

## COMMENTS

### A LINE IN THE SAND: FLORIDA MUNICIPALITIES STRUGGLE TO DETERMINE THE LINE BETWEEN VALID NOISE ORDINANCES AND UNCONSTITUTIONAL RESTRICTIONS

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#### I. INTRODUCTION

Florida's beautiful beaches, expanding job market, and moderate climate attract thousands of new residents to the state each year.<sup>1</sup> In addition, Florida's population swells by approximately 920,000 during winter months, as "snowbirds" and other long-term visitors flock to the state to enjoy its warm weather and recreational opportunities.<sup>2</sup> While this growth is undoubtedly good for the state's economy, increases in population can also negatively impact quality of life.

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\* © 2006, Paula P. Bentley. All rights reserved. Notes and Comments Editor, *Stetson Law Review*, 2006; Editor in Chief, 2006–2007. J.D. Candidate, Stetson University College of Law, May 2007. I would like to thank Professors Paul Boudreaux, Thomas C. Marks, and Jennifer E. Murphy for their valuable insights and recommendations regarding this Comment. I also want to recognize all the faculty advisors, editors, and associates of *Stetson Law Review*, especially Jennifer LaRocco and Sarah Lahlou-Amine, who worked so diligently to make this the best Comment it could be. Most of all, I want to thank my family—my husband Mark and my two beautiful children, Erin and Adam—for putting up with me during the writing process, and for always cheering me on when my energy or enthusiasm was failing. You are my inspiration and motivation in all things.

1. U. Fla. Bureau of Econ. & Bus. Research, *Florida Statistical Abstract 2004*, at 5 (Susan S. Floyd ed., 38th ed., U. Fla. 2004) (providing census charts that reflect a population increase between 1990 and 2000 of 23.5 percent, or just over 3 million).

2. Stanley K. Smith & Mark House, *Snowbirds and Other Temporary Residents: Florida, 2004*, [http://www.bebr.ufl.edu/Articles/Temp\\_Residents\\_2004.pdf](http://www.bebr.ufl.edu/Articles/Temp_Residents_2004.pdf) (Oct. 2004) (stating that a survey of Florida residents, conducted from the years 2000–2003, revealed that approximately 920,000 temporary residents were present during winter months, and their average length of stay was five months).

Intrusive and bothersome community noise, or noise pollution, is one such problem that growing municipalities must deal with as common noise sources multiply and spread into formerly rural and residential areas.<sup>3</sup> A look at recent Florida headlines reveals the varied but pervasive noise problems within the state. Hillsborough County has been embroiled in a lengthy legal battle to reduce noise emanating from an open-air amphitheater that is bothering residents who live as far as four miles from the site.<sup>4</sup> In central Florida, annoyed citizens are searching for a solution to ear-splitting sound from airboats.<sup>5</sup> And the sound from booming car stereos throughout the state has grown so bothersome that the Florida Legislature recently amended a motor vehicle statute so that citations can now be issued if stereos are audible merely twenty-five feet from the vehicle, rather than the previous one hundred feet.<sup>6</sup>

While it has long been recognized that government has the legal right to regulate or prohibit noise that poses a danger to the public health or welfare,<sup>7</sup> laws developed to restrict such harmful

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3. James P. Cowan, *Handbook of Environmental Acoustics* ix (John Wiley & Sons, Inc. 1994). Because many human activities generate noise that may be bothersome to others, "no area is immune from noise-related problems." *Id.*

4. *Court Ought Not Tolerate Thundering Outdoor Concerts*, Tampa Trib., Nation/World 14 (Feb. 25, 2005) (stating that Hillsborough County inspectors have "recorded 833 violations of the county's noise ordinance" since the Ford Amphitheatre opened seven months ago). A county circuit court later held portions of Hillsborough County's noise ordinance vague and unconstitutional, and the county Environmental Protection Commission sought a temporary injunction to halt concerts until a settlement could be reached regarding the noise. Eddy Ramirez, *Judge Calls Noise Ordinance Vague*, St. Petersburg Times 1B (Feb. 26, 2005).

5. Wes Smith, *Airboat Wars: Yuppies vs. Crackers in High-Decibel Showdown*, Orlando Sentinel A1 (June 26, 2005) (reporting that airboats are now enjoying wider popularity and airboat-noise complaints have "followed population growth and the increased development in waterfront areas").

6. Fla. H. 1697, 107th Reg. Sess. (June 8, 2005); see also Kris Thoma, *Law Aims to Take the Bump out of Trunks*, Pensacola News J. 1A (June 25, 2005) (reporting that the new law would go into effect July 1, 2005, and that the stricter criteria would make the law easier to enforce).

7. See e.g. *Kovacs v. Cooper*, 336 U.S. 77, 86-87, 89 (1949) (holding that the challenged noise ordinance was justified by the need to protect citizens from distracting noises because "[t]he unwilling listener . . . is practically helpless to escape this interference with his privacy . . . except through the protection of the municipality"); *Brachey v. Maupin*, 126 S.W.2d 881, 887 (Ky. App. 1939) (upholding the challenged noise regulation because it was a "reasonable and legitimate exercise of the police power in the protection of the citizens in their quietude, rest and sleep"). The Supreme Court has recognized that "[t]he police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a commu-

conduct still must fall within constitutional constraints.<sup>8</sup> The broadly drafted noise ordinances that most municipalities rely on to control neighborhood noise are especially susceptible to constitutional challenge because the ordinances seek to regulate conduct—the production of sound—that may involve First Amendment freedoms of speech and expression.<sup>9</sup> These constitutional challenges are most often grounded in the First Amendment or the Fourteenth Amendment Due Process Clause and seek to invalidate ordinances by claiming that they define noise in vague or overbroad terms.<sup>10</sup>

Because existing noise ordinances in many Florida municipalities are outdated<sup>11</sup> or rely on subjective standards for determining violations,<sup>12</sup> they are particularly vulnerable to constitutional challenge.<sup>13</sup> In fact, Florida courts have invalidated parts of municipal noise ordinances on constitutional grounds in several instances.<sup>14</sup>

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nity.” *Kovacs*, 336 U.S. at 83.

8. See *infra* pt. III (presenting cases concerning varied constitutional challenges to laws enacted to control community noise).

9. See *infra* pt. III(A) (discussing the bases for First Amendment challenges to municipal noise ordinances). As two commentators stated, “Arguably, anytime a restriction is placed on noise, the right to free speech is implicated, since verbal speech creates sound and if loud enough, noise.” Joseph M. Donley & Glenn E. Davis, *Guidelines for Drafting Municipal Noise Control Ordinances*, in *Current Municipal Problems*, vol. 24, 163, 167 (West 1998).

10. Jason A. Leif, *Insuring Domestic Tranquility through Quieter Products: A Proposed Product-Nuisance Tort*, 16 *Cardozo L. Rev.* 595, 619–620 (1994); see *infra* pt. III (presenting a survey of case law on constitutional challenges to noise regulation).

11. See *infra* n. 288 (giving two examples of outdated Florida noise ordinances that are still on the books).

12. The phrase “subjective standards” refers to the practice of defining noise violations based on the subjective character of the noise, using adjectives such as “annoying,” “disturbing,” or “unnecessary.” See Ralf G. Brookes, *For Crying out Loud!! Preserving Neighborhoods and Regulating Noise*, 16 *Envtl. & Land Use Rptr.* 1, 2 (Oct. 1994) (discussing the evolution of noise ordinances in Florida and stating that many communities now rely on nuisance-based standards for noise regulation). One Florida municipality declares it unlawful to make “prolonged and continued loud and unnecessary and unusual noises which either annoy or disturb any person . . . or which tend[] to destroy the quietude, peace and tranquility of the residents.” Kenneth City Code Ords. (Fla.) § 30-141 (current through Dec. 2003).

13. See *infra* pt. IV (presenting several Florida cases that have invalidated parts of noise ordinances on constitutional grounds).

14. *E.g. Daley v. City of Sarasota*, 752 So. 2d 124, 127 (Fla. 2d Dist. App. 2000) (striking down part of a city noise ordinance for overbreadth); *Easy Way of Lee Co., Inc. v. Lee Co.*, 674 So. 2d 863, 867 (Fla. 2d Dist. App. 1996) (holding that portions of the challenged noise ordinance were unconstitutionally vague and overbroad).

As Florida cities expand to meet increasing population demands, municipalities must meet the challenge of effectively abating harmful noise pollution in a way that balances the often conflicting interests of developers, business owners, and neighborhood residents.<sup>15</sup> More specifically, noise ordinances must strike a constitutional balance between the noisemaker's right to free expression and the unwilling listener's right to peace and tranquility.<sup>16</sup> This Comment addresses the constitutional issues of municipal noise regulation, with a special focus on Florida, and suggests steps that could be taken to cure constitutional deficiencies in existing legislation and to reduce constitutional challenges in the future.

Part II of this Comment identifies the adverse effects of noise and tracks the progress made to date in legislative noise control efforts at the federal, state, and local levels. Part III sets forth the most common First Amendment and Due Process Clause grounds for invalidation of noise ordinances and provides an overview of the judicial decisions on those issues. The case law discussed in Part III illustrates the jurisdictional disagreement that currently exists regarding the point at which a noise regulation restricts protected freedoms too severely. Part IV presents the rather limited number of Florida cases in which noise ordinances have been challenged as unconstitutional and discusses the reasoning behind each decision.

In Part V, the Comment addresses particular steps that state and local governments can take to improve the effectiveness and reliability of noise control efforts, particularly in Florida. First, the constitutional parameters derived from the case law are incorporated into specific recommendations for drafting a valid noise control ordinance. To provide the clarity and specificity that courts require, it is suggested that particular sections be included in the noise regulation, such as a purpose statement, a definition section, a noise emission limitation section, and an enforcement

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15. See e.g. Lisa Emmerich, *Got Noise Gripes? City Has an Idea: Issue Music Permits*, Orlando Sentinel G1 (Jan. 4, 2005) (detailing a proposal by the Mayor of Mount Dora, Florida, to issue music permits in an attempt to compromise between the interests of business owners and residents).

16. See *Kovacs*, 336 U.S. at 88 (noting that freedom of speech has a "preferred position" in society, but legislators must still be sensitive to the right of citizens to protection from distracting noises).

provision. Drafting an ordinance to rely primarily on precise sound level limitations, within specified times and places, is recommended as the safest format.

Part V then discusses a long-term approach to noise abatement: a state noise control act. The Florida Legislature and Department of Environmental Protection should initiate a statewide noise control program to provide needed guidance and support to Florida municipalities in their noise control efforts. Several noise control statutes from other states are presented and discussed. Finally, the Author proposes a general framework for a Florida noise control program that includes promulgation of a state model ordinance and agency approval of all municipal noise ordinances.

## II. NOISE AND ITS REGULATION

Noise, defined as unwanted sound,<sup>17</sup> has been a problem requiring legislative control since the time of ancient Rome.<sup>18</sup> Although noise is not a new problem, recognition of its seriousness in terms of health risks and socioeconomic impacts on a community is a fairly recent phenomenon.<sup>19</sup> At high or prolonged levels, noise can cause permanent hearing loss, hypertension, and hormonal changes.<sup>20</sup> But even at lower levels, noise is responsible for sleep disturbances, communication interference, annoyance, and stress-related illnesses.<sup>21</sup> The potential for economic and social harm to the community—such as diminished work and school productivity, decreased levels of concentration, declining property values, and stress-induced depression or violence—only serves to

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17. Cowan, *supra* n. 3, at 1; Frank P. Grad, *Treatise on Environmental Law* § 5.01[1] (Matthew Bender & Co. 2002).

18. IMLA Model Noise Ord. 11-5.17 ed. commentary (Intl. Mun. Laws. Assn., Inc. 2005) (stating that ancient Rome enacted a law to control noise from iron wagon wheels on stone pavement).

19. World Health Org., *Fact Sheet No. 258: Occupational & Community Noise*, <http://www.who.int/mediacentre/factsheets/fs258/en/print.html> (revised Feb. 2001).

20. Leif, *supra* n. 10, at 598. Studies have also suggested that noise can have harmful effects on digestion and respiratory function and can even contribute to increased mortality rates. *Id.* Noise triggers “the ‘fight or flight’ response, which is characterized by an adrenaline surge, increased heart rate, and general physiological stimulation.” *Id.* at 598–599. This response causes stress on the body which, if repeated over time, can lead to permanent physiological damage. *Id.*

21. Cowan, *supra* n. 3, at 1; see World Health Org., *Guidelines for Community Noise, Executive Summary* pt. 3, <http://www.who.int/docstore/peh/noise/ComnoiseExec.htm> (accessed May 19, 2005) (offering a detailed discussion of the various adverse effects of noise).

increase the significance of a local government's interest in abating excessive noise.<sup>22</sup>

While the legal basis for government regulation of noise is well established,<sup>23</sup> communities are still struggling to find the most effective way to exercise this authority.<sup>24</sup> The earliest attempts to control noise were through common law private- nuisance actions, which sought to limit offensive noise inflicted by one neighbor upon another.<sup>25</sup> When the first noise control laws were enacted in the nineteenth and early twentieth centuries, they were limited to local ordinances that prohibited noise based on general nuisance standards such as "annoying," "disturbing," or "unnecessary," and contained virtually no objective definitions of proscribed noise levels.<sup>26</sup> Enforcement of these noise ordinances usually fell to local police officers, who responded to isolated neighborhood complaints about noise.<sup>27</sup> Noise was considered a local concern, and its regulation was undertaken by local governments, largely because the effects of noise were felt over a relatively small area and dissipated quickly.<sup>28</sup> These early laws remained mostly unchanged until the late 1960s and early 1970s, when portable noise-measuring equipment became available and

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22. Leif, *supra* n. 10, at 601–603. Leif points out that noise pollution costs the public billions of dollars annually due to increases in workplace absenteeism and accidents and decreases in worker productivity. *Id.* at 601. Additionally, Leif states that it is not uncommon for people to respond with violence and anguish when persistent noise threatens the sanctity of their homes. *Id.*

23. Grad, *supra* n. 17, at § 5.03[2]; *see also supra* n. 7 and accompanying text (presenting legal precedent that establishes the legitimate governmental interest in protecting citizens from unwanted noise).

24. Grad, *supra* n. 17, at § 5.03[2] (discussing the many different approaches to noise control legislation).

25. Albert J. Rosenthal, *Noise and the Law*, in *Handbook of Acoustical Measurements & Noise Control* 51.1, 51.3 (Cyril M. Harris ed., 3d ed., Acoustical Soc. of Am. 1998). Common law remedies for a neighbor's noise might include an injunction to halt the noisy activity or damages for harm caused to the listener. *Id.* In urban areas, however, such "[c]ommon-law remedies proved inadequate" to address the increasing and varied origins of noise, and the need for legislative efforts was recognized. *Id.* at 51.4.

26. Grad, *supra* n. 17, at § 5.02[2]; Sidney A. Shapiro, *Lessons from a Public Policy Failure: EPA and Noise Abatement*, 19 *Ecology L.Q.* 1, 7 (1992) (stating that, prior to the late 1960s, local noise ordinances were based on subjective standards and were therefore difficult to enforce).

