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## AN OVERVIEW OF NOISE REGULATION IN FLORIDA

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### I. Introduction

The state of Florida is experiencing incredible growth, attracting thousands of new residents and businesses each year. A negative side effect of this growth is noise pollution, which local governments must now deal with as development encroaches into areas which once were rural and residential. A review of recent Florida headlines indicates the pervasive noise problems within the state. In 2005, central Florida citizens have been annoyed by the invasive sound of airboats. Hillsborough County was embroiled in several months of litigation with the owners of an outdoor amphitheater that has severely annoyed residents within miles and caused them many sleepless nights. Also in 2005, the City of Treasure Island's noise ordinance was challenged by a bar owner, and was ruled invalid as applied by the Circuit Court, resulting in amendments to the ordinance. In 2009, Hillsborough County's Animal Control Ordinance was ruled unconstitutional in part as its prohibition against allowing pets to emit sounds that unreasonably annoy humans or interfere with the reasonable use and enjoyment of property, was ruled facially unconstitutional. Basically, the Court found that what may annoy or disturb one person, may not necessarily be objectionable to another.

In addition, the now pervasive sound of thumping car stereos caused the Legislature during its 2005 session to amend a motor vehicle statute so that a violation would now occur if the music is plainly audible from twenty-five feet from the vehicle. (the "Bass Thumping Law".) However, even the Bass Thumping Law was recently successfully challenged as being unconstitutional by the Second District Court of Appeal in the 2011 case of *State v. Catalano*. The Court determined that: (1) the term "plainly audible" was unconstitutionally vague and overbroad, and allowed for its arbitrary, selective application and (2) was not content neutral as it suppressed certain types of speech (music), while exempting speech relating to a business or political purpose. Basically you could get cited for playing Lady Gaga too loud within 25 feet, but Rush Limbaugh could be "plainly audible" a mile away.

Given that the topic of noise regulation is so broad and the caselaw from around the country is so divergent in its interpretations of common terms typically contained in noise regulations, such as "annoy," "disturb," "unnecessary," or "excessive," as they implicate the relevant provisions of the U.S. Constitution, this article will focus on the treatment Florida has given noise regulation. It will also discuss the trend toward adopting quantitative, objective noise

level standards and how even these standards can be subject to attack and undermined by alleged violators.

## **II. The Florida Constitution and Statutes**

In Florida, the state Constitution sets forth the State's policy concerning protection of its citizens from noise pollution. Specifically, Article II, § 7 states that: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise . . . ."

In order to implement this aforementioned constitutional provision, the Florida Legislature delegated authority to the Florida Department of Environmental Protection (DEP) to establish standards "for the abatement of excessive and unnecessary noise." *See* F.S. Section 403.061(11) 2004. However, as of this date, the DEP has failed to enact any regulations, and therefore, the only statutory regulations regulating noise propagation sources are laws relating to motor vehicles, loud music from car stereos, and marine vessel noise. *See* F.S. Sections 316.272, 316.293, 316.3045 and 327.605 (2004), respectively.

## **III. Local County and City Noise Regulations**

Most local governments have some form of noise control based on either subjective nuisance or disturbance based standards, or an objective decibel based standards, or a combination thereof. Many of the subjective noise ordinances seek to control excessive noise that is of such character that it "tends to annoy, disturb or cause physiological or psychological harm to a person with normal sensitivities." Improvements in sound measurement technology and federal noise initiatives that occurred in the 1970's, however, have caused a trend among local governments to adopt detailed objective decibel-based noise regulations that incorporate noise emission limitations and noise assessment criteria. These ordinances are often coupled with traditional nuisance based regulations that allow for a two-pronged approach to noise control.

## **IV. Federal Constitutional Standards**

In order for a noise regulation to comport with the United States Constitution, it must be content neutral, clearly and narrowly drafted, and must not provide unlimited discretion to government officials, or regulate more conduct that is necessary to serve the alleged governmental interest. Local government regulations are most commonly challenged on First Amendment grounds for impeding free speech rights, or under the Fifth and Fourteenth Amendments for violating due process rights. Amplified music, even your neighbor's teenager's "boom box" blasting your home with Snoop Dogg's unconventional perspective on social relationships, is considered a form of protected expression and communication that is subject to very narrowly tailored regulation.

