

# THE RUTHERFORD INSTITUTE

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Charlottesville City Council  
605 E. Main Street  
Charlottesville, VA 22902

Re: Music zoning

Dear Council Members:

The Rutherford Institute has been contacted by several local musicians and area businesses who are concerned that the City Planning Commission's efforts to amend the city's zoning code as it relates to businesses offering live music<sup>1</sup> could result in restrictions on expressive First Amendment activity, as well as costly permit fees. While we understand that this review was undertaken in part in response to complaints about excessive noise from residents of the Belmont neighborhood, it would be a sad reflection on the Charlottesville community, which prides itself on artistic expression and on having a thriving music scene,<sup>2</sup> if a solution were to come at the expense of vital First Amendment freedoms.

Live entertainment has long been held to be within the protections of the First and Fourteenth Amendments to the United States Constitution.<sup>3</sup> For example, in expounding the breadth of constitutional protections for live entertainment, the U.S. Supreme Court specifically held in *Schad v. Mount Ephraim* that localities may not enact zoning schemes under which no property in the locality may be principally used for the commercial production of live entertainment.<sup>4</sup>

Thus, it is with an eye toward protecting free expression and the city's vibrant arts community that The Rutherford Institute cautions the City Council against enacting any zoning

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<sup>1</sup> Sean Tubbs, "City tuning zoning code to help keep music playing," *Daily Progress* (Jan. 31, 2011), [http://cvillettomorrow.typepad.com/charlottesville\\_tomorrow\\_/2011/01/music-halls.html](http://cvillettomorrow.typepad.com/charlottesville_tomorrow_/2011/01/music-halls.html).

<sup>2</sup> "Charlottesville's eclecticism and great support of the arts lends the local scene an amazing breadth. Music lovers enjoy big-name shows like Sugarland as well as local boys, the Dave Matthews Band at the John Paul Jones Arena or perhaps Lyle Lovett or Widespread Panic at the Charlottesville Pavilion, and even Bob Dylan at the Paramount Theatre on Charlottesville's Historic Downtown Mall." Charlottesville Welcome Book, [http://www.charlottesvillewelcomebook.com/The\\_Arts\\_&\\_Music\\_Scene/](http://www.charlottesvillewelcomebook.com/The_Arts_&_Music_Scene/) [Accessed on Feb. 7, 2011].

<sup>3</sup> *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981)(citations omitted).

<sup>4</sup> *Id.* at 66.

plan that would unduly restrict or chill the ability of local musicians and business owners to exercise their First Amendment rights.

When considering zoning matters that impact the constitutional rights of area residents, it is important to remember that while local governments enjoy broad power to zone and control land use, this power is not infinite and unchallengeable. It must be exercised within constitutional limits.<sup>5</sup> Where a city excludes a broad category of protected expression as a permissible commercial use, the First Amendment requires that the ordinance be narrowly drawn and further a sufficiently substantial government interest.<sup>6</sup> Reviewing courts will look specifically to whether or not the asserted governmental interests “could be served by means that would be less intrusive on activity protected by the First Amendment.”<sup>7</sup> Finally, in defending this type of constitutionally suspect zoning ordinance, a locality must present evidence that the use in question poses problems more significant than those associated with various permitted uses.<sup>8</sup>

Unfortunately, the question of zoning for restaurants that offer live music is a complicated one, not easily resolved through the requirement of a special use permit. Under the City of Charlottesville’s present zoning definitions, § 34-1200, “Restaurant” is defined as a place of business wherein foods or beverages are provided for human consumption. The definition further states that “Entertainment for restaurant patrons which is clearly incidental to the restaurant’s primary function as defined herein, such as the playing of a piano or other non-amplified music, is permitted.” On the other hand, “Music hall” is defined as a business where music concerts are provided, for which an admission fee is charged or compensation is collected by cover charge or otherwise. Foods or beverages may be purchased at music halls “incidentally to the music hall’s stated primary function as defined herein.”

