NOISE MANAGEMENT AND ATTENUATION FOR RESTAURANTS IN TODAY'S GROUND FLOOR AND ROOFTOP PROJECTS

Classic Landlord Language

When it comes to managing sound emanating from a demised Premises, landlords have traditionally used generic all-encompassing language such as: "Tenant shall not permit or constitute upon the Premises a public or private nuisance or make any noise which will disturb other tenants." That language worked fine for decades in the traditional strip center environment and even through the early days of the new millennium when retail suddenly moved up to the street front. But with redevelopment of urban environments featuring street level retail with multilevel office and/or multifamily over the top, the game has changed.

The Challenges of New Landlord Requirements

With ever-increasing frequency landlords are requiring greater specificity in the tenant's build out and post build out occupancy noise mitigation and containment. This is particularly true where the restaurant is above or below multifamily. Language such as the following can now be expected in a first draft of a landlord's lease:

Tenant shall meet the following acoustical requirements:

1. The criteria for sound insulation between adjacent tenants shall be designed to meet an STC Rating of 65-70.
2. Freestanding multi-layer drywall partitions shall be provided around all common stairwells, elevator shafts, or other multi-level elements.
3. Penetrations through any construction elements should be avoided. Where such penetration must occur, completely enclose the element in a freestanding multi-layer drywall enclosure.
4. Tenant may play amplified music within the Premises provided it does not to exceed 70 decibels.

To address the same, tenants need to first understand the basics of sound management and mitigation.

<u>How is sound measured?</u>

Sound has two main components; frequency and intensity. Frequency is how high or low a sound is based on the number of vibrations per second. It is measured in "hertz." Intensity is the pressure created by the vibrating source which determines how loud the frequencies are, and it is measured in "decibels." The following addresses the latter as it relates to sound attenuation in commercial leases. Sound attenuation is the dampening of noise by lessening the energy of the sound wave. Attenuating or reducing sound depends on where the sound originates. When sound is generated from within a room, and the goal is to prevent it from escaping at full acoustic power, that sound must somehow be absorbed. There are multiple ways in which the absorption capabilities of a room, structure, or material can be measured.

The International Building Code ("IBC") has been adopted by Ohio, and most other jurisdictions within the United States. The code was developed by the International Code Council to address building and safety performance requirements.[1] The IBC uses two main scales to determine a specified material's ability to attenuate sound.

First, Sound Transmission Class ("STC", measured in decibels) measures a material or structure's ability to block sound, i.e., a wall, ceiling or floor. The higher the STC rating, the more attenuated the sound will be. For example, a typical interior wall with two sheets of ½" drywall and no insulation, has an STC of 33.

[1] INTL. BLDG. CODE § 101 (2015).

Second, Impact Isolation Class ("IIC", also measured in decibels) measures a material or surface's - usually a floor - ability to absorb sound caused by impact with the material. The most common impact is footsteps. Like STC, it is reflected by an integer; the larger the number, the more impact sound is being absorbed or blocked. For example, bare six-inch concrete slabs have an IIC of 25. Since most restaurant retail is ground floor, the STC becomes more important than the IIC, but for those entering the white-hot "roof top" arena, IIC is the lynchpin.

Both IIC and STC are first measured in decibels in a lab setting. Both tests involve a standardized noise-making apparatus in an upper chamber and a sound measuring system in a lower chamber. Decibel measurements are recorded at various specified frequencies in the lower chamber. Those readings are then combined using a mathematical formula to create a whole number representation of the test; the higher the number, the higher the sound resistance. Ratings of 50 or above for both the IIC and STC are required to satisfy most of the International Building Code recommendations.

Non-laboratory "field" tests for impact sound (FIIC) and for airborne sound (FSTC) are also recognized by the International Building Code. These sound tests utilize the same testing methods as IIC and STC but are conducted in an actual building after the construction is complete. The IBC suggests ratings of 45 or higher for most FIIC and FSTC testing. See examples of STC ratings below.

- 25 – Normal speech can be understood quite clearly
- 30 – Loud speech can be understood fairly well
- 35 – Loud speech is audible but not intelligible
- 45 – Loud speech is very faint
- 50 – Loud speech is not audible, but amplified sound will be audible

- 60 – Minimum requirement for amplified sound

How does Ohio deal with STC and IIC?