## V. Florida Cases Involving Constitutional Challenges

Florida courts have generated very few opinions concerning the constitutionality of local government noise ordinances. Of the five cases that are mentioned herein, four have resulted in decisions holding in part that the ordinance under attack was unconstitutional. Generally, these cases indicate that the courts will uphold certain subjective provisions in a noise ordinance, but also further suggest a policy of strict judicial adherence to the requirement that ordinances must be narrowly tailored to fulfill a legitimate governmental interest.

In *City of Miami Beach v. Seacoast Towers-Miami Beach, Inc.*, 156 So.2d 528 (Fla. 3d DCA 1963), the Third District Court of Appeal considered the validity of a provision in a 1948 noise ordinance and ultimately affirmed a circuit court's injunction prohibiting its enforcement. The ordinance in question contained sections that prohibited "restricted noises," which included construction noise within fifty yards of any apartment building or hotel "at all hours" during the timeframe consisting of December 1<sup>st</sup> through March 31<sup>st</sup>. In applying a balancing of interests test, the court found this provision of the ordinance unconstitutional as it placed too great a burden on the property owner by prohibiting any construction for one-third of the year. Although the *Seacoast* court recognized that the government had a substantial interest in promoting tourism and protecting visitors from disturbances, the court failed to find a reasonable basis for the law's ban on construction noise during winter months as tourists were now coming to Miami Beach "year round," as opposed to when the ordinance was enacted in 1948.

A second provision of the ordinance that allowed the city manager "to waive any and all requirements herein in cases of emergency where the welfare of persons or property may be jeopardized," was held to be an arbitrary and unconstitutional standard. The court applied a due process vagueness analysis and found that this section was invalid as it allowed arbitrary enforcement of the ordinance at the "whim and fancy" of a city official "without any ascertainable standard of guilt" or standard indicating what qualified as an "emergency."

The next reported Florida opinion concerning noise regulation was the Second District Court of Appeal's decision in *Easy Way of Lee County, Inc. v. Lee County*, 674 So.2d 863 (Fla. 2d DCA 1996). *Easy Way* concerned portions of the county's noise ordinance prohibiting the use of certain devices for the production of sound "in such a manner as to cause noise disturbance so as to disturb the peace, quiet and comfort of the neighborhood . . . [or] between the hours of 12:01 a.m. and the following 10:00 a.m. in such a manner as to be plainly audible across property boundaries . . . or plainly audible at fifty (50) feet from such device when operated within a public space." The ordinance defined "plainly audible" as "any sound produced . . . that can be clearly heard by a person using his or her normal hearing faculties, at a distance of fifty (50) feet or more from the source." The alleged violations were generated by a bottle club whose owners were cited by law enforcement officials for violations of the ordinance when residential neighbors complained of amplified music propagating from the nightclub. In response, the club owner challenged the constitutionality of the aforementioned portions of the ordinance as being both vague and an overly broad restriction on the right to free speech.

The *Easy Way* court upheld that portion of the ordinance that prohibited devices used to cause "noise disturbance so as to disturb the peace, quiet and comfort" of others, finding it to be

a valid exercise of police power by Lee County. In coming to this conclusion, the court's analysis relied heavily on *Reeves v. McConn*, 631 F.2d 377 (5th Cir. 1980) wherein the court found that a qualitative noise standard of “unreasonably loud, raucous, jarring, disturbing, or a nuisance” was not unconstitutionally vague. The *Easy Way* court also made reference to *Reeves* wherein it suggested that a standard of conduct may depend on abstract words “even though they fall short of ‘mathematical certainty,’” because “‘flexibility and reasonable breadth, rather than meticulous certainty’ is acceptable in this area.” Accordingly, agreeing with the *Reeves* court, the Second District Court of Appeal upheld this subjective provision contained in Lee County's ordinance.

However, the Second District struck that portion of the ordinance that contained a “plainly audible” standard for determining a noise violation. Finding that the term “plainly audible” did not provide sufficient guidelines to prevent arbitrary enforcement because it allowed noise to be prohibited based on the subjective and personal perceptions of a particular listener, the court determined that this provision was unconstitutionally overly broad and vague.

