



## MEMORANDUM

### **I. Introduction**

Plaintiff Midwest Retailers Association is an organization consisting of owners and operators of retail food and beverage stores. These store owners have received license applications from Defendant City of Toledo pursuant to the newly-enacted Toledo Municipal Ordinance 797-07. Pursuant to Fed. R. Civ. P. 65(a), Plaintiffs respectfully seek a preliminary injunction order preventing enforcement of Toledo Municipal Ordinance 797-07, which took effect on May 1, 2008.<sup>1</sup> Unless a preliminary injunction is granted, store owners affected by this ordinance will face irreparable injuries. Specifically, Toledo Municipal Ordinance 797-07 criminalizes the operation of retail food and beverage stores smaller than 5000 square feet without a special license. Attainment of this license is contingent upon a vague, overly burdensome, and unconstitutional application process. Moreover, Toledo Municipal Ordinance 797-07 vests Toledo City officials with nearly limitless discretion to revoke or refuse to renew licenses.

The threat of irreparable injury to Plaintiff and the store owners it represents is immediate and real. If the City of Toledo begins enforcement of Ordinance 797-07, affected business owners will have to choose between (i) complying with a law that will cause them irreparable injury in the form of lost business and good will, loss of constitutional rights, and the prospect of lawsuits from governmental, quasi-governmental, and private parties, and (ii) violating the law

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<sup>1</sup> Appendix A contains Toledo Municipal Ordinance 797-07 as it was enacted by the Defendant on December 11, 2007 and as it was transmitted to the initial group of effected Retail Store owners on March 17, 2008.

and facing the prospect of lawsuits from governmental and private parties, as well as criminal sanctions including fines, property loss, and incarceration.

Plaintiffs are likely to prevail on the merits of this case, for reasons set forth in the memorandum below. First, Ordinance 797-07 is unconstitutionally vague. Second, the ordinance creates a multitude of unconstitutional conditions, by forcing licensees to surrender both their right to be free of unreasonable searches and seizures, and their Due Process right to just compensation guaranteed by the Fifth and Fourteenth Amendments. By transferring numerous law enforcement responsibilities onto licensees, the ordinance functions to create a condition of involuntary servitude in violation of the Thirteenth Amendment. Ordinance 797-07 also violates the Ex Post Facto Clause by enhancing penalties for prior criminal offenses. Finally, Ordinance 797-07 is preempted by Ohio law.

If Toledo Municipal Code Ordinance 797-07 is implemented and enforced, Plaintiff and its members will suffer immediate and irreparable injury. By contrast, a preliminary injunction will merely preserve the status quo, causing the City of Toledo and its citizens no substantial injury. Because of the severity and magnitude of the constitutional violations Toledo Municipal Ordinance 797-07 threatens to inflict, the public interest favors provisional relief. The Court can avoid these irreparable injuries by granting Plaintiff's request for preliminary injunction pending resolution of this litigation.

## **II. Constitutional Violations**

### **A. Ordinance 797-07 is unconstitutionally vague.**

“Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the State commands or forbids.” *Papachristou v. City of*

*Jacksonville*, 405 U.S. 156, 162 (1972) (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). An ordinance is void for vagueness when it “fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,” thereby “encourag[ing] arbitrary and erratic” enforcement. *United States v. Harriss*, 347 U.S. 612, 617 (1954). “In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed.” *Papachristou*, 405 U.S. at 162. Despite the “greater leeway” afforded to statutes of a regulatory nature, Toledo Municipal Ordinance 797-07 is unconstitutionally vague because the ordinance threatens fines, revocation of license, and criminal penalties for non-compliance, and yet fails to provide any clear guidance as to how affected business owners can fully comply. Furthermore, in practical effect, Ordinance 797-07 gives Toledo City officials unfettered discretion to make determinations regarding compliance, the imposition of fines, and revoking licenses.

First, the language of Ordinance 797-07 fails to adequately specify which businesses are affected by the regulations it contains. The ordinance purports to regulate “convenience stores.” However, § 721.01 defines a “convenience store” as a retail seller “of food and beverages for home consumption...with a floor area of less than 5000 [square feet].” On its face, this rather broad definition would include wide array of businesses, such as carry-outs, any restaurant offering carryout service, health food stores, and most gas stations. However, the City has only sent notice and license applications to a small subset of businesses falling under the § 721.01 definition of a “convenience store.” Not only does this uneven application have the appearance of arbitrary enforcement, but many small business owners are left with substantial uncertainty as to whether or not they might be subject to the requirements of Ordinance 797-07.

In addition to failing to adequately define the class of persons affected, Ordinance 797-07 sets forth broad, nebulous requirements, creating significant uncertainties about what steps are sufficient to achieve and maintain compliance. For example, § 721.15 states that “[i]t shall be the responsibility of the licensee to take *appropriate action* to prevent violations following conduct by *any persons* on the business premises, *including parking areas*, in violation of any” of an enumerated list crimes, including “gambling,” “prostitution and acts relating thereto,” “unlawful sale or possession of controlled substances,” “indecent exposure and the exhibition and distribution of obscene materials or performances,” “unlawful possession, sale, or use of a weapon,” “disorderly conduct,” “loitering,” and “obstructing legal process.” Section 721.15 does not clearly define what “appropriate steps” a store owner is expected to take to “prevent any further violations” of any crimes on their premises. Nevertheless, failure to comply with this ill-defined standard “shall be grounds for the denial, refusal to renew or the revocation of the license.”

Finally, Ordinance 797-07 provides City officials with unfettered discretion to find violations and revoke the license of any affected business owner. Pursuant to § 721.11, in determining whether or not to revoke an operator’s license, “the Director of Public Safety shall be guided by the following considerations”:

“(1) A license generally should not be revoked until the licensee has been given a reasonable opportunity to cure the problems identified at the convenience store; but

(2) Once a reasonable opportunity to cure the problems has been afforded to the licensee without substantial success, a license *should be revoked even though the license holder has taken all reasonable measures to achieve compliance* [emphasis added].”

