

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

SHERI PEOPLES, on her own behalf and on	)	
behalf of a class of those similarly situated,	)	
FLAHERTY AND COLLINS, INC.,	)	
INDIANA APARTMENT ASSOCIATION,	)	
RUNAWAY BAY, LLC,	)	
Plaintiffs,	)	
	)	
vs.	)	1:06-cv-01324-LJM-WTL
	)	
TOWN OF SPEEDWAY, INDIANA,	)	
Defendant.	)	

**ORDER ON PLAINTIFFS’ SECOND MOTION FOR PRELIMINARY INJUNCTION**

On January 18, 2007, this Court held a hearing on plaintiffs’, Sheri Peoples (“Peoples”), on her own behalf and on behalf of those similarly situated, Flaherty and Collins, Inc., Indiana Apartment Association (“IAA”), and Runaway Bay, LLC (collectively, “Plaintiffs”), Second Motion for Preliminary Injunction. Plaintiffs argue that defendant’s, the Town of Speedway, Indiana (“Speedway” or the “Town”), Ordinance No. 1062 (“Ordinance 1062”) is unconstitutional because it proscribes conduct that violates the First Amendment of the Constitution and because it unreasonably impairs contracts between landlords and tenants in violation of the Contract Clause of the Constitution, Article 1, Section 10, Clause 1. Speedway contends that its ordinance does not violate Plaintiffs’ constitutional rights in any way.

At the end of the hearing, the Court took the matter under advisement and now renders its decision. For the reasons stated herein, the Court **DENIES** Plaintiffs’ Second Motion for Preliminary Injunction.

## I. BACKGROUND

Ordinance 1062 was adopted by Speedway in response to certain legislative findings regarding the condition of rental property in the Town. More specifically, in early 2006, residents of Speedway approached the Speedway Town Council (the “Council”) with complaints about criminal and other misconduct occurring in leased residential property within the Town. McCurtain Decl. ¶ 3. These complaints included that landlords and hotel operators had rented property in Speedway to criminals and others who made those properties unsafe for other residents and neighbors. *Id.* ¶ 4. These complaints also indicated that many of the rental properties had units that were overcrowded with many individuals sharing a single unit. *Id.* The complaints alleged that the condition of these properties made the surrounding neighborhoods in Speedway less safe. *Id.* The complainants reported that the condition of many rental units was also lowering the property value in the surrounding neighborhoods. *Id.* ¶ 5.

In addition, residents repeatedly informed the Council that criminal acts—including drug dealing and some violent crime—were frequently occurring at some of the apartment complexes and hotels in the Town. *Id.* ¶¶ 6 & 7. These assertions were supported by Speedway’s police department, which informed the Council that its officers had also noticed an increase in criminal activity in apartment units in the Town and reported that its officers were making numerous runs to those apartment units. *Id.* ¶ 6 & Def.’s Exh. 1.

When it reviewed this information, the Council made the following legislative findings regarding the condition of rental property in Speedway:

- “there are numerous rental housing units within the Town . . . that have been the site of regular dispatches of police and emergency public safety runs;” Ord. No. 1057;

- “it is to the benefit of the public safety personnel of the Town to identify the management and owners of rental units in the Town and work with those managers and owner to foster and enforce the general public health, safety and welfare of all residents of the Town;” *id.*;
- “the Town Council . . . has determined that remedial action is necessary for the best interests of the Town’s citizens and that it is important for the public health, safety and general welfare that the ownership and management of rental housing units be regulated on an ongoing basis;” *id.*;
- “the Town . . . has received complaints or identified numerous concerns over the use or a sale [sic] of illegal drugs or controlled substances and other illegal activities;” Ord. No. 1062;
- “the Town desires to provide for the abatement, removal and/or penalty for or creating or permitting the continued existence of a public nuisance resulting from illegal activities or other circumstances as provided herein . . . .” *Id.*

The Council further declared “that there exists within the Town housing units, which by reason of their operation, use or occupancy affect or are likely to affect the public health, safety and general welfare of the Town.” Speedway Code § 5.48.010.

