IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN B. GRAVES and GENEVIEVE M. GRAVES
(d/b/a Waterfront Bar & Grill) and
GRAVES INVESTMENT, INC.,

Plaintiffs,

v.

VILLAGE OF LAKE NEBAGAMON,
ROBERT ANDERSON, RAY ENRIGHT,
TIM FITZGERALD, PERRY FLEMMEN,
HOWARD LEVO and AL LISDAHL,

Defendants.

OPINION and ORDER

11-cv-309-slc

In this civil action for monetary, injunctive and declaratory relief, plaintiffs John Graves, Genevieve Graves (d/b/a Waterfront Bar & Grill) and Graves Investment, Inc. have sued defendants in their individual and official capacities for violating their rights under the First Amendment and the equal protection clause of the Fourteenth Amendment in enacting and applying the Village of Lake Nebagamon's noise and cabaret ordinances. On January 5, 2012, defendants moved for summary judgment on all of plaintiff's claims. Dkt. 14. Because discovery deadlines had been extended and plaintiffs' attorney was busy preparing for another trial in this court at the time, plaintiffs asked the court to extend the January 20 deadline for filing dispositive motions and the January 26 deadline for responding to defendants' motion. Dkt. 19 (filed on January 18, 2012). Following a telephonic status conference, the court entered an amended scheduling order on February 1, 2012, extending the deadline for plaintiffs to file their own motion for summary judgment and their response to defendants' pending motion to April 13, 2012.

Although plaintiffs responded to defendants' original proposed findings of fact, they did not file a brief in opposition to defendants' motion, choosing instead to file their own motion for summary judgment. *See* dkt. 23. In their motion, plaintiffs voluntarily dismiss their individual capacity and Fourteenth Amendment equal protection claims (*id.* at 1-2) and generally argue that the noise and cabaret ordinances are unconstitutionally vague, not content-neutral and impose unreasonable time, place or manner restrictions on music and entertainment in violation of the First Amendment. Both summary judgment motions are now before the court.

Although I find that plaintiffs have failed to show that they can survive summary judgment with respect to some specific arguments, specifically that the ordinances are not content-neutral and that the ordinances impose unreasonable time, place and manner restrictions, the court needs additional information from the parties on the issue whether the ordinances unconstitutionally grant village officials unfettered discretion in granting licenses or enforcing the ordinances. Specifically, neither side has provided the court with adequate briefing of the legal issues related to unfettered discretion.

Further, because it is not clear from the record before the court, I am requiring plaintiffs to explain their theory of recovery and show what harm they believe that they sustained before they will be allowed to proceed. Therefore, I will stay ruling on the parties' motions until both sides have had an additional opportunity to supplement their briefs.

Finally, because the new briefing dates would not allow the court to issue a ruling until the eve of trial, I am striking the remainder of the trial calendar so as to spare the parties, their clients and any witnesses what might be unnecessary or misdirected trial preparation. Upon

providing a final order on summary judgment, if a trial still is necessary, then the court will set the earliest trial date that works for both sides and the court.

FACTS

I. The Parties

Plaintiffs John and Genevieve Graves reside in Superior, Wisconsin and own the Waterfront Bar and Grill (the Waterfront) located in Lake Nebagamon, Wisconsin. They also own plaintiff Graves Investment, Inc., a Wisconsin corporation with offices in Superior.

Defendant Village of Lake Nebagamon, Wisconsin is a village government created pursuant to the laws of Wisconsin. It is a rural village with a population of about 1000, located on the shore of Lake Nebagamon in Douglas County, Wisconsin, about 30 miles southwest of Superior.

At all times relevant to this action, defendant Robert Anderson was the president of the Village Board and defendants Ray Enright, Tim Fitzgerald, Perry Flemmen, Howard Levo and Al Lisdahl were trustees of the Village Board. (Plaintiffs voluntarily dismiss their individual liability claims against all of these defendants, *see* dkt. 23 at 1-2).

