IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

	*	
WILLIAM F. HASSAY, JR.,		
	*	
Plaintiff,		
	*	
v.		Civil Action No. 13-cv-01076-ELH
	*	
MAYOR AND CITY COUNCIL OF OCEAN CITY, MARYLAND, *et al*.	*	
	*	
Defendants.	*	

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR AN ORDER PRELIMINARILY ENJOINING ENFORCEMENT OF DEFENDANT OCEAN CITY'S UNCONSTITUTIONAL NOISE ORDINANCE

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PRELIMINARY STATEMENT

In the summer of 2012, Plaintiff William F. Hassay, Jr.—an accomplished concert violinist—was threatened with arrest, up to three months imprisonment, and a $500 fine for playing his violin in Ocean City, Maryland on the town boardwalk—an established public forum. The police officers who issued this warning were employees of Defendant Mayor and City Council of Ocean City, Maryland ("**Ocean City**"). They were purportedly enforcing a noise ordinance that deems all music played on the boardwalk from an instrument or device to be "unreasonably loud," and thus criminally prohibited, if it is "audible" from a distance of 30 feet.

Ocean City's 30-foot audibility restriction on music violates the First Amendment to the United States Constitution (the "**First Amendment**"). It is content-based, is not narrowly tailored, and leaves Mr. Hassay and other performers with inadequate alternative channels for communication on the boardwalk. To put the restriction in perspective, the jingling of a dog collar is audible from more than 30 feet away on the boardwalk. Thus, the restriction effectively prohibits performers on the boardwalk from playing any music that anyone could hear.

Prior to filing this action, Mr. Hassay notified Ocean City that its 30-foot audibility restriction on music is unconstitutional and asked Ocean City to cease enforcing it and consider its repeal.[1] He has not received a response to this request. Thus, to prevent further deprivation of his and others' rights, Mr. Hassay was forced to file this action and move the Court for an order preliminarily enjoining the Defendants from enforcing the 30-foot audibility restriction on music while the matter is litigated. Mr. Hassay, by his undersigned attorneys, respectfully submits this memorandum of law in support of that motion.

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[1] *See* Declaration of Deborah A. Jeon, Exhibit A (Letter dated August 17, 2012 from counsel for Mr. Hassay to Mayor Richard W. Meehan and Council President James S. Hall). Two of Mr. Hassay's fans also contacted Ocean City to object to Mr. Hassay's treatment. (*See* Declaration of Brian Rudolph, ¶¶ 6-7; Declaration of Mary Lou Rowe, ¶ 7.)

FACTUAL BACKGROUND

A. The Ocean City Boardwalk

Ocean City is a municipality in Maryland located along the coast of the Atlantic Ocean.[2] The easternmost street in Ocean City, running north to south, is Atlantic Avenue—a wooden pedestrian walkway that is commonly known as the "**Boardwalk**." The Boardwalk is approximately three miles long and 50 to 75 feet wide, and is located between the ocean beach and the paved streets of Ocean City. At various points, which are commonly known as the "**Street Ends**," the Boardwalk intersects with paved streets that run east to west.

The Boardwalk is a popular tourist attraction, particularly during the summer months. It is lined with shops and other attractions for pedestrians. Thus, Ocean City describes the Boardwalk as "three miles of concentrated, family-friendly fun" that is "like a buffet . . . [o]r a shopping mall[,] [o]r a stage[,] [o]r all of them put together."[3] "At night the [B]oardwalk comes to life with rides, arcades, [and] performers."[4] "[A] host of performers materialize daily to put on shows, create balloon sculptures, draw caricatures, or just strum a guitar."[5]

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[2] Pursuant to Rule 201 of the Federal Rules of Evidence, this Court may take judicial notice of information "generally known within [the Court's] territorial jurisdiction." Fed. R. Evid. 201. "Geographical information is especially appropriate for judicial notice." *United States v. Johnson*, 726 F.2d 1018, 1021 (4th Cir. 1984); *see Chase v. Town of Ocean City*, 825 F. Supp. 2d 599, 603-05 (D. Md. 2011) (taking judicial notice of basic geographic information relating to Ocean City and the Boardwalk).

[3] Ocean City, Maryland, "Orientation Map," http://ococean.com/explore-oc/orientation-map; *see also* Ocean City, Maryland, "Ocean City Maryland Boardwalk," http://ococean.com/things-to-do/boardwalk.

[4] Ocean City, Maryland, "Things To Do in Ocean City Maryland," http://ococean.com/things-to-do.

[5] Ocean City Police Department, "OCPD Public Advisory Regarding Street Performers and the New Noise Ordinance," *available at* http://oceancitymd.gov/police/media/?p=892.

B. Mr. Hassay and His Musical Performance

One of the individuals who, until recently, performed on the Ocean City Boardwalk is Plaintiff William F. Hassay, Jr.

Mr. Hassay is a classically trained violinist whose career as a professional musician spans over 34 years and includes work as a First Violinist with the Alabama Symphony Orchestra, as well as performances in numerous other orchestras. (Affidavit of William F. Hassay, Jr. ("**Hassay Aff.**"), ¶ 1.)

From 1995 until 2012, Mr. Hassay played his violin on the Boardwalk as much as five to six nights each week during the summer months. (*Id*., ¶¶ 7, 13.) Mr. Hassay's performance involves blending the "voice" of his violin with various styles of prerecorded background music played from a portable speaker. (*Id*., ¶¶ 5-6.) Mr. Hassay limits the volume on his speaker so that the music does not drown out his unamplified violin. (*Id*., ¶ 5.)

Over the years, Mr. Hassay has garnered numerous fans of his performances. (*See, e.g.*, Declaration of Brian Rudolph; Declaration of Mary Lou Rowe.) In addition, he has received up to $25,000 of donations each summer season, which supplements his income as a substitute teacher in the Anne Arundel County public school system. (Hassay Aff., ¶¶ 3, 9.)

C. Ocean City's Noise Ordinance

During his tenure as a "street performer" at the Ocean City Boardwalk, Mr. Hassay has been subject to a number of ordinances that regulate his performances, including a permitting scheme that was later enjoined as unconstitutional, and an amplification ban that was later rescinded. (*Id.*, ¶ 11.) *See also Chase v. Town of Ocean City*, 825 F. Supp. 2d 599, 630 (D. Md. 2011) (enjoining Ocean City's permitting scheme as in violation of street performer's First Amendment right to free speech).

Among other restrictions, the Code of the Town of Ocean City, Maryland (the "**Ocean City Code**") currently limits the locations in which performances may be conducted, confining them to the "areas of the [B]oardwalk . . . encompassed within the extended boundaries of the [S]treet [E]nds." Ocean City, MD, Code, Part II, Ch. 62, Art. I, § 62-5(b)(1)[6]; *see also* Ocean City Police Department, "OCPD Public Advisory Regarding Street Performers and the New Noise Ordinance," *available at* http://oceancitymd.gov/police/media/?p=892 ("**OCPD Public Advisory**"). Within those approximately 30 by 30 foot spaces, performers are further prohibited from performing within 10 feet of any tables, business entrances or exits, and a tram lane, and from obstructing pedestrian traffic, entrances to the beach, and trash receptacles. Ocean City, MD, Code, Part II, Ch. 62, Art. I, § 62-5(b)(3), (4); *see also* OCPD Public Advisory. The cumulative effect is that there are very few spaces that street performers may lawfully occupy. (Hassay Aff., ¶ 10; *see also id.*, Ex. A (depiction of areas where performances are permitted).)

In addition to limiting the locations available for performances, the Ocean City Code provides that it is "unlawful" for any performer to "[v]iolate the town's noise ordinances, after being warned by a police officer." Ocean City, MD, Code, Part II, Ch. 62, Art. I, § 62-5(b)(6).

Ocean City's noise ordinances appear in the Ocean City Code at Part II, Chapter 30, Article V (collectively, the "**Noise Ordinance**").

The Noise Ordinance makes it "unlawful for any person to make, continue or cause to be made or continued any unreasonably loud noise or any noise which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of others within the corporate limits of Ocean City." Noise Ordinance, Div. 2, § 30-271.

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[6] An electronic version of Ocean City's Code is available at: http://library.municode.com/index.aspx?clientId=12833&stateId=20&stateName=Maryland. For the convenience of the Court, copies of relevant code sections are also in the appendix hereto.

Violation of the Noise Ordinance is a misdemeanor criminal offense "punishable by a fine of not more than $500.00 and/or [imprisonment] for a term not to exceed three months, or both." Ocean City, MD, Code, Part II, Ch. 1, § 1-8(b).[7]

The Noise Ordinance enumerates certain acts which are "declared to be unreasonably loud noises" and thus criminally prohibited by the ordinance. Noise Ordinance, Div. 2, § 30-272.

In February of 2012, Ocean City amended the Noise Ordinance so that the enumerated acts prohibited by the Noise Ordinance now include:

> The using of, operating of or permitting to be played, used or operated any radio receiving set, musical instrument, phonograph, sound amplification system or other machine or device for the producing or reproducing of sound on or directed toward a public beach, the boardwalk, streets or other public ways at any time in such a manner as to be plainly audible at a distance of 30 feet from the source of such sound which is deemed to be unreasonably loud so as to disturb the peace, quiet and comfort of other persons or at a louder volume than is necessary for the convenient hearing of the individual carrying the instrument, machine or device or those individuals immediately adjacent thereto and who are voluntary listeners thereto.

Id. § 30-272(2)b. Plaintiff refers to this provision as the "**30-Foot Audibility Restriction**."

Ocean City interprets this new 30-Foot Audibility Restriction as providing that "[a]ny person playing a musical instrument or operating a sound amplification device that can be heard at a distance of 30 feet (roughly the width of the boardwalk) or greater is in violation of the Noise Ordinance." OCPD Public Advisory; *see also id.* ("Performances must be in compliance with the Noise Ordinance (30' Amplification, Musical Instruments . . .)"). The 30-Foot Audibility Restriction applies year-round, at all times of the day and night.