Based on these legislative findings, the Council passed Ordinance 1062 entitled “An Ordinance Amending the Town of Speedway, Indiana Municipal Code to Provide for Public Nuisances.” Ord. 1062. Ordinance 1062 is divided into two sections, one that proscribes “Public Nuisances” and one that proscribes additional “Prohibited Conduct on Real Property.” The Public Nuisance provision first defines Public Nuisances:

9.80.010 Definitions. For purposes of this title and unless otherwise defined in the Code, “public nuisance” shall mean the doing of an unlawful act, or the omitting to perform a duty, or the suffering or permitting of any condition or thing to be or exist, which act, omission, condition or thing either:

- (1) Injures or endangers the comfort, repose, health or safety of others; or

- (2) Offends decency; or
- (3) Is offensive to the senses; or
- (4) Unlawfully interferes with, obstructs or tends to obstruct or renders dangerous for passage any public or private street, highway, sidewalk, stream, ditch or drainage; or
- (5) In any way renders other persons insecure in life or the use of property; or
- (6) Essentially interferes with the comfortable enjoyment of life and property, or tends to depreciate the value of the property of others.

Ord. 1062, Sec. 1. Ordinance 1062 then provides “Illustrative Enumeration,” with the following caveat:

The maintaining, using, placing, depositing, leaving or permitting to be or remain on any public or private property of the following items, conditions or actions are hereby declared to be and constitute a nuisance; provided, however, this enumeration shall not be deemed or construed to be conclusive, limiting or restrictive in any way . . .

*Id.* § 9.80.020. The specific enumeration with which Plaintiffs take issue is: “(6) All unnecessary or unauthorized noises and annoying vibrations, including noises.” *Id.*

The Public Nuisance section of Ordinance 1062 makes it “unlawful for any property owner, occupant, or other person to allow a Public Nuisance to exist.” *Id.* § 9.80.030. If Speedway learns of a public nuisance, it “may give written notice to the owner, occupant, and/or any person holding a beneficial interest in the property upon which such Public Nuisance exists or upon the person causing or maintaining the nuisance.” *Id.* § 9.80.040. Furthermore,

- (2) The notice shall give the owner, occupant, and/or any person holding a beneficial interest in the property, at least ten (10) days from the date of receipt of the notice to bring the property into compliance as set forth in the notice.
- (3) The notice shall (i) give a statement of the nature and location of the alleged Public Nuisance; (ii) give a statement of acts deemed necessary to correct the condition; (iii) fix a date not sooner than ten (10) days from the date of the receipt of

the notice when said property owner, occupant, and/or any person holding a beneficial interest in the property, may appear before the Town Council to be heard on the question of the alleged Public Nuisance; and (iv) give a statement that if the alleged Public Nuisance is not abated as directed and no request for a hearing is made within the prescribed time, the Town may abate the Public Nuisance and assess the cost thereof against the owner, occupant, or person having a beneficial interest in the property, and that such costs will constitute a lien against the property.

*Id.*

The Public Nuisance section of Ordinance 1062's enforcement provision provides:

When a Public Nuisance is found to exist and after all persons known to have a substantial interest in the property have been given notice under Section 9.80.040, and given reasonable opportunity to bring the property into compliance and have not done so, the Town . . . my request that the Code Enforcement Officer issue a town ordinance violation citation to the record owner of the property or to the person shown to have right of exclusive possession of the property. Such citation shall impose a fine in conformance with Section 9.80.090.

*Id.* § 9.80.080. Correspondingly, the penalty portion of Ordinance 1062 states:

(1) Except as otherwise provided, any person found in violation of a provision of this Article shall be fined not less than one hundred dollars (\$100.00) for a first offense, and not less than two hundred fifty hundred [sic] dollars (\$250.00) for a second and all subsequent offenses, but no fine for any individual offense shall exceed two thousand five hundred dollars (\$2,500.00).

(2) The amount of fine shall be determined by the Town Council, or its designee.

(3) Each day after the expiration date of the time limit ordered for abatement stated in the notice to abate a Public Nuisance under this article shall constitute a distinct and separate offense.

*Id.* § 9.80.090.

The second section of Ordinance 1062 is directed to "Prohibited Conduct on Real Property:

Disorderly Houses." This section defines a "disorderly house" as follows:

(1) "Disorderly House" means a building, dwelling, establishment, premises or place where Prohibited Conduct occurs, and it includes the outside area contiguous to and surrounding the structure such as a yard or lot under the same ownership. If the

building, dwelling, establishment, premises or place is a multiple-unit dwelling or residence, hotel or motel, or commercial or office building, this definition applies only to that dwelling unit, room or suite of rooms in the hotel or motel, office rooms or suite, store, lot or yard in or on which Prohibited Conduct occurs.

