THE FIRST AMENDMENT STRIKES BACK: AMPLIFIED RIGHTS

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I. INTRODUCTION

In *Daley v. City of Sarasota*,[1] Florida's Second District Court of Appeal struck down a municipality's attempt to impose an absolute ban on amplified noise emanating from unenclosed structures within certain zoning districts during specified hours of the day and night.[2] The appellate court found that, despite the City's laudable goal in attempting to regulate unreasonable noise, the First Amendment[3] prohibits local governments from completely banning amplified noise.[4] The Second District Court of Appeal's holding extends to amplified commercial noise as well.[5] Hence, any attempt to regulate amplified noise is "subject to strict guidelines and definite standards closely related to permissible governmental interests" and "must be sufficiently definitive as to secure against arbitrary enforcement."[6]

The appellate court's ruling undoubtedly will have an impact on a local government's attempt to control noise, commercial or otherwise, within its jurisdiction. This is especially true for a municipality desiring to revitalize its city in an effort to make the community more attractive to residents, businesses, and tourists.

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1. 752 S.2d 124 (Fla. Dist. App. 2d 2000).

2. *Id*. at 127.

3. The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. The First Amendment is applicable to the states through the Fourteenth Amendment, which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1.

4. *Daley*, 752 S.2d at 126–127.

5. *Id*. at 127.

6. *Id*. (citing *Easy Way of Lee County, Inc. v. Lee County*, 674 S.2d 863, 866 (Fla. Dist. App. 2d 1996)).

Assuming that a city successfully revitalizes its community, local government may need to address the growing pains commonly associated with revitalization, most notably noise from commercial establishments.

The issue of noise, especially noise from commercial establishments, often pits the interests of the residents of the revitalized community against the interests of nearby businesses, particularly businesses that provide nighttime entertainment. The residents feel that the rejuvenated community interferes with their accustomed way of life. Their neighborhood, which may have once been sparse and quiet, has been transformed into a crowded and clamorous area featuring a variety of commercial establishments, some of which may provide nighttime entertainment. The residents want what they had — peace and quiet. Ultimately, the residents may petition the local government to place noise restrictions on the businesses in an effort to make their revitalized neighborhood less noisy.

The businesses, in contrast, feel that, after being courted by a city to invest a substantial sum of money into revitalization, they need not significantly restrict their commercial entertainment activities, which may draw substantial revenue. After all, the businesses argue, the city desperately wanted what it now seeks to restrict — a rejuvenated community. According to the businesses, the residents should be required to tolerate an increased level of noise because they live in, or near, a commercial zoning area. And, because the more restrictive noise ordinances likely did not exist when the businesses initially opened, they feel sandbagged by the municipality's subsequent attempt to place significant restrictions on their entertainment activities.

This philosophical conflict between residents and businesses was the underlying practical issue that gave birth to the noise ordinance addressed in *Daley*.[7] In an effort to control unreasonable noise, the City elected to take an "easy" approach to the perceived noise problem. The City's simple solution consisted of imposing an absolute ban on all amplified noise in designated commercial areas of the City, during certain hours of the day and night, from structures that were not completely enclosed.[8] However, as the appellate court in *Daley* noted, the City's ordinance went too far and unreasonably encroached upon First

7. *Infra* pt. II(A).
8. *Daley*, 752 S.2d at 125.

Amendment protections, despite the City's good intentions.[9]

This Last Word addresses the practical issue that remains following the *Daley* decision: How can a municipality balance the interests among businesses and residents in the community and, at the same time, stay within the constitutional confines of the First Amendment? Although the issue may, at first blush, appear fairly simple, the actual act of balancing the competing interests among businesses and residents becomes increasingly complex.

