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August 2, 2007

Mr. Barry Zalben, Manager
Legislative Reference Bureau
City Hall, Room B-11

Attention: Richard L. Withers

Re: Noise Ordinance Proposal/Common Council File No. 070429

Dear Mr. Zalben:

By e-mail dated June 25, 2007, you asked this office to review a proposed ordinance revising § 80-65-4-a, MCO, relating to complaint procedures for noise violations.

Currently, § 80-65, MCO addresses the method of measuring excessive noise for purposes of issuing a citation under § 80-63(1). Section 80-65-4 describes "noise nuisances" that are impractical to measure, and alternative methods are set forth to address such noises when they become nuisances, in order to justify the issuance of a citation under § 80-63(2). For example, under § 80-65-4-a-1, a citation may be issued based on a complaint, without a police officer's or inspector's personal observation, if it is a type of noise that cannot be measured because it occurs at unpredictable times or is of short duration. No one can be convicted, however, except upon testimony of at least one affected adult witness. The types of noises that are impractical to measure include radios, televisions, CD players, and the like. Section 80-65-4-b, MCO.

The proposed change would repeal all of § 80-65-4. The new section would again recognize that certain noises are impractical to measure. It would continue allow the current practice of issuing a citation based on the personal observation of a police officer or DNS inspector. However, in the alternative to personal

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observation, under the proposal a citation must be based on receipt of a “written and verified” complaint that meets certain requirements and alleges that the noise was boisterous and unreasonably loud, as defined by the ordinance. No person can be convicted unless at least one affected adult witness testifies.¹

The proposal introduces a new concept in situations where “the identity of the person or persons” cannot be readily determined by the officer or inspector at the scene or from the written complaint. In such cases, the Chief or Commissioner may mail a notice to the last known owner of the property or vehicle from which the alleged noise nuisance emanated. The notice will direct the owners to “show cause in writing” within 14 days of receipt, why a citation should not be issued charging the owner or owners with violation of “this section.”² If the owners fail to adequately and timely show cause as to why the citation should not be issued, the citation may be issued.

This proposal would limit the police to issuing noise citations only on written sworn complaints, unless they personally observe the violation. This makes it more difficult to effectively complain about a noise nuisance.

A prosecution in Municipal Court is a civil matter; the burden of proving the violation rests with the City. Regardless of whether an owner responds to the notice in the proposed draft, the City must still prove its case against the defendant, and thus must be able to prove that the defendant named in the citation in fact violated the noise ordinance. In American courts, a defendant does not have the obligation to prove that he did not violate the law.

Therefore, absent a confession, the failure of an owner to respond “adequately” may not be of any assistance to this office in prosecuting the citation. And, under the draft, a judge would, in any case, need a witness to testify that the defendant was indeed the violator.

¹ The placement of this provision appears to be in error; under your revision, an “affected” witness would be required even if a police officer personally observed the violation. This was most likely not your intent.

² We believe you mean a “violation of Section 80-63.”

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More fundamentally, under state law and municipal ordinance, a citation must contain "a statement that the defendant committed the violation." Wis. Stat. § 800.02(2); § 50-25, MCO. This proposal would authorize a police officer or inspector to make that statement with no supporting evidence, even from a witness; this would be improper.

Therefore, not only does this revision take away the ability that currently exists to issue a citation based on a witness's oral complaint, it impermissibly authorizes the issuance of a citation without evidence of wrongdoing on the part of someone named in the citation. In any event, it would be of little assistance in the prosecution of these cases.

Section 80-63(3), MCO, appears to provide some recourse against owners of premises where a noise nuisance occurs. We will certainly work with you to identify the concerns of Alderman Donovan and to develop a strategy to address them, perhaps in the context of existing ordinances. Please contact us at your earliest convenience, so that we may meet with you about this issue.

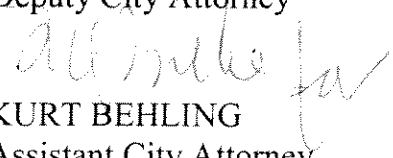
Very truly yours,



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