

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Midwest Retailers Associated, Ltd.)	Case No. 3:08-CV-851
)	
Plaintiff.)	
)	CHIEF JUDGE JAMES G. CARR
vs.)	
)	
City of Toledo,)	
)	
Defendant.)	
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)	
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)	

**DEFENDANT CITY OF TOLEDO’S OPPOSITION TO
PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

I. FACTS

On December 11, 2007, Toledo City Council passed Ordinance 797-07 by a vote of 9 to 2. The Ordinance amended the Toledo Municipal Code and created a new Chapter 721 to require all convenience stores to be licensed in order to operate. The reason for Council’s action is stated in the Summary & Background section, which provides in pertinent part:

*** Toledo City Council has been faced with complaints about the operation of convenience stores, many of which are not subject to the [Special Use Permit] because they pre-date the 1992 zoning regulations. The concerns include the manner of operation, the activity, proximity to other properties, behavior by customers, licensees and the public. The provisions of this Chapter which establish licensing requirements for convenience stores will preserve the best interests of all parties in a more neighborhood-oriented environment because it will apply to all convenience stores. The new requirements will allow for the revocation of licenses for any convenience store that presents a continuing neighborhood problem. ***

A copy of the Ordinance is attached as Exhibit A. The Ordinance contains several requirements that address the concerns that led to its adoption. These requirements include criminal background checks for potential licensees; installation and maintenance of a surveillance camera system; maintenance of the business premises; and taking appropriate action to curtail gambling, prostitution, the sale of drugs and other criminal acts at the business premises.

Midwest, in its Motion for Preliminary Injunction, has taken issue with several of the provisions of the Ordinance. It contends that the provisions of the Ordinance are vague; and that they violate its members' constitutional rights under the Fourth Amendment; the Fifth and Fourteenth Amendments; the Thirteenth Amendment and the *Ex Post Facto* Clause. In addition, Midwest contends that the Ordinance is preempted by Ohio law. Midwest argues that these violations of its members' constitutional rights amount to immediate and irreparable harm that only a preliminary injunction can prevent.

Midwest's claims, however, are without merit. Its constitutional claims are at best dubious and there is little likelihood that it will succeed on the merits of these claims. This lack of success on the merits of the constitutional claims also destroys the immediate and irreparable harm that Midwest contends its members will incur. Simply, Midwest cannot satisfy its burden of proof necessary to impose the extraordinary relief of a preliminary injunction under Rule 65.

II. ARGUMENT

A. Preliminary Injunction – Burden of Persuasion

Injunction relief under Rule 65 is an extraordinary remedy, the purpose of which is to preserve the status quo. The factors to be considered in granting a preliminary injunction are as follows:

- (1) Whether the movant has shown a strong or substantial likelihood of success on the merits;

- (2) Whether the movant has shown irreparable injury;
- (3) Whether the issuance of a preliminary injunction would cause substantial harm to others; and
- (4) Whether the public interest would be served by granting injunctive relief.

See *Mason County Med. Assn' v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977). The Sixth Circuit advocates a balancing approach to these factors. In *In re De Lorean Motor Co.*, 755 F.2d 1223 (6th Cir. 1985), the Court stated:

The varying language applied to the likelihood of success factor can best be reconciled by recognizing that the four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required may depend on the strength of the other factors. ***

Id. At 1229. Furthermore, the burden of persuasion in the four factors is on the party seeking the injunctive relief. In this case, the balance of these four factors favors the City. As a result, Midwest's motion should be denied.

1. Likelihood of Success on the Merits

Midwest has alleged that by enacting Ordinance No. 797-07, the City has created unconstitutional conditions relative to the Fourth Amendment rights to be free from unreasonable searches and seizures; the Fifth and Fourteenth Amendment due process rights; the Fifth Amendment right to just compensation for regulatory takings; violation of the *ex post facto* clause; and violation of the Thirteenth Amendment's prohibition of involuntary servitude. Midwest also alleges that the Ordinance is unconstitutionally vague and that it conflicts with general state law. Midwest, however, cannot show that it has a substantial likelihood of success on the merits of any of these claims.

a. Involuntary Servitude Claim

Midwest contends that the Ordinance violates the Thirteenth Amendment because it creates a condition of involuntary servitude. Midwest states that the Ordinance creates this condition “by transferring to selected business owners duties and responsibilities traditionally reserved for law enforcement personnel.” Motion for Preliminary Injunction at 11. Case law interpreting the Thirteenth Amendment, however, makes it clear that no Thirteenth Amendment violation has occurred in this matter.

