

April 1, 2013 – Written comments for the Record  
Cambridge City Council  
Regarding City Manager report #3  
Idenix Lawsuit and the Noise Ordinance

Gerald Bergman  
82 Elm Street Cambridge, Ma 02139



Attachments:

- 1) Copy of the Court suit filed by Idenix Pharmaceuticals against the Cambridge License Commission and the City of Cambridge (August 11, 2008)
- 2) Testimony regarding Idenix Pharmaceuticals by Gerald Bergman (June 28, 2011)
- 3) Letter from the License Commission to Idenix granting a variance (July 7, 2010)

In February the City Council unanimously asked for specifics about the Idenix noise ordinance lawsuit. You have before you a report authored by the City Solicitor answering the Council request for specifics about the lawsuit.

The city Solicitor disputes the unanimous Council Order contention that Idenix challenged, via a lawsuit, the City of Cambridge's authority to regulate noise volumes established by the noise ordinance. The City Solicitor stated that "Idenix did NOT challenge the authority of the city to regulate noise by way of its Noise ordinance."

What seems to be missing from the Solicitors response is the fact, as the court suit reads, that this suit seeks

- 1) to quash a cease and desist order **unlawfully** issued by the defendants (the City of Cambridge and the License Commission) and
- 2) that the suit is a declaration that the Defendants lacked authority to issue the order. The Court suit states, "The noise Control Ordinance **does not authorize** the Commission to issue orders that restrain or enjoin noise-producing operations. Rather, the Commission must seek such orders from a court of competent jurisdiction.... The issuance of the Cease and Desist Order is substantial error, as the **Commission is without authority** under the Noise Control Ordinance, or any other law, to issue unilaterally an order to restrain or enjoin Idenix's operations at the building."

I am not a lawyer. However, the Court suit does seem to at least raise issues of the Commission's authority to enforce the ordinance unilaterally, and without orders from the court.

I wondered to myself why the Solicitor did not mention this critically important portion of the lawsuit. As a result of this omission, I would suggest that the letter

from the City Solicitor is at best problematic in regard to making the public and the Council aware of the potential impact of the Idenix court suit and the influence it may have had in the final 2-1 License Commission vote which granted Idenix the first and only variance given under the Cambridge Noise Ordinance.

Many Area 4 residents who advocated for years that Idenix should be held to the noise limitations of the ordinance, that fines should be levied, and that no variance be given to go above the stated noise limits felt that it was the pressure of the court suit itself that may have been the tipping point which resulted in the License Commission vote to grant a variance to Idenix.

The City of Cambridge, having blundered in its zoning that allowed Idenix to operate at that location, and seeing bio-tech as too big to fail, did not want to end up in court where the noise ordinance enforcement authority was at risk. The pressure to grant a variance was tremendous.

This was a David and Goliath fight; Idenix Pharmaceuticals, then a tenant of Met Life, a multi-billion dollar real estate company; Idenix, at the time principally owned by Novartis a multi-billion dollar company, hiring Hale and Dorr to win two out of three votes at the License Commission.

If Idenix were to win in court, then perhaps there would be no issue before the License Commission, dealing with the noise ordinance that could be enforced unilaterally by the Commission. The regulatory power and authority of the Commission would be compromised.

Going forward, I suggest some areas of action (partial list):

- 1) We need transparency from the solicitor's office regarding lawsuits such as these.
- 2) We need an ordinance that we believe can hold up in court
- 3) We need to clarify issues that kept being debated before the Commission, such as ambient noise, buffer zones, where and when to measure noise, and a clearer definition of hardship.
- 4) The community needs better tools to help us enforce the ordinance, collect fines and have transparent zoning to protect us from excessive noise.
- 5) The city need to gather ongoing input from the community regarding current issues with noise, future potential issues with noise that will be associated with new development as it relates to ambient noise, and the ability and willingness of the Commission to enforce the noise ordinance.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

TRIAL COURT  
SUPERIOR COURT  
DEPARTMENT  
CIVIL ACTION NO.

IDENIX PHARMACEUTICALS, INC.

Plaintiff

v.