II. FACTUAL HISTORY

A. Preliminary Information

Some time ago, the City sought to revitalize its downtown area and, in furtherance of its ambition, committed a substantial sum of money to make the area more attractive to residents, businesses, and tourists.[10] Various businesses also invested significant resources in connection with the City's revitalization project.[11] In early 1996, while revitalization was substantially underway, a restaurant named the Lemon Coast Grill opened.[12] The Lemon Coast Grill featured live outdoor nighttime entertainment.[13] As predicted, the Lemon Coast Grill, together with other commercial establishments in the area, successfully attracted crowds to the downtown area, especially during the nighttime hours. However, during the course of a two-month period in the summer of 1996, the Lemon Coast Grill received seventeen noise complaints.[14] The noise complaints originated almost exclusively from residents living near the Lemon Coast Grill.[15]

Eventually, the residents sought assistance from the City in an effort to control the noise emanating from the business establishment.[16] At that time, the City's noise ordinance prohibited "loud and raucous" noise within the municipality.[17]

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9. *Id.* at 127.

10. Sarasota City Commn., Spec. Mtg., *Minutes of the Spec. Sarasota City Commn. Meeting*, bk. 42, 15702, 15707, 15719–15720 (Dec. 8, 1997).

11. *Id.*

12. Sarasota City Commn., Reg. Mtg., *Minutes of the Regular Sarasota City Commn. Meeting*, bk. 40, 13512 (Aug. 5, 1996).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

However, the City's police department experienced difficulties in interpreting and enforcing the "loud and raucous" noise standard.[18] According to the City, the primary difficulty with enforcing the "loud and raucous" standard was that it involved the differing interpretations of individual police officers arriving at the scene of a particular noise complaint.[19] Because of the difficulties associated with the "loud and raucous" noise standard, the City prompted its attorneys to draft a noise ordinance that would ban all outdoor amplified music during certain hours of the day and night in certain sections of the City, even if the ordinance "[came] at the expense of the Lemon Coast Grill."[20] Enacting such an ordinance was considered the "easiest" solution to the City's perceived noise problem.[21]

B. The Noise Ordinances

The City responded by adopting two noise ordinances: a general noise ordinance and a commercial-district noise ordinance.

1. The General Noise Ordinance

The City's general noise ordinance applied throughout the geographical boundaries of the municipality.[22] It prohibited persons from making "unreasonable noise."[23]

Under the City's general noise ordinance, certain noise was deemed unreasonable per se, despite its volume.[24] Noise classified as being unreasonable per se included, with some exceptions, in summary fashion, the following: the use of radios, phonographs, tape players, television sets, and musical instruments in any manner that annoys, disturbs, injures, or endangers the comfort, repose, health, peace, or safety of a reasonable person of normal sensibilities;[25] the use of loudspeakers during certain hours of the day and night within or near residential, commercial, or noise-sensitive areas,[26] excluding non-commercial public speech;[27] sel-

18. *Id*. at 13513–13514, 13516–13517.
19. *Id*.
20. *Id*. at 13512–13513, 13519–13521.
21. *Id*. at 13519.
22. Sarasota City Code § 20 (2000) (City of Sarasota Noise Control Ordinance).
23. *Id*. § 20-4(a).
24. *Id*. § 20-5(a)(1).
25. *Id*. § 20-5(a)–(b).
26. The term "noise-sensitive area" specifically includes "schools, libraries, hospitals,

ling anything by shouting within any residential, commercial, or noise-sensitive area;[28] animals that annoy, disturb, injure, or endanger the comfort, repose, health, peace, or safety of a reasonable person of normal sensibilities within or near residential property or a noise-sensitive area;[29] loading or unloading in a manner that annoys, disturbs, injures, or endangers the comfort, repose, health, peace, or safety of a reasonable person of normal sensibilities between certain hours of the day and night within or near residential property or a noise-sensitive area;[30] construction or demolition activity between certain hours of the day and night;[31] the use of powered model vehicles[32] during certain hours of the day and night within or near any residential or noise-sensitive area;[33] the use of emergency signaling devices during certain times of the day and night;[34] the use of domestic power tools during certain hours of the day and night, unless the activity is confined within a completely enclosed structure;[35] and the use of any recreational motorized vehicle[36] or motorcycle[37] off the public right-of-way within any residential or noise-sensitive area.[38]

The City's general noise ordinance also contained a catch-all provision that prohibited any excessively or unusually loud sound that annoys, disturbs, injures, or endangers the comfort, repose, health, peace, or safety of a reasonable person of normal sensibilities.[39] In determining whether a particular noise is unreasonable, the general noise ordinance requires a

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churches, nursing homes and convalescent centers." *Id*. § 20-3(a).