In *Steiner v. Bethlehem Area School District*, 987 F.2d 989 (3rd Cir. 1993), rev’d on other grounds, a case upon which Midwest relies, the Court stated that not every situation in which an individual faces a choice between labor or legal sanction constitutes involuntary servitude. *Id.* At 999. Furthermore, the Court stated:

Modern day examples of involuntary servitude have been limited to labor camps, isolated religious sects, or forced confinement. (citations omitted).

Outside of these contexts, courts have consistently rejected claims that “forced labor” amounted to involuntary servitude. For example, it is not involuntary servitude when the state requires attorneys to provide a fixed number of hours of legal representation without compensation as a condition of practicing law. (citation omitted.). Similarly, it is not involuntary servitude for the government to collect liquidated damages from a participant in the National Health Service Corps scholarship program who, after accepting the scholarship money and completing his medical degree, declined to perform the required services. (citation omitted.) Finally, it is not involuntary servitude to offer prisoners an option of participating in a work-release program, even though the consequence of not working and remaining in jail may be “painful”. (citation omitted.)

In each of these situations courts found no compulsion because the individuals had alternatives to performing the labor: a lawyer can choose not to practice law to avoid the mandatory service requirement; a doctor can refuse to provide the contracted-for-services and instead pay the damages for breach of the contract; and a prisoner can choose to stay in jail rather than enter the work-release program. The fact that

these choices may not be appealing does not make the required labor involuntary servitude. See also *Booker*, 655 F.2d at 566-67 (not involuntary servitude if “the servant knows he has a choice between continued service and freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad” (quoting *United States v. Shackney* 333 F.2d 475, 486 (2nd Cir. 1964))).

Id. At 999-1000.

In the instant matter, the servitude that Midwest alleges is not akin to labor camps, isolated religious sects or forced confinement. Moreover, Midwest’s members have alternatives to performing the actions that the Ordinance requires. Midwest’s members can choose not to operate a convenience store to avoid the Ordinance. Midwest’s members can choose to alter the nature of their business by expanding to more than 5000 square feet or discontinue selling food and beverages for home consumption. Although these choices may not be appealing to Midwest’s members, this fact does not make the actions required under the Ordinance voluntary servitude. Id. Midwest, therefore, cannot show a substantial likelihood of success on the merits of this claim.

b. Unconstitutional Takings Claim

Midwest also contends that the Ordinance subjects its members to unconstitutional takings because it forces licensees to purchase and maintain high-resolution security cameras and to operate them pursuant to its regulations. Midwest argues that this “effects a conversion by shifting ownership of the cameras and recording equipment from the putative licensee and into the hands of the City.” Motion for Preliminary Injunction at 16. Midwest asserts that under this arrangement, the City enjoys all incidents of ownership of this equipment. Id.

Midwest’s attack on the Ordinance is limited to a facial challenge which requires it to prove that the mere enactment of the Ordinance deprives its members of economically viable use

of their property. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). However, Midwest's contention that the Ordinance "forces licensees to purchase high resolution cameras" evidences a lack of a property interest in these unpurchased high-resolution cameras. The enactment of the Ordinance cannot deprive Midwest's members of property that they do not own.

Even if some of Midwest's members have already installed high resolution cameras in their convenience stores, the Ordinance does not deprive those members of any use of the subject high resolution cameras. Midwest's members are free to use the cameras in any manner. If a member removes an installed high-resolution camera and he wants to continue operating the convenience store, he must replace the subject high-resolution camera with another. However, if a member does not want to continue operating the convenience store, no replacement is necessary. As a result, the Ordinance's effect is not a total or near total deprivation of Midwest's members' interest in the high-resolution cameras. The Ordinance, therefore, does not constitute a regulatory taking of Midwest's members' property.

c. The *Ex Post Facto* Claim

Midwest contends that Ordinance 797-07 is a criminal statute that is retrospective, and, therefore, violates the *Ex Post Facto* Clause of Article I, §10 of the United States Constitution. Midwest cites the penalty section of the Ordinance which makes operation of a convenience store without a license a fourth degree misdemeanor to establish that the Ordinance is criminal in nature. Midwest then cites to the criminal background provision for the retrospective application of the Ordinance. However, the application of this provision does not violate the *Ex Post Facto* Clause.

Section 721.99, the penalty provision of the Ordinance, provides:

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 the administrative fines specified in Section 721.12 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 a license required by this Chapter shall be guilty of a misdemeanor of the fourth degree.

Clearly, the only criminal aspect of the Ordinance is the penalty for operating a convenience store without a license. This penalty is not based upon a person's past actions. Rather, it concerns a person's current actions.

Moreover, the section of the Ordinance that concerns an applicant's past behavior, §721.04(e), provides:

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.

Clearly, a person is not subject to any criminal penalty because of his prior criminal convictions. A conviction may prevent a person from obtaining a license to operate a convenience store, but this is not a criminal penalty.