II. Background

The Graves bought the Waterfront in 2000 after it had been losing money, was in foreclosure and was in need of repair. They spent more than $100,000 renovating the Waterfront. Within a few years, the Graves were able to turn the Waterfront into a financially successful bar and grill that employed many local residents throughout the year.

An important part of the operations and financial success of the Waterfront under the Graves' ownership has been, and continues to be, the provision of live and recorded music and entertainment, both inside and outside the building, with dancing and singing for the enjoyment of Waterfront patrons. The Waterfront is located within an area zoned commercial, but it is on the border of an area that was re-zoned from commercial to residential around 2000, at a property owner's request.

During 2009 and 2010, the village retained Attorney Stephen Olson, a member of the law firm Maki, Ledin, Bick & Olson, S.C., in Superior, Wisconsin, to draft two municipal ordinances related to noise. Although neither ordinance expressly states its purpose, Olson avers that the village wanted to create a uniform regulation of noise levels and a uniform licensing process. Village officials had discussed and were concerned about noise generated by all terrain vehicles (ATVs), snowmobiles and boats, as well as businesses and individuals generating unreasonably loud noise. The village also had received complaints about music and the operation of cars and machinery.

III. The Noise Ordinance

On January 5, 2010, defendants passed and adopted Ordinance No. 12.02(3), titled "Loud and Unreasonable Noise Prohibited," (the noise ordinance) which limits noise levels in residential, commercial and industrial zones of the village between the hours of 10pm and 7am. Defendants Anderson, Fitzgerald, Flemmen, Levo and Lisdahl voted for the ordinance and defendant Enright voted against it. The noise ordinance was published on January 12, 2010 and took effect the next day.

The noise ordinance prohibits the "production or reproduction of sound in such a manner as to disturb the peace, quiet and comfort of neighboring residents or any reasonable person of normal sensitiveness residing in the area." It sets the maximum noise levels for residential areas at 55 decibels (dB(A)) between 7 am and 10 pm, and 45 dB(A) between 10 pm and 7 am. In commercial areas, the volume limit is 60 dB(A) from 7 am to 10 pm and 55 dB(A) from 10 pm to 7 am. ATVs, motor boats and snowmobiles are allowed to emit higher dB(A) levels than any other regulated sources. The noise ordinance also specified exclusions not based on any maximum dB(A) levels, including "[n]oises associated with a public or private meeting, concert, parade or other similar event, with prior approval of the Village of Lake Nebagamon Board." Violations of the ordinance are punishable by civil forfeitures plus the "costs of prosecution including reasonable attorney's fees."

IV. Cabaret License Ordinance

On June 8, 2010, defendants Anderson, Enright, Fitzgerald, Flemmen, Levo and Lisdahl voted to adopt Ordinance No. 11.07, titled "Cabaret License," (the cabaret ordinance) which was published on June 15 and became effective on June 16, 2010. The cabaret ordinance incorporates and cross-references the noise ordinance and includes a "Special Event Outdoor Cabaret License" designed to allow persons or businesses to apply for a license to exceed the noise level regulation for a short period of time. When adopting the cabaret ordinance, village officials discussed regulating the amount of noise coming from businesses in the downtown area and outdoor noise from parties, weddings and outdoor festivals. There also were specific discussions about the noise from playing music outdoors, especially during the summer season.

Subsection 2 of the cabaret ordinance defines and restricts two types of cabarets, indoor and outdoor:

> An "indoor cabaret" is defined as a place to which the general public is admitted and where dancing and/or live or recorded (radio, CDs, I-Pods, etc.) entertainment is permitted or furnished to patrons by management with or without special charge therefor, and where liquid refreshments and/or foods are sold; provided, that if dancing is permitted, not less than fifty percent (50%) of the floor area of the room or rooms in which the dancing is permitted or furnished shall be occupied by tables and chairs for the use of patrons. Juke Box music is excluded from this ordinance.
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> An "outdoor cabaret" is defined as an outdoor area to which the public is admitted and where dancing and/or live or recorded (radio, CD's, I-Pods, etc.) entertainment is permitted or furnished to patrons by management with or without special charge therefore, and where liquid refreshment and/or foods are sold.