27. *Id*. § 20-5(c).

28. *Id*. § 20-5(d).

29. *Id*. § 20-5(e).

30. *Id*. § 20-5(f).

31. *Id*. § 20-5(g).

32. The term "powered model vehicle" specifically includes model airplanes, boats, cars, and rockets. *Id*. § 20-3(a).

33. *Id*. § 20-5(h).

34. *Id*. § 20-5(i).

35. *Id*. § 20-5(j). The term "completely enclosed structure" is not defined anywhere in the general noise ordinance. *Id*. § 20-3(a).

36. The term "recreational motor vehicle" is not defined anywhere in the general noise ordinance, but the term "motor vehicle" specifically includes "any vehicle which is, or is designed to be, self-propelled or is designed or used for transporting person or property, including off-road vehicles being operated for recreational purposes." *Id*. § 20-3(a).

37. The term "motorcycle" specifically includes "motor scooters, mopeds or other motorized bicycle[s] or three-wheel vehicle[s]." *Id*. § 20-5(i).

38. *Id*. § 20-5(k).

39. *Id*. § 20-5(l).

consideration of the following factors: the volume of the noise,[40] the intensity of the noise,[41] whether the nature of the noise is usual or unusual,[42] the volume and intensity of any background noise,[43] the proximity of the noise to residential sleeping facilities,[44] the nature and zoning of the area within which the noise emanates,[45] the time of the day or night the noise occurs,[46] the duration of the noise,[47] and whether the noise is produced by commercial or non-commercial activity.[48] The City's general noise ordinance contained a variety of exemptions[49] and exceptions that could be obtained by way of a permit.[50]

2. Commercial-District Noise Ordinance

The commercial-district noise ordinance applied within certain commercial districts in the City.[51] The commercial-district noise ordinance contained two material provisions, the first of which imposed maximum permissible noise levels, and the second of which prohibited amplified noise within unenclosed structures during certain hours of the day and night.[52] The commercial-district noise ordinance also contained a variety of exemptions[53]

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40. *Id*. § 20-4(b)(1).

41. *Id*. § 20-4(b)(2).

42. *Id*. § 20-4(b)(3). The terms "usual" and "unusual" are not defined anywhere in the City's general noise ordinance.

43. *Id*. § 20-4(b)(4).

44. *Id*. § 20-4(b)(5).

45. *Id*. § 20-4(b)(6).

46. *Id*. § 20-4(b)(7).

47. *Id*. § 20-4(b)(8).

48. *Id*. § 20-4(b)(9).

49. *Id*. § 20-7. These exemptions primarily addressed sounds produced by radios and tape players within motor vehicles, noises made by vehicular horns, and certain noises produced by motorboats, all of which are regulated by Florida law. Fla. Stat. §§ 316.3045, 316.271, 327.65 (2001).

50. Sarasota City Code § 20-6. The general city-wide noise ordinance contained a procedure wherein an individual could obtain a special permit from the City. In determining whether a special permit should be issued, the City was required to consider the following: "the nature of the event and its importance to the general community, the potential benefit to the City or the general public," "the size of the event," and "the availability of alternate locations." *Id*.

51. Sarasota, Fla., Ordin. 97-4019 (Nov. 25, 1997).

52. *Id*. Ordin. 97-4019, §§ 2(a)–(b), 3(a)–(c), 5(a)–(b).

