

11-0019

IN THE SUPREME COURT OF OHIO

BARTEC, INC. *et al.*,  
 Defendants-Appellants,  
 v.  
 ALVIN JACKSON,  
 OHIO DEPARTMENT OF HEALTH  
 Defendant-Appellee  
 RICHARD CORDRAY,  
 ATTORNEY GENERAL  
 Defendant-Appellee

: ON APPEAL FROM THE  
 : FRANKLIN COUNTY COURT  
 : OF APPEALS, TENTH  
 : APPELLATE DISTRICT  
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 : COURT OF APPEALS  
 : CASE NO. 10AP-173  
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 : TRIAL COURT  
 : CASE NO. 09CVH08-12197  
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**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS BARTEC, INC AND RICHARD M. ALLEN**

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## EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves issues of public and great general interest, and raises several novel and substantial constitutional questions. The issues here, the legality of (1) how the statewide smoking ban is enforced; and (2) its inclusion of bars, affect tens, affect thousands of Ohioans, and have garnered great interest from the public. Meanwhile, they implicate the contours of Ohioans' property rights and police power, Ohio agencies' regulatory authority, and Ohioans' capacity to meaningfully redress their constitutional rights in Ohio courts. These are issues of first impression related to a ubiquitously applicable but yet to be construed or interpreted statute, the Smoke Free Workplace Act.

First, the Act affects many Ohioans. The Ohio Department of Health ("ODH") estimates that 280,000 "public places" and "places of employment" are covered by the Ohio smoking ban.<sup>1</sup> Enforcement began in May of 2007, and through the end of 2009 alone 5,612 distinct proprietors had received a total of 33,347 citations.<sup>2</sup> Proprietors that can be characterized as "bars" received 60 percent of these citations, and comprise 62 percent of proprietors cited,<sup>3</sup> while private clubs such as VFW posts have received much of the remainder. And these citations are not trivial: the Act's fine structure quickly escalates to the considerable amount of \$5,000 per infraction.<sup>4</sup>

Great public interest in this case is further verified by the intense media scrutiny surrounded it since the day it was filed, and as it has moved through the Court system.<sup>5</sup> Indeed, in August of 2010, this case precipitated a poll where a majority indicated that they do not believe that the smoking ban

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<sup>1</sup> See <http://www.odh.ohio.gov/alerts/ohiosmokingban.aspx>.

<sup>2</sup> See Marlow, Michael, *the Economic Losers from Smoking Bans*, Cato Regulation, Summer 2010, available at <http://www.cato.org/pubs/regulation/regv33n2/regv33n2-4.pdf>.

<sup>3</sup> Id.

<sup>4</sup> See OAC 3701-52-09.

<sup>5</sup> *State sues 2 bars over smoking ban*, Columbus Dispatch, August 15, 2009; *Bar seeks to put out ban*, Columbus Dispatch, 2009; *Judge throws out enforcement of smoking ban against bar*, Dayton Daily News, February 25, 2010; *Ohio Plans to Appeal Smoking Enforcement Decision*, Toledo Blade, February 26, 2010; *Columbus Bar to Appeal Smoking Ban Ruling*, Columbus Dispatch, November 17, 2010.

should apply in Ohio's bars.<sup>6</sup> Meanwhile, since implementation of the ban in 2007, bars in Ohio have lost at least \$141 million in sales, costing the state nearly \$10 million in tax revenue, alongside the \$3.2 million in enforcement costs.<sup>7</sup>

Third, this case features significant constitutional questions, which are also questions of first impression.<sup>8</sup> Since this Court has recently issued decisions articulating the robustness of both Ohio's separation of powers and protection of property rights, a shadow already looms over the issues in this case, but precedent stops short of squarely addressing those issues. The first of these issues is whether the Ohio Department of Health and its designees are violating Ohio's separation of powers principles by deliberately abstaining from enforcing an integral part of the Smoke Free Act, and enforcing the remainder in a strict liability fashion that is unsupported by the text of the law handed down by the Ohio General Assembly.

The "first, and defining, principle of a free constitutional government is the separation of powers,"<sup>9</sup> which mandates that "the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."<sup>10</sup> These principles prohibit Ohio's executive agencies from exercising legislative powers by making policy.