27. Rosenthal, *supra* n. 25, at 51.4.

28. *Id.*

increasing concern regarding the health hazards of noise drew federal attention.<sup>29</sup>

Pursuant to the National Environmental Policy Act of 1969 (NEPA),<sup>30</sup> the Environmental Protection Agency (EPA) established the Office for Noise Abatement and Control (ONAC) in 1970 to research noise pollution and to prepare a report to aid Congress in further legislation.<sup>31</sup> ONAC's report resulted in the adoption of the Noise Control Act of 1972 (NCA)<sup>32</sup> to protect Americans from "noise that jeopardizes their health and welfare."<sup>33</sup> The NCA required the EPA to coordinate noise control efforts among federal agencies, promote noise education and research, identify new noisy products, and implement a product-noise-labeling scheme.<sup>34</sup> Since Congress declared that the "primary responsibility for control of noise rested with State and local governments,"<sup>35</sup> the EPA was also required to assist with state and local abatement efforts.<sup>36</sup> After it became apparent that the NCA's original mandates were insufficient to foster needed state and local noise control initiatives,<sup>37</sup> Congress amended the NCA with the Quiet Communities Act of 1978.<sup>38</sup> This amendment authorized ONAC to provide financial and technical assistance to

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29. Shapiro, *supra* n. 26, at 7. The availability of portable noise measurement devices spurred the promulgation of state and local legislation containing objective noise standards based on decibel limitations. *Id.* This change to more objective noise legislation coincided with the EPA's report to Congress on the noise pollution problem and with Congress' directive to the EPA to establish the Office of Noise Abatement and Control. *Id.* at 7–8.

30. 42 U.S.C. §§ 4321–4370 (2000).

31. Shapiro, *supra* n. 26, at 7.

32. 42 U.S.C. §§ 4901–4918 (2000).

33. *Id.* at § 4901(b).

34. Shapiro, *supra* n. 26, at 8–9. Under the NCA, the EPA was responsible for promulgating emission standards for new noisy products distributed in interstate commerce as well as for noise emitted by interstate railroads and motor carriers. *Id.* at 8–10. The EPA was also charged with providing noise emission information to the public by mandating the labeling of products that emit or reduce noise. *Id.* at 8, 13. ONAC failed to promulgate any labeling regulations, however, other than those for hearing-protection devices. *Id.* at 13.

35. 42 U.S.C. § 4901(a)(3).

36. Shapiro, *supra* n. 26, at 9.

37. *Id.* at 17 (stating that congressional oversight hearings revealed this inadequacy of the NCA). Shapiro suggests that the NCA's failure to require the EPA to set state noise abatement goals further hindered state and local efforts and resulted in ONAC's assuming a primarily federal orientation. *Id.* at 8–9. This lack of mandatory state goals also resulted in a lack of political attention to noise control because state and local governments were not legally required to address noise pollution. *Id.*

38. 42 U.S.C. § 4913.

state and local governments and resulted in the creation and distribution of several model ordinances.<sup>39</sup> The local model, titled the Model Community Noise Control Ordinance,<sup>40</sup> was designed to provide a tool for municipalities to replace outdated, subjective noise ordinances based on nuisance-type standards with more effective and enforceable ordinances based on definitive, decibel-based noise standards.<sup>41</sup>

The EPA's efforts in the 1970s succeeded in stimulating state and local interest regarding noise pollution.<sup>42</sup> This progress came to a halt, however, when Congress cut funding for ONAC in 1981, and ONAC closed its doors in 1982.<sup>43</sup> The NCA, however, was not repealed following ONAC's demise, resulting in a unique dilemma wherein the EPA is still responsible for enforcing the noise regulations it promulgated through ONAC but lacks the budget and the program for enforcing and updating those regulations.<sup>44</sup> After the demise of ONAC, noise control efforts at all three levels of government declined dramatically.<sup>45</sup>

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39. Shapiro, *supra* n. 26, at 17–18. ONAC provided technical support through the establishment of regional technical centers, the creation of the Each Community Helping Others (ECHO) program, and the presentation of “over 100 training programs attended by 4000 noise officials.” *Id.* at 18.

40. Model Community Noise Control Ord. (EPA 1975). This model noise ordinance was prepared by the National Institute of Municipal Law Officers in conjunction with the EPA. *Id.* at foreword.

41. *Id.* at preamble. Decibel-based ordinances regulate noise through the use of numeric sound level limitations, measured in decibels. Donley & Davis, *supra* n. 9, at 173. These types of ordinances are also referred to as quantitative ordinances because they prohibit noise based on the amount of sound produced. *Id.* Subjective-standard ordinances, on the other hand, are often categorized as qualitative ordinances, due to the fact that they define noise violations based on the “character or nature” of the noise. *Id.*

42. Shapiro, *supra* n. 26, at 19. A 1980 EPA report stated that there were twenty states that had incorporated ONAC's model state ordinance at that time. *Id.* at 19 n. 122 (citing EPA, *Noise Control Program: Progress to Date—1980* at 2 (EPA 1980)).

43. Cowan, *supra* n. 3, at 160; see Shapiro, *supra* n. 26, at 28–30 (discussing the decline in state and local noise programs following ONAC's closure).

44. Cowan, *supra* n. 3, at 161; see also Shapiro, *supra* n. 26, at 2–3 (pointing out that the NCA still preempts state and local governments from adopting stricter noise emission and labeling standards than the EPA's, but the loss of funding for ONAC has rendered the EPA unable to research or update these standards to reflect improved research and technology).

45. Shapiro, *supra* n. 26, at 5. Since ONAC's funding was cut, the EPA has continued almost none of its noise abatement activities, and the subsequent decline in state and local programs “strongly suggests that ONAC's support activities were crucial to local noise abatement efforts.” *Id.* at 18. Initiatives to reestablish ONAC have led to the introduction of several bills in Congress, but to date, none have been enacted. See *infra* n. 307 (discussing these legislative actions).



Currently, state regulation of noise occurs on a very limited scale.<sup>46</sup> The only statutes applicable to noise control that exist in virtually every state are those enacted by state departments of transportation for motor vehicle emissions and traffic noise.<sup>47</sup> The EPA reported that in 1989, following the loss of ONAC support and funding, “only a handful of states [had] on-going noise abatement programs.”<sup>48</sup> Of the states that currently have noise legislation,<sup>49</sup> some maintain noise regulations that are similar in format to local noise ordinances,<sup>50</sup> while others have more sophisticated noise-control acts.<sup>51</sup> It is unknown how many states actively implement their noise control legislation, however, because many state governments cut funding and manpower to their noise programs after federal support was withdrawn.<sup>52</sup>

In Florida, the state Constitution clearly articulates the State’s position on protection of its citizens from noise pollution in

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46. Cowan, *supra* n. 3, at 198.

47. *Id.*; see also Grad, *supra* n. 17, at Table of St. Noise Control Ls., app. to ch. 5 (indicating the existence of motor vehicle noise statutes in almost every state). *E.g.* Idaho Code § 49-937 (2004); Kan. Stat. Ann. § 8-1739 (2004); Miss. Code Ann. § 63-7-55 (2004).

48. Donley & Davis, *supra* n. 9, at 164 (citing to *Transportation Noise: Federal Control & Abatement Responsibilities May Need to Be Revised* 27 (Gen. Acctg. Off. 1989)). The lack of state programs is also a reflection of the localized nature of noise pollution, which makes it more effectively addressed by local governments. *Id.* There is a lack of reliable data regarding the extent of the decline in noise programs due to difficulties in estimating both the number of programs in existence at the time ONAC was discontinued and the number of current, ongoing programs. Shapiro, *supra* n. 26, at 29 n. 192; see also *infra* n. 49 (referring to a 1997 survey of state noise control laws). A review of judicial decisions concerning noise control laws reveals that Illinois’ is the only state noise control act whose enforcement has been challenged in recent years. See *e.g. Roti v. LTD Commodities*, 823 N.E.2d 636, 638 (Ill. App. 2d Dist. 2005) (affirming the remedies ordered by the Illinois Pollution Control Board for violations of the noise prohibitions contained in the state Environmental Protection Act).

49. A website maintained by the Noise Pollution Clearinghouse contains a survey of state noise legislation which reflects that in December 1997, only thirteen states had “comprehensive state-wide noise regulations” on the books, and of those, only eight states actively enforced the laws. Noise Pollution Clearinghouse, *State Noise Statutes & Regulations*, <http://www.nonoise.org/lawlib/states/states.htm> (accessed Jan. 14, 2006).

50. Cowan, *supra* n. 3, at 198. For example, Delaware’s noise control statute defines “noise disturbance” in subjective terms and prohibits any person from “undertak[ing] any activity which in any way may cause or contribute to the creation of noise or a noise disturbance.” Del. Code Ann. tit. 7, §§ 7103–7104 (2004).

51. The more elaborate noise control acts may provide a model ordinance for use by municipalities or empower a state board or commission with the regulation and enforcement of the law. See *e.g.* Conn. Gen. Stat. § 22a-73 (2005); 415 Ill. Comp. Stat. 5/25 (2004).

52. See Shapiro, *supra* n. 26, at 29 n. 192, 34–36, 36–37 n. 228 (citing interviews with several state agencies that were in the process of phasing out their state programs following ONAC’s closing).

Article II, Section 7: “Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise . . . .” The Florida Legislature has taken the first steps toward state noise control by empowering the Florida Department of Environmental Protection (DEP) to establish standards “for the abatement of excessive and unnecessary noise.”<sup>53</sup> But to date, the DEP has not enacted any such regulations.<sup>54</sup> The Florida Legislature has made no further attempts to initiate a statewide program for noise pollution control, but the abatement of noise is addressed to a limited degree in Florida statutes that regulate noise from specific sources, such as motor vehicle noise,<sup>55</sup> loud music from car stereos,<sup>56</sup> and marine vessel noise.<sup>57</sup>

On the local level, noise control ordinances exist in some form in almost all municipalities.<sup>58</sup> Improvements in sound measurement technology and federal noise initiatives in the early 1970s created a trend among larger cities of adopting more objective, decibel-based noise ordinances.<sup>59</sup> The Model Community Noise Ordinance distributed by the EPA provided guidance for those communities wanting to adopt new regulations defining violations in terms of decibels of noise emitted, rather than hard-to-prove subjective standards.<sup>60</sup> Difficulties with untrained personnel and the need for expensive and complicated noise measurement equipment created problems with the enforcement of these ordinances,<sup>61</sup> causing some cities to return to their subjective “public disturbance” or “nuisance” guidelines.<sup>62</sup>

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53. Fla. Stat. § 403.06 (2005) (declaring that the DEP has “the power and the duty” to establish these standards).

54. A review of the Florida Administrative Code reveals no state regulations for the control of community noise pollution.

55. Fla. Stat. §§ 316.272, 316.293 (2005).

56. Fla. Stat. § 316.3045 (2005).

57. Fla. Stat. § 327.65 (2005).

58. Grad, *supra* n. 17, at § 5.03[2].

59. Shapiro, *supra* n. 26, at 7; Rosenthal, *supra* n. 25, at 51.4. For example, New York City adopted a new noise code in 1972, which contained noise criteria based on the results of a complicated environmental assessment process recommended by NEPA. Cowan, *supra* n. 3, at 205.

60. Model Community Noise Control Ord. preamble.

61. Rosenthal, *supra* n. 25, at 51.4.

62. Brookes, *supra* n. 12, at 2.

At this point, the ways in which local governments choose to regulate noise diverge widely.<sup>63</sup> Many smaller communities still rely on outdated nuisance or disturbance regulations that numerous commentators have labeled as completely ineffective at controlling noise.<sup>64</sup> Larger cities often have detailed, objective noise-control codes that incorporate the EPA's suggestions for noise-emission limitations and noise-assessment criteria.<sup>65</sup> Some municipal codes contain numerous separate noise provisions aimed at restricting noise from specified sources such as animals, car stereos, sound amplifiers, and construction equipment.<sup>66</sup> Florida's municipal noise ordinances reflect this varied approach to noise control, with the existence of more sophisticated and objective noise control laws in larger cities and counties,<sup>67</sup> and the use of one or more subjective-language ordinances in many smaller municipalities.<sup>68</sup>

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63. See Lief, *supra* n. 10, at 618 (discussing city noise codes and stating that cities have "used varying approaches to attack noise"); Shapiro, *supra* n. 26, at 30 (stating that "[c]ities apply widely varying approaches to noise abatement").

64. *E.g.* Grad, *supra* n. 17, at § 5.03[2] (discussing traditional noise control laws and stating that "[t]he one valid generalization that can be made about most of these laws is that they are almost completely ineffective in dealing with massive modern noise problems"); Lief, *supra* n. 10, at 616 (stating that "[l]ocal anti-noise statutes have been described as 'a sorry collection of restrictions or bans against "unreasonable," "unusual," . . . and "raucous" noises"' (quoting William H. Rodgers, Jr., *Environmental Law* 563–564 (West 1977)); Shapiro, *supra* n. 26, at 30 (citing one commentator's view that the local regulation of noise is "close to chaos").

65. Cowan, *supra* n. 3, at 205–217 (discussing the noise codes in New York City, Los Angeles, and Chicago); see *e.g.* Chi. Mun. Code (Ill.) tit. 11, art. VII (1988) (incorporating standards based on maximum decibel limits and time constraints and specifying use of American National Standards Institute standards for assessment methods).

66. See 61C Am. Jur. 2d *Pollution Control* § 1533 (2004) (discussing cases that considered the constitutional validity of municipal ordinances designed to regulate noise from loud machinery, animals, sound amplifiers, and car mufflers); see *e.g.* Daley, 752 So. 2d at 124–125 (deciding the constitutionality of a noise ordinance banning amplified sound under certain conditions); *City of Miami Beach v. Seacoast Towers–Miami Beach, Inc.*, 156 So. 2d 528, 529–530 (Fla. 3d Dist. App. 1963) (regarding the violation of a city noise ordinance aimed at construction noise); *State v. Taylor*, 495 S.E.2d 413, 414 (N.C. App. 1998) (concerning the violation of a county ordinance banning excessive noises by dogs). It has been suggested that these collections of miscellaneous provisions have developed because, historically, noise issues have been "too neglected . . . to be brought together in public health laws or similar legislation." Grad, *supra* n. 17, at § 5.03[2].

67. See *e.g.* Alachua County Code Ords. (Fla.) ch. 110 (2005); Jacksonville Ord. Code (Fla.) ch. 368 (2005); Orlando City Code (Fla.) ch. 42 (2005).

68. See *e.g.* Oldsmar City Code Ords. (Fla.) ch. 26, art. II (current through Mar. 2005) (containing separate, subjective standards for prohibitions on noise from radios, phonographs, and musical instruments; horns and signaling devices; motor vehicles; sound trucks; hawkers and peddlers; and construction equipment); Eustis City Code Ords. (Fla.)

Local governments have several other noise-abatement tools at their disposal, such as land use planning, permitting, environmental impact statements, and impact fees based on noise emissions.<sup>69</sup> For example, in Florida, many municipal zoning codes include “operational performance standards” or “industrial performance standards” to impose specific noise emission limitations on commercial zoning districts.<sup>70</sup> The focus of this Comment, however, is limited to general noise ordinances aimed at the broad regulation of non-industrial, or community, noise.

