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May 8, 2012

Bernadette DiPino
Chief of Police
Town of Ocean City
6501 Coastal Highway
Ocean City, Maryland 21842

VIA E-MAIL AND CERTIFIED MAIL

Re: Mark Chase / Noise Ordinance

Dear Chief DiPino:

We are once again writing you in defense of the constitutional rights and civil liberties of Mark Chase, an artist and street performer who has practiced his art on the Ocean City boardwalk over the past several tourist seasons. As Mr. Chase reported to us, he arrived for the 2012 season this past Friday May 4 and was immediately threatened with arrest under Ocean City's recently-enacted amendment to its noise ordinance.[1] He had just set up his performance area, which includes a portable music system which plays music that is an integral part of his performance because it provides inspiration and sets a tempo for his work.[2] Soon after the music began playing, Mr. Chase was approached by a Town police officer who informed him that his music was in violation of the Town's noise regulations. Significantly, immediately before the officer approached and told Mr. Chase to lower the volume of his music, Mr. Chase saw the officer speaking to a boardwalk shop owner who is antagonistic to Mr. Chase. The officer warned Mr. Chase that he must turn down the music from his system and the officer was not satisfied until the volume was turned down to level that was barely audible.

Because Mr. Chase has never previously been cited or warned that the music aspect of his performance violated the Town's noise regulations, the basis for the officer's threat to Mr. Chase must be the amendment to the Town's noise ordinance that

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[1] Town of Ocean City Code § 30-272(2)(b).
[2] *Chase v. Town of Ocean City*, 2011 WL 4072111, at *9 (D. Md. Sept. 9, 2011).

was adopted this past February and which prohibits sound from an amplification device if the sound is "plainly audible at a distance of 30 feet . . . 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" device.[3] As you are probably aware, a federal court recently held that Mr. Chase's performance on the Town's boardwalk constitutes expression that is protected by the First Amendment to the United States Constitution.[4] In order for this noise regulation to be applied to Mr. Chase consistent with the constitutional protection of free speech, it must appear that the provisions of the ordinance are narrowly tailored to serve a substantial governmental interest.[5]

The noise regulation at issue here cannot pass that test because its terms are entirely too vague and overbroad. A law, and in particular those laws which are applied to activity protected by the First Amendment, must be sufficiently explicit to inform the public what conduct will render persons liable for a violation.[6] Equally important, a law is void for vagueness if it lacks fixed enforcement standards or guidelines and thereby impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant danger of arbitrary and discriminatory enforcement.[7]

The noise ordinance provision used to stifle Mr. Chase's constitutionally-protected performance wholly fails the vagueness test. Under Town Code § 30-272(2)(b) as amended, Mr. Chase and other performers can be prosecuted for sound that is at a "louder volume than is necessary," but the ordinance leaves it wholly to the discretion of officers as to what volume is "necessary." Virginia's highest court considered a comparable noise restriction and held that it was inherently vague because the standards for what constitutes "loud, disturbing and unnecessary" noise are unascertainable and improperly leave that determination to police officers.[8]

The same problem affects the other part of § 30-272(2)(b) which forbids sound audible from 30 feet away "which is deemed to be unreasonably loud so as to disturb the peace[.]" Again, there is no standard to restrain police officer discretion in what is "unreasonably loud." Moreover, the very terms of the ordinance make its application dependent on the subjective sensibilities of others. If one person "deems" the sound unreasonably loud, the ordinance is violated regardless of whether a reasonable person would consider the sound too loud. Indeed, the danger of arbitrary and discriminatory enforcement that this kind of vagueness raises is manifested here because the decision to

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[3] Town of Ocean City Code § 30-272(2)(b).
[4] *Chase v. Town of Ocean City*, *supra*, at *11.
[5] *Eanes v. State*, 318 Md. 436 (1990).
[6] *Id.* at 458-59.
[7] *Id.* at 459.
[8] *Tanner v. City of Virginia Beach*, 277 Va. 432, 674 S.E.2d 848, 853 (2009).

stifle Mr. Chase's performance stemmed from a person who dislikes Mr. Chase and his activities on the boardwalk. The exercise of First Amendment rights cannot be made subject to the whim and caprice of the public.

Mr. Chase and his constitutionally-protected performances should not be suppressed under the noise ordinance because it is unconstitutionally vague and is likely being applied in a discriminatory manner. It is significant that Mr. Chase was never previously cited for being too loud prior to his having successfully sued the Town. The vagueness of § 30-272(2)(b) presents the perfect vehicle for retaliation against Mr. Chase and is precisely why enforcement of such laws is forbidden. On his behalf, we demand that the Town's police refrain from arresting or threatening to arrest Mr. Chase under § 30-272(2)(b) and respect his First Amendment rights as established in the recent litigation. Because the incident on Friday May 4 has seriously chilled his exercise of his rights, we must receive assurances that he will be allowed to exercise his First Amendment rights by the close of business Friday May 11, 2012, so he may do so free of a fear of prosecution.

Sincerely,

Douglas R. McKusick
Staff Attorney

Cc: Guy Ayres, Esq.
John Garza, Esq.
Mark Chase