



ALAN WILSON
ATTORNEY GENERAL

July 12, 2021

Sheriff S. Duane Lewis
Berkeley County
223 N. Live Oak Drive
Moncks Corner, SC 29461

Dear Sheriff Lewis:

Attorney General Alan Wilson has referred your letter to the Opinions section. The letter asks this Office to review a proposed Berkeley County noise ordinance and to suggest changes that would make the “proposed noise ordinance pass constitutional muster.” Due to the length of the ordinance, this opinion will focus on provisions of the proposed ordinance (the “ordinance”) that have been subject to constitutional challenges in comparable circumstances. First, the ordinance states, “Any persons found to ... make[] or causes to be made **any loud, boisterous and unreasonable noise or disturbance** shall be in violation of this ordinance.” (emphasis added). Next, the ordinance directs that an “investigating officer shall take the enforcement factors listed in this ordinance into [consideration] when making a charge for violating this ordinance.” The ordinance describes the enforcement factors as follows:

Enforcement factors. In the enforcement of standards established in this section, an enforcement officer may be required to exercise judgment in determining if a particular noise is **sufficiently loud or otherwise so offensive that it would unreasonably disturb a person of ordinary sensibilities** in the vicinity. When making the determinations, the enforcement officer shall consider the following factors:

- (1) The volume of the noise;
- (2) The intensity of the noise;
- (3) Whether the nature of the noise is usual or unusual;
- (4) Whether the origin of the noise is natural or unnatural;
- (5) The type and intensity of background noise, if any;
- (6) The proximity of the noise to residential sleeping facilities;
- (7) The nature of zoning of the area(s) in which the noise is heard;
- (8) The time of day or night the noise occurs;
- (9) The duration of the noise; and

(10) Whether the noise is recurrent, intermittent or constant.

(emphasis added). Finally, the ordinance states that a violation is punishable by a fine “not less than \$100.00, or more than \$500.00, or [imprisonment] for a period not exceeding 30 days, or both.”

Law/Analysis

It is this Office’s opinion that a court would likely find the ordinance complies with the Due Process Clause of the Fifth and Fourteenth Amendment of the United States Constitution. Our prior opinions have commented on probable challenges to noise ordinances:

[T]he most likely challenge to regulations imposed for noise control is that they are unconstitutionally vague. An act of the General Assembly is “void for vagueness if its prohibitions are not clearly defined.” Grayned v. City of Rockford, 408 U.S. 104 (1972). Vague noise control ordinances implicate due process concerns in two ways: they may not give a person of ordinary intelligence a reasonable opportunity to know what exactly he is prohibited from doing and they may impermissibly allow law enforcement to apply them in an arbitrary and discriminatory manner.

Op. S.C. Att’y Gen., 2000 WL 1347169, 2-3 (August 14, 2000).¹ As the United States Supreme Court explained, to sustain a challenge that an ordinance is unconstitutionally vague, “the complainant must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the

¹ See also City of Beaufort v. Baker, 315 S.C. 146, 152–53, 432 S.E.2d 470, 474 (1993).

In determining whether a statute is vague, we have held:

The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise Judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.

State v. Albert, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971) (held common law definition of riot not unconstitutionally vague).

sense that no standard of conduct is specified at all.” Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 495 n.7 (1982) (internal quotations omitted).

In City of Beaufort v. Baker, 315 S.C. 146, 432 S.E.2d 470 (1993), the South Carolina Supreme Court upheld a municipal noise ordinance that was challenged as being unconstitutionally vague. In relevant part, the ordinance read:

In October of 1991, Beaufort City Council amended local ordinance § 9–1008 (Ordinance) to read as follows:

Section 9–1008 LOUD AND UNSEEMLY NOISE

(a) It shall be unlawful for any person to willfully disturb any neighborhood or business in the City by making or continuing loud and unseemly noises, or by profanely cursing and swearing, or using obscene language. It shall further be unlawful for any person to willfully disturb any neighborhood or business within the City by the use of words which threaten or tend to threaten or incite physical violence, or which endanger or tend to endanger the health and safety of others within the City.