Here, for enforcement ease, ODH has brushed aside the plain language codified in R.C. 3794.01 *et seq.*, which specifies alternative standards of liability that limit liability for compliant

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<sup>6</sup> Poll: *Smoking should be allowed in Ohio bars*, Cincinnati Enquirer, August 3, 2010; *New Poll Shows Ohioans Interested In Allowing Smoking In Bars, Just Over Half Support A Change In State Smoking Ban*, NBC 4, Columbus, August 6, 2010. See <http://www2.nbc4i.com/news/2010/aug/06/4/new-poll-shows-ohioans-interested-allowing-smoking-ar-181759/>. Last checked on December 20, 2010.

<sup>7</sup> See <http://kansas.watchdog.org/4348/st-louis-fed-no-ifs-and-or-butts-smoking-ban-hurt-revenues/>

<sup>8</sup> While this Court declined to review wholesale property rights-based facial challenge in *Deer Park Inn v. Ohio Dept. of Health*, 126 Ohio St.3d 1516, 930 N.E.2d 333 (Table), 2010 -Ohio- 3331, this challenge is much more narrowly tailored, only challenging the ban's application to bars, and features considerable evidence not in the record in *Deer Park Inn*, and deals with enforcement issues.

<sup>9</sup> See *State v. Bodyke* (2010), 126 Ohio St.3d 266, 933 N.E.2d 753, 2010 -Ohio- 2424.

<sup>10</sup> *Id.*

proprietors, and extend liability to non-compliant patrons, instead opting to cite proprietors upon the instantaneous presence of smoke. Indeed, the Trial Court, after reviewing the evidence, which included (1) an admission that despite the thousands of citations issued to proprietors, no citations had ever been issued to individuals under R.C. 3794.02(D); (2) a policy that presumes that a proprietors “permits” smoking, as forbidden by the statute, whenever smoking is present on his property, concluded that the Ohio Department of Health and its designees had exceeded their enforcement authority, and had actually engaged in the type of policymaking that is properly reserved for the legislative branch of government, thus essentially taking the law into its own hands. Appellants encourage the Court to review the trial court’s opinion, appended hereto.

Secondly, this case requires delineation of the disjunctive relationship between Ohio’s constitutional protection of property rights, and the outermost boundary of the state’s police powers. While the state maintains leeway in promulgating regulations pursuant to its police powers, this leeway is far from unlimited. To the contrary, the police power \* \* \* is based upon *public necessity*. *There must be essential public need for the exercise of the power in order to justify its use.*”<sup>11</sup>

In determining whether an interference with property rights is beyond the necessities of the situation, Ohio courts should be “extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power.”<sup>12</sup> And for good reason: “the constitutional guaranty of the right of private property would be hollow if all legislation enacted in the name of the public welfare were *per se* valid.”<sup>13</sup>

Meanwhile, this Court has stridently affirmed the Ohio Constitution’s protection of the type of property interests in dispute here, stating just five years ago, “Ohio has always considered the right of property to be a *fundamental right*. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly,

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<sup>11</sup> *State ex. rel. Killeen Realty Co. v. City of East Cleveland* (1959), 169 Ohio St. 375, 160 N.E.2d 1.

<sup>12</sup> *City of Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539, 49 N.E.2d 412, 414.

<sup>13</sup> *Id.*, at 546.

*no matter how great the weight of other forces.*"<sup>14</sup> In Ohio, these "venerable rights associated with property" include "[t]he rights [to] *use*, [and] *enjoy*."<sup>15</sup>

Inclusion of bars in the ban illustrates the conflict between (1) an expansive view of the police power; and (2) the traditional intrinsic and extrinsic limitations on that power, becomes a stark reality. R.C. 3794.02(A) states that "no proprietor of a public place . . . shall permit smoking in the public place." While R.C. 3794.03 makes a myriad of seemingly arbitrary exemptions, none are for bars, even though alcohol and cigarette consumption tend to run hand-in-hand at such locations, rendering the ability to efficiently allocate the use of one's indoor air an important feature of property ownership and use. This issue runs the core of this state's constitutional jurisprudence: to allow the police power to subsume explicitly-recognized constitutional rights implicitly adopts a "living, breathing" constitution, that is capable of amendment through every legislative enactment, rather than through the only allowable channel of permissible constitutional amendment.

The Appellate Court created a third compelling issue that merits review: whether an Ohioan loses his right to raise and vindicate his constitutional rights, as against a statute or regulatory policy, simply because he has been fined under that statute or policy in the past. If this Court were to permit the Appellate Court's decision and reasoning to stand, perverse and absurd results ensue: Ohioans who are most effected by a statute or regulatory policy would have the least standing to challenge that policy, and its application to them, simply because they have been cited under the statute in the past.