Some states, including Ohio, New York, and California, have not only adopted the IBC as recommended instruction, but codified the requirements in statutes. For example, Ohio has an air-borne (STC) as well as impact (IIC) sound section to its interior environment chapter. Walls, partitions, and floor/ceiling assemblies separating living units from each other or from public or service areas must have a sound transmission class of at least 50 (or at least 45 if field tested), and floor/ceiling assemblies between living units and or public or service areas must have an IIC of at least 50 (or 45 if field tested).

So, how do STC and IIC affect the restaurant industry? The IIC and STC ratings are typically predetermined as part of the construction of the building. So, the weary tenant would be well advised to make early inquiry as to the design requirements of the building it intends to occupy. But it is not that simple when amplified sound is or may be introduced by the tenant, as measurement metrics do not always adequately account for low-frequency sounds (sub woofers) or fluctuating sound levels.[2]

What if the restaurant is in a building constructed before adoption of the IBC standards?

Ohio law does not have a specific statewide noise provision for restaurants, multifamily or mixed-use buildings that were built before adoption of the IBC sound standards. And while, Ohio does have general noise and sound ordinances, for the most part, it grants discretion to each

[2] Tyler Adams, Mei Wu, *Identifying impacts of amplified sound in commercial spaces below residences in mixed-use buildings*, INTER.NOISE (Aug. 2015), http://www.mei-wu.com/r_d/paper201508_files/CommerciaL_INTERNOISE_FINAL.pdf.

city or township to create their own local ordinance governing sound.[3] For example, the City of Columbus provides separate decibel limits for residential and commercial categories.[4] They further distinguish by time of day. So, in the City of Columbus for commercial property (assuming at least the restaurant itself would be "commercial property", and while there is a question as to the zoning classification of the apartments above, they too would likely be "commercial property" even though housing a residential use) the maximum between 10:00 p.m. and 7 a.m. would be 70 decibels based on a continuous 1-hour average. Many townships have similar ordinances; allowing a limit of 75 decibels between 7 a.m. and 10 p.m., reducing the limit by 5 decibels between 10 p.m. and 7 a.m.[5]

How are noise complaints made and who decides them?

Noise complaints are typically, but not exclusively, made by an occupant of the building filing notice of the issue with the landlord, condo association or governing authorities. In such case a decibel reading is usually conducted to determine if a party is in violation of an ordinance or the lease. When a complaint is made to a landlord or to the city or township, the local authority will come and use a decibel reader to determine the level of sound. The reading must be measured at the boundary of the location from which the complaint was made. The final decibel number generally must be determined by a measurement taken over the course of at least an hour.

Are there court cases evaluating when a restaurant has been accused of making too much noise?

[3] OHIO REV. CODE § 505.172 (West 2011).
[4] COLUMBUS, OHIO, ORDINANCE 2329.11 (2008).
[5] *Id.*

There is little to no case law concerning when a tenant or even citizen has violated an ordinance or lease agreement for being too loud "per se." The cases that do exist revolve around a landlord and its duty to protect a tenant's "right to quiet enjoyment." A right to quite enjoyment exists in every residential rental agreement, whether it is stated in such agreement or not. If there is no such covenant in the lease, the court will construe the lease agreement to contain one. Though the term may include sound, the word "quiet" in the term "right to quiet enjoyment" is not referring to sound. Most often, a tenant's right to quiet enjoyment is violated when there are other violations or unanticipated interruptions such as frequent visits from the landlord, interruptions in utility use. A tenant's ability to quietly enjoy their leased space, as it pertains to sound, is usually only violated when the sound they complain about is deemed to be a nuisance.

The conundrum is (i) even if a tenant restaurant complies with the local ordinance and the lease agreement, they may still be subject to claims by an occupant if the noise level in the restaurant results in a nuisance prohibiting the ability of another occupant to quietly enjoy their space; and (ii) even if no nuisance exists, if the noise level exceeds limits with this lease or the local ordinance the tenant may nevertheless be in violation of the lease or the ordinance. Thus, the proverbial two-headed monster.

When does sound become a nuisance?