The ordinance requires every person who keeps, maintains, conducts or operates "any cabaret as defined in Subsection (2)" to obtain a cabaret license. Individuals already holding a cabaret license on the approval date of the ordinance were permitted to operate their business until June 30, 2010. Thereafter, a business had to renew its cabaret license annually in accordance with the application provisions.

The ordinance establishes three classes of cabaret licenses: indoor, outdoor and special event. The fee for each class of license is $10.00. A cabaret license is not required for these activities:

> A. Musical entertainment, provided by non-profit organizations, at events for a period of not more than seven (7) days, such as events being held at the Village Auditorium, lake front or other locations approved by the Village Board.
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> B. Those entities that meet the qualifications to hold a temporary beer and/or wine license under Chapter 125.81(g) of the Wisconsin Statutes.

The cabaret ordinance requires that license applications be submitted to the village clerk and provides a procedure for the village police department to investigate the application and applicant and make reports and recommendations to the village board. Failure to obtain a cabaret license "will result in a $500.00 fine per occurrence plus associated attorney's fees and court expenses."

Section 9 of the cabaret ordinance gives the village board the following discretion in deciding whether to grant or deny a cabaret license:

> The Board shall have discretion to refuse the granting of any license or transfer thereof if in its judgment the granting or transfer of such license shall be against the public interests either because of the unsuitability of the location, undesirability or unreliability of the applicant or manager, or because of the failure of such applicant or manager to observe the provisions of this Code in the prior conduct of a cabaret, dance hall, or other similar place.

Section 10 of the ordinance provides that:

> [A]ny noise emanating from within the licensed area [under a Cabaret License] shall not violate the regulations of the Village Code of Ordinances pertaining to noise. Noise Ordinance 12.02(3) Offenses Endangering Public Peace and Good Order.
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> * * *
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> Indoor Cabarets shall be closed to the public between 2:00 a.m. and 6:00 a.m. on Sunday through Thursday, and 2:30 a.m. and 6:00 a.m. on Saturday and Sunday.
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> No licensee of an outdoor cabaret shall be permitted to provide music, dancing or singing from 10:00 p.m. to 12 noon. The Village Board shall establish the time restrictions for a Special Event Outdoor Cabaret.

Section 12 of the cabaret ordinance provides that "[a]ny resident of the Village may file a sworn complaint with the Village Clerk alleging that a person holding a Cabaret License has violated the Cabaret Ordinance." This provision then shifts the burden onto the licensee to

"appear before the Village Board . . . and show cause why his or her license should not be revoked or suspended."

V. Application of Ordinances to Plaintiffs

The Waterfront is one of only two or three business in the village that fall under the cabaret ordinance. On or about June 15, 2010, defendant Lisdahl personally went to the Waterfront and met with John Graves about the cabaret ordinance. Lisdahl told Graves that he and his wife could not play live or recorded music outside at the Waterfront after 10 pm and before noon. (The parties dispute whether Lisdahl was threatening the Graves with potential citations and forfeitures if they failed to comply.)

During the summer of 2010, the Graves booked the Lamont Cranston Band, a blues band from Minneapolis, Minnesota with a large following. On June 30, 2010, the Waterfront Bar & Grill applied for and received indoor and outdoor cabaret licenses valid through June 30, 2011. On August 30, 2010, the Waterfront Bar & Grill applied for and received a special event outdoor cabaret license for the Lamont Cranston Band that was valid from 8 pm to 11 pm on September 11, 2010.

Because it was raining on September 11, 2010, the band played indoors at the Waterfront. That night, Village Police Officer Don Hakes arrived at the Waterfront at about 11:30 pm and stood on the outdoor deck. He stated that he was enforcing the cabaret ordinance. (The parties dispute whether Hakes talked to Graves about shutting the windows and doors so the music would not drift outside.) The Graves' Waterfront staff requested that Officer Hakes use the police station noise meter to check the sound levels from the music but he said that it was locked up in the village clerk's office. Officer Hakes stood on the Waterfront

deck for 30 minutes and kept people inside the building without measuring the sound levels. He did not issue a citation.