Shortly after the filing of the *Easy Way* decision, Florida's Sixteenth Judicial Circuit issued an unpublished opinion ruling on the constitutionality of Monroe County's municipal noise ordinance. In *Kolbenheyer v. State*, 1996 Fla. ENV LEXIS 99\* 1 (Fla. 16th Cir. May 31, 1996), a section of the County's noise ordinance was challenged as being unconstitutionally vague and overbroad. Specifically, this regulation stated that “[n]o person shall unnecessarily make, continue, or cause to be made or continue, any noise disturbance,” along with the definition of noise disturbance as “any sound in quantities which are or may be potentially harmful or injurious to human health or welfare . . . or unnecessarily interfere with the enjoyment of life or property . . . of a reasonable person with normal sensitivities.” The Circuit Court found that the use of the term “unnecessarily” failed to provide a “standard by which to measure the actor's conduct.” Furthermore, the court opined that violations of the ordinance were “wholly dependent” on the subjective reactions and complaints of a third party, without any attempt to determine volume or “necessity” of the sound being generated. In light of these deficiencies, the court determined that these sections were vague and unenforceable.

Next, in 1998, the constitutionality of a “plainly audible” standard was once again addressed by the Fifth District Court of Appeal in *Davis v. State*, 710 So.2d 635 (Fla. 5th DCA 1998). In *Davis*, the court held that a portion of the Florida Statute that prohibited the playing of a motor vehicle's radio so that the sound was “plainly audible at a distance of 100 feet or more from the motor vehicle” was not unconstitutionally vague as it clearly conveyed what conduct was forbidden. The court also disregarded the appellant's First Amendment argument alleging that the statute was not content neutral, indicating that the statute simply limited how loudly sound could be played and failed to regulate content, stating that “. . . the statute permits one to listen to anything he or she pleases, although not as loudly as one pleases.”

Notably, this decision was in direct contradiction of *Easy Way*. This very brief opinion noted that it had failed to find cases on point from Florida and cited to noise ordinance cases from other states in support of its decision. Therefore, it is interesting that the court neglected to recognize the earlier *Easy Way* decision, and its opposite result regarding the vagueness of the “plainly audible” standard.

The most recent Florida case concerning the constitutionality of a noise ordinance was *Daley v. City of Sarasota*, 752 So.2d 124 (Fla. 2d DCA 2000). The alleged violator in *Daley* was cited on two different occasions for violating a provision of the City's noise ordinance that prohibited "amplified sound not in a completely enclosed structure" during certain night time hours within a commercial business district. The petitioner attacked the constitutionality of the ordinance, claiming that the regulation imposed an overly broad restriction on the right to free speech. The court indicated that the ordinance in question simply sought to regulate protected speech in a public forum, and therefore it applied a First Amendment time, place, or manner analysis used by the U.S. Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The court determined that the City's interest in regulating unreasonable sound was unquestionably a legitimate interest; however, the City's noise ordinance was not narrowly tailored to achieve its intended goal of regulating unreasonable sound. This was because the portion of the ordinance that was challenged completely banned all amplified sound coming from unenclosed structures during certain hours, irrespective of whether the volume or the sound could be heard outside of the structure. Further, the ordinance placed absolutely no limits on unamplified sound, regardless of the time of day. Accordingly, the court ruled that the ordinance restricted First Amendment rights more intrusively than necessary and therefore, was unconstitutionally overbroad.

The foregoing Florida cases suggest that regulations seeking to limit noise must be narrowly tailored to specific times and places, and also must be reasonable relative to the government's perceived harm, in order to avoid being invalidated based on overbreadth.

## **VI. Noise Ordinances In Florida**

A cursory review of numerous ordinances of Florida counties and municipalities intended to control noise indicates that many are legally insufficient, may be difficult to enforce, and are subject to legal challenge. Generally, these ordinances contain subjective nuisance based standards and/or objective decibel based standards with insufficient guidelines or criteria to properly quantify and prosecute a noise violation.