CAMBRIDGE LICENSE COMMISSION and  
CITY OF CAMBRIDGE

Defendants

COMPLAINT

INTRODUCTION

1. This action, brought by a Cambridge biotech pharmaceutical company, seeks (1) a grant of certiorari to quash a cease and desist order unlawfully issued by Defendants and (2) a declaration that the Defendants lacked authority to issue the order.

PARTIES

2. Plaintiff Idenix Pharmaceuticals, Inc. ("Idenix") is a Delaware corporation with a principal place of business at 60 Hampshire Street, Cambridge, Massachusetts 02139.

3. Defendant Cambridge License Commission (the "Commission") is, upon information and belief, an agency of the City of Cambridge.

4. Defendant City of Cambridge (the "City") is a political subdivision of the Commonwealth of Massachusetts.

JURISDICTION

5. Jurisdiction in this Court is proper pursuant to G.L. c. 249, § 4 and c. 231A, § 1.

6. Venue in this Court is proper because all parties reside or conduct business in the City.

#### BACKGROUND FACTS

7. Idenix is in the business of researching and developing anti-viral pharmaceuticals for the treatment of hepatitis and HIV. Idenix employs approximately 180 persons.

8. Idenix conducts some of its research functions at a building at 60 Hampshire Street in Cambridge, Massachusetts, which it occupies pursuant to a lease term that commenced on December 15, 2003 (the "Building"). The Building comprises 39,014 square feet. The Building is owned by Metropolitan Life Insurance Company.

9. The Building is located in an "Office-1" zoning district and is adjacent to both a "Residence" zoning district and an "Industry" zoning district.

10. The Building utilizes a sophisticated heating, ventilation, and air conditioning ("HVAC") system, which includes a number of rooftop units. This system is critical to the safe and proper operation of Idenix's laboratories and to the accuracy of Idenix's pharmaceuticals research, which requires strict control of indoor air quality and temperature.

11. Idenix is subject to stringent regulation by federal, state, and local agencies, including the U.S. Occupational Safety and Health Administration and the City Fire Department. Laws and regulations administered and enforced by these agencies require Idenix to operate its rooftop HVAC equipment continuously for health and safety reasons.

12. Chapter 8.16 of the Cambridge Municipal Code governs "all sound and vibration originating within the limits of the City," which includes noise emanating from the Building's HVAC system (the "Noise Control Ordinance"). See Noise Control Ordinance, § 8.16.020. A copy of the Noise Control Ordinance is attached hereto as Exhibit A.

13. The Chairperson of the Commission is authorized to enforce the Noise Control Ordinance using the enforcement mechanisms specified in Section 8.16.040.

14. The Noise Control Ordinance prohibits “any noise which causes or results in a noise level, measured at any lot line of any lot located in any residential area” that exceeds a volume of 60 dB(A) during the day and 50 dB(A) during the night. See Noise Control Ordinance, § 8.16.060(B) and Table 8.16.060E.

15. In 2007, neighbors in the “Residence” zoning district adjacent to the Building complained about the noise emanating from the Building rooftop.

16. In an effort to address these complaints and to comply with the volume thresholds in the Noise Control Ordinance, Idenix expended approximately \$250,000 between May 2007 and February 2008 to reduce the noise emanating from its HVAC system.

17. Several months later, the Commission notified Idenix’s landlord, Metropolitan Life Insurance Company, of a “disciplinary hearing” to be held on Idenix’s alleged violation of the Noise Control Ordinance. Notice was given by memorandum and letter dated May 5, 2008. The letter was accompanied by an April 18, 2008 “Investigative Report” of Andrea M. Boyer, the Commission’s Chief Licensing Investigator (“Boyer Report”). A copy of the memorandum listing the matters scheduled for hearing is attached as Exhibit B. A copy of the letter giving notice of the hearing and the Boyer Report are attached as Exhibit C.

18. The Boyer Report provided, in relevant part, that noise readings taken from the third floor of a residence at 11 Market Street, located across the street from the Building, were 58.7 to 58.9 dB(A) “flux” on the night of April 17, 2008, and confirmed that the volume thresholds applicable to the Building are 60 dB(A) during the day and 50 dB(A) during the night. Boyer Report, ¶ 1.

