

THE GREAT MASH-UP DEBATE: A HOLISTIC APPROACH TO CONTROLLING NOISE POLLUTION IN FLORIDA'S DOWNTOWN DISTRICTS

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INTRODUCTION

Florida, the Sunshine State,¹ attracts millions of tourists and hundreds of thousands of new residents every year.² In early 2015, Governor Rick Scott announced a record-breaking high of “[m]ore than [ninety-eight] million tourists”³ and just shy of twenty million Florida residents.⁴ Although this has a positive effect on the state’s economic growth,⁵ the hordes of tourists and residents have raised a great din in Florida’s municipalities and communities.⁶

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1. See *Visit Florida: Facts*, VISIT FLORIDA, <http://www.visitfloridamediablog.com/home/florida-facts/facts> (last visited Nov. 10, 2015).

2. See *Population Studies Program*, BUREAU OF ECON. AND BUS. RES., <http://www.bebr.ufl.edu/population> (last visited Feb. 10, 2015).

3. News Release, Florida Governor Rick Scott, *Gov. Scott: More than 98 Million Tourists in 2014* (May 1, 2015), <http://www.flgov.com/2015/05/01/gov-scott-more-than-98-million-tourists-in-2014> (alteration in original) (explaining Florida tourism is increasing annually).

4. *Population Studies Program*, *supra* note 2.

5. See News Release, *supra* note 3 (“Tourism is Florida’s number one industry, and every 85 visitors to our state adds another job for our families.”). See also News Release, Florida Governor Rick Scott, *Gov. Rick Scott: Another Record Year for Florida Tourism* (Feb. 14, 2014), <http://www.flgov.com/2014/02/14/gov-rick-scott-another-record-year-for-florida-tourism/> (describing that new jobs are being created, such as those in Universal Studios’ Wizarding World of Harry Potter).

6. See Adrian Simo & Michelle A. Cleary, *Intrusive Community Noise Negatively Impacts South Florida Residents*, in Proceedings of the Third Annual College of Education Research Conference 122, 126 (Apr. 24, 2014) (case study). “This study . . . confirmed many of the findings of previous studies that noise

New land use patterns and mixed-use development further amplify the fracas. As noise pollution increases, so does the need for control.⁷ A great chorus of scholars have intoned the negative effects of sound on residents and communities.⁸ Accordingly, Florida's municipal leaders should take the lead in enacting reasonable ordinances.⁹

Part I of this Note will discuss the regulation, mash-up debate and other problems concerning noise. Part A will address both the history of noise regulation in the United States since the Noise Control Act of 1972¹⁰ and the enforcement of noise in the State of Florida.

Part B will review Florida's ongoing and turbulent noise debate between residents and the nocturnal club revelry, specifically, live and amplified music in mixed-use communities. Part C will examine noise abatement strategies in Florida and the problems accompanied with enforcing noise ordinances. Moreover, this section will examine the process of issuing a verified noise complaint and the complications that arise with it.

The general parameters and requirements of nuisance law will be reviewed in Part D. The positive and negative effects of nuisance regulations on Florida businesses will also be considered in this section. A short, but important, conversation in the application of the covenant of quiet enjoyment in different zoning areas will be evaluated.

Part II will deliberate constitutional challenges of noise control, such as First Amendment limitations on noise regulation by summarizing the three prongs that render a valid ordinance.

Rather than focusing solely on how to build and structure a new ordinance, Part III of this Note will propose a holistic, bottom-up solution for local community regulation of noise. As the population in the state of Florida continues to grow, state and local governments must begin assessing noise pollution from the planning process, especially in mixed-use districts. Local

pollution affects people of all ages and location." *Id.* Additionally, noise pollution can have a long-term effect on Florida's residents, "including physiological and psychological consequences." *Id.*

7. See Noise Control, 42 U.S.C. § 4901(a)(1) (2012) ("[I]nadequately controlled noise presents a growing danger to the health and welfare of the Nation's population . . .").

8. See Mark Bentley, *An Overview of Noise Regulation in Florida*, MARK BENTLEY, <http://www.markbentleypa.com/wp-content/uploads/2015/04/An-Overview-of-Noise-Regulations2015.pdf> (last visited Nov. 10, 2015) (This article explains that noise pollution is a consequence of Florida's flourishing population. Accordingly, local governments must now attempt to regulate pervasive noise problems.); Robert C. Chanaud, *Noise Ordinances*, 1-1, 3-1 to 3-15 (July 2014), <https://www.noisefree.org/Noise-Ordinance-Manual.pdf> (Chapter 3 discusses "Noise Effects on Health and Welfare."). See generally Simo & Cleary, *supra* note 6, at 122, 126 (explaining how even the most common noise can influence quality of life).

9. Noise Control, 42 U.S.C. § 4901(a)(3) (2012) ("[P]rimary responsibility for control of noise rests with State and local governments . . ."). See also *Summary of the Noise Control Act*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/laws-regulations/summary-noise-control-act> (last visited Nov. 10, 2015) (the responsibility of enforcing noise primarily lies with state and local governments).

10. Noise Control, 42 U.S.C. § 4901 (2012).

governments should require a holistic approach, implementing mitigation efforts prior to noise complaints in order to create a harmonic environment.

I. NOISE REGULATION: A SYMPHONY

A. *Noise Regulations, Sonata-Form*

Typically one of the first movements in a symphony, Sonata-form is a fast-tempo and sets up a dialogue between two contrasting themes: tonic key and dominant key.¹¹ It “is the most important large structure of individual movements from the ‘common-practice’ tonal era.”¹²

Throughout the years, national, state, and local governments have passed statutes and guidelines to abate noise.¹³ However, headlines and ongoing litigation show enacting regulations that can be clearly enforced and pass constitutional muster are a recurring problem.¹⁴

In 1972, Congress passed the Noise Control Act,¹⁵ the first important noise action program under the United States Environmental Protection Agency (EPA).¹⁶ Primarily designed to protect the public health and welfare of United States citizens,¹⁷ the EPA reserved the right to call any federal regulation of noise for public review if the agency found that it inadequately protected Americans.¹⁸ During this time, the EPA also mandated “all federal

11. *Sonata-Form*, NAXOS: THE WORLD’S LEADING CLASSICAL MUSIC GROUP, <http://www.naxos.com/education/glossary.asp?char=S-U#> (last accessed Sept. 6, 2015) (select “Sonata-form”).

12. JAMES HEPOKOSKI & WARREN DARCY, *ELEMENTS OF SONATA THEORY* 14–15 (1st ed. 2006).

13. *See, e.g.*, 42 U.S.C. § 4901 (2012). *See also* Hillsborough County Environmental Protection Act, LAWS OF FLA. ch. 84-446 (1984); MIAMI DADE COUNTY, FLA., COUNTY CODE ch. 21, art. IV, § 21-28(b) (1985, as amended 1996); LEE COUNTY, FLA., LEE COUNTY NOISE CONTROL ORDINANCE ch. 24¼ (2014); Motor Vehicle Noise, FLA. STAT. § 316.293 (2015).

14. *See generally* Daley v. City of Sarasota, 752 So. 2d 124, 124–25, 127 (Fla. Dist. Ct. App. 2000) (striking down as unconstitutional the City of Sarasota’s absolute ban of amplified sound in nonenclosed structures for certain hours each day). *See also* State v. Catalano, 104 So. 3d 1069, 1077–81 (Fla. 2012) (striking down a noise control statute as an unreasonable restriction on First Amendment rights); Carol Wright, *Good Morning: Turning It Down a Notch in West Palm*, BROWARD DAILY BUS. REV. (Jan. 22, 2001) at 6; *Loud Car Music Ban Struck Down by Florida Supreme Court (SONGS)*, HUFFPOST MIAMI (Dec. 14, 2012, 12:07 AM), http://www.huffingtonpost.com/2012/12/14/vehicular-loud-music-ban-unconstitutional_n_2301013.html (last updated Dec. 15, 2012, 9:00 AM).

15. Noise Control, 42 U.S.C. § 4901 (2012).

16. Press Release, U.S. Env’tl. Prot. Agency, EPA to Launch Noise Control Program (Nov. 6, 1972), <https://www.epa.gov/aboutepa/epa-launch-noise-control-program> (last updated Apr. 14, 2015).

