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## Portsmouth ice cream truck ruling music to kids' ears

By JEN MCCAFFERY, The Virginian-Pilot

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**Summonses against ice-cream-truck drivers and owners based on an ordinance prohibiting the use of anything but bells on the trucks have led to convictions and fines.** courtesy photo

### PORTSMOUTH

"The Entertainer" soon will be a legal way to sell a snow cone here.

City attorneys agreed this week that the Portsmouth ordinance prohibiting ice-cream-truck drivers from using music – or anything but a bell – to beckon customers is unconstitutional.

A defense lawyer plans to ask for similar decisions in other South Hampton Roads cities that have limited ice-cream trucks' noisemaking.

Portsmouth Commonwealth's Attorney Earle Mobley and City Attorney Tim Oksman plan to ask the City Council to revise the code, said Bill Prince, spokesman for Mobley.

He anticipates that the new language could limit the decibel level of noise.

Prince also said prosecutors plan to recommend dropping the most recent conviction against an ice-cream vendor for playing music from his truck .

**Video: City calls ice cream ordinance unconstitutional**  
BRIAN CLARK | HAMPTONROADS.TV

"The city of Portsmouth can welcome back the ice-cream man and the music of 'The Entertainer,'" said attorney Kevin Martingayle , who represents the owner of Norfolk-based Jumpn' G's Ice Cream and its drivers.

The city's decision came after Martingayle challenged the conviction of one of Jumpn' G's drivers, Claudio Jose Sanchez. Martingayle argued that the ordinance was an unconstitutional restriction on commercial speech.

City attorneys have also advised Portsmouth police not to enforce the ordinance, said Detective Jan Westerbeck, police spokeswoman.

The issue arose this summer in Portsmouth after police Officer Jim Conrad began enforcing ordinances pertaining to ice-cream-truck vendors.

He looked into the code after a 10-year-old girl was hit last spring by a car after visiting an illegally parked ice-cream truck. That incident did not involve Jumpn' G's Ice Cream .

Since May, Conrad's summonses against ice-cream-truck drivers and company owners have resulted in about 16 misdemeanor convictions – including convictions for driving without a license and equipment violations – and more than \$1,700 in court fines and costs.

Portsmouth prosecutors did not handle Sanchez's three convictions in Portsmouth General District Court earlier this year. They first dealt with the case when he appealed to Portsmouth Circuit Court his third conviction for illegally playing music from an ice-cream truck.

Martingayle also plans to contact city officials in Virginia Beach and Chesapeake to ask them to repeal ordinances similar to Portsmouth's that ban ice-cream vendors from projecting certain noises , he said.

Chesapeake City Attorney Ron Hallman said the city would look at its own ordinance about ice-cream vendors in light of the Portsmouth case to make sure the code is consistent with current law.

He said Chesapeake's ordinance about ice-cream vendors dates back to 1966 .

Oksman wrote in an e-mail that he did not know when or why the city's ordinance was passed.

Aimee Knapp Sullivan, an associate city attorney in Virginia Beach, said her office had not been asked to look at the city's ordinance on ice-cream-truck drivers.

"I don't know of any cases where a police officer has pulled over an ice-cream truck for noise," said Rene Ball, a Virginia Beach police spokeswoman.

Michael P. Grover, owner of Jumpn' G's Ice Cream, said he knew Portsmouth's ordinance was unconstitutional based on previous court decisions. But he said he never had to worry about it, because no one had ever enforced it before Conrad.

Grover said he eventually stopped sending his drivers to Portsmouth this summer because Conrad kept stopping and "harassing" them.

The loss of business and hiring an attorney cost Grover thousands of dollars, he said. With only a few days left in the ice-cream season, Grover said his drivers likely will return to Portsmouth next summer.

Not everyone is a fan of ice-cream-truck music, however.

Dave Thacker, a retired Norfolk police officer who lives in Chesapeake, complains that his city doesn't enforce its ordinance governing the noise ice-cream-truck drivers can make.

He questioned why people get pulled over for playing loud music in their cars when an ice-cream-truck driver in his neighborhood can play music audible from three blocks away with no penalty.

Thacker said he's contacted Chesapeake police as many as 40 times over the past few years about one particular driver, to no avail.

"As he rounds the corner," Thacker said, "he will turn up his music, just to get my goat."

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