19. The Boyer Report noted that the noise reading taken in 2007 was 66.0 dB(A) and that Idenix had “executed many steps of work [since then] to bring the noise levels down.” Boyer Report, ¶ 4.

20. Finally, the Boyer Report noted that “this case has had many difficulties.” In particular, “during warm weather months, the building next to Idenix, zoned Industrial, emanates rooftop noises due to the HVAC system, which adds to the ambient noise levels which makes an isolated noise reading of Idenix rooftop not possible.” Boyer Report, ¶ 5.

21. A disciplinary hearing was held before the Commission on May 27, 2008.

22. On June 11, 2008, the Commission issued a written finding that Idenix is in violation of the Noise Control Ordinance between the hours of 6 pm and 7 am. The Commission, by this same letter, ordered Idenix to “CEASE AND DESIST operations between those hours,” but stayed the effective date of this order “until the 60 day appeal period expires.” The letter also stated the Commission’s intention to impose a fine of \$300.00 per day if the Building is not in compliance with the Noise Control Ordinance by the end of the 60-day period. A copy of this letter is attached hereto as Exhibit D (“Cease and Desist Order”).

23. The Noise Control Ordinance does not authorize the Commission to issue orders that restrain or enjoin noise-producing operations. Rather, the Commission must seek such orders from a court of competent jurisdiction. *See* Noise Control Ordinance, § 8.16.040(D).

24. Enforcement of the Commission’s unlawful Cease and Desist Order would result in a substantial injury to Idenix, including the potential termination of operations in Idenix’s research and development laboratories at the Building.

COUNT ONE: CERTIORARI (G.L. c. 249, § 4)

25. Idenix restates and incorporates by reference the allegations in Paragraphs 1-24.

26. Idenix has commenced this action in the nature of certiorari within 60 days of the Commission's June 11, 2008 Cease and Desist Order, which concluded Idenix's disciplinary hearing.

27. The Commission acted as a quasi-judicial tribunal when it held the disciplinary hearing on Idenix's alleged violation of the Noise Control Ordinance and subsequently issued a Cease and Desist Order containing a written finding of violation.

28. The Commission's issuance of the Cease and Desist Order is not otherwise reviewable by motion or by appeal.

29. The issuance of the Cease and Desist Order was arbitrary and capricious, as the information presented in the Boyer Report and the testimony given at the disciplinary hearing were insufficient bases upon which to make a finding of violation of the Noise Control Ordinance.

30. The issuance of the Cease and Desist Order is substantial error, as the Commission is without authority under the Noise Control Ordinance, or any other law, to issue unilaterally an order to restrain or enjoin Idenix's operations at the Building.

31. Enforcement of the Cease and Desist Order would result in substantial injury.

32. Pursuant to G.L. c. 249, § 4, Idenix is entitled to seek a quashing of the Cease and Desist Order in an action in the nature of certiorari.

COUNT TWO: DECLARATORY RELIEF (G.L. c. 231A)

33. Idenix restates and incorporates by reference the allegations in Paragraphs 1-24.

34. There is an actual controversy as to whether the Commission had sufficient bases upon which to make a finding of violation of the Noise Control Ordinance.

35. Under the Noise Control Ordinance, the Commission has no authority to issue an order to restrain or enjoin noise-producing operations. *See* Noise Control Ordinance, § 8.16.040.

36. There is an actual controversy as to whether the Commission had the authority to issue the Cease and Desist Order.

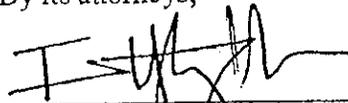
37. Pursuant to G.L. c. 231A, Idenix is entitled to a declaratory judgment that the Commission acted arbitrarily and capriciously in making a finding that Idenix violated the Noise Control Ordinance and lacked authority to issue the Cease and Desist Order, which restrains and enjoins Idenix's operations at the Building.

