

## UNITED STATES DISTRICT COURT RULES ON BURLINGTON'S NOISE ORDINANCE

### ***Introduction***

In a recent decision the United States District Court for the District of Vermont ruled that part of the City of Burlington's Noise Ordinance is constitutional and part of the ordinance is unconstitutional. *Howard Opera House Associates v. Urban Outfitters, Case No. 2:99-CV-140 (2001)*. The decision represents a good example of the legal issues municipalities should keep in mind when enacting noise ordinances.

Noise ordinances are frequently challenged on the grounds that they violate the United States Constitution. This is because, in regulating noise, municipalities are attempting to control individual expression or speech. While a municipality has the authority to control individual speech when it has a legitimate reason to do so, such ordinances must be drafted in a manner that does not infringe upon an individual's First Amendment right to freedom of speech.

Noise ordinances also raise constitutional issues because it is difficult to set a hard and fast standard by which to judge how much noise is too much. What is noisy to one person may be considered music to another. Thus, setting an objective noise standard can be difficult. As we have learned from recent Vermont Supreme Court decisions, ordinances that do not contain adequate standards violate the due process provisions of both the Vermont and United States Constitutions because such ordinances do not provide sufficient notice to the public as to what practices are legally acceptable. See Legal Coroner article in the December, 2000 *VLCT News on In re Handy v. Town of Shelburne, Vt. Nos. 98-015 and 98-016 (November 17, 2000)*.

In *Howard Opera House Associates (HOHA)*, the defendant, Urban Outfitters, was accused by its neighbors, the Howard Opera House and the law firm O'Neill, Crawford and Green, of playing loud music in violation of the City of Burlington's noise ordinance and of Urban Outfitter's lease. *Id at 1*. Urban Outfitters and O'Neill Crawford and Green are both tenants in a building owned by the Howard Opera House.

The City's noise ordinance bans, "any loud or unreasonable noise," defined as noise which "disturbs, injures or endangers the peace or health of another, or which endangers the health, safety and welfare of the community." *Id at 6*. The ordinance also prohibits sounds from radios, television sets, musical instruments, phonographs and the like which "disturb(s) the peace, quiet or comfort of the public," or which "is audible through walls between units within the same building, from another property or from the street." *Id at 6*. Urban Outfitters challenged these provisions of the noise ordinance in Federal Court on the grounds that the ordinance violated its First Amendment right to free speech and that the ordinance was so vague that it violated its constitutional right to due process.

### ***Due Process – Void for Vagueness***

The District Court ruled that Burlington's ordinance did not violate the due process provisions of the United States Constitution and it is not "void for vagueness." *Id at 10*. In rendering its decision the District Court recognized that due process requires that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and "provide explicit standards for those who apply them." *Id at 10*.

The Court compared Burlington's ordinance with an ordinance adopted by the Town of Poughkeepsie, New York prohibiting "unnecessary noise," which the New York Court of Appeals struck down as "void for vagueness" in 1982. *Id at 11*. The New York Court found that the definition of "unnecessary noise" in the Poughkeepsie ordinance was so broad that any sound that annoyed another person could constitute a violation.

The District Court in *HOHA* ruled that unlike the Poughkeepsie ordinance, the unreasonable noise standard in Burlington's noise ordinance "gives sufficiently fair warning of prohibited conduct by using words of common understanding." *Id at 14*. To support its decision the District Court cited a Vermont Supreme Court decision that provides "unreasonable noise" connotes an objective standard, as distinguished from the subjective "unnecessary noise." "Unreasonable does not mean unnecessary; reasonableness is gauged by the totality of the circumstances at the time." *Id at 12*.

### ***Freedom of Speech***

In order to comply with the First Amendment of the United States Constitution, municipal ordinances that affect an individual's freedom of speech must be content neutral, narrowly tailored to serve

a significant governmental interest, and leave open ample alternative channels for communication of the information. *Id at 14*. In *HOHA*, the District Court ruled that while Burlington's noise ordinance affects an individual's freedom of speech it is content neutral. *Id at 14*.

Content neutral means that a law does not regulate speech because the government disagreed with the message of the speaker. The Court recognized that the purpose of the Burlington's ordinance is to regulate unreasonable noise in the City regardless of the content of the message contained in the noise. Accordingly, the Court deemed Burlington's noise ordinance to be content neutral.

The Court also recognized that Burlington "has a substantial interest in protecting its citizens from unwelcome noise." *Id at 16*. Furthermore, the Court held that the parts of Burlington's ordinance that prohibit unreasonable noise, noise between units and noise from the street were narrowly tailored to meet the governmental interest in reducing excessive noise. *Id at 17*. However, the Court ruled that the provisions of Burlington's noise ordinance that prohibited the operation of any device for the production or reproduction of sound "in such a manner as to be audible through walls . . . or from the street," was not sufficiently tailored to meet Burlington's interest in regulating noise. In rendering its decision the Court stated, "that a ban on all sound, amplified or unamplified, that can be heard through walls or from the street burdens substantially more speech than is necessary to further the City's legitimate interest in eliminating excessive noise." *Id at 18*.

### ***Conclusion***

What should municipalities learn from this decision? First, when drafting any ordinance make sure that the ordinance includes clear, enforceable standards. With respect to noise ordinances in particular, municipalities should adopt a "reasonable noise" standard similar to the one adopted by Burlington. Secondly, when enacting an ordinance that affects an individual's freedom of speech, 1) ensure that the ordinance is addressing a legitimate governmental interest (such as prohibiting excessive noise), 2) do not attempt to regulate the content of speech and, 3) draft your ordinance as narrowly as possible to meet your regulatory goal. Finally, consult your town attorney or the VLCT Law Center prior to enacting an ordinance that may infringe upon an individual's constitutional rights. Lawyers can assist in identifying the constitutional issues discussed in this article and recommend language that will reduce the likelihood that an ordinance will be successfully challenged in court.

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