

**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION**

PRESTIGE FEED PRODUCTS, LLC, an Illinois
limited liability company,

Plaintiff/Counter-Defendant,

v.

VILLAGE OF MOUNT PROSPECT, an Illinois
municipal corporation, et.al.,

Defendants/Counter-Plaintiffs.

Case No. 2023 CH 5147
(transferred to Law Division)
Hon. Thomas More Donnelly
Calendar W
Courtroom 1912

CITY OF DES PLAINES, an Illinois municipal
corporation,

Intervening Petitioner

**PRESTIGE FEED PRODUCTS, LLC’S REPLY TO VILLAGE OF MT. PROSPECT’S
RESPONSE TO PRESTIGE’S COMBINED MOTION FOR JUDGMENT ON THE
PLEADINGS AND PARTIAL SUMMARY JUDGMENT**

Prestige, for its Reply in support of Prestige’s Combined Motion For Judgment on the Pleadings and Partial Summary Judgment (“Motion”) on the Village’s Third Amended Counterclaim (“Counterclaim”), and in opposition to the Village’s Response thereto, states:

SUMMARY OF ARGUMENT

First, the Village fails to respond to Prestige’s argument, and therefore concedes, that the Counterclaim does not allege any facts that Prestige’s operations release odors that exceed an odor threshold of 24 dilutions as measured by a Scentometer pursuant to 35 IAC §245.121. Hence, Prestige is entitled to a judgment on the pleadings under §2-615(e). Second, the Village fails to respond to Prestige’s argument, and therefore concedes, that there is no evidence in the record that Prestige releases odors that exceed an odor threshold of 24 dilutions as measured by a Scentometer pursuant to 35 IAC §245.121. Hence, Prestige is entitled to a summary judgment under to §2-1005 on said issue. Third, the standard for sufficiency of the allegations for all three counts of the

Counterclaim should be determined using only the objective standard for measuring odors. The objective standard for measuring odors applies to the allegations of Count I (§14.604) because the Village cannot arbitrarily and subjectively determine that Prestige's operations fall outside the definition of 'Manufacturing, Light.' Further, the objective standard of measuring odors also applies to the allegations of Count II (§14.2104(G)(6)) because the plain language of that section mandates a four-pronged objective test rather than three separate subjective tests. Further, the objective standard of measuring odors also applies to the allegations of Count III (common law public nuisance) because Prestige cannot cause a common law public nuisance when the objective odor readings indicate non-detect levels or levels below legal thresholds.

ARGUMENT

- I. Prestige is entitled to a judgment on the pleadings pursuant to § 2-615(e) because the Village fails to respond to Prestige's argument that the Counterclaim does not allege any facts demonstrating that Prestige released odors that exceed an odor threshold of 24 dilutions as measured by a Scentometer pursuant to 35 IAC §245.121.**

The Village fails to respond to Prestige's argument, and therefore concedes, that the Counterclaim does not allege any facts that Prestige's operations release odors that exceed 24 dilutions as measured by a Scentometer pursuant to the legal threshold levels established by the *Illinois Joint Committee on Administrative Rules, Administrative Code, Title 35: Environmental Protection, Subtitle B: Air Pollution, Chapter I: Pollution Control Board, Subchapter L: Air Quality Standards and Episodes, Part 245 Odors, Section 245.121 Objectionable Odor Nuisance Determination* ("35 IAC 245.121"). The Village alleges nowhere in the 177 paragraphs of the Counterclaim that Prestige has released, or is releasing, odors detectable in the ambient air after having been diluted with 24 volumes of odor free air as measured by a Scentometer. The Response concedes this issue. Instead, the Response argues that the Village is entitled to apply subjective standards to allege that Prestige's operations violate Village Code §§ 14.604 and 14.2104(G)(6),

or that Prestige’s operation causes a common law public nuisance. The Village also argues that the Scentometer thresholds established by 35 IAC §245.121 do not apply to alleged violations of §§ 14.604 and 14.2104(G)(6), or to common law public nuisance. In the alternative, the Village argues that even if it is required to objectively plead said allegations, the Village is not required to allege specific benchmark statistics at the pleading stage, citing *Stop NorthPoint, LLC v. City of Joliet*, 2024 IL App (3d) 22051; 244 N.E.3d 758, 478 Ill.Dec. 10 (2024).