In *Smith v. Doe*, 538 U.S. 84 (2003), the Supreme Court stated:

As the Court stated in *Flemming v. Neston*, rejecting an *ex post facto* challenge to a law terminating benefits to deported aliens, where a legislative restriction “is an incident of the state’s power to protect the health and safety of its citizens,” it will be considered “as evidencing an intent to exercise that regulating power, and not a purpose to add to the punishment.” (citations omitted.)

Id. at 93-94. In this instant case, the Ordinance was enacted to address citizens’ concerns regarding the manner of operation of convenience stores, the activities that occur at convenience stores, and the behavior of customers and managers of convenience stores. See Exhibit A, Summary & Background. Thus, the purpose of the Ordinance is not to add punishment for an individual’s prior criminal convictions. As a result, the Ordinance does not violate the *ex post facto* clause of the Constitution and Midwest cannot show a substantial likelihood of success on the merits of this claim.

d. Unconstitutionally Vague Claim

Midwest also claims that the Ordinance is vague because it fails to specify which businesses are affected by the regulations and that the Ordinance fails to provide any clear guidance as to how business owners should comply with its requirements. Midwest’s contentions, however, are wrong.

First, the Ordinance defines “convenience stores” as a retail seller “of food and beverages for home consumption***with a floor area less than 5000 sq. ft.” This definition is not vague. Midwest, however, assumes that this definition applies to some undefined subset of businesses that meet the definition of convenience store. Midwest bases its erroneous assumption on the fact that the City sent written notices and applications to less than all of the businesses to which the definition would apply. Midwest concludes that only the businesses that received the written notice and application are subject to the Ordinance. Midwest, however, has offered no evidence

that the Ordinance will be applied according to its assumption. In fact, there has been no application of the Ordinance since it was enacted and Midwest's contention is only speculation.

Midwest also contends that its members cannot understand the requirements of the Ordinance. However, the Supreme Court, in *U.S. v. National Dairy Products Corp.*, 372 U.S. 29 (1963), stated that "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *Id* at 32. Moreover, the Ordinance provides that the City will identify "appropriate actions" upon request. Specifically, the Ordinance states:

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

Ordinance section 721.15. Thus, a business owner who does not understand the requirements of the Ordinance can discuss those requirements with the City, and he will be given suggestions of what actions to take to comply with the Ordinance. As such, the Ordinance is not unconstitutionally vague, and Midwest cannot show a substantial likelihood of success on the merits of this claim.

e. **Unreasonable Search and Seizure Claim**

Midwest contends that the Ordinance subjects its members to warrantless surveillance and seizures of private property in violation of the Fourth Amendment. Specifically, Midwest argues that the Ordinance's requirement that its members install surveillance cameras on their premises, operate the cameras twenty-four hours a day, archive the surveillance tapes, and make the tapes available to any authorized City official on eight hours notice, amounts to an

unconstitutional search and seizure. However, the only arguable search and seizure provision of the Ordinance is in Section 721.13, which states in pertinent part:

* * *

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.

* * *

(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 forum shall be provided to the official no later than eight (8) hours after the request.

See Exhibit A. These provisions of the Ordinance do not violate the Fourth Amendment.¹

Although the Fourth Amendment's prohibition against unreasonable searches and seizures applies to administrative searches of commercial premises, it has long been recognized that the expectations of privacy concerning commercial premises that are "closely regulated" is attenuated. *New York v. Burger*, 482 U.S. 691, 700-01 (1987). Warrantless inspections of commercial property may be unreasonable if they are unnecessary to further important governmental interests, or if their occurrence is so random, infrequent, or unpredictable that the owner has no real expectation that the property will, from time to time, be inspected. *Donovan v. Dewey*, 452 U.S. 594, 599 (1981). However, where a regulatory scheme does protect business owners from being exposed to the almost unbridled discretion of executive and administrative officers as to when to search and whom to search, statutes authorizing warrantless administrative searches may pass constitutional muster. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323

¹ Should the Court determine that Midwest has shown a substantial likelihood of success on the merits of its Fourth Amendment claim and that it has met its burden of persuasion regarding this claim, the City requests that any preliminary injunction that the Court imposes be limited to enjoining the City from inspecting recording devices and from demanding that recording tapes be turned over on demand.

(1978). Thus, under certain circumstances, property may be subject to warrantless inspection where such inspection is necessary to further a regulatory scheme and the regulatory presence is sufficiently comprehensive and defined that the owner of the commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes. *Donovan v. Dewey* at 599-600.

Administrative searches of closely regulated businesses will be deemed reasonable only if they meet three criteria set forth in *New York v. Burger, supra*. First, there must be a substantial government interest for the regulatory scheme. Second, the warrantless inspections must be necessary to further the regulatory scheme. Finally, the inspection program must provide a constitutionally adequate substitute for a warrant. *Id.* at 702-03.

