



## **MEMORANDUM**

### **A. SEVERABILITY**

In a footnote, Defendant raises the issue of severance, suggesting “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.”<sup>1</sup> However, severance is not appropriate at this stage in the litigation.

Pursuant to Toledo Municipal Code § 101.08:

“If any provision of a section of the Municipal Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect the other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.”

For the purposes of a preliminary injunction, the Court need not hold invalid any provision of Ordinance 797-07. Rather, the Court makes a determination regarding the plaintiff’s likelihood of success on the merits. Severance is only appropriate after an adjudication on the merits, at which point the Court will have reached a decision regarding the constitutional validity of Ordinance 797-07. Thus, if the Court finds that MWRA has a likelihood of success on the merits, the Court should refrain from severing any provisions of Ordinance 797-07 until the case is decided on the merits.

### **B. VAGUENESS**

Defendant cannot avoid a “void for vagueness” challenge by merely selecting a few phrases from the Ordinance and attempting to clarify the meaning of those phrases. Ordinance 797-07 is a set of interrelated provisions designed to function as a cohesive regulatory scheme. As a whole, Ordinance 797-07 fails to provide reasonably clear

---

<sup>1</sup> Defendant’s “Motion in Opposition,” page 10.

guidelines for compliance, and allows for arbitrary and erratic enforcement. The Supreme Court described the “void for vagueness” doctrine in *Grayned v. City of*

*Rockford*:

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters...for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” 408 U.S. 104, 108-09 (1972).

Because Ordinance 797-07 lacks any discernible standards, a reasonable business owner is left without guidance as to what conduct is required to achieve compliance.

Defendant responds that the City, on request by a business owner, will provide “suggestions of what actions to take to comply with the Ordinance.”<sup>2</sup> If “appropriate actions” is not vague terminology, Defendant should be able to do better than merely offer “suggestions” as to what conduct may or may not comply with the ordinance. Moreover, the undefined “appropriate actions” requirement sets the stage for arbitrary and erratic enforcement. With no fixed standards in place, the City is free to set a different standard of “appropriate actions” for each store owner.

By design, Ordinance 797-07 also “delegates basic policy matters for resolution on an ad hoc and subjective basis.” *Id.* This much is obvious because, as Defendant readily concedes, Defendant has already engaged in selective enforcement of Ordinance 797-07. Specifically, “the City sent written notices and applications to less

---

<sup>2</sup> Defendant’s “Motion in Opposition,” page 9.

than all of the businesses” to which Defendant’s definition of “convenience stores” applies.<sup>3</sup> This behavior is not encouraging in light of the Ordinance’s remaining provisions, which, when read as a whole, bestow upon City officials limitless discretion to grant, revoke or deny licenses. Ordinance 797-07 presents significant “dangers of arbitrary and discriminatory application,” and consequently, is unconstitutionally vague.

### **C. UNREASONABLE SEARCH AND SEIZURE**

As Defendant correctly observes, Ordinance 797-07 requires MWRA members to “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.”<sup>4</sup> Even couched in the favorable prose of defense counsel, the Fourth Amendment problems presented by this regulatory regime are obvious. For instance, Defendant fails to explain how § 721.13 provides an adequate substitute for a warrant. Also, Defendant does not even attempt to explain why City officials should be permitted, without a warrant or probable cause, to seize recording media and data held by private citizens. These omissions underscore the constitutionally indefensible nature of Ordinance 797-07.

First, Defendant contends that Ordinance 797-07 “meets the criteria outlined in *New York v. Burger*.”<sup>5</sup> However, Defendant provides insufficient support for this conclusion. Conspicuously absent from Defendant’s memorandum is an explanation of how Ordinance 797-07 provides an “adequate substitute for a warrant,” as required by *Burger*. 482 U.S. 691, 702-03 (1987). As the *Burger* court explained, to provide an

---

<sup>3</sup> Defendant’s “Motion in Opposition,” page 8.