The Village’s arguments lack merit. The sufficiency of the allegations in the three counts of the Counterclaim must be measured using only the objective standard of measuring odors. *See infra, Argument, Section III*. Further, between the Village Code and other Illinois statutes, there is only one section that defines “the odor threshold level,” and that is 35 IAC §245.121, which sets forth an objective, scientific, and measurable definition of odor threshold levels that require objective, scientific, and measurable Scentometer readings. Finally, *Stop NorthPoint, LLC* is distinguishable from our facts, because in that case, Plaintiffs had already alleged in their fourth amended complaint that at full build-out, the project would conservatively generate an additional 10,370 trucks per day and also included with a traffic crash report, a research study, and a public health study. 244 N.E.3d at 765-766. Hence, the Village’s arguments fail and Prestige is entitled to a judgment on the pleadings pursuant to § 2-615(e) on all three counts of the Counterclaim.

II. Prestige is entitled to at least a partial summary judgment on the issue that there is no evidence in the record that Prestige releases odors that exceed an odor threshold of 24 dilutions as measured by a Scentometer pursuant to 35 IAC §245.121.

The Village fails to respond to Prestige’s argument, and therefore concedes, that there is no evidence in the summary judgment record that Prestige releases odors that exceed an odor threshold of 24 dilutions as measured by a Scentometer pursuant to 35 IAC §245.121. The Village has failed to present objective, measurable, evidence in the Counterclaim and in the Response that

Prestige has released odors detectable in the ambient air after being diluted with 24 volumes of odor free air as measured by a Scentometer. Specifically, between March 2019, when Prestige began operating at the Facility and July 19, 2024, when the Village filed its latest Counterclaim, the Village failed to perform a single objective scientific or measurable study concerning the odors which it complains Prestige is releasing from its Facility. Instead of measurable scientific data, the Counterclaim relies entirely on subjective complaints. In the Response, the Village attempts to create the appearance of a material question of fact by arguing that certain readings that it has acquired after filing the Counterclaim using a Nasal Ranger show dilution to threshold readings that are higher than the Scentomer readings that Prestige has offered in evidence. However, the Village readings are (a) not part of the allegations in the Counterclaim (i.e, not within the four corners of the Counterclaim), and (b) not the proper measurements required under 35 IAC §245.121.

Specifically, 35 IAC §245.121 states:

“Section 245.121 Objectionable Odor Nuisance Determination

An objectionable odor nuisance exists:

b) On or adjacent to industrial premises when odor is detectable in the ambient air after it is diluted with twenty-four volumes of odor-free air as measured by the Scentometer; [...]” [Emphasis added]. Complaint ¶¶ 24 – 25.

The Village concedes that the proper Scentometer reading when a property is bordered by industrial premises is 24 dilutions *See, Resp. at § C(2), fn. 2, p. 23*. On all four sides (to the East, North, South, and West), Prestige’s Facility is surrounded by industrial zoned businesses. Prestige offers the only objective evidence on record that scientifically measures odors that it generates at its borders. Prestige’s objective, measurable, and scientific evidence collected in this case shows that Prestige is emitting odors at levels well below the odor threshold level of 24 dilutions adjacent to industrial premises. The June 2, 2021, Mostardi Platt Investigation Odor Report states:

“...The Olfactometer results of all four Tedlar Bag samples collected at the boundaries of the neighboring real properties adjacent to the Facility had detection readings of 3 or lower. The Scentometer results at all 21 tested locations had detection readings of less than 2. Therefore, no objectionable odor nuisance from the Facility exists on the properties surrounding the Facility. As a result, the normal operation of the Facility does not have a significant impact on the use and enjoyment of neighboring real properties. See *Hartley Affidavit, Exhibit 2, PREST000062*.

Further, the October 31, 2022, Mostardi Platt Investigation Odor Report provides:

“...Based on our analysis of the data collected at the Facility during our investigation and in preparation of both these reports, we conclude that Prestige’s operation of the feed producing machinery does not emanate objectionable odor nuisances anywhere near to the applicable threshold levels. As a result, this operation does not impact the use and the enjoyment of neighboring properties, and it does not constitute a nuisance.

Since our first report of June 14, 2021, Prestige has installed at the Facility additional odor control measures including newer air filtration and vapor units. As a result, key readings at the Real Property boundaries improved significantly. The Scentometer readings were **zero (0)** at 7 of the 8 tested fence-line locations. The only one noticeable Scentometer reading of **less than two (2)** was at the location directly by the Facility’s discharge bay in the North-East corner of the Real Property. These results demonstrate that the Facility’s operation does not reach or surpass the nuisance threshold Scentometer readings under applicable law (8 along the Real Property’s southern border and 24 everywhere else).” See *Hartley Affidavit, Exhibit 3, PREST000173*.