### III. THE CONSTITUTIONAL LIMITATIONS

As long as a regulation is not preempted by federal legislation in the same area, state and local governments have the right to regulate noise for the protection of the public health and welfare.<sup>71</sup> In order to satisfy the United States Constitution, a noise control ordinance must be content-neutral and clearly and narrowly drawn, and must not give undue discretion to government officials or regulate more conduct than is necessary to serve the governmental interest.<sup>72</sup> Municipal noise regulations are most commonly challenged under the First Amendment for interference with free-speech rights or under the Fourteenth Amendment for violation of due-process rights.<sup>73</sup>

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(current through Nov. 2002) (containing separate ordinances regulating noises from animals § 14-72; home occupations § 112-4(b); garbage collection § 78-57(d); and motor vehicle radios § 34-102).

69. Shapiro, *supra* n. 26, at 29.

70. See e.g. Dunnellon City Code Ords. (Fla.) § 11.04 (current through Aug. 2005); Alachua County Code Ords. at § 110.04.

71. See Donley & Davis, *supra* n. 9, at 166 (stating that federal legislation may preempt the subject matter of a municipal noise ordinance); IMLA Model Noise Ord. 11-5.25 ed. commentary pt. II, § IV (stating that “certain [municipal] noise regulations may face federal preemption challenges,” such as “ordinances affecting airport and railroad noise”); see also *supra* n. 7 and accompanying text (setting forth cases that establish the legitimate governmental interest in protecting citizens from unwanted noise).

72. Carolyn Kelly MacWilliam, *Validity of State or Local Enactment Regulating Sound Amplification in Public Area*, 122 A.L.R.5th 593, 604 (2004); see *infra* pt. III (discussing the various requirements that courts analyze in finding a noise ordinance constitutionally valid).

73. Stuart A. Laven, *Turn Down the Volume: The Constitutionality of Ohio's Municipal Ordinances Regulating Sound from Car Stereo Systems*, 51 Clev. St. L. Rev. 1, 14 (2004).

## A. First Amendment Challenges

The First Amendment to the United States Constitution prohibits Congress from making any law “abridging the freedom of speech.” Through the Fourteenth Amendment, this mandate applies equally to state and local governments.<sup>74</sup> Freedom of speech is not absolute, however. The United States Supreme Court has repeatedly held that the government may impose reasonable time, place, or manner restrictions on protected speech, even if such speech takes place in a public forum, provided the regulations are content-neutral, allow “ample alternative channels for communication,” and are “narrowly tailored to serve a significant governmental interest.”<sup>75</sup> If a noise ordinance places restrictions on the time, place, or manner of protected speech, the law must pass all three prongs of this test to be upheld.<sup>76</sup>

When addressing the first prong—the content-neutrality of a noise provision—the Court’s controlling consideration is the government’s purpose in enacting the statute.<sup>77</sup> If the regulation is an attempt to suppress speech due to disagreement with its message, then the Court will deem the regulation to be a content-based restriction and will most likely hold it unconstitutional.<sup>78</sup> In most cases, a law controlling noise is found to serve a purpose that is “unrelated to the content” and is therefore “deemed neu-

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74. U.S. Const. amend. XIV, § 1.

75. *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293 (1984)); e.g. *Heffron v. Intl. Socy. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647–648 (1981) (applying the same test to find a state law that infringed on free speech to be a constitutional time, place, or manner restriction).

76. *Ward*, 491 U.S. at 791 (setting forth the Court’s traditional three-part analysis for restrictions on speech in a public forum and stating that the Court will analyze each of the “requirements” in turn); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 16.47, 1320–1321 (7th ed., West 2004) (discussing the three-part test that courts use when analyzing the validity of a time, place, or manner restriction).

77. *Ward*, 491 U.S. at 791. Noise ordinances are usually considered content-neutral because their purpose is not to stop a certain message but to limit the volume of sound being produced. See e.g. *id.* at 792 (stating that the purpose of the city’s sound-amplification guidelines was “to control noise levels at bandshell events” and therefore was totally unrelated to the content of the music).

78. Nowak & Rotunda, *supra* n. 76, at 1321 n. 5 (stating that the Supreme Court applies very strict scrutiny to content-based restrictions, and that such a restriction will be valid only if it concerns an unprotected category of speech such as obscenity).

tral, even if it has an incidental effect on some speakers or messages but not others.”<sup>79</sup>

For example, plaintiffs challenged a noise ordinance that contained an exemption for amplified church music on Sundays as content-based, alleging that it restricted speech based on who was broadcasting it.<sup>80</sup> The Seventh Circuit Court of Appeals upheld the ordinance, holding that the city council’s decision to provide a church exemption was not based on the identity of the sound-maker or the message, but on the intrusiveness of the sound based on its character, and therefore the ordinance was content-neutral.<sup>81</sup> A noise provision may be considered content-based, and declared invalid, if it is clearly aimed at controlling a certain type of message, such as a ban only on amplified sound that is used to sell products to the public.<sup>82</sup>

Regarding the second prong, courts usually find that “ample alternative channels” are available if the noise ordinance merely places limits on the volume, time, or location of noise produced, because citizens may still express themselves at a lower volume, during specified times, or in a different location.<sup>83</sup> A noise regulation will be found to violate this part of the test only if the court concludes that the restriction is so severe that it leaves the speaker with no other adequate means of expression.<sup>84</sup>

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79. *Ward*, 491 U.S. at 791.

80. *Stokes v. City of Madison*, 930 F.2d 1163, 1167, 1171 (7th Cir. 1991).

81. *Id.* at 1171–1172.

82. *See Anabell’s Ice Cream Corp. v. Town of Gloucester*, 925 F. Supp. 920, 929 (D.R.I. 1996) (holding that an ordinance was unconstitutional where it banned only amplified sound that was used to attract attention for business purposes).

83. *E.g. Ward*, 491 U.S. at 802 (holding that a city guideline was valid because it allowed continued expressive activity at the bandshell and only regulated the extent of amplification); *Housing Works, Inc. v. Kerik*, 283 F.3d 471, 481 (2d Cir. 2002) (holding that an ordinance was a valid time, place, or manner restriction because there were “many other public areas” in which to use sound amplification equipment); *Stokes*, 930 F.2d at 1172 (noting that speakers had “several alternative channels,” such as speaking during a specific time period or speaking without amplification equipment).

84. *E.g. Reeves v. McConn*, 631 F.2d 377, 385 (5th Cir. 1980) (invalidating part of a noise ordinance because “[a]n absolute and city-wide prohibition of all sound amplification” except during certain hours was not narrowly tailored); *Wollam v. City of Palm Springs*, 379 P.2d 481, 486–487 (Cal. 1963) (holding that a city ordinance requiring sound trucks to be moving at least ten miles per hour was unconstitutional because it prohibited effective communication); *see also infra* nn. 85–92 and accompanying text (discussing the closely related overbreadth doctrine).

The third requirement, that the restriction be narrowly tailored to serve the government's legitimate interests, is the one most often raised when challenging the constitutionality of a time, place, or manner restriction on sound.<sup>85</sup> Narrow tailoring is accomplished if the "regulation promotes a substantial government[al] interest that would be achieved less effectively absent the regulation."<sup>86</sup> The Supreme Court has held that the regulation does not need to be the least restrictive means of serving the governmental interest and that courts are not required to "[sift] through all the available or imagined alternative means of regulating sound" in analyzing the validity of an ordinance.<sup>87</sup> The Court will find the noise ordinance invalid, however, if it regulates sound in a way that substantially limits more speech than is necessary to achieve the goal of protecting citizens from excessive noise.<sup>88</sup>

A separate but similar basis for a First Amendment challenge lies in the assertion that the noise ordinance is "overbroad."<sup>89</sup> The overbreadth doctrine holds that a law may be struck down by a court if it is written so broadly that its prohibitions extend to a considerable amount of constitutionally protected conduct.<sup>90</sup> To prove that a noise ordinance is overbroad, the challenging party must demonstrate that the ordinance intrudes on free-speech rights more than is necessary to serve the governmental interest<sup>91</sup> and that it is therefore likely to *significantly* compromise the First Amendment rights of others not before the court.<sup>92</sup>

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85. See e.g. *Ward*, 491 U.S. at 802; *U.S. v. Albertini*, 472 U.S. 675 (1985).

86. *Albertini*, 472 U.S. at 689.

87. *Ward*, 491 U.S. at 797; see also *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) (stating that "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge").

88. *Ward*, 491 U.S. at 799.

89. *Grayned v. City of Rockford*, 408 U.S. 104, 114–115 (1972).

90. *Id.*

91. See *Reeves*, 631 F.2d at 383 (stating "[i]f, at the expense of First Amendment freedoms, a statute reaches more broadly than is reasonably necessary to protect legitimate state interests, a court may forbid its enforcement").

92. *Broadrick v. Okla.*, 413 U.S. 601, 612 (1973). The Supreme Court refers to this as a requirement of "substantial overbreadth": "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. Most courts therefore require a showing that the regulation's potential application is likely to reach a *significant* amount of constitutionally protected activity. See e.g. *Village of Kel-*

Noise regulations containing broad prohibitions based on the ability to hear sounds outside the premises or at a certain distance from the source have been invalidated for overbreadth.<sup>93</sup> In *Beckerman v. City of Tupelo*,<sup>94</sup> the Fifth Circuit Court of Appeals held that a city ordinance prohibiting the use of sound equipment at any time in residentially zoned areas was overbroad because such zones contained structures other than homes, such as churches or schools, which were not necessarily incompatible with the use of sound equipment.<sup>95</sup> The key inquiry is whether the forbidden activity is completely incompatible with the usual activities of a certain place at a certain time.<sup>96</sup>

In a decibel-based ordinance, the actual decibel limitation can also be found to be overbroad if it is thought to restrict more activity than necessary to serve the government's purpose.<sup>97</sup> For example, in *U.S. v. Doe*,<sup>98</sup> the D.C. Circuit Court of Appeals found a sixty-decibel limitation to be an unreasonably low restriction for the setting of a national park.<sup>99</sup> Another court held that a noise ordinance that prohibited sound above fifty-five decibels within ten feet of hospitals or churches was unreasonably overbroad because it sought to criminalize sounds that were produced within the normal range of activities on public streets and in public parks.<sup>100</sup>

The Supreme Court has made clear, however, that invalidating a law for overbreadth is to be done "sparingly and only as a

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*leys Is. v. Joyce*, 765 N.E.2d 387, 393 (Ohio App. 6th Dist. 2001).

93. See e.g. *State v. Yee*, 523 A.2d 116, 118–119 (N.H. 1987) (finding that the portion of an ordinance penalizing production of sound that did not penetrate beyond the noise-maker's own property lines was overbroad and unconstitutional); *Duffy v. City of Mobile*, 709 So. 2d 77, 81 (Ala. Crim. App. 1997) (holding that a noise ordinance declaring any amplified sound that is plainly audible at a distance of fifty feet from its source to be "prima facie evidence of a violation" was overly broad because it prohibited such sound at all times and in all places in the city, without any requirement that anyone be disturbed).

94. 664 F.2d 502 (5th Cir. 1981).

95. *Id.* at 516.

96. *Grayned*, 408 U.S. at 116. The Court also stated that the reasonableness of a certain regulation is dependent on the nature of the place being restricted. *Id.*

97. Mark A. Gruwell, *The First Amendment Strikes Back: Amplified Rights*, 31 *Stetson L. Rev.* 367, 379–380 (2002).

98. 968 F.2d 86 (D.C. Cir. 1992).

99. *Id.* at 91.

100. *Lionhart v. Foster*, 100 F. Supp. 2d 383, 388 (E.D. La. 1999). The court considered evidence presented by plaintiffs that the fifty-five decibel value would include normal human conversation and passing automobile traffic. *Id.*



last resort” and that the overbreadth doctrine should not be invoked when a limiting construction or partial invalidation of the law can be used to correct its constitutional deficiencies.<sup>101</sup> In *Ward v. Rock against Racism*,<sup>102</sup> the Court determined that the manner in which New York City interpreted and applied its noise ordinance provided such a limiting construction.<sup>103</sup> The ordinance in *Ward* required the use of City sound technicians and equipment by all bandshell performers,<sup>104</sup> and the Court held that the City’s policy of deferring to a sponsor’s desires with respect to the sound mix remedied any constitutional deficiencies of the ordinance.<sup>105</sup>

Another potential First Amendment problem arises when a noise ordinance requires a permit or license to allow certain noise-producing activities. If the regulation lacks clear and narrow guidelines for granting the permit or does not provide for prompt judicial review of the decision, it may be held to be an unconstitutional prior restraint of free speech.<sup>106</sup> In *Saia v. New York*,<sup>107</sup> the Supreme Court held that a city ordinance allowing the use of sound amplification devices only with the permission of the chief of police was unconstitutional because the ordinance contained no standards for the exercise of discretion in refusing a permit and denied prompt judicial review.<sup>108</sup> The Court stated that noise abuses could be controlled with narrowly drawn statutes, but when a regulation allowed uncontrolled discretion to

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101. *Broadrick*, 413 U.S. at 613.

102. 491 U.S. 781.

103. *Id.* at 795–796. The Court stated that “[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.” *Id.* (quoting *Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494 n. 5 (1982)). The narrowing construction in this case was accomplished through “administrative interpretation and implementation” of the law. *Id.*

104. *Id.* at 784.

105. *Id.* at 795.

106. *Saia v. N.Y.*, 334 U.S. 558, 560–561 (1948).

107. 334 U.S. 558.

108. *Id.* at 560–561. The Court, noting that the chief of police had uncontrolled discretion over the right to speak and that he could only be removed after criminal conviction and a lengthy appeal, held that “[a] more effective previous restraint is difficult to imagine.” *Id.* The Court found a further problem in the fact that the ordinance did not narrowly specify the hours or volume at which loudspeakers would be allowed. *Id.* at 560.

ban loud-speakers, it became a “device for suppression of free communication of ideas.”<sup>109</sup>

All noise-permit schemes do not amount to prior restraint, however. If the law contains clear standards for when to grant or deny a permit, those standards are reasonably related to a legitimate municipal goal, and there are avenues for prompt review of denials, the ordinance will probably be upheld.<sup>110</sup>

### B. Due Process Challenges

Municipal ordinances describing noise standards in vague terms that fail to provide fair warning of what conduct is forbidden, or failing to set reasonable guidelines for their enforcement, can be found to violate due-process rights under the Fourteenth Amendment.<sup>111</sup> The key criterion considered in determining whether legislation is unconstitutionally vague is “whether persons of ‘common intelligence’ understand its prohibitions without the need to ‘guess at its meaning.’”<sup>112</sup> The main goals of the vagueness doctrine are to ensure that the public has reasonable notice of what conduct is forbidden by a law and to avoid arbitrary or discriminatory enforcement of a law whose standards are unclear.<sup>113</sup>

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109. *Id.* at 562.

110. See e.g. *Turley v. Police Dept. of N.Y.*, 167 F.3d 757, 762 (2d Cir. 1999) (holding that the permit requirement had clearly articulated guidelines and therefore did not confer impermissible discretion on enforcement officials); *Housing Works*, 283 F.3d at 480 (holding that a regulation banning the use of amplified sound in areas next to city hall was valid because it served the legitimate purpose of preventing excessive noise from interrupting “essential government functions”).

111. *Grayned*, 408 U.S. at 108–109; Andrew E. Goldsmith, Student Author, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 Am. J. Crim. L. 279, 286 (2003).