*Id.* § 9.90.020(1). The section also defines “prohibited conduct,” which includes

conduct or activities occurring in violation of statutes or ordinances related to any of the following:

\* \* \*

(k) Unnecessary Noises, as prohibited by Section 9.12.010 of the Code;

\* \* \*

(m) Failure to comply with Section 9.80.030, (Prohibition on Public Nuisances), or Section 6.03.030, (Prohibition on Environmental Public Nuisances) of the Code constitutes Prohibited Conduct whenever the Town has verified with the Town Manager or Code Enforcement Officer that such violation has occurred at the property three (3) or more times within a calendar year. Such violation constitutes Prohibited Conduct regardless of whether the Town has taken action to abate the condition or conduct and regardless of whether the Town has issued a citation for the violation.

*Id.* § 9.80.030(6).

The Prohibited Conduct section of Ordinance 1062 makes it a violation for an owner of real property to “knowingly allow” its real property to be the “site for any Prohibited Conduct.” *Id.* § 9.90.030(1). But, the ordinance also states that “Whenever Prohibited Conduct occurs in or upon a building, dwelling, establishment, premises or place, the Town hereby deems the building, dwelling, establishment, premises or place to be a Disorderly House and a Public Nuisance.” *Id.* § 9.90.030(2).

If the Speedway police department determines that Prohibited Conduct is taking place on a particular property,

a written notice shall be sent . . . to the owner . . . of the real property and a copy to the tenant or occupant whose premise is the subject of the investigation . . . informing the owner that the initial investigation revealed suspected Prohibited Conduct on the real property and the fact that there is an on-going investigation.

(2) The notice shall inform the owner that whenever Prohibited Conduct occurs in or upon a building, dwelling, establishment, premises or place, the Town deems such location to be a Disorderly House and a Public Nuisance.

(3) The notice shall further inform the owner that he/she shall take legal action, within twenty (20) days of the date of the letter, to abate such suspected Prohibited Conduct, which may include, but is not limited to, filing an eviction action.

\* \* \*

(5) Any owner or tenant who believes the determination by the Police Department of Prohibited Conduct on the premises is insufficient to permit an eviction of the tenant or other occupant, may appeal that determination in writing, within ten (10) days of the date of the first notice[,] to the Town Council.

(6) The decision of the Town Council shall be final and based upon substantial evidence and in accordance with legal principles. The Town Council shall hear such appeal at the first reasonable opportunity but no less than ten (10) days from the date of giving said appeal owner notice of the date, time and place of the meeting at which the appeal shall be heard.

During such appeal and before a decision is rendered by the Town Council, the Town shall not commence an action against the owner for violation of this section of the Town Code. Failure to appeal to the Town Council shall not prejudice the rights of the owner in any proceedings under this section.

*Id.* § 9.90.050. The Prohibited Conduct section further provides that “[t]he Town deems the owner of the property and the occupants of the property responsible for any and all Prohibited Conduct occurring upon the premises after receipt of the notice.” *Id.* § 9.90.060.

(1) If the Prohibited Conduct has not been abated or an eviction action has not been commenced within twenty (20) days of the first written notice, a second written notice shall be sent to the owner . . . and shall inform the owner that the investigation at the premises is continuing, and that the legal proceedings may be commenced pursuant to this section. Such letter shall inform the owner of his/her failure to take some form of remedial action within ten (10) days to abate the Prohibited Conduct,

including eviction of those persons conducting the Prohibited Conduct, will result in legal proceedings against said owner for violation of this section.

(2) If the owner . . . fails to take required legal action to abate the Prohibited Conduct or commence an eviction action within ten (10) days of receipt of the second notice, the Town may proceed to collect the fines provided in this section and/or proceed under state law to abate or enjoin any suspected Prohibited Conduct as defined herein constituting a Public Nuisance as defined under the Town Code or state law.

*Id.* ¶ 9.90.070.

The penalties in the Prohibited Conduct section of Ordinance 1062 are described as follows:

(1) It shall be a violation of this chapter for any person to knowingly allow his/her property to be used for the activities which are prohibited by this section, or fail to comply with the terms of this chapter. The violation is by property address.

(2) Any person who violates any provision of this chapter shall be subject to a civil penalty of two hundred fifty dollars (\$250.00) for the first violation at a dwelling unit, with the second violation at the same dwelling unit carrying a civil penalty of five hundred dollars (\$500.00), and the third and subsequent violations at the same dwelling unit carrying a penalty of two thousand five hundred dollars (\$2,500.00). Each day a violation exists shall be considered a separate violation and a court may assess a monetary civil penalty for each day a violation exists. The fins for the second and any subsequent violations shall be imposed only if the person fined was an owner in a previous violation.