Further, the V3 Odor Assessment Report dated April 1, 2024, concludes:

“...The odor strength at the real property boundaries lines is either non-existent or below the threshold levels established in *Illinois Administrative Code, Title 35: Environmental Protection, Subtitle B: Air Pollution, Chapter I: Pollution Control Board, Subchapter L: Air Quality Standards and Episodes, Part 245 Odors, Section 245.121 Objectionable Odor Nuisance Determination* (“35 IAC 245.121”). The onsite Scentometer readings and odor panel Olfactometer results of air samples collected at the real property lines and adjacent properties in January 2024 are depicted in **Table 1** below and are similar to or lower than those of the 2022 Report. Also, the addition of the Strobic Fan at the Facility has increased air dispersion to further reduce any odor impacts at the real property line and the neighboring properties. **Based on these results, Prestige’s operation at the Facility does not constitute a nuisance [...]**” See *Hartley Affidavit, Exhibit 4, PREST000252*.

The Second Declaration of Angie Wanger attached as Exhibit C to the Village Response commits several simple logical fallacies. First, she states that “The standard of measurement units that Trinity Consultants used to collect its odor measurements at Prestige [...] facility is the same standard referenced in, as defined by the Motion, Prestige’s Supposed Scentometer Standard.” *Response, Ex C.*, ¶ 3. Then she states that “The Nasal Ranger and Scentometer are both odor measurement devices known as field olfactometers.” *Id.* ¶ 4. Then she states that “Both the Nasal Ranger and the Scentometer function under the same principle and a study comparing the two declared that there was no significant difference between the accuracy of the two devices.” *Id.* at ¶ 5. These statements are easily refutable.

First, 35 IAC §245.121 specifically calls for a Scentometer, not a Nasal Ranger, and not a field olfactometer. Also, 35 IAC §245.121 provides specific dilution thresholds and how they are to be measured. Ms. Wagner states that because all Scentometers are olfactometers and all Nasal Rangers are olfactometers, all Scentometers are Nasal Rangers. By analogy, the Village is asking the Court to accept the argument that “because all horses are mammals and all dogs are mammals, all horses are dogs because some studies show that both horses and dogs accurately run on four legs.”

Hence, the Village has failed to present any objective evidence that shows Prestige released odors detectable in the ambient air after having been diluted with 24 volumes of odor free air as measured by a Scentometer. In fact, the only objective and undisputed evidence in this case shows that Prestige has never exceeded the odor of 24 dilutions to threshold level of 35 IAC §245.121. Because the Village failed to present objective, measurable, evidence that Prestige has released odors detectable in the ambient air after being diluted with 24 volumes of odor free air as measured by a Scentometer, summary judgment should be entered in favor of Prestige on this issue.

III. The sufficiency of the allegations in the three counts of the Village's Counterclaim can be determined using only an objective standard for measuring odors using a Scentometer as provided in 35 IAC §245.121.

This Court should hold that the sufficiency of the allegations of the Village's Counterclaim can be measured using only an objective standard. The objective, scientific, and quantifiable standard of measuring odors applies to determine whether the Village has sufficiently alleged facts that, if true, would entitle the Village to relief in each of Count of its Counterclaim. On the other hand, the Village is incorrect to argue that (i) a subjective standard is enough to do so, and that (ii) the Village, along with a handful of Village and City constituents, are empowered to subjectively determine whether Prestige's operations violate §§ 14.604 and 14.2104(G)(6) of the Village Code, or that Prestige's operation causes a common law public nuisance. Because the Village is trapped by the lack of the empirical and scientific data in its Counterclaim, it is forced to argue that a subjective standard should apply to the Village's allegations. As discussed below, the Village's position is erroneous.