Under subsection (1), the City may, but need not, provide a licensee with a “reasonable opportunity” to correct any problems City officials choose to identify. And, even if the City chooses to provide a licensee with a “reasonable opportunity” to correct any problems, the City may revoke the license even if the licensee takes all steps a reasonable person could be expected to take to cure those problems. As discussed above, § 721.15 assigns to licensees direct and vicarious responsibility for essentially all activity of all parties anywhere on the licensee’s premises at any time. For all practical purposes, the responsibilities of licensees are limitless, and the potential for “violations” of § 721.15 is therefore also without limit. Read in conjunction with § 721.15, § 721.11 enables the City to revoke a license on the basis of problems caused by third parties, or otherwise beyond the control of the licensee, even if the licensee has taken all reasonable measures to correct those problems.

In short, Ordinance 797-07 is plagued with vague provisions, rendering the entire ordinance facially unconstitutional. The ordinance fails to provide an adequate definition of the affected class of parties. The scope of responsibility placed upon business owners by these regulations is indeterminate. A person of average intelligence, reading this ordinance, cannot possibly understand what steps must be taken to avoid the possibility of substantial fines, license revocation, and criminal sanctions. Worse still, this ordinance places no restraint on the discretion of City officials to deploy these substantial penalties. For these reasons, Ordinance 797-07 is void for vagueness.

**B. Ordinance 797-07 unconstitutionally conditions receipt of a license on the surrender of fundamental constitutional rights.**

Pursuant to the unconstitutional conditions doctrine, “a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or an entertainment permit, on an agreement to refrain from exercising one’s constitutional rights.” *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1077 (6th Cir. 1994). Although the government may deny a business owner an operating license “for any number of reasons...it may not deny [this] benefit to a person on a basis that infringes his constitutionally protected interests.” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The unconstitutional conditions doctrine applies “even if the government may withhold [the] benefit altogether.” *Amelkin v. McClure*, 330 F.3d 822, 827 (6th Cir. 2003). Although the unconstitutional conditions doctrine is most frequently employed in the context of First Amendment claims, “it has been applied by the Supreme Court to other constitutional provisions, including the Takings Clause,” and “should equally apply to prohibit the government from conditioning benefits on a citizen’s agreement to surrender due process rights.” *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005).

Ordinance 797-07 threatens to deny, revoke, or refuse to renew the license of any business owner who refuses to surrender several fundamental constitutional protections. First, the ordinance requires affected business owners to relinquish essential Fourth Amendment protections by allowing Toledo City officials to conduct electronic surveillance and seize personal property without probable cause or a warrant. Second, the ordinance strips affected business owners of their due process rights under the Fifth and Fourteenth Amendments. Third, the ordinance subjects affected business owners to regulatory takings without providing just compensation. Finally, Ordinance 797-07 delegates to affected business owners responsibilities traditionally in the realm of law enforcement, creating a condition of involuntary servitude in

violation of the Thirteenth Amendment. The specific nature of these unconstitutional conditions is set forth in sections C-F.

**C. Ordinance 797-07 demands surrender of core 4th Amendment protections.**

The “Fourth Amendment’s prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes.” *New York v. Burger*, 482 U.S. 691, 699 (1987). This protection “exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes.” *Id.* at 700. Administrative searches are “significant intrusions on interests protected by the Fourth Amendment,” and generally require that a government official possess a suitably restricted search warrant. *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967). Toledo Municipal Ordinance 797-07 demands that affected business owners install surveillance cameras on their premises, operate these cameras 24 hours a day, archive the surveillance tapes, and make these tapes available to any “authorized” Toledo City official on eight hours notice. Under this section, the City may make this demand without a warrant, and without even providing a cursory explanation as to why City officials wish to view the surveillance footage. This regulatory regime effectively jettisons the Fourth Amendment’s warrant requirement, reasonableness requirement, and probable cause. In short, Ordinance 797-07 subjects a class of small business owners to warrantless surveillance and seizures of private property.

In *New York v. Burger*, the Supreme Court set forth three criteria the government must meet before it may perform warrantless searches pursuant to a regulatory scheme:

“First, there must be a ‘substantial’ government interest that informs the regulatory scheme pursuant to which the inspection is made...[s]econd, the warrantless

inspections must be ‘necessary to further the regulatory scheme,’ [and third], the statute’s inspection program, in terms of the certainty and regularity of its application, [must] provide a constitutionally adequate substitute for a warrant.” *Id.* at 702-703.

Ordinance 797-07 fails to meet all three criteria described by the *Burger* Court.

First, no “substantial government interest informs the regulatory scheme pursuant to which the inspection is made.” Clearly, “there is a substantial government interest in regulating the food industry.” *Contreras v. City of Chicago*, 920 F.Supp. 1370, 1389 (N.D.Ill. 1996). However, Ordinance 797-07 does not consist of regulations designed to address state interests related to food and beverage sales. Rather, in both design and function, Ordinance 797-07 serves general law enforcement needs. One key provision of the ordinance delegates to store owners the “responsibility” of taking “appropriate action to prevent further violations...by any persons on the business premises” of a laundry list of criminal offenses. These crimes are enumerated in § 721.15(1) and include “gambling,” “prostitution and acts relating thereto,” “unlawful sale or possession of controlled substances,” “indecent exposure and the exhibition and distribution of obscene materials or performances,” “unlawful possession, sale, or use of a weapon,” “disorderly conduct,” “loitering,” and “obstructing legal process.” Prevention of such crimes is clearly a legitimate state interest, but certainly not related to the specific reasons for closely regulating retail vendors of food and beverages. Many other provisions of Ordinance 797-07, including the surveillance camera requirement, are also designed to support this general law enforcement goal. The City cannot circumvent the requirements of the Fourth Amendment by attempting to disguise a general law enforcement program as an ordinance professing to merely regulate retail sellers of food and beverages.

Second, whether or not the warrantless searches provided for in the ordinance are “necessary to further the regulatory scheme” is irrelevant because, as discussed above, Ordinance

797-07 attempts to circumvent the Fourth Amendment by advancing general law enforcement goals in a regulatory scheme purporting to address the operation of convenience stores.