*Id.* § 9.90.100.

Plaintiff Peoples contends that as a resident of an apartment in Speedway who, on occasion, will associate with family and friends at her apartment for parties and cookouts, under Ordinance 1062 Peoples has no idea if any noise, cooking smells, or music that might arise from these gatherings would be considered a Public Nuisance. Peoples contends that she does not know what the illustrative enumeration “unnecessary or unauthorized noises and annoying vibrations, including noises” encompasses. Peoples has altered her conduct as a result of passage of Ordinance 1062.

Plaintiff Runaway Bay, LLC, is the owner of Runaway Bay Apartments located in Speedway. Plaintiff IAA is a member organization, located in Indianapolis, that serves the apartment industry of the State of Indiana; apartment owners in Speedway are members of IAA. Runaway Bay and IAA (collectively, the “Landlords”) contend that Ordinance 1062 requires them to police their tenants and to guard against matters that are deemed Public Nuisances under 9.80.010 because the ordinance makes it unlawful for the Landlords to allow such nuisances to exist on their property. The Landlords are concerned about this because of the penalties described in Ordinance 1062, and because a corresponding ordinance, Ordinance 1057, allows a landlord’s license to be denied or revoked or a rental unit permit to be denied or revoked if there is any violation of the Speedway Code or if property is maintained in a manner that Speedway deems to be threatening to the public health or general welfare, such as one in violation of Ordinance 1062. *See* Ord. No. 1057 §§ 5.48.030(e)(9), (11), (13); 5.48.030(f)(7), (9), (12); 5.48.040(c)(6); 5.48.030(h)(3), (5).

The Landlords are also concerned that the Prohibited Conduct section of Ordinance 1062 compels them to evict tenants in response to a notice that they must abate Prohibited Conduct for which they have received notice. The Landlords contend that this edict effectively rewrites the contract they have with their tenants about the circumstances under which the Landlords would initiate eviction proceedings.

## **II. PRELIMINARY INJUNCTION STANDARD**

A preliminary injunction is an extraordinary remedy granted only when there is a clear showing of need. *See Cooper v. Salazar* 196 F.3d 809, 813 (7th Cir. 1999). In order to be entitled to such relief Plaintiffs must show a likelihood of success on the merits, irreparable harm if the

injunction is denied, and the inadequacy of any remedy at law. *See Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 896 (7<sup>th</sup> Cir. 2001); *Cooper*, 196 F.3d at 813. Once Plaintiffs make this threshold showing, the Court balances the hardship on Plaintiffs if the injunction is wrongfully denied against the hardship on Speedway if it is wrongfully granted, and the Court considers the impact of the injunction on the public interest. *See Cooper*, 196 F.3d at 813; *Ferrell v. United States Dep't of Housing & Urban Dev.*, 186 F.3d 805, 811 (7<sup>th</sup> Cir. 1999). The injunction will not issue if the factors do not favor Plaintiffs.

Although courts should make findings with respect to each of the factors and then weigh each against the other, it is not always necessary to make findings with respect to the relative harms and the public interest when a movant has failed to carry its burden on the crucial threshold factors. *See Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1556 (Fed. Cir. 1994).

The only element argued by Speedway is the likelihood of success element; therefore, the Court focuses on that element, and takes the arguments of Plaintiffs on the other elements as undisputed.

### **III. DISCUSSION**

#### **A. WHETHER ORDINANCE 1062 VIOLATES THE FIRST AMENDMENT**

Plaintiffs argue that Ordinance 1062 is unconstitutionally vague because, in application, it may proscribe conduct protected by the First Amendment. The Public Nuisance section of the ordinance applies to, among other things, “unnecessary or unauthorized noises” and “annoying . . . noises.” Ord. 1062, § 9.80.020. There is no exception for public expression and/or discourse, therefore, Plaintiffs argue, the Court must apply strict scrutiny to the ordinance. Under such a

standard, the ordinance is void because there is no precise standard from which a person might conform his conduct and there is no precise standard by which a police officer can determine if a person has violated the ordinance. Moreover, Plaintiffs contend that a reasonableness standard cannot be read into Ordinance 1062 because it is necessarily different from other nuisance ordinances and statutes by design, and because Ordinance 1062 does not contain limiting language that the proscribed actions must interfere with the comfortable enjoyment of life or property. Plaintiffs also aver that Ordinance 1062 is overbroad because it could be applied without limit to First Amendment activities that a particular individual finds noisy or offensive or that in some other way disturbs that individual's comfort and repose.