112. William B. Harvey, *Street Preaching Versus Privacy: A Question of Noise*, 14 St. Louis U. Pub. L. Rev. 593, 601 (1995) (quoting *Eanes v. State*, 569 A.2d 604, 615 (Md. 1990)).

113. *Grayned*, 408 U.S. at 108–109. One commentator suggests that in applying the vagueness doctrine, the Supreme Court has now largely abandoned the original goal of fair notice in favor of the secondary goal of preventing arbitrary enforcement. Goldsmith, *supra* n. 111, at 282. Goldsmith refers to a Supreme Court statement that “perhaps the most meaningful aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.” *Id.* at 289 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

The vagueness standard is applied more strictly when an enactment reaches protected speech,<sup>114</sup> but even in those circumstances, courts do not require “meticulous specificity” in the wording of the regulation.<sup>115</sup> In addition, courts may look to judicial interpretations, enforcement practices, or the common use of words to give ordinances a valid construction.<sup>116</sup> The Supreme Court has noted that it is impossible to define a precise line between impermissible vagueness and permissible uncertainty in words used to describe forbidden conduct.<sup>117</sup> This dilemma has led to divergent results in the courts.<sup>118</sup>

Certain words in noise regulations have been found to pass constitutional scrutiny in a majority of jurisdictions, while other words have been found impermissibly vague. For example, the Supreme Court has found the words “loud” and “raucous” to be acceptable standards for prohibited noise, because “they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden.”<sup>119</sup> Prohibitions on “loud and unseemly” noises have also been upheld by several courts as possessing an adequate degree of clarity.<sup>120</sup> On the other hand, the words “unnecessary,” “annoy-

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114. *Reeves*, 631 F.2d at 383; Goldsmith, *supra* n. 111, at 281.

115. *E.g. Grayned*, 408 U.S. at 110. The Supreme Court has made clear that the requirement of specificity does not prevent the government from prohibiting evils through the use of abstract terms that “have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden.” *Kovacs*, 336 U.S. at 79–80.

116. Goldsmith, *supra* n. 111, at 296, 299–301. Goldsmith provides a detailed discussion of eight defenses against vagueness challenges that are currently recognized by the Supreme Court. *See e.g. Grayned*, 408 U.S. at 110 (stating it is the Court’s task to “extrapolate” the meaning of a statute by looking at the interpretation given to it by lower courts and enforcement officials).

117. *Kovacs*, 336 U.S. at 80.

118. Compare *e.g. Thelen v. State*, 526 S.E.2d 60, 61–62 (Ga. 2000) (finding a prohibition on sound that “either annoys, disturbs, injures, or endangers” others to be unconstitutionally vague) with *e.g. State v. Cornwell*, 776 N.E.2d 572, 574, 576 (Ohio App. 7th Dist. 2002) (holding an ordinance forbidding noise that “disturb[s] the quiet, comfort or repose of other persons” was not void for vagueness); *see also infra* nn. 133–139 and accompanying text (discussing the conflicting decisions on the issue of whether a “plainly audible” standard is impermissibly vague).

119. *Kovacs*, 336 U.S. at 79.

120. *E.g. City of Beaufort v. Baker*, 432 S.E.2d 470, 474 (S.C. 1993) (holding that “loud and unseemly” is “clear enough” because “unseemly” modifies “loud” and means “unreasonably loud in the circumstances”); *Eanes*, 569 A.2d at 610 (upholding “loud and unseemly” standard as constitutionally valid).

ing,” and “unusual,” when modifying the term “noise,” have been found unconstitutionally vague by several courts.<sup>121</sup>

Courts that disapprove certain abstract terms usually do so because they find the terms violate due process by allowing arbitrary enforcement based on purely subjective determinations by complainants or enforcement officials.<sup>122</sup> In *Thelen v. State*,<sup>123</sup> the Georgia Supreme Court held that an ordinance outlawing “loud, unnecessary or unusual sound or noise which either annoys, disturbs, injures, or endangers the comfort, repose, health, peace, or safety of others” was unconstitutional because its terms were “inherently vague” and it made violations dependent on the “individualized sensitivity of each complainant.”<sup>124</sup> The Court reasoned that an ordinance that required the application of such a subjective standard was invalid because it invited arbitrary and discriminatory application by police officers, judges, and juries.<sup>125</sup>

There is, however, a commonly recognized cure for such vague terminology. If the noise regulation also references a reasonable person standard for determining violations, courts may find use of subjective terms acceptable.<sup>126</sup> For example, an ordinance prohibiting noise that could “unreasonably annoy or disturb” persons in the vicinity was upheld because the court ruled the objective “reasonable person” standard saved the ordinance from vagueness.<sup>127</sup> Another court found use of a “loud, raucous

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121. *E.g. Nichols v. City of Gulfport*, 589 So. 2d 1280, 1283 (Miss. 1991) (holding that a noise provision prohibiting “unnecessary or unusual” noises that may “annoy” others was unconstitutionally vague because the Mississippi Supreme Court could conceive of no setting in which those terms would give persons reasonable notice of prohibited conduct).

122. *E.g. id.* at 1284 (invalidating portions of a noise ordinance because they allowed conviction “based upon subjective conclusions reached and reported by citizens”); *Thelen*, 526 S.E.2d at 62 (finding that the ordinance in question was vague because whether a certain noise was “unnecessary” or “annoying” depended on the individual sensitivities of the listener).

123. 526 S.E.2d 60.

124. *Id.* at 61–62 (quoting *Nichols*, 589 So. 2d at 1284).

125. *Id.* at 62.

126. *See e.g. Township of Plymouth v. Hancock*, 600 N.W.2d 380, 382–383 (Mich. App. 1999) (deciding that an ordinance prohibiting noise that would “annoy or disturb” people was not impermissibly vague because it also utilized a reasonable person standard); *City of Madison v. Baumann*, 470 N.W.2d 296, 302 (Wis. 1991) (holding that the term “reasonably” in the ordinance saved it from being vague, as the standard “has been relied upon in all branches of the law for generations”).

127. *Hancock*, 600 N.W.2d at 382–383. The *Hancock* ruling was based on the court’s belief that “the reasonable person standard serves to provide fair notice of the type of conduct prohibited, as well as preventing abuses in application of the ordinance.” *Id.* at 383.

and disturbing” standard acceptable when that phrase was defined later in the ordinance as sound which, because of its volume or character, annoys or disturbs “reasonable persons of ordinary sensibilities.”<sup>128</sup> An ordinance’s reference to “neighboring persons of ordinary sensibilities” has also been deemed an acceptable reasonable person standard.<sup>129</sup> In some cases, a court will construe a reasonable person standard where none expressly exists. For example, in *Marietta v. Grams*,<sup>130</sup> the challenged ordinance made it unlawful to “disturb the good order and quiet of the Municipality,” and the Ohio Court of Appeals construed the enactment as having a “reasonable person of common sensibilities” standard.<sup>131</sup>

Courts also disagree as to whether a “plainly audible” standard for noise regulation is unconstitutionally vague.<sup>132</sup> Many noise ordinances contain provisions that prohibit amplified sounds that are “plainly audible,” either at the property line or at a designated distance from the source.<sup>133</sup> Some jurisdictions uphold these ordinances on the grounds that they provide a standard that is easily understood and that the numeric distance requirement provides an objective standard that is not susceptible to arbitrary enforcement.<sup>134</sup>

For example, in *City of Portland v. Aziz*,<sup>135</sup> the Oregon Court of Appeals considered a regulation that made it unlawful to operate a sound production device between specified nighttime hours “so as to be plainly audible within any dwelling unit which [was]

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128. *State v. Garren*, 451 S.E.2d 315, 316, 318–319 (N.C. App. 1994).

129. *State v. Holcombe*, 145 S.W.3d 246, 254 (Tex. App. Ft. Worth Dist. 2004).

130. 531 N.E.2d 1331 (Ohio App. 4th Dist. 1987).

131. *Id.* at 1333, 1336; *see also Eanes*, 569 A.2d at 616 (construing “loud and unseemly” to mean “unreasonably loud in the circumstances” and therefore finding the phrase to be an acceptable objective standard).

132. Compare *e.g. Kelleys Is.*, 765 N.E.2d at 393 (holding that the “plainly audible” standard provides fair warning and is therefore constitutional) with *e.g. Thelen*, 526 S.E.2d at 61 (finding the standard “audible to a person of normal hearing” to be unconstitutionally vague); *see Laven*, *supra* n. 73 (providing a thorough review of the case law considering use of a “plainly audible” noise standard).

133. *See infra* nn. 134–138 and related text (discussing several ordinances that use a “plainly audible” standard to define noise violations).

134. *E.g. State v. Ewing*, 914 P.2d 549, 553, 557 (Haw. App. 1996) (finding that use of a “plainly audible” standard did not render the law subject to arbitrary enforcement); *Kelleys Is.*, 765 N.E.2d at 389, 393 (holding that a standard of “plainly audible at a distance of 150 feet or more from the source” was “sufficiently definite to preclude arbitrary and discriminatory enforcement”).

135. 615 P.2d 1109 (Or. App. 1980).

not the source of the sound.”<sup>136</sup> The court held this to be an adequately clear standard, even though application of the ordinance could vary based on factors such as the amount of insulation in a building.<sup>137</sup> Other courts have come to the opposite conclusion, finding the standard impermissibly vague because sound that is “plainly audible” is not necessarily bothersome, and enforcement will be based on the subjective responses of the listener.<sup>138</sup>

While subjective terminology can prove problematic, decibel-based standards for determining violations almost always satisfy due process because they utilize objective and measurable criteria that provide the requisite clarity and notice.<sup>139</sup> Courts often invalidate the vague, subjective language in a noise ordinance but keep the objective decibel sections intact.<sup>140</sup> In *Dupres v. City of Newport*,<sup>141</sup> the city noise ordinance prohibited four different categories of noise: three based on subjective nuisance standards and one containing decibel standards.<sup>142</sup> The United States District Court of Rhode Island held all three subjective standards to be unconstitutionally vague and overbroad—including the “unreasonably loud or disturbing” phrase that many courts have up-

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136. *Id.* at 1113 (emphasis omitted).

137. *Id.* at 1113–1114. The court found that the fact that the prohibited volume of sound would differ based on the quality of insulation in the building did not render the ordinance vague, but merely provided flexibility. *Id.* at 1114.

138. *E.g. Thelen*, 526 S.E.2d at 61 (finding inclusion of a standard that sound be plainly audible “[fifty] feet from the point of origin” was vague); *Yee*, 523 A.2d at 118–119 (finding the “plainly audible” standard to be too vague because it could be used to regulate sound that was not unreasonably disturbing to anyone).

139. *E.g. Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 493–494 (4th Cir. 1983) (finding that the ordinance provision setting forth decibel limitations was acceptably precise); *Dupres v. City of Newport*, 978 F. Supp. 429, 433 (D.R.I. 1997) (deciding that the decibel standard “define[d] the conduct it proscribe[d] with the requisite specificity so as to pass constitutional muster”).

140. *E.g. Crockett*, 706 F.2d at 489–490 (ruling the term “unnecessary” to be impermissibly vague but holding that the section prohibiting amplified sound at designated sound levels in particular areas at certain times was valid); see generally *Champlin Refining Co. v. Corp. Commn. of Okla.*, 286 U.S. 210, 234 (1932) (establishing the rule that “[t]he unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions,” as long as what remains is “fully operative as a law”).

141. 978 F. Supp. 429.

142. *Id.* at 432–433. The subjective provisions prohibited noise that (1) was “unreasonably loud, disturbing, or unnecessary”; (2) was “detrimental to the life, health, or welfare of any individual” because of its character or intensity; or (3) “annoy[ed], disturb[ed], injure[d], or endanger[ed] the comfort, repose, peace, or safety of any individual.” *Id.* at 433 (referring to portions of Newport Codified Ords. (R.I.) § 8.12.040).

held—but found that the “specific, objective, and measurable” decibel provision passed constitutional muster.<sup>143</sup>

Finally, due process can be violated by noise ordinances that hold certain activities to be “prima facie evidence” of a violation or declare certain noises to be per se violations.<sup>144</sup> In *Jim Crockett Promotion, Inc. v. City of Charlotte*,<sup>145</sup> plaintiffs challenged a noise ordinance because it stated that the receipt of three complaints from citizens, or the complaint of one citizen combined with the complaint of an enforcement official, constituted “prima facie evidence” that the sound was “unreasonably loud or unnecessary noise” in violation of the law.<sup>146</sup> The Fourth Circuit Court of Appeals ruled this provision unconstitutional because it found no rational reason to accept that unproven complaints warrant a presumption by a jury that the noise was “loud” or “disturbing.”<sup>147</sup> To allow such an inference would violate a defendant’s due-process rights.<sup>148</sup> Similarly, courts have decreed that a noise ordinance can define specific acts as per se violations only if those acts are in themselves actual or imminent threats of “material and substantial disruption” to persons or the community.<sup>149</sup> A municipality may not broadly prohibit conduct that might *sometimes* result in a disruption.<sup>150</sup> This line of decisions suggests that per se and prima facie characterizations are most likely to be upheld if they

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143. *Id.* at 433, 435.

144. Although *Black’s Law Dictionary* defines “per se” to be a finding “as a matter of law,” and prima facie evidence to be merely a rebuttable presumption, courts frequently consider the words “prima facie” in an ordinance to have the same effect: certain conviction of a violation. *Black’s Law Dictionary* 1178, 1228 (Bryan A. Garner ed., 8th ed., West 2004). An example of this treatment can be found in *Duffy*, in which the court stated that declaring a sound to be prima facie evidence of a violation had the same effect as “an absolute prohibition” of the sound. 709 So. 2d at 81.

145. 706 F.2d 486.

146. *Id.* at 488–489.

147. *Id.* at 491.

148. *Id.*; see also *Duffy*, 709 So. 2d at 81 (addressing a noise ordinance in which sound plainly audible fifty feet from its source constituted prima facie evidence of a violation and holding that the ordinance was overbroad because it removed the requirement that the noise be disturbing).

149. See e.g. *Garren*, 451 S.E.2d at 318 (quoting *Reeves*, 631 F.2d at 388). The ordinance in *Garren* attempted to define noise violations by declaring certain sounds to be “loud, raucous and disturbing” in violation of the law, regardless of their volume or actual impact on listeners. *Id.* at 316. The court invalidated that portion of the regulation because it was deemed an overly broad restriction on protected speech. *Id.* at 318.

150. *Id.*

are applied only to sounds that clearly support the need for complete prohibition.

It is evident from this review that there are few hard-and-fast rules regarding the constitutionality of noise regulations, but certain general conclusions can be drawn. The precedent suggests that the safest approach to noise control is through objective, decibel-based ordinances that are narrowly tailored to address noise at particular volumes, times, and geographic areas. Subjective language is carefully scrutinized, but it can be successfully utilized when the terms are clearly defined and measured by a reasonable person standard. On the other hand, laws are most vulnerable to constitutional attack when they vest too much discretion in local officials or prohibit more noise than is reasonably necessary to protect the public. Local legislators can look to these general guidelines, as well as to court decisions from their own jurisdiction, when attempting to draft a constitutional noise ordinance.