While requiring exhaustion of administrative remedies may or may not preempt a litigation from later challenging a specific fine or citation, it does not, as the Appellate Court asserted, prevent Ohioans from bringing a declaratory judgment action (1) challenging an unwritten policy that has been, is, and will be used against them; and (2) challenging application of a statute to a unique class to which they belong. This seemingly narrow procedural issue has very substantive real-world

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<sup>14</sup> *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1129 (internal citations omitted).

implications: the declaratory judgment statute is the most common gateway to an Ohioan's vindication of his or her constitutional rights. Removing his opportunity to open this gate, once sued, denies him the benefit that the statute exists to confer.

Thus, the two issues raised in Zeno's counterclaim, and the Appellate Court's holding, give rise to substantial constitutional questions of great public importance.

### STATEMENT OF THE CASE

The Ohio Department of Health began enforcing the statewide smoking ban in May of 2007, and quickly levied a number of fines against Zeno's, a Columbus tavern. On August 13, 2009, ODH filed the state's first Smoke Free Act statutory injunction action against its proprietor and holding corporation, seeking to (1) order Zeno's to "follow the law," i.e. comply with R.C. 3794, and (2) collect over \$30,000 in unpaid fines.<sup>16</sup>

Due to a dispute over the meaning of R.C. 3794, its enforcement, and its lawfulness, Zeno's filed an Answer and Counterclaim requesting a declaration that relevant provisions of R.C. Chapter 3794 and OAC 3701 are unconstitutional, either facially or as applied to Zeno's (police power and property rights causes of action); that ODH has engaged in unlawful rulemaking and policymaking (R.C. 119 and Separation of Powers Cause of Action); that ODH's interpretations and applications of relevant provisions of R.C. 3794 and OAC 3701 are in contravention of the statute; and an injunction prohibiting "[a]ny further unconstitutional or unlawful enforcement of R.C. 3794 and OAC 3701."<sup>17</sup>

The trial court conducted bench trial, which was held on November 23, 2009.<sup>18</sup> Proposed Findings of Fact and Conclusions of Law were filed by ODH on December 21, 2009 and Zeno's on December 22, 2009. Post Trial Briefs were filed by ODH and Zeno's on January 4, 2010.

The Trial Court acknowledged that "[i]t is well established \* \* \* that administrative rules, in general, may not add to or *subtract from* ... the legislative enactment,"<sup>19</sup> concluding that "the

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<sup>16</sup> See ODH's Complaint, at p. 10.

<sup>17</sup> Zeno's Answer, Counterclaim and Cross Claim at 25-26.

<sup>18</sup> Trial Court Decision and Entry, *supra* at 1.

Department of Health's policy of strict liability against property owners exceeds the authority granted to it by R.C. 3794.02,"<sup>20</sup> and "the citations levied against Defendants pursuant to that policy are invalid."<sup>21</sup> On appeal and cross-appeal, the Appellate Court concluded "[t]he trial court should not have considered Bartec's as applied challenge to the enforcement of the Smoke Free Act, as Bartec wrongly attempted to use declaratory judgment as a means to collaterally attack the ten final orders finding violations against Bartec," and thus "[t]he trial court exceeded its authority both in vacating the ten existing violations and in ruling on ODH's past enforcement."<sup>22</sup>

On Zeno's separation of powers argument, the Court stated because the Trial Court erred in vacating Bartec's ten existing final judgments, "we need not consider whether ODH actually adopted a policy of strict liability in enforcing the Smoke Free Act."<sup>23</sup> Despite this observation, the Court did conclude, without addressing the Trial Court's findings otherwise, that ODH enforced the law on a "case by case basis," rather than pursuant to a policy.<sup>24</sup>

Similarly, on Zeno's police power and property rights challenge, the Appellate Court held "although Bartec's argument included an assertion that the statute is unconstitutional on its face, the trial court refused to decide the issue in light of its other holdings. No purpose is served in remanding the matter to the trial court to consider the issue, as this court previously upheld the facial constitutionality of the Smoke Free Act."<sup>25</sup>

### STATEMENT OF THE FACTS

For 25 years, Mr. Allen has owned and operated "Zeno's" in Columbus, Ohio. The Record establishes that to comply with the smoking ban, Zeno's posted "no smoking" signs, pulled ashtrays,

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<sup>19</sup> Trial Court Decision and Entry, *supra* at 5, quoting *Central Ohio Joint Vocational School Dist. Bd. of Edu. v. Admn. Ohio Bureau of Employment Serv.* (1986) 21 Ohio St.3d 5, 10, emphasis in original.

<sup>20</sup> Id.