A. Municipal Ordinances Cannot be Subjective and Arbitrary.

Municipal ordinances must be reasonable and not arbitrary and must "supply adequate guidelines to the administrative body which must enforce it." *City of Aurora v. Navar*, 210 Ill. App. 3d 126 (2d Dist. 1991). An ordinance violates due process rights when its terms are so vague, incomplete, indefinite, or uncertain that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Rios v. Lane*, 812 F.2d 1032, 1038 (7th Cir. 1987). A municipal noise nuisance ordinance declaring to be a nuisance any commercial activity audible from adjacent premises was so vague and uncertain as to violate state and federal due process provisions, since the ordinance did not define or delineate any sort of measurement as to when commercial activity was or became "audible." *Id.* State law may authorize the Village to declare

what may be a nuisance, but this does not authorize it to act arbitrarily or declare to be a nuisance that which is not in fact a nuisance. *City of Bushnell v. Chicago, B. & Q.R. Co.*, 259 Ill. 391, 395, 102 N.E. 785, 787 (1913).

These rules apply to zoning ordinances. *Halfway House v. City of Waukegan*, 267 Ill. App. 3d 112, 118 (2d Dist. 1994). Zoning ordinances are in derogation of the common law so that any ambiguity or uncertainty must be decided in favor of the property owner. *Lubershane v. Vill. of Glencoe*, 63 Ill. App. 3d 874, 878, 380 N.E.2d 890, 893 (1st Dist. 1978). Due process requires the terms of the ordinance to be clear enough so that every citizen may know how the ordinance will operate to affect their rights when it is utilized. *City of Wheaton v. Sandberg*, 215 Ill.App.3d 220, 227 (2d Dist. 1991). A condition of use permit prohibiting halfway house from accepting residents convicted of offenses “of a sexual nature” was void for vagueness. *Id.*

B. *The objective standard of measuring odors applies to Count I (§14.604) because the Village cannot arbitrarily and subjectively determine that Prestige’s operations fall outside ‘Manufacturing, Light.’*

In Count I of the Counterclaim and in sections B.1 and C.1 of its Response, the Village alleges that Prestige operations at the Facility fall outside ‘Manufacturing, Light’ and within ‘Manufacturing, Heavy’ as those terms are defined in Code §14.2401. In support, the Counterclaim attaches affidavits by Village officials and several residents and business representatives, according to whom Prestige’s alleged odors not only travel beyond the boundaries of Prestige’s Facility, but also that such odors are unpleasant and pose a danger to public health. The Village then alleges that Prestige violates **Land Use Table 2 of** Code §14.604 which provides that in the Village’s I-1 district, where the Facility is located, ‘Manufacturing, Light’ uses are Permitted as of right, but ‘Manufacturing, Heavy’ uses are permitted only as Conditional Uses; and that Prestige has not obtained a Conditional Use for its operations at the Facility.

In its Verified Complaint filed on May 25, 2023, and numerous pleadings since, Prestige alleges that its operations at the Facility fall within the definition of ‘Manufacturing, Light.’ In support, Prestige has offered empirical, objective, and scientific odor measurements and readings that show that any odors that Prestige allegedly generates are either nondetectable at the boundary line or far below legal threshold level of 24 dilutions listed in 35 IAC §245.121. This objective evidence includes four scientific reports that Prestige conducted over a period of three years and that Prestige shared with the Village at the time of filing the Complaint and again in May 2024. When the Village filed its latest Counterclaim on July 19, 2024, the Village had conducted no tests, field studies, or scientific odor measurements or readings to counter these four reports that were written by scientists whom Prestige had already disclosed to the Village as Prestige’s expert witnesses, and whom concluded that in their professional opinion, Prestige’s operations do not exceed state and locally mandated odor threshold levels. The only report that the Village presents in support of its current arguments was prepared after the filing of the Counterclaim.

Absent an objective standard to measure whether Prestige’s operations create odors or safety hazards outside the Facility or its lot, the Village’s application of the definition of ‘Manufacturing, Light’ to Prestige is not clear enough for Prestige or other citizens or property owners in the Village to know how it will operate to affect their rights when it is utilized. The definition of ‘Manufacturing, Light’ in §14.2401 requires an objective standard to determine whether Prestige’s operations create odors or safety hazards outside of the building or lot where such assembly, fabrication, or processing takes place, where such processes are housed entirely within a building. Specifically,

“MANUFACTURING, LIGHT: The assembly, fabrication or processing of goods and materials using processes that do not create noise, smoke, fumes, odors, glare or health or safety hazards outside of the building or lot where such assembly, fabrication, or processing takes place, where such processes are housed entirely

within a building. Light manufacturing generally includes processing and fabrication of finished products predominantly from previously prepared materials and includes processes that do not require extensive floor areas or land areas. "Light manufacturing" shall not include any use that is otherwise listed specifically in a zoning district as a permitted or conditional use." [emphasis added].