#### IV. FLORIDA'S TREATMENT OF CONSTITUTIONAL CHALLENGES TO NOISE ORDINANCES

Florida's state courts have generated few written opinions regarding the constitutionality of municipal noise ordinances. Of the five cases reviewed below, four resulted in decisions holding at least part of the noise ordinances in question unconstitutional. These cases reflect a willingness on the part of Florida courts to uphold certain subjective terms in noise ordinances, but they also reveal a judicial policy of strict adherence to the requirement of narrow tailoring.

In 1963, Florida's Third District Court of Appeal considered the constitutional validity of a noise ordinance in *City of Miami Beach v. Seacoast Towers-Miami Beach, Inc.*<sup>151</sup> The court ultimately declared two portions of the City of Miami Beach's noise ordinance unconstitutional and upheld a circuit court's injunction prohibiting its enforcement.<sup>152</sup> The challenged sections of the or-

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151. 156 So. 2d 528.

152. *Id.* at 532. The plaintiff construction company had begun building a legally permitted oceanfront apartment building on November 1. *Id.* at 530. City police directed the plaintiff to halt construction on the building, stating that under the current noise ordinance, such work could not commence until the following April. *Id.* The plaintiff filed a



dinance prohibited certain “restricted noises,” which included construction noise, within fifty yards of any apartment building or hotel “at all hours” during the time period of December 1 through March 31.<sup>153</sup> The court applied a balancing-of-interests analysis and found this section of the ordinance unconstitutional because it placed too great a burden on the property owner.<sup>154</sup> The *Seacoast* court recognized the government’s substantial interest in promoting tourism and protecting visitors from disturbance but found no reasonable basis for the law’s ban on construction noise during winter months, as tourists had started coming to Miami Beach “year round.”<sup>155</sup>

The court held another portion of the Miami Beach noise ordinance, which allowed the city manager “to waive any or all requirements herein in cases of emergency where the welfare of persons or property may be jeopardized,” to be an arbitrary and unconstitutional standard.<sup>156</sup> The Third District utilized a vagueness analysis, although not referring to it as such, and found that this section of the ordinance was invalid because it allowed arbitrary enforcement of the ordinance at the whim of a city official “without any ascertainable standard of guilt” or of what constituted an “emergency.”<sup>157</sup>

Over thirty years after the *Seacoast* decision, the Second District Court of Appeal considered the constitutionality of a noise

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complaint to enjoin the city from enforcing the ordinance, claiming the law unconstitutionally deprived him of the use of his property, that it had no “reasonable relationship to the public health, safety or welfare,” and that it vested arbitrary discretion in the sole official allowed to grant waivers. *Id.* The trial court agreed and granted a temporary injunction. *Id.*

153. *Id.* at 529–530. The court pointed out that the city chose those specific dates because at the time the ordinance was adopted, “Miami Beach was primarily . . . a winter resort and depended solely upon the tourists who visited the city during the winter months.” *Id.* at 531. The court went on to say that the character of the community had since changed and the local economy now depended on the presence of year-round tourists. *Id.*

154. *Id.* The Third District reasoned that because the provision had the effect of prohibiting *any* construction during the specified months, it was a “forbearance forced on the property owner [that was] entirely out of proportion to any benefit redounding to the public.” *Id.*

155. *Id.*

156. *Id.* at 530, 531–532.

157. *Id.* at 531–532. Under the usual vagueness analysis, courts consider a law unconstitutionally vague when it invites arbitrary and discriminatory application by officials. *See supra* nn. 113, 123–125 and related text (discussing the vagueness doctrine’s goal of preventing arbitrary enforcement and presenting cases that apply such reasoning).

ordinance in *Easy Way of Lee County, Inc. v. Lee County*.<sup>158</sup> *Easy Way* involved portions of a county noise ordinance<sup>159</sup> that prohibited 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. . . .<sup>160</sup>

The ordinance went on to define “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.”<sup>161</sup> The appellants, a nightclub and its owners, were cited by the sheriff for violations of the ordinance when residential neighbors complained of the amplified music emanating from within the club.<sup>162</sup> The appellants challenged the constitutionality of the cited portions of the ordinance as being vague and an overly broad restriction on free speech.<sup>163</sup>

The *Easy Way* court found part of the ordinance to be valid but struck another section as being both vague and overbroad.<sup>164</sup> The court upheld that part 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.”<sup>165</sup> In reaching this decision, the court relied heavily on *Reeves v. McConn*,<sup>166</sup> in which the Fifth Circuit Court of Appeals found a subjective noise standard of “unreasonably loud, raucous, jarring, disturbing or a nuisance,” not unconstitutionally vague.<sup>167</sup> The *Reeves* court stated that the term

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158. 674 So. 2d 863.

159. Lee County Code Ls. & Ords. (Fla.) ch. 24 1/4 (1993).

160. *Easy Way*, 674 So. 2d at 864 (quoting Lee County Code Ls. & Ords. at Section 24 1/4-5) (emphasis omitted).

161. *Id.* (quoting Lee County Code Ls. & Ords. at Section 24 1/4-5).

162. *Id.* at 864–865.

163. *Id.* at 864.

164. *Id.* at 863.

165. *Id.* at 863, 865.

166. 631 F.2d 377.

167. *Easy Way*, 674 So. 2d at 866 (citing *Reeves*, 631 F.2d at 386). The *Easy Way* opinion incorporated extensive quotations from *Reeves*, including excerpts of the *Reeves* opinion

“disturb[ing]” was not vague because it was expected that a state court would “interpret the term objectively.”<sup>168</sup> The *Easy Way* court also referred to the *Reeves* discussion that a standard of conduct may depend on abstract words, “even though they fall short of providing ‘mathematical certainty,’” because “‘flexibility and reasonable breadth, rather than meticulous specificity’ is acceptable in this area.”<sup>169</sup> In apparent agreement with the Fifth Circuit’s reasoning in *Reeves*, the Second District approved this subjective provision of Lee County’s ordinance.<sup>170</sup>

The Second District did not, however, uphold those portions of the ordinance that used a “plainly audible” standard for violations.<sup>171</sup> The court found that the term “plainly audible” as used in the ordinance did not provide sufficient guidelines to prevent arbitrary enforcement because the ordinance allowed sound to be prohibited based on the personal and subjective perceptions of listeners.<sup>172</sup> Without separately analyzing the vagueness and overbreadth issues, the Second District stated that the “plainly audible” standard used in Lee County’s noise ordinance was “both overly broad and vague.”<sup>173</sup> The court’s brief opinion also made no mention of the limiting language contained in the invalidated sec-

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that set forth the standards of review for overbreadth and vagueness and the *Reeves* reasoning for sustaining certain subjective portions of the ordinance. *Id.* at 866–867.

168. *Id.* at 867 (citing *Reeves*, 631 F.2d at 386). The *Reeves* opinion, in turn, referred to the United States Supreme Court’s decision in *Grayned*, which upheld the challenged ordinance’s use of the word “disturbs” because a state court would likely interpret the term to mean “actual or imminent interference with . . . ‘peace or good order.’” *Reeves*, 631 F.2d at 386 (quoting *Grayned*, 408 U.S. at 109–112).

169. *Easy Way*, 674 So. 2d at 867 (quoting *Reeves*, 631 F.2d at 386 (quoting *Grayned*, 408 U.S. at 110)).

170. The Second District never clearly articulated its reasons for upholding this subjective provision. The court merely stated that the section was valid and then set forth portions of *Reeves* that upheld a similarly worded noise provision. *Id.* at 863, 866–867.

171. *Id.* at 867.

172. *Id.* at 866–867. The Second District again relied on *Reeves*, this time for its discussion of vagueness. *Id.* The Fifth Circuit in *Reeves* found that the subjective language being challenged was not unconstitutionally vague, but the court went on to say that “[i]f actual experience with the ordinance were to demonstrate that it represents a subjective standard, prohibiting a volume that any individual person ‘within the area of audibility’ happens to find personally ‘disturbing,’ we would not hesitate to change our judgment accordingly.” *Reeves*, 631 F.2d at 386 (emphasis omitted). The *Easy Way* court felt that Lee County’s “plainly audible” standard represented exactly the type of subjective standard *Reeves* would have overturned. *Easy Way*, 674 So. 2d at 867.

173. *Easy Way*, 674 So. 2d at 867. The *Easy Way* opinion set forth the separate standards of review for vagueness and overbreadth, but the court did not engage in a separate analysis of these issues. *Id.* at 866–867.

tions, such as specific hours, numerical distances, and reference to “normal hearing faculties,” which other courts have used to find similar noise provisions acceptable.<sup>174</sup>

About one week after the date 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.<sup>175</sup> In *Kolbenheyer v. State*,<sup>176</sup> the ordinance challenged as vague and overbroad stated, “[n]o person shall unnecessarily make, continue, or cause to be made or continued, any noise disturbance.”<sup>177</sup> The ordinance defined a 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.”<sup>178</sup> The Sixteenth Circuit found that use of the term “unnecessarily” provided “no standard by which to measure the actor’s conduct.”<sup>179</sup> Additionally, the court believed that violations of the ordinance were “wholly contingent” on the subjective reactions and complaints of third parties, without any attempts to determine the volume or “necessity” of the sound.<sup>180</sup> Because of these deficiencies, the court found the challenged sections of the noise code to be vague and unenforceable.<sup>181</sup>

It is not surprising that the court in *Kolbenheyer* found the term “unnecessary” to be impermissibly vague.<sup>182</sup> What is unexpected, however, is that the court also found the phrase “reasonable person with normal sensitivities” to be vague and unenforce-

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174. *Id.* at 864–866; see e.g. *supra* nn. 134, 139 and accompanying text (discussing cases holding the “plainly audible” standard to be sufficiently clear, especially when it refers to a numerical distance and a reasonable person standard).

175. *Kolbenheyer v. State*, 1996 Fla. Envtl. LEXIS 99 at \*1 (Fla. 16th Cir. May 31, 1996) (evaluating Monroe County Code (Fla.) ch. 13, art. III (2000)).

176. 1996 Fla. Envtl. LEXIS 99.

177. *Id.* at \*1.

178. *Id.* The appellant owned and operated a waterfront restaurant whose outdoor entertainment caused complaints from several neighbors. *Id.* at \*3. He was ultimately charged with making a noise disturbance in violation of the county ordinance and was convicted of the violation in county court. *Id.* at \*\*2–3.

179. *Id.* at \*6.

180. *Id.* at \*\*6–8.

181. *Id.* at \*13.

182. Many courts have likewise held that the term “unnecessary” is vague and invites arbitrary enforcement. See *supra* nn. 121–125 and related text (discussing cases invalidating laws that contain the word “unnecessary”).

able.<sup>183</sup> The Sixteenth Circuit claimed that the Florida Supreme Court in *Commission on Ethics v. Barker*<sup>184</sup> had “invalidated the ‘reasonable person’ standard” for use in proscribing conduct, and therefore “the existence of a criminal (or prohibited, noncriminal) act may not constitutionally depend on the thought processes of a third person, even a ‘reasonable’ one.”<sup>185</sup> However, because *Kolbenheyer* is unpublished and appears to have engaged in faulty reasoning in applying the *Barker* ruling, the case is not likely to have much persuasive value in Florida courts.<sup>186</sup>

In 1998, the Fifth District Court of Appeal approved the constitutional validity of a “plainly audible” standard, in apparent contradiction of the holding in *Easy Way*. In *Davis v. State*,<sup>187</sup> the court held that a portion of a Florida statute prohibiting 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”<sup>188</sup> was not unconstitutionally vague because the words of the law clearly conveyed what conduct was forbidden.<sup>189</sup> The court also quickly disposed of a First Amendment argument, saying that the statute did not address content in any way; it simply limited how loud a sound could be.<sup>190</sup>

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183. *Id.* at \*\*11–13. The reasonable person standard has long been recognized as providing an objective criterion for judging conduct, as well as providing the requisite fair notice of forbidden conduct. *See supra* nn. 126–131 (setting forth cases holding that a reasonable person standard can save an ordinance from impermissible vagueness).

184. 677 So. 2d 254 (Fla. 1996).

185. *Kolbenheyer*, 1996 Fla. Envtl. LEXIS 99 at \*\*8, 11–12.

186. It appears that the *Kolbenheyer* court erred in stating that the reasonable person standard was invalidated by the Florida Supreme Court, because the Court in *Barker* merely stated that “the reasonably prudent man test is an inapposite tool to determine whether a particular official would be influenced . . . by a gift.” *Barker*, 677 So. 2d at 255 (quoting *D’Alemberte v. Anderson*, 349 So. 2d 164, 168 (Fla. 1977)) (emphasis added). The Court in *Barker* made no sweeping determination that the reasonable person standard was “invalid,” as the *Kolbenheyer* court asserts.

187. 710 So. 2d 635 (Fla. 5th Dist. App. 1998).

188. Fla. Stat. § 316.3045(1)(a). This statute has since been amended to prohibit noise that is audible twenty-five feet from the vehicle. *See supra* n. 6 and accompanying text (explaining this change).

189. *Davis*, 710 So. 2d at 635–636. In *Davis*, a police officer stopped the appellant for violating a noise ordinance by playing his car stereo too loudly. *Id.* at 635. Once the appellant was stopped, a consensual search revealed cocaine in his possession. *Id.* The appellant attempted to overturn his conviction for cocaine possession by claiming that the noise ordinance was unconstitutional and that his conviction was therefore the result of an illegal stop. *Id.*

190. *Id.* at 636. The court employed the three-pronged time, place, or manner analysis used in *Ward* and held that Florida’s car stereo statute was an acceptable content-neutral

In a very brief opinion, the court claimed that it had found no cases on point from Florida and cited to out-of-state noise ordinance cases in support of its holding.<sup>191</sup> It is puzzling that the court made no reference to the earlier *Easy Way* case, and the contradictory result regarding the vagueness of the “plainly audible” standard leaves Florida municipalities with no clear guidance as to the use of this standard in a noise ordinance.<sup>192</sup> Future decisions on this issue may distinguish *Easy Way* from *Davis* based on the fact that *Easy Way* involved a county noise control ordinance,<sup>193</sup> while *Davis* concerned a state statute regulating the operation of radios in motor vehicles.<sup>194</sup>

The most recent Florida decision concerning the constitutionality of a noise ordinance was rendered by the Second District in *Daley v. City of Sarasota*.<sup>195</sup> The petitioner in *Daley* was cited on two occasions for violating a provision of a city ordinance that prohibited “amplified sound not in a completely enclosed structure” during specified nighttime hours within the commercial business district.<sup>196</sup> Daley attacked the constitutionality of the ordinance, and the Second District agreed, finding that the regulation was an overly broad restriction on free-speech rights.<sup>197</sup> The

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restriction. *Id.* The Fifth District felt that the ordinance did not involve content because “the statute permits one to listen to anything he or she pleases, although not as loudly as one pleases.” *Id.*

191. *Id.*

192. In *Easy Way*, the Second District held that the “plainly audible” standard rendered portions of the challenged ordinance unconstitutionally overbroad and vague. 674 So. 2d at 867; see *supra* nn. 158–173 and accompanying text (providing an in-depth discussion of *Easy Way*).

193. *Easy Way*, 674 So. 2d at 863.