Business at the Waterfront dropped off after September 11, 2010 and the Waterfront continues to lose a substantial amount of business. (The parties dispute whether Officer Hakes's presence at the bar caused this decline. Graves avers that the band had been playing to an audience of about 100 people when Officer Hakes arrived, but within about a half hour, the crowd was intimidated and dwindled to only about 14 people. Defendants point out that in his deposition, Graves testified that the officer arrived after the band had stopped playing and that he speculated that the crowd left within a half hour because Officer Hakes had arrived. The police report shows that Hakes arrived at 11:13pm. Graves also testified that he does not know the reason why he has had a drop in business from earlier years—it is only his belief that the decline was caused by a public reaction to what occurred after the Lamont Cranston Band performance.)

On May 3, 2011, the Waterfront Bar & Grill applied for and received indoor and outdoor cabaret licenses valid for a period of one year. On July 14, 2011, John Graves applied for and received a special event outdoor cabaret license for July 23, 2011.

The village has never issued a municipal citation or prosecuted plaintiffs for any alleged violation of the noise or cabaret ordinances. The village never has denied any application made by plaintiffs for an indoor cabaret license, an outdoor cabaret license or a special event outdoor cabaret license.

OPINION

I. Summary Judgment Standard

Under Fed. R. Civ. P. 56, summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment, the admissible evidence presented by the nonmoving party must be taken as true and all reasonable inferences must be drawn in the nonmovant's favor. However, a party that bears the burden of proof on a particular issue may not rest on his pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires a trial. *Hunter v. Amin*, 538 F.3d 486, 489 (7th Cir. 2009) (internal quotation omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The applicable substantive law will dictate which facts are material. *Darst v. Interstate Brands Corp.*, 512 F.3d 903, 907 (7th Cir. 2008). Further, a factual dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248; *Roger Whitmore's Auto. Servs., Inc. v. Lake County, Ill.*, 424 F.3d 659, 667 (7th Cir. 2005). The court's function in a summary judgment motion is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249; *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007).

II. Standing

As an initial matter, defendants point out that some of the ordinance provisions that plaintiffs criticize have never been applied to plaintiffs. Plaintiffs, however, have challenged the

ordinances on their face, not merely as applied. "In a facial constitutional challenge, individual application facts do not matter." *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011). "Once standing is established, the plaintiff's personal situation becomes irrelevant. It is enough that '[w]e have only the [statute] itself' and the 'statement of basis and purpose that accompanied its promulgation.'" *Id.* at 697-98 (quoting *Reno v. Flores*, 507 U.S. 292, 300–01 (1993)) (also citing Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1238 (2010) ("[F]acial challenges are to constitutional law what *res ipsa loquitur* is to facts—in a facial challenge, *lex ipsa loquitur*: the law speaks for itself."); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 Iowa L. Rev. 41, 58 (2006) ("A valid-rule facial challenge asserts that a statute is invalid on its face as written and authoritatively construed, when measured against the applicable substantive constitutional doctrine, without reference to the facts or circumstances of particular applications."); Mark E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 387 (1998) ("[A] valid rule facial challenge directs judicial scrutiny to the terms of the statute itself, and demonstrates that those terms, measured against the relevant constitutional doctrine, and independent of the constitutionality of particular applications, contains a constitutional infirmity that invalidates the statute in its entirety.")).

Here, plaintiffs own a bar that provides music, dancing and singing within the village, making them subject to the noise and cabaret ordinance restrictions. Whether plaintiffs actually suffered injury from an application of the ordinance is a question that goes to the merits of some of their claims, not to their standing to challenge the ordinances as unconstitutional on their face or as applied. As discussed further below, if the court finds that certain provisions of the

ordinances are unconstitutional, *then* we move onto questions about what specific harm plaintiffs allegedly suffered as a result. As a starting point, however, plaintiffs' status as bar owners establishes their standing to sue. *Sherman v. Koch*, 623 F.3d 501, 507 (7th Cir. 2010) (holding similar in First Amendment establishment clause case).