17. Noise Control, 42 U.S.C. § 4901(a)(1) (2012) (Congress found “that inadequately controlled noise presents a growing danger to the health and welfare of the Nation’s population, particularly in urban areas . . .”).

18. “Under the new authorities, . . . EPA must be consulted by other Federal agencies prior to publishing new regulations on noise. If the agency feels that any proposed . . . regulations do not adequately protect the public health and welfare, it can call for public review of them.” Press Release, *supra* note 16.

noise control activities [pass] through its Office of Noise Abatement and Control” (ONAC).¹⁹

Despite the dissolution of ONAC under President Ronald Reagan less than a decade later, this large structured program was the prelude to more convoluted noise control.²⁰ Consequently, the EPA eliminated all funding and “concluded that noise issues were best handled at the [s]tate or local government level.”²¹ Even though Congress never rescinded the Noise Control Act, the responsibility of noise abatement was ultimately transferred to the states.²²

Unlike most types of pollution, the effects of sound do not create physical destruction, which explains the lack of attention drawn to it.²³ As a result, enforcing noise has not been a top priority in Florida.²⁴ Historically, noise ordinances were retroactively implemented through the common law doctrine of nuisance,²⁵ focusing on governance only after receiving a complaint by the aggrieved.²⁶ Now, the main functions to an ordinance are proactively placing restrictions on such things as the type, duration, amount, time, or source of noise.²⁷ The problem, though, lies not only in enacting a proper ordinance, but in the capability and understanding to effectively police it.

The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this Act to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products.

Noise Control, 42 U.S.C. § 4901(b) (2012).

19. Press Release, *supra* note 16 (alteration in original).

20. *See id.*

21. *See id.*

22. *See id.*

23. Chanaud, *supra* note 8, at 1-1.

24. *See* Manatee County Government Administrative Center Commission Chambers, Adoption of Proposed Noise Ordinance 13-05, <http://www.mymanatee.org/published/June%204,%202013%20-%20Regular%20Meeting%20on%20Tuesday,%20June%2004,%202013/447C5775-8B59-4E7B-A7DBE9A17CA436D7-4612FB5A-F5DC-4D02-96CD-C643AABE4110.htm> (last visited Apr. 1, 2015) [herein after Manatee].

25. DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 2 (6th ed. 2012).

26. *See, e.g.*, Manatee, *supra* note 24.

27. *Id.*

B. *The Drawn Out Noise Debate, Largo*

“Largo” is the second movement in a symphony, is a slow tempo—usually to give the audience time to personally reflect.²⁸ Of Italian origin, “Largo” means “broad, wide, large, and consequently slow.”²⁹

Defined as a “loud or unpleasant sound,”³⁰ noise ranges from music emanating out of a car stereo³¹ to an airplane flying overhead³² or even amplified music at a nightclub.³³ The meaning of “noise” is highly subjective, which typically can interfere with the requirements of an objective legal analysis.³⁴ Although part of daily life, noise has proven to elicit highly provocative confrontations between business owners and residents.³⁵

For communities that thrive off tourism, such as Florida’s, live bands and amplified music are often blared loudly to attract consumers to restaurants, bars, and clubs.³⁶ Noise is necessary for local businesses, but can create controversy for neighboring landowners’ and tenants’ quality of life.³⁷ Industrial districts³⁸ and commercial districts³⁹ are zoned in a way that

28. Maya Pritsker, *Symphony No. 6 in B Minor, OP. 54 (1939)*, AMERICAN SYMPHONY ORCHESTRA <http://americansymphony.org/symphony-no-6-in-b-minor-op-54-1939/> (last visited Nov. 11, 2015).

29. *Largo Definition*, OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/us/translate/italian-english/largo> (last visited Sept. 8, 2015).

30. *Noise Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/noise> (last visited Feb. 10, 2015).

31. See, e.g., *State v. Catalano*, 104 So. 3d 1069, 1072 (Fla. 2012).

32. See generally Katherine Albers, *South Lee Residents Make Noise About Airplane Noise*, NAPLES DAILY NEWS (Aug. 18, 2011), <http://www.archive.naplesnews.com/news/local/south-lee-residents-make-noise-about-airplane-noise-ep-391171225-342845182.html>.

33. See generally Alina Matas, *Defining Moment: Nightclub Case Is Symbolic of Larger Struggle Between Club and Restaurant Owners, Condo Residents That Will Define Miami Beach’s Future*, BROWARD DAILY BUS. REV., July 17, 2003, at 24.

34. Andrew L. Quittner, *Can You Hear Me Now? The Law of Sound Under State and Local Law*, TEX. MUN. CTS. EDUC. CENT. 1, 1–2 (Jan. 12, 2015), http://www.tmcec.com/files/1613/9525/5447/Quittner_-_00_-_BINDER_-_Noise.pdf.

35. Aaron Kraut, *Bethesda Condo Owners Tired of Noise from Nearby Lounge*, BETHESDA MAGAZINE (May 2, 2014), <http://www.bethesdanow.com/2014/05/02/bethesda-condo-owners-tired-of-noise-from-nearby-lounge> (discussing the conflict between residents and The Parva, a bar and lounge).

36. See Wright, *supra* note 14, at 6.

37. Kraut, *supra* note 35.

38. See NAPLES, FLA., CODE OF ORDINANCES § 58-711 (2006). In Naples, Florida, the commercial-core district is zoned in a way that plans for daily noise in the operation of gas stations; professional, business, financial offices, civil or public utility offices; occasionally restaurants, lounges and rental of motor vehicles, etc. *Id.* at §§ 58-712, 58-713. This “district is a utilitarian district characterized by storage, repair, manufacturing, processing, wholesaling and trucking activities.” *Id.* at § 58-711.

39. See, e.g., *id.* at §§ 58-591, 58-651, 58-681. In Naples, Florida, the General Commercial District permits shopping centers, bakeries, pet shops, and restaurants. *Id.* at § 58-592. Similarly, the Heavy Commercial District is a “utilitarian business district” permitting “[w]arehousing, wholesaling or

specifically anticipates and accommodates different types of sound.⁴⁰ But, when municipalities choose to embrace the economic benefits of revitalized communities, they must also compensate for new issues that arise. For example, mixed-use districts—areas combining residential, commercial, and sometimes industrial—create a division of personalities throughout the communities.⁴¹ In this type of development, poor land use planning will most certainly generate complaints of an insalubrious living environment.⁴²

Miami Beach's own *Jarndyce and Jarndyce*⁴³ is the perfect illustration of this all too-common struggle.⁴⁴ In 2001, a Miami Beach nightclub, Opium Gardens (Opium), was charged with repeatedly violating city and county noise ordinances.⁴⁵ Opium had received ten noise violations over the course of six months, and the club contested the violations.⁴⁶ It was reported that the legal battle was just a “part of a larger conflict that ha[d] divided the community, with clubs, bars and restaurants on one side and South Beach residents and city officials on the other.”⁴⁷

Preceding the conflict, Miami Beach's city code allowed Opium to build an open-air facility, which also operated as a nightclub because the area was significantly undeveloped.⁴⁸ As new, multimillion-dollar condominiums were erected near the club, tensions ran high when owners started to vocalize their complaints.⁴⁹ Opium's owners' defense was that they are “simply operating the business that they were licensed to operate.”⁵⁰ The influx of objections prioritized the problem of noise pollution for city officials and led to discussions of passing a new noise ordinance.⁵¹ As residents and business owners agreed, this was an extremely sensitive and controversial issue.⁵²

distribution facilities” and the like. *Id.* at §§ 58-651, 58-652. Logically, these districts expect certain types of noise not contained in residential districts.

40. *See supra* note 38, 39.

41. Matas, *supra* note 33.

42. Kraut, *supra* note 35. *See also* Karen Orr, *Gainesville, Florida: A Continuous Roar of Noise*, NOISE FREE AMERICA (Mar. 1, 2014), <http://www.noisefree.org/newsroom/pressrelease-display.php?id=155> (A Turkey Creek, Florida resident, Judy Sims, expressed concern about noise pollution saying, “The peace and tranquility of our neighborhood is gone. My health is being impacted by the disrupted sleep I am continually experiencing. My heart goes out to others suffering like me . . .”).