<sup>4</sup> Defendant’s “Motion in Opposition,” page 9.

<sup>5</sup> Defendant’s “Motion in Opposition,” page 11.

adequate substitute for a warrant, a regulation 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 provides none of these procedural safeguards. Rather, § 721.13 of the Ordinance provides City officials with limitless discretion to seize archived video footage on demand, without even a cursory explanation to the store owner as to why the seizure is necessary. Under the plain language of *Burger*, Ordinance 797-07 cannot be said to provide an “adequate substitute for a warrant.”

Second, Defendant fails to explain how a mere “eight hours notice” satisfies the requirements of the Fourth Amendment. Assuming, *arguendo*, that the surveillance systems required by Ordinance 797-07 are the property of each respective store owner, it necessarily follows that the store owners have a property interest in not only the cameras and recording devices, but also enjoy a property interest in any recording media associated with those surveillance systems. Additionally, the store owners will have both property and privacy interests in any data stored on their recording media. If the City of Toledo wishes to seize any recording media owned by MWRA members and access the data contained on that media, City officials must first demonstrate probable cause and seek a warrant. However, Defendant cites no authority supporting the proposition that government officials may seize physical property and electronic data without a warrant. In short, where the City seeks to carry out a search and seizure of private property, the Fourth Amendment requires more from City officials than a demand without explanation and “eight hours notice.”

#### **D. INVOLUNTARY SERVITUDE**

Essentially, Defendant argues that the requirements of Ordinance 797-07 do not create a condition of involuntary servitude because “Midwest’s members have alternatives to performing the actions that the Ordinance requires.”<sup>6</sup> One “alternative” Defendant claims MWRA members have available is “to alter the nature of their business by expanding to more than 5000 square feet.” As an initial matter, it is far from clear how merely expanding the size of a convenience store “alters the nature” of the business. Apparently, an increase in square footage is sufficient to ameliorate the City’s concerns about crime and public safety. But more importantly, it is simply not accurate to say that a convenience store can simply “choose” to expand the size of their business. Many affected businesses do not have available room to expand due to location. Others lack the financial resources required for substantial remodeling. And, at any rate, a business owner cannot expand the size of their business without obtaining applicable permits from the City. In short, Defendant cannot argue that a business owner may freely choose to expand their business when, in fact, such an expansion cannot take place without permission from Defendant.

The other “alternative” Defendant suggests is to “discontinue selling food and beverages for home consumption,” or “choose not to operate a convenience store to avoid the Ordinance.” To say the least, it is not obvious how eliminating the primary source of “food and beverages for home consumption” in many of Toledo’s poorest neighborhoods serves Defendant’s stated goals of public safety and crime prevention. But, setting aside the disjunct between these “alternatives” and Defendant’s policy

---

<sup>6</sup> Defendant’s “Motion in Opposition,” page 5.

goals, the thrust of Defendant's argument seems to be that Ordinance 797-07 does not create conditions sufficiently oppressive to amount to involuntary servitude. In support, Defendant cites examples of situations where individuals might choose an "alternative" to avoid state-compelled labor:

"[A] lawyer can choose to not 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 a work-release program."<sup>7</sup>

None of these examples are analogous to the case at bar. True enough, a person can elect to not enter the practice of law to avoid a *pro bono* services requirement. However, choosing not to enter a vocation is something quite different than closing an existing business, especially for small business owners who often have their life savings invested in their business. Moreover, *pro bono* requirements for attorneys are limited to a fixed number of hours. By contrast, the labor required by Ordinance 797-07 is an open-ended obligation. As for defendant's other examples, MWRA members have not entered any sort of contract with the City, nor are MWRA members prisoners of the state.