III. Plaintiffs' Challenges

The parties agree that under Supreme Court precedent, music is a form of protected speech on which the government may impose reasonable restrictions as to time, place and manner, provided that the restrictions "'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981)). Citing *Ward*, plaintiffs generally contend that the ordinances are vague, not content-neutral and that they impose unreasonable time, place and manner restrictions. With respect to vagueness, plaintiffs argue that various provisions of the ordinances either are unclear or fail to include reasonably objective standards or criteria for reviewing permit applications or enforcing the ordinance provisions.

But other than outlining the general standard set forth in *Ward* and string-citing First Amendment cases relating to permits, plaintiffs have not developed their legal theories or correlated the facts of their case to a particular theory.[1] *See International Marketing, Ltd. v.*

[1] Plaintiffs seem to have incorporated verbatim this court's overview of First Amendment jurisprudence from the summary judgment order entered in *Otis Scheer v. City of Hayward*, 10-cv-447-slc

Archer-Daniels- Midland Co., Inc., 192 F.3d 724, 733 (7th Cir. 1999) (discussing difference between burden at pleading stage versus later stages of lawsuit in presenting legal theory). In fact, plaintiffs cite only one case in the body of their brief for the very general proposition that the ordinances must be reasonable and must "establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner." *See* dkt. 24 at 16 and 20 (quoting *Sherman*, 623 F.3d at 503, 519-20). Defendants' legal analysis is similarly lacking, consisting of an introductory recitation of various aspects of First Amendment law.

As the Supreme Court has made clear, "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party opposing summary judgment then "must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered." *Transamerica Financial Servs., Inc. v. Skyes*, 171 F.3d 553, 555 (7th Cir. 1999); *Robyns v. Reliance Standard Life Ins. Co.*, 130 F.3d 1231, 1237 (7th Cir. 1997) (quoting *Reklau v. Merchants Nat'l Corp.*, 808 F.2d 628, 629 n. 4 (7th Cir. 1986)). With respect to many of their challenges to the ordinances, plaintiffs have failed to meet their burden, either as the moving party or the nonmoving party because they have not offered a legal analysis of the issues that they present in headline form. Although the same could

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(which involved the same lawyers on both sides of this lawsuit). Procedurally this is fine, since it can't hurt to remind a judge what he has said in a previous case, but substantively, this tactic is persuasive only if it presents an apples-to-apples comparison. My case summary in *Otis Scheer* was part of qualified immunity discussion, it was not a substantive analysis of the merits of plaintiff's First Amendment claims. Therefore, plaintiffs' use of the *Otis Scheer* string cite does not advance their position in the absence additional analysis, including specific application of the holdings of these cases to the facts in this case.

be said of defendants, defendants do not bear the burden incumbent on a party seeking to strike two local ordinances as unconstitutional.

Taking this into account, I will address plaintiffs' challenges to the ordinances to the extent possible given the arguments presented by the parties. However, given that "First Amendment jurisprudence is a vast and complicated body of law that grows with each passing day," *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 871 (4th Cir. 1998), the court cannot and will not provide legal theory or analysis where none has been advanced by plaintiffs.

A. Content Neutrality

To pass constitutional muster, regulations cannot favor one form of speech over another. *Stokes v. City of Madison*, 930 F.2d 1163, 1171 (7th Cir. 1991). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. An ordinance is considered content neutral so long as it is justified or serves purposes unrelated to the content or subject matter of the speech. *Milestone v. City of Monroe, Wis.*, 665 F.3d 774, 783 (7th Cir. 2011); *Stokes*, 930 F.2d at 1171.

Plaintiffs argue that the noise ordinance is not content neutral because it allows ATVs, motor boats and snowmobiles to emit higher dB(A) levels than other sources. Defendants respond that they are not favoring any one form of speech over another because noise from the above recreational vehicles is not "speech." They also explain that the higher limits for the recreational vehicles correspond to those set forth in certain sections of the Wisconsin Statutes and the Wisconsin Administrative Code. Plaintiffs maintain that this is not a rational basis for

the distinction because it does not make sense for defendants to regulate noise created by protected speech more strictly than noise from other less desirable sources. Plaintiffs raise a similar challenge to the cabaret ordinance, which they assert improperly singles out music, dancing and singing for regulation and not other forms of speech.