53. *Id*. Ordin. 97-4019, §§ 2(d), 3(e), 5(d). These exemptions primarily addressed sounds produced by radios and tape players within motor vehicles, noises made by vehicular horns, and certain noises produced by motorboats, all of which are regulated by Florida law. Fla. Stat. §§ 316.3045, 316.271, 327.65 (2001). Additional exemptions included non-commercial public speaking, church bells, and sounds produced by police

and exceptions that could be obtained by way of a permit.[54]

a. Maximum Permissible Noise Levels

The commercial-district noise ordinance prohibited continuous sound exceeding seventy-five decibels[55] and impulse sound[56] exceeding eighty decibels at all times of the day and night.[57] To determine the proper measurement of a particular sound, the commercial-district noise ordinance required measurements to be taken with an approved sound-level meter placed approximately five feet above the ground at or beyond the property line from which the sound emanated.[58] In some instances, obtaining proper measurements was contingent upon placing a wind-screen device over the sound-level meter and disregarding certain background noises such as motor-vehicle traffic and aircraft.[59]

b. Prohibition of Amplified Sound from Unenclosed Structures

Additionally, the commercial-district noise ordinance prohibited any type of amplified[60] sound[61] not within a completely enclosed structure[62] between the hours of 10:00 p.m. and 7:00

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equipment, emergency work, cellular telephones, and alarm systems.

54. Sarasota, Fla., Ordin. 97-4019 §§ 2(c), 3(d), 5(c). The commercial-district noise ordinance contained a procedure wherein an individual could obtain a special permit from the City. In determining whether a special permit should be issued, the City is required to consider the following: "the nature of the event and its importance to the general community," "the potential benefit to the City or the general public," "the size of the event," and "the availability of alternate locations." *Id*.

55. The term "decibel" refers to a unit of measurement for sound pressure levels wherein the number of decibels of a measured sound is equal to twenty times the logarithm to the base ten of the ratio of the sound pressure of the measured sound to the sound pressure of a standard sound, which is twenty micropascals. Sarasota, Fla., Ordin. 97-4019, § 1(b).

56. The term "impulse sound" describes a sound that has a duration of less than one second. *Id*.

57. *Id*. Ordin. 97-4019, §§ 2(b)(2)–(3), 3(c)(2)–(3), 5(b)(2)–(3).

58. *Id*. Ordin. 97-4019, §§ 2(b)(1)(i), (iii), 3(c)(1)(i), (iii), 5(b)(1)(i), (iii).

59. *Id*. Ordin. 97-4019, §§ 2(b)(1)(i), 3(c)(1)(i), 5(b)(1)(i).

60. The term "amplified" means to increase the strength, amount, or loudness of a device. *Id*. Ordin. 97-4019, § 1(b).

61. Term "amplified sound" specifically includes any amplification system or any amplified radio, phonograph, tape player, television set, musical instrument, drum, or other similar device that is amplified. *Id*.

62. The term "completely enclosed structure" is not defined in the City's commercial district noise ordinance, but the term "completely enclosed building" describes a building with a permanent roof and exterior walls, pierced only by closed windows and normal

a.m. from Sundays through Thursdays, and between the hours of 11:59 p.m. and 10:00 a.m. on Fridays, Saturdays, and holidays, regardless of the volume of the noise.[63] This is the Section of the City's commercial-district noise ordinance that was challenged in *Daley*.

III. PROCEDURAL HISTORY

On May 6, 1998 at approximately 10:30 p.m., City police officers issued the petitioner a citation for violating the City's commercial-district noise ordinance by allowing amplified music to be played in his restaurant while the front door was open.[64] The petitioner filed a motion seeking to declare the City's commercial-noise ordinance unconstitutionally overbroad.[65] During the hearing on the motion, the City called one of its attorneys to testify about the history behind the commercial-district noise ordinance. The City's attorney testified that the commercial-district noise ordinance prohibited amplified sound from an unenclosed structure during certain hours of the day and night, regardless of the volume of the amplified sound and regardless of whether the amplified sound could be heard by others.[66] The petitioner argued that the City's commercial-district noise ordinance prevented a business owner from watching television or listening to a radio after hours if a window or door to the business establishment happened to be open, even if the volume of the television or radio was otherwise reasonable.[67]

Citing *Easy Way of Lee County, Incorporated v. Lee County*[68] and *Reeves v. McConn*,[69] the trial court found the City's noise ordinance overly broad and, therefore, unconstitutional.[70] The

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entrance or exit doors that could not be opened except for normal ingress and egress. *Id*. Ordin. 97-4019, §§ 1(b), 2(b).