43. *Jarndyce and Jarndyce* was a fictional court case from the novel *Bleak House* by Charles Dickens. It is commonly used as a byword for seemingly endless legal proceedings.

44. *See generally* *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254 (11th Cir. 2007).

45. *Id.* at 1258.

46. *Id.*

47. Matas, *supra* note 33, at 2.

48. *Id.* (Opium was built in 1994 and the nearby surrounding area included only restaurants and businesses).

49. *Id.* at 3.

50. *Id.*

51. *Id.*

52. *Id.* at 1.

Residents wanted to coexist by living in a peaceful environment, while the local businesses were interested in capitalizing on the demand for nightlife.⁵³

The drawn-out South Beach noise debate became even more notorious when the fight turned political during the 2003 November city commissioner elections. Tony Guerra, co-owner and promoter of Crobar nightclub (Crobar) in Miami, ran against the incumbent, Simon Cruz, causing public outcries from neighboring residents—including the president of the South Beach Homeowners Association—stating that “[a]ny commissioner who stands against [the nightclub issue] is going to get an enormous backlash.”⁵⁴ Cruz, who once was perceived as an advocate of the club industry, supported the ban on outdoor music from new clubs.⁵⁵

Following years of litigation and an unsuccessful appeal to the Eleventh Circuit,⁵⁶ Opium unfortunately had to close its doors and move.⁵⁷ Residents of South Beach considered it a great “victory.”⁵⁸ However, this interminable lawsuit and others like it brought to light many issues that city planners, county commissioners, and developers had not yet thought about.⁵⁹ As residents move into these multimillion-dollar condominiums, what should happen to the surrounding area?

Following the move of Opium, another nightclub named “Amnesia” moved into the same space.⁶⁰ In an attempt to mitigate noise levels and alleviate any further grievances, the club spent a fortune putting on a roof, quickly leading to financial difficulties.⁶¹ Once again, poor acoustic planning resulted in another nightclub unable to keep its doors open. Only in the past decade have local governments begun to apprehend that noise pollution issues must be addressed proactively before permits are issued.⁶² Noise, specifically amplified music and live bands, must be taken into consideration sooner rather than later.⁶³

Intrusive community noise is not just a subject that has adversely impacted Florida residents. In August 2009, Manhattan, New York had an issue comparable to the Miami Beach dispute. The Beatrice Inn, a busy nightclub located in the basement of a residential building became a popular

53. *Id.*

54. *Id.* at 2 (alteration in original).

55. *Id.*

56. *See* DA Mortg., Inc. v. City of Miami Beach, 486 F.3d 1254, 1273 (11th Cir. 2007).

57. Fred Gonzalez, *Story Nightclub to Take over Old Amnesia, Opium Space*, MIAMI.COM (Nov. 13, 2012), <http://www.miami.com/story-nightclub-take-over-old-amnesia-opium-space-article>.

58. Matas, *supra* note 33, at 1.

59. *See id.*

60. Gonzalez, *supra* note 57.

61. *Id.*

62. *See, e.g.,* Wright, *supra* note 14 (discussing Palm Beach officials consideration of the grant of permits for private special events).

63. *Id.*

hangout for fashion icons, music gurus, and film insiders until a Manhattan law enforcement raid shut it down for overcrowding and noise complaints.⁶⁴ A resident in the building explained that she called the city five times per week filing noise complaints, wore earplugs on a daily basis, and spent a small fortune attempting to soundproof her apartment.⁶⁵

A reporter following the noise debate wrote that “noise is hardly a new problem in a city where thousands of people . . . are packed into every square mile.”⁶⁶ However, with the appeal of the New Urbanism movement,⁶⁷ the real estate boom; and the migration of older, wealthier people to these mixed-use districts, local governments have not sufficiently planned for policing offensive noise.⁶⁸ Before issuing permits, government agencies should have provided safeguards for incoming residents, ensuring adequate soundproofing of businesses before allowing them to open. Instead, “[n]ightclubs are now [being] seen as nuisances.”⁶⁹

Many other cases have surfaced throughout the United States as residents continue to be lured into cities and communities that have leaned towards adopting mixed-use areas.⁷⁰ City officials are learning that this is not just a problem surrounding nightclubs; amplified music, live bands at restaurants, and concerts are also sources of complaints.⁷¹ The argument residents made was “the rejuvenated community interferes with their accustomed way of life.”⁷² On the other hand, opposing arguments have remained the same: “the city desperately wanted what it now seeks to restrict—a rejuvenated

64. Ravi Somaiya, *A Club's Closing: It's the Old Issue of Neighbors vs. Noise*, N.Y. TIMES (Aug. 14, 2009), http://www.nytimes.com/2009/08/15/nyregion/15metjournal.html?_r=0.

65. *Id.*

66. *Id.*

67. New Urbanism is a planning movement that “promotes the creation and restoration of diverse, walkable, compact, vibrant, mixed-use communities . . .” As such, it is the desirability and movement of residents to mixed-use development areas. *New Urbanism Info*, NEW URBANISM, <http://www.newurbanism.org/newurbanism.html> (last accessed Feb. 29, 2016).

68. Somaiya, *supra* note 64.

69. *Id.* (“The attitude is that if clubs just went away, [residents] could have a quiet life.” (alteration in original)).

70. *See generally* *Andross v. Town of W. Hartford*, 939 A.2d 1146 (2008) (one of the reasons town residents opposed mixed-use development was noise pollution); *Krempasky v. Nez Perce Cnty. Planning & Zoning* (In re Approval of a Conditional Use Permit #CUP-2008-3), 245 P.3d 983 (2010) (neighbors had noise and traffic concerns about a conditional use permit being issued for weddings and outdoor events in a mixed-use community); Nick Birdsong, *Treasure Island Tidies up Its Noise Ordinance*, TAMPA BAY TIMES (Aug. 7, 2005), http://www.sptimes.com/2005/08/07/Neighborhoodtimes/Treasure_Island_tidie.shtml.

71. In 1989, a rock concert that took place in an amphitheater in New York City’s Central Park was the cause of controversy when the city attempted to regulate the volume of the amplified music. *See* *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). *See also* Abbie Vansickle, *Music or Nuisance? Inverness May Clarify*, TAMPA BAY TIMES, (Nov. 5, 2005), http://sptimes.com/2005/11/05/Citrus/Music_or_nuisance_Inv.shtml (describing a restaurant named “Chateau Chan Sezz” offering live jazz, blues, and rock music, which caused a neighbor to complain about the noise level).

72. Mark A. Gruwell, *Last Words on Recent Developments: The First Amendment Strikes Back: Amplified Rights*, 31 STETSON L. REV. 367, 368 (2002).

community. . . . [Therefore,] residents should be required to tolerate an increased level of noise”⁷³

In an attempt to curb repeated complaints, the City of Sarasota, Florida “adopted [a] Noise Ordinance by amending chapter 20 of its City Code.”⁷⁴ The newly amended noise ordinance approved a list of permitted and prohibited uses within the specific zoning district the appellee restaurant-nightclub owners were zoned in.⁷⁵ These changes created an unfavorable effect on the sound level and music that the restaurant-nightclub owners could play.⁷⁶ The owners filed a complaint stating that the ordinance should be declared invalid because it was not reviewed by the local planning agency “in accordance with chapter 163, Florida Statutes (1995).”⁷⁷ The Second District Court of Appeals corrected the owners of their misconceptions regarding the proper procedures for enacting an ordinance in Florida.⁷⁸ The court explained that if the noise ordinance were a land development regulation, then the ordinance would have to be submitted for review by a planning agency.⁷⁹ Regulations, such as this one, were enacted to regulate conduct, thereby making it “exempt from this review process.”⁸⁰

Again, in 2000, the city imposed an absolute ban on amplified noise within certain zoning districts during specified hours of the day and night.⁸¹

73. *Id.* (alteration in original).

74. *City of Sarasota v. 35 S. Lemon, Inc.*, 722 So. 2d 268, 268 (Fla. Dist. Ct. App. 1998) (alteration in original).

§ 20-5 of the Noise Ordinance defines unreasonable noise to include the following:

. . .