Smells or odors are scientifically measurable and quantifiable. There exist scientifically proven methods for measuring smells and odors to the same degree of certainty as weight, height, noise, speed, time, temperature, blood alcohol levels, etc. These objective and measurable standards are used to allow consistent, neutral, unbiased outcomes when the government seeks to deprive an individual of their rights. By way of analogy, if a building code prohibits erecting a frame structure taller than 30 feet, the contractor would not simply "give it the eyeball test" to determine if the building conforms with the code. Rather, the contractor would measure the height of the building with a tape measure to ensure compliance. Further, if the contractor's employee were prohibited by OSHA from working more than 10 hours in any 24-hour period, the contractor would not simply ask the employee to opine as to how many hours the employee worked each day. Instead, the contractor would use a punch clock to measure the precise amount of time the employee worked to ensure there are no OSHA violations. Finally, if the contractor was prohibited from using machinery that exceeded 85 decibels, the contractor would not rely upon his ears (or those of the neighbors) to determine if the machine was too loud. Instead, the contractor would use an acoustic measurement device to verify that the machine noise level was compliant. These objective and scientific measurements, as opposed to individuals subjective opinions, are dispositive as to a building's actual height, the number of hours someone actually worked, and how loud a machine actually is.

- C. *The objective standard of measuring odors applies to Count II (§14.2104(G)(6)) because the plain language of that section mandates a four-pronged objective test rather than three separate subjective tests.*

In Count II of the Counterclaim and in sections B.2 and C.1 of its Response, the Village alleges that Prestige operations at the Facility violate §§ 14.2104(G)(1) and 14.2104(G)(6). In support, the Counterclaim relies on the same affidavits by Village officials and residents and business representatives. The Village’s Response argues that §§ 14.2104(G)(1) and 14.2104(G)(6) demand subjective rather than objective interpretations, and that the Village is not required to prove that Prestige is releasing odors detectable in the ambient air above the odor threshold levels listed in 35 IAC 245.121 (which the Village dismissively calls the ‘*Supposed Scentometer Standard*’). The Village’s arguments are without merit.

In order for the Village to survive Prestige’s §2-615(e) Motion, the Village must demonstrate that its Complaint pleaded facts that could establish Prestige violated §14.2104(G)(6), which it does not. Section 14.2104(G)(6) of the Village Code provides:

“The release of odorous matter from any industrial district across residence or business district boundary lines shall be so controlled that, at ground level or at habitable elevations, the concentration shall not exceed the odor threshold level. Further, the release of odorous matter across lot lines shall not become a nuisance or source of discomfort to neighboring uses.” § 14.2104(G)(6). [*emphasis added*]

(i) *The Preamble in §14.2104(G) Establishes Objective Performance Standards*

First, Village Code Section 14.2104: Bulk Regulations states:

[...] G. Performance Standards: No use established in an I-1 limited industrial district shall be operated so as to exceed the performance standards listed below. Any use already established shall be permitted to be altered, enlarged, expanded or modified provided that all performance standards of the district are met. [*emphasis added*].

The fact that §14.2104(G) refers to “performance standards” twice before it proceeds to sub-sub sections (1) and (6) shows clear legislative intent to establish objective standards to determine whether business owners comply with them. This interpretation, in conjunction with the case law cited at the beginning of the Argument section above provide the context for this Court to hold that §§ 14.2104(G)(1) and (6) require an objective standard of pleading.

- (ii) *The definition of “nuisance” in §14.2104(G)(1) mandates an objective pleading standard.*

Section 14.2104(G)(1) of the Village Code defines an odor related “nuisance,” as:

“...[t]o use any premises to create an offensive smell which taints the air and renders it unwholesome or unreasonably disagreeable to other persons.” §14.2104(G)(1). (Ccl, ¶ 48).

The Village’s argument that §14.2104(G)(1) is a subjective standard runs afoul of the case law cited herein. Who are the other persons who would find Prestige’s alleged odors offensive and which taint the air and render the air unwholesome or unreasonably disagreeable? Does 1 complaint from 1 person suffice to shut down Prestige’s business that employs 13 workers over two shifts? How many such people or complaints would it take? Will 300 complaints from 30 individuals suffice? Does it matter that Prestige’s neighbors immediately to the south who share the same building with Prestige have never complained? Does it matter that there are close to 6,000 separate real estate parcels within 1.25 miles of the Facility, but that only 10 people complain all day and every day (even on days when Prestige does not operate)? What about the thousands of people who do not complain?