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[7] Elsewhere, the Ocean City Code suggests that a performer's violation of the Noise Ordinance, after being warned by a police officer, would be a "municipal infraction" that is punishable by a fine of not less than $25.00 nor more than $1,000.00. Ocean City, MD, Code, Ch. 62, Art. I, § 62-5(b) [Sic. Should be (c)]; *id.* Ch. 1, § 1-8(c). But Ocean City interprets the Ocean City Code as providing that performers who violate the Noise Ordinance are "subject to a penalty of three months in jail and/or a $500 fine," which are the punishments applicable to misdemeanors offenses. OCPD Public Advisory.

The 30-Foot Audibility Restriction was enacted after consideration during four sessions of Ocean City's Mayor and City Council between December 2011 and February 2012. The deliberations during these sessions reveal that the 30-Foot Audibility Restriction originated out of a concern regarding noise that was being emitted from the stores that line the Boardwalk. For example, during the December 13, 2011 session, Mayor Richard Meehan stated:

> **Mayor Richard Meehan**: One item that . . . I know we've all had discussions with it is the amplification on the Boardwalk and I think it does have an effect on people's experience when they walk by certain locations and then there's just all-of-a-sudden you know they get blasted by music that's coming out of those particular locations. And I know that's not the intent because I think the Code reads that you're supposed to have all speakers facing within the store itself but I'm not sure that's what's being done and if it is, ya know what? Quite frankly, it's not working. And, Mr. President, I'd really like us to schedule that for discussion and do something if the Council agrees with the Code to address that problem because that would go a long way towards addressing some of the concerns because that's just so noticeable and so objectionable to most people that are walking by the Boardwalk and it becomes a battle of the sounds, one guy gets louder and the next guy's got to get louder than that and the next thing you know you've got certain areas that you know it really is objectionable, I think, so I would hope we could talk about that.[8]

Video: Mayor and City Council Work Session (Dec. 13, 2011), at Part 1, 00:14:15-00:15:17 http://www.oceancitymd.gov/City_Clerk/videofiles/20111213.html.

The following month, during the January 17, 2012 session, City Solicitor Guy Ayres introduced an amendment to the Noise Ordinance for a "first reading." This original amendment would have imposed a 50-foot audibility restriction on music played from instruments and devices. *See* Town of Ocean City Clerk Office, "Agenda: Mayor and City Council – Regular Session," at 40, *available at* http://www.oceancitymd.gov/City_Clerk/Agendas/2012/0117.pdf. That distance limitation was further reduced to 30 feet during the following exchange:

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[8] These deliberations continued at the Mayor and City Council's January 10, 2012 session. Video: Mayor and City Council Work Session (Jan. 10, 2012), at Part 2, 01:12:42-01:49:58. http://www.oceancitymd.gov/City_Clerk/videofiles/20120110a.html.

Councilwoman Margaret Pillas: The 50 foot is in place really for . . . I mean it starts off for properties that are in residential areas and also cars and things like that. But to me it seems to me that the benches that sit out in front of these stores are like 30 feet away and it could really affect people that are sitting on that bench that are just – ya know that music is just piling into them. And it also, on either side of the store you have within 30 feet . . . you'll have two other stores that their own businesses can be involved and that people will walk right by them, or they can't even make a purchase in that store because the music is so loud people can't hear to make the sales. So I would rather see it shortened, just for the Boardwalk, not for the rest of the Town. That would be considered.

Mayor Richard Meehan: Captain Kirstein could you come up please? I know we had this conversation and I talked to the Captain and he was going to go up and walk that area to make a determination whether he thought 50 feet was the right distance. Captain?

Police Captain Kevin Kirstein: Good evening ladies and gentlemen. In conversation with Jesse we did talk about that. The Mayor advised after the last meeting. 50 feet is roughly two and a half stores. And I heard it from the Mayor, I've heard it from Councilwoman Pillas, I've heard it from Jesse, I actually heard it from my wife that perhaps 50 feet is too far. So one of the things Jesse and I did look at, and I believe we came up with 30 feet was about the distance the width of the boardwalk, so that would cover out to where the benches are. It would also give you about a one store length buffer so we certainly would support the 50 feet as well, uh I'm sorry, the 30 feet as well. Perhaps 50 feet in this zone is too far.

Councilman Jim Hall: Would you like to amend your motion to…?

Councilwoman Margaret Pillas: I amend the motion for the 30 foot rule.

Councilman Jim Hall: And will you amend your second Mary?

Councilwoman Mary Knight: Yes.

Councilman Jim Hall: Okay. Jesse?

Jesse Houston [Director of Planning and Community Development]: I checked with Harry today with the boardwalk dimensions and everything and it basically ranges from 33 feet to 40 feet from the property line on the west side of the boardwalk to the east edge of the boardwalk. So it's a range between about 33 and 40 feet.

Councilman Jim Hall: So 30 would cover it?

Jesse Houston: Yeah.

Councilman Jim Hall: Good. Okay. Alright.

Councilwoman Margaret Pillas: Thank you.

Councilman Jim Hall: Mary, you okay?

Councilwoman Mary Knight: Yeah.

Councilman Jim Hall: Okay. I have a motion to second as amended. All those in favor? Let the record show the vote was unanimous.

Video: Mayor and City Council Work Session (Jan. 17, 2012), at 00:51:01-00:53:35 http://www.oceancitymd.gov/City_Clerk/videofiles/20120117.html.

Weeks later, at the February 6, 2012 session, City Solicitor Ayers re-introduced the amendment to the Noise Ordinance City for a "second reading." During that session, the 30-Foot Audibility Restriction was again approved by the Mayor and City Council, following a brief discussion that included the following comment from Councilwoman Margaret Pillas:

> **Margaret Pillas**: I just want to comment that it was that we have a 50 foot rule in town that's really great for people who live in homes and that if you're 50 feet away and if noise are heard that are disturbing people can call the police officers and they'll come and quiet it down but sitting on the Boardwalk the 50 feet rule would not work (pause) you can change the whole complexion of a business transaction if somebody's right there within 50 feet of distracting you and a lot of noise and foul language and whatever we're trying to get control of down there so this will help us. If you're sitting on a bench and you felt that the music was too loud for you to sit on the bench and enjoy yourself you would have some options here to call the officers and they would have to turn the volume down so we thought 30 feet would be better than 50.

Video: Mayor and City Council Work Session (Feb. 6, 2012), at Part 2, 00:30:28-00:31:13 http://www.oceancitymd.gov/City_Clerk/videofiles/20120206.html.

D. Mr. Hassay's Threatened Arrest

By the time Mr. Hassay began performing at the Boardwalk in the summer of 2012, the 30-Foot Audibility Restriction had become effective.

On June 18, 2012, Mr. Hassay was performing on the Boardwalk when he was approached by an Ocean City police officer. (Hassay Aff., ¶ 14.) The officer told Mr. Hassay that he was in violation of the Noise Ordinance and instructed him to turn his music down. (*Id*.) When Mr. Hassay asserted that he had a First Amendment right to continue performing, the officer called his supervisor, Corporal Richard Wawrzeniak, who arrived soon after. (*Id*., ¶¶ 15-16.) Corporal Wawrzeniak said that he would pass on Mr. Hassay's concerns to his superiors, and asked Mr. Hassay to follow up with him by email in a couple of days. (*Id*., ¶ 18.)

After Corporal Wawrzeniak and the other officer departed, Mr. Hassay continued to perform for the rest of the night and the following day without incident. (*Id*., ¶ 19.) On June 22, 2012, however, Mr. Hassay was once again approached by an Ocean City police officer, Sergeant James Grady, who told Mr. Hassay that he was in violation of the Noise Ordinance. (*Id*., ¶ 20.) Sergeant Grady was soon joined by four other officers, including Lieutenant Mark A. Pacini. (*Id*., ¶ 22.) Lieutenant Pacini advised Mr. Hassay that he had "used up [his] warnings" and that he risked receiving a citation if he continued performing. (*Id*.)

Fearful of arrest, Mr. Hassay immediately ceased performing, left the Boardwalk, and has not returned. (*Id*., ¶ 23.)

APPLICABLE STANDARD

The question before the Court is whether to issue a preliminary injunction to protect the First Amendment rights of Mr. Hassay and other performers during the pendency of this case. Rule 65 of the Federal Rules of Civil Procedure gives the Court authority to do so.

When deciding whether to issue a preliminary injunction, the Court is guided by four factors: (1) the likelihood that the plaintiff will succeed on the merits of his claims; (2) the likelihood that the plaintiff will suffer irreparable harm if the preliminary injunction is denied;

(3) the likelihood that the government will be harmed if the preliminary injunction is granted; and (4) the public interest. *See Pashby v. Delia*, No. 11-2363, 2013 U.S. App. LEXIS 4516, at *22-23 (4th Cir. Mar. 5, 2013) (explaining factors for consideration).

Where, as here, a plaintiff asserts a First Amendment violation,[9] the second, third, and fourth factors are each presumed to favor issuance of a preliminary injunction because the plaintiff's "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976); a government "is in no way harmed by issuance of an injunction that prevents [it] from enforcing unconstitutional restrictions," *Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011); and "upholding [the plaintiff's] constitutional rights is in the public interest," *Newsome v. Albermarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003).

Accordingly, the only relevant factor here is the likelihood that Mr. Hassay will succeed on the merits of his First Amendment claims.[10] *See, e.g.*, *Chase v. Town of Ocean City*, 825 F. Supp. 2d 599, 616 (D. Md. 2011) ("I shall focus primarily on whether plaintiff can demonstrate a likelihood of success on the merits."). As to this factor, Ocean City bears the burden of persuasion. *United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *see also Chase*, 825 F. Supp. 2d at 616 ("[B]ecause Ocean City's ordinances

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[9] Mr. Hassay's complaint also alleges that the Defendants selectively enforce the Noise Ordinance in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (*See* Complaint, ECF No. 1.) While Mr. Hassay reserves all of his rights to continue to pursue that claim in this case, Mr. Hassay's motion for a preliminary injunction focuses only on his First Amendment claims.

[10] Although the Court need not reach this far, the potential for harm to Ocean City is further reduced here by the narrow scope of the preliminary injunction that Mr. Hassay is requesting, which would only enjoin enforcement of the 30-Foot Audibility Restriction, not the Noise Ordinance as a whole.

impose restrictions on speech and/or expressive conduct, which are subject at least to intermediate scrutiny, the City bears the burden of persuasion as to this issue.").