Amplified Music. Using or operating for any purpose, or permitting the operation or use for any purpose, any amplification system, or any amplified radio, phonograph, tape player, telephone set, musical instrument, drum or similar device which is amplified between the hours of 10:00 p.m. and 7:00 a.m. on Sunday through Thursday, inclusive, or 12:00 midnight and 10:00 a.m. on Friday and Saturday and holidays in the C-CBD zoning district of the City as defined and regulated by the Zoning Code and as delineated on the official zoning atlas, except when such system or device is operated or used in a completely enclosed structure.

. . .

(m) Any excessive or unusually loud sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a reasonable person of normal sensibilities.

Id. at 268 n.1.

75. *Id.*

76. *Id.*

77. *Id.* at 269.

78. *Id.*

79. *Id.*

80. *Id.* This was an attempt to regulate conduct because the business could still operate according to its previous use before the amended ordinance. Simply, it had to comply with the noise level requirements.

81. *Daley v. City of Sarasota*, 752 So. 2d 124, 127 (Fla. Dist. Ct. App. 2000).

Luckily for the city, the court struck down this ordinance, finding that the First Amendment prohibits cities from completely banning amplified music.⁸²

Accordingly, local governments and planning agencies face the challenge of constructing complex ordinances—to balance the competing interests of residents and business owners—while proclaiming noise regulations that can be objectively enforced.

C. *Noise Abatement in Florida: Scherzo*

Both Beethoven and Chopin were known to use a scherzo, the third movement in a symphony.⁸³ This “light-hearted movement . . . is generally used to frame a trio section of contrasted material.”⁸⁴

The traditional rationale for creating separate zones for separate land uses was practical, but the “unnatural separation of uses can be harmful to communities.”⁸⁵ Particularly, this type of zoning has led to the division of communities into sectors, with zones for a single-type use.⁸⁶ Single-type use zoning unintentionally produced urban sprawl, urban dismemberment, and the disappearance of social gathering places.⁸⁷ Today, residents want to be closer to everything: safe neighborhoods and attractive sidewalks have become more alluring—which entice people to walk, bicycle, and avoid long commutes.⁸⁸

To rectify the problems caused by urban sprawl, mixed-use zones have emerged; combining different land uses such as: apartments, bars, lounges, offices, and retail outlets within a city.⁸⁹ Urban mixed-use districts have become a very effective solution because they “[i]ncrease[] the [s]upply of [a]ffordable [u]rban [h]ousing,”⁹⁰ “decrease[] commuting distances and time

82. *Id.*

83. *Scherzo*, NAXOS.COM, <http://www.naxos.com/education/glossary.asp?char=S-U#> (last accessed Oct. 12, 2015) (select “Scherzo”).

84. *Id.*

85. Nicolas M. Kublicki, *Innovative Solutions to Euclidean Sprawl*, 31 ENVTL. L. REP. 11001, 11001 (Aug. 2001).

86. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 380–81 (1926).

87. FORM-BASED CODES INST., <http://formbasedcodes.org> (follow hyperlink “What Are Form Based Codes?”) (last visited Oct. 12, 2015).

88. Kublicki, *supra* note 85, at 11003.

89. *Id.* However, mixed-use districts “[d]ecrease[] [c]ommuting [c]osts.” *Id.* at 11007.

90. *Id.* Generally, residential/commercial buildings command lower residential rent. *Id.* However, “mixed-use land is often more expensive than single-use land because of its potential to generate greater total revenue . . .” *Id.*

periods,”⁹¹ “decrease[] parking development costs,”⁹² and much more.⁹³ City officials did not plan for the consequences of compatible zoning,⁹⁴ which is clear as the South Florida community, in general, is very anti-sprawl.⁹⁵ As new types of developments⁹⁶ in desirable areas are being promoted to

91. *Id.* (explaining that residents are able to commute less because they are closer in distance than if they were in the suburbs). Thus, commuting costs and time periods spent in a car are reduced. *Id.* In addition, “other commuting costs such as highway and bridge tolls, insurance, gasoline, and vehicle maintenance” are decreased. *Id.*

92. *Id.* Cities often permit a shared parking regime that allows mixed-use developments to provide fewer parking spaces. *Id.* at 11007–08. (“For example, commercial uses such as offices and retail establishments can use parking spaces in the development during the day while other uses, such as residential, can use them at night.”)

93. *Id.* at 11008. Other benefits arising from the elimination of urban sprawl include the increase of stable areas, “[i]nteraction [b]etween [s]ocioeconomic [c]lasses,” and an “[u]rban [r]esident’s [s]ense of [c]ommunity [r]esponsibility.” *Id.* Additionally, eliminating urban sprawl would “[d]ecrease[] [c]ertain [n]egative [p]sychological and [s]ociological [i]mpacts.” *Id.*

94. The Florida Bar published a case study on the City of Jacksonville regarding noise complaints and where they originated between October 2006 and May 2007. Dana L. Brown & Lee White, *Noise: A Land Use Dilemma? A Case Study of the City of Jacksonville*, 83 FLA. B.J. 52, 52 (2009). A “majority of the complaints [fell] into one of four categories . . .” *Id.* One category concerned nightclubs, many of which resulted in actions taken against the owner/operator of the noise source. *Id.* This article emphasizes the need to take a proactive approach: “[A]ddressing these common noise issues would be a much preferred path rather than a regulatory reaction which may involve the imposition of penalties and the costs of corrective actions . . .” *Id.* Requiring environmental assessments prior to any change in zoning or future development, with specific attention given to the impact of noise, can help make the plan more effective in protecting citizens and fostering positive growth while maintaining the quality of life. *Id.* See also Tom Angotti, *Noise Pollution: A City Planning Problem*, GOTHAM GAZETTE (Sept. 19, 2003) (summarizing that it is the responsibility of each county and city to address the problem of noise at the planning level rather than once an influx of noise complaints has occurred).

95. Mike Lydon, *Action Alert: Stop Sprawl, Say No to Senate Bill 360*, TRANSITMIAMI.COM: MOVING FORWARD, TOGETHER (Mar. 25, 2009), <http://www.transitmiami.com/sprawl/action-alert-stop-sprawl-say-no-to-senate-bill-360>. See also Ben Fried, *Obama: The Days of “Building Sprawl Forever” Are Over*, STREETS BLOG NYC (Feb. 10, 2009), <http://www.streetsblog.org/2009/02/10/obama-the-days-of-building-sprawl-forever-are-over>. Captured by C-SPAN, President Obama deviated from his campaign for the stimulus bill when he commented on land use and transportation stating, “The days where we’re just building sprawl forever, those days are over. I think that Republicans, Democrats, everybody . . . recognizes that’s not a smart way to design communities. So we should be using this money to help spur this sort of innovative thinking when it comes to transportation.” *Id.*

96. In Naples, Florida, the “D downtown district” is a prime example of mixed-use development. The purpose of the D downtown district is to contain a mixture of uses “including commercial, . . . restaurant, . . . and residential.” NAPLES, FLA., CODE OF ORDINANCES § 58-901 (2006).

The primary function of the district is:

- (1) To promote the orderly redevelopment of the downtown area;
- (2) To improve the aesthetics and physical appearance of the downtown area;
- (3) To provide for a prosperous, viable downtown;
- (4) To encourage fulltime residential use in the downtown area;
- (5) To recognize and promote the role of the medical community in the area;

encourage residents to move closer to cities, businesses are also inventing new ways to attract residents and tourists.⁹⁷ The result is a dichotomy between the two. Since Florida has presently grown to the “third most populous state,”⁹⁸ the major conflict is how to police noise without thwarting the growth of businesses.⁹⁹

In Florida, most localities have some form of noise control ordinance based on either a subjective plainly audible standard or objective decibel-based standard.¹⁰⁰ Subjective ordinances are based mostly on nuisance law—finding that a noise complaint may arise from a specific incident or source.¹⁰¹ Therefore, no measurement is taken.¹⁰² This type of ordinance is generally enforced by a police officer’s ear; if the noise is “plainly audible” from the residence, there is a violation.¹⁰³ Essentially, a noise control officer or other official bases his decision on the degree of noise intrusion without any reference to the level of measurement.¹⁰⁴

Objective decibel-based ordinances, however, have a set decibel measurement; which the noise may not exceed. When a local government implements this type of ordinance, “the personnel assigned to the enforcement . . . may have very little, or no training in the use of sophisticated measurement equipment.”¹⁰⁵ The measurement equipment may vary greatly in sophistication and cost, as well.¹⁰⁶ Thus, enacting mitigation techniques in

(6) To retain and promote the establishment of a variety of consumer and service businesses so that the needs of the area’s residential and working populations will be satisfied;

(7) To reinforce the role of the downtown as a community center and a meeting place for residents, tourists, and visitors;

(8) To encourage mixed-use, infill development, particularly residential and retail; [and]

(9) To promote pedestrian-friendly streets.