- (iii) *§14.2104(G)(6) Establishes a Four-Pronged Objective Test, Rather Than Three Separate Subjective Tests as Argued by the Village.*

Further, the Village’s argument that §14.2104(G)(6) offers three independent subjective tests is also inaccurate. The Village argues that the objective standard set forth in 35 IAC §245.121 is not dispositive of this case because §14.2401(G)(6) has “three independent tests from which the Village can determine a violation,” and that the Village’s failure to plead facts demonstrating that Prestige exceeded the odor threshold level defined in 35 IAC §245.121 is of no moment because, the Village alleged facts in support of the two other “independent tests.” *Resp. at § C(1), p. 21-23.*

The Village's selective reading of §14.2104(G)(6) is misguided, ignores its plain language, and is incongruent with the precepts of statutory construction. See, e.g., *People v. Botruff*, 212 Ill. 2d 166 (2004) (stating that every “word, clause and sentence of the statute, if possible, must be given reasonable meaning and not rendered superfluous”); and *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004) (stating that courts are loath to read a statute in a manner that would render part of it entirely superfluous). Contrary to the Village's argument, the plain language of §14.2104(G)(6) clearly requires pleading a *prime facie* cause of action using specific factual allegations that demonstrate: (i) Prestige released odorous matter from its property located in an I-1 zoning district; (ii) that the odorous matter crossed residential or business district boundary lines; (iii) the release of the odorous matter was not so controlled that, at ground level or at habitable elevations, the concentration exceeded “the odor threshold level”; and further, (iv) the release of the odorous matter across lot lines became a nuisance or source of discomfort to neighboring uses. See §14.2104(G)(6). (Emphasis added).

Each provision within §14.2104 (G)(6) can only be read as adding separate and additional elements that are all required to be pleaded and proven in order to establish any violation of §14.2104(G)(6). Tellingly, the drafters of the ordinance included all elements in a single subparagraph and chose to use language such as “further,” as opposed to “or,” when adding additional sentences. Had the drafters intended to afford the Village “three independent” tests to selectively determine when a single violation of §14.2104(G)(6) occurred, it would have created three independent subsections separating each of the objective and subjective “tests” as opposed to placing all of the language in a single subsection. Similarly, the drafters would have used language such as “any of the following shall be deemed a violation of this ordinance ...” or used the word “or” in between each of the three alleged “tests” (e.g., the release of odors, *or* odorous

matter crosses lot lines, *or* the concentration exceeds the odor threshold, *or* the odorous matter across lot lines becomes a nuisance or source of discomfort). The plain language of the ordinance makes it clear that the Village must plead facts in support of each of the elements set forth in § 14.2104(G)(6) in order to demonstrate any entitlement to relief – not selectively choose which of “three independent tests” it must meet. Because the Village failed to plead facts in support of each element, including objective facts showing that Prestige released odors above the threshold level, Prestige is entitled to a judgment in its favor.

(iv) *§14.2104(G)(6) Incorporates the Objective Tests of 35 IAC §245.121.*

Section 14.2101(G)(6) requires the Village to plead that Prestige released odorous matter in a concentration that exceeds “the odor threshold level.” The drafters of the ordinance chose to use the language, “the odor threshold level,” as opposed to something akin to “an odor threshold level” or “a reasonable threshold level.” The Village also concedes that the Code does not define “*the* odor threshold level” in its Code. Accordingly, the Village’s choice to include the precise language, “*the* odor threshold level,” in §14.2104(G)(6) makes it clear that the drafters intended to rely upon “*the* odor threshold level” as that term was, and remains, defined elsewhere by Illinois law. There is only one section of Illinois law that defines “*the* odor threshold level.” Specifically, as set forth more fully in the Motion, “*the* odor threshold level,” is defined in 35 IAC §245.121, which sets forth an objective, scientific, and measurable definition of odor threshold levels that require objective, scientific, and measurable Scentometer readings.

By way of analogy, “Bakeries” are listed as a Permitted uses in the same I-1 zoning district at the Prestige Facility. Some people like the smell of baking bread – and some do not. If a commercial bakery operating in an I-1 zoning district emitted an odor of baking bread across its lot line, some of the neighboring residents may find the smell disagreeable, putrid, or nauseating.