Wherefore, Idenix respectfully requests that the Court

- A. Enter judgment for Idenix;
- B. Grant certiorari and quash the Cease and Desist Order;
- C. Declare that the Commission acted arbitrarily and capriciously in finding that Idenix violated the Noise Control Ordinance and lacked authority to issue the Cease and Desist Order; and
- D. Grant such other relief as the Court deems just and proper.

IDENIX PHARMACEUTICALS INC.

By its attorneys,



Richard A. Johnston (BBO 235420)

Tina Yuting Wu (BBO 657670)

WILMER CUTLER PICKERING

HALE AND DORR LLP

60 State Street

Boston, Massachusetts 02109

Tel: 617-526-6000

Fax: 617-526-5000

Dated: August 11, 2008

TO PLAINTIFF'S ATTORNEY: PLEASE CIRCLE TYPE OF ACTION INVOLVED: —  
TORT — MOTOR VEHICLE TORT — CONTRACT —  
EQUITABLE RELIEF — OTHER

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT  
DEPARTMENT  
OF THE  
TRIAL COURT  
CIVIL ACTION  
No.

MIDDLESEX ..... , ss



Idenix Pharmaceuticals, Inc, Plaintiff(s)

v.

Cambridge License Commission and  
City of Cambridge ..... , Defendant(s)

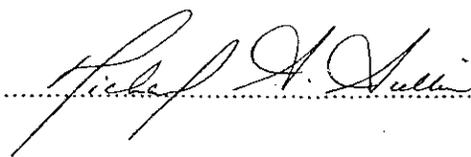
SUMMONS

To the above-named Defendant: (City of Cambridge)

You are hereby summoned and required to serve upon Richard A. Johnston of Wilmer Cutler  
Pickering Hale and Dorr LLP ..... plaintiff's attorney, whose address is 60 State Street,  
Boston, MA 02109....., an answer to the complaint which is herewith  
served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you  
fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You are also  
required to file your answer to the complaint in the office of the Clerk of this court at 200 TradeCenter,  
Woburn, MA 01801 ..... either before service upon plaintiff's attorney or within a  
reasonable time thereafter.

Unless otherwise provided by Rule 13(a), your answer must state as a counterclaim any claim which you may  
have against the plaintiff which arises out of the transaction or occurrence that is the subject matter of the plaintiff's  
claim or you will thereafter be barred from making such claim in any other action.

Witness, Barbara J. Rouse, Esquire, at Suffolk County Courthouse, Boston, Massachusetts  
the 3rd ..... day of September .....  
....., in the year of our Lord 2008.....

  
Clerk

NOTES.

- 1. This summons is issued pursuant to Rule 4 of the Massachusetts Rules of Civil Procedure.
- 2. When more than one defendant is involved, the names of all such defendants should appear in the caption. If a separate summons is used for each defendant, each should be addressed to the particular defendant.

NOTICE TO DEFENDANT — You need not appear personally in court to answer the complaint, but if you claim to have a defense, either you or your attorney must serve a copy of your written answer within 20 days as specified herein and also file the original in the Clerk's Office.

PROOF OF SERVICE OF PROCESS

I hereby certify and return that on September 3, 2008, I served a copy of the within summons, together with a copy of the complaint in this action, upon the within-named defendant, in the following manner (See Mass. R. Civ. P. 4 (d) (1-5)):

by certified mail, return receipt requested, to Margaret Drury, Clerk of the City of Cambridge, pursuant to Mass. R. Civ. P. 4(d)(4).

Dated: September 3, 2008

N.B. TO PROCESS SERVER:

PLEASE PLACE DATE YOU MAKE SERVICE ON DEFENDANT IN THIS BOX ON THE ORIGINAL AND ON COPY SERVED ON DEFENDANT.

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( )

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.
SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION
No.

Idenix Pharmaceuticals, Inc., Piff.
v.
Cambridge License Commission and
City of Cambridge, Defl.

SUMMONS
(Mass. R. Civ. P. 4)

*Geoffrey* *Attachment #2*

**Testimony regarding Idenix Pharmaceuticals Inc.**

June 28<sup>th</sup>, 2011

I am urging the License Commission to vote NOT TO RENEW the special variance that was granted to Idenix Pharmaceuticals on July 7, 2010.