<sup>21</sup> Id. at 8.

<sup>22</sup> *Jackson v. Bartec*, 2010 Ohio 5558, appended hereto, p. 16.

<sup>23</sup> Id., at p. 11.

<sup>24</sup> Id., at p. 17.

<sup>25</sup> Id., at p. 12.

established a policy of informing patrons of the smoking ban upon seeing them light cigarettes, asking smoking patrons to discontinue smoking,<sup>26</sup> communicated this policy to Zeno's employees, and enforced and witnessed the enforcement of this policy.<sup>27</sup> Although some patrons occasionally continue to smoke, or later light up again, even after they are asked to discontinue smoking or informed by Zeno's of the smoking ban,<sup>28</sup> ODH's unwritten policies caused Zeno's, rather than these patrons, to be fined. The Trial Court concluded that Zeno's enforced the smoking ban.

The ODH and its designees interpret and enforce the ban so as to require proprietors like Zeno's to *prohibit* smoking,<sup>29</sup> meaning that proprietors are liable at the instant when smoking is "present" on premises.<sup>30</sup> ODH also interpret R.C. 3794.02(A) so as to fine proprietors whenever there is "smoking in a prohibited area," and it substitutes this phrase for R.C. 3794.02(A) during enforcement.<sup>31</sup> Those charged with enforcing the ban never investigate whether proprietors ask the patrons to discontinue smoking prior to issuing a fine.<sup>32</sup> Instead they maintain "if there's smoking in the establishment in an enclosed area, that's a violation."<sup>33</sup>

Next, ODH, as a matter of policy, does not enforce R.C. 3794.02(D), which dictates that a patron, and not the proprietor, should be cited for smoking if he or she continues to smoke in a public place once asked to stop. No fines have *ever* been issued under R.C. 3794.02(D),<sup>34</sup> even though smokers routinely continue to smoke once notified of the ban and/or asked to stop,<sup>35</sup>

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<sup>26</sup> Tr. 96-97, 195, 201.

<sup>27</sup> Transcript of November 23, 2009 Trial, 100-101 (hereafter "TR").

<sup>28</sup> Tr. 99.

<sup>29</sup> Tr. 44. October 27, 2009 Deposition of Lance Himes, pp. 32-33, 24, 17; Tr. 72-76.

<sup>30</sup> See "Ohio Smoking Ban Frequently Asked Questions," and also Tr. 74-75; Lance Himes Deposition, p.

10. Mary Clifton Deposition, pp. 34, 37.

<sup>31</sup> Tr. 53-60.

<sup>32</sup> *Id.* at 69.

<sup>33</sup> *Id.* at 71.

<sup>34</sup> Tr. 45, 66; Mary Clifton Deposition, 22

<sup>35</sup> Tr. at 102.

Meanwhile, the ban, fines aside, has caused tremendous damage to Zeno's business,<sup>36</sup> and this damage is attributable to the enforcement of R.C. Chapter 3794,<sup>37</sup> and in Franklin County alone, bar employment has decreased by 869 employees, or 29 percent, between 2006 and 2008 (the latest numbers over which the ban has been in effect), due to the ban.<sup>38</sup> Further, Smoking bans impact liquor permit-holding taverns, like Zeno's, far more adversely than they impact other types of businesses because bars are viewed by the public as places where one goes to smoke, and alcohol and cigarette consumption are viewed as complementary by many.<sup>39</sup> and the economic injury imposed on a tavern owner by the smoking ban is higher when the establishment caters to a high percentage of patrons that are smokers, as opposed to a lower percentage, and thus the injury to Zeno's is higher than that imposed on an average business because 75 percent of Zeno's patrons are smokers.<sup>40</sup>

#### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: The Health Department's method of enforcing the smoking ban violates separation of powers, and must be discontinued.**

The Health Department and its designees have and continue to exceed their limited executive branch authority when they employ a policy of strict liability for the presence of smoking against Ohio's business and property owners. Through Section 1, Article II of the Ohio Constitution, the people vested the legislative power of the state in the General Assembly only.<sup>41</sup> While the General Assembly sets public policy, and administrative agencies, when granted rulemaking power, may only "develop and administer" those policies.<sup>42</sup> Thus they may not alter the substance of those policies to effectuate a policy that differs from what the General Assembly has decreed. Put another way, "An

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<sup>36</sup> Tr. 148-49, 194-95.

<sup>37</sup> Tr. 83, 86-87, 144-45; Trial Court Exhibit on "Impact of Ban on Zeno's Revenue," