

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

MIDWEST RETAILERS  
ASSOCIATION, LTD.  
520 Madison Avenue, Suite 820  
Toledo, Ohio 43604

Plaintiff,

-vs-

CITY OF TOLEDO  
One Government Center  
640 Jackson, Suite 2200  
Toledo, OH 43604

Defendant.

Case No. 3:08-CV-851

Judge James G. Carr

**MOTION FOR TEMPORARY  
RESTRAINING ORDER WITH  
MEMORANDUM IN SUPPORT**

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Now comes Plaintiff Midwest Retailer's Association, and respectfully moves this Court for a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure, for reasons set forth below. In the alternative, Plaintiff respectfully requests this Court to deny Defendant's motion for extension of time.

## INTRODUCTION

Defendant City of Toledo passed Toledo Municipal Ordinance 797-07 on December 11, 2007. Ordinance 797-07 requires owners of “convenience stores” to obtain an operators license, subject to numerous detailed regulations. On March 17 , 2008, Defendant notified affected business owners of these new requirements, demanding that each “convenience store” owner fill out an application, and return the completed application and application fee to Defendant. Plaintiff Midwest Retailer’s Association (MWRA), consisting of business owners subject to the requirements of Ordinance 797-07, filed a complaint on April 2, 2008. In the complaint, MWRA alleges that Ordinance 797-07 is unconstitutionally vague, violates numerous provisions of the United States Constitution, and impermissibly conflicts with Ohio law.

Subsequent to filing the complaint, MWRA participated in several meetings with Defendant’s counsel, attempting to reach a settlement acceptable to all parties. Although Ordinance 797-07 took effect on May 1, 2008, Defendant informally agreed to refrain from enforcing Ordinance 797-07 for thirty days. Ostensibly, this 30-day stay on enforcement would provide an opportunity for the parties to reach a settlement. And, if the parties could not reach an settlement, the the 30-day period would also provide a reasonable opportunity for MWRA to seek a preliminary injunction.

In reliance on Defendant’s promise to not enforce Ordinance 797-07, MWRA did not file a motion for a temporary restraining order. Rather, after two weeks and several good faith attempts at negotiation, MWRA filed a motion for preliminary injunction on May 15, 2008. By filing on this date, MWRA provided Defendant with ample time to prepare and respond before the 30-day period expired. Also, MWRA remained open to the possibility that a settlement could

be reached prior to the preliminary injunction hearing. However, Defendant has chosen to engage in conduct inconsistent with that of a party willing to negotiate in good faith.

Despite several meetings with MWRA counsel and individual MWRA members, Defendant has failed to make any sort of settlement offer. Defendant has also been completely unresponsive to settlement proposals from MWRA. Worse still, Defendant has chosen to engage in a disgraceful display of intimidating behavior towards MWRA and its members. On May 27, 2008, Defendant delivered a second round of 797-07 licensing applications to MWRA members. Although delivery by mail was apparently adequate to deliver the original applications in March 2008, Defendant chose to deploy Toledo Police officers to hand-deliver this second round of applications. These officers were in uniform and armed. Each application was accompanied by a letter<sup>1</sup> declaring that “[t]hose who operate a convenience store without the license required by this chapter may be charged with a misdemeanor of the fourth degree, punishable by 30 days in jail and/or a \$250.00 fine,” and “stores with cameras that do not meet all of the requirements 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.”<sup>2</sup> The letter does not acknowledge that Ordinance 797-07 is the subject of pending litigation, nor does the letter provide a due date for license applications. The only reasonable interpretation of this letter is that Defendant is demanding immediate compliance with Ordinance 797-07, on threat of fines and other criminal penalties.

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<sup>1</sup> A copy of the letter is in Appendix B.

<sup>2</sup> This is actually a misstatement of Ordinance 797-07, pursuant to which *only licensees* are subject to the detailed regulations set forth in the ordinance. Only by filling out an application, obtaining a license, and becoming a licensee would a store owner be subject to the \$100/day fine for non-compliance with the security camera requirements. By contrast, non-licensees are subject only to a 4th-degree misdemeanor for operating without a license.

By engaging in the conduct described above, Defendant has manifested clear intent to end settlement negotiations, and proceed with the enforcement of Ordinance 797-07. At the same time, Defendant has requested an extension for more time to respond to MWRA's motion for preliminary injunction. If Defendant's motion is granted, Defendant will be free to enforce Ordinance 797-07 for approximately two weeks prior to the preliminary injunction hearing, leaving MWRA members vulnerable to immediate and irreparable harm in the form of pecuniary injuries and a variety of potential constitutional violations. The nature of these harms is described in the Memorandum below.

Enforcement of Ordinance 797-07 threatens immediate and irreparable harm to MWRA and its members. The scope and magnitude of these potential injuries is significant. For these reasons, MWRA respectfully requests a temporary restraining order preventing Defendant from enforcing Ordinance 797-07 until the preliminary injunction hearing. In the alternative, MWRA requests this Court to deny Defendant's motion for extension of time, and set a hearing for preliminary injunction at a time of the Court's earliest convenience. Also, in the interests of fairness and justice, MWRA requests this Court to enjoin Defendant from utilizing City law enforcement personnel to discourage MWRA members from pursuing this litigation.