The fact that the village's ordinances favor some producers of sound over others has no bearing on whether the ordinances are content neutral. In *Ward*, the Court instructed that the controlling consideration is the government's purpose. 491 U.S. at 792. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.*; *see also Hill v. Colorado*, 530 U.S. 703, 724 (2000) ("[T]he contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support.") Here, the different maximum decibel levels for recreational vehicles and other sources of noise have nothing to do with the content of the expression.

First, as defendants point out, noise emitted from ATVs and similar motorized vehicles is not speech: there is no "content" or expression for the village impermissibly to favor. Second, noise levels are the same for all types of entertainment: no type of expression is favored over another with respect to decibel levels. The restrictions in the ordinances relate to the character of the sound and how intrusive it is to nearby residents. Defendants explain that in adopting the noise ordinance, they chose to follow the state's judgment with respect to what is acceptable noise from a recreational vehicle. The fact that defendants have determined that recreational vehicles—or for that matter, fire trucks, church bells and chainsaws—do not impose "intrusive noise harm" on residents to the same extent as other sources of sound does not mean that the

noise ordinance violates content neutrality. *See Stokes*, 930 F.2d at 1171 (finding same with respect to sound amplification ordinance exempting Sunday morning church music). Therefore, to the extent that plaintiffs argue that the noise ordinance is not content-neutral because it favors ATVs, motorboats and snowmobiles, this argument fails.

For the same reasons, the cabaret ordinance's focus on music, dancing and singing does not violate content neutrality. The cabaret ordinance's restrictions do not address what type of music is being played or what message it conveys. The cabaret ordinance's sole concern is with how loud certain activities are at certain hours. Defendants are not required to regulate all sources of sound equally; they are entitled to find that certain types of sounds (and not others) are non-intrusive and acceptable background noise. *See id*.

B. Unreasonable Time, Place and Manner Restrictions

Although plaintiffs generally assert that the ordinances "impose unreasonable time, place or manner restrictions,'" *see* dkt. 24 at 11, they make no attempt to show how the ordinances fail to promote a substantial government interest that would be achieved less effectively by the village in the absence of the ordinances. The ordinances at issue in this case regulate noise levels in the community, a government interest that plaintiffs agree is compelling or significant. *See* dkt. 24 at 13 (citing *Ward*, 491 U.S. at 791; *City of Ladue v. Gilleo*, 512 U.S. 243, 248 (1994)). Plaintiffs make a half-hearted stab at arguing that the time periods established for the ordinances are "arbitrary" and that the noise ordinance's distinction between commercial and residential areas is unreasonable and permits arbitrary and discriminatory enforcement. However, plaintiffs devote paltry discussion to the issue and they offer no legal analysis.

The only time plaintiffs even mention the term "narrowly tailored" is to criticize the higher noise limits that the noise ordinance allows for ATVs, motor boats and snowmobiles. However, even in that context, plaintiffs state only that "it makes no sense for Defendants to establish lower, more restrictive noise limits for music and entertainment which . . . are well-defined categories of protected speech under the First Amendment." As previously discussed, defendants chose to follow the state's judgment with respect to what is acceptable noise from a recreational vehicle. The fact that there is incidental effect on some speakers or messages but not others does not violate the First Amendment.

To obtain summary judgment, plaintiffs must show that the volume limits set by the village's ordinances for music and entertainment are not narrowly tailored to further a compelling state interest. Plaintiffs' conclusory statements about certain provisions of the ordinances being unreasonable do not suffice at the summary judgment stage, where the moving parties must show that they are entitled to judgment as a matter of law. As the court of appeals has stated many times, summary judgment is the "put up or shut up" moment in litigation when the parties are required to show that they have sufficient evidence to allow a reasonable to jury to find in their favor. *Goodman v. National Security Agency, Inc.*, 621 F.3d 651, 654 (7th Cir. 2010). Plaintiffs' failure to develop their argument related to unreasonable time, place or manner restrictions in any meaningful way constitutes waiver. *See Long v. Teachers' Retirement System of Illinois*, 585 344, 349 (7th Cir. 2009) (unsupported and undeveloped arguments are waived; a party may waive an argument by disputing a district court's ruling in a footnote or a one-sentence assertion that lacks citation to record evidence); *Garg v. Potter*, 521F.3d 731, 736 (7th Cir. 2008) (undeveloped arguments are waived).

C. Vagueness and Unfettered Discretion

Both parties seem to be confusing the Fourteenth Amendment's void-for-vagueness doctrine with the First Amendment's prohibition against unlimited authority to grant or deny permits regulating protected speech. For example, plaintiffs seem to be concerned primarily with "vague and ambiguous" provisions that grant city officials "unfettered discretion." However, the case they cite as support involves a *Fourteenth Amendment due process* vagueness challenge to an Illinois act mandating a period of silence in public schools and does not discuss First Amendment concerns with unfettered discretion. *See Sherman*, 623 F.3d at 503, 519-20; *see also Hegwood v. City of Eau Claire*, 676 F.3d 600, (7th Cir. 2012) (emphasis added) ("The void for vagueness doctrine rests on the basic *due process principle* that a law is unconstitutional if its prohibitions are not clearly defined."). Although defendants do not identify due process challenges to the ordinances in the body of their brief, they cite cases discussing the void for vagueness doctrine in their introductory recitation of relevant legal authorities. *See* dkt. 16 at 3-4.

It is not clear whether plaintiffs are arguing that certain provisions of the ordinances are so unclear or vague as to violate due process. Although they make passing reference to the term "void for vagueness" in their complaint and brief in support of summary judgment, they do not cite the due process clause; more dispositively, plaintiffs have announced the voluntary dismissal of their Fourteenth Amendment claims against defendants. In their brief, plaintiffs assert that because their bar is located in a commercial area but borders a residential area, it is unclear whether the volume limits for commercial or residential areas would apply to them. They also contend that the cabaret ordinance is unclear because it sets two different time periods during which indoor cabarets must be closed on Sundays: from 2:00 a.m. to 6:00 a.m. and from 2:30

a.m. to 6:00 a.m. Plaintiffs' argument is limited to these brief statements, and plaintiffs offer no supporting legal analysis. All of this would indicate that plaintiffs never intended to raise a due process vagueness claim, or if they did, that they have waived it.

In any event, even on the merits, plaintiffs' limited arguments are non-starters. "[P]erfect clarity and precise standards have never been required of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794. A statute is unconstitutionally vague only "'if it fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and it fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner.'" *Hegwood*, 676 F.3d at 603 (quoting *Fuller ex rel. Fuller v. Decatur Public School Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662, 666 (7th Cir. 2001)). In a facial vagueness challenge, the question is whether the statute is vague in all its operations. *Sherman*, 623 F.3d at 520. Further, "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). The Supreme Court has explained that entities subject to civil ordinances, such as the Waterfront, are likely to consult relevant legislation and often can clarify the meaning of regulation by its own inquiry or through an administrative process. *Id.*

On their face, the cited provisions do not rise to the level of ambiguity required to render them void under the Fourteenth Amendment. The noise ordinance clearly defines separate noise limits for commercial and residential areas. As defendants point out, a person reading the ordinance reasonably and logically could conclude that if a business is located in a commercial area, then it is subject to the levels set for commercial areas. Nothing in the ordinance indicates

that the village could apply the stricter residential limits to bars operating "near" a residential area, and plaintiffs cite no reason why the village would attempt this. The 30-minute difference in the time periods listed in the cabaret ordinance appears to be a minor drafting error that likely can be resolved easily through inquiry or an administrative process. In sum, even if plaintiffs have not waived their arguments with respect to the due process clause, they have not overcome their burden on summary judgment with respect to their general allegations of "vagueness."