194. *Davis*, 710 So. 2d at 635. The different purposes the challenged regulations serve may also provide some justification for the divergent decisions. Since the purpose of the motor vehicle statute is partly to prevent loud music from interfering with the safe operation of motor vehicles, it is more reasonable to base violations solely on whether they are “plainly audible” at a specified distance. See Thoma, *supra* n. 6 (quoting the statute’s sponsor, Representative Greg Evers, who identified road safety as an important concern behind the statute). But when a municipal ordinance is designed to protect the neighborhood from disturbing noises, as it was in *Easy Way*, it is much less reasonable to prohibit noises that are audible but may not be disturbing to anyone. *Easy Way*, 674 So. 2d at 864 (quoting the ordinance making it unlawful to produce any sound that was a “noise disturbance”).

195. 752 So. 2d 124 (Fla. 2d Dist. App. 2000); see generally Gruwell, *supra* n. 97 (offering a detailed analysis of the case by the attorney representing the petitioner).

196. 752 So. 2d at 125. Daley owned a restaurant that provided both live and recorded musical entertainment for its customers. *Id.*

197. *Id.*

court stated that the ordinance in question “sought to regulate protected free speech in a public forum,”<sup>198</sup> and it employed the three-pronged time, place, or manner analysis used by the United States Supreme Court in *Ward*.<sup>199</sup> The Second District found that the city’s interest in regulating unreasonable sound was “unquestionably” a legitimate one but that the noise ordinance was not narrowly tailored to achieve that goal.<sup>200</sup> As written, the challenged portion of the ordinance completely banned “all amplified sound in nonenclosed structures” during certain nighttime hours, “regardless of the decibel level . . . and regardless of whether the sound [was] audible outside the structure.”<sup>201</sup> The court therefore ruled that the ordinance restricted First Amendment rights more severely than necessary and was unconstitutionally overbroad.<sup>202</sup>

The City of Sarasota argued that a limiting construction could cure the deficiency if the restriction was limited to amplified commercial speech, but the Second District rejected that assertion.<sup>203</sup> While conceding that a finding of overbreadth can sometimes be cured by imposing a limiting construction on the regulation, the court felt that the same “blanket ban” on amplified commercial speech would still be too severe a restriction.<sup>204</sup> The court also noted that in order to satisfy constitutional tests, a noise regulation must contain “strict guidelines and definite standards” sufficient to deter arbitrary enforcement.<sup>205</sup> In *Daley*, the Second District clearly set forth its position that it would not tolerate overly broad noise restrictions that may reach protected speech.<sup>206</sup>

The decisions in Florida reflect a certain degree of judicial disagreement regarding the constitutional parameters of noise

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198. *Id.* at 126. Although Daley’s restaurant was not a public forum, when a law is attacked facially the court will consider all situations within the regulation’s “plainly legitimate sweep.” *Broadrick*, 413 U.S. at 612–615.

199. *Daley*, 752 So. 2d at 126; see *Ward*, 491 U.S. at 791 (setting forth the three-pronged analysis to be used when considering the constitutionality of a time, place, or manner restriction on free speech).

200. *Daley*, 752 So. 2d at 126.

201. *Id.* at 125–126.

202. *Id.* at 126–127.

203. *Id.* at 127.

204. *Id.*

205. *Id.*

206. *Id.*

ordinances, but the opinions also provide some guidance for local governments. The cases suggest that noise prohibitions in Florida must be narrowly tailored to specific times and places and must be reasonable in light of the perceived harm to avoid invalidation for overbreadth.<sup>207</sup> Subjective standards in a noise ordinance have been upheld as constitutional, but the limited analysis offered by the Second District in *Easy Way* left unanswered many questions regarding what terms are acceptable and how they must be qualified.<sup>208</sup> The Second District has, however, made it clear that judicial construction may be employed to cure constitutional deficiencies.<sup>209</sup> Use of the “plainly audible” standard is risky because, within a two-year period, it was declared constitutional by one district<sup>210</sup> and void for vagueness by another.<sup>211</sup> In light of these limited and often conflicting decisions, it seems that Florida municipalities should look to other sources for additional guidance before drafting a noise ordinance.

#### V. PROPOSED CHANGES TO NOISE CONTROL IN FLORIDA

In the short term, it would be wise for Florida counties and municipalities to review their current noise ordinances for constitutional infirmities. Necessary changes to current ordinances should be given high priority to avoid the costs of defending an ordinance in court, to protect citizens from increasing levels of community noise, and to give developers and business owners fair warning of noise restrictions that may affect their business activities.<sup>212</sup> In the long term, Florida’s Legislature should enact noise

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207. See *e.g. id.* at 126, 127 (stating that the ordinance was unconstitutional because it could be used to suppress speech far beyond the “unreasonable” sound it legitimately sought to regulate and that the City could regulate sound using “strict guidelines and definite standards closely related to permissible governmental interests”).

208. The Second District in *Easy Way* stated only that it found the subjective standard in the ordinance to be valid but gave no reasoning for its conclusion. *Easy Way*, 674 So. 2d at 865. The opinion did, however, provide some guidance for lawmakers by citing to the Fifth Circuit’s standard of review and analysis for vague language in a noise ordinance. *Id.* at 866–867.

209. *E.g. Daley*, 752 So. 2d at 127 (recognizing that the way an ordinance is applied by a city may correct its constitutional infirmities); *Easy Way*, 674 So. 2d at 866–867 (recognizing that a state court may interpret a vague term objectively so that the application of the ordinance is thereby rendered constitutional).

210. *Davis*, 710 So. 2d at 636.

211. *Easy Way*, 674 So. 2d at 867.

212. See Gruwell, *supra* n. 97, at 367–369, 381 (discussing the noise problems associ-



control legislation that sets forth policy, procedure, and enforcement guidelines for noise control at the state and municipal levels.<sup>213</sup> State guidance is crucial to establishing consistent and effective noise control in Florida's municipalities.

#### A. Short Term: Drafting a Constitutional Noise Ordinance

Since the right to protection from unreasonable noise has been firmly established by law,<sup>214</sup> the problem Florida municipalities now face is how to draft a general noise ordinance that is clearly worded and narrowly drawn so as not to unreasonably restrict due-process or First Amendment rights.<sup>215</sup> One court noted what many have observed: "[t]he nature of sound makes resort to broadly stated definitions and prohibitions not only common but difficult to avoid."<sup>216</sup> What is the acceptable level of "flexibility and reasonable breadth" on the spectrum between impermissible vagueness and "meticulous specificity"?<sup>217</sup> The divergent case law on the subject reveals the struggle courts have had in delineating constitutionally acceptable language in a noise ordinance, and Florida courts are no exception.<sup>218</sup> Although courts may sometimes disagree, the weight of authority supports the use of certain language and construction to minimize the risk of a general noise ordinance being declared unconstitutional.

First, a noise ordinance should include a declaration of purpose or policy that sets forth the government's interest in regulat-

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ated with growth and rejuvenation of cities and recommending the revision of noise ordinances before the revitalization projects begin).

213. See *infra* nn. 292-301 and accompanying text (providing examples of noise control acts from other states).

214. *Supra* n. 7 and accompanying text (citing cases holding that the regulation of noise is a legitimate exercise of the police power).

215. See *supra* pt. III (discussing constitutional grounds for the invalidation of noise ordinances).

216. *People v. N.Y. Rock Trap Corp.*, 442 N.E.2d 1222, 1226 (N.Y. 1982).

217. *Grayned*, 408 U.S. at 110 (stating that, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language. The words of the [challenged] ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' but we think it is clear what the ordinance as a whole prohibits." *Id.* (quoting *Esteban v. C. Mo. St. College*, 415 F.2d 1077, 1088 (8th Cir. 1969))).

218. See *supra* nn. 118-131 and accompanying text (discussing the varied positions that courts may take when deciding whether the use of certain terms makes an ordinance invalid); *supra* pt. IV (setting forth Florida cases deciding the constitutionality of noise provisions).

ing community noise.<sup>219</sup> As discussed earlier, a court analyzing an ordinance that seeks to restrict the time, place, or manner of free speech in a public forum will consider the reasonableness of the restriction in relation to this stated purpose.<sup>220</sup> To pass constitutional scrutiny, each prohibition in the ordinance must serve to advance the government's stated goals without restricting speech further than necessary.<sup>221</sup>

The declaration of purpose should set forth statements regarding the effects of noise pollution on the public health, welfare, safety, and quality of life; the public's right to an environment free from excessive noise; and the local government's policy on reduction and abatement of unreasonable and excessive noise.<sup>222</sup> Purpose or policy statements should avoid characterizing noise in subjective terms such as "annoying" or "unnecessary" to eliminate the risk of vagueness.<sup>223</sup> Care should also be taken to avoid any language that suggests the purpose is related to the content of the sound, rather than its volume.<sup>224</sup>

The policy statement can be couched in general terms that address all noise within the city or county, or it can include specific findings and policy regarding certain noise and its effect on a particular community.<sup>225</sup> If specific noise problems are addressed,

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219. Courts often refer to the stated purpose of an ordinance in determining its constitutionality. *See e.g. Grayned*, 408 U.S. at 112 (noting that "the statute's announced purpose" made it clear that noise disturbances were to be measured by their impact on school activity). Alabama's Court of Criminal Appeals recommended that the City of Mobile incorporate a purpose statement in its noise ordinance to help avoid constitutional problems. *Duffy*, 709 So. 2d at 81.

220. *Ward*, 491 U.S. at 801 (stating that "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct"); *see also supra* nn. 77-82, 85-88 and accompanying text (discussing the role that governmental purpose plays in a First Amendment analysis of a noise ordinance).

221. *See Ward*, 491 U.S. at 803 (finding that the requirement of narrow tailoring had been met because the challenged guidelines "serve[d] the substantial and content-neutral governmental interests of avoiding excessive sound volume"); *Friedrich v. City of Chi.*, 619 F. Supp. 1129, 1142 (N.D. Ill. 1985) (stating that the government bears the burden of proving that its interests are legitimate and compelling and that the ordinance actually and narrowly serves those interests).

222. *See e.g.* Model Community Noise Control Ord. § 2.1 (including a "Declarations of Findings and Policy" section); IMLA Model Noise Ord. § 11-501 (including a "Declaration of Policy" section).

223. *See supra* nn. 121-124 and accompanying text (discussing cases invalidating noise ordinances for use of vague terminology).

224. *See supra* nn. 77-82 and accompanying text (discussing the content-neutrality requirement for valid time, place, or manner restrictions on speech).

225. For example, the IMLA Model Noise Ordinance includes a specific statement re-

it is important to include a caveat stating that the listed noises are not exclusive and that *all* unreasonable noise within municipal boundaries is to come under the ordinance.<sup>226</sup> A local government may choose to address First Amendment protections directly by including a statement such as the following: “[i]t is not the intent of this legislation to interfere unduly with freedom of speech or religion” and thus “the direct amplification of the human voice” is not regulated hereby.<sup>227</sup>

The second recommendation for a constitutional noise ordinance is a definition section clearly specifying the measurement devices and methods to be used in determining decibel limit violations.<sup>228</sup> For example, the term “decibel” should be defined,<sup>229</sup> the type of sound-level meter should be specified,<sup>230</sup> and the method of sound measurement should be detailed.<sup>231</sup> These definitions will provide clear notice for the public and specific guidelines for enforcement officials, so that claims of vagueness and arbitrary enforcement can be avoided.<sup>232</sup> It is important to keep these ordi-

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garding amplified sound: “The use of sound amplification equipment creates loud and raucous noise that may, in a particular manner and at a particular time and place, substantially and unreasonably invade the privacy, peace, and freedom of inhabitants of, and visitors to [the named city].” IMLA Model Noise Ord. § 11-402(c).

226. Possible statutory language for this provision is the following: “‘This ordinance will apply to the control of [all] sound originating within [the jurisdictional limits of] [the Named City].’ Nothing within this section will be construed to limit the regulation of noise to those sources specified herein.” IMLA Model Noise Ord. § 11-501.

227. The quoted portions of this statement are taken from a Honolulu ordinance cited in *Duffy*, 709 So. 2d at 81 (quoting Honolulu Ord. (Haw.) § 90-26 (1990)).

228. See James Cowan, *How to Draft an Effective Noise Ordinance*, Zoning News (newsletter of the Am. Plan. Assn.) 1, 1 (May 1994) (stating that “[d]efinitions are important if an ordinance is to be enforceable”); Donley & Davis, *supra* n. 9, at 174 (stating that it is important to outline the methods and conditions under which noise emission levels must be determined). IMLA, in drafting the IMLA Model Noise Ordinance, acknowledged that it is generally sound drafting practice to minimize definitions in an ordinance, but that a decibel-based ordinance requires a greater use of definitions due to the complexity of sound measurement. IMLA Model Noise Ord. 11-5.21 to 11-5.22 ed. commentary pt. II, § IV.

229. IMLA Model Noise Ord. § 11-502, 11-5.22 ed. commentary pt. II, § IV (giving several alternative definitions of “decibel” that can be included in a noise ordinance).

230. See *id.* at § 11-502 (providing an example of a sound level meter definition). Most experts recommend using at least a Type 2 sound-level meter that uses an A-weighted scale and complies with specifications established by the American National Standards Institute (ANSI). *Id.* at §§ 11-502, 11-504; Cowan, *supra* n. 228, at 2.

231. Donley & Davis, *supra* n. 9, at 174; IMLA Model Noise Ord. 11-5.18 ed. commentary pt. II, § II (stating that decibel ordinances require that “close attention [be] paid to the actual method of measuring sound”); see Cowan, *supra* n. 3, at 263–265, app. art. 5 (providing recommendations for a “Sound Measurement Procedures” section in a noise ordinance).

232. See *e.g. Crockett*, 706 F.2d at 493 (holding that the decibel section of a noise ordi-

nance provisions as simple as possible because enforcement officers usually have little or no acoustic training and can easily misinterpret these technical criteria.<sup>233</sup> Current developments in acoustic technology have produced sound-level meters that are less expensive and easier to use, enabling a greater number of local communities to control noise effectively through objective, quantitative standards.<sup>234</sup>

Since all courts seem to recognize numeric decibel limitations as a clear and objective standard for determining noise violations,<sup>235</sup> the third ordinance recommendation is the inclusion of a section setting out maximum permissible sound levels in decibels.<sup>236</sup> To provide proper notice and protect against arbitrary enforcement, the decibel section should be very specific in terms of numeric decibel limitations and the times and locations to which these limits apply.<sup>237</sup> This level of specificity will also protect against overbreadth challenges. For instance, an ordinance prohibiting amplified sound above a certain volume at all times or in all locations throughout the city would most likely be deemed an overly broad restriction of free speech.<sup>238</sup>

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nance, which did not specify the duration of the "measurement period" to be used in measuring sound, was not vague because the ordinance required ANSI standards to be used and those standards specified the proper measurement period); *U.S. Lab. Party v. Pomerleau*, 557 F.2d 410, 412-413 (4th Cir. 1977) (invalidating an ordinance that allowed enforcement personnel to use their own discretion as to the measuring distances and locations when taking sound measurement readings).

233. Cowan, *supra* n. 228, at 1-2; *see also infra*. nn. 280-282 and accompanying text (recommending that training requirements for all noise enforcement personnel be set forth in the local noise ordinance).