## **MEMORANDUM**

### **I. Facts**

Plaintiff Midwest Retailers Association (MWRA) 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), MWRA respectfully seeks a temporary

restraining order and a preliminary injunction to prevent enforcement of Toledo Municipal Ordinance 797-07, which took effect on May 1, 2008.<sup>3</sup> Unless injunctive relief 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 MWRA and the store owners it represents is immediate and real. If Defendant 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 and facing the prospect of lawsuits from governmental and private parties, as well as criminal sanctions including fines, property loss, and incarceration.

MWRA is likely to prevail on the merits of this case, for reasons set forth in the discussion 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

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<sup>3</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.

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, MWRA and its members will suffer immediate and irreparable injury. By contrast, a temporary restraining order will merely preserve the status quo pending the preliminary injunction hearing, 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 a temporary restraining order and preliminary injunction pending resolution of this litigation.

## **II. Discussion**

### **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 Defendant 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. Moreover, the most recent round of 797-07 applications sent by Defendant to affected business owners was hand delivered by uniformed Toledo Police officers. These applications were accompanied by letters containing the following instruction: “If you have any questions. please call...the Toledo Police Department.” These facts further support the conclusion that Ordinance 797-07 is, in reality, a program designed primarily to aid and assist law enforcement. Defendant City of Toledo 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, Defendant 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 Ordinance 797-07 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, Ordinance 797-07 conflicts with the state statute, and therefore violates the Ohio Constitution.

### **III. Standard Governing Temporary Restraining Orders**

Pursuant to FRCP Rule 65, a temporary restraining order may be granted without written or oral notice to the adverse party only if:

“(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party’s attorney can be heard in opposition, and (2) the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.”

“[R]equests for temporary restraining orders are governed by the same general standards that govern the issuance of a preliminary injunction.” *Lamon v. Plier*, 2006 WL 120088 (E.D.Cal., 2006). Ohio courts have been guided by the following well-recognized criteria in determining whether injunctive relief is appropriate: (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 temporary restraining order.

First, MWRA 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, MWRA 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 MWRA would suffer if Ordinance 797-07 is allowed to take effect. Fourth, injunctive relief serves the public interest in several ways. One, MWRA 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.

Moreover, a temporary restraining order is appropriate where necessary “to preserve the status quo until the Court can conduct a thorough inquiry into the propriety of a preliminary or permanent injunction.” *Hospital Resource Personnel, Inc. v. United States*, 860 F.Supp. 1554, 1556 (S.D.Ga., 1994). In this case, no hearing date has been set for a preliminary injunction hearing. Defendant has requested a 14-day extension. At the same time, Defendant has manifested clear intent to begin enforcement of Ordinance 797-07. If Defendant is permitted to enforce the provisions of Ordinance 797-07, MWRA will be vulnerable to a variety of potential injuries, including fines, criminal penalties, pecuniary loss, and embarrassment and expense

resulting from enforcement by law enforcement. As discussed above, Ordinance 797-07 is an ill-conceived regulatory scheme that violates numerous provisions of both the federal and Ohio constitutions. As such, Defendant City of Toledo should be enjoined from enforcing Ordinance 797-07 until MWRA has an opportunity to be heard at a preliminary injunction hearing.

#### **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, Defendant 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 MWRA, and local media should be sufficient supplemental notice. For these reasons, MWRA 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 30, 2008 at 9:00AM, or at such other time as the Court may designate. Plaintiff estimates this hearing will require no more than one hour of oral argument. Plaintiff does not, at this time, expect to offer oral testimony.

### **CONCLUSION**

On the basis of the foregoing, Plaintiff is entitled to a temporary restraining order and preliminary injunction against Defendant City of Toledo, prohibiting the City from implementing and enforcing Toledo Municipal Ordinance 797-07. As discussed above, MWRA has raised numerous constitutional objections to this ordinance, each with a high likelihood of success on the merits. And, despite MWRA's willingness to engage in good faith settlement negotiations, Defendant has chosen to pursue a course of conduct that is both disreputable and counterproductive. By utilizing Toledo Police officers in an attempt to discourage MWRA members from vindicating fundamental constitutional rights in a court of law, Defendant hampers the effective administration of justice, and diminishes public confidence in government. Such behavior should not be permitted to continue. Accordingly, MWRA respectfully requests that this Court grant their motion for a temporary restraining order, thereby preventing enforcement of Toledo Municipal Ordinance 797-07 pending outcome of this litigation. In the alternative, MWRA requests this Court to deny Defendant's motion for extension of time, and set the preliminary injunction hearing at the Court's earliest convenience. MWRA also requests that this Court enjoin Defendant City of Toledo from utilizing law enforcement personnel and other City resources for the purpose of intimidating MWRA and its members.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on Thursday, May 29, 2008, a copy of the foregoing Motion for a Temporary Restraining Order was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

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