ARGUMENT

I. MR. HASSAY IS LIKELY TO SUCCEED ON THE MERITS OF HIS FIRST AMENDMENT CLAIMS.

Under the Free Speech Clause of the First Amendment, "government entities are strictly limited in their ability to regulate private speech in . . . traditional public fora."[11] *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (quotation omitted); *see also Steinburg v. Chesterfield County Planning Comm'n*, 527 F.3d 377, 384 (4th Cir. 2008) ("In the traditional public forum . . . speaker's rights are at their apex.").

Although municipalities may impose time, place, and manner restrictions on speech, those restrictions must be "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Where a restriction fails this threshold test, the restriction "slips from the neutrality of time, place, and circumstance into a concern about content" and "may be sustained only if the government can show that the [restriction] is a precisely drawn means of serving a compelling interest." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536, 540 (1980) (quotation omitted). This standard is known as "strict scrutiny." *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) ("If the regulation were content based, it would be . . . subject to strict scrutiny.").

Even if a restriction is content neutral, however, it still must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for

[11] The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." The Supreme Court has construed the Due Process Clause of the Fourteenth Amendment to the United States Constitution as making this prohibition applicable to municipal ordinances. *See Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

communication of the information" that a speaker wishes to communicate. *Ward*, 491 U.S. at 791. This standard is known as "intermediate scrutiny." *See Alameda Books*, 535 U.S. at 440 ("[M]unicipal ordinances receive only intermediate scrutiny if they are content neutral.").

Here, there can be no dispute that Ocean City's Noise Ordinance, which directly restricts musical performances on the Boardwalk, regulates private speech. *See Ward*, 491 U.S. at 790 ("Music, as a form of expression and communication, is protected under the First Amendment."). It also cannot be disputed that the Ocean City Boardwalk is a "traditional public forum." *See Frisby v. Schultz*, 487 U.S. 474, 480 (1988) ("[W]e have repeatedly referred to public streets as the archetype of a traditional public forum."); *see also Chase v. Town of Ocean City*, 825 F. Supp. 2d 599, 615 (D. Md. 2011) ("I am readily satisfied that the [Ocean City] boardwalk constitutes a traditional public forum."); *Markowitz v. Mayor & City Council of Ocean City*, No. MJG-95-1676 (D. Md. June 22, 1995) (applying standards for a public forum to Boardwalk).[12]

The starting point for the Court's analysis, then, is whether the Noise Ordinance warrants strict or intermediate scrutiny.[13] Because the Noise Ordinance is not content neutral, the Court should apply strict scrutiny. But even if the Court applied intermediate scrutiny, Ocean City could not satisfy its burden of establishing that the Noise Ordinance complies with the First Amendment. Accordingly, Mr. Hassay is likely to succeed on his claims.

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[12] A copy of the Court's opinion in *Markowitz* is included in the appendix hereto.

[13] Mr. Hassay's complaint asserts separate facial and "as-applied" First Amendment challenges to Ocean City's Noise Ordinance. But the Court may analyze these claims together because "[t]he same legal standard analysis applies to facial and as-applied challenges to time, place and manner restrictions." *Ross v. Early*, 758 F. Supp. 2d 313, 325 (D. Md. 2010).

A. The Noise Ordinance is Not Content Neutral and, Therefore, the Court Should Apply Strict Scrutiny.

"The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. The touchstone for this inquiry is whether the regulation is "justified without reference to the content of the regulated speech." *Id.* However, "the mere assertion of a content-neutral purpose [will not] be enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). Rather, the Court must "examine[ ] whether the government's content-neutral justification reasonably comports with the content distinction on the face of the regulation." *Clatterbuck v. City of Charlottesville*, No. 12-1149, No. 12-1215, 2013 U.S. App. LEXIS 3651, at *14 (4th Cir. Dec. 5, 2012). This prevents the government from disguising a content based restriction beneath a content neutral justification. *See Saia v. New York*, 334 U.S. 558, 562 (1948) (recognizing that "[a]nnoyance at ideas can be cloaked in annoyance at sound").

On its face, Ocean City's Noise Ordinance imposes greater restrictions on music played from instruments or devices (which is prohibited if it is audible from a distance of 30 feet at any time) than it does on other speech, including yelling, shouting, hooting, whistling and singing (which are prohibited if audible from a distance of 50 feet between midnight and 7 a.m.). *Compare* Noise Ordinance, Div. 2, § 30-272(2)b. *with id.*, § 30-272(3)b.

But Ocean City has not offered, and cannot offer, any explanation for this distinction. Ocean City justifies the Noise Ordinance by reference to its interest in protecting the "comfort, repose, health, peace or safety of others." Noise Ordinance, Div. 2, § 30-271. To be sure, that is a valid justification for regulating noise as a general matter. But it does not provide a justification for treating music played from instruments or devices differently than other sources

of sound. Ocean City could not have legitimately concluded that music that is just audible at 30 feet (which is prohibited) is more disturbing to the "comfort, repose, health, peace or safety" of the inhabitants of or visitors to Ocean City than "yelling" or "hollering" that is audible at even greater distances. (*See* Declaration of Gary Ehrlich ("**Ehrlich Dec.**"), Ex. A, at 6 ("We are unaware of any reason why noise from musical instruments or . . . devices would be considered more annoying to the average person than would noise from singing, yelling, etc.").)

Given that Ocean City's proffered justification for the Noise Ordinance does not support the content distinction created by the 30-Foot Audibility Restriction, the Noise Ordinance cannot be considered content neutral. *See, e.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426-27, 428-31 (1993) (finding city regulation that prohibited use of freestanding newsracks to distribute commercial publications but not other publications was not content neutral even though the city justified the regulation by reference to a general interest in eliminating "safety concerns and visual blight" where "commercial and noncommercial publications . . . [we]re equally responsible for those problems" and the city failed to offer "a neutral justification for its selective ban on newsracks" that distribute commercial publications); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513, 516 (1981) (finding that where city enacted ordinance by which "[t]he use of onsite billboards to carry commercial messages related to the commercial use of the premises [wa]s freely permitted, but the use of otherwise identical billboards to carry noncommercial messages [wa]s generally prohibited," yet "d[id] not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city," the distinction "t[ook] the regulation out of the domain of time, place, and manner restrictions"); *see also Montgomery v. State*, 69 So. 3d 1023, 1030-32 (Fla. Dist. Ct. App. 2011) (holding state law

was not content neutral where "music . . . amplified so as to be heard twenty-five feet away from a vehicle would violate the statute, while a sound truck blaring 'Eat at Joe's' or 'Vote for Smith' . . . would be authorized").

Thus, the Noise Ordinance warrants strict scrutiny. Ultimately, though, the Noise Ordinance cannot withstand even intermediate scrutiny, for reasons to which we now turn. And because it cannot withstand intermediate scrutiny, the Noise Ordinance necessarily fails under the more demanding strict scrutiny standard as well. *See, e.g.*, *Chase*, 825 F. Supp. 2d at 626 n. 23 ("Because the City has not met its burden of justifying [§] 62-5(b)(10) under intermediate scrutiny, I need not determine whether the provision is . . . subject to strict scrutiny.")

B. <u>The Noise Ordinance is Unconstitutional Under Even Intermediate Scrutiny</u>.

1. The Noise Ordinance is Not Narrowly Tailored.

Assuming *arguendo* that the Noise Ordinance is a content-neutral time, place, and manner restriction (as discussed above, it is not), it still must be "narrowly tailored serve a significant governmental interest" in order to satisfy the First Amendment. *Ward*, 491 U.S. at 798. This means that the Noise Ordinance cannot be "substantially broader than necessary to achieve the government's interest." *Id.* at 800; *see also Frisby*, 487 U.S. at 485 ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."). When determining whether this narrow tailoring requirement is satisfied, the Court "must, of course, take account of the place to which [the Noise Ordinance] appl[ies]" including "the pattern of its normal activities." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 771 (1994) (quotation omitted).

Here, Ocean City enacted the Noise Ordinance pursuant to its authority to control "excessive" noise, and justifies the ordinance by reference to its interest in protecting the

"comfort, repose, health, peace or safety of others." Ocean City, MD, Code, Part I, Title XIV, § C-1403.B. (municipal charter); Noise Ordinance, Div. 2, § 30-271 (referring to interest). Ocean City's decision to later amend the Noise Ordinance to include the 30-Foot Audibility Restriction was not informed by any acoustical analysis. (*Cf.* pp. 6-8, *supra* (recounting Mayor and City Council deliberations).) Based only on lay opinions, the Noise Ordinance now treats all music played from instruments and devices on the Boardwalk that is audible at 30 feet as "excessive" and disturbing to the "comfort, repose, health, peace or safety of others." But that is plainly not the case, especially given the festival-like environment of the Boardwalk.

For evidence, the Court need not look any farther than the face of the Noise Ordinance. The Noise Ordinance prohibits "yelling, shouting, hooting, whistling and singing" on the Boardwalk that is audible at a distance of 50 feet between the hours of midnight and 7 a.m. Noise Ordinance, Div. 2, § 30-272(3)b. The necessary implication is that that those sounds are not considered excessive when they are audible at only 30 feet (and even farther), even during late-night hours. As discussed above, there is no legitimate basis for Ocean City to treat music played from instruments or devices any differently. (*See* Ehrlich Dec., Ex. A, at 6 ("We are unaware of any reason why noise from musical instruments or . . . devices would be considered more annoying to the average person than would noise from singing, yelling, etc.").)

Moreover, when Mr. Gary Ehrlich—a professional acoustical engineer—conducted an acoustical analysis of the ambient sound at four of the Street Ends where street performers are permitted on the Boardwalk, he found that "virtually all ambient sounds are audible at distances far greater than the [N]oise [O]rdinance limit of 30 feet." (*Id.*) Examples of sounds he observed that were audible at distances greater than 30 feet include people talking, a skateboard rolling, a bicycle coasting, a car door closing, and a dog collar jingling. (*Id.*, at 3.)