63. *Id*. Ordin. 97-4019 §§ 2(a), 3(a), 5(a).

64. *City of Sarasota v. Daley*, Nos. 98-6487-MA, 98-7796-MA, slip op. at 2 (Fla. Sarasota County Ct. Nov. 5, 1998). This action in the County Court, for the purpose of deciding whether the commercial-district noise ordinance was unconstitutional, consolidated this citation and a subsequent citation for the same offense on a later date.

65. [Petr.'s] Mot. to Declare [City's] Noise Ordin. Unconstitutional at 1, *City of Sarasota v. Daley*, Nos. 98-6487-MA, 98-7796-MA (Sarasota County Ct. filed June 22, 1998).

66. *Daley*, Nos. 98-6487-MA, 98-7796-MA, slip op. at 2, 3.

67. [Petr.'s] Memo. of Law in Support of Mot. to Declare [City's] Noise Ordin. Unconstitutional at 6, *Daley*, Nos. 98-6487-MA, 98-7796-MA.

68. 674 S.2d 863 (Fla. Dist. App. 2d 1996).

69. 631 F.2d 377 (5th Cir. 1980).

70. *Daley*, Nos. 98-6487-MA, 98-7796-MA, slip op. at 3.

City appealed and the circuit court reversed, finding that the petitioner's illustrations regarding how the City's commercial-district noise ordinance could be violated constituted purely "hypothetical examples" that did not amount to "real and substantial" overbreadth challenges.[71] Furthermore, the circuit court held that "[t]hose affected by this noise ordinance will simply need to comply [by closing all windows and doors] if a violation as intended by the ordinance is a concern."[72] The circuit court concluded that the City's commercial-district noise ordinance was narrowly tailored.[73] As noted above, the Second District Court of Appeal reversed the circuit court's decision, holding that the circuit court departed from the essential requirements of law by declaring the City's commercial-district noise ordinance to be constitutionally valid.[74] The Florida Supreme Court declined to exercise jurisdiction.[75]

IV. DISCUSSION

Although the City expressed concerns about the enforceability of its "loud and raucous" noise ordinance, the "loud and raucous" noise standard surprisingly has withstood constitutional scrutiny. In *Kovacs v. Cooper*,[76] the United States Supreme Court addressed the validity of the "loud and raucous" noise standard in terms of constitutional vagueness. The Supreme Court noted that, although the phrase "loud and raucous" is abstract, it has "through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."[77] *Daley* cited *Easy Way* and *Reeves*, both of which relied on *Kovacs*, as support for the "loud and raucous" noise standard.[78] Accordingly, the "loud and raucous" noise standard is constitutionally enforceable.

Despite its constitutional conformity, the "loud and raucous" noise standard presents a problem in terms of practical enforcement. Under the "loud and raucous" noise standard, not

71. *City of Sarasota v. Daley*, No. 99-0301-CA-01, slip op. at 2 (Fla. Cir. Ct. 12th Dist. June 16, 1999).

72. *Id.* at 3.

73. *Id.* at 2.

74. *Daley v. City of Sarasota*, 752 S.2d 124, 125 (Fla. Dist. App. 2d 2000).

75. *City of Sarasota v. Daley*, 776 S.2d 275 (Fla. 2000).

76. 336 U.S. 77 (1949).

77. *Id.* at 79.