Id.

97. Wright, *supra* note 14, at 1 (*e.g.*, businesses in CityPlace hold private special events, restaurants, and clubs bring in live bands to play outside).

98. *Florida Passes New York to Become the Nation’s Third Most Populous State*, Census Bureau Reports, U.S. CENSUS BUREAU, Release No. CB14-232 (Dec. 23, 2014), <http://www.census.gov/newsroom/press-releases/2014/cb14-232.html> (not including seasonal population).

99. For example, in West Palm, “[t]he Downtown Development Authority and other business groups [were] trying to work out a compromise with West Palm Beach before the City Commission vote[d] on [a] proposed noise control ordinance.” Wright, *supra*, note 14, at 1. The amplified music that draws tourists to the area was a major source of complaints from local residents. *Id.* The city was focused on drawing up a new ordinance that somehow allowed residential and commercial noise to coexist. *Id.*

100. Chanaud, *supra* note 8, at 1-4.

101. Manatee, *supra* note 24. See also Patrick K. Dooley, *Enforcing Noise Ordinances in Florida*, FLA. DEP’T OF L. ENFORCEMENT 5 (Aug. 2000), <https://www.fdle.state.fl.s/Content/getdoc/7062db7-f60b-4190-8666-72c5deeadcf1/Dooley-pat-paper-pdf.aspx> (last visited Nov. 20, 2015).

102. Dooley, *supra* note 101, at 5.

103. Manatee, *supra* note 24.

104. *Id.*

105. *Id.*

106. *Id.*

Florida has become quite an endeavor. City and county governments acknowledge the problem but understand that their main issue has become policing the noise.¹⁰⁷ The degree of enforcement varies from each city as the population and nocturnal revelry grow.¹⁰⁸

Cities attempt to curb noise pollution by allowing concerned citizens to file noise complaints. A noise complaint form typically is filed “in the police or sheriff’s departments, but may also be sent to the [city].”¹⁰⁹ For example, if a complainant lives in a condominium where condominium documents do not control amplified noise (the offensive noise) and the city issues a permit—failing to realize that the business should soundproof its establishment—the only resolution is for the resident to call the police.¹¹⁰ A code enforcement officer or law enforcement officer will arrive on the scene and make a formal investigation regarding the complaint to determine if the noise is violating a local ordinance.¹¹¹ This report is generally detail-oriented because, during legal proceedings, it is often admitted as a way to show evidence of the investigation and result of the noise complaint.¹¹² Thus, pertinent elements are usually included in the form.¹¹³

Due to the intricate nature of the investigation report, the enforcement of local ordinances may not be an effective remedy.¹¹⁴ When a resident makes a noise complaint, an enforcement officer will arrive at the scene and begin the report.¹¹⁵ In order to verify the complaint, the enforcement officer must corroborate the noise.¹¹⁶ By the time the form is complete and the officer has been able to measure the noise to determine if there has been a violation, the business (restaurant, bar, or nightclub) might have had the opportunity to turn down or shut off the music. Thus, the process itself renders the ordinance ineffective.

107. *Id.*

108. Chanaud, *supra* note 8, at 1-4 (discussing the difference between active and passive enforcement)

109. *Id.* at 2-6 (alteration in original).

110. Dooley, *supra* note 101, at 6, 11.

111. *FAQ’s: What Should I Do About a Noise Complaint?*, GAINESVILLE POLICE DEPT., <http://p2c.gainesvillepd.org/FAQ.aspx?faq=9> (last visited Oct. 14, 2015).

112. BRÜEL & KJAER, ENVTL. NOISE MEASUREMENT 17 (1986).

113. Dooley, *supra* note 101, at 6. The pertinent elements in the noise complaint include: name/address of the noise source; date/day/time of the week; the investigating agency/officer; description of noise source to be measured and property receiving the noise; description of residual and extraneous noises; description of instrument used to measure noise; neighborhood residual noise measurement; measurement of total noise; corrective actions taken; and time started and time ended. *Id.* at 11.

114. Chanaud, *supra* note 8, at 4-17.

115. *Noise Complaint Process*, PORTLAND, ME., www.portlandmaine.gov/568/Noise-Complaint-Process (last visited Nov. 20, 2015).

116. Transcript of Zoning Board Item No. Three: Quench Super Club 5:00 a.m. Variance Before Chairman Fernandez at 2, City of Miami Zoning Board (Sept. 8, 2003), <http://egov.ci.miami.fl.us/Legistar-web/Attachments/10697.pdf>.

For example, if a tenant lives in a condominium and a restaurant-club is on the first floor of the building playing amplified music, the tenant should allow the police officers to go into the apartment to corroborate the noise.¹¹⁷ But if the tenant does not allow the law enforcement officer into his/her apartment, all the officer can do is stand outside of the building to ensure that nothing going on indoors is being heard from the streets.¹¹⁸ If the police officer is able to verify that the noise, in fact, is coming from the particular establishment, then the officer can put a nuisance abatement complaint together (or even close down the establishment).¹¹⁹ Consequently, some citizens may hesitate in reporting their claim because the officer will often gauge the sound from inside their residence.¹²⁰

If, however, the officer is able to verify the complaint as a noise sufficient to constitute a violation of the city or county ordinance, a notice of violation will be issued.¹²¹ Prior to the issuance of the notice of violation, a code inspector or law enforcement officer will generally first issue an oral or written warning to immediately cease the violation.¹²² In some cities, such as Miami Beach, an inspector may issue one oral courtesy per day.¹²³

Often, commercial noise complaints are rapidly muffled and vigorously defended.¹²⁴ A code enforcement officer may hesitate in enforcing a noise complaint without building a strong case that will likely result in favor of the prosecution.¹²⁵ Generally, statutory issues such as scope and clarity are raised, along with the amount of training experience and concerns with the sound measurement device itself.¹²⁶ Therefore, it is essential that the code enforcement officer be able to substantiate calibration of the device and ensure that proper procedures are followed.¹²⁷

Some businesses have defended their noise level by arguing city procedures are wrong, that the process violates the separation of powers.¹²⁸ Yet, it is commonly known that the power to regulate land is vested in the

117. *Id.* at 6.

118. *Id.* at 6–7.

119. *Id.* at 3, 6–7.

120. *Id.* at 6–7.

121. NAPLES, FLA., CODE OF ORDINANCES § 56-125(a) (2006).

122. MIAMI BEACH, FLA., CODE OF ORDINANCES, art. IV, § 46-158(a) (2016).

123. *Id.*

124. *See generally* DA Mortg., Inc. v. City of Miami Beach, 486 F.3d 1254 (11th Cir. 2007) (a case involving a year-long legal battle between Opium nightclub and the residents of Miami Beach).