Finally, the ordinance fails to provide a “constitutionally adequate substitute for a warrant.” To meet this requirement, the City of Toledo must “advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.” *Burger*, 482 U.S. at 703. Ordinance 797-07 does not even pretend to provide any substitute for a warrant. Section 721.13(b)(5) states that a licensee must surrender the stored surveillance tapes “[u]pon the request of an authorized City official...no later than eight (8) hours after the request.” The class of “authorized City officials” is not limited to law enforcement personnel. Nor does 797-07 require the City official requesting a tape to provide the store owner with any explanation as to the City’s reasons for the request. Under the plain language of this ordinance, any city employee can demand the release of up to 30 days of archived videotapes from a store owner, without providing the store owner with any explanation for the request. Under these circumstances, a store owner cannot possibly know if the request “has a properly defined scope,” and there are no provisions placing even minimal limitations on the reasons a City official may request a surveillance tape. The only limitation on this power appears to be the personal discretion of the City official making the request. Moreover, if the store owner fails to comply, § 721.13(a) provides for “administrative fines in the amount of \$100 per day for each day of non-compliance and [non-compliance] shall constitute cause for revocation or non-renewal of a license.”

Ordinance 797-07 violates every requirement of the Fourth Amendment. With this regulation, the City of Toledo demands that selected business owners install surveillance

cameras, and provide City officials with limitless access to videotapes recorded by those cameras. The ordinance blatantly circumvents the Fourth Amendment's warrant requirement, and does not even purport to limit this access to law enforcement purposes. Adding financial injury to constitutional insult, Ordinance 797-07 demands that affected business owners bear the expense of installing and maintaining the very equipment by which the City intends to carry out these constitutional violations. In short, Ordinance 797-07 unconstitutionally conditions grant or renewal of a business license on the licensee's surrender of core Fourth Amendment protections.

**D. Ordinance 797-07 creates a condition of involuntary servitude in violation of the Thirteenth Amendment.**

Under the Thirteenth Amendment, "neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." The term "involuntary servitude" has a "larger meaning than slavery." *Slaughter-House Cases*, 83 U.S. 36, 69 (1873). The "essence of involuntary servitude" is "that control by which the personal service of one man is disposed or coerced for another's benefit." *Steirer v. Bethlehem Area School District*, 789 F.Supp. 1337, 1342 (E.D. Pa., 1992) aff'd, 987 F.2d 989 (3rd. Cir. 1993). "[T]he critical factor in every case finding involuntary servitude is that the victim's only choice is between performing the labor on one hand and physical/and or legal sanctions on the other." *Steirer v. Bethlehem Area School Dist.*, 987 F.2d 989, 999 (3rd. Cir. 1993), rev'd on other grounds, (citing *United States v. Kozminski*, 487 U.S. 931, 943 (1988)).

Ordinance 797-07 creates a condition of involuntary servitude by transferring to selected business owners duties and responsibilities traditionally reserved for law enforcement personnel. This ordinance also threatens substantial fines, revocation of operating license, and both civil and

criminal liability for failure to carry out these responsibilities to the satisfaction of City officials. Section 721.15 charges business owners with the responsibility of taking “appropriate action” to prevent various criminal activities from occurring on their premises, including the parking lot. Exactly what constitutes “appropriate action” is not made clear in the ordinance. Section 721.15(1) states: “Suggestions for appropriate actions will be provided to the applicant upon request and may include but not be limited to adequate lighting” and “signage stating acceptable activities.” Section 721.15(4) makes the licensee responsible for providing “adequate security to prevent criminal activity...on the business premises, including parking areas.”

The scope of responsibilities delegated to private business owners by these provisions is magnified significantly when read in light of § 721.11, which, as discussed above, declares that in situations where a business owner cannot cure a problem, the owner’s “license *should be revoked even though the license holder has taken all reasonable measures to achieve compliance* [emphasis added]”. For example, if a business owner has a problem with crime in his parking lot, failure to eliminate that criminal activity is grounds for license revocation under § 721.15. For obvious reasons, mere signs and lighting will not be sufficient to discourage many types of crime. To avoid the possibility of license revocation, a store owner will be forced to take whatever additional steps are necessary to completely eliminate all criminal activity on their property. Under §721.11, “reasonable efforts” are not good enough -- anything less than total success leaves the licensee vulnerable to license revocation.

Reading the provisions of Ordinance 797-07 together, the concept of “appropriate action” is law enforcement responsibility with no discernible limit. For a small business owner in a high-crime area, compliance with the demands of Ordinance 797-07 essentially requires a store

owner to take on the role of police officer. Moreover, unlike law enforcement officers, 797-07 licensees are directly and vicariously liable for criminal activity they fail to prevent, and may be subject to fines and other penalties. These regulations force a targeted class of business owners to choose between performing fundamental law enforcement duties, or facing legal sanctions including loss of the ability to operate their business. As such, Ordinance 797-07 creates a condition of involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution.

**E. Ordinance 797-07 functions as an ex post facto criminal sanction.**

Article I, § 10, of the United States Constitution forbids the states from passing any "ex post facto Law." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 504 (1995). The Ex Post Facto Clause ensures that: 1) individuals are given "fair warning" of the effect of legislation and the ability to rely on the meaning of such legislation until changed; 2) the separation of powers is maintained; and 3) individuals are protected from "injustice and tyranny." *Carmell v. Texas*, 529 U.S. 513, 531-32 (2000). In *Calder v. Bull*, Justice Chase set forth four categorical descriptions of ex post facto laws which the Constitution prohibits:

First, "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," second, "[e]very law that aggravates a crime, or makes it greater than it was, when committed," third, "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed," and fourth, "[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." 3. U.S. 386, 390-91 (1798).

These categories are no less relevant today, as demonstrated by the Supreme Court's recent decision in *Stogner v. California*. 539 U.S. 607, 611-612 (2003) (holding that under *Calder*, a

state law enacted after the expiration of a previously applicable limitations period violates the Ex Post Facto Clause when applied to revive a previously time-barred prosecution).

