



ASSOCIATED GENERAL CONTRACTORS of ALASKA

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February 1, 2007

Lura J. Morgan
Manager, Division of Environmental Services
Municipality of Anchorage
825 L. Street
Anchorage, Alaska 99501

Dear Ms. Morgan:

We received your letter of December 29 and distributed it to members of our task force on the noise ordinance. Unfortunately because of the holidays, business trips, and other such interruptions, it has taken us some time to respond in the manner that seemed appropriate considering the seriousness of the issue.

First of all, we need to remind you that AGC is a trade association of commercial contractors. As such we do not have a cadre of members readily available to analyze the intricacies or nuances involved with the technical aspects of a noise ordinance. For these items, it is necessary that we turn to experts in the field. AGC believes that it is in the best interests of the construction industry that we not receive special treatment, only that we receive fair treatment. We also understand that the definition of the term "fair" may differ depending on ones perspective. For this reason, AGC believes that it is appropriate to look to other localities to help determine how they balance these different perspectives.

Second, we requested assistance from Earl Mullins to address some of your questions. I'm sure that you would agree that Earl is arguably the foremost expert in Alaska on the technical issues involved. While Earl is not a "hired gun" of AGC, he has agreed to respond to some of the questions you asked, but I expect that any further guidance or assistance from him will appropriately come with a request that he be reimbursed for his expertise. If the MOA desires more detailed information or wants to know what is happening in other areas of the country, it would seem only fair that they hire Earl as a consultant, since he is interested in being true to the science, not undertaking research to support a predetermined objective.

Finally, this issue is extremely important to AGC and the construction industry. We understand the concerns of those seeking a more strict interpretation of a noise

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ordinance. It is not our desire to be unreasonable on this matter. Instead we are committed to work toward a compromise under which all parties seek a common ground based on a mutual appreciation of the goals and objectives of each. There seems to be little doubt that this issue will become of even greater concern as Anchorage continues to grow and become more congested, and therefore it deserves a reasoned, responsible approach now.

As indicated above, Earl Mullins has agreed to respond to some of your questions. His letter is attached and is considered part of this letter. AGC has not edited his response nor have we solicited answers from him that might be considered pro-industry. If we have any issues with his responses, we will address them at a future time in a separate letter.

The question specifically not addressed in Earl's response concerns Section 15.70 Paragraph B. It is the position of AGC's Task Force that Section 15.70(B) must expressly provide that the applicable noise limit in cases involving different adjoining land use categories between the emitting property and the receiving property is the arithmetic mean of the noise limits for each respective land use category. In response to your request for authority supporting the inclusion of an arithmetic mean clause, please consider the following examples which are not all inclusive, but merely illustrative:

Numerous city noise ordinances include an express arithmetic mean provision. See e.g., San Diego Municipal Code § 59.5.0401(B) ("The sound level limit at a location on a boundary between two zoning districts is the arithmetic mean of the respective limits for the two districts."); Coronado Municipal Code § 41.10.010(B) ("The sound level limit at a location on a boundary between two zoning districts is the arithmetic mean of the respective limits for the two districts."); Solana Beach Municipal Code § 7.34.040(C) ("The sound level limit at a location on a boundary between two zoning districts is the arithmetic mean of the respective limits for the two districts."); Long Beach Municipal Code § 8.80.150(D) ("If the measurement location is on a boundary between two different districts, the noise level limit applicable shall be the arithmetic mean of the two districts."); Poway Municipal Code § 8.08.040 ("The sound level limit at a location on a boundary between two zoning districts is the arithmetic mean of the respective limits of the two districts;"); Orono Municipal Code § 13-53(a) ("Where properties in two or more districts join at a common boundary, the maximum noise level shall be the arithmetic mean of the maximum levels for each of the properties affected); and Tulalip Tribes Ordinance No. 155, § 5(b) ("The sound level limit at a location on a boundary between two zoning districts is the arithmetic mean of the respective limits for the two districts").

The municipality's position, that the sound level limit is the arithmetic mean of two adjoining *receivers*, is inconsistent with the plain language of all arithmetic mean ordinances, including those the city ordinances set forth above, and we believe inconsistent with any common sense interpretation of the existing MOA ordinance. The arithmetic mean clause in all arithmetic mean ordinances applies to the differing adjoining land use categories as between the *emitter* and the receiver, and not

between two adjoining receivers. For example, the Poway Municipal Code § 8.08.040 provides that “it is unlawful for any person to cause or allow the creation of any noise to the extent that the one-hour average sound level, at any point on or beyond the boundaries of the property on which the sound is produced, exceeds the applicable limits set forth below. . . The sound level limit at a location on a boundary between two zoning districts is the arithmetic mean of the respective limits for the two districts. . . .” In other words, if the emitter’s noise extends on or beyond the property boundary into a different zoning district, for example the emitter is within an industrial zone and the receiver is within a residential zone, then the sound level limit is the arithmetic mean of the respective limits for the emitter’s and receiver’s districts.

