Intracoastal Waterway -- Noise Regulation

Number: INFORMAL

Date: August 17, 2016

Ms. Maggie D. Mooney-Portale
Town Attorney, Town of Longboat Key
Persson & Cohen, P.A.
6853 Energy Court
Lake Ranch, Florida 34240

Dear Ms. Mooney-Portale:

On behalf of the Town of Longboat Key, you have requested this office's assistance in determining whether the Town of Longboat Key has the authority to adopt and enforce a local sound regulation that would include the application of such ordinance to non-motorized noise emanating from certain vessels anchored in and around sand shoal areas located within the Intracoastal Waterway. As more fully addressed in the discussion below, it would appear that the Town of Longboat Key is foreclosed from adopting any local sound ordinance or local sound regulation which would "regulat[e] any vessel upon the Florida Intracoastal Waterway" as provided in section 327.60(2)(c), Florida Statutes.

The Town of Longboat Key is a ten mile barrier island located in both Manatee and Sarasota Counties. The northern end of Longboat Key is located in Manatee County and includes within its municipal boundaries two additional islands. These islands are only accessible by boat and are located within Sarasota Bay. Between one of the islands and Longboat Key is a sand shoal area which is within the Intracoastal Waterway.[1]

According to your letter, the sand shoal area is a popular gathering place for vessels to anchor and for boaters to engage in partying activities. Frequently, the boaters listen to loud music that is amplified by speakers located on the anchored vessels. The amplified music is occasionally heard by property owners on the Sarasota Bay side of the Town. A number of residential property owners have expressed concern and frustration regarding the disturbance of their piece and solitude resulting from the loud music played by vessels anchored on the Intracoastal Waterway.

The Town Commission of Longboat Key is exploring options relating to enforcement of locally adopted sound ordinances relating to disturbing levels of sound, including those produced by speakers. The Town is considering the possibility of an acoustical sound analysis for the intent of establishing acoustical measurements of ambient sound levels for inclusion in a noise ordinance. You advise that the Town desires to control disturbing nuisance noise within its jurisdictional boundaries regardless of the source of the sound. The noise ordinance would apply throughout the Town including the sand shoal areas located within the Intracoastal Waterway. You have stated that you are confident in the Town's authority to adopt a noise ordinance and you have not requested any comment on that authority. You state that the Town would not, through this ordinance, regulate any aspect of boat equipment, navigation, or operation noise.

Of primary concern to the resolution of your question is section 327.60, Florida Statutes, entitled "[l]ocal regulations; limitations." As the statute states:

"The provisions of this chapter and chapter 328 shall govern the operation, equipment, *and all other matters relating thereto* whenever any vessel shall be operated upon the waters of this state or when any activity regulated hereby shall take place thereon." (e.s.)

The statute authorizes the adoption of ordinances or other local regulations relating to the operation of vessels with certain, specifically enumerated exceptions:

"(2) Nothing in this chapter or chapter 328 shall be construed to prevent the adoption of any ordinance or local regulation relating to operation of vessels, except that *a county or municipality shall not enact, continue in effect, or enforce any ordinance or local regulation*:

* * *

(c) *Regulating any vessel upon the Florida Intracoastal Waterway*[.]" (e.s.)

Thus, it is clear that the state has preempted[2] regulation of vessels on the Florida Intracoastal Waterway and that local governments have no authority to enact, continue in effect, or enforce "any[3] ordinance or local regulation" that regulates any vessel on the Florida Intracoastal Waterway.[4] The statute does not limit the prohibition to ordinances dealing with boat equipment, navigation, or operation noise, rather, the language of the statute addresses any ordinance or local regulation when the vessel is upon the Florida Intracoastal Waterway. In fact, other provisions of section 327.60, Florida Statutes, do limit the enactment of local ordinances regulating vessel equipment performance or safety standards; regulating the design, manufacture, installation, or use of marine sanitation devices on vessels; discriminating against personal watercraft; discriminating against airboats; regulating the anchoring of vessels outside mooring fields; regulating engine or exhaust noise; or regulations that may conflict with the provisions of Chapter 327, Florida Statutes, or the rules adopted pursuant to this chapter. The language relating to the Intracoastal Waterway is broad and does not limit local regulation to specific topics, rather, it completely removes vessels upon the Intracoastal Waterway from local regulation except as may be authorized therein and without regard to whether areas of the Intracoastal Waterway may come within the geographical boundaries of a municipality.