Many of these noise ordinances are deficient in that:

1. They fail to account for existing ambient sound in their noise level standards and measurements;
2. They are based on an A-weighted standard, which deducts significant sound energy from low frequencies, often providing misleading results relative to the actual annoyance of low frequency sound;
3. The low quality analog measurement equipment identified in their ordinance allows for imprecise "ballpark" estimated violations subject to a large margin of human error, as opposed to digital equipment that more precisely measures sound level data;
4. They often contain provisions and standards that have been ruled facially unconstitutionally vague by various courts;

5. They fail to account for numerous variables, such as ambient noise, refraction, wind and humidity, reflection from water bodies, building refraction, and other environmental conditions, which leads to difficulty in attributing sound to the source property;

6. They provide exceptions for sound relating to certain uses, such as church bells, religious holiday events, or amplified public events, that provide a basis for a First Amendment equal protection challenge; and

7. They provide inappropriate discretion for enforcement officials as they fail to define permitting and appeal periods, or how sound will actually be measured, (i.e. Lmax, providing for an instantaneous maximum sound level measurement, or Leq, an equivalent continuous sound level providing for measurement to be averaged over a period of time).

Most local noise ordinances have generally included subjective provisions prohibiting activities based on traditional common law nuisance standards. For example, the City of Inverness' noise ordinance simply states that “[t]he volume of sound inherently and currently generated shall be controlled so as not to become a nuisance to adjacent property owners.” Notably, in 2005, the City's ordinance was being applied to a restaurant that was the subject of several complaints for excessive noise. When questioned by the media concerning the matter, the City's Development Director was quoted as saying that “[t]he problem that we had with it is it's very difficult to enforce because it's very broad.” *Music or Nuisance? Inverness Looks to Clarify*, St. Petersburg Times 7 (November 6, 2005).

Another example of a subjective regulation is the City of Treasure Island's which states that:

“It shall be unlawful for any person to willfully make, continue or cause to be made or continued any loud and raucous noise, which term shall mean any sound that, because of its volume level, duration and character, annoys, disturbs, injures or endangers the comfort, health, peace or safety of reasonable persons of ordinary sensibilities within the limits of the city.” *See* Sec. 18-72, Code of Ordinances, City of Treasure Island, FL (1998).

Still another example of a typical subjective noise regulation is contained in Hillsborough County's ordinance, which states in part that:

“ . . . (b) Definition of noise disturbance. As used in this section, a 'noise disturbance' is any sound which is either:

(1) Excessive in amount or of such duration, wave frequency or intensity as may be or is injurious to human or animal life or property; (2) Excessive or unnecessary in

amount, level or duration as to unreasonably interfere with the comfortable enjoyment of life, property or the conduct of business; (3) Of such character and in such quantity or level as to be detectable by a considerable number of persons or the public, so as to interfere with such person or the public health, repose or safety, or to cause severe annoyance or discomfort, or which interferes with normal conduct of business, or is otherwise detrimental or harmful to the health, comfort, living conditions, welfare and safety of the inhabitants of the county.” *See* Code of Hillsborough County (Fla.) Section 26-4.1 (1985).

These types of ordinances are based upon standards that are often subject to attack as being unconstitutionally vague, with the court’s providing a great divergence in their decisions. These qualitative regulations are most often subject to the enforcement of either affected citizens, local law enforcement personnel, or code enforcement officials that have broad discretion to determine whether a sound is “unreasonable,” “unnecessary,” “excessive,” “annoying,” “disturbing,” or causing “discomfort.”

## **VII. Trend Toward Objective or Quantitative Standards**

The trend is now for local governments to adopt objective standards in their noise ordinances to avoid enforcement problems and legal challenges. Quantitative ordinances with objective noise level limits proscribe noise producing activity by applying scientific standards of sound intensity and frequency, measured as “decibels.” Maximum sound levels are generally measured in dBA and vary considerably from ordinance to ordinance.

Notwithstanding that these objective standards are generally more reliable and defensible than traditional subjective standards, and if well crafted, can virtually eliminate First Amendment challenges, they are still subject to attack by offenders for a variety of reasons. Therefore, any quantitative ordinance should be carefully drafted to avoid or at least minimize any facial or as applied challenges. Specifically, these ordinances should consider the following items:

1. Exceptions – that any exceptions to the ordinance are narrowly crafted, including time, duration and decibel levels. For example, many ordinances exempt activities such as holiday events, entertainment districts, amusement parks, sporting events, school carnivals, and events sponsored by governments. If certain reasonable limitations are not placed on these exceptions, they can be used as the basis for an equal protection challenge to the ordinance. Therefore, in considering any exemptions, it is wise to limit their duration, time, and noise level intensity. Consideration should also be given to authorizing certain events through a permitting process that would allow a temporary exemption. The permitting process should set forth clear and narrow guidelines for granting or denying the permit to prevent arbitrary denials, and consequently, First Amendment prior restraint challenges.