Some may find the odor pleasant or enjoyable. Others still may be entirely indifferent to the odor despite being able to detect it from their backyard or in front of their business. Some residents may repeatedly file complaints with the Village or file a class action lawsuit against the bakery, while others may not take any action whatsoever.

Simply because some people may find the smell of baking bread crossing lot lines to be obnoxious, putrid, or a cause of discomfort, while others are indifferent or find the smell pleasant, does not mean, and cannot mean, that that the bakery in the I-1 zoning district is violating §14.2104(G)(6). Rather, as is the case at bar, the only way the Village could establish the bakery is in violation of §14.2104(G)(6), would to plead and prove: (i) the bakery released odorous matter from its property located in an I-1 zoning district; (ii) that the odorous matter crossed residential or business district boundary lines; (iii) the release of the odorous matter was not so controlled that, at ground level or at habitable elevations, the concentration exceeded “the odor threshold level”; and (iv) the release of the odorous matter across lot lines became a nuisance or source of discomfort to neighboring uses. (See § 14.2104(G)(6) of the Village Code). For the reasons set forth herein, the Court should determine that the objective odor measurement threshold standards set forth in 35 IAC §245.121 is “the odor threshold level” defined in § 14.2104(G)(6).

- D. *The objective standard of measuring odors applies to Count III (common law public nuisance) because Prestige cannot cause a common law public nuisance when the objective odor readings indicate non-detectible levels or levels below legal thresholds.*

A public nuisance claim must plead and prove: “(1) the existence of a public right; (2) a substantial and unreasonable interference with that right by the defendant; (3) proximate cause; and (4) injury.” *Burns v. Simon Properties Grp., LLP*, 2013 IL App (5th) 120325, ¶ 6. As a threshold issue, the objective measurement standard set forth by 35 IAC §245.121 is the only appropriate methodology to determine this matter. This standard should be applied throughout all

the Village's claims in order to avoid inconsistent outcomes involving the same subject matter and same parties. Under the objective measurement standard, the Village can neither establish a substantial and unreasonable interference with any public right or injury.

Typically, unreasonable interference with a public right may be demonstrated by showing: (i) the conduct involves a significant interference with the public health, public safety, public peace, public comfort or public convenience; (ii) the conduct is proscribed by a statute, ordinance or administrative regulation; or (iii) the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, the accused has reason to know the conduct has a significant effect upon the public right. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 375–76 (2004). In the Counterclaim, the Village has failed to plead or present the existence of any objective evidence that would demonstrate Prestige's operations significantly interfere with anyone's health, comfort, or convenience. The Village merely presents anecdotal allegations based upon the subjective beliefs of its elected officials, its employees, and a small minority of its constituents.

Further, what the law expressly authorized to be done cannot be complained of as a public nuisance. *Chicago, R.I. & P. Ry. Co. v. Smith*, 111 Ill. 363, 370–71 (1884). This is true so long as lawful enterprise is conducted in a reasonable manner. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d at 389. Accordingly, Prestige's operations cannot interfere with the public rights so long as Prestige is operating its business legally and in conformity with the Village's ordinances. Similarly, the Village has failed to plead or present any objective, nonspeculative, facts that demonstrate Prestige has reason to know the conduct has a significant effect upon the public right. In fact, the objective data presented by Prestige to both the Village, and this Court, clearly shows that Prestige typically operates its facility at non-detectible odor levels determined by the Scentometer.

CONCLUSION

WHEREFORE, Prestige Feed Products, LLC respectfully requests that the Court enter a judgment in its favor and against the Village of Mount Prospect on its Third Amended Verified Counterclaim for Injunctive Relief pursuant to §2-619.1 of the Illinois Code of Civil Procedure, enter a partial summary judgment pursuant to 735 ILCS 5/2-1005, and for any further relief the Court deems just.

Respectfully submitted,
Prestige Feed Products, LLC

By: /s/ Riccardo A. DiMonte
One of its attorneys

Riccardo A. Di Monte (rdimonte@robbinsdimonte.com)
Anastas Shkurti (ashkurti@robbinsdimonte.com)
Dominic G. Erbacci (derbacci@robbinsdimonte.com)
Robbins DiMonte, Ltd.
216 W. Higgins Rd.
Park Ridge, Illinois 60068
Tel: (847) 698 - 9600
Attorney No. 99688