234. Cowan, *supra* n. 228, at 2. For example, Cowan states that Type 2 sound-level meters are adequate for enforcement of most ordinances and are popular because they have few buttons, can fit in an officer's pocket, and cost less than five hundred dollars. *Id.*

235. *E.g. Dupres*, 978 F. Supp. at 433 (finding that the ordinance's decibel provision placed "specific, objective, and measurable limits on sound" and therefore passed constitutional muster); *Daley*, 752 So. 2d at 126 n. 1 (characterizing decibel limitations as "objective criteria").

236. *See Donley & Davis*, *supra* n. 9, at 176-177 (recommending the inclusion of a section setting forth "maximum permissible sound pressure levels").

237. *See Dupres*, 978 F. Supp. at 433 (holding the part of a noise ordinance establishing specific and measurable sound limits for different parts of the city to be valid because the ordinance defined the proscribed conduct with the required degree of clarity and specificity); *Daley*, 752 So. 2d at 127 (noting that ordinances must be drafted with sufficient clarity to avoid arbitrary enforcement).

238. *See e.g. Beckerman*, 664 F.2d at 516 (holding that a noise provision that failed to specify hours during which amplified noise was prohibited amounted to a "blanket prohibition of the use of sound equipment in areas zoned residential" and was therefore over-

A government may wish to individually tailor the decibel section of the ordinance to address particular noise concerns or protect certain noise-sensitive areas within the community.<sup>239</sup> For example, many municipalities establish areas around schools, churches, or hospitals as “noise sensitive areas” requiring lower sound limits,<sup>240</sup> and protect citizens from sleep disturbances by setting lower decibel values in residential areas during nighttime hours.<sup>241</sup> Another common practice in decibel ordinances is to designate different values for allowable sound emission based on compatibility with various land use categories.<sup>242</sup>

Courts will usually find such decibel standards constitutional provided they are tailored to the “nature of a place,” meaning their purpose is to prohibit sounds that are not compatible with the normal activities of the particular environment.<sup>243</sup> In other words, the specified hours, geographic areas, and decibel values in an ordinance will be upheld only if they are reasonably related to the ordinance’s purpose. For instance, one court invalidated a noise ordinance that prohibited amplified sound after 6:00 p.m. because the purpose of the restriction was to protect citizens from disturbing noises after sunset, but sunset occurred several hours after 6:00 p.m.<sup>244</sup>

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broad).

239. Two commentators have observed that quantitative decibel standards are “more [amenable] to tailoring in order to meet the specific, unique needs of a local community.” Donley & Davis, *supra* n. 9, at 173. IMLA suggests that before adopting the model noise ordinance, a municipality should adjust the recommended decibel values to reflect the circumstances in the affected community, such as normal ambient, or background, noise levels. IMLA Model Noise Ord. 11-5.22 ed. commentary pt. II, § IV.

240. *See generally* Model Community Noise Control Ord. § 6.2.16 (recommending special provisions for established “noise sensitive zones”); *see e.g.* *Reeves*, 631 F.2d at 383 (considering an ordinance that restricted “sound amplification within 100 yards of a hospital, school, church, or courthouse”); *Lionhart*, 100 F. Supp. 2d at 385 (ruling on a noise provision that restricted sound levels in certain established “quiet zones,” which included areas around hospitals and churches).

241. *See* IMLA Model Noise Ord. §§ 11-506(D)(2), 11-507(A)–(C), 11-508(B) (recommending different decibel standards for daytime and nighttime hours); *see e.g.* Alachua County Code Ords. at § 110.04(a), tbl. 1 (designating maximum permissible decibel emissions for daytime and nighttime hours in each of four zoning districts); Orlando City Code at § 42.02, chart 1 (specifying different daytime and nighttime decibel limitations for each land use category).

242. *See e.g.* Donley & Davis, *supra* n. 9, at 177 (recommending that a noise ordinance set forth decibel restrictions for specific land use categories); *supra* n. 240 (giving examples of ordinances that establish noise limitation values based on land use designations).

243. *Grayned*, 408 U.S. at 116.

244. *Beckerman*, 664 F.2d at 516.

Similarly, when prescribing decibel limits, drafters of an ordinance must take into account the normal background noise, or ambient noise,<sup>245</sup> present in a location, so that a court will not deem the level too low and the ordinance therefore overbroad.<sup>246</sup> If the ambient noise present in an area is so high that it prevents activities at permissible sound levels from being heard, then those decibel levels are susceptible to being overturned.<sup>247</sup> For assistance in determining appropriate decibel values, drafters may refer to a model ordinance<sup>248</sup> or to guidelines for acceptable noise levels that are published by the World Health Organization.<sup>249</sup>

The fourth recommendation for an effective and constitutional noise ordinance is the inclusion of one or more separate provisions regulating noise based on the character or nature of the sound. Inclusion of such a subjective provision in a noise ordinance will allow a municipality the flexibility to determine violations based on either a subjective or an objective standard.<sup>250</sup> One can envision several situations in which a restriction based solely on decibel limitations would not accomplish noise control goals.<sup>251</sup> First, circumstances may arise in which noise does not violate the decibel limitations of an ordinance but is still extremely bothersome to neighbors.<sup>252</sup> Second, certain noise sources do not lend

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245. Ambient noise is defined as “the surrounding or steady background noise” in a particular location, as distinct from the specific noise being measured. Donley & Davis, *supra* n. 9, at 175.

246. See *e.g. Turley*, 167 F.3d at 762–763 (indicating that the ambient noise on the streets of New York City should have been taken into account when setting a reasonable decibel limitation for amplified sound).

247. IMLA Model Noise Ord. 11-5.22 ed. commentary pt. II, § IV; *e.g. Turley*, 167 F.3d at 762–763 (finding the New York City ordinance’s 75-decibel limit to be too low in light of the ambient noise level in Times Square).

248. *E.g.* IMLA Model Noise Ord. 11-5.13 to 11-5.15, tbls. 1–3 (providing tables of recommended decibel values for different hours and locations); Cowan, *supra* n. 3, at 265–266 (providing recommended decibel standards).

249. World Health Org., *supra* n. 21, at pt. 4, <http://www.who.int/peh/noise/noiseindex.html> (providing recommendations for the appropriate sound levels to maintain public health and welfare).

250. See IMLA Model Noise Ord. 11-5.17 ed. commentary pt. II (noting that some communities incorporate both decibel and reasonable person standards when drafting noise ordinances in order to increase “their ability to deal with a variety of situations in the most effective way”).

251. See *Beaufort*, 432 S.E.2d at 473 (noting that “only a flexible approach to volume control can adequately serve the myriad circumstances which the State can legitimately regulate” (quoting *Eanes*, 569 A.2d at 613)).

252. James Cowan, a certified noise control engineer, points out that the absolute-noise level limits set by many noise ordinances do not compensate for ambient-noise differences.

themselves to the use of sound measurement equipment, such as noise from a motor vehicle or boat.<sup>253</sup> Third, some communities, due to their size or budget constraints, are unable either to purchase measurement equipment or to hire and train personnel to take sound readings.<sup>254</sup> Last, instances may arise when harmful noise is present, but there is no sound-level meter on hand, there are technical problems with the equipment, or the responding officer is not trained in the equipment's use.<sup>255</sup>

This subjective standard for enforcement may be included in a separate provision under some type of "general prohibition" heading, or as part of the meaning of "noise" or "noise disturbance" in the definition section, or it may be included in both sections.<sup>256</sup> Regardless of where in the ordinance the subjective language is incorporated, drafters must take certain steps to ensure that the provision passes constitutional muster. As the cases amply illustrate, certain words have repeatedly been struck down as vague, such as "unnecessary," "annoying," and "unusual," and should therefore be avoided completely.<sup>257</sup> On the other hand "loud," "loud and raucous," and "loud and unseemly" have all passed constitutional scrutiny,<sup>258</sup> although they might prove difficult to establish in court.<sup>259</sup> A noise standard employing the term

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Cowan, *supra* n. 228, at 2. This oversight creates a situation where, when background noise is low, a noise source could fail to raise the sound level above the noise-level limit but still be extremely disturbing to people with normal hearing. *Id.*

253. See IMLA Model Noise Ord. 11-5.24 ed. commentary pt. II, § IV (stating that the enforcement of a decibel limit in situations involving noise emanating from vehicles may prove difficult due to the transient and mobile character of the noise source).

254. See Cowan, *supra* n. 228, at 2 (observing that, because of the high cost of noise analyzers, many communities do not possess the equipment necessary to enforce decibel-based ordinances); Rosenthal, *supra* n. 25, at 51.4 (stating that local governments often cannot afford the trained personnel and expensive equipment needed to enforce objective standard noise ordinances).

255. *E.g. Duffy*, 709 So. 2d at 80 (considering a situation in which enforcement officers were not trained in the use of decibel meters and therefore relied on the subjective standard portion of the noise ordinance to determine violations).

256. See *e.g. Donley & Davis*, *supra* n. 9, at 176 (recommending inclusion of a "General Prohibitions" section that "generally define[s] prohibited acts to include making excessive noise or creating a noise disturbance" and a provision in the definition section that defines noise disturbance as "any sound which endangers or injures the health of humans or disturbs a reasonable person of normal sensitivities").

257. See *supra* nn. 119–124 and accompanying text (discussing cases invalidating certain subjective terms due to unconstitutional vagueness).

258. See *supra* nn. 119–120 and accompanying text (providing examples of cases upholding these terms against vagueness challenges).

259. Gruwell, *supra* n. 97, at 375–376 (discussing why the "loud and raucous" noise

“disturb” or “disturbing” would most likely be upheld in Florida, based on the decision in *Easy Way*.<sup>260</sup>

For added protection against constitutional challenge, the subjective-standard noise provision must incorporate a reasonable person standard in the language.<sup>261</sup> When choosing the precise wording, however, it is important to note that courts do not look equally favorably on all uses of the term “reasonable.”<sup>262</sup> For example, a definition of noise as sound that is “disturbing to a reasonable person of ordinary sensibilities” is much more likely to be upheld than an ordinance prohibiting “unreasonably annoying” sound.<sup>263</sup> In Florida, subjective provisions find legal support in the Second District’s opinion in *Easy Way*, which recognized both the constitutionality of the term “unreasonably” and the practice of construing a subjective term objectively to correct vagueness.<sup>264</sup>

Use of a “plainly audible” standard for determining general noise violations is not recommended because many courts, including Florida’s Second District Court of Appeal, have found it unconstitutional.<sup>265</sup> The *Davis* decision, which upheld the “plainly audible” standard in Florida’s car stereo noise statute,<sup>266</sup> leaves open the question of whether the “plainly audible” standard can be validly utilized when restricting particular noise sources, as

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standard is difficult to prove).

260. 674 So. 2d at 865 (declaring valid that portion of the ordinance that prohibited sound deemed to be a “noise disturbance so as to disturb the peace, quiet and comfort of the neighborhood”).

261. See *supra* nn. 126–131 and accompanying text (discussing cases in which a reasonable person standard saved subjective ordinance provisions from vagueness).

262. See *supra* nn. 126–131 and accompanying text (providing examples of different reasonable person language courts have favored).

263. Compare *e.g. Garren*, 451 S.E.2d at 318–319 (declaring the phrase “reasonable persons of ordinary sensibilities” to be an objective standard and therefore holding that portion of the ordinance constitutionally valid) with *e.g. Dupres*, 978 F. Supp. at 435 (finding a standard that prohibited “unreasonably loud, disturbing or unnecessary noise” to be unconstitutionally vague).

264. *Easy Way*, 674 So. 2d at 867. As discussed earlier, it is unlikely that the unpublished *Kolbenheyer* opinion will have much of an impact on Florida’s treatment of the reasonable person standard in noise ordinances because the court appears to have incorrectly applied the rule of law on which it was relying. See *supra* n. 186 (discussing the faulty reasoning in *Kolbenheyer* regarding the invalidation of the reasonable person standard in Florida).

265. See *Easy Way*, 674 So. 2d at 867 (holding that the “plainly audible” standard used in Lee County’s ordinance was unconstitutionally vague and overbroad); see also *supra* n. 139 (citing two cases invalidating a “plainly audible” standard as impermissibly vague).

266. 710 So. 2d at 635–636.



opposed to broadly regulating community noise.<sup>267</sup> However, relying on the holding in *Davis*, a noise provision limiting only car stereo sounds based on a “plainly audible” standard would probably be upheld in Florida, provided the restriction’s wording closely followed the state statute.<sup>268</sup>

The fifth drafting recommendation involves the practice of designating certain noises to be a per se violation or “prima facie evidence” of a violation. Because several courts have held that due process is violated by noise provisions decreeing certain activities to be “prima facie evidence” of a violation,<sup>269</sup> it would probably be prudent to leave those presumptions out of a noise regulation. Similarly, courts discourage declarations that certain noises are per se violations of a noise ordinance unless the enacting authority can clearly demonstrate that the activity always creates a sufficiently negative impact to warrant complete prohibition.<sup>270</sup> A more acceptable method for addressing specific noise concerns is to include a section, possibly entitled “Specific Prohibitions” or “Restricted Activities,” forbidding common and particularly bothersome activities during particular hours, in certain areas, or above specified decibel levels.<sup>271</sup> An example would be a provision stating that non-commercial use of power tools or lawn maintenance equipment may not occur between the hours of 8:00 p.m. and 8:00 a.m., unless sound from such equipment meets specified decibel limitations.<sup>272</sup> Even when one of these specific

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267. See *supra* n. 193 (discussing possible reasons for Florida’s contradictory holdings on the “plainly audible” standard and suggesting that differences in the format and purpose of the two laws might account for the divergent outcomes).

268. “It is unlawful for any person operating or occupying a motor vehicle on a street or highway to operate or amplify the sound produced by a radio, tape player, or other mechanical soundmaking device or instrument from within the motor vehicle so that the sound is . . . [p]lainly audible at a distance of 25 feet or more from the motor vehicle.” Fla. Stat. § 316.3045(1)(a).

269. See *supra* nn. 144–148 and accompanying text (discussing cases holding prima facie stipulations to be invalid as violating due process).

270. Gruwell, *supra* n. 97, at 380; see also *Garren*, 451 S.E.2d at 318 (holding that the examples given in the ordinance caused it to reach more broadly than necessary because it bans certain sounds regardless of their volume or effect on people).

271. See Model Community Noise Control Ord. § 6.2 (including a “Specific Prohibitions” section enumerating eighteen different noise-producing activities that a community might want to address with specific provisions); Donley & Davis, *supra* n. 9, at 176 (suggesting that a noise ordinance include a section specifying certain prohibited disturbances, such as noise from animals or loading operations).