What becomes apparent upon reading those two definitions is that there is an in-between category of business that does not fit into either definition. Consider C-ville Coffee, for instance. To the extent that this business offers non-amplified music as entertainment for its patrons without profiting from a cover charge, it falls within the definition of “Restaurant” and would *not* fall within the definition of “Music hall.” However, if C-ville Coffee were to offer live, amplified music for its patrons *incidental* to its primary function as a restaurant, it would meet neither the definition of “Restaurant” nor that of “Music hall,” because a music hall sells foods or beverage only “incidentally to the music hall’s stated primary function” as a place providing concerts in exchange for an admission fee or other compensation.

Thus, while there may be times when restaurants offering live music may temporarily fall out of the technical definition of “Restaurant,” even then they do not meet the definition of “Music hall,” and it would be inappropriate and costly to require them to apply for a special use

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<sup>5</sup> *Schad*, 452 U.S. at 68 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in judgment)).

<sup>6</sup> *Id.* at 67, 68.

<sup>7</sup> *Id.* at 70 (citing *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980)).

<sup>8</sup> *Id.* at 74.

permit to offer live music or to consider them in violation of the zoning ordinances on the basis that they are offering live music in a district where music halls are not permitted.

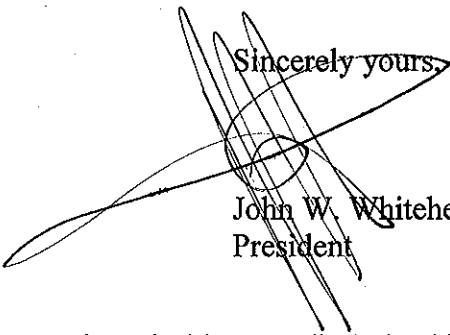
Furthermore, any attempt to force restaurants offering live music into the definition of "Music hall" will yield a much greater problem. Because music halls are not permitted "by right" in any zoning district, classifying any establishment where live music is performed for a fee as a music hall represents a serious infringement on the First Amendment right to free expression.<sup>9</sup>

The fact that under Charlottesville's zoning ordinances business may offer live, amplified music in certain districts upon obtaining a special use permit is of little comfort. The United States Court of Appeals for the Fourth Circuit has ruled that an ordinance is a prior restraint on speech—and highly suspect under the First Amendment—where it prohibits expressive conduct anywhere within a municipality until permission in the form of a special exception is granted.<sup>10</sup> In this case, it is highly improbable that the City of Charlottesville's zoning ordinance—if interpreted to classify restaurants offering live, amplified music as "Music halls"—could survive constitutional scrutiny. This is because the obvious and far less restrictive means by which the City can address its genuine concerns regarding noise levels is for the City to simply enforce its existing noise ordinances.

Apart from the noise levels associated with the music, there is no logical reason to distinguish restaurants offering amplified music to patrons from other restaurants that do not offer music, or those that offer only non-amplified music. Moreover, if the Planning Commission has any concerns about parking and overcrowding as a result of restaurants offering live, amplified music, these concerns would be more appropriately addressed by enforcing existing parking and occupancy regulations rather than by adopting measures to restrict protected First Amendment expression.

Finally, in an effort to guard against any possible constitutional violations, The Rutherford Institute would be happy to make itself available to the City Council and Planning Commission as a resource on how best to balance the First Amendment rights of musicians and business owners with the noise concerns of affected area residents. Otherwise, the City may find itself engaged in costly litigation over the constitutionality of any proposed ordinances that unduly restrict expressive activity.

Sincerely yours,

  
John W. Whitehead  
President

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<sup>9</sup> See § 34-796 (matrix showing special use permit required for every district in which music halls are allowed).

<sup>10</sup> *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 638 (4<sup>th</sup> Cir. 1999) (citing *11126 Baltimore Blvd. v. Prince George's County, Md.*, 58 F.3d 988, 995 (4<sup>th</sup> Cir. 1995) (*en banc*) (overruled in part on other grounds by *City of Littleton v. Z.J. Gifts D-4 L.L.C.*, 541 U.S. 774 (2004))).