Mr. Ehrlich's findings demonstrate that music played from instruments or devices that is just audible at a distance of 30 feet (or even farther) would not be any louder than the sounds created by the normal pattern of activity at the Boardwalk, which sounds are not excessive, by definition. *See United States v. Doe*, 968 F.2d 86, 89 (D.C. Cir. 1992) (explaining that while government has an interest in preventing "excessive" noise in parks, "'excessive' noise by definition means something above and beyond the ordinary noises associated with the appropriate and customary uses of the park"); *see also Deegan v. City of Ithaca*, 444 F.3d 135, 143 (2d Cir. 2006) (holding that an ordinance that prohibited all noise audible at 25 feet "restrict[ed] considerably more than is necessary to eliminate excessive noise" where "the decibel level of speech that would comply with the 25 foot rule was often lower than the decibel level generated by the foot steps of a person in high heeled boots, conversation among several people, the opening and closing of a door, the sounds of a small child playing on the playground, or the ring of a cell phone"); *U.S. Labor Party v. Pomerleau*, 557 F.2d 410, 413 (4th Cir. 1977) (holding that a "city has no legitimate interest in banning amplified political messages which do not exceed the sounds encountered daily in the most tranquil community").

By prohibiting music that is not excessive, the Noise Ordinance sweeps more broadly than is necessary to achieve its purpose. And it does so substantially. In the course of his acoustical analysis, Mr. Ehrlich found that, given the ambient noise at the Boardwalk, music that produced a sound level of 68.7 dBA at 30 feet would be "appropriate" and "not greater than is necessary to provide good listening conditions at 15 feet away." (Ehrlich Dec., Ex. A, at 7.) But to comply with the Noise Ordinance, "the music would have to produce a sound level of approximately 30.8 to 40.4 dB[A] at 30 feet"—more than 30 decibels below the level required

for good music listening conditions. (*Id*.) For reference, this sound level "is noticeably quieter than conversational speech inside a suburban house and . . . most refrigerators." (*Id*., at 8.)

Mr. Ehrlich thus concluded that it is "infeasible" for any musical performer to comply with the Noise Ordinance. (*Id*. at 6.) Simply put, "the sound of all musical instruments and . . . devices would be audible at 30 feet." (*Id*.) The Noise Ordinance is therefore tantamount to a complete ban on playing music from instruments and devices on the Boardwalk. *See, e.g.*, *Lilly v. The City of Salida*, 192 F. Supp. 2d 1191, 1194 (D. Colo. 2002) (holding that a noise ordinance that imposed a "25 feet limitation on the audibility of sound measured from [a] property line [wa]s so limiting that it constitute[d] a complete ban on the use of amplified sound for any form of speech"). As such, it is a quintessential example of a restriction on speech that is not narrowly tailored. *See City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. . . . [T]he danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech."); *Frisby*, 487 U.S. at 485 ("A complete ban can be narrowly tailored, but only if *each* activity within the proscription's scope is an appropriately targeted evil.") (emphasis added).

Indeed, Ocean City could have readily chosen substantially less restrictive means to achieve its goal of controlling excessive noise. A review of the Ocean City Code reveals that the 30-Foot Audibility Restriction is by far the most restrictive noise limitation currently in effect in Ocean City. In other contexts, Ocean City has adopted either audibility standards with much lengthier distance limitations or sound level standards with decibel limitations that exceed the maximum sound level that could comply with the 30-foot audibility restriction for music on the Boardwalk, which, according to Mr. Ehrlich, is 30.8 to 40.4 dBA measured at 30 feet. *Cf.* Noise

Ordinance, Div. 3, § 30-301 (prohibiting any dancehall or nightclub from producing noise "in excess of 65dB(A) in the daytime hours and 55 dB(A) in the nighttime hours [measured] at the adjoining property line" or that "is plainly audible at a distance of 50 feet from the establishment"); *id.*, Div. 4, §§ 30-323 through 30-326 (prohibiting operation of any powered mechanical or hand tools creating noise "in excess of 79 decibels" and any other tools "used in construction, drilling, repair, alteration, renovation, maintenance, dredging, demolition, and all related practices . . . creating noise in excess of 89 decibels at the adjoining property line").

Perhaps most notably, in residentially zoned districts, Ocean City prohibits sound levels "in excess of 65 dB(A) during the daytime hours and 55 dB(A) during the nighttime hours," *id.*, Div. 6, § 30-367(1), measured at the boundary of the source, *id.* § 30-366(a). Given that Ocean City's interest in controlling noise "is perhaps at its greatest when [it] seeks to protect the well-being, tranquility, and privacy of the home," *Ward*, 491 U.S. at 796, its decision to impose greater restrictions on music from instruments and devices on the Boardwalk is paradoxical.

"Government may not regulate expression in such a manner that a substantial portion of the burden of speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. But that is exactly what Ocean City has done with the 30-Foot Audibility Restriction. The Noise Ordinance is not narrowly tailored to eliminate sound that is excessive. For this reason alone, it violates the First Amendment and, thus, Mr. Hassay is likely to succeed on his First Amendment claims.

2. There Are Not Adequate Alternative Channels for Communication.

In addition to the narrow tailoring requirement, the Noise Ordinance must also "leave open ample alternative channels for communication of the information" that a speaker wishes to communicate. *Ward*, 491 U.S. at 791. The focus of this inquiry is whether there are adequate alternatives "within the forum in question," here, the Boardwalk. *Chase*, 825 F. Supp. 2d at 625

(quoting *Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640, 655 (1981)); *see also id*. at 625-26 ("[T]he [Supreme] Court has long maintained that one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.") (quoting *Reno v. ACLU*, 521 U.S. 844, 880 (1997)).

As discussed above, the Noise Ordinance effects a total ban on Mr. Hassay and other performers playing music from musical instruments or other devices on the Boardwalk. (*See* Ehrlich Dec., Ex. A, at 6.) This ban all but forecloses "one of the oldest forms of human expression." *Ward*, 491 U.S. at 790. The Supreme Court has recognized that music has a special "capacity to appeal to the intellect and to the emotions." *Id.* As a result, there are not, and could not be, any adequate alternatives available for performers to communicate their intended messages on the Boardwalk, especially for performers such as Mr. Hassay who have significant skills in the musical arts. *Cf. City of Ladue*, 512 U.S. at 54-59 (finding city ordinance that prohibited residential signs except for residence identification signs, "for sale" signs, and safety warnings did not leave adequate alternative channels of communication because "residential signs have long been an important and distinct medium of expression").

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court (i) grant Plaintiff's motion, (ii) enter an order preliminarily enjoining the Defendants from enforcing the 30-Foot Audibility Restriction during this case, and (iii) award such other relief as is proper.

Dated: April 10, 2013
Washington, DC

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ONE WORLD ONE FAMILY NOW, INC., et al.	*	
Plaintiffs	*	
vs.	*	CIVIL ACTION NO. MJG-95-1401
MAYOR & CITY COUNCIL OF OCEAN CITY, et al.	*	
Defendants	*	
* * * * * * * * *		
JESSE N. MARKOWITZ, et al.	*	
Plaintiffs	*	
vs.	*	CIVIL ACTION NO. MJG-95-1676
MAYOR & CITY COUNCIL OF OCEAN CITY, et al.	*	
Defendants	*	
* * * * * * * * *		

MEMORANDUM OF DECISION

On June 13, 1995, the Constitutional claims[1] in these consolidated cases were tried before the Court without a jury. The Court has heard the evidence, reviewed the exhibits, considered the materials and memoranda submitted by the parties, and had the benefit of the arguments of counsel. The Court now issues this Memorandum of Decision as its findings of fact and conclusions of law in compliance with Rule 52(a) of the Federal Rules of Civil Procedures.

[1] Claims arising under the Maryland Open Meetings Law, State Government Code § 10-504, et seq. and Section C-409 of the Ocean City Code were bifurcated for separate trial if necessary.

I. BACKGROUND

It suffices to note that Ocean City, Maryland, the state's only ocean front resort, is long and narrow, oriented North to South. The Boardwalk extends from South 2nd Street to 33rd Street. The City itself extends north to the Delaware State Line at 146th Street.

Prior to May 4, 1995, Ocean City did not allow "hawking and peddling" on any city street or public way, boardwalk, beach or any parking lot. See Ocean City Code § 72-4 and § 61-4(59). There was an exception to this general prohibition for

> [a]ny person who shall peddle, solicit, distribute or hawk within the limits of Ocean City any merchandise or literature in pursuit of a religious or political activity, or for the purpose of communicating on religious, political or philosophical issues, and not for private profit or other purely commercial purpose . . . .

Ocean City Code § 72-5(A)(2).

This "Excepted Class" was permitted to "peddle, solicit, distribute or hawk" in (essentially) any public area from September 15 to June 15 of the following year. From June 16 to September 14, members of the Excepted Class could engage in such activities in specified areas. These permitted areas included the blocks of the Boardwalk from 9th to 10th Streets, the four blocks at the end of the Boardwalk, and city streets north of Tenth Street and west of Baltimore Avenue, a street one block west and parallel to the Boardwalk up to 33rd Street. Ocean City Code § 72-5.1(a).

The Plaintiffs do not contend that these pre-May 4, 1995 restrictions are subject to attack on any basis. All concerned were, and are, willing to abide by these restrictions.

On May 4, 1995, the Ocean City Council passed the Ordinance at issue, restricting the Excepted Class in what Plaintiffs contend is an unconstitutional manner.

II. THE ORDINANCE

Ordinance 1995-9 ("the Ordinance") was introduced and passed by the City Council of Ocean City on May 4, 1995. The City approved the Ordinance as an emergency measure and, with the approval of the Mayor, implemented it immediately upon passage.

The Ordinance amended Ocean City Code § 72-5 and (as here relevant) prohibited, from April 15 to October 15, all "peddling," "soliciting," "distributing" and "hawking" on the entire Boardwalk, as well as all streets, beaches and parking lots on the east side (i.e., East of Baltimore Avenue to 33rd Street and East of Coastal Highway form 33rd to 146th Streets). The Ordinance permitted "peddling and soliciting" for noncommercial purposes on the west side but allowed use of a table or stand (no longer than three square feet) to promote "religious, political or philological (sic)[2] beliefs."

[2] This is an apparent typographical error in view of the § 72-5(A)(2) reference to philosophical issues. It is unlikely that the Ocean City Council singled out the love of learning and literature to the exclusion of other subjects.