2. Definitions – an ordinance should clearly specify and define the devices and methods that will be used to avoid overbreadth and vagueness challenges.

3. Equipment – all the equipment identified in the ordinance should meet industry standards and should be digital equipment capable of recording and downloading data, as opposed to analog equipment requiring hand written field measurements, which are difficult to precisely register while monitoring a noise source.

4. Use of equipment –the equipment used should meet American National Standards Institute (ANSI) industry technical specifications, and should be used in accordance with American Society for Testing Materials (ASTM) standards on measurement protocols.

5. Calibration – the equipment must be properly calibrated prior to each reading per the manufacturer’s specifications, and also at the factory as suggested by the manufacturer.

6. Ambient noise – existing or background noise must be measured and logged to determine its effect on the source noise.

7. Competence of field personnel – all field personnel should be trained to utilize the equipment and interpret its data, in accordance with the manufacturer's specifications and follow an established written protocol for using the equipment.

8. Measurement of different octave bands - the A weighted scale is designed to correct decibel readings to account for the fact that the human ear is less sensitive to low pitched sounds than it is to high pitched sounds. However, oftentimes the offending noise source results in bass sounds, or vibrations only detected by a sound meter measuring the lower octave bands. Therefore, consider measuring the noise source based on different frequency or octave band levels which not only will identify the noise source that is causing the complaint, but will more easily identify the source if challenged based on the distinct octave bands recorded. This way, if a violation is challenged, a pattern of octave band levels can be distinguished from the ambient levels and other noise sources, which will pinpoint the source and isolate the offender, similar to a fingerprint.

9. Point of measurement – Sound should be measured as close to the source as possible to avoid arguments that the measurement was tainted by ambient sound, atmospheric conditions, environmental conditions, traffic, chirping insects, power lines, building refraction or other possible sources.

10. Outside experts – if the situation appears that it may lead to litigation, outside acoustical consultants should be hired whose experience, quality of equipment, and reliability of data will provide the basis for a strong almost “bulletproof” case. Money spent on experts when dealing with a contentious situation that will be hotly contested, such as a popular nightclub, auto raceway, or outdoor nightclub where the offender continues to ignore citations and will most likely litigate seeking to invalidate the

ordinance and its application, may be money well spent. This will avoid many of the typical “as applied” challenges that offender’s raise concerning competence of the field personnel, quality of the equipment, recording of data, inaccuracies due to ambient noise skewing the data, and other defenses.

### **VIII. Subjective Nuisance Based Standards**

Although oftentimes difficult to enforce, a subjective standard can still be an important weapon in a local government's arsenal for controlling noise disturbances. There are certain situations where a noise disturbance may not exceed a certain established objective noise level standard, but relative to that particular environment, may still qualify as a nuisance.

Naturally, in light of the diverse caselaw interpreting subjective noise standards, caution should be executed in drafting an ordinance that will withstand constitutional scrutiny. Therefore, a subject noise standard should consider the following:

1. Utilize terms that have sustained constitutional challenges, such as "loud and raucous," "disturb," and "loud and unseemly," while avoiding terms that have been determined to be vague.
2. Employ a reasonable person standard because they have been upheld by most courts and they have often been held to cure otherwise vague standards.
3. Ensure that the ordinance's permitting scheme is tightly drafted and provides for prompt judicial review of a denial to avoid arbitrary action by the permitting authority, which could provide the basis for a prior restraint argument.
4. Ensure that the ordinance is clearly and plainly worded and includes time for compliance, penalties, an appellate process and a review process, which will deflect arguments concerning inconsistent enforcement.
5. Alleged violations should be determined by designated trained officials and should not be solely based on citizen complaints.

### **IX. Conclusion**

Although the Florida Constitution states that noise abatement is an important state policy, Florida has done virtually nothing to achieve this goal. Control of noise pollution in Florida is handled on an ad hoc basis at the local government level with each city and county having its own unique method of control. Most of these regulatory schemes include the use of a subjective standard that is often extremely difficult to defend in this rapidly developing state that presents many opportunities for incompatibility and conflict. Therefore, cities and counties should evaluate their laws to ensure that they comply with recent caselaw and that they will provide a strong basis to effectively control excessive noise, while also avoiding costly, time consuming legal challenges.

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