Id. at 148–49, 432 S.E.2d at 472. The Court quoted the Maryland Appellate Court’s reasoning in Eanes v. State of Maryland, 318 Md. 436, 569 A.2d 604 (1990), *cert. denied*, 496 U.S. 938, 110 S.Ct. 3218, 110 L.Ed.2d 665 (1991), which upheld a noise ordinance that also prohibited noises that are “loud and unseemly.”

[W]e here apply normal meanings to words of common understanding and conclude that speech that is so unreasonably loud as to unreasonably intrude on the privacy of a captive audience may be punished. We hold that the words ‘loud and unseemly,’ so construed, give sufficient notice of what conduct is penalized. ‘Unseemly’ modifies ‘loud’ and means ‘unreasonably loud in the circumstances.’ That is clear enough. The objective ‘reasonable’ test is used in many areas of the law as an appropriate determinant of liability and thus a guide to conduct.

Id. at 152–53, 432 S.E.2d at 474. This construction of “unseemly” narrowed the circumstances to which the ordinance applies to only those circumstances when a noise is found to exceed what is “unreasonably loud in the circumstances.”² Admittedly, while this threshold level of noise

² In Asquith v. City of Beaufort, 139 F.3d 408, 412 (4th Cir. 1998), the Fourth Circuit Court of Appeals cited the Baker Court’s construction with approval in reversing a preliminary injunction that prohibited enforcement of the very same noise ordinance. (“[I]n view of the narrowing construction of the ordinance at issue by the Supreme Court of South Carolina in Baker, ... we think it cannot be said that the plaintiffs are likely to prevail on the merits of their contention that the ordinance is vague and overbroad and invalid on its face.”)

may be imprecise, it provides a “comprehensible normative standard” by which a person can conform his conduct that due process demands. See Vill. of Hoffman Ests., supra.

Turing to the text of the subject ordinance, it is this Office’s opinion that a court would likely hold it also offers a comprehensible standard that comports with due process and uphold it against a claim that the ordinance is unconstitutionally vague. Again the ordinance states, “Any persons found to ... make[] or causes to be made any loud, boisterous and unreasonable noise or disturbance shall be in violation of this ordinance.” The ordinance establishes enforcement factors that law enforcement officers must use to determine if “a particular noise is sufficiently loud or otherwise so offensive that it would unreasonably disturb a person of ordinary sensibilities in the vicinity.” (emphasis added). A court would likely hold this standard approximates the Baker Court’s construction such that the noise ordinance only applies to noises that are “unreasonably loud in the circumstances.” Therefore, it is this Office’s opinion that the ordinance contains an objective standard that a court would likely hold is facially constitutional.

Conclusion

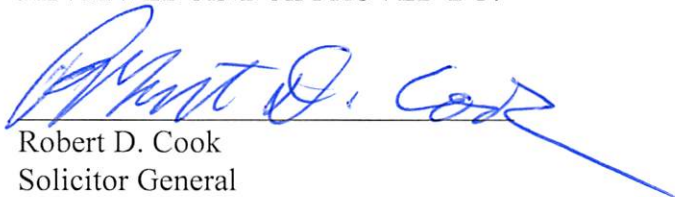
As is discussed more fully above, it is this Office’s opinion that a court would likely find the ordinance complies with the Due Process Clause of the Fifth and Fourteenth Amendment of the United States Constitution. The ordinance establishes enforcement factors that law enforcement officers must use to determine if “a particular noise is sufficiently loud or otherwise so offensive that it would unreasonably disturb a person of ordinary sensibilities in the vicinity.” (emphasis added). A court would likely hold this standard approximates the Court’s construction of the noise ordinance in Baker of “unreasonably loud in the circumstances.” City of Beaufort v. Baker, 315 S.C. 146, 432 S.E.2d 470 (1993). Therefore, it is this Office’s opinion that the ordinance contains an objective standard that a court would likely hold is facially constitutional. Please note, however, that this Office cannot anticipate all challenges or guarantee that an ordinance will not be the subject of future litigation.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General