The arithmetic mean clause proposed by AGC is not only consistent with all other arithmetic mean city ordinances, but it is also consistent with two leading model noise

ordinances which advocate setting standards interrelating the different classes of noise receivers with those of noise emitters. See Findley & Flager, *State Regulation of Nontransportation Noise: Law and Technology*, 48 S. Cal. L. Rev. 209 (1974); York, *A Model Ordinance to Control Urban Noise Through Zoning Performance Standards*, 8 Harv. J. Legis. 608 (1971). Findley & Flager explain that this scheme “has the advantage of providing a mechanism for establishing levels which give the different classes of receiver the maximum feasible protection according to their needs and to the abilities of different classes of emitters to quiet down. At the same time, it does not impose a higher standard on the emitter than necessary to respond to the different classes of receivers.” 48 S. Cal. L. Rev. at 263. Similarly, York states, “[T]he preferable mode of regulation therefore is to control noise according to both source *and* recipient. . . As Figure 9 illustrates, the amount of noise that a use in a particular zone may produce depends upon the location of the source as well as the location of the recipient. An industrial use, for example, may transmit more noise to its industrial neighbors...than it can to its commercial neighbors . . . The fact that industry may make more noise in a commercial zone than may a commercial use in the same zone...is a reflection of the compromise achieved by this statute which renders it more realistic than the flat recipient statute.” 8 Harv. J. Legis. at 628. A review of York’s table of recommended noise limits shows that the applicable noise limit for each combination of land use categories is based on the arithmetic mean of the noise limits for each respective category. For example, the noise limit...for a noise emitted from an industrial zone and received in a residential zone constitutes the arithmetic mean of the industrial noise limit and the residential noise limit. See 8 Harv. J. Legis. at 629.

The City of Portland, Oregon has adopted a noise ordinance which follows the model noise ordinances advocated by Findley & Flager and York. See Portland Municipal Code § 18.10.010. The Portland ordinance establishes varying noise limits in cases involving different adjoining land use categories of the emitting and receiving properties. The ordinance sets forth the applicable noise limit for every possible combination of different land use categories based upon the average of the applicable noise limit for each respective land use category. *Id.*

While there is significant authority in support of an arithmetic clause that averages the emitting and receiving noise limits, *supra*, **AGC is not aware of any authority in support of the Municipality's interpretation of the existing MOA ordinance** in which the applicable noise limit for the receiving property is based upon the adjoining land use category of another receiver.

Finally, it should be noted that the Municipality's previously proposed hybrid "receiver-only" noise ordinance suffers from the "sequential siting problem" articulated by Findley & Plager which is "created by a system that focuses (either solely or only partly) on the receiver." 48 S. Cal. L. Rev. at 260. Findley & Plager query, "is it reasonable for the residential user which has knowingly established himself adjacent to the industry to claim a right to the same noise environment which could be demanded if he had established a residential use adjacent to other residential uses or to less noisy commercial use?" *Id.* at 260-261. Some noise ordinances have addressed this problem by exempting preexisting nonconforming uses or providing for a compliance period. See York, *Controlling Urban Noise Through Zoning Performance Standards*, *The Urban Lawyer*, Vol. 4, No. 1 at p. 700 (Winter 1972). Even the EPA Model Community Noise Control Ordinance cautions that "It may not be possible for several manufacturers impacting the [single] residence to lower their noise levels to meet the limit specified for residential areas. Situations of this type will require some discretion in enforcement." See U.S. EPA, *Model Community Noise Control Ordinance*, (1975) at p. 9. Further, the EPA model attempts to remedy the "sequential siting problem" by including land use planning provisions to ensure that no new residences are constructed in high noise areas. *Id.* The noise ordinance previously proposed by the Municipality, however, does not include any ameliorating provisions, such as grandfathering or compliance periods, which would reduce the harsh effects of a "receiver-only" ordinance.

It is our understanding that all of these sites had been previously provided to the MOA.

We appreciate this opportunity to provide additional information to the MOA for their consideration. Since you did not raise questions with the other points mentioned in our earlier letter, we assume that you understand our position on those issues. We hope that similar requests were solicited from those seeking a more restrictive ordinance.

As you may be aware, AGC has been running television ads on Channel 2 promoting the construction industry. As part of our contract, AGC is allowed to ask certain questions in the quarterly survey Ivan Moore Research undertakes to determine the opinions of Anchorage residents. In the third quarter, 2006 survey, AGC requested that two questions be asked of the 502 people polled:

(a) The Municipality of Anchorage is considering a new noise ordinance that will reduce road construction on evenings and weekends. Do you think such an ordinance in Anchorage is necessary, or not necessary?

Necessary	20%
Not Necessary	78%
Not sure	2%

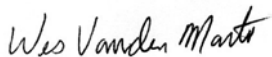
(b) The net result of this ordinance will be concentration of construction schedules in daytime hours, more congested daytime traffic, increased construction costs, and the extension of construction schedules later into the year. Knowing this, do you think such an ordinance in Anchorage is necessary, or not necessary?

Necessary	12%
Not Necessary	85%
Not Sure	3%

The responses to these questions clearly show by a four to one margin residents do not support a more restrictive noise ordinance. If such restrictions were to lead to greater congestion, the gap is even greater at seven to one against such restrictions. Based on the opinions of residents during the third quarter of 2006, little support exists in the greater Anchorage area for a more restrictive noise ordinance.

Once again, if we can be of any further assistance in this matter, please contact us.

Sincerely,



Wes Vander Martin
Task Force Chairperson



Richard Cattnach
Executive Director

cc: Denis LeBlanc
AGC MOA Noise Ordinance Taskforce

Enclosure