Speedway contends that the ordinance is not vague because it specifically proscribes only unlawful acts, or failing to perform a duty. Moreover, Speedway avers that the Court must place Ordinance 1062 in the historical context of other nuisance laws and construe the terms of Ordinance 1062 in accordance thereof. Properly construed, Speedway argues, Ordinance 1062 measures proscribed conducting using an objective reasonableness standard, which is not unconstitutionally vague. Finally, Speedway argues that the ordinance is not overbroad because Ordinance 1062 proscribes only "unnecessary" or "unlawful" noises, which have a particular meaning according to Speedway Code § 9.12.020. Even if it is overbroad, Speedway contends that the noise provision may be severed from the remainder of the ordinance without changing the meaning of Ordinance 1062.

The Court finds that Plaintiffs are not likely to succeed in proving that the Public Nuisance section of Ordinance 1062 is either unconstitutionally vague or unconstitutionally overbroad. An ordinance is "void for vagueness" if it "contains 'terms so vague that [persons] of common

intelligence must necessarily guess at its meaning and differ as to its application.” *Gresham v. Peterson*, 225 F.3d 899, 907 (7<sup>th</sup> Cir. 2000) (alteration by the Seventh Circuit) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) (quoting *Connelly v. Gen’l Constr. Co.*, 269 U.S. 385, 391 (1926))). The touchstone of the inquiry is whether the ordinance is articulated “‘with a reasonable degree of clarity’ to reduce the risk of arbitrary enforcement and allow individuals to conform their behavior to the requirements of the law.” *Id.* (quoting *Roberts*, 468 U.S. at 629). “A statute that ‘vests virtually complete discretion in the hands of the police’ fails to provide the minimal guidelines required for due process.” *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). Moreover, “laws imposing civil rather than criminal penalties do not demand the same high level of clarity;” however, an ordinance that “potentially interferes with the right of free speech, suggest[s] that a ‘more stringent vagueness test should apply.’” *Id.* at 908 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982))

A federal court assessing the constitutionality of an allegedly vague state ordinance must consider any limiting constructions given to the ordinance by a state court or agency. *See id.* at 907-08. Here, the parties have pointed to none save Speedway’s own interpretation of the ordinance. The Court “will not hold a vague [ordinance] unconstitutional if a reasonable interpretation by a state court could render it constitutional in some application.” *Id.* at 908.

Peoples claims that Ordinance 1062 is void for vagueness because she does not know how Speedway is likely to enforce its provisions if she held a backyard barbecue where she played music or if she played music in her home. Peoples contends that the traditional “reasonable person” standard cannot apply in this case because Speedway specifically adopted more narrow language than traditional nuisance statutes in the State of Indiana; therefore, the terms must mean something

more narrow. In essence Peoples argues that the language used in the ordinance fails to inform her how loud her parties may be before they could be considered a Public Nuisance, and that the ordinance fails to provide the Speedway police department standards by which they can measure her conduct if one of her neighbors complains about the noise from her apartment.

The Court disagrees with Peoples. First, the ordinance is careful to define as a Public Nuisance unlawful acts or omissions of duty. Ord. 1062, § 9.80.010. Applying these limiting terms to the remainder of the Public Nuisance provisions is clear. A reasonable person can understand whether the music they are playing in their home, or the noise coming from their backyard barbeque would be considered unlawful or an omission of a duty.

The other conduct proscribed by the definition of Public Nuisance is not necessarily as clear:

the suffering or permitting of an condition or thing to be or exist, which act, omission, condition or thing either:

- (1) Injures or endangers the comfort, repose, health or safety of others; or
- (2) Offends decency; or
- (3) Is offensive to the senses; or

\* \* \*

- (6) Essentially interferes with the comfortable enjoyment of life and property . . . .

*Id.* Peoples argues that music or other speech might offend her neighbor's sense of decency or their senses, yet be protected by the First Amendment. Because the standard is arbitrary, Peoples contends, the ordinance is too vague.