III. THE PLAINTIFFS

A. The Markowitz Plaintiffs

Plaintiffs Jesse N. Markowitz ("Markowitz"), the chairman of the Libertarian Party of Maryland, wishes to solicit signatures needed to maintain official recognition of the party in Maryland. Party workers also wish to distribute literature expressing the party's views.

Plaintiffs James Starck ("Starck") and Brian Hamilton ("Hamilton") are street performers. Starck puts on portable marionette shows and Hamilton juggles. Both obtain compensation for their performances by having readily available a receptacle for those watching who are inclined to provide a "tip" for the entertainment. While no doubt enjoying their work and pleasing their audience, Starch and Hamilton are very interested in the financial returns for their efforts.

B. The One World Plaintiffs

A California Certificate of Status issued October 22, 1993 certifies that "One World One Family Now (Non-Profit Religious Corporation)" was incorporated in that state on October 19, 1990. On the sparse record before this Court, it will be assumed that One World is a bona fide non-profit corporation. However, there has been no evidence presented as to the use of the funds generated by its widespread sales activities. Nor does the record reflect, other than Plaintiff Porecki's acknowledgement

that he receive a "stipend," the manner or extent to which those who operate One World's widespread sales locations are compensated.

This Court has a good deal of skepticism about the purported "spiritual" motivation of the One World Plaintiffs and notes that, for all practical purposes, they operate a movable store that sells T-shirts and some books.

The T-shirts are colorful, contain an environmental message and discordantly, have pictures of the Capitol Building, the Lincoln, Jefferson and Washington Monuments together with the names "Washington, D.C." and "Ocean City, Maryland." The books are on environmental topics. Porecki also distributes literature about One World. To display the wares, Porecki sets up a table at the edge of the Boardwalk, placed so that the table itself does not extend into the flow of pedestrian traffic.

C. Objectives Of All Plaintiffs

All Plaintiffs wish to "do their thing" where the people are in Ocean City on the Boardwalk rather than in the far less frequented areas permitted under the Ordinance.

IV. ARE PLAINTIFFS ENGAGED IN FIRST AMENDMENT PROTECTED ACTIVITY?

There appears to be no doubt that the Markowitz Plaintiffs are engaged in activities subject to First Amendment protection.

The activities of Markowitz and the Libertarian Party are quintessential protected free speech. Stack and Hamilton, street performers, are also obviously entitled to the First Amendment protection.

The One World Plaintiffs present a more troublesome situation. It appears true that in today's world a T-shirt can be a vehicle for transmitting political and other expressive messages. See Gaudiya Vaishnava Soc. v. City of San Francisco, 952 F.2d 1059, 1064 (9th Cir. 1990) (applying the First Amendment to the sale of commercial products, like, T-shirts, on which an expressive message is "inextricably intertwined"). In addition, the use of a table to display the shirts is protected in the same way that the Supreme Court has protected the use of a newsrack to sell newspapers. See City of Lakewood v. Plain Dealer Pub. Co., 108 S.Ct. 2138, 2150 (1988); see also International Caucus of Labor Committees v. City of Montgomery, 856 F.Supp. 1552, 1557 (M.D. Ala. 1994); One World One Family Now v. City of Key West, 825 F. Supp. 1005, 1009-10 (S.D. Fla. 1994).

However, a vendor cannot simply place a political or religious message on any commercial item and thereby obtain the protection of the First Amendment. The First Amendment does not provide a loophole through which a merchant can cynically avoid regulation of commercial activity. The T-shirts sold by One World contain an expressive "message" but also have a souvenir aspect which is in no way related to any message. The Court need not now determine whether the commercial or speech aspect of the

T-shirts predominate. The environmental message is larger but the geographic location and monument pictures are prominent and are included on the T-shirts to make them souvenir items and enhance their commercial appeal.[3]

In this case, the Court need not decide whether One World's sales of its "souvenir T-shirts" are subject to the same protection as would be T-shirts expressing ideas only. For, even if not engaged in protected activity, the One World Plaintiffs will have the benefit of the relief to which the Markowitz Plaintiffs are entitled. Also, it is likely that even if not themselves engaged in protected activity the One World Plaintiffs could assert the rights of nonparties whose free speech rights are affected by the Ordinance in order to invalidate the Ordinance. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

V. SUBSTANTIVE DISCUSSION

On its face and as applied, the Ordinance restricts various forms of expressive activity protected by the First Amendment. The Ordinance's prohibition of "soliciting" includes solicitation for charitable causes which enjoys First Amendment protection. See Village of Schaumburg v. Citizens for a Better Environment, 100 S.Ct. 826, 834 (1980) ("[O]ur cases long have protected speech even though it is in the form of . . . a solicitation to

[3] The Court notes that commercial T-shirt vendors, such as Harley Davidson licensees, include location information as a sale feature.

pay or contribute money.") (internal quotations omitted). The restriction on "soliciting" also includes street performers who accept donations and political organizers seeking petition signatures[4]. The Ordinance restricts "distributing" of literature in support of political and religious causes.[5] Further, the Ordinance restricts and limits the use and size of tables or stands which facilitate free speech.

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[4] According to the testimony of Markowitz, when a Libertarian Party volunteer attempted to gather signatures on the boardwalk, an Ocean City police officer indicated that such activity was not permitted on the boardwalk and threatened the volunteer with arrest.

[5] At the trial, Ocean City argued that the ordinance restricts "distributing" of literature for commercial purposes but not "leafletting" for noncommercial purposes. However, when the City Council considered the Ordinance on May 4, 1995, the City Solicitor, who is also counsel for Ocean City in this case, stated that the Ordinance would affect the distribution of campaign literature. (Special Sess. of the Mayor & City Council at 2 (May 4, 1995) (Pls.' Ex. 55.))

At a subsequent City Council meeting, a pastor of a church reported that City officials had told him that the Ordinance covered the handing out of gospel tracts. The City Solicitor promised to prepare a set of enforcement "rules" indicating that the Ordinance restricted leafletting for commercial reasons but not for religious, political or philosophical purposes. (Reg. Sess. of the Mayor & City Council at 35 (June 5, 1995) (Pls.' Ex. 57.))

The City never submitted such enforcement rules to the Court. Indeed, the existence of such rules would harm not help the City's legal position. Permitting noncommercial but not commercial speech is patently content-based discrimination which, as discussed infra, subjects the City to far more exacting judicial scrutiny than content-neutral discrimination.

More importantly, the language of the Ordinance simply does not permit the distinction which the City now claims exists. The word "distributing" does not contain within in it a notion of the intent of the person doing the distributing. The Court must assume that the Ordinance restricts all forms of "distributing," including the distribution of literature for political, religious and philosophical purposes.

A. Ocean City's Justifications

Ocean City carries the burden to justify its restrictions on First Amendment rights. The City raises two defenses. First, the City claims that the Ordinance is permitted under the rationale of Heffron v. International Society of Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981). Alternatively, the City claims that the Ordinance is a proper "time, place, or manner" restriction.

1. The Heffron Defense

In Heffron, the organizers in charge of the Minnesota State Fair banned all solicitation and distribution of materials inside the fair except from rented booths. Id. at 2562. The Supreme Court upheld the ban, relying on the differences between the fair and a public street. Id. at 2566. The state fair was a temporary event, held for the special purpose of exhibiting products and attracted huge crowds over just twelve days. Id. The Court noted that the fair rented booths to any group on a first-come, first-serve basis. Id. at 2562. In addition, the groups could engage in their First Amendment activity directly outside of the fair. Id. at 2567.

Ocean City claims that its Boardwalk is more like a state fair than a public street. Accordingly, it argues, it should be permitted to restrict First Amendment as it would if it were a state fair. That argument fails for several reasons.

First, to the extent that the Heffron defense has any merit, it applies only to the Boardwalk and not to any of the City's streets, sidewalks and other public areas affected by the Ordinance. Ocean City provided no evidence to indicate that the areas other than the Boardwalk deserve or require special status. Thus, Ocean City can use Heffron only to defend the Ordinance as it applies to the Boardwalk.

Second, the Boardwalk is not precisely the same as a state fair. Like the fair, the Boardwalk is an attraction which draws large numbers of people. However, unlike the fair, the Boardwalk is not a temporary event. It is open to the public 365 days each year and 24 hours each day. Moreover, unlike a fair, the Boardwalk is used for transportation and not just as a destination or place to browse. Furthermore, unlike a fair midway which can be expected to be crowded at all times it is open, the Boardwalk has pedestrian density which varies tremendously by virtue of the time of year, day of week, time of day and location.

Third, in Heffron, the fair organizers made booths available to the various commercial and noncommercial groups on a first-come, first-serve basis. Ocean City has provided no similar opportunity for such groups on the Boardwalk.[6] Moreover, while

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[6] The fact that the Plaintiffs can rent space from private property holders on the boardwalk is not the same. Unlike the fair organizers who themselves offered booths to groups in a nondiscriminatory fashion, Ocean City places Plaintiffs in the hands of private persons who might discriminate against certain activity, e.g., because it economically competes with their businesses or promotes an unpopular cause.

the groups in Heffron had the alternative to solicit and distribute outside of the fair, the restrictions of the Ocean City Ordinance extend well beyond the Boardwalk itself.

Finally, and most importantly, the special characteristics and limited purpose of the state fair in Heffron did not automatically allow the organizers to ban First Amendment activity. Instead, the Supreme Court simply factored the event's special nature into its "time, place, or manner" calculation. Thus, the City must still justify its ordinance as a proper "time, place and manner" restriction.

2. Time, Place, Or Manner" Defense

The Supreme Court summarized the "time, place, or manner" defense in Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3069 (1984):

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they 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 of communication of the information.

The Court assumes, for the purpose of this time, place or manner analysis, that the Ordinance is content neutral. Thus it is assumed arguendo, that it can be "justified without reference to the content of the regulated speech."

a. Significant governmental interest

The City's restriction of free speech must serve a "significant" governmental interest. Ocean City's only professed interest is avoidance of pedestrian congestion.[7]

While the City undoubtedly can bar the obstruction of public sidewalks when it occurs, to justify a prophylactic regulation, Ocean City must demonstrate a valid special concern about pedestrian movement on particular public property. After all, there is always the possibility that free speech can block pedestrian movement if enough people exercise their free speech rights at the same time and place.