The Ex Post Facto Clause applies only to statutes that are criminal or penal in nature. The question of whether a particular statutory penalty is civil or criminal is a matter of statutory construction. *United States v. Ward*, 448 U.S. 242, 248 (1980) (citing *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972)). Once a statute has been determined to be criminal or penal, the statute must meet "two critical elements" for the statute to be considered ex post facto. Specifically, "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

By design, Toledo Municipal Ordinance 797-07 is not only a criminal statute, but also imposes supplemental punishments for criminal offenses previously adjudicated. Specifically, § 721.99 states: "One who operates a convenience store without a license requires by this Chapter shall be guilty of a Misdemeanor of the fourth degree." Additionally, pursuant to § 721.04(e), states that a license shall be revoked or denied if any crime has been committed by the applicant in the past five years. In short, Toledo Municipal Ordinance 797-07 disadvantages the putative licensee both by holding him criminally liable, and by effectively dispossessing him of his property because of his past conviction.

To be sure, Ordinance 797-07 is criminal in nature by its own terms, which specify that failure to comply is a misdemeanor. The ordinance is also retrospective because it looks back five years for criminal violations. Specifically, § 721.04(e) states:

"Within five (5) years of the date of the application an applicant cannot have been convicted of any crime related to the occupation for which the license is sought which

conviction has not been, pursuant to law, annulled or expunged, including but not limited to the violation of any law dealing with food subsidy programs or the sale, possession, manufacture or transportation of controlled substances.”

As with numerous other provisions of Toledo Municipal Ordinance 797-07, § 721.04(e) suffers from a lack of clarity. As descriptive language, “any crime related to the occupation for which the license is sought” leaves much to the imagination, particularly when followed by the phrase “including but not limited to.” Read as a whole, this provision declares that any affected store owner with any type of criminal conviction within five years of the application date may be denied a license to operate, and thereby suffer the numerous collateral consequences that flow naturally from this deprivation.

The unworkable vagueness of § 721.04(e) is compounded by a lack sufficient procedural safeguards to protect against arbitrary or erratic enforcement. Section 721.04(e) declares: “If a violation is found there must be an additional review and approval by the Toledo Police Department of said background check. The applicant has the right to show relevant evidence of sufficient rehabilitation and present fitness.” As discussed above, there is no obvious means to determine which prior convictions might qualify as a “violation.” Apparently, the question of what qualifies as a violation of § 721.04(e) depends entirely on the discretion of the Toledo Police Department. The same limitless discretion applies in deciding which violations are susceptible to “rehabilitation.”

Section 721.04(e) allows Toledo officials to use a store owner’s prior conviction as a pretext for shutting down that owner’s business. With this power, the City may effectively impose additional punishments on the mere basis of prior criminal record. And, by design, the decision whether or not to impose the penalties available under § 721.04(e) is entirely

discretionary. Consequently, Toledo Municipal Ordinance 797-07 functions to retroactively increase punishments in violation of the Ex Post Facto Clause of the Constitution.

F. **Ordinance 797-07 requires license applicants to submit to unconstitutional takings in violation of the Fifth Amendment.**

The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." The Supreme Court has recognized "two categories of takings: physical takings and regulatory takings." *Waste Mgmt., Inc. v. Metropolitan Gov't of Nashville*, 130 F.3d 731, 737 (6th Cir. 1997). A physical taking occurs where the government physically intrudes on private property, or allows others to do so. *Id.*, see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Also, the Supreme Court has noted that facial takings claims are generally ripe the moment the challenged ordinance is passed. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 (1997).

In this case, Toledo Municipal Ordinance 797-07 is vulnerable to a facial takings challenge because § 721.13 will subject all affected business owners to a permanent physical government presence. Section 721.13 forces licensees to purchase high-resolution security cameras, and operate those cameras pursuant to detailed regulations designed to further the City's policy goals. In this way, § 721.13 effects a conversion by shifting ownership of the cameras and recording equipment from the putative licensee and into the hands of the City. Indeed, under this arrangement, the City of Toledo enjoys all incidents of ownership of these cameras and video recording systems. For example, § 721.13(c)(1) requires store owners to maintain, "for a period of no less than 30 days," an archive of this surveillance video for on-demand use by City officials. The cameras and recording devices must be of specifications

specifically suited to meet the purposes of the City, and the City also claims the right to make on-demand inspections of these surveillance systems. Further manifesting its complete dominion over these surveillance systems, the City asserts the right to demand archived video footage without a warrant, at any time, for any reason.

In effect, § 721.13 creates a bailment out of the camera system, placing the store owner in the position of a bailor and the City in the position of a bailee. In most “takings” cases, the government subjects a property owner to a permanent physical intrusion. Here, the City of Toledo is not only attempting to physically intrude on private businesses to advance state-oriented objectives, but also seeks to transfer onto business owners the substantial costs of establishing and maintaining these physical intrusions. Such a blatant attempt by the City to encroach on private property cannot survive Fifth Amendment scrutiny.

**G. Ordinance 797-07 is preempted by Ohio law.**

Toledo Municipal Ordinance 797-07 requires all convenience stores to apply for and purchase a municipal license to operate their businesses. Convenience stores are defined as retail stores that sell food and beverages “with a floor area of less than 5000 [square feet].” Most, if not all of these stores sell beer, wine, or liquor. In order to sell beer, wine, or liquor, these stores must apply for and purchase a license from the Ohio Division of Liquor Control. R.C. § 4301.10. If the Ohio Division of Liquor Control permits a store to sell beer, wine, or liquor under its standards, but the City of Toledo finds that a store does not comply with Ordinance 797-07 and refuses to issue a convenience store license, then the City Ordinance conflicts with the state statute.

Generally, the Ohio Constitution grants municipalities “home rule” authority. Ohio Const. Art. XVIII, § 3 states that municipalities are authorized “to exercise all powers of local government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws.” *Mendenhall v. Akron*, 17 Ohio St.3d 33 (2007); *Portsmouth v. McGraw*, 21 Ohio St. 3d 117 (1986). More specifically, however, a municipality’s “home rule” authority is limited when a state statute takes precedence over it. *Canton v. State*, 95 Ohio St.3d 149 (2002).

The test set forth in *Canton* is widely recognized as the standard for determining whether a state statute takes precedence over a local ordinance. “A state statute takes precedence over a local ordinance when (1) the ordinance is an exercise of the police power rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with statute.” *Mendenhall*, 117 Ohio St.3d at 37. “If an ordinance relates solely to self-government the analysis stops.” *Id.* “However, “if on the other hand the ordinance pertains to local police...and other similar regulations, the municipality has exceeded its home rule authority only if the ordinance is in conflict with a general state law.” *Id.*

Ordinance 797-07 can be nothing other than an exercise of the city of Toledo’s police power. *Auxter v. City of Toledo*, 173 Ohio St. 444 (1962) (“It seems obvious that a municipal ordinance prohibiting the doing of something without a municipal license to do it would be a municipal police regulation”). Therefore, the next step is to determine whether the City Ordinance is in conflict with a general state law.

The Ohio Revised Code states, “Each permit issued under sections 4303.02 to 4303.23 of the Revised Code shall authorize the person named to carry on the business specified at the

place...specified.” R.C. § 4303.27. To qualify as a general law, R.C. § 4303.27 and the other liquor control laws “must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.” *Canton*, 95 Ohio St.3d at 153.

R.C. § 4303.27 and the other liquor control laws can be nothing other than a general law in consideration of the *Canton* qualifications. *Auxter*, 173 Ohio St. 444, *City of Columbus v. Mauk*, 1 Ohio App.3d 38, 41, 203 N.E.2d 653 (1963). Liquor control laws apply to all parts of the state uniformly. Moreover, the specificity of the liquor control laws outlines state regulations without granting legislative power to municipalities regarding beer, wine, or liquor permits. Since these state laws are general laws, the only remaining issue is whether the City Ordinance conflicts with them.

In *Auxter*, the Ohio Supreme Court outlined the standard to determine whether there is a conflict. “In determining whether an ordinance is in conflict with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.” 173 Ohio St. at 447 (citations omitted). Applying this test, the Court in *Auxter* after expressly referencing the provisions of R.C. § 4303.27, decided that “any municipal ordinance which prohibits the carrying on by such person of such business at that place without a city license to do so, that is obtainable only upon paying a fee, would conflict with Section...4303.27 of the Revised Code.” *Id.*

Here, while the City Ordinance does not specifically target beer and liquor retailers as did the challenged ordinance in *Auxter*, it still requires convenience store owners to purchase a municipal license that could, in effect, prohibit convenience store owners from carrying on their business when they are already licensed to do so under R.C. § 4303.27. Therefore, the City Ordinance conflicts with the state statute, and ought to be found unconstitutional as a result.

### **III. Standard Governing Preliminary Injunctions**

Ohio courts have been guided by the following well-recognized criteria in determining whether a preliminary injunction is proper: (1) the likelihood of plaintiff's success on the merits; (2) whether the injunction will save the plaintiff from irreparable injury; (3) whether the injunction would harm others; and (4) whether the public interest would be served by the injunction. See e.g., *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982); *Diamond v. Gentry Acquisition Corp.* (1998), 531 N.E. 2d 777. In this case, all four factors weigh in favor of granting Plaintiff's request for a preliminary injunction.

First, Plaintiff has a high likelihood of success on the merits. As discussed above, Toledo Municipal Ordinance 797-07 is unworkably vague, violates numerous provisions of the United States Constitution, and impermissibly conflicts with Ohio law. Second, given the nature and magnitude of these constitutional violations, Plaintiff will suffer irreparable injury absent preliminary injunctive relief. Third, if Ordinance 797-07 is temporarily enjoined pending resolution on the merits, the City of Toledo will not suffer substantial injury. In any event, any nominal injury to the Defendant is far outweighed by the injury that Plaintiff would suffer if Ordinance 797-07 is allowed to take effect. Fourth, injunctive relief serves the public interest in

several ways. One, Plaintiff seeks to vindicate fundamental constitutional rights enjoyed by all citizens. Two, a municipality should not be permitted to abuse home-rule authority by implementing regulations in conflict with properly-enacted state law. Three, an injunction will force the City of Toledo to rescind or modify Ordinance 797-07, benefitting the public by reversing or improving a poorly conceived City regulation. In short, the facts of this case provide ample support for a grant of injunctive relief.

#### **IV. Amount of Bond**

Rule 65(c) of the Federal Rules of Civil Procedure vests in the District Courts “discretion as to amount of security required, if any.” *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999). “Where no cost or damages would be incurred or suffered by defendants as result of issuance of preliminary injunction,” a court may properly find “that no amount is proper.” *Hurwitt v. Oakland*, 247 F.Supp 995, 1006 (N.D. Cal. 1965). The “amount of any bond to be given upon issuance of preliminary injunction rests within sound discretion of trial court,” and thus, the trial court may dispense with filing of bond entirely. *Doctor’s Assocs. v. Stuart*, 85 F.3d 975, 985 (2nd Cir. 1996). In this case, the City of Toledo will suffer no real injury if Ordinance 797-07 is enjoined pending adjudication on the merits. Any possible costs or damages, if incurred, would necessarily “be incurred in the course of the continuing duty of defendants to maintain law, order and public convenience” in the City of Toledo. *Hurwitt*, 247 F.Supp at 1006. Also, Defendant should not incur expenses related to notice, as most of the affected business owners are members of Plaintiff Midwestern Retailers Association, and local media should be sufficient supplemental notice. For these reasons, Plaintiff respectfully requests this court to dispense with the filing of bond entirely, or in the alternative, set a nominal bond.

### **REQUEST FOR HEARING**

Plaintiff requests a hearing on this Motion on May 23, 2008 at 10:00AM, or at such other time as the Court may designate. Plaintiff estimates this hearing will require one hour of oral argument, divided evenly between Plaintiff and Defendant. Plaintiff do not, at this time, expect to offer oral testimony.