Here, however, the Court concludes that an Indiana court could construe these terms under a reasonable person standard. In other words, if the noise would be sufficiently offensive or indecent

as to make it unreasonable to proceed, then the activity would be deemed a Public Nuisance. *See City of Gary ex. rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1229-31 (Ind. 2003) (adopting the Restatement (Second) of Torts § 821B reasonableness standard for public nuisances as the proper construction of the Indiana nuisance statute found at Indiana Code § 32-3-6-6). Peoples seems to argue that because Ordinance 1062 is written differently than the Indiana nuisance statute, Indiana Code § 32-3-6-6,<sup>1</sup> an Indiana court would not apply a reasonable person standard to Ordinance 1062. At the hearing, Peoples relied on *Lutz v. City of Indianapolis*, 320 N.E.2d 766 (Ind. Ct. App. 2005), to support her theory that an Indiana court would not imply a reasonableness standard in this circumstance. In *Lutz*, plaintiff challenged an Indianapolis ordinance that stated, in pertinent part:

“[I]t shall be unlawful for any person to make, continue to cause to be made or continued any loud, unnecessary or unusual noise, or any noise which either annoys, disturbs, inures or endangers the comfort, repose, health and peace or safety of others within the city. Accordingly, the following acts, among others, are declared to be loud, disturbing and unnecessary noises and in violation of this section, but such enumeration shall not be deemed to be exclusive:

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<sup>1</sup>Indiana Code § 32-3-6-6 reads:

Whatever is:

- (1) injurious to health;
- (2) indecent;
- (3) offensive to the senses; or
- (4) an obstruction to the free use of property;

so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.

(2) *Radios and phonographs*. Playing, using or operating, . . . any radio or television receiving set, musical instrument . . . for producing or reproducing sound in such a manner as to disturb the peace, quiet and comfort of the neighboring inhabitants, or at any time with louder volume than is necessary for convenient hearing for the person or persons who are in the room, vehicle or chamber in which such machine or device is operated. . . . The operation of any such . . . machine . . . between the hours of 11:00 p.m. and 7:00 a.m. in such a manner as to be plainly audible at a distance of fifty (50) feet from the building, structure or vehicle in which it is located shall be prima facie evidence of a violation of this subsection.”

*Id.* at 768 (quoting Indianapolis, Ind., Rev. Code of the Consol. City & County § 391-302(a)(2)). Indianapolis argued that its ordinance was more clear than the similar Indiana statute, the disorderly conduct statute, Indiana Code § 35-45-1-3(2), therefore it was not unconstitutionally vague. *Id.* at 768-69. The Indiana Court of Appeals disagreed stating that Indianapolis’ ordinance did not include any objective test. *Id.* at 769. Moreover, unlike Indiana’s disorderly conduct statute, the ordinance did not include any warning about the conduct prior to the sanction, which would “not enable individuals of ordinary intelligence to adequately comprehend what conduct the Ordinance is prohibiting.” *Id.* For these reasons, the *Lutz* court concluded that the ordinance was unconstitutionally vague. *Id.* at 770. The *Lutz* court proceeded to sever the portions of the ordinance that did not include a sufficiently ascertainable standard of conduct, leaving in the portion of the statute that proscribed the conduct during certain hours and a certain distance away from the noise-making machine. *Id.* at 770-71.

In the instant case, Speedway urges the Court to look at the historical interpretation of nuisance statutes and the language in Ordinance 1062 that proscribes unlawful acts or omissions of duties to imply a reasonableness standard to the remainder of the proscribed conduct. Although the Court agrees with Peoples that Ordinance 1062 is worded slightly differently than the corresponding Indiana statute, more narrowly circumscribed conduct does not necessarily imply abandonment of

the reasonableness standard common to nuisance law interpretation for over a hundred years. *See Smith & Wesson Corp.*, 801 N.E.2d at 1230 (discussing the consistent application of the common law reasonableness standard in nuisance law for the 122 years prior to its current decision). Moreover, application of the *ejusdem generis* doctrine to the less clear prohibitions in the ordinance would only prescribe conduct that was equal in nature to conduct that was unlawful or an omission of a duty.

Similarly, Peoples takes issue with the seemingly open-ended nature of the illustrative enumerations in the Public Nuisance section of Ordinance 1062, which implies that “unnecessary or unauthorized noises and annoying vibrations, including noises” would not limit the noises to which Speedway would apply the ordinance. In other words, Peoples argues that the ordinance is overbroad. But, there is nothing unclear about what noises are prohibited by this example; the “including noises” phrase clearly modifies “annoying vibrations,” which necessarily limits the type of noise that would be considered Public Nuisances under this section. Moreover, an Indiana court, using the doctrine *ejusdem generis*, could construe the disclaimer to the illustrative enumeration that it “shall not be deemed or construed to be conclusive, limiting or restrictive in any way,” such that only similarly offensive noises would be a Public Nuisance. In addition, read in conjunction with the definition of a Public Nuisance, only unnecessary, unlawful or unreasonable noises are proscribed; First Amendment speech would not fall under any of those categories. There is no reasonable argument that Ordinance 1062 “reaches a substantial amount of constitutionally protected conduct.” *Village of Hoffman Estates*, 455 U.S. at 494.