Idenix Pharmaceuticals should be required to meet the full requirements of the City of Cambridge Noise Control Ordinance, pursuant to Cambridge City Code, Section 8.16.090 (B).

I will not review the testimony that I have presented at several hearings over the past many months. As a neighbor that was active in the zoning discussions in the 1990's regarding this area of Cambridge, it has never been clearer that this pharmaceutical laboratory is the wrong use for this location. Idenix, in their application for development at this location, said that they would abide by the Cambridge Noise Ordinance, and as of this date, they have not done so.

Of course I am saddened that the threat of a lawsuit caused the special variance to be given to Idenix. We are dealing with multi-BILLION dollar corporations (Novartis is the majority owner of Idenix, and Met Life is the landlord and owner of the property....both are multi-BILLION dollar corporate entities.) We are not dealing with a mom and pop owner that would face financial ruin if they had to abide by the law.

Idenix wrote the following in their March 7, 2011 report to stockholders:

"We have been involved in a dispute with the City of Cambridge, Massachusetts and its License Commission pertaining to the level of noise emitted from certain rooftop equipment at our research facility located at 60 Hampshire Street in Cambridge. The License Commission has claimed that we are in violation of the local noise ordinance pertaining to sound emissions, based on a complaint from neighbors living adjacent to the property. We have contested this alleged violation before the License Commission, as well as the Middlesex County, Massachusetts, Superior Court. In July 2010, the License Commission granted us a special variance from the requirements of the local noise ordinance for a period of one-year, effective as of July 1, 2010. We may, however, be required to cease certain activities at the building if: a) the noise emitted from certain rooftop equipment at our research facility exceeds the levels permitted by the special variance; b) the parties are unable to resolve this matter through negotiations and remedial action; or c) our legal challenge to the position of the City of Cambridge and the License Commission is unsuccessful. In any such event, we could be required to relocate to another facility which could interrupt some of our business activities and could be time consuming and costly."

Clearly, Idenix understands that they may have to move their facility if they do not abide by the Cambridge Noise Ordinance. This event would not be a financial disaster for them. Idenix chose this location, agreed to meet the standards of the noise ordinance, and now it is time that they are held accountable for their decision to locate their laboratory at a site surrounded by residential neighborhoods.

As for their good faith efforts, they have been forced to make the changes they have made in their operations due to the advocacy of the community....no good faith there. The changes in their rooftop equipment have been heartbreakingly slow in coming. They have not made some of the changes that are way overdue, such as working with Met Life, their landlord, to update and move the noisy air conditioner on their roof which generates a huge amount of noise which should be

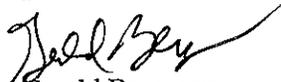
replaced and relocated with more modern equipment. Both Idenix and Met Life are profiting from the special variance issued by the License Commission because the property is now available for pharmaceutical laboratory use, thereby increasing its value.

From the beginning this has been a David and Goliath story. It is time that the License Commission do what is right. Stand up for the community, enforce the noise ordinance as written, and do not let BILLIONAIRE corporate interests and the threats of lawsuits stop the Commission from protecting residential neighborhoods from disruptive and damaging noise.

Vote against any effort to make permanent the special variance.

Vote to end the special variance.

Enforce the noise ordinance.

  
Gerald Bergman

82 Elm Street  
Cambridge, MA 02139

June 28, 2011



*Gerald Bejn* *Attachment #3*

# CAMBRIDGE LICENSE COMMISSION CITY OF CAMBRIDGE

831 MASSACHUSETTS AVE., 1ST FLOOR, CAMBRIDGE, MASSACHUSETTS 02139 • TEL (617) 349-6140 • FAX (617) 349-6148

RICHARD V. SCALI  
Chairman

CHIEF GERALD R. REARDON  
Fire Department  
Commission Member

COMMISSIONER ROBERT C. HAAS  
Police Department  
Commission Member

ELIZABETH Y. LINT  
Executive Officer

July 7, 2010

Christopher Gilman  
Idenix Pharmaceuticals  
60 Hampshire Street  
Cambridge, MA 02139

RE: Continued from November 10, 2009  
Application for special variance from the City of Cambridge  
Noise ordinance by Idenix Pharmaceuticals, Inc.