272. See IMLA Model Noise Ord. § 11-507(A) (recommending similar language in a provision of its model noise ordinance).

restrictions may reach some constitutionally protected expression, the provision will most likely be upheld if the guidelines are narrowly drawn to achieve the government's legitimate purpose.<sup>273</sup>

The sixth suggestion is for local governments to consider constitutional requirements particularly carefully when drafting an ordinance section that provides a process for granting permits for sound-producing activities.<sup>274</sup> To prevent arbitrary denials, the permitting provision must set forth clear and narrow guidelines for granting or refusing the permit.<sup>275</sup> The permit program will be considered a prior restraint on free speech if it broadly denies permits for certain types of activities that are not clearly harmful in all situations.<sup>276</sup> To satisfy due process, the regulation must also provide for prompt judicial review of a denial.<sup>277</sup> An ordinance may impose a permit fee if the amount is reasonably related to the cost of enforcement or implementation.<sup>278</sup>

Finally, due-process challenges may be avoided by drafting a clearly worded enforcement section that identifies such things as penalties, enforcement officers, time for compliance, and a process for review.<sup>279</sup> Inclusion of specific procedures for issuing violations will help preclude claims of inconsistent enforcement of the noise regulation.<sup>280</sup> Enforcement responsibilities may be delegated to designated noise-control officers, to local police, or to both groups.<sup>281</sup> In either case, the ordinance should describe the train-

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273. See *supra* nn. 86–88 and accompanying text (setting forth case law that establishes the requirements for narrow tailoring to prevent invalidation for overbreadth). A noise provision will not be declared facially invalid unless it reaches a *substantial* amount of protected speech. See *supra* n. 91 (discussing the requirement of substantial overbreadth).

274. See *supra* nn. 106–110 and accompanying text (discussing cases that establish constitutional parameters for noise-permitting schemes).

275. *Saia*, 334 U.S. at 562.

276. *Id.*

277. *Id.* at 561.

278. See *NAACP v. City of Chester*, 253 F. Supp. 707, 714 (E.D. Pa. 1966) (finding a \$25 permit fee unconstitutional because it bore no relationship to the cost of enforcement).

279. Penalties normally consist of fines that increase in severity for repeated or willful violations, and each day the offender is found to be in violation of the ordinance is generally considered a separate offense. Donley & Davis, *supra* n. 9, at 177. For several examples of ordinance provisions relating to enforcement issues, see Model Community Noise Control Ord. art. XI; IMLA Model Noise Ord. §§ 11-408, 11-409, 11-510 to 11-521; Cowan, *supra* n. 3, at 262, 269.

280. See *supra* n. 232, 237, and related text (explaining the importance of clear guidelines in a noise ordinance to avoid due process challenges).

281. For examples of ordinance language pertaining to various enforcement personnel,

ing qualifications of the enforcement officials who will be utilizing sound measurement equipment to determine violations.<sup>282</sup> Proper training of all enforcement personnel will limit reliance on subjective standards for determining violations, which are more difficult to prove.<sup>283</sup>

To avoid claims of arbitrary enforcement based on subjective perceptions, violations should not be based solely on complaints by citizens.<sup>284</sup> It is a safer practice to require investigation by a designated enforcement officer upon receipt of a noise complaint.<sup>285</sup> If the ordinance relies mainly on objective decibel limitations, the determination of a violation will depend on sound measurements by an official.<sup>286</sup> Last, due-process rights demand an opportunity for timely appeal of noise citations.<sup>287</sup>

In summary, Florida courts apply strict scrutiny to ordinances that broadly restrict free-speech rights and are likely to invalidate them if they reach any more conduct than is necessary for reasonable protection from noise pollution. Drafters of municipal ordinances should, therefore, be extremely careful to delineate general prohibitions on sound with as much specificity as possible. Judicial decisions in Florida are much less clear on the issue

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see the model provisions referred to at *supra* n. 279. The use of police officers to issue noise citations is more likely in smaller communities with less funding or in larger communities during nighttime hours. See *supra* n. 254 (discussing the effects funding can have on noise personnel and equipment).

282. See *supra* nn. 228, 232–234, and accompanying text (outlining the importance of clear guidelines for noise measurement in a decibel-based ordinance to avoid invalidation on due process grounds).

283. See *e.g. Duffy*, 709 So. 2d at 80 (presenting a situation in which officers had to rely on a “plainly audible” standard of enforcement because they were not trained in the use of sound-level meters, even though the city ordinance contained decibel limitations).

284. See *e.g. Crockett*, 706 F.2d at 488–489, 491 (invalidating a noise provision citing three complaints by citizens as prima facie evidence of a violation); *Easy Way*, 674 So. 2d at 866–867 (holding unconstitutional a standard that allowed the prohibition of sound at any volume that was found to be individually disturbing).

285. See *Beaufort*, 432 S.E.2d at 472–473 (finding an ordinance constitutional as applied when police investigated noise complaints and warned preachers that they were in violation of noise ordinances before arresting the preachers).

286. See *e.g. Cowan*, *supra* n. 3, at 262–263, 269 (urging noise control officers to use sound-level meters when determining whether there has been a violation of decibel limitations).

287. See *e.g. Saia*, 334 U.S. at 561 (finding a noise ordinance facially unconstitutional, in part because it required “conviction and [a] lengthy appeal” process before a permit denial could be reversed). Information on hearings and appeals may be left out of the noise ordinance as long as it is included in some other portion of the municipal code. IMLA Model Noise Ord. 11-5.25 ed. commentary pt. II, § IV.

of vagueness; therefore, it is recommended that noise ordinances incorporate decibel standards as much as possible, limit use of subjective terms to those that have been approved by the United States Supreme Court or a majority of state courts, and include a reasonable person standard for added objectivity. Unfortunately, until more binding opinions are published on this important and timely issue, local governments must err on the side of caution when drafting general noise ordinances and hope for the best.

### B. Long Term: State Oversight of Noise Control

The outdated noise ordinances currently in place in many smaller Florida cities are susceptible to constitutional challenges because they rely on subjective and often vague terminology that provides neither adequate notice for citizens nor clear standards for enforcement personnel.<sup>288</sup> However, even regulations enacted more recently have been invalidated by the courts for violating First Amendment or due-process rights.<sup>289</sup> These constitutional deficiencies, as well as the general inconsistency among local governments' noise control efforts, reflect a lack of expert guidance in the technical and legislative aspects of noise control.<sup>290</sup> This prob-

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288. See e.g. Leesburg City Code Ords. (Fla.) § 15-5 (current through May 2005) (enacted in 1953 and stating "[i]t shall be the duty of every hotel, tavern or inn keeper . . . to prevent the persons, who may resort to their houses, from disturbing their neighbors, either in the day or in the nighttime, by loud cries, carousals, songs or other noises, calculated or having the effect to interrupt the tranquility, peace and quietude of the neighborhood . . ."); Shalimar Town Code Ords. (Fla.) § 26-86 (current through Nov. 2001) (stating "[i]t shall be unlawful to disturb maliciously or willfully the quiet of any street or neighborhood . . . by making loud or unusual noises, by blowing horns or other instruments, by the beating of drums, pans or other things of like nature, by loud and boisterous laughing, singing, screaming, or by using any other device or means whatever . . . so as to disturb the peace").

289. *Daley* invalidated an ordinance enacted in 1997. *Daley*, 752 So. 2d at 125. The unconstitutional portion of Lee County's ordinance in *Easy Way* was adopted in 1994. *Easy Way*, 674 So. 2d at 863.

290. An informal survey of municipal ordinances in Florida reveals many different formats, ranging from long, detailed noise codes in larger cities or counties, to simple, subjective provisions based on "loud and raucous" standards or "plainly audible" standards in smaller communities. Compare e.g. Broward County Code (Fla.) §§ 24-1 to 24-11 (current through Oct. 2005) (containing a lengthy, detailed noise code) with e.g. Altamonte Springs City Code Ords. (Fla.) § 12-4 (current through Sept. 2005) (containing a simple provision based on a "plainly audible" standard); Dunnellon City Code Ords. at § 42-3 (containing a provision based on a "loud and raucous" standard); see also *supra* nn. 63-68 and related text (discussing the inconsistent and often ineffective approaches to noise control regulation in the United States generally, and in Florida specifically). The Noise

lem could be remedied with a coordinated statewide program of noise pollution prevention, abatement, and control. Therefore, the Author's recommendation for long-term, effective noise control in Florida is the enactment of a state Noise Control Act by Florida's Legislature.

There are many different ways to structure a state noise control program, but the crucial goals of the legislation include setting forth the policy of the State regarding noise abatement and control, establishing specific goals and guidelines to effectuate that policy, authorizing a state agency to implement the program, and providing local governments with the power and guidance necessary to carry out their own noise control programs.<sup>291</sup> Noise control laws enacted in other states could serve as guidelines in developing our own state program.<sup>292</sup> For example, in Connecticut, the state DEP is charged with developing, maintaining, and enforcing the statewide noise regulation program.<sup>293</sup> Connecticut's statute suggests methods to be used by the DEP but does not require any particular standards or specify numerical noise limitations.<sup>294</sup> Municipal noise regulation is expressly encouraged, but the state law requires any local noise ordinance to be approved by the DEP before it can become effective.<sup>295</sup>

Colorado's noise abatement provisions establish statewide standards for "maximum permissible noise levels," in decibels, that are allowed in certain zoning districts during specified hours.<sup>296</sup> Municipalities and counties are then permitted to adopt noise regulations that are at least as stringent as the state standards.<sup>297</sup> In Illinois, a state statute charges the Illinois Pollution Control Board (IPCB) with categorizing types and sources of

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Pollution Clearinghouse website contains a 1997 survey of state noise legislation that reflects that only five states provide support or training to local governments, and only nine states offer a model ordinance as guidance to municipalities. Noise Pollution Clearinghouse, *supra* n. 49, at <http://www.nonoise.org/lawlib/states/states.htm>; *see also supra* nn. 42-43 and accompanying text (discussing the demise of state and local noise efforts after funding for ONAC was withdrawn).

291. *See supra* pt. V(A) (discussing each of these crucial elements).

292. *See e.g.* Conn. Gen. Stat. §§ 22a-67 to 22a-76 (2005); 415 Ill. Comp. Stat. 5/23-5/25 (2004); Wash. Rev. Code §§ 70.107.010-70.107.910 (2005).

293. Conn. Gen. Stat. § 22a-69(a).

294. *Id.*

295. *Id.* at § 22a-73(a), (c).

296. Colo. Rev. Stat. § 25-12-103 (2005).

297. *Id.* at § 25-12-108.

harmful noise emissions and prescribing maximum permissible noise limits for each category.<sup>298</sup> In addition, the IPCB conducts hearings on noise complaints and issues fines and injunctions if violations are found.<sup>299</sup> Although these state noise control laws vary to some degree, they all fulfill the main goals of establishing necessary policy and providing support and guidance to local government.

There are several important points to keep in mind when promulgating a noise control act in Florida. First, the provisions should clearly empower local governments to formulate separate noise regulations and should articulate that the state law does not preempt local ordinances.<sup>300</sup> The statute should also require that state environmental authorities review any proposed local noise regulations prior to adoption to ensure statewide consistency and compliance.<sup>301</sup> To increase the degree of uniformity throughout the State, and to provide concrete guidance to local drafters, the promulgation of a model ordinance by the Florida DEP is highly recommended. At the same time, however, municipalities should be free to vary the model standards to reflect the community's preferences regarding the relative importance of protecting business activity and personal freedom compared to preserving peace and tranquility.<sup>302</sup>

The suggested model ordinance scheme provides flexibility to address individual community needs but at the same time allows the state to control and monitor the standards being utilized in local noise legislation. The state agency charged with oversight of

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298. 415 Ill. Comp. Stat. 5/25. In 1985, the Illinois Supreme Court upheld the constitutionality of these noise standards against due process and equal protection challenges, holding that the classifications within the statute were reasonably related to a legitimate government purpose. *Chi. Natl. League Ball Club, Inc. v. Thompson*, 483 N.E.2d 1245, 1251 (Ill. 1985).

299. 35 Ill. Admin. Code § 900.102 (2004); see also *Roti*, 823 N.E.2d at 645-649 (determining that the respondent was a noise nuisance in violation of the state noise control act and upholding the IPCB's \$15,000 fine and order shutting down nighttime operations).

300. See e.g. Colo. Rev. Stat. § 25-12-108 (declaring that Colorado's noise abatement statutes do not "preempt or limit the authority of any municipality or county to adopt standards which are no less restrictive" than the state statutes).

301. See e.g. Conn. Gen. Stat. § 22a-73(c) (requiring that municipal ordinances be approved by the state DEP before becoming effective).

302. For example, a city like Daytona Beach, Florida, which depends heavily on revenue from auto racing and accompanying tourism, would most likely desire less stringent noise-emission standards.

the program can track judicial decisions regarding the constitutionality of local noise ordinances and make necessary changes to the model ordinance to keep it within constitutional guidelines. Another advantage of statewide consistency is that if all municipal ordinances reflect the same model ordinance, courts throughout the state will be more likely to reach a consensus on what language in an ordinance satisfies constitutional requirements.

## VI. CONCLUSION

Noise levels rise in direct proportion to increases in population density,<sup>303</sup> and Florida is one of the fastest growing states in the country.<sup>304</sup> Unfortunately, noise control efforts in Florida reflect the national trend of inconsistent and frequently ineffective legislation, lack of funding, and lack of state or federal support. The transient and localized nature of noise makes it a pollutant that is difficult to control and low on many environmentalists' priority lists.<sup>305</sup> There is simply not a lot of political pressure to control community noise.<sup>306</sup>

These factors place Florida in the untenable position of attempting to regulate noise pollution in a highly populated and rapidly growing state, while carefully considering the important and often competing interests of residents, business owners, developers, and tourists. This balancing act involves the constitutional rights to free expression and free use of property on the one hand, and the right to necessary government protection from harmful noise on the other. With the absence of both state and federal noise control programs, Florida municipalities are lacking the needed support and guidance to deal with the increasing noise levels in the State.

Even within these constraints, however, Florida municipalities can effectively battle the noise pollution problem by utilizing the available resources—case law, agency publications, model or-

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303. Shapiro, *supra* n. 26, at 4.

304. U. Fla. Bureau of Econ. & Bus. Research, *supra* n. 1, at 787 (reflecting that from 2000 to 2003, Florida's growth rate of 6.1 percent was second only to Arizona's rate of 8.0 percent).

305. Donley & Davis, *supra* n. 9, at 164 (stating that noise pollution has been "all but ignored" by environmental groups).

306. See generally Shapiro, *supra* n. 26, at 34–39 (discussing several reasons for the decline in state and local regulation of noise).

dinances, and legislation from other states—to create local noise control programs that are tailored to unique community needs. This Comment is designed to provide concrete suggestions and references for use in drafting a general noise control ordinance, which is an integral part of any noise control initiative.

Successful legislative efforts in other areas of environmental law support the conclusion that the most effective noise control would be realized through efforts on the federal, state, and municipal levels, with coordination and support between all three. Someday, perhaps the federal government will again fund an Office for Noise Abatement and Control,<sup>307</sup> but until that time, state and local efforts can be successful if they are properly funded, well coordinated, and consistently implemented.

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307. Legislative efforts to reestablish ONAC have been introduced in both the Senate and the House of Representatives on numerous occasions, most recently in 2005, but the bills have never made it past referral to committee. *E.g.* H.R. 2895, 109th Cong. (June 14, 2005) (entitled the Quiet Communities Act of 2005); H.R. 475, 108th Cong. (Jan. 29, 2003) (entitled the Quiet Communities Act of 2003); H.R. 1116, 107th Cong. (Mar. 20, 2001) (entitled the Quiet Communities Act of 2001); Sen. 951, 105th Cong. (June 24, 1997) (entitled the Quiet Communities Act of 1997); H.R. 4308, 104th Cong. (Sept. 28, 1996) (entitled the Quiet Communities Act of 1996).