In further support of this conclusion, the Florida Legislature has carved out a limited exception to this preemption with the provisions of section 327.65, Florida Statutes.[5] While entitled "[m]uffling devices" and initially addressing the muffling of vessel engine exhaust, the statute goes on to address noise pollution on Florida waterways and provides that counties may, *pursuant to section 327.60(2), Florida Statutes*, adopt noise pollution regulations. However, as noted above, section 327.60(2) authorizes, in subparagraph (g), the regulation of engine or exhaust noise. Thus, reading the statutes *in pari materia*,[6] the authority of a county to regulate engine or exhaust noise on the Florida Intracoastal Waterway is authorized, but only as set forth in section 327.65(2)(g), Florida Statutes.

In conclusion, it would appear that the Town of Longboat Key is foreclosed by the provisions of section 327.60(2)(c), Florida Statutes, from adopting a local sound ordinance or local sound

regulation which would apply to or "regulat[e] any vessel upon the Florida lntracoastal Waterway."

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

GH/t

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[1] Section 327.02(12), Fla. Stat., defines the "Florida Intracoastal Waterway" as:

"'Florida lntracoastal Waterway' means the Atlantic lntracoastal Waterway, the Georgia state line north of Fernandina to Miami; the Port Canaveral lock and canal to the Atlantic lntracoastal Waterway; the Atlantic Intracoastal Waterway, Miami to Key West; the Okeechobee Waterway, Stuart to Fort Myers; the St Johns River, Jacksonville to Sanford; the Gulf lntracoastal Waterway, Anclote to Fort Myers; the Gulf lntracoastal Waterway, Carrabelle to Tampa Bay; Carrabelle to Anclote open bay section, using the Gulf of Mexico; the Gulf lntracoastal Waterway, Carrabelle to the Alabama state line west of Pensacola; and the Apalachicola, Chattahoochee, and Flint Rivers in Florida."

[2] As provided in the Municipal Home Rule Powers Act, Ch. 166, Fla. Stat., Florida municipalities are authorized to "enact legislation concerning any subject matter upon which the state Legislature may act, except: . . . (c) [a]ny subject expressly preempted to state or county government by the constitution or by general law[.]" *See* s. 166.021(3)(c), Fla. Stat.

[3] *See* Ops. Att'y Gen. Fla. 74-311 (1974) and 09-31 (2009) in which this office has previously expressed its opinion that the term "any" may be read to mean "all" or "every."

[4] *And see* Op. Att'y Gen. Fla. 05-58 (2005), concluding that Citrus County was prohibited from adopting an ordinance creating a boating restricted area near residential properties for the purpose of vessel noise abatement and stating that:

"Chapter 327, Florida Statutes, and the administrative rules promulgated thereunder limit the authority of local governments to adopt noise abatement regulations and enforce those regulations on state waters. The county's authority to regulate is subject to the state's paramount power to regulate and control the use of its sovereign lands. A corollary to the requirement that regulations and restrictions of certain activities must be in furtherance of public health, safety, and welfare is that such regulation must not be in violation of constitutional protections afforded to the public for the use of, and access to, state sovereignty lands."

[5] The statute provides:

"327.65 Muffling devices.-
(1) The exhaust of every internal combustion engine used on any vessel operated on the waters of this state shall be effectively muffled by equipment so constructed and used as to muffle the

noise of the exhaust in a reasonable manner. The use of cutouts is prohibited, except for vessels competing in a regatta or official boat race, and for such vessels while on trial runs.
(2)(a) Any county wishing to impose additional noise pollution and exhaust regulations on vessels may, pursuant to s. 327.60(2), adopt by county ordinance the following regulations:
1. No person shall operate or give permission for the operation of any vessel on the waters of any county or on a specified portion of the waters of any county. including the Florida Intracoastal Waterway, which has adopted the provisions of this section in such a manner as to exceed the following sound levels at a distance of 50 feet from the vessel: for all vessels, a maximum sound level of 90 dB A.
2. Any person who refuses to submit to a sound level test when requested to do so by a law enforcement officer is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.
(b) The following words and phrases. when used in this section. shall have the meanings respectively assigned to them in this subsection.
1. "dB A" means the composite abbreviation for the A-weighted sound level and the unit of sound level. the decibel.
2. "Sound level" means the A-weighted sound pressure level measured with fast response using an instrument complying with the specification for sound level meters of the American National Standards Institute. Inc.. or its successor bodies. except that only a weighting and fast dynamic response need be provided."

[6] When two statutes relate to common things or have a common or related purpose, they are said to be *in pari materia*, and where possible, that construction should be adopted which harmonizes and reconciles the statutory provisions so as to preserve the force and effect of each. *See, e.g., Pritchard v. Jax liquors, Inc.*, 499 So. 2d 926 (Fla. 1st DCA 1986), *review denied* , 511 So. 2d 298 (Fla. 1987), and *Mann v. Goodyear Tire and Rubber Company*, 300 So. 2d 666 (Fla. 1974).