With respect to the substantial government interest factor, the public welfare is a legitimate government interest that can be protected by municipal police power. *See Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). In the instant case, the Ordinance was enacted in part to protect business invitees and convenience store employees from the dangerous activities of robbers and other criminals. *See* Exhibit A. Second, periodic inspections of the recording equipment to assure that it is in place and operating furthers the regulatory scheme of protecting business invitees and convenient store clerks from robbers and other criminals. Finally, the Ordinance gives notice to convenience store owners that the City will conduct periodic inspections of the recording devices only by the Business License Division of the City, the Toledo Police Department or authorized City officials. *See* 721.12. The Ordinance, therefore, meets the criteria outlined in *New York v. Burger*. As a result, the Ordinance does not violate the Fourth Amendment and Midwest cannot show a substantial likelihood of success on the merits of this claim.

f. State Law Preemption Claim

Midwest also contends that the Ordinance conflicts with R.C. 4301.10, 4303.27 and other liquor control laws because a business owner could be granted a liquor license from the State of Ohio and prevented from selling beer, wine or liquor as a result of his failure to comply with the Ordinance. However, the Ordinance does not conflict with the statute.

Pursuant to Article XVIII, Section 3 of the Ohio Constitution, municipalities have authority to enact health and safety regulations that do not conflict with general laws. Because the grant of authority to municipalities to adopt “local police, sanitary and other similar regulations” derives directly from the Ohio Constitution, the Ohio Legislature cannot extinguish those powers through a state law regarding liquor licensing. Only in those instances where the local ordinance is in direct conflict with a general law of the state on the same subject must the local law yield to the state statute. *Fondessy Enterprises, Inc. v. City of Oregon*, 223 Ohio St.3d 213, 216 (1986). In the case at bar, there is no direct conflict with R.C. 4301.10, 4303.27 or any other liquor control laws.

The analysis to determine whether a conflict exists between a general law of the state and a municipal ordinance is whether the ordinance permits or licenses that which the statute forbids or prohibits, and vice-versa. *Weir v. Remmelin*, 15 Ohio St.3d 55, 57 (1924). However, a conflict sufficient to nullify a local law is not easily demonstrated. *City of East Cleveland v. Scales*, 10 Ohio App.3d 25, 26 (1983).

In the case at bar, unlike *Auxter v. City of Toledo*, 173 Ohio St. 944 (1962), the Ordinance does not attempt to regulate the sale of beer and liquor in the City. It simply attempts to regulate certain actions concerning the operation of a convenience store. In fact, the Ordinance applies to all stores with a floor area of 5000 square feet or less that sell food and beverages for home

consumption. See 721.01. This definition includes stores that do not sell beer or liquor, but meet the definition of the Ordinance. Thus, the Ordinance does not target stores with liquor licenses. Nothing in the Ordinance declares something to be wrong that the state law declares to be right or vice-versa. See *Leit v. City of Eastlake*, 7 Ohio App.2d 218 (1966). As a result, there is no conflict with the state law, and Midwest cannot show a substantial likelihood of success on the merits of this claim.

2. **Irreparable Injury, Harm to Others, and Public Interest**

Midwest's failure to show a likelihood of success on the merits must be balanced against its showing regarding the other three factors. Midwest's claim of irreparable harm, however, is tied to its allegations of constitutional violations. Thus, if the Ordinance does not violate the constitutional rights of Midwest's members there is no showing of irreparable harm. As set forth above, Midwest's constitutional claims are dubious. Thus, Midwest cannot show that its members will suffer immediate and irreparable harm.

Whether the preliminary injunction would cause substantial harm to others is another factor for consideration. *Tumblebus, Inc. v. Cransmer*, 399 F.3d 754, 760 (6th Cir. 2005). In this case, granting a preliminary injunction will maintain the status quo and will continue to expose third parties to the dangerous activities of robbers and other criminals at convenience stores.

Finally, whether the public interest would be served by the issuance of the injunction must be considered. *Tumblebus* at 760. In the case at bar, the Ordinance does not violate the constitutional rights of Midwest's members. Furthermore, the City's enactment of the Ordinance is not an abuse of its home-rule authority. As a result, there is no public interest to be served by issuing a preliminary injunction in this case. In fact, the public interest is best served by denying Midwest's motion, which requires convenience stores to take steps to protect their customers,

their employees and the neighborhood in which they are located. As a result, balancing the four factors for issuance of a preliminary injunction indicate that the motion for preliminary injunction should be denied.

III. CONCLUSION

For the reasons stated above, Midwest's Motion for Preliminary Injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition to Plaintiff's Motion for Preliminary Injunction was filed electronically this 10th day of June, 2008. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Keith J. Winterhalter
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