As the Third Circuit observed in *Steirer*, "the 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." 987 F.2d at 999 (3rd. Cir. 1993). This is precisely the choice presented to MWRA members by Ordinance 797-07. This ordinance shifts full-time law enforcement duties onto MWRA members, while providing no discernible benefit in exchange. Rather, Ordinance 797-07 seeks to secure compliance by threatening legal sanctions, including fines, criminal charges, and

---

<sup>7</sup> Defendant's "Motion in Opposition," page 4.

loss of business. This choice between performing a substantial amount of labor on behalf of the City and legal sanctions creates a condition of involuntary servitude.

### **E. EX POST FACTO LAWS**

As Defendant readily concedes, under Ordinance 797-07 “[a] conviction may prevent a person from obtaining a license to operate a convenience store.”<sup>8</sup> However, Ordinance 797-07 also permits Defendant to revoke the license of a store owner with a business already in operation, or deny renewal of a license. Under the plain language of Ordinance 797-07, any affected store owner with any type of criminal conviction within five years of the application date may be denied a license to operate. Continuing to operate a convenience store without this license is a criminal offense. This outcome is not, as Defendant claims, based on “a person’s current actions,” but rather makes a person vulnerable to fines, criminal penalties, and loss of business for no reason other than a past conviction. This is the very essence of an *ex post facto* law.

### **F. UNCONSTITUTIONAL TAKINGS**

Defendant argues that “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 its property.”<sup>9</sup> Essentially, Defendant argues that before raising a constitutional challenge to Ordinance 797-07, MWRA must wait for the City to consummate the unconstitutional takings threatened by the Ordinance. Extending Defendant’s reasoning, no legislative enactment would ever be subject to a

---

<sup>8</sup> Defendant’s “Motion in Opposition,” page 7.

<sup>9</sup> Defendant’s “Motion in Opposition,” page 5.

facial challenge, because “mere enactment” of a law does not violate constitutional rights -- rights violations always occur during the enforcement process.

However, MWRA does not have to wait for the City to begin enforcement of Ordinance 797-07 before challenging the validity of the Ordinance. A plaintiff “has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.” *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497, 500 (7th Cir., 1980). In *Maciejewski*, the plaintiff challenged a municipal ordinance, claiming the ordinance’s “lack of standards” violated due process. *Id.* Although the municipality had not yet moved to enforce the ordinance against the plaintiff, the *Maciejewski* court held that the ordinance was nevertheless subject to a facial challenge: “plaintiff need not risk closure of its theatre in order to activate judicial review.” *Id.* at 500-501. A case is “ripe for resolution” where a plaintiff alleges “infringement of a constitutional right by the administrative process itself.” *Id.*

Moreover, there is every reason to believe that Defendant intends to enforce Ordinance 797-07. Several weeks ago, Defendant sent uniformed police officers to MWRA members to hand-deliver 797-07 applications. Each application was accompanied by a letter, signed by the Chief of Police, demanding compliance with the ordinance. This conduct is a clear manifestation of Defendant’s intent to enforce the ordinance. If enforced by the City, Ordinance 797-07 will subject MWRA members to unconstitutional takings. And, ostensibly, the only reason Defendant is not currently enforcing Ordinance 797-07 is because this Court has ordered Defendant to refrain

from doing so. Thus, the threat of constitutional harm to MWRA members is both non-speculative and imminent.

**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 (0082779)  
CIOLEK & WICKLUND  
520 Madison Avenue, Suite 820  
Toledo, OH 43604  
Phone: (419) 931-6431  
Fax: (866) 890-0419  
Email: Scott.Ciolek@gmail.com

## CERTIFICATE OF SERVICE

I hereby certify that on Monday, June 16, 2008, a copy of the foregoing REPLY TO DEFENDANT'S MOTION IN OPPOSITION 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.

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

s/ Scott A. Ciolek  
Scott A. Ciolek (0082779)  
CIOLEK & WICKLUND  
520 Madison Avenue, Suite 820  
Toledo, OH 43604  
Phone: (419) 931-6431  
Fax: (866) 890-0419  
Email: Scott.Ciolek@gmail.com