### **CONCLUSION**

On the basis of the foregoing, Plaintiff is entitled to a preliminary injunction against Defendant City of Toledo, prohibiting the City from implementing and enforcing Toledo Municipal Ordinance 797-07. Accordingly, Plaintiff Midwest Retailer's Association respectfully requests that this Court grant their motion for a preliminary injunction, thereby preventing enforcement of Toledo Municipal Ordinance 797-07 pending outcome of this litigation.

Respectfully submitted,

/s/ Scott A. Ciolek  
Scott A. Ciolek  
Attorney for Plaintiff

# Appendix A

## CHAPTER 721 Convenience Stores

- 721.01 Definitions and scope.
- 721.02 License required.
- 721.03 Application for license.
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- 721.05 Issuance of license; renewal of license.
- 721.06 Rejection of application.
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- 721.08 License fee; expiration date.
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- 721.16 License certificate to be posted in conspicuous place.
- 721.17 New license after revocation.
- 721.18 Neighborhood plans.
- 721.19 Implementation.
- 721.99 Penalty.

### CROSS REFERENCES

General business licensing provisions - see BUS. REG. Ch. 701

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## 721.01. Definitions and Scope.

The provisions of this Chapter shall apply to all establishments, locations and/or places, which fall under the Toledo Municipal Code definitions of Section 1116.0217 Food and Beverage Retail Sales-Chapter 11 which now exist and which may be established or conducted in the future. "Convenience store"- As defined in 1116.0217 (A) Food and Beverage Retail Sales- Retail sales of food and beverages for home consumption: convenience stores with a floor area of less than 5000 sq. ft.

## 721.02 License Required.

No person or legal entity shall operate a convenience store within the limits of the City until the convenience store has been duly licensed for such purpose. Failure on the part of any person(s) or entity to obtain such license shall subject him/her/it or them to the penalties hereinafter provided.

## 721.03 Application for License.

Every person, society, club, firm, or legal entity (corporation, partnership, sole proprietorship, limited liability company) desiring a license to operate a convenience store shall make written application to the City of Toledo Department of Finance. Each application shall be in the form prescribed herein. Such application shall be filed at least 30 days prior to the time of granting such license and after an investigation as hereinafter provided.

## 721.04 Content of Application.

Each applicant for a convenience store license shall file with the Department of Finance a written application stating the name and address of the applicant, or if more than one person or an entity or firm, the full name of all parties interested and their addresses. If the applicant is a partnership, corporation or limited liability company the application shall contain a complete list of the officers or members of such entity with the names and addresses of such officers, the state in which such entity is organized, and the names and addresses of persons designated as its manager or managers. The application shall also include the following:

(a) The location by street name and address where the convenience store is to be operated.

(b) The name of the owner of the premises in which such convenience store is to be located.

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(c) Whether a shareholder, owner, member, manager or chief financial officer applicant has ever been engaged in the operation of a convenience store, and if so, when, where and how long in each place.

(d) No license shall be granted or renewed for any premises or person on which taxes, assessments or other financial claims of the City are delinquent or unpaid. If an appeal is filed questioning the amount or the validity of taxes, the Division of Taxation may waive this provision. No waiver may be granted, however, for taxes, or any portion thereof, which remain unpaid for a period exceeding one year after becoming due unless a payment plan has been entered into or the liability is under litigation or appeal. A certificate of tax compliance must be provided with the application.

(e) The application shall have attached a criminal background check performed within the last 30 days of all applicants. The check shall be for northwest Ohio unless the applicant has resided or operated a business in the State of Michigan in the last 5 years, in which case an additional check for the State of Michigan shall also be provided. All background checks shall be performed at the expense of the applicant. Within five (5) years of the date of the application an applicant cannot have been convicted of any crime related to the occupation for which the license is sought which conviction has not been, pursuant to law, annulled or expunged, including but not limited to the violation of any law dealing with food subsidy programs or the sale, possession, manufacture or transportation of controlled substances. If a violation is found there must be an additional review and approval by the Toledo Police Department of said background check. The applicant has the right to show relevant evidence of sufficient rehabilitation and present fitness.

The application shall be signed by the applicant or applicants or in the case of a partnership, limited liability company or corporation, by the shareholder/directors or members of the entity thereof in addition to the manager / chief financial officer.

(f) The application shall have attached a Zoning review addendum. This form must be completed and approved by the Toledo Lucas County Plan Commission. This will verify the correct zoning issues have been met prior to the issuance of the license. This review includes but is not limited to zoning, Special Use Permits and site plan reviews.

(g) The application shall have attached a Building Inspection review addendum, as shown by an Occupancy Permit for said location. This form must be completed and approved by the Toledo Division of Building Inspection.

## 721.05 Issuance of License; Renewal of License.

(a) If the Department of Finance determines that an application is complete and the applicant qualifies to engage in such business as defined in TMC 721.01, the Department of Finance shall grant the application and issue the license.

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(b) No license shall be granted or renewed unless the application contains all the information required, together with the approval of the various departments charged with the duty of conducting the investigations and making the reports as above set forth.

(c) Any application for a license that does not contain all requested and/or necessary information shall be deemed incomplete. An application remaining incomplete for one hundred twenty (120) days shall be administratively denied by the Director of Finance. The director shall notify the applicant of any deficiencies at least thirty (30) days prior to administrative denial.

(d) If the application remains incomplete after being given the thirty-day notice, the director shall send written notice that the application is denied. Applicants shall not be allowed to engage in any activities for which a license is required. Application fees shall not be refunded.

(e) An applicant may, prior to denial, send a written request to extend the application deadline. The director may extend the deadline for good cause. An applicant may appeal a license or extension denial to the Appeal Board as defined in 721.07 within ten (10) days of receipt of notification of the denial. The notification shall be presumed to have been received three (3) days after mailing.

