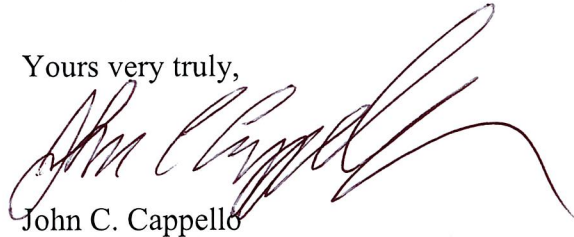
I note that the provisions being applied are Village code noise regulations and not a zoning law. Therefore, the law must be applied equally to all property owners and residents in the Village regardless of whether such business or home was in existence prior to adoption of the law. There are no grandfather provisions.

Mr. Bontje's reply letter includes information based upon sound study and analysis he conducted demonstrating that the two business where he took measurements would have failed both the daytime and the nighttime noise limits if the Lmax standard were to be applied. Therefore, if the Village and/or Planning Board were to attempt to interpret the table and the noise law and apply the Lmax standard, these two businesses and likely many more business owners and residences would be in violation of the standards and the Village Noise Law since the Village is required to enforce the law equally against these business owners and residents in addition to the applicant. It is quite clear that this would lead to an absurd result and severely restrict existing and future business owners seeking to conduct business and locate in the Village from operating.

Therefore, based on the above, we believe it is clear that the standard to be applied is Leq standard as suggested in Mr. Bontje's letter and consistent with DEC guidelines. I note the Mr. Bontje's letter includes the additional measurements and studies requested by Mr. Szulecki and provides the results and analysis and whatever additional mitigation measures are being undertaken to address those conditions.

I look forward to discussing this matter with your Board further in the very near future to come to a resolution and appropriately conclude this matter.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Cappello", with a long, sweeping flourish extending to the right.

John C. Cappello

JCC/jb  
Encls.

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