Dear Mr. Gilman

On August 6, 2009, Idenix Pharmaceuticals, located at 60 Hampshire Street, filed an application for a Special Variance from the requirements of the City of Cambridge Noise Control Ordinance, pursuant to Cambridge City Code, Section 8.16.090(B). Specifically, Idenix requested relief from the 50 dBA Limit and asked for an alternate limit of 60 dBA.

The request for a variance was filed as a result of a disciplinary hearing held on May 29, 2008. At this time Idenix was ordered to cease and desist operations during nighttime hours, (6PM to 7 AM), as they were consistently found to be over the 50 dBA limit. A letter was sent to Idenix on June 11, 2008 detailing this. There had been a previous application for a variance filed by Idenix on June 2, 2008. This was denied by the Board of License Commissioners on October 30, 2008. The Commissioners noted that Idenix was taking steps to mitigate the noise emanating from their equipment, but it had not reached a satisfactory level. Idenix subsequently filed an appeal of this denial in Middlesex Superior Court, which is pending.

In order to grant a special variance, pursuant to City Code Section 8.16.090(B)(3) the Commission:

"...shall balance the hardship to the applicant and the community, of not granting the special variance, against the adverse impact on the health, safety, and welfare of the persons affected, the adverse impact on property affected, and any other adverse impacts of granting the special variance."

The Commission shall also consider "whether the noise disturbance occurs in or across a buffer zone."

A buffer zone is defined by the noise ordinance as an imaginary line along the ground surface, its vertical extension, and the area at fifty feet on either side of the line, which separates a residential area from a commercial area or an industrial area.

It is important to note that Idenix is in an office area, abutting residential on one side and industrial on the other.

Hearings were held by the License Commission on the request for a special variance on September 9, 2009, February 23, 2010, June 22, 2010, and July 1, 2010. On all of the occasions, noise readings were reviewed. The readings were taken by Cavanaugh Tocci Associates, on behalf of Idenix, as well as Andrea Boyer, under the direction of the License Commission. In addition, Idenix continued to take steps to reduce the noise, such as consolidating equipment, installing sound curtains, replacing older equipment, and moving some equipment. Throughout the entire process one of the critical issues has been the ambient noise levels which have an effect on the readings taken. At all of these hearings the Commissioners heard from residents about their concerns, as well.

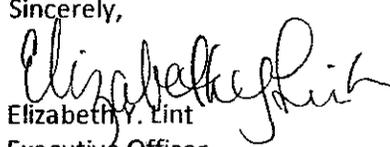
On July 1, 2010 the Board of License Commissioners held a decision making hearing. At this time they were asked by Idenix to not hold them responsible for and to have flexibility with things that they have no control over, such as the noise emanating from other buildings in the area. They also suggested that the problem is really a seasonal issue, and that they have no further creative moves to lower their noise output.

In weighing the hardships of the applicant and the community, and understanding the disturbance to the residents as well as the consequences of not granting a variance to the applicant, the Commissioners voted 2-1 to grant a variance to the noise control ordinance with the following conditions:

1. The Variance is for a dBA level of 55;
2. It is for 1 year only, starting July 1, 2010;
3. The variance runs to Idenix only and not with the building. Should Idenix leave that location, the variance ceases to exist;
4. Readings are to be done during the course of the year by Idenix;
5. Ms. Boyer shall do a reading prior to July 1, 2011;
6. Idenix shall continue to take steps to maintain their units and attempt to reduce the number of units on the roof in order to lower the noise level;
7. Measurements are to be taken at the lot line up to the roof line, and not at the window of 11 Market Street. This is a vertical line upward to the roof line or at the point of disturbance.

You have a right to appeal the decision of the granting of the amended variance to Middlesex Superior Court within 60 days of receipt of this letter pursuant to MGL c. 249 sec. 4.

Sincerely,

  
Elizabeth Y. Lint  
Executive Officer

EYL/co

cc: Richard Scali, Chairman; Chief Gerald Reardon; Commissioner Robert Haas; Andrea Boyer; Abutters.