

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL**



Public Safety Division

February 16, 2007

Tommy Wells
Councilmember, Ward 6
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Mary Cheh
Councilmember, Ward 3
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Councilmembers Wells and Cheh:

I am writing to follow up on our January 30, 2007 meeting. Based upon our discussions during that meeting, you asked the Office of the Attorney General ("OAG") to prepare draft legislation to address the problem created by the 2004 amendment to the Noise Control Act of 1977. Attached is the draft legislation that you requested.

I want to note that while the attached bill reflects the potential compromise that was discussed, it is not necessarily the ideal fix. From a legal perspective -- and in terms of a law that would provide residents of the District with the greatest level of protection from intrusive levels of noise emanating from speech -- the ideal fix would be to simply strike the sentence that was added in 2004.

As you know, the 2004 amendment modified the definition of a noise disturbance found in Section 2799.1 of Title 20 of the DCMR to exempt non-commercial public speaking during the daytime from enforcement under the Noise Control Act.¹ As a result, non-commercial speech during the daytime is subject to absolutely no noise limitations under District law. My Office

¹ The sentence at issue reads: "A sound shall not be considered a noise disturbance if made during non-commercial public speaking during the daytime." 20 D.C.M.R § 2799. This sentence was adopted at the request of First Amendment advocates to replace a 1996 amendment that limited the special exemption given to non-commercial speech to certain non-residential zones and only when the noise did not exceed 80 decibels when measured from certain distances.

has been unable to identify any other major urban jurisdiction that has adopted a similar provision.² Moreover, no such provision is necessary to ensure that a noise regulation passes constitutional muster. Thus, if the Council were to simply remove this exemption from the definition of a noise disturbance, District residents would be entitled to protection from noise emanating from speech that is unreasonable and excessive according to the judgment of a reasonable person of ordinary sensibilities in the vicinity of the noise. The standard that would apply is the same standard that applies to other types of noise disturbances; specifically, the law would prohibit:

Any sound which is loud and raucous or loud and unseemly and unreasonably disturbs the peace and quiet of a reasonable person of ordinary sensibilities in the vicinity thereof, unless the making and continuing of the noise is necessary for the protection or preservation of the health, safety, life or limb of some person. In making a determination of a noise disturbance, the Mayor shall consider the location, the time of day when the noise is occurring or will occur, the duration of the noise, its magnitude relative to the maximum permissible noise levels permitted under the Act, the possible obstruction or interference with vehicular or pedestrian traffic, the number of people that are or would be affected, and such other factors as are reasonably related to the impact of the noise on the health, safety, welfare, peace, and quiet of the community.

20 DCMR § 2799.1. This approach would adequately protect the public's dual interests in tranquility and free expression and would be constitutionally defensible. Notably, this appears to be the approach favored by most large urban jurisdictions and by the courts.

OAG has consistently asserted that this "reasonable person" standard provides sufficient protection for First Amendment activity without the need for a special exception for noise made during non-commercial speech. The Mayor and the Corporation Counsel took this position in connection with 1996 amendments to the Noise Control Act that were introduced and adopted after the Superior Court found the application of the statute's general decibel limitations to union protest activity to be unconstitutional.³ Over objection, the Council amended the "reasonable person" standard contained in the noise disturbance definition to include a provision that exempted noise made during non-commercial public speaking from the noise disturbance standard if it exceeded 80 decibels, in specific areas of the District, when measured from inside a

² We have reviewed noise ordinances from Chicago, Boston, Los Angeles, San Diego, Atlanta, Maryland, and New York. Of the other noise control statutes reviewed, only Los Angeles differentiates speech from other categories of amplified sound, and regulates it based on the time of day, the location, whether it is commercial or non-commercial, and the distance from the source at which the sound can be heard. The other statutes do not directly address speech or treat excessively loud speech differently from other types of unreasonable noise.

³ This decision was issued in *Streeter v. Hotel and Restaurant Employees Local 25, AFL-CIO*, Civil Action No. 1826-92. It has been described in the legislative record as finding the District's general decibel levels to be unconstitutionally restrictive of non-commercial speech. This ruling, coupled with the D.C. Circuit's opinion in *United States v. Doe*, 968 F.2d 86 (D.C. Cir. 1992), highlighted the difficulty of broadly applying restrictive decibel level limitations to First Amendment activity without evidence in the legislative record establishing that a restrictive level is narrowly tailored, under the particular circumstances presented, to the government's interest in preventing excessive noise. See also, *Lionhart v. Foster*, 100 F. Supp. 2d 383 (E.D. La. 1999); cf. *Deegan v. City of Ithaca*, 444 F.3d 135 (2d Cir. 2006) (construction on statute limiting distance at which sound could be heard was overbroad).

nearby occupied building or from a distance of 50 feet. Mayor Marion Barry, Jr. returned the act containing this amendment without signing it, noting that the Council's efforts to include a high decibel level limitation in the statute as a means for protecting First Amendment expression inadequately protected citizens from unreasonable noise. The Barry Administration took the position that the existing "reasonable person" standard was well-crafted, allowed the question of excessive noise to be evaluated based on all the circumstances, and was sufficiently unambiguous to survive a constitutional attack.

Although the preferred and most commonly applied approach to resolve this issue would be simply to apply the reasonable person standard found within the current definition of a noise disturbance, without providing any added protection for non-commercial⁴ public speaking, I recognize that the Council may wish to maintain some measure of special protection for First Amendment expression. In response to this preference, the attached compromise bill would exempt from the definition of noise disturbance noise that is made during non-commercial public speaking during the daytime if it falls below 80 decibels when measured at a distance of 50 feet. In turn, noise emanating from speech at or above 80 decibels, when measured at a distance of 50 feet, would be subject to the reasonable person standard found within the definition of a noise disturbance.