78. *Daley*, 752 S.2d at 126–127.

only must a noise be "loud," but it must also be "raucous." The term "raucous" has been recognized as meaning rough-sounding, harsh, boisterous, and disorderly.[79] Hence, loud noise that is not rough-sounding, harsh, boisterous, and disorderly would not be considered "loud and raucous." In the end, a "loud and raucous" noise violation is difficult to establish.[80]

Aside from the constitutional difficulties discussed in *Daley*, do the remainder of the City's noise ordinances create other constitutional quandaries? For example, the City's general noise ordinance contains a catch-all provision that describes unreasonable noise as being any "excessive or unusually loud sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a reasonable person of normal sensibilities."[81] In *Dupres v. City of Newport*,[82] the court addressed a similar noise ordinance that prohibited, among other things, "unreasonably loud, disturbing or unnecessary noise" together with "noise of such character, intensity or duration as to be detrimental to the life, health or welfare of any individual, or which either steadily or intermittently annoys, disturbs, injures or endangers the comfort, repose, peace or safety of any individual."[83] The court struck down the provision as being unconstitutionally vague and overly broad because the standard was contingent upon subjective variables.[84]

The court in *Fratiello v. Mancuso*[85] reached the same conclusion.[86] In *Fratiello*, the ordinance in question banned

> unnecessary noises . . . which are physically annoying to persons, or which are so harsh, or so prolonged or unnatural, or unusual in their use, time and place as to occasion physical discomfort, or which are injurious to the lives, health, peace and comfort of the inhabitants of the city.[87]

The court expressed concerns about the term "annoying," explaining that the ordinance could be used in a wholly subjective

79. *Merriam-Webster's Collegiate Dictionary* 967 (10th ed., Merriam-Webster 2000).

80. *E.g. City of Beaufort v. Baker*, 432 S.E.2d 470 (S.C. 1993) (upholding "loud and unseemly" noise standard).

81. Sarasota City Code § 20-5(l).

82. 978 F. Supp. 429 (D.R.I. 1997).

83. *Id.* at 431.

84. *Id.* at 433–435.

85. 653 F. Supp. 775 (D.R.I. 1987).

86. *Id.* at 790–791.

87. *Id.* at 790.

manner to suppress speech.[88] Thus, city noise ordinances are more vulnerable to constitutional attacks when the standards are predominately subjective.[89]

The courts are more inclined to uphold noise ordinances that are based on an objective standard than those based upon subjective criteria. For example, in *State v. Garren*,[90] the county adopted a noise ordinance that prohibited "loud, raucous and disturbing noise" defined as "sound which, 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."[91] The court held the provision of the ordinance that incorporated an objective "reasonable person" standard passed constitutional muster.[92] In *City of Madison v. Baumann*,[93] the city passed a noise ordinance that made it unlawful to generate noise that would "unreasonably disturb the peace and quiet of persons in the vicinity thereof."[94] The court sustained the constitutionality of the noise ordinance, explaining that the term "unreasonably" imposed an objective "reasonable person" standard on the noise ordinance.[95]

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88. *Id*. at 790–791. For additional discussion relating to the difficulties of interpreting the phrase "annoying," see *McCray v. City of Citrus Heights*, 2000 U.S. Dist. LEXIS 13593 at **22–23 (E.D. Cal. Aug. 7, 2000) (finding the city's "annoying" standard as applied to its noise ordinance to "depend upon subjective criteria" and therefore overbroad), and *Nichols v. City of Gulfport*, 589 S.2d 1280, 1283–1284 (Miss. 1991) (explaining that "conduct that annoys some people does not annoy others").

89. *See Lionhart v. Foster*, 100 F. Supp. 2d 383, 385, 389–390 (E.D. La. 1999) (finding a statute that banned the use of sound amplifying devices "in a manner likely to disturb, inconvenience, or annoy a person of ordinary sensibilities" in certain quiet zones of the city held overly broad and vague since the phrase "likely to . . . annoy" invokes a subjective standard, despite the statute's reference to "a person of ordinary sensibilities"); *but see Deegan v. City of Ithaca*, 2001 U.S. Dist. LEXIS 2438 at **3, 16 (N.D.N.Y. Feb. 28, 2001) (holding unconstitutional an ordinance that defined unreasonable noise as noise "which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of the public or which causes injury to animal life or damages to property or business").

