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Defending Municipal Noise Complaints Against Outdoor Facilities

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This article briefly explores threshold defenses available in either civil or quasi-criminal matters asserting violations of municipal noise ordinances. While the principles discussed apply equally to residential complaints, the article focuses mainly upon the predicaments faced by al fresco dining, recreational and other outdoor commercial facilities.

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Proper Procedural Enactment

In challenging or defending against any noise ordinance, counsel should initially make certain the ordinance has been properly enacted in compliance with the procedural requirements of N.J.S.A. 40:49-2.

New Jersey's Noise Control Act

Our legislature has the right to reallocate municipal power to a state agency, *Terminal Enters. v. Jersey City*, 54 N.J. 568 (1969), which is precisely what it did when it enacted the Noise Control Act (NCA) of 1971, N.J.S.A. 13:1G-1 to -23. While not preemptive, the NCA imposes two material restrictions upon municipal power to control noise.

- First, the NCA, which sets its own standards, allows municipalities to enact ordinances with greater but not lesser noise restrictions. N.J.S.A. 13:1G-21.
- Second, the NCA requires municipalities to submit all proposed noise ordinances to the New Jersey Department of Environmental Protection (DEP) for approval. *Ibid.*; *State v. Krause*, 399 N.J. Super. 579 (App. Div. 2008). Under N.J.A.C. 7:29-1.8(a), that approval must be "written."

Thus, counsel should first determine whether the municipal noise standard charged is less restrictive than the standard set by the NCA and whether the noise ordinance has been submitted and approved in writing by the DEP.

The Necessary Relationship to N.J.S.A. 40:48-1(8)

Municipal noise ordinances, like all others, carry a rebuttable presumption of validity, *Collingswood v. Ringgold*, 66 N.J. 350, 351 (1975), and are to be liberally construed in a civil context. N.J Const. art. IV, §7, ¶11. However, they must bear a reasonable relationship to N.J.S.A. 40:48-1(8), which permits noise

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ordinances to be enacted only "to prevent *disturbing* noises" (emphasis added). Constitutional issues aside, any municipal ordinance, especially one imposing business regulations or proscriptions, "must be reasonably calculated to meet the evil and not … substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated." *Kirsch Holding Co. v. Borough of Manasquan,* 59 N.J. 241, 251 (1971).

Thus, an ordinance that flatly proscribes either inside or outside music without regard to any resultant annoyance or other standard, including the distance from which it is plainly audible, exceeds municipal power and is void.

Take, for example, the impact of either total or partial music preclusion for outside dining facilities: music played while eating and drinking affects customers' moods and attitudes as well as the amount of time and money they spend in the restaurant. As early as Roman times musicians performed during dinner parties and minstrels entertained dining guests at medieval banquets. Playing music while eating seemingly makes food taste better, makes waiting more palatable, and, depending upon the type of music, may even permit tables to turn over more rapidly. Clearly, precluding inside music that may be heard outside upon the opening of a door or the playing of outside music without annoyance to anyone constitutes a devastating blow to business.

The case of *State v. Yee*, 129 N.H. 155 (1987), is particularly instructive. There, the New Hampshire Supreme Court reversed a noise ordinance conviction on the grounds that the ordinance was "unconstitutionally overbroad" and that its enactment exceeded the statutorily delegated municipal authority. *Id.* at 155, 158. The ordinance prohibited commercial establishments from playing music "in such manner as to disturb the peace, quiet and comfort of the neighboring inhabitants or at any time with a volume louder than necessary" for the intended audience's convenient hearing. *Id.* at 156. The ordinance also deemed the operation of a sound device between 11:00 p.m. and 7:00 a.m. "in such a manner as to be plainly audible outside of the physical limits of a building or structure in which it is located" to be prima facie evidence of a violation. *Ibid.*

After reviewing New Hampshire's enabling statute empowering, but limiting, municipalities "to prevent unreasonable noise and disturbance to people who are occupying property in which they have an interest or such other public or private premises as they lawfully visit," the court struck down the ordinance as ultra vires, reasoning:

> There is no apparent objective to empower cities and towns to regulate sound that neither penetrates beyond the boundaries of the noisemaker's own premises nor constitutes an unreasonable disturbance to people lawfully on those premises.

Id. at 158.

In sum, courts cannot uphold ordinances that exceed statutorily delegated authority or that transcend public need simply because they take the form of a police regulation.

Music and Amplification of Sound as Constitutionally Protected

Noise ordinances may also be constitutionally challenged both "facially" and "as applied" in particular circumstances. The question of whether an ordinance is overbroad is a concept that is "a fraternal, not identical twin" to whether it is vague. *Goguen v. Smith*, 471 F.2d 88, 91 (1st Cir. 1972), *aff'd,* 415 U.S. 566 (1974). "An ordinance which is not overbroad on its face may nevertheless be unconstitutional as applied if it is enforced against a protected activity." *Felix v. Young*, 536 F. 2d 1126, 1134 (6th Cir. 1976).

