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## Homeowners associations and 'the noise assault'

December 17, 2011

By MARIO D'ARTAGNAN - Real Estate in Perspective , Cape Coral Daily Breeze

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A few weeks ago I wrote about homeowners associations, and have received an overwhelming response from readers. This is a follow-up and the important issue of noise, particularly in private, gated, golf course communities. In researching this topic, the general Lee County ordinance states that in residential communities, the decibel level cannot exceed 66 between the hours of 7 a.m. and 10 p.m. Between the hours of 10 p.m. and 7 a.m., decibel levels may not exceed 55.

There was a Lee County case that challenged the constitutionality of the ordinance wherein an 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). The following excerpt is from Mark Bentley, Esquire, Gray Robinson, P.A., Tampa.

"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 disturbances 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, #719510v2. However, the Second District struck that portion of the ordinance that contained a 'plainly

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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."

Mario D'Artagnan is a broker associate with Realty World Florida Inc. He is a former investigator for the Florida Real Estate Commission. He is also a former real estate instructor. He is a published author and has been a keynote speaker on the subject of agency law, and is also a veteran of the U.S. Air Force. For questions or comments contact him at:

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