This Court can envision application of a reasonableness standard to the terms of the Public Nuisance section of Ordinance 1062, and there is evidence that an Indiana court would adopt such

a standard when it construes the provision. In addition, using such a limited construction, there is no evidence that the Public Nuisance section of Ordinance 1062 reaches a substantial amount of constitutionally protected speech. As a result, the Court finds that Plaintiffs are unlikely to succeed in showing that Ordinance 1062 is either void for vagueness or unconstitutionally broad. Plaintiffs' Second Motion for Preliminary Injunction on First Amendment grounds should be **DENIED**.

**B. WHETHER ORDINANCE 1062 IN CONJUNCTION WITH ORDINANCE 1057 VIOLATES THE CONTRACT CLAUSE OF THE CONSTITUTION**

The Landlords contend that Ordinance 1062 creates a substantial impairment on their existing contractual relationships with tenants and that Speedway's articulated purpose for Ordinance 1062 is not of a character appropriate to its stated important public purpose; therefore, Ordinance 1062 violates the Contract Clause of the Constitution. The Landlords evidence that the contracts with their tenants allow for termination of a lease if the Landlord determines that there is "good cause." The Landlords argue that in the face of a tenant's alleged violation of Ordinance 1062, they face a Hobson's Choice of evicting the tenant or losing their license. This reality, the Landlords aver, substantially impairs existing contracts. The Landlords also contend that the ordinance significantly overreaches its stated purposes because rather than imposing sanctions directly on offending tenants or on landlords who violate the ordinance, Ordinance 1062 requires the Landlords to initiate eviction proceedings once Speedway determines that suspected Prohibited Conduct is taking place on the Landlords' property.

Speedway argues that Ordinance 1062 does not impair the Landlords' leases with their tenants because Indiana already heavily regulates landlord/tenant relationships including the

circumstances under which a landlord may evict a tenant. Speedway contends that Ordinance 1062 does not impose a significantly greater burden on the Landlords's leases than those existing laws. Even if it does, Speedway avers that Ordinance 1062 is a valid exercise of the Council's police power to protect Speedway residents from crime and the harmful effects of public nuisances.

The Court concludes that the Landlords are not likely to succeed on the merits of their challenge to Ordinance 1062 under the Contract Clause of the Constitution. To address a challenge to an ordinance under the Contract Clause, the Court first makes a threshold inquiry: “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.” *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1977)). In determining the extent of impairment, the Court considers “whether the industry the complaining party has entered has been regulated in the past.” *Id.* As stated by the Seventh Circuit, “the level of scrutiny given the law varies directly in accordance with the severity of the impairment of existing contracts and varies inversely in accordance with the degree of prior regulation in a particular field of activity.” *Chi. Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 739 (7<sup>th</sup> Cir. 1987) (citations omitted).

If there is a substantial impairment, Speedway must justify the ordinance by showing that there is “a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem.” *Id.* at 411-12 (internal citations omitted). “Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of ‘the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the ordinance’s] adoption.’” *Id.* at 412

(quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)) (alteration in original, and by this Court).

Although Speedway argues that there is no impairment of the Landlords' leases with tenants, the Court finds that there is an impairment because operation of Ordinance 1062 changes the circumstances under which the Landlords might seek to evict a tenant. The question is whether the impairment is substantial. In answering this question, the Court agrees with Speedway that the impairment is not substantial. Despite the Landlords' argument to the contrary, the contracts between landlords and tenants are already heavily regulated. *See* Ind. Code §§ 32-30-2 *et seq.* & 32-30-3 (the "Ejectment and Quiet Title" chapters of Indiana's property code); Ind. Code § 32-31, *et seq.* (the "Landlord-Tenant Relationship" article of Indiana's property code). Moreover, Indiana regulates landlord liability for nuisances. *See, e.g.*, Ind. Code § 32-30-6 *et seq.* (defining causes of action for nuisance). Ordinance 1062 merely makes more specific the duty of the Landlords with respect to policing Public Nuisances or Prohibited Conduct on their rental property. In light of this statutory scheme, the Landlords' argument that Ordinance 1062's impairment on their leases is substantial is not persuasive.