Ohio law requires a tenant to conduct itself (and those on its property with its consent) in a manner that does not disturb its neighbors' peaceful enjoyment of the premises, and a landlord has the right to bring an action for damages against a tenant who violates the law by causing a

nuisance.[6] However, courts have struggled defining what constitutes a nuisance. Courts often cite the quote from Prosser & Keeton which states, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word nuisance."[7] Ohio courts have defined the concept of nuisance as anything which annoys or gives trouble or vexation, and which is offensive or obnoxious or hurts, inconveniences or damages another. They have also defined it as anything wrongfully done or permitted which injures or annoys the enjoyment of his legal rights. These definitions are sometimes just as detrimental to a claimant or tenant as they are beneficial. The subjectivity of the law makes it difficult for a landlord to definitively claim one tenant was causing a nuisance to another, especially when the nuisance is based on sound (which by the lease must be measured).

Even when the court does determine a sound or conduct to be a nuisance, they are weary to grant injunctions against the noisy tenant or property.[8] They will typically only grant an injunction when no other remedy will suffice.

Unlike a decibel limit, an apartment complex, homeowner's association, or condominium community cannot have its own subjective standard of nuisance. If a lease or bylaw is to contain a restriction, it cannot be based on a subjective belief of what is offensive to a particular tenant.[9] It must state a specific decibel limit and the means of measuring to the limit. The more specific a lease agreement is with its sound or noise violations, the more likely the court will recognize it as reasonable and objective.

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[6] OHIO REV. CODE § 5321.05(A)(8) (West 2018).
[7] Prosser & Keeton, THE LAW OF TORTS,616, § 86 (5th ed.1984).
[8] *See* Goodall v Crofton, 33 Ohio St. 271 (1877).
[9] *See* Tonti v. E. Bank Condominiums, L.L.C., 10th Dist. Franklin No. 07AP-388, 2007-Ohio-6779

Can a Restaurant mitigate its liability for noise violations?

Yes. Although the solutions are not always the easiest, restaurant tenants have multiple ways to avoid lease or ordinance violations or a claim of nuisance. This starts with understanding what the base building STC and IIC are, and what would be reasonable for the tenant to undertake considering the same to protect its intended use (including its use of amplified sound, if applicable). It includes putting the landlord on notice of the tenant's concept and the noise that may be produced from the same, which can best be accomplished in cases where tenant's concept is already in existence at another location, by inviting the landlord to visit the made and thereafter consenting to the same. Detailing the consent in the lease should of course follow. Second, the Tenant may take preventative steps within the restaurant as part of the tenant buildout to absorb more sound. Generally, the best way to do this is by adding mass. Third, pick the right location. Courts have decided that whether something is considered a nuisance will be determined by considering the surrounding circumstances, i.e., the nature of the location and character of the neighborhood. If your location is in the most vibrant and active late-night area of town, the standard to determine whether it is a nuisance will be different than if it is next to a retirement community. Fourth, pursue an objective standard that works under the circumstances to avoid confusion. Fifth, make sure there are reasonable opportunities to cure any such alleged infractions after receipt of written of the same. Finally, don't move! If a restaurant has been in a location long enough, the court may consider it to have a prescriptive right to continue its operation unabated. The reasoning is if the other tenants and nearby landowners were on notice of a nuisance before they moved in or purchased, they may be estopped from complaining.

What have we learned?

1. Most new buildings have been built to satisfy the IBC and State IIC and STC requirements, but older buildings may not. So, make early inquiry as to the design requirements of the building it intends to occupy.
2. Parties to a lease may contract to whatever noise restrictions they wish, so having the landlord agree to objective standards can eliminate direct disputes with the landlord.
3. No matter what a lease says, all parties are also subject to the local sound ordinance and nuisance law.
4. The courts are generally hesitant to find there was a nuisance violation for complaining parties because of the subjectivity and difficulty of enforcement, which is particularly true if the surrounding circumstances are similar to the complained event or if the business has operated in a similar manner for years.
5. Tenants can mitigate their liability by contracting to favorable terms and taking preventative steps to include operation standards, The landlord's acknowledgement to its familiarity to the concept, and concept to the same, and rights to cure.

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