In Heffron, the government's interest in controlling pedestrian movement was significant only because of the extremely large crowds at the fair, the narrow pathways, and the special purpose of the event. Heffron, 101 S. Ct. at 2565 ("[T]he significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.") The Supreme Court distinguished the state fair from a regular public street which is "continually open, often uncontested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where

[7] In its Memorandum in Opposition to Request for Preliminary Injunction, Ocean City stated that its interests were "pedestrian safety and traffic flow, aesthetic concerns to avoid look of open bazaar on the walkways, and concern with impact on merchants with shops fronting the boardwalk." Id. at 5. However, at the trial, Ocean City claimed that its sole interest was avoiding pedestrian congestion. The City provided no evidence in support of other interests. Therefore, the Court cannot consider them.

people may enjoy the open air or the company of friends and neighbors in a relaxed environment." Id. at 2566.

Ocean City has provided no evidence to suggest that its public streets are unusual in any way. The only evidence presented by the City concerned the Boardwalk which, as noted above, does bear some (but not total) resemblance to a fair. Thus, Ocean City does not have an interest sufficient to justify a prophylactic regulation on its streets. The Ordinance, as it applies to the streets[8], is for this reason alone unconstitutional.

b. "Narrowly tailored"

Ocean City has a substantial interest in regulating crowd movement on the Boardwalk. Even so, the Ordinance must be "narrowly tailored". While the Ordinance need not be the least restrictive alternative, it cannot "burden substantially more speech than is necessary to further the government's legitimate interests." Ward v. Rock Against Racism, 109 S. Ct. 2746, 2757-58 (1989).

To meet its burden, the City must explain how its interest in avoiding pedestrian congestion is jeopardized by each form of expressive activity banned on the Boardwalk. See, e.g., Multimedia Publishing Co. v. Greenville-Spartanburg Airport, 991 F.2d 154, 161 (4th Cir. 1993) (affirming the district court's determination that the governmental interests asserted as

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[8] As distinguished from the Boardwalk.

justification for the ban were post hoc pretextual creations, which were not shown to have been significantly threatened by the conduct banned).

There are four activities targeted by Ordinance 1995-9: soliciting, hawking, peddling and distributing. The City provided the Court with only three instances of congestion caused by soliciting prior to the passage of the Ordinance. Two entertainers, on two separate occasions, attracted large crowds which blocked pedestrian traffic. However, both entertainers were violating the permits they had received under the system which existed prior to the current Ordinance.[9] The City also pointed to the example of a pro-smoking group which gathered signatures and handed out free cigarette lighters. While this activity apparently attracted the attention of people, the City offered no evidence that the activity resulted in significant pedestrian congestion.

The City failed to show any pattern of congestion caused by solicitors. The City did not provide any example of an entertainer who, acting in conformance with his or her permit, substantially blocked or slowed pedestrian traffic. Nor did the City provide any example of congestion caused by a group like One World which sets up small tables on the edge of the Boardwalk.

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[9] One entertainer, a one-man band, had stopped moving in violation of his permit. (Testimony of Kirstein at the Preliminary Injunction Hearing (Transcript at 73.)) The other performer committed "many illegalities" by joining up with three other performers, using knives and fire batons and running an electric wire out of one of the amusement arcades. (Testimony of Mathias at the Preliminary Injunction Hearing (Transcript at 50.))

Also, the City provided no evidence that distributors of materials contributed to pedestrian congestion.

Ocean City need not wait for problems to occur before acting to avoid them. Moreover, the City can consider the combined effect of all vendors, entertainers and distributors on the Boardwalk.

This Court might be able to defer to the reasonable determinations of the Mayor and City Council, made, for example, in the form of legislative findings after a formal or informal examination of the situation, that the expressive activity on the Boardwalk was substantially contributing to pedestrian congestion in a way that posed a real threat to the reasonable progress of pedestrians up and down the Boardwalk. However, the City did not examine the crowds in a systematic or objective way. Nor did it make any legislative findings. Instead, the City simply claimed that the crowds on the Boardwalk resembled those at the Minnesota State Fair in Heffron. The evidence presented to this Court belies that contention. The evidence establishes that the crowds are sparse during many times of the day, even during busy weekends.

Moreover, testimony of the City's own officials indicated that the crowds on the Boardwalk vary significantly (and predictably) by the time of year, time of day, day of week and location. Only in a few places at a few times do the crowds approach the apparently jammed condition which existed at the Minnesota State Fair during the entire twelve days of its operation.

This Court need not, and cannot, tell Ocean City precisely when, where and in what way it can restrict free speech on the Boardwalk. However, a total ban on soliciting, hawking, peddling and distributing from April 15 to October 15 at all times and in all places is vastly overbroad. The Ordinance also unnecessarily bans at least one activity, the handing out of leaflets, which the City has not shown to cause congestion at any time or in any place. The Ordinance unnecessarily prohibits soliciting where and when the density of pedestrians is minimal. The City has not shown that the prior permit system, properly enforced and with minor adjustments, could not equally prevent pedestrian congestion.[10]

c. Ample alternative channels of communication

Unlike the situation presented in Heffron, Plaintiffs here are barred from conducting their expressive activity anywhere near the Boardwalk. Thus, the City has failed to offer Plaintiffs with ample alternative channels of communication.

3. Content neutral or content based?

The Ordinance is not content neutral. It more narrowly restricts speech with a commercial motive than speech with a

[10] This conclusion is even stronger for streets other than the boardwalk. Thus, even if the Court had found that the City had a substantial interest in prophylactically restricting expressive activity on its streets, the Court would find that the total ban on the East Side and the table restriction on the West Side were not narrowly tailored.

noncommercial motive. The Ordinance permits solicitors to use a table or stand only if they use the table to "display items promoting the individual's religious, political or philological[11] beliefs." A solicitor displaying the same items for a commercial purpose could not use a table. Similarly, a person displaying items but not selling them could use a table or stand of any size and operate anywhere in the City including on the Boardwalk. On the East Side, the Ordinance permits entertainers who do not seek donations but not those who do.

The Supreme Court has held that discrimination on free speech based on motive is a content based restriction. In R.A.V. v. City of St. Paul, the Supreme Court found content based an ordinance which criminalized activity only if motivated by bias. 112 S. Ct. 2538, 2545 (1992). Also, the Heffron decision, upon which Ocean City so heavily relies, found the state fair's restrictions content neutral because they included both "commercial" and "charitable" groups. Heffron, 101 S. Ct. at 2564.

Content-based regulations of free speech can be justified only by a compelling reason. However, the City has provided no justification for restricting only commercially motivated activity other than the de minimis alleged extra disruption caused by people while making a payment. In fact, entertainers block the same degree of pedestrian traffic whether they accept

[11] As discussed supra note 3, the City certainly meant to use "philosophical" and not "philological."

donations or not. A table used to display goods obstructs as much as a table which offers those goods for sale. As the Supreme Court stated in City of Cincinnati v. Discovery Network Inc., "the distinction bears no relationship whatsoever to the particular interests that the city has asserted." 113 S. Ct. 1505, 1514 (1993). In City of Cincinnati, the Court rejected a ban on newsracks that held commercial handbills but which allowed newsracks that held newspapers. The city's claimed interests were public safety and aesthetics. Id. at 1510. In Erznoznik v. City of Jacksonville, the Supreme Court analyzed a statute which banned nudity on drive-in movie screens on the basis that the nudity "distract[ed] passing motorists, thus slowing the flow of traffic and increasing the likelihood of accidents." 95 S. Ct. 2268, 2275 (1975). The court stated:

> By singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is strikingly under inclusive. There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist. . . .
>
> Appellee offers no justification, nor are we aware of any, for distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic. Absent such a justification, the ordinance cannot be salvaged by this rationale.

95 S. Ct. at 2275-76.

Because the Ordinance discriminates against commercially motivated speech without any reasonable justification, the Ordinance would be unconstitutional even if it met the test as a proper "time, place or manner" restriction.

V. CONCLUSION

Ocean City has an understandable desire to make its public areas safe and pleasant for its citizens and visitors. However, the Ordnance's sweeping restriction of significant forms of expressive activity violates the First Amendment of the United States Constitution. Ocean City's Ordinance bans, or narrowly restricts, substantial amounts of expressive activity which the City has not shown to affect its purported interest in avoiding pedestrian congestion. At the same time, the Ordinance without justification fails to restrict expressive activities which equally affect pedestrian congestion. This unjustified favoritism requires the Court to apply the most exacting scrutiny to the Ordinance and also leads the Court to suspect that the City's real motives lie elsewhere than pedestrian congestion, e.g., protecting local merchants from unwanted commercial competition from charitable groups.[12]

It may be that Ocean City can pass a valid Ordinance that would ban the activities of some, or all, of the Plaintiffs in these cases. However, Ocean City must first determine the interests it seeks to protect by restricting expressive activity on public property. Then it must determine those forms of expressive activities, if any, that actually harm or substantially threaten those interests. For each targeted

[12] That motive is not necessarily an improper one. However, the Court cannot not decide this case based upon interests the City dos not rely upon.

activity, the City must consider when, where, and how the activity harms or threatens the City's interests and develop an ordinance which directly addresses the evil posed by each activity. Finally, the City must consider alternatives which either leave First Amendment activity unaffected or use means short of total bans.

The process necessary to pass a valid ordinance may take more effort and time than the City would rather spend. Also, it is quite possible that a valid Ordinance would not be passed due to the scope of its coverage. Hence, it remains to be seen whether Ocean City will, in fact, pass another Ordnance that would affect these Plaintiffs.

For the foregoing reasons:

1. Ordinance 1995-9 is hereby declared in violation of the First and Fourteenth Amendments.

2. The Ocean City Code remains in effect (as relevant to this case) as it existed prior to the enactment of Ordnance 1995-9.

3. Plaintiffs' are entitled to a Permanent Injunction as requested.

4. A separate Injunction Order shall be issued.

5. The Court is not now resolving Plaintiffs demands for costs (including legal fees).

6. Plaintiffs may file, but Defendant may oppose, motions seeking costs (including legal fees).

SO ORDERED this 22nd day of June, 1995.

Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ONE WORLD ONE FAMILY NOW, INC., et al.

Plaintiffs

vs. CIVIL ACTION NO. MJG-95-1401

MAYOR & CITY COUNCIL OF OCEAN CITY, et al.

Defendants

* * * * * * * * *

JESSE N. MARKOWITZ, et al.

Plaintiffs

vs. CIVIL ACTION NO. MJG-95-1676

MAYOR & CITY COUNCIL OF OCEAN CITY, et al.

Defendants

* * * * * * * * *

PERMANENT INJUNCTION

For the reasons stated in the Memorandum And Order issued this date:

1. Defendants Mayor and City Council of Ocean City, Maryland, Police Chief David Massey and their respective agents, officers, employees and other acting in concert with them shall not enforce Ordinance 1995-9.

2. This Order does not prohibit the enforcement of any provision of the Ocean City Code other than Ordinance 1995-9.

SO ORDERED this 22nd day of June, 1995.

Marvin J. Garbis
United States District Judge

§ C-1403. - Power to regulate loud noises. (204A)

A. The town shall have the power to regulate and prohibit the use of loudspeakers or other mechanical devices on any boat, ship, plane or vessel of any kind near enough to the shore or beaches at Ocean City to produce or reproduce loud noises which can be heard in or near Ocean City to the discomfort or inconvenience of persons residing or being in Ocean City.

B. The Mayor and City Council may by ordinance regulate and control excessive noise within the corporate limits of the town by any reasonable and necessary means, including (without limitation) the establishment of a permit procedure to ensure that only those owners of real property situated within the corporate limits of the town who exercise due diligence in controlling noise on or emanating from their property shall be permitted to use their property to provide temporary shelter to the town's transient population and temporary residents.

C. There shall be a Noise Control Board consisting of seven (7) members appointed by the Mayor and City Council, each for a term of three (3) years or until their successors are appointed, approved and take office, except that the initial appointments shall be three (3) members for three (3) years, three (3) members for two (2) years and one (1) member for one (1) year. Vacancies shall be filled by the Mayor and City Council for the unexpired term of any member whose term becomes vacant. The compensation of the members of the Board shall be determined by the Council. The Board shall appoint one (1) of its members as Chairman. The Board shall exercise such duties and powers as may be provided in an ordinance adopted pursuant to Subsection B of this section. Proceedings before the Board in any contested case shall be conducted in conformance with the applicable provisions of the State Administrative Procedure Act, Ann. Code of Md., State Government article, tit. 10, subtits. 1—4 (Ann. Code of Md., State Government article, § 10-101 et seq.).

D. Any person aggrieved by a final decision of the Noise Control Board, whether such decision is affirmative or negative in form, may within thirty (30) days of such decision petition the Circuit Court for Worcester County to review the decision upon the record created by the Board. Judicial review shall be conducted in conformance with the applicable provisions of the State Administrative Procedure Act, Ann. Code of Md., State Government article, tit. 10, subtits. 1—4 (Ann. Code of Md., State Government article, § 10-101 et seq.).

(Res. No. 1982-3, 3-15-1982; Res. No. 1986-1, 6-16-1986; Res. No. 2007-2, 10-15-2007)

Sec. 1-8. - Violations and penalties.

(a) *Prohibitions.* It shall be unlawful to violate any of the laws, ordinances or resolutions of Ocean City, Maryland, as same may be, from time to time, adopted, passed or amended by the Mayor and City Council of Ocean City, Maryland; and any violations thereof, unless otherwise provided in this Code, shall be either a misdemeanor or a municipal infraction as particularized herein.

(b) *Misdemeanors.*

(1) Any violation of the following laws, ordinances or resolutions shall be, and they are hereby declared to be, a misdemeanor:

a. Chapter 6: section 6-34(7), (8), (12), (14), (15), (16) and (21).
b. Chapter 18
c. Chapter 30, article V, divisions 2 through 7.
d. Chapter 58, article II.
e. Chapter 58, article III.
f. Chapter 82

(2) Any offender violating any of the provisions of the above enumerated laws, ordinances or resolutions or committing any of the acts therein declared to be unlawful shall, upon conviction thereof, by a court of competent jurisdiction, be deemed guilty of an offense classified as a misdemeanor and be punishable by a fine of not more than $500.00 and/or be imprisoned for a term not to exceed three months, or both.

(c) *Municipal infractions.*

(1) Any person, partnership, corporation, unincorporated association, or other business entity who shall violate any of the provisions of the following laws, ordinances or resolutions or who shall fail to comply therewith, or who shall violate or fail to comply with any such order made thereunder, within the time fixed therefor, shall, for each and every such violation and/or noncompliance respectively, be deemed to have committed a "municipal infraction," punishable by a fine of not less than $25.00 nor more than $1,000.00:

a. Chapter 6 (except as provided in subsection (b) hereof).
b. Chapter 10
c. Chapter 14, article II.
d. Chapter 30: section 30-1
e. Chapter 30, article II, division 2.
f. Chapter 30, article IV.
g. Chapter 30, article V, division 8.
h. Chapter 34
i. Chapter 58, article I.
j. Chapter 90, articles I, III, IV, V, VI.
k. Chapter 66
l. Chapter 70, article V.
m. Chapter 74, articles I and II.
n. Chapter 74, article V.

o. Chapter 78: section 78-121
p. Chapter 90, articles V and V-A.
q. Chapter 90, article VII.
r. Chapter 94, article II.
s. Chapter 94, article III.
t. Chapter 98
u. Chapter 102, article II.
v. Chapter 106, article III, division 2.
w. Chapter 106, article III, division 5.
x. Chapter 106, article III, division 6.
y. Chapter 110, zoning.

(2) Any person, partnership, corporation, unincorporated association, or other business entity who shall be deemed to have committed a "municipal infraction" shall be issued a citation for such violation and/or noncompliance. For the purposes of this section, the following listed officials are authorized by the Mayor and City Council to issue citations to violators:

a. Police officers.
b. Cadets.
c. Animal Control Officers.
d. Fire Marshal.
e. Members of the fire prevention commissions.
f. Fire investigators and fire inspectors.
g. Members of the beach patrol.
h. Building officials.
i. Planning and zoning administrators.
j. Licensing investigators and licensing inspectors.
k. City Engineers and assistants.

A copy of the citation shall be retained by the issuing authority and it shall bear his certification attesting to the truth of the matter therein set forth.

(3) The citation shall contain:

a. Name and address of the person, partnership, corporation, unincorporated association or other business entity charged;
b. The nature of the infraction;
c. The location where and time that the infraction occurred;
d. The amount of the infraction fine assessed;
e. The manner, location and time in which the fine may be paid to Ocean City; and
f. Notice of the right to elect to stand trial for the infraction pursuant to Ann. Code of Md. art. 23A, § 3.

(4) The imposition of one "municipal infraction" citation for any violation and/or noncompliance shall not excuse the violation and/or noncompliance nor permit it to continue; and all such violators guilty of such violation and/or noncompliance shall be required to correct or remedy such violation and/or noncompliance within a reasonable time; and when not otherwise specified, each 24 hours that prohibited conditions are maintained shall constitute a separate "municipal infraction."

(d) *Other relief.* It shall be unlawful for any person to fail and/or refuse to provide proper identification to the issuing authority by providing his (her) name and address. Any person who shall fail and/or refuse to provide his (her) name and address to the issuing authority shall be charged with a violation of this section and upon conviction thereof, by a court of competent jurisdiction, be deemed guilty of an offense classified as a misdemeanor and be punishable by a fine of not more than $1,000.00 and/or be imprisoned for not more than 90 days, or both. In addition to any fines and penalties in subsections (b) and (c) of this section described, the Mayor and City Council of Ocean City, Maryland, may avail itself of any and all civil and equitable remedies for the purpose of stopping continuing offenses and violations of any chapter of this Code.

(e) *Continuing offenses.* Each day an offense continues is a separate offense in the absence of provisions to the contrary.

(Ord. No. 1982-28, §§ 106-1—106-4, 6-7-1982; Ord. No. 2000-4 (emer.), 2-15-2000; Ord. No. 2000-7 (emer.), 3-14-2000; Ord. No. 2008-9, 5-19-2008; Ord. No. 2009-18, 8-3-2009; Ord. No. 2012-22, 6-18-2012)

State law reference— *Violations of ordinances and resolutions, Ann. Code of Md. art. 23A, § 3.*

Sec. 30-271. - Prohibited.

It shall be unlawful for any person to make, continue or cause to be made or continued any unreasonably loud noise or any noise which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of others within the corporate limits of Ocean City.

(Code 1972, § 67-1)

Sec. 30-272. - Prohibited noises enumerated.

The following acts, among others, are hereby declared to be unreasonably loud noises in violation of this division:

(1) The sounding of any horn or signaling device on any automobile, motorcycle or other vehicle on any street, way, avenue or alley or other public place of Ocean City, except as a danger warning; the creation by means of any such signaling device of any unreasonably loud or harsh sound; the sounding of any such device for an unnecessary or unreasonable length of time; the use of any signaling device, except one operated by hand or electricity; the use of any horn, whistle or other device operated by engine exhaust; and the use of any such signaling device when traffic is for any reason held up.

(2) Use of radios, phonographs and musical instruments.

a. The using of, operating of or permitting to be played, used or operated any radio receiving set, musical instrument, phonograph or other machine or device for the producing or reproducing of sound in such a manner as to disturb the peace, quiet and comfort of the neighboring inhabitants or at any time with louder volume than is necessary for convenient hearing for the person or persons who are in the room, vehicle or chamber in which such machine or device is operated and who are voluntary listeners thereto.

b. The using of, operating of or permitting to be played, used or operated any radio receiving set, musical instrument, phonograph, sound amplification system or other machine or device for the producing or reproducing of sound on or directed toward a public beach, the boardwalk, streets or other public ways at any time in such a manner as to be plainly audible at a distance of 30 feet from the source of such sound which is deemed to be unreasonably loud so as to disturb the peace, quiet and comfort of other persons or at a louder volume than is necessary for the convenient hearing of the individual carrying the instrument, machine or device or those individuals immediately adjacent thereto and who are voluntary listeners thereto.

c. The using of, operating of or permitting to be played, used or operated any radio receiving set, musical instrument, phonograph or other machine or device for the producing or reproducing of sound between the hours of 12:00 midnight and 7:00 a.m. in such a manner as to be plainly audible at a distance of 50 feet from the building, structure or vehicle in which it is located.