(f) After being granted a license under this Chapter, the licensee shall make an annual application for renewal of the license accompanied by the required license fee. If there have been no material changes in the information provided on the licensee's last full application, the licensee shall so state and need not submit the full application required for an initial license. The Director of Finance is authorized to issue the renewal of the license on the basis of the affirmation of no material change, but is authorized to require the licensee to provide complete information and to conduct a review of that information if the Director deems such further review to be appropriate.

## 721.06 Rejection of Application.

The application for a license or re-instatement shall be rejected if the report submitted therewith shows that the applicant(s) fail(s) to qualify or the premises sought to be licensed do not comply with the health, building and fire inspection regulations, ordinances and laws applicable thereto.

## 721.07 Right to Appeal; Procedure and Board.

(a) If the application is denied, the applicant shall be notified in writing of the reasons for denial and shall have the right to appeal to a Board composed of the Director of Public Safety, Commissioner of Inspection and the Director of Law, or their designees. Publication will be made of all Appeals filed.

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(b) In case of appeal the applicant shall, within ten (10) days after receiving notice of denial, perfect the appeal by giving notice in writing of the applicant's request to appeal at the office of the Director of Finance. The Appeal Board shall set a time and place for a hearing not later than thirty (30) days after the date of filing the notice of appeal. The applicant may be represented by counsel at the hearing and present witnesses or other evidence showing that the application should be granted. After hearing, the Appeal Board may sustain, modify or reverse the decision of the Director of Finance and in every case the decision of the Board shall be final.

## 721.08 License Fee; Expiration date.

Any person, firm or entity to whom a license is granted shall pay an annual fee of Two Hundred and Fifty Dollars (\$250.00) per license location. The annual fee shall be due and payable on September 1 (commencement date) of each year. The license is valid for one year expiring every year on August 31st. Failure to renew by September 30th will constitute full expiration. For the period of May 1, 2008 through August 31, 2008, the license fee shall be One Hundred Dollars (\$100.00).

## 721.09 Transfer of License.

No transfer of a Convenience Store license shall be permitted. Once a new license is approved for a specific location it shall supercede and cancel any previous licenses for that location.

## 721.10 Conditional Licensing.

At the discretion of the Director of Finance, a license that is scheduled to be revoked may be extended for a length of time as a conditional license. This license may contain written terms as conditions to the license. If the established conditions are not satisfied the license may be revoked. A conditional license must be posted, with its conditions, in a conspicuous place where it can be plainly seen by the public and in compliance with Section 721.16.

## 721.11 Revocation of License.

(a) The Director of Finance shall revoke the license of any convenience store if the Director of Public Safety certifies to the Director of Finance that the licensee no longer satisfies the requirements for holding a license under this Chapter, including the licensee's persistent or willful failure to discharge the licensee's responsibilities under Section 721.13, 721.14 or 721.15. In determining whether to make a certification for revocation to the Director of Finance due to the licensee's failure to discharge the

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licensee's responsibilities under Section 721.13, 721.14 or 721.15, the Director of Public Safety shall be guided by the following considerations:

(1) A license generally should not be revoked until the licensee has been given a reasonable opportunity to cure the problems identified at the convenience store; but

(2) Once a reasonable opportunity to cure the problems has been afforded to the licensee without substantial success, a license should be revoked even though the license holder has taken all reasonable measures to achieve compliance.

(b) A revocation of a convenience store license shall go into effect thirty (30) days after the Director of Finance notifies the licensee of the revocation. The revocation shall not be effective during the period that the licensee is appealing the revocation to the Appeal Board, and shall go into effect thirty (30) days after Appeal Board affirms the decision to revoke the license.

## 721.12 Notice of Revocation; Hearing.

The Department of Finance shall notify in writing the individual, firm, or entity whose license has been revoked within ten (10) days after its act of revocation effective prospectively to cease operations within 30 days.

## 721.13 License Conditions; Security Cameras Required.

(a) All Convenience stores are required under each license to install and maintain a surveillance camera system to be operated in the following manner:

### SIGNAGE REQUIRED.

Establishments shall post a conspicuous sign which states that the property is under camera surveillance.

### PERIODIC INSPECTIONS

All recording devices shall be subject to periodic inspections by the Business License Division, the Toledo Police Department or any authorized City official. Licensees shall cooperate in any inspections and make recording devices available for inspection.

### 24 HOURS PER DAY OPERATION.

All recording devices shall operate 24 hours per day without interruption. One tape shall be used each 24-hour period.

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## VIOLATION OF RULES SUBJECT TO ENFORCEMENT UNDER ADMINISTRATIVE ENFORCEMENT.

Stores with cameras that do not meet all of the requirements in this Chapter are subject to administrative fines in the amount of \$100 per day for each day of non-compliance and shall constitute cause for the revocation or non-renewal of a license. Administrative fines shall not be regarded as criminal penalties. Administrative fines may be appealed to the Appeal Board.

(b) The camera system shall be:

1. Positioned to provide photographic coverage of the cash register or place where money is exchanged or other area approved by the Director of Finance.

2. Maintained on a routine basis by the licensee to ensure that the camera system contains required equipment and is working properly. The camera system shall have a light or other signal, which indicates when the system has been activated.

3. Capable under normal lighting and operating conditions of recording and producing a recognizable color, retrievable, enlargeable and reproducible photographic image of persons in the designated photographic field. Such photographic image shall be of sufficient clarity to provide for suspect identification in investigations or criminal proceedings.

4. Remain fixed in this location and not consist of a panning camera.

5. Recorded images must be capable of being retrieved by the Toledo Police Crime Lab. Upon the request of an authorized City official, the media form shall be provided to the official no later than eight (8) hours after the request.

(c) Tapes/images shall be maintained in the following manner:

1. Each licensee shall maintain his or her tapes or retrievable images for a period of no less than 30 days.

2. It is the responsibility of the licensee to maintain all equipment, assure the accuracy of time keeping and schedule immediate repair if necessary.