125. *Id.*

126. *Id.*

127. *Id.*

128. Matas, *supra* note 33. Opium Gardens (“Opium”) nightclub in Miami Beach, Florida, argued, “[T]he city’s procedure for resolving alleged noise violations is unconstitutional.” The city brings matters before a special master, “typically a lawyer or retired judge,” when it adjudicates its contested code violations. *Id.* This, Opium alleged, was a violation of the separation of powers doctrine—a violation of the executive and judicial branches. *Id.* The city defended that allegation by stating that “state statute does allow [them] to use such a system to hear zoning matters.” *Id.* (alteration in original).

state.¹²⁹ State legislatures have typically delegated land-use regulation to cities and counties by means of a zoning enabling act,¹³⁰ or similar form of statutory authorization.¹³¹ These statutes both enable and set limits for the local regulation of land. A court will invalidate a land-use regulation that is not authorized by an enabling act because the regulation is *ultra vires*.¹³² The Florida Constitution, states, “[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of . . . excessive and unnecessary noise.”¹³³

For instance, in 2001, West Palm Beach decided to update their noise ordinance, stating that they had to “dust[] it off, shine[] it up, [and] put in some enforcement.”¹³⁴ The city changed the standard from a “decibel-based measure of sound to plainly audible.”¹³⁵ Understandably, the local business community was unhappy with the drafted ordinance because it was so subjective.¹³⁶ Essentially, it allowed police officers to rely on their own hearing to resolve complaints, and it permitted them to conduct random checks.¹³⁷ The new standards also allowed the noise levels to be checked at

129. ROGER BERNHARDT & ANN M. BURKHART, REAL PROPERTY IN A NUTSHELL 521 (5th ed. 2005).

130. See *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, AMERICAN PLANNING ASS'N, <https://www.planning.org/growingsmart/enablingacts.htm> (last visited Nov. 20, 2015). The Standard State Zoning Enabling Act (SZEA) was developed by an advisory committee on zoning appointed by Secretary of Commerce (and later President) Herbert Hoover in 1921. *Id.* After several revisions, the Government Printing Office published the first printed edition in May 1924 and a revised edition in 1926. *Id.*

131. Tony A. Arrant, PLANNING AND GROWTH MANAGEMENT 111, *in* FLA. COUNTY GOV'T. GUIDE (2010).

The State of Florida has one of the most comprehensive and progressive land use planning programs in the country. The authority and responsibility for establishing and implementing the roles, processes, and powers of comprehensive planning programs to guide and control future development in Florida is vested in local governments because local governments have regulatory authority over the use of land. Regulatory authority over the use of land means that local governments are the agencies that issue development permits. The land use planning program in Florida is commonly referred to as “Growth Management” and is found in a broad collection of laws, rules, regulations, and policies affecting all planning and development activities of the state and local governments.

Id.

132. BERNHARDT & BURKHART, *supra* note 129, at 421. See also Daniel A. Himebaugh, *Ultra Vires Land Use Regulations: A Special Case in Substantive Due Process*, 19 OCEAN & COASTAL L.J. 173, 173 (2014) (“The U.S. Supreme Court’s land use jurisprudence establishes that arbitrary land use regulations violate the doctrine of substantive due process. Ultra Vires land use regulations—those regulations that exceed the delegated authority of the regulating agency under state law—represent a particular type of arbitrary land use regulation.”).

133. FLA. CONST. art. II, § 7(a).

134. Wright, *supra* note 14, at 2 (alteration in original).

135. *Id.*

136. *Id.*

137. *Id.*

the place from which the complaint originated or the source.¹³⁸ In addition, business establishments bringing in live bands or amplified music were limited to holding “special events” only three times per year.¹³⁹

In 2011, Mayor Lois Frankel¹⁴⁰ of the City of West Palm Beach responded to a group calling itself Noise Action People, Inc. (NAP).¹⁴¹ NAP was a group of residents from nearby downtown condominiums who wanted the amplified music hushed.¹⁴² The Mayor replied that “residents knew what they were getting into when moving to a downtown, and that the bars and clubs already existed when the condos were built.”¹⁴³ Philip Nicozisis, the leader of NAP, explained that the group “bought into the idea of city living, but never signed up for blaring nightclubs open until 4 [in the morning] and all-day amplified noise at the waterfront.”¹⁴⁴

Here, the key issue was the noise ordinance set in place: that noise should not be heard more than 100 feet from any establishment.¹⁴⁵ The problem, city officials learned, was that some establishments would promise the residents that they would turn down the music, but the residents were still able to hear it from their condominiums.¹⁴⁶ Ultimately, it turned into a gigantic nuisance in which the only resolution was a call to the police.¹⁴⁷

Understandably, when the standard is “plainly audible,” it becomes extremely subjective and varies from person to person.¹⁴⁸ Many subjective noise ordinances seek to control excessive noise that is of such character that it annoys or disturbs a person with normal sensitivities.¹⁴⁹ Accordingly, it is important for governments to determine the relationship between what is an annoyance and what rises to the level of an actual complaint.¹⁵⁰

138. *Id.*

139. *Id.* These restrictions interfere with the business environment as Florida establishments thrive off of holding these events for tourists, which also entice seasonal residents. *Id.*

140. *About the Mayor*, CITY OF W. PALM BEACH, <http://wpb.org/mayor-muoio> (last visited Oct. 9, 2015).

141. Andrew Abramson, *West Palm Beach Groups Struggle for Balance Between Lively Downtown vs. Quiet Condos*, PALM BEACH POST (Jan. 5, 2011, 4:14 PM), <http://www.palmbeachpost.com/news/news/west-palm-beach-groups-struggle-for-balance-between/nLnyN>.

142. *Id.*

143. *Id.*

144. *Id.* (alteration in original).

145. Susan Spencer-Wendel, *Is Clematis Bar Being Singled Out for Noise Restrictions*, PALM BEACH POST (Mar. 12, 2011, 5:18 PM), <http://www.palmbeachpost.com/news/news/is-clematis-bar-being-singled-out-for-noise-restri/nLqmy> (“For the downtown area—from Tamarind Avenue to North Flagler Drive and from Banyan Boulevard to Okeechobee Boulevard—an ‘unreasonably loud’ noise is defined as plainly audible at a distance of more than 100 feet from the property line of the property where the sound originates.”).

146. Abramson, *supra* note 141.

147. *Id.*

148. Chanaud, *supra* note 8.

149. *Id.*

150. *Id.*

In *Daley v. City of Sarasota*,¹⁵¹ the court held that “[t]he City may regulate amplified sound subject to strict guidelines and definite standards closely related to permissible governmental interests.”¹⁵² Nevertheless, any such regulation may not be subject to arbitrary enforcement.¹⁵³ Therefore, a noise ordinance cannot be overbroad or vague so as to violate due process.¹⁵⁴ Conversely, Jacksonville Beach is a city in Florida that has an objective decibel-based ordinance where unnecessary noises that “are not measurable by the sound pressure level meter[, which] may be excessive” are prohibited and may be subject to a sworn complaint.¹⁵⁵

Following the closing of ONAC, the primary responsibility to enforce noise shifted to state and local governments. Each year, as noise pollution becomes more of a priority, governments are struggling to find a balance between enacting regulations and the ability to properly enforce them. Noise complaints are a tricky business, especially when it involves a commercial

151. *Daley v. City of Sarasota*, 752 So. 2d 124 (Fla. Dist. Ct. App. 2000).

152. *Id.* at 127.

153. *Id.*

154. *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1262 (11th Cir. 2007).

155. JACKSONVILLE BEACH, FLA., CODE OF ORDINANCES § 18-4 (2014), https://www.municode.com/library/fl/jacksonville_beach/codes/code_of_ordinances.

Noises prohibited; unnecessary noise standard; statement of intent; sworn complaint required.

(a) Some sounds may be such that they are not measurable by the sound pressure level meter or may not exceed the limits of Table I or II, but they may be excessive, unnatural, prolonged, unusual and are a detriment to the public health, comfort, convenience, safety, welfare and prosperity of the residents of the city.

(b) Noises prohibited by this section are unlawful notwithstanding the fact that no violation of section 18-3 is involved, and notwithstanding the fact that the activity complained about is exempted in section 18-3(g). Thus, the following acts, among others, are declared to be loud, disturbing and unnecessary noises in violation of this chapter, but said enumeration shall not be deemed to be exclusive:

(1) The sounding of any horn or signaling device on any automobile or other vehicle, except as a danger warning; the creation by means of any signaling device of any unreasonably loud or harsh sound; the sounding of any signaling device for any unnecessary and unreasonable period of time; and the unreasonable use of any signaling device.

(2) The using, operating or permitting to be placed, used or operated any radio, television, tape or record player, amplifier, musical instrument, or other machine or device used for the production, reproduction or emission of sound, any prolonged sounds made by people, and the keeping of any animal or bird which by causing frequent or long continuous noise in such manner as to disturb the public peace, quiet and comfort of the neighboring inhabitants or at any time with greater intensity than is necessary for convenient hearing for the person or persons who are in the room, vehicle or chamber in which such sound emitter is operated and who are voluntary listeners thereto. Quieter standards are expected during nighttime hours.

(3) Any person making a complaint under this section shall be required to sign a sworn complaint prior to an arrest being made, otherwise no such complaint will be honored.

Id.

company. When enforcing a complaint, it is imperative that the officer be able to document everything completely, right down to crossing his T's and dotting his I's.

D. *Common Law: Allegretto*

Allegretto, which may be used in the fourth movement in a symphony, is diminutive and fast-paced.¹⁵⁶

Nuisance is defined as, “[a] condition, activity, or situation (such as loud noise or foul odor) that interferes with the use or enjoyment of property.”¹⁵⁷ The nuisance doctrine is fact intensive and can significantly vary from case to case.¹⁵⁸ The two primary categories that make up the doctrine of nuisance are: public and private.¹⁵⁹ A private nuisance is defined as an act that affects an individual, whereas a public nuisance affects the rights of a larger community.¹⁶⁰

Although the doctrine of nuisance has been overshadowed and is somewhat inconsequential, the common law doctrine is important to examine because it is still available when legislative controls are lacking.¹⁶¹ Nuisance law allows a person to recognize that there is an alternative remedy from legislative land-use controls, and that it is one of judicial review.¹⁶² The general rule of nuisance is that “an owner is at liberty to use his property as he sees fit, without objection or interference from his neighbor, provided such use does not violate an ordinance or statute.”¹⁶³ However, as there usually is, there is a limitation to this general rule. “[S]ic utere tuo ut alienum non laedas” is a common maxim that means “one must so use his property as not to injure that of another.”¹⁶⁴ But it is important to note that not every annoyance provides a legal remedy.¹⁶⁵ In fact, the courts have determined this point by whether the premises were reasonably used under the circumstances.¹⁶⁶ For instance, a nuisance may merely be a right thing in a wrong place, like “a pig in the parlor instead of the barnyard.”¹⁶⁷

156. *Allegro*, NAXOS: THE WORLD'S LEADING CLASSICAL MUSIC GROUP, <http://www.naxos.com/education/glossary.asp?char=A-C#> (last visited Oct. 10, 2015) (select “Allegro”).

157. BLACK'S LAW DICTIONARY 1233 (10th ed. 2014).

158. See generally *Bove v. Donner-Hanna Coke Corp.*, 258 N.Y.S. 229, 231 (App. Div. 1932).

159. *CALLIES ET AL.*, *supra* note 25, at 14.

160. *Id.* at 15.

161. *Id.* at 6.

162. *Id.* at 7.

163. *Bove*, 258 N.Y.S. at 231.

164. *Id.*

165. *Id.* at 232.

166. *Id.*

167. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

Normally, noise ordinances are the most effective way to regulate noise, but there are positive characteristics of nuisance regulation.¹⁶⁸ The first, and probably most compelling, is that there are virtually no First Amendment issues.¹⁶⁹ Similarly, local governments do not have to deal with excessive noise complaints and fewer individuals would bring actions because of the amount of money it takes to litigate a case in court.¹⁷⁰ Nuisance law could also free up code enforcement officials and reduce the number of hearings because complainants would have to seek relief through the judicial system.¹⁷¹

Though there are some relatively positive aspects of nuisance law, the benefits do not substantially outweigh the burdens.¹⁷² Nuisance law is retroactive; it grants relief once a person has already been inconvenienced.¹⁷³ Additionally, the doctrine is very case specific, which clashes with community expectations of consistent noise enforcement.¹⁷⁴ With nuisance law being subjective with no clear standards, a person cannot really define what noise will or will not be considered a nuisance without spending time and money litigating.¹⁷⁵

Likewise, the covenant of quiet enjoyment is a common law doctrine that insures an owner or tenant against a disturbance of his or her right to possess or use property.¹⁷⁶ In considering the facts of a case, a court of equity must seek to balance the right of the plaintiffs to quiet enjoyment of their home with the opportunity of a business, restaurant, or nightclub to operate.¹⁷⁷ Noise creates many confrontations between residents, but the quiet enjoyment doctrine is not a guarantee of a noise-free premises.¹⁷⁸ “[U]nder the law, a covenant of quiet enjoyment is only an assurance against a defective title Thus, there is no breach of the covenant for quiet enjoyment *unless* there

168. Aaron C. Dunlap, *Come on Feel the Noise: The Problem with Municipal Noise Regulation*, 15 U. MIAMI BUS. L. REV. 47, 69 (2006).

169. *Id.* See also Andrew E. Forshay, *The First Amendment Becomes a Nuisance: Arcara v. Cloud Books, Inc.*, 37 CATH. U. L. REV. 191, 217 (1987) (“[T]he [Supreme] Court makes clear that it will not allow the first amendment to be used as a device to foster illegal conduct and escape state regulations.” (alteration in original)).

170. Dunlap, *supra* note 168.

171. *Id.*

172. *Village of Euclid*, 272 U.S. at 388.

173. See, e.g., *Bove v. Donner-Hanna Coke Corp.*, 258 N.Y.S. 229 (App. Div. 1932) (Plaintiff had already suffered discomfort and annoyance by the time she sought relief in court.).

174. See *CALLIES ET AL.*, *supra* note 25, at 11, 15.

175. See *id.* at 8, 15–16.

176. BLACK’S LAW DICTIONARY 444 (10th ed. 2014).

177. Christine A. Corcos, “*Who Ya Gonna C(S)ite?*” *Ghostbusters and the Environmental Regulation Debate*, 13 J. LAND USE & ENVTL. L. 231, 245 (1997) (“Objecting neighbors would have to demonstrate that the noise, traffic, and general disruption in the area substantially limit their quiet enjoyment of their property. Once the release takes place however, it affects the entire city and becomes a public nuisance.”).

178. EDWARD H. RABIN ET AL., *FUNDAMENTALS OF MODERN PROPERTY LAW* 49, 52, 54–55 (6th ed. 2011).

be actual constructive eviction of the lessee.”¹⁷⁹ Nonetheless, the covenant of quiet enjoyment is not a guard against interference by third parties;¹⁸⁰ if the source of the noise is also in the same building, the complainant can always take the business establishment to court and potentially get a preliminary injunction.¹⁸¹

Despite the fact that common law doctrines are still available, they prove to be ineffective remedies. Even though noise abatement has not been perfected, regulating noise through ordinances is still preferred.

II. CONSTITUTIONAL CHALLENGES: THE OVERTURE¹⁸²

The United States Constitution states that “Congress shall make no law . . . abridging the freedom of speech. . . .”¹⁸³ This law extends to the state and local governments through the Fourteenth Amendment.¹⁸⁴ In addition to the dilemma described earlier in this Note, local governments must also be wary of Constitutional challenges, such as those based on First Amendment rights.¹⁸⁵

The First Amendment prohibits an abridging of speech,¹⁸⁶ however, “[n]ot every restriction on speech necessarily constitutes an ‘abridging’ of the right.”¹⁸⁷ A regulation that is (1) content-neutral, (2) narrowly tailored to serve a governmental interest, and (3) allows “ample alternative channels for communication,” will be upheld even if there are reasonable restrictions put on the time, place, and manner of the protected speech.¹⁸⁸ Furthermore, if the regulation passes all three elements, then the forum the speech takes

179. Ira Meislik, *What Is This Thing Called Quiet Enjoyment? (In the Context of Commercial Leases)*, MEISLIK & MEISLIK: BUSINESS AND REAL ESTATE LAW (Aug. 5, 1997), http://www.meislik.com/articles/quiet_enjoyment_commercial_leases (emphasis added) (quotation) (alteration adopted).

180. *Id.*

181. RABIN ET AL., *supra* note 178, at 52, 55.

182. *Overture*, NAXOS: THE WORLD’S LEADING CLASSICAL MUSIC GROUP, <http://www.naxos.com/education/glossary.asp?char=M-O#> (last visited Oct. 10, 2015) (select “Overture”).