In addition, contrary to the Landlords' assertion, with respect to Public Nuisances, Ordinance 1062 gives the Landlords the opportunity to abate the nuisance before any citation or violation is found. Ord. 1062, § 9.80.040(2). Similarly, with respect to the Prohibited Conduct section of the ordinance, the Landlords may take actions other than eviction to abate suspected Prohibited Conduct, such as asking an offending invited guest of a tenant to leave. *Id.* § 9.90.050(3). In part, Ordinance 1062 is a benefit to the Landlords because it provides them with detailed information about potential "good cause" for terminating a tenant's lease.

The Landlords briefly take issue with Ordinance 1062's appeal process arguing that the ordinance requires the appellate body, the Town Council, to apply the deferential "substantial evidence" standard to police department findings. However, the Court agrees with Speedway that, properly construed, Ordinance 1062 applies no such standard. Ordinance 1062 states: "Any owner . . . who believes the determination by the Police Department of Prohibited Conduct on the premises is insufficient to permit an eviction of the tenant or other occupant, may appeal that determination" to the Council within ten days of the first notice. Ord. 1062, § 9.90.050(5). The ordinance further provides that the decision of the Council on appeal "shall be . . . based upon substantial evidence and in accordance with legal principles." Ord. 1062, § 9.90.050(6). In other words, in making any final decision on whether Prohibited Conduct has occurred on the property, the Council must base its decision on substantial evidence. There is nothing in the ordinance that implies that the Council must give deference to the police department's findings.

Although the Court has found that Ordinance 1062 does not substantially impair existing contracts, there is some impairment, therefore, the Court will scrutinize the reasonableness of the ordinance under a deferential standard. *See Chi. Bd. of Realtors, Inc.*, 819 F.2d at 739 (discussing the sliding scale of scrutiny in Contract Clause cases). There is no dispute that Speedway has justified Ordinance 1062 by showing its interest to regulate conduct that "might endanger the public health, safety, or welfare." Ord. 1062, Preamble. The legislative findings specifically identify complaints and concern over the use or the sale of illegal drugs or controlled substances, other illegal activities, and or public nuisances stemming from such illegal activity. *Id.*

In assessing the reasonableness of these purposes, the Court is mindful of the Supreme Court's guidance to "defer to legislative judgment as to the necessity and reasonableness of a

particular measure.” *Energy Reserves Group*, 459 U.S. at 412-13 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)). The Landlords contend that Ordinance 1062 is unreasonable because of the faulty appeals process afforded a Landlord and because the ordinance forces the Landlords to initiate eviction proceedings regardless of whether or not they feel such proceedings is justified under the circumstances. In other words, the Landlords contend that they must evict tenants whose conduct does not necessarily threaten the health, safety or welfare of other Speedway residents. The Court disagrees that Ordinance 1062 unreasonably overreaches its stated objective. As discussed earlier in this opinion, the proscribed conduct in Ordinance 1062 is measured by an objective reasonableness standard or must be unlawful. Moreover, the appeal process allows the Landlords to challenge the police department’s findings in a particular instance, and the Council’s *de novo* findings must be based on substantial evidence. The Court finds that these are reasonable safeguards for the Landlords under the circumstances here where the ordinance does not substantially impair the leases between the Landlords and their tenants. Ordinance 1062 has reasonable conditions and is tailored to the public purpose used by Speedway to justify its adoption.

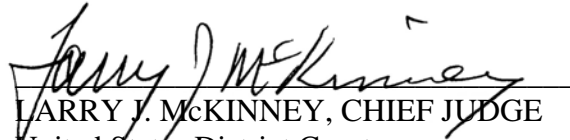
In summary, Plaintiffs have not shown a likelihood of success on the merits of their challenge to Ordinance 1062 under the Contract Clause of the Constitution. Therefore, their Second Motion for Preliminary Injunction should be **DENIED**.

#### **IV. CONCLUSION**

For the foregoing reasons, the plaintiffs, Sheri Peoples, on her own behalf and on behalf of those similarly situated, Flaherty and Collins, Inc., Indiana Apartment Association, and Runaway Bay, LLC, have failed to show a likelihood of success on the merits on any of their challenges to

defendant's, the Town of Speedway, Indiana, Ordinance No. 1062. Plaintiffs' Second Motion for Preliminary Injunction is **DENIED**.

IT IS SO ORDERED this 16<sup>th</sup> day of February, 2007.

  
LARRY J. MCKINNEY, CHIEF JUDGE  
United States District Court  
Southern District of Indiana

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