721.14. Business premise maintenance.

Licensees shall inspect their premises from lot line to lot line and shall remove any litter and debris found thereon daily. All solid waste and recyclable materials shall be stored in refuse containers made of metal or approved plastic and shall be equipped with secure lids or covers, and such covers shall remain closed so as to prevent the intrusion of storm water or vermin. Refuse storage containers shall be enclosed on all

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four (4) sides by screening compatible with the principal structure and not less than two (2) feet higher than the refuse container or shall be otherwise effectively screened from the street, adjacent residential uses located in a residential or commercial district. The buildings, fixtures, and grounds of all business premises shall be well maintained and in compliance with the Building Code of the City of Toledo. Further, facilities shall at all times be in compliance with the setback and landscaping requirements of T.M.C. Section 1108.0203.

## 721.15. Business license management responsibilities.

The following minimum standards and conditions shall be met in order to hold a license. Failure to comply with any of these standards and conditions shall be grounds for the denial, refusal to renew or the revocation of the license.

(1) It shall be the responsibility of the licensee to take appropriate action to prevent further violations following conduct by any persons on the business premises, including parking areas, in violation of any of the following Toledo Municipal Code Sections:

- a. TMC Section 517.02 which prohibits gambling.
- b. TMC Section 513.10, which prohibits prostitution and acts relating thereto.
- c. TMC Chapter 513 which prohibits the unlawful sale or possession of controlled substances.
- d. TMC Sections 533.07, 533.11 and 533.12 which prohibit indecent exposure and the exhibition and distribution of obscene materials or performances.
- e. ORC Section 2923.12, which prohibits the unlawful possession, transportation, sale or use of a weapon.
- f. TMC Section 509.03 which prohibits disorderly conduct.
- g. TMC Section 509.08 which prohibits loitering.
- h. TMC Sections 139.11 and 1726, which prohibit public nuisance and permitting a public nuisance.
- i. TMC Section 525.07 which prohibits obstructing legal process.
- j. Any other criminal activity arising out of the conduct of the business.

Suggestions for appropriate actions will be provided to the applicant upon request and may include but not be limited to adequate lighting in problem areas, signage stating

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acceptable activities such as no loitering, and review of items for sale which could be used as drug paraphernalia or in illegal activities.

(2) It shall be the responsibility of the licensee to maintain and operate the business in compliance with all applicable laws and ordinances, including the zoning, fire, health, food, liquor, housing and building codes.

(3) The licensee is directly and vicariously responsible for any violations on the premises, including parking areas, by any employees, independent contractors, other persons hired by the licensee, or otherwise under the supervision or management of the licensee.

(4) It shall be the responsibility of the licensee to provide adequate security to prevent criminal activity, loitering, lurking and disorderly conduct on the business premises, including parking areas.

(5) A license shall be required to pay all delinquent court judgments for violations of the Toledo Municipal Code including fines and costs.

(6) Areas of the premises that are not regularly monitored by employees or security shall not be accessible to patrons, customers, or the public.

(7) Vending and other unattended coin operated machines shall be in plain view of employees and shall not be operable during hours the business is not open to the public and in operation.

(8) Parking and other outdoor areas of the premises accessible to the public shall be illuminated subject to TMC 1107.1908 Lighting.

(9) The provisions of this section are not exclusive. This section shall not preclude the enforcement of any other provisions of this Code or state and federal laws and regulations.

721.16 License certificate to be posted in conspicuous place.

The license certificate issued under this Chapter shall be posted in a conspicuous place on the premises of the business. For the purposes of this section, "conspicuous place" shall mean display of the license certificate on a wall of the business, clearly visible to customers of the business.

721.17 New license after revocation.

Upon a license revocation, no new license application shall be accepted or license issued to the same individual, firm, entity or any shareholder/director, member,

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manager/chief financial officer of any of the same until after the expiration of at least one year from the effective date of revocation.

## 721.18 Neighborhood Plans.

(a) In those parts of the City in which a recognized Community Development Corporation ("CDC"), as identified by the current map on file at the City of Toledo Department of Neighborhoods, operates, a licensee and the applicable CDC may enter into a written Neighborhood Plan. The Neighborhood Plan shall address issues of concern, which may include but not be limited to plans to address issues of crime, safety, loitering, traffic, noise, store operations, items offered for sale at the premises, marketing plans to encourage residents to patronize the store, and any other areas the licensee and the CDC deem appropriate. Either party may withdraw from the Neighborhood Plan upon thirty (30) days notice to the other party. The parties may mutually agree to modify the Neighborhood Plan or mutually terminate it at any time. A representative of the licensee and the CDC shall sign the Neighborhood Plan and provide a copy to the Director of Finance who shall keep the Neighborhood Plan on file with the licensee's file.

(b) The Director of Finance shall periodically publish a list of the licensees that have entered into Neighborhood Plans with

CDCs and distribute that list in a manner that encourages the community to patronize establishments that have Neighborhood Plans in place.

(c) The Mayor shall, from time to time, recommend other means of rewarding and encouraging CDCs and convenience store owners to work together to build stronger neighborhoods, reduce the incidence of tobacco use, especially among young people, and increase the opportunity for residents to purchase healthy foods at neighborhood convenience stores.

## 721.19 Implementation.

All initial applications shall be submitted to the City of Toledo Department of Treasury prior to May 1st. All applications which are complete and have not been issued or denied a permit from the City within 21 days shall be issued a temporary permit to be in effect until a permit is either issued or denied.

## 721.99 Penalty.

Except for one who operates a convenience store without the license required by this Chapter, the violation of the provisions of this Chapter shall not be deemed to be a criminal offense. A licensee who violates this Chapter's provisions shall be subject to

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the administrative fines specified in Section 721.13 and shall be subject to license revocation or non-renewal in accordance with the provisions of this Chapter. In addition, the Law Director is authorized to bring an action to compel compliance with this Chapter and an action to cease and desist operations in violation of this Chapter. One who operates a convenience store without the license required by this Chapter shall be guilty of a misdemeanor of the fourth degree.

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing complaint has been served on the individual listed below by delivery, this 15th day of May, 2008:

John Madigan, Law Director  
One Government Center  
640 Jackson  
Toledo, Ohio 43604  
Counsel for the Defendant

/s/ Scott A. Ciolek  
Scott A. Ciolek  
Attorney for Plaintiff