Next, although plaintiffs' arguments about the ordinances granting village officials unfettered discretion in reviewing license applications and enforcing the ordinances also lack legal analysis, plaintiffs have done a better job defining their concerns and their reasoning. Specifically, plaintiffs point out that the following provisions fail to include any objective criteria, thus permitting or even encouraging village officials to discriminate against certain types of protected speech based on its content rather than its volume:

- The noise ordinance allows the village board to exempt noises "associated with a public or private meeting, concert, parade or other similar event." The ordinance does not provide criteria for granting exemptions.

- The cabaret ordinance allows the village board to deny a cabaret license based on the "unsuitability" of the proposed location or the "undesirability or unreliability of the applicant or manager." The ordinance does not define these terms and it does not provide criteria for determining unsuitability, undesirability or unreliability.

- The cabaret ordinance gives the village board discretion to establish the time restriction for a one-day special event cabaret. The ordinance doe not provide criteria for making such determinations.

- The cabaret ordinance allows any village resident to file a sworn complaint with the village clerk and then shifts the burden onto the licensee to appear before the board to

> show cause why the license should not be revoked or suspended. The ordinance does not specify what constitutes a legitimate sworn complaint or require a complainant to specify what provision(s) of the ordinance allegedly were violated.

I agree with plaintiffs that at least some of these provisions appear to give the village board wide latitude to decide who may be subject to the ordinance, which therefore could allow or encourage content-based decision making. Plaintiffs, however, have provided no guidance to the court as what levels of discretion have been found constitutional or unconstitutional in similar regulatory schemes. Apart from generally declaring that ordinances have been struck down for containing obscure standards or unlimited discretion, plaintiffs make no attempt to analyze the facts of this case in light of current First Amendment jurisprudence. That's problematic. Nonetheless, because plaintiffs have at least adequately raised these issues and because defendants' response in opposition is equally lacking in legal support, I will allow the parties to supplement their briefs in order to make appropriate legal arguments and analyze relevant case law *on this issue*. This is not carte blanche for plaintiffs to revisit other issues in which the court has found their presentation wanting.

IV. Plaintiffs' Harm

Although plaintiffs limit *their* summary judgment motion to the issue of liability, *defendants'* motion (to which plaintiffs never actually responded) asks what injury plaintiffs sustained as a result of being subjected to the village's noise and cabaret ordinances. Defendants have a point: plaintiffs' theory of recovery and the harm they allegedly sustained is not obvious from the record before the court.

Plaintiffs' only remaining challenge–that parts of the ordinances grant village officials unfettered discretion–would seem to be solely a facial challenge because it does not appear that defendants applied any of these challenged ordinance provisions to plaintiffs or the Waterfront. For example, plaintiffs were not denied a license under either ordinance, and no complaints ever were lodged against plaintiffs for violating the ordinances.

Although plaintiffs are not necessarily prevented from seeking judicial review just because defendants never enforced the ordinance against them, they still must show that a "credible threat" existed that defendants would take the challenged action against them. *See Holder v. Humanitarian Law Project*, ___ U.S. ___, 130 S. Ct. 2705, 2717 (2010); *Ezell v. City of Chicago*, 651 F.3d 684, 695-96 (7th Cir. 2011) (internal citations omitted) (pre-enforcement challenges to statute are proper because very existence of statute implies threat to prosecute). *See also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]e do not require a plaintiff to expose himself to liability before bringing suit"); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298-99 (1979) ("When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."). Because it is unclear what harm plaintiffs have suffered–including whether they ever have faced or now face a credible threat of prosecution under the ordinance provisions bullet-pointed on pages 20-21 above– plaintiffs must explain their theory of recovery and support it with a showing of the harm they claim to have sustained before this court will hold a trial on the issue of damages.

ORDER

IT IS ORDERED that:

(1) The court's ruling on the motions for summary judgment filed by both sides is STAYED pending further briefing;

(2) Plaintiffs shall have until September 10, 2012 to supplement their summary judgment motion as directed in this opinion. Defendants shall have until September 24, 2012 to respond. There shall be no reply.

(3) The remainder of the existing schedule in this case is stricken. New dates, if necessary after the court's rulings, will be set in consultation with both sides.

Entered this 24th day of August, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge