

March 8, 2018

TO: Board of Health

FROM: Kurt Eggebrecht, Health Officer  
Amanda K. Abshire, Assistant City Attorney

RE: Resolution #2-R-18

This memo is written in response to a resolution submitted by Alderperson Ed Baranowski which attempts to clarify the City of Appleton's Municipal Code Chapter 12, Noise. This memo also addresses concerns raised by the Board of Health related to the resolution.

Resolution #2-R-18 accurately states that the Appleton Municipal Code does not define a "Special Community Event" nor does it specify the makeup of a Special Community Event. Similarly, it does not define the maximum frequency nor duration of a Special Community Event. It also does not specifically detail how the City should weigh the benefit to the community versus the benefit to an organization or business.

It is our belief that these omissions of definitions were intentional when written. These omissions seem to allow for discretion of both the Board of Health and Common Council so that each application can be considered on a case-by-case basis.

Further it is our belief that defining each of the aforementioned considerations, as requested by the resolution, has the potential to create unintended consequences contrary to the intent of the ordinance. For example, placing a maximum frequency on the number of events at a location may impose restrictions which could preclude establishments from hosting weddings, retirements, confirmations, and similar life celebrations— even though these events are generally well received by the community and surrounding neighborhoods. Similarly, by attempting to define what is necessary to promote public health or strictly defining a benefit to the community (versus an organization or business), there could be similar unintended consequences restricting events like the 4<sup>th</sup> of July fireworks, parades, backyard parties (and the like) from occurring.

When the Board of Health met on February 14, 2018, Resolution #2-R-18 was discussed as an information item. Board members were informed that the City Attorney's Office and Health Department would work together and bring back thoughts based on the Board's questions and comments. The following questions (in italics) were provided at the meeting. The Health Department together with the Attorney's Office seek to provide answers to each of the concerns below:

1. *Should the location of the event be a consideration for the Board and Council to consider prior to approving a variance (for example: should an event within the Central Business District be treated differently than an event outside of that area)?*

The City has already defined the Central Business District (CBD) and the noise ordinance has delineated maximum permissible sound pressure levels in three categories: commercial into residential, industrial into residential and industrial into commercial. The CBD would fall under the category of "commercial into residential" and would be regulated pursuant to AC Sec. 12-81. As such, locations of events are already considered by the City – so the Board and Council are well within their authority in continuing to consider the location of the event prior to granting or denying a variance.

2. *Does the municipal code distinguish between a public event versus private event when a variance is requested?*

The noise ordinance does not currently differentiate between requests from public or private sector requests or locations.

3. *When should an event be considered a "special community event"? Is there a maximum number of events and/ or duration that should be allowed?*

As discussed above, designating a maximum number of events or specifically defining the duration may have unintended consequences. While not set forth within the ordinance, the number of events can be considered on a case-by-case basis by the Board and Council, and as such, discretion can be used in determining whether or not to grant a variance. If a variance is granted, the Board and Council have the authority to set all necessary conditions (including time limits) on the permitted activity pursuant to AC Sec. 12-83(a)(4) .

4. *Does the ordinance address the potential number of homes affected by noise?*

We were unclear regarding the intent of this question but our belief is that a better measure of those affected by the noise would be the number of complaints received. We would not be in a position to determine how many homes will hear a sound prior to that sound being made as there are a number of factors that could impact how sound is disseminated.

5. *Can we adopt a system to notify potential neighbors/neighborhoods of noise variance requests?*

A neighborhood notification is already encouraged at the time of request and granting of a variance. To identify and then require all neighbors be notified and seek their advance approval would likely lead to denials of requests. Further, as indicated above, it may be difficult to accurately predict all of the persons that could be affected by the noise.

6. *Can you better define how loud an event can be?*

It is assumed that anyone requesting a variance will exceed the city noise ordinance levels. It would place a burden on city staff to respond to each variance request by monitoring the sound levels of these events to ensure compliance. Levels can fluctuate with different types of instruments and sounds played. It is our belief that previous citizen complaints would be a better predictor of excessive and offensive noise going forward.

7. *Can we establish a standard time for conducting events?*

The Municipal Code already regulates noise based on when the noise occurs. Daytime hours (between 7:00 a.m. and 10:00 p.m.) have a higher threshold for noise. It is our belief that further defining this would place unwarranted restrictions on and take away discretion from Board of Health and Common Council members who already have the ability to set necessary conditions on the applicant pursuant to AC Sec. 12-83(a)(4).

8. *Can we detail a way in which noise measurements can be standardized?*

Acceptable noise measurement methods are already set forth within AC Sec. 12-79.

9. *Are there best practices for regulating outdoor noise (i.e., an approach that is consistent with evidence-based decision making)?*

While we were unable to find any best practices, we did look at a number of noise/ sound-related ordinances throughout Wisconsin specific to the regulation of outdoor music—as an example of one type of sound. There were quite a variety of methods used to regulate sound (ranging from allowing music at licensed premises during all normal operating hours to banning music from being played outside of a building). This wide range seems to suggest that each community has created rules and regulations specific to the needs, values, and general location of their community. A very brief summary of some of the ordinances that we reviewed is found below. We note that this listed summary is used only to illustrate a far-reaching range in the regulation of sounds (often to include music) throughout Wisconsin:

- *Seymour*: Prohibits loud and unnecessary noise. Provides an exception for licensed premises – and allows loud speakers or amplifying devices during the same hours in which a licensed premise is allowed to operate. (Sec. 50-37).
- *De Pere*: Prohibits excessive noise. Exempts outdoor gatherings, shows, and other similar outdoor events from regulation provided that a permit has been obtained from the appropriate permitting authority.

(Sec. 146-6).

- *La Crosse*: Prohibits noise in excess of the established noise levels. Exempts Oktoberfest and Riverside Park from provision as well as provides an exception for special event outdoor cabaret license holders. (Sec. 32-134).
- *Neenah*: Prohibits unreasonably loud and raucous noise from the premises of a commercial establishment including any outdoor area which is under the control of the establishment, between the hours of 10:00 p.m. and 6:00 a.m. which is plainly audible at a distance of 5 feet from any residential property. (Sec 11-146(13)).
- *Antigo*: Has a separate provision for outdoor beer gardens that prohibits amplified sound or music from being played outside of the enclosed (building) premises. As such, amplified sound or music is not permitted in the beer garden. (Sec. 18-100).

**Recommendation from the Health Department and the City Attorney’s office moving forward:**

The City Attorney’s office, during the previous Board of Health meeting, requested that members of the Council and/or the Board reach out to advise how they would like to further define a Special Community Event (as they are the body tasked with creating legislation). As of today, March 8, 2018, neither the Attorney’s office nor the Health Department has received any recommendations on solutions moving forward.

Further, after examining numerous other municipal ordinances, it is our joint recommendation to leave the Appleton Noise ordinance as-is. It is our joint opinion that our ordinance sufficiently allows the Board of Health and the Common Council to examine each request for a special community event variance permit individually and decide whether the request meets the current standards set forth in the ordinance, to include the following considerations:

- whether the work producing such noise is necessary to promote the public health or welfare (AC Sec. 12-83(a)(1))
- whether reasonable steps are taken to keep such noise at the lowest practical level (AC Sec. 12-83(a)(1))
- whether the work producing such noise is being conducted during a special event or similar gatherings, festivals, presentations and the like (AC Sec. 12-83(a)(2))
- whether the event is limited in duration (AC Sec. 12-83(a)(2))
- whether the event is generally acceptable to the people of the community (AC Sec. 12-83(a)(2))
- whether precautions are taken to maintain the noises produced at the lowest practical level (AC Sec. 12-83(a)(2))

If, after consideration of all of the above factors, the Common Council grants the final approval of the special variance permit, the Council still has the discretion and authority to impose “all necessary conditions, including a time limit on the permitted activity” pursuant to AC Sec. 12-83(a)(4).

As always, if you have any questions or concerns, please do not hesitate to get in touch with either office.