90. 451 S.E.2d 315 (N.C. App. 1994).

91. *Id*. at 316, 318–325.

92. *Id*. at 318.

93. 470 N.W.2d 296 (Wis. 1991).

94. *Id*.

95. *Id*. at 303; *see Howard Opera House Assoc. v. Urban Outfitters, Inc.*, 131 F. Supp. 2d 559, 560, 567 (D. Vt. 2001) (finding a noise ordinance that defined "loud and unreasonable" noise as sound that "disturbs, injures or endangers the health, safety or welfare of the community" constitutional where the term "unreasonable" triggered an objective "reasonable person" standard into the noise ordinance); *Township of Plymouth*, 600 N.W.2d 380, 381 (Mich. App. 1999) (holding constitutional an ordinance that banned "shouting, whistling, loud, boisterous, or vulgar conduct, the playing of musical

In some instances, the courts will construe an objective "reasonable person" standard into a noise ordinance even though the noise ordinance makes no express or implied reference to such a standard. For example, in *Marietta v. Grams*,[96] the city's noise ordinance prohibited individuals from "disturb[ing] the good order and quiet of the Municipality by clamors or noises in the night season."[97] Although the noise ordinance made no direct or indirect reference to any objective "reasonable person" standard, the court nonetheless construed the noise ordinance as including an objective "reasonable person with common sensibilities" standard.[98]

The City's noise ordinance also declares certain noises to be unreasonable per se.[99] However, some courts have expressed concerns about noise ordinances that declare, as a matter of law, certain noises to be unreasonable per se, despite the presence of an objective "reasonable person" standard. In *State v. Garren*,[100] the county noise ordinance prohibited "loud, raucous and disturbing noise," defined as "noise which, 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."[101] This provision of the noise ordinance was held constitutional.[102] However, the county's noise ordinance further declared the following to constitute loud, raucous and disturbing noise: "[r]adios, amplifiers, phonographs, group gatherings, etc., [s]inging, yelling, or the using, operating

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instruments, phonographs, radios, televisions, tapeplayers or any other means of amplification at any time or place so as to unreasonably annoy or disturb the quiet, comfort and repose of persons in the vicinity" where the term "unreasonably" inferred an objective "reasonable person" standard into the statute); *but see Langford v. City of Omaha*, 755 F. Supp. 1460, 1461–1463 (D. Neb. 1989) (finding a city ordinance that prohibited "unreasonable" noise was unconstitutional because the term "unreasonable," absent additional guidelines, is too vague); *Kim v. City of N.Y.*, 774 F. Supp. 164, 168, 170–171 (S.D.N.Y. 1991) (finding overly broad and vague a city ordinance that prohibited "excessive or unusually loud sound or any sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a person, or which causes injury to plant or animal life, or damage to property or business" because the ordinance was predicated upon a subjective standard).

96. 531 N.E.2d 1331 (Ohio App. 4th Dist. 1987).
97. *Id*. at 1333.
98. *Id*. at 1336.
99. *Supra* nn. 20–34 and accompanying text.
100. 451 S.E.2d 315 (N.C. App. 1994).
101. *Id*. at 316.
102. *Id*. at 319.

or permitting to be played, used or operated any radio, amplifier, musical instrument, phonograph, interior or exterior loudspeakers, or other device for the producing or reproducing of sound in such manner as to cause loud, raucous and disturbing noise."[103] The court struck down this provision as being overly broad, reasoning that the county could not, as a matter of law, declare certain noises to be "loud, raucous, and disturbing."[104]

As previously noted, the City's noise ordinance additionally contains several provisions that prohibit certain types of noises from being generated near or within residential or noise-sensitive areas.[105] Again, some courts express reluctance about these types of noise-ordinance provisions. In *Beckerman v. City of Tupelo*,[106] the municipality's noise ordinance prohibited the use of sound equipment within areas zoned for residential purposes.[107] The court struck down the provision as being unconstitutional because the city presumed that noise generated by sound equipment was necessarily incompatible in an area zoned for residential use.[108]