(3) Yelling, shouting, hooting, whistling and singing.

a. Yelling, shouting, hooting, whistling or singing on the public streets or public areas or from private property at any time or place so as to annoy or disturb the

quiet, comfort or repose of persons in any dwelling, hotel or other type of residence or any persons in the vicinity, between the hours of 7:00 a.m. and 12:00 midnight, after having been warned to quiet or cease such noisemaking.

b. Yelling, shouting, hooting, whistling or singing on the public streets or public areas or from private property in such a manner as to be plainly audible at a distance of 50 feet from the public street, public area, building, structure or vehicle from which the noise emanates, between the hours of 12:00 midnight and 7:00 a.m.

(4) The operation of any boat or other water vessel with an outboard motor or with an inboard motor, unless equipped with an adequately muffled exhaust system; or the use of any siren or other noise-producing or noise-amplifying instrument or mechanical device on a boat in such a manner that the peace and good order of the neighborhood is disturbed; provided, however, that nothing in this division shall be construed to prohibit the use of whistles, bells or horns as signals as required by the United States Motor Boat Act or other state or federal laws for the safe navigation of motor boats or vessels.

(Code 1972, § 67-2; Ord. No. 2012-2, 2-6-2012)

Sec. 30-301. - Soundproofing required.

It shall be unlawful for any person or persons, firm or corporation to operate, maintain or carry on as a business any dancehall or nightclub or any other business as a part of which or incidental to which dancing and entertainers are or any of them is offered for the entertainment of the patrons of such establishment, except in a room or rooms that has or have been so soundproofed or have been so located or constructed that no noise emanates from such establishment which is in excess of 65 dB(A) in the daytime hours and 55 dB(A) in the nighttime hours at the adjoining property line or is plainly audible at a distance of 50 feet from the establishment; and each day any such dancehall, nightclub or other business, as aforesaid, shall be operated, maintained or carried on in violation of this division shall constitute a separate offense.

(Code 1972, § 67-5)

Sec. 30-323. - Maximum noise level.

The operation of any tools used in construction, drilling, repair, alteration, renovation, maintenance, dredging, demolition and all related practices, except those specified in division 8 of this article, creating noise in excess of 89 decibels at the adjoining property line is hereby prohibited.

(Code 1972, § 67-8)

Sec. 30-324. - Noise from powered mechanical tools.

Except as otherwise provided in section 30-326, the operation of powered mechanical tools is regulated as follows:

(1) Between May 1 and September 30, the operation of mechanical tools is permitted only between 9:00 a.m. and 5:30 p.m.

(2) Between October 1 and April 30, the operation of mechanical tools is permitted only between 7:00 a.m. and 5:30 p.m.

(3) In no instance may the noise level from mechanical tools be in excess of 79 decibels at any adjoining property line.

Sec. 30-325. - Noise from non-powered hand-operated tools.

The operation of hand tools is regulated as follows:

(1) Between May 1 and September 30, the operation of hand tools creating noise audible from an adjacent property is permitted only between 8:00 a.m. and 6:30 p.m.

(2) Between October 1 and April 30, the operation of hand tools creating noise audible from an adjacent property is permitted only between 6:00 a.m. and 6:30 p.m.

(3) In no instance may the noise level from hand tools be in excess of 79 decibels at any adjoining property.

Sec. 30-326. - Noise from pile drivers, excavating machines and jackhammers.

(a) Between May 1 and September 30, persons, groups of persons, firms, companies, corporations or any other legal entities may operate, use or allow the operation of any pile driver, excavating machinery or jackhammer only between 10:00 a.m. and 2:00 p.m., Monday through Friday, and at no time on Saturdays, Sundays and holidays. The Mayor and City Council may grant a permit to operate such machinery during the ordinarily prohibited time if it determines that the project site is sufficiently distant from inhabited or occupied property and that such activity would not disturb the property occupants.

(b) Between October 1 and April 30, the operation of pile drivers, excavating machinery and jackhammers shall be subject to the time limitations set forth in section 30-324(2), except on weekends. On Saturdays, Sundays and holidays operation is allowed only between 10:00 a.m. and 2:00 p.m.

(c) In no event shall the operation of this machinery at any time create noise in excess of 89 decibels at the next inhabited or occupied property line.

Sec. 30-366. - Measurement of noise levels.

(a) The measurement of noise levels shall be conducted at points on the property line of the source if the source is in a residential zoning district, or farther away, or on the boundary of a zoning district if the source emanates from property in a nonresidential zoning district, or farther away, or may be made on the premises of any property in a residentially zoned district reached by the sound waves from the noise emanating from the source.

(b) Measurement equipment shall be sound level meters complying with ANSI SI.4, 1971, Specifications for Sound Level Meters, of at least type 2 quality and sensitivity, comprising a microphone, amplifier, output meter and frequency weighting network(s).

(c) Measurement equipment operators shall be members of the division herein described who have been properly trained in the operation of sound level meters.

(Code 1972, § 67-20)

Sec. 30-367. - Maximum noise levels in residential districts.

The following sound/noise levels represent the maximum permissible levels in residential zoning districts. Levels exceeding said permissible levels are prohibited.

(1) *Noise prohibitions.*

a. The creation or allowance of such creation within residential zoning districts R-1, R-2, R-2A, R-3, R-3A, MH and planned overlay districts of noise/sound levels in excess of 65 dB(A) during the daytime hours and 55 dB(A) during the nighttime hours is hereby prohibited.

b. In situations where noise levels are measured at an interface or boundary line between a residential district and a nonresidential zoning district or where noise levels measured in a residential zoning district emanate from a source in another zoning district, the applicable permissible noise level at the point of measurement shall be the noise level permitted in the residential zoning district.

c. It is prohibited for any person to cause, permit or allow any noise emanated by him or from property owned by him in any nonresidential zoning district to reach any residential zoning district at noise levels exceeding those as set forth in subsection (1)a above.

(2) *Exemptions.*

a. The provisions of this section shall not apply to devices used solely for the purpose of warning, protecting or alerting the public, or some segment thereof, of the existence of an emergency situation.

b. The provisions of this section shall not apply to the operation of municipally owned and/or operated equipment used in the cleaning or preservation of beach areas.

c. The provisions of this section shall not apply to the following:

1. Household tools and portable appliances in normal usage.
2. Lawn care equipment in normal daytime usage if used and maintained in accordance with the manufacturer's specifications.
3.

Motor vehicles on public roads, but this subsection shall not be construed to interfere with any other regulations of said motor vehicles under other Ocean City, state or federal law or regulations.

4. Aircraft.
5. Boats.
6. Operations by, or sanctioned by, the proper authorities (Ocean City, state or federal) for the protection of persons or property where imminent physical trauma or property damage demands immediate action.
7. Emergency utility operation.
8. Operations by Ocean City departments.
9. Nonamplified sound emanating from duly licensed and/or authorized athletic contests, parades and municipally sponsored public celebrations.
10. Amusement parks and amusement arcades existing on the date of the enactment of this division are exempted, except from 11:59 p.m. of one day until 10:00 a.m. the following day. This division shall apply to amusement parks and amusement arcades between 11:59 p.m. of one day and 10:00 a.m. of the next day.
11. Mechanical and construction noise as the same is regulated under division 4 of this article.
12. Any activity causing noise if a variance for such activity and the noise resulting therefrom has been obtained from the environmental health administration of the Maryland department of health and mental hygiene or is being processed pursuant to the rules and regulations of that department. This exemption shall apply only to the extent of any such variance so granted or being processed.

(Code 1972, § 67-19)

Sec. 62-5. - Prohibited acts on boardwalk.

(a) The Mayor and City Council, having determined that the boardwalk is a major tourist attraction with congregations of pedestrians and the boardwalk tram necessitating the regulation of the location of activities, allowed hereunder, for public safety purposes, has determined that the best interest of the public health, safety and general welfare is best served by limiting such activities to the area within the extended boundaries of street ends.

(b) It shall be unlawful for any person engaging in the permitted activity of peddling, soliciting, hawking or street performing on the boardwalk to:

(1) Exercise or perform such activity or display in any area of the boardwalk other than within the area encompassed within the extended boundaries of the street ends, except for the area encompassed within the extended boundaries from the south side of the boardwalk ramp on the south side of N. Division Street to the north side of the boardwalk ramp on the north side of N. Division Street, where such activity is also prohibited.

(2) Use anything other than portable tables or chairs for display purposes.

(3) Set up any display on or within ten feet of tables, adjacent property entrance or exit, or boardwalk tram lane.

(4) Obstruct or block pedestrian or vehicular traffic, the entrance to ramps and stairways to the beach, the entrance to comfort stations, the concrete pads on the east side of the boardwalk, public telephones, or trash receptacles.

(5) Reserved.

(6) Violate the town's noise ordinances, after being warned by a police officer.

(7) Connect to any municipal electric outlet or private electric outlet without the permission of the owner.

(8) Use nudity, pornographic materials, or obscenity in any display or performance.

(9) Conduct sales or exchanges as prohibited by section 62-4 hereof.

(10) Set a price or fee or accept same for observing or participating in a display or performance, other than being a tip the amount of which is not solicited.

(11) Handout or distribute any advertising or promotional material which promote an activity, product or service other than that which the peddler, solicitor, hawker or street performer is engaged in as an integral part of the display or performance.

(12) Use animals, other than for legitimate ADA purposes, fire or other hazardous materials in a display or performance.

(b) Any person, partnership, corporation, unincorporated association, or other business entity who shall violate any provision of this section or sections 62-3 and 62-4 hereof shall be deemed to have committed a municipal infraction and be subject to the penalties provisions for municipal infractions set forth in section 1-8(c) of this Code.

(Ord. No. 1998-8, § 72-5.2, 5-18-1998; Ord. No. 2009-11, 5-18-2009; Ord. No. 2011-23, 6-20-2011)