183. U.S. CONST. amend. I.

184. U.S. CONST. amend. XIV, § 1.

185. CALLIES ET AL., *supra* note 25, at 1–2. *See also* State v. Catalano, 104 So. 3d 1069, 1078 (Fla. 2012); Dara Kam, *Turn up the Justin Timberlake; Florida Noise Law Struck Down*, PALM BEACH POST (Dec. 13, 2012, 6:22 PM), http://www.palmbeachpost.com/news/news/state-regional-govt-politics/turn-up-the-justin-timberlake-florida-noise-law-st/nTWSp/#_federated=1. In *Catalano*, the defendant’s argument was that “the case [went] beyond traffic law.” *Id.* (alteration in original). He further argued, “It really does go to freedom of speech issues. (The legislators) are throwing their dragnet way too far and overregulating. It’s just a case of overregulating things.” *Catalano*, 104 So.3d at 1078. Ultimately, the Florida Supreme Court “rejected the state’s argument that the law is justified because it protects the public from excessively loud noise on public streets.” *Id.*

186. U.S. CONST. amend. I.

187. JEROME A. BARRON & C. THOMAS DIENES, *FIRST AMENDMENT LAW IN A NUTSHELL* 3 (4th ed. 2008).

188. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

place in is rendered insignificant.¹⁸⁹ In analyzing the regulation, the first question that the court will ask is, what was the government's purpose in enacting the instant law?¹⁹⁰ The Court has held, "The government's purpose is the controlling consideration."¹⁹¹ This prong is easy to overcome. The regulation will be deemed content-neutral if the purpose is "unrelated to the content of expression,"¹⁹² regardless of an incidental effect on some speakers, or it regulates expressive activity, but is "*justified* without reference to the content of the regulated speech."¹⁹³ If the first prong is met, the court will then look to determine if the second prong of this three-prong test has been sufficiently met. The government "ha[s] a substantial interest in protecting its citizens from unwelcome noise,"¹⁹⁴ including, "traditional public forums [such] as city streets and parks."¹⁹⁵ Furthermore, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"¹⁹⁶ But the Court also expressly states that a regulation that restricts time, place, and manner may not place a burden on "substantially more speech" than what is actually necessary to achieve the government interest.¹⁹⁷

The last prong in the three-prong test requires that the government "leave open ample alternative channels of communication."¹⁹⁸ Hence, the opposing party must "show [] that the remaining avenues of communication are inadequate,"¹⁹⁹ burdensome, or the regulation is so severe that it leaves the speaker with no other means of expression.²⁰⁰ Provided that all three prongs are met, the government will uphold the regulation in question. Finally, "[t]he overbreadth doctrine prohibits the Government from banning

189. *Id.* at 791 ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Id.* (quoting *Clark*, 468 U.S. at 293)).

190. *Id.* ("The principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

191. *Id.*

192. *Id.*

193. *Id.* (quoting *Clark*, 468 U.S. at 293) (emphasis added).

194. *Id.* at 796 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984)). See *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

195. *Ward*, 491 U.S. at 796 (alteration in original).

196. *Id.* at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). See also *Clark*, 468 U.S. at 297.

197. *Ward*, 491 U.S. at 799 (holding that "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid . . . because . . . the government's interest could be adequately served by some less-speech-restrictive alternative.").

198. *Id.* at 802 (Marshall, J., dissenting).

199. *Id.*

200. *State v. Catalano*, 104 So. 3d 1069, 1080 (Fla. 2012).

unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.”²⁰¹

III. A HOLISTIC APPROACH TO NOISE MANAGEMENT: THE MASH-UP DEBATE

In 2013, composer Steve Hackman debuted a mash-up of “Brahms V. Radiohead” performed by the Colorado Music Festival Orchestra.²⁰² The thirty-four-year-old was able to bring together the sounds of “an iconic German pianist” who has been dead for well over 100 years and a “critically hailed British alternative rock band” in a compelling marriage.²⁰³ In order to craft this masterpiece, Hackman explained that he had to start at the basics and look at the chromatics of both Brahms’ *Symphony No. 1* and Radiohead’s *OK Computer*.²⁰⁴ He had to examine “the pathos of both, and the balance and tension and relief of both.”²⁰⁵ Essentially, Hackman was able to take a holistic approach and create unpredictable results by bridging the gap of pop and classical music.

Similarly, in order to mash-up the increasingly divided communities in Florida, municipalities need to take a comprehensive holistic approach to manage and police noise. First, developers must start from the very beginning of the planning process—as Hackman did in composing. Cities should identify tensions that may arise in the community and attempt to pinpoint a balance between. In order to do this, local governments must get noise management firms involved from the moment a business lays its foundation or starts moving onto its premises. Secondly, the mitigation actions should extend to sound design and be integrated throughout the entire development process.

In practice, the holistic approach will require sound planners to look over proposals for any business in a mixed-use development that will potentially “flourish” during “season”—Florida’s tourist season that is. When examined at its earliest stages, sound planners can analyze existing infrastructure and determine how future developers, businesses, residents’ and the surrounding

201. *Id.* at 1077 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)). See *City of Daytona Beach v. Del Percio*, 476 So. 2d 197, 202 (Fla. 1985) (an example of a recent Florida Supreme Court case that emphasized the overbreadth doctrine and how to analyze it). In *City of Daytona Beach*, the defendants argued that Florida statute section 316.3045(1)(a), which set forth standards for radios in vehicles was held to be facially unconstitutional. *Id.*

202. Ricky O’Bannon, *The Mash-up Debate*, BALTIMORE SYMPHONY ORCHESTRA, <http://bsomusic.org/stories/the-mash-up-debate.aspx> (last visited Oct. 11, 2015) (describing a composer’s mix of pop and classical music).

203. Jay Cridlin, *Composer Steve Hackman Brings Radiohead-Brahms Mash-up to the Florida Orchestra*, TAMPA BAY TIMES (Jan. 28, 2015, 8:56 AM), <http://www.tampabay.com/things-to-do/stage/composer-steve-hackman-brings-radiohead-brahms-mash-up-to-the-florida/2215412>.

204. *Id.*

205. *Id.*

community can mitigate noise pollution. Inviting sound planners into the equation will also allow them to consider soundscape, analogous to landscape but aural-based, instead of geographical. Municipalities should be able to define their goals and objectives and by including sound planners, officials will be able to obtain a glimpse into noise and sound maps, providing an essential perspective in applying the holistic approach.

If a city is considering revamping their downtown district, sound planners should be included from the outset. Moreover, the permitting process must also include consultations with sound planners; questions regarding the noise limits, maintaining surrounding neighborhoods quality of life, and any other mitigating factors should be examined and defined. For example, if a restaurant that has leased the first floor of a condominium building applies for a special-use permit regarding live or amplified music, the first requirement should include sound planners to consider any compatibility issues. If condominium documents do not control noise and the city initially failed to realize that the condominium building was improperly soundproofed, the only remedy that residents will have is to call the police. Although the mixed-use developments are extremely desirable, these developments will start to have unpredictable, negative effects if local governments do not start properly planning.

In addition, state and local governments should proactively seek out companies that will soundproof a business before any permits are issued. Acoustic consultants should work with clients (architects, homeowners, developers, government officials, lawyers, and others) to control or enhance the acoustic properties of structures, spaces, and events.

Furthermore, local governments would not preclude business from opening, thereby avoiding constitutional issues. On the contrary, enforcement officers would be encouraging any businesses to open itself to the public, but properly plan to abate noise before it moves in. Therefore, obtaining a permit would be less expensive and more efficient by providing noise management documentation in the application process.

As municipalities continue to work on enacting new ordinances to regulate community noise, they should also look deeply into noise abatement factors. Despite difficulties local governments face, it is commonly known that a city or county noise ordinance provides more relief for noise complaints than any statutory regulations.

CONCLUSION: THE FINALE

As the State of Florida continues to increase in size, local governments should start addressing the compatibility issues in mixed-use developments. In essence, as local governments are encouraging residents to move

downtown, developers and city planners need to accommodate for the great mash-up.

As local governments continue to work to enact new ordinances to regulate community noise, they should take a holistic approach by focusing on balancing competing tensions, pathos, and relief of both. This is more than considering environmental assessments. Sound planners should be involved in the earliest stages—assisting in defining acoustic goals and objectives—and integrate acoustic planning into all future growth. The Florida Constitution states, “[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provisions shall be made by law for the abatement of . . . excessive and unnecessary noise. . . .”²⁰⁶ Only when local governments begin to confront noise regulation in a holistic and comprehensive manner will they create a thriving masterpiece of Florida’s mixed-use communities. After all, it is just good development!

206. FLA. CONST. art. II, § 7.