Finally, the City's commercial-district noise ordinance imposes sound limitations of seventy-five or eighty decibels, depending upon the type of noise being generated, within certain commercial districts of the municipality.[109] As a general rule, the courts have overwhelmingly approved the use of decibel limitations in noise ordinances, primarily because decibel limitations provide an objective standard by which noise can be measured. Indeed, the Second District Court of Appeal in *Daley* expressly noted that a decibel limitation constitutes an "objective criterion."[110] Nevertheless, the actual decibel limitation must pass constitutional scrutiny.[111] In *United States v. Doe*,[112] the court

103. *Id*. at 317.

104. *Id*. at 318–319.

105. Sarasota City Code § 20-5(c).

106. 664 F.2d 502 (5th Cir. 1981).

107. *Id*. at 517.

108. *Id*. at 516. The Second District Court of Appeal in *Daley* touched on this issue by noting that the City's commercial-district noise ordinance was premised upon the presumption that all amplified sound within an unenclosed structure is necessarily unreasonable. *Daley*, 752 S.2d at 126–127; *see Reeves v. McConn*, 631 F.2d 377, 381, 388 (5th Cir. 1980) (holding a city ordinance that banned amplified sound within 100 yards of schools, courthouses, churches, and the like unconstitutional).

109. *Supra* nn. 51–55 and accompanying text.

110. *Daley*, 752 S.2d at 126 n. 1.

111. *U.S. v. Doe*, 968 F.2d 86 (D.C. Cir. 1992).

112. 968 F.2d 86 (D.C. Cir. 1992).

struck down a sixty decibel limitation in a national park as being an unreasonably low restraint.[113] Similarly, in *Lionhart v. Foster*,[114] the court invalidated a statute that prescribed a fifty-five decibel limitation in certain "quiet zones."[115] The court concluded that the fifty-five decibel limitation was unreasonably overbroad.[116]

V. FINAL ANALYSIS

Drafting a noise ordinance that effectively balances the interests of businesses and residents while remaining within the requirements of the First Amendment can prove frustrating to a local government. However, there are certain steps that a city can take to minimize the risk of a particular noise ordinance ultimately being declared unconstitutional.

First, the noise ordinance should contain an express, objective standard by which noise can be measured. The use of reasonable decibel limitations has been recognized as a constitutionally-acceptable method of measuring noise. Second, the incorporation of a "reasonable person" standard into the noise ordinance has generally withstood constitutional scrutiny. Because the "reasonable person" standard is found in other areas of the law, the courts have little difficulty applying the "reasonable person" standard to noise ordinances. Third, the noise ordinance should avoid declaring certain noises to be unreasonable per se. Courts are wary of local governments declaring designated sounds to be unreasonable as a matter of law, absent other criteria that adequately demonstrate a sufficient negative impact on those subjected to the noise. Fourth, the noise ordinance should not be premised upon a presumption that a particular noise is necessarily incompatible with certain parts of the community. The courts generally require cities to consider the individualized needs of a particular portion of the community when drafting a noise ordinance. And, finally, the noise ordinance should not contain any absolute prohibitions on certain types of sound.

In closing, a city desiring to revitalize its community should consider carefully the impact of revitalization on not only the residents of the community, but also the businesses who

113. *Id*. at 86, 91.
114. 100 F. Supp. 2d 383 (E.D. La. 1999).
115. *Id*. at 385.
116. *Id*.

contribute significant financial resources toward the revitalization project. In the context of noise, a municipality may find it beneficial, from a political standpoint at least, to consider noise ordinances as an integral part of the revitalization project. Waiting to revise noise ordinances until after the revitalization project is substantially underway may result in sacrificing not only businesses, but also businesses' constitutional rights. Such a scenario ultimately may result in a finding that a city has an unconstitutional noise ordnance.