While our original inclination in fashioning a compromise was to seek a purely objective decibel limit, as noted above a number of courts have stricken such limits down in the context of noise emanating from speech. The proposed compromise, however, should avoid the problem of constitutional overbreadth cited in *Doe, supra*, because, rather than imposing a broadly applicable decibel limit on how loud speech can be, it merely establishes protection from regulation for speech up to a specified decibel level. Pursuant to the bill, non-commercial public speech measured at or above 80 decibels would only constitute a noise disturbance if it were also found to be excessive under the "reasonable person" standard that is contained in the definition. We have selected this decibel level because it appears defensible given that it exceeds the general daytime sound limitations applied to different zones in 20 DCMR § 2701 and because it was accepted by the Council in a similar context in 1996. It will be important that the legislative record developed in consideration of this amendment contain a factual and scientific analysis supporting the use of this or whatever decibel level is ultimately adopted.

The attached bill also addresses the criticisms that First Amendment advocates leveled against the 1996 version during hearings on the 2004 amendments by removing the geographical limits the prior version applied to the non-commercial speech exemption and by providing a single, easily identifiable point of measurement for decibel levels. Thus, although the compromise bill may not provide an optimal level of noise protection for all individuals affected by loud public speaking, we believe it reasonably balances conflicting interests in a constitutionally acceptable manner. I would note, however, that we have not been able to find a statute or regulation adopted in another jurisdiction that has followed this approach, and, as a result, have also found

⁴ Another concern is that non-commercial speech is not defined. If the Council decides to retain some form of a special exception for First Amendment speech, it might be advisable to define this term.

no caselaw testing its constitutionality. Nonetheless, for the reasons cited earlier, we believe that it would survive a constitutional challenge.

Before concluding, I would like to address two additional provisions that you asked my Office to explore as part of this potential compromise. Specifically, 1) Councilmember Wells asked us to explore a narrowing of the non-commercial speech exemption that would limit its application to weekdays, similar to the manner in which it is currently limited to daytime hours; and 2) Councilmember Cheh suggested strengthening the proposed compromise by creating a presumption that noise above a certain decibel level constitutes a noise disturbance. The following summarizes our analysis of each of those proposals.

Narrowing the Non-commercial Speech Exemption to Exclude the Weekend

Although we have found no caselaw specifically addressing this proposed restriction, such a provision might invite litigation on the ground that it is constitutionally overbroad. While it is true that many individuals value the peace and tranquility they are able to enjoy on weekends, it may also be equally true that weekends present unique opportunities for First Amendment activity. A broad weekend restriction on the volume of speech could be challenged, for example, by individuals who must work during the week and are only able to express themselves on weekends, who have particular religious messages that they believe should be expressed on a particular day, or who wish to organize a demonstration at a particular time and location on a weekend to ensure that their message is heard by the largest possible number of citizens. Restricting speech on weekends in particular zones or neighborhoods would not necessarily solve this problem if the speaker had a specific reason for wishing to be heard by residents of a restricted neighborhood, if the site selected did not threaten to unreasonably disturb residents, or if the distinctions between locations in different neighborhoods were otherwise not adequately justified. Based on these factors, our recommendation is to avoid a broadly applicable weekend limitation.

Presumption of a Noise Disturbance for Non-commercial Speech Over a Specified Decibel Level

We attempted to craft such a presumption based on language in San Diego's noise ordinance that makes noise at a certain level prima facie unreasonable at night. However, we concluded that, unless the decibel level were so high as to provide only minimal protection to District residents, a broadly applicable presumption based on decibel levels could also engender litigation. It is simply not clear from the relevant case law that there is a constitutionally significant difference between stating a decibel level as a protective limitation and using the decibel level as a basis for applying a presumption of illegality. In both cases, unless the decibel level can be justified as an indicator of excessive noise under a wide variety of circumstances, we anticipate an argument that it burdens constitutionally protected activity in a manner that is not narrowly tailored to serve a significant government interest. Although we support this approach from an enforcement perspective, in the absence of a factual record supporting the use of a specific presumptive volume limitation at different times and locations, we have opted against including a broad presumption based on noise volume at this time in the bill.

Although we have avoided including either of these provisions in the draft bill, we would certainly expect that the Council may hear testimony relevant to these issues during the course of public hearings on any legislation that is introduced. Should that testimony develop a record that invites additional examination of either of these issues, we will be happy to revisit these proposals.

I hope that this information will be helpful as the Council moves forward toward a resolution of this issue. I look forward to working with you.

Sincerely,



David M. Rubenstein
Deputy Attorney General for Public Safety

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Vincent C. Gray, at the request of the Mayor, introduced the following bill, which was referred to the Committee on _____.

To amend the District of Columbia Noise Control Act of 1977 to permit noise made during noncommercial public speaking during the daytime to be considered a noise disturbance if it otherwise satisfies the definition of a noise disturbance and exceeds 80 decibels when measured at a distance of 50 feet from the source of the noise, and to specify that the Mayor need not measure the decibel level of a noise to find a noise disturbance if the noise is made at night or does not involve noncommercial public speaking.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the “Noise Control Protection Amendment Act of 2007”.

Sec. 2. Section 3(n) of the District of Columbia Noise Control Amendment Act of 1977, effective March 16, 1978, (D.C. Law 2-53; 20 DCMR § 2799.1) is amended by striking the last two sentences and inserting two new sentences in their place to read as follows: “A noise shall not be considered a noise disturbance if it is made during noncommercial public speaking during the daytime and does not exceed 80 decibels when measured at a distance of 50 feet from the source of the noise. If the noise is made at night or does not involve noncommercial public speaking, the Mayor shall not be required to measure the decibel level of the noise in order to find a noise disturbance.”.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.