Thus, although the government may place a reasonable time, place and manner regulation upon protected speech, the regulation must: (1) be content neutral, (2) be narrowly tailored to serve a significant governmental interest, and (3) leave open alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Put more plainly, municipalities need to narrowly tailor a noise restriction so as not to commit unconstitutional overkill by "burn[ing] the house to roast the pig." *Butler v. State of Mich.,* 352 U.S. 380, 383 (1957).

As *Ward* teaches:

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions and have censored musical compositions to serve the needs

> of the State. The Constitution prohibits any like attempts in our legal order. Music, as a form of expression and communication, is protected under the First Amendment. 491 U.S. at 790

Likewise protected under the First Amendment is the amplification of sound. *Saia v. New York,* 334 U.S. 558, 559–60 (1948).

New Jersey's constitutional protection of free speech is "an affirmative right broader than practically all others in the nation." *Green Party of N.J. v. Hartz Mountain Indus.*, 164 N.J. 127, 145 (2000); *see* N.J. Const. art. I, ¶ 18. In fact, in *Southland Corporation v. Township of Edison*, 217 N.J. Super. 158, 174 (Ch. Div. 1986), the court elected to analyze the validity of a city's ordinance "under this State's constitutional concepts since the nature of the issues before it (private property rights vs. the police power) afford … [New Jersey's] citizens broader rights than might be allowed under federal law." *Daley v. City of Sarasota*, 752 So.2d 124 (Fla. 2nd DCA 2000) is a striking example of unconstitutional overbreadth. There, the court invalidated Sarasota's noise ordinance that prohibited all amplified music emanating from partially open structures in a commercial zoning district between 10 p.m. and 7 a.m., regardless of the decibel level and regardless of whether the sound was audible outside the structure. *Id.* at 125.

Municipalities can easily conform to the strictures of N.J.S.A. 40:48-1(8) by providing at least *some* standard of disturbance in their ordinances. *See, e.g., State v. Clarksburg Inn,* 375 N.J. Super. 624 (App. Div. 2005) (upholding an ordinance prohibiting noise that was "loud," "unnecessary" or "unusual," or that annoyed or disturbed others at an audible distance of 100 feet from the building in which it was located); *State v. Holland*, 132 N.J. Super 17, 21–22 (App. Div. 1975) (sustaining an ordinance also proscribing "unreasonably loud, disturbing or unnecessary noise" and noise "of such a character, intensity or duration to be detrimental to the life, health or welfare of any individual").

In sum, municipalities have a legitimate interest in curtailing annoying, unwelcome and excessive musical sound, but have no legitimate interest in prohibiting any and all musical sound. "A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz,* 487 U.S. 474, 485 (1988).

Selective Enforcement

Discriminatory enforcement by governmental officers is unconstitutional as a denial of equal protection under the Fourteenth Amendment. *Cox v. Louisana*, 379 U.S. 550, 557–58 (1965). The age-old general test is whether the law is being "applied and administered by public authority with an evil eye and unequal hand …." *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). Proof of discriminatory enforcement is weighty, requiring the establishment of a discriminatory effect and motivating discriminatory purpose: it is not enough just to establish conscious governmental exercise of "some selectivity in enforcement … unless the decision to prosecute is based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Twp. of Pennsauken v. Schad*, 160 N.J. 156, 183 (1999). Thus, mere laxity in enforcement does not suffice.

Available Remedies

In the usual case, municipalities elect to file quasi-criminal noise complaints in municipal court despite the greater imposed burden of proof beyond a reasonable doubt. N.J.S.A. 2C–13(a); *State v. Clarksburg Inn*, 375 N.J. Super. 624 (2005); *see State v. Weir*, 183 N.J. Super.237, 243 (App. Div. 1982) (suggesting the better alternative of a civil action).

Where the harm sought to be avoided is imminent and irreparable—such as in the instance of an on-going commercial operation, within the context of *Crowe v. De Gioia*, 90 N.J. 126 (1982)— counsel should strongly consider filing a declaratory judgment action seeking preliminary restraints. If the ordinance is challenged on constitutional grounds, the suit should allege infractions under the Federal and New Jersey Civil Rights Acts, pursuant to which counsel fees are securable. *See* 42 U.S.C. §1988(b); N.J.S.A. 10:6-2(c) and (f). Indeed, First Amendment rights have long been recognized as ipso facto irreparable, *Davis v. New Jersey Dept. of Law & Pub. Safety*, 327 N.J. Super. 59, 68-69 (Law Div. 1999), and New Jersey courts are not shy in enjoining the enforcement of invalid ordinances. *Toms River Publ'g Co. v. Borough of Manasquan*, 127 N.J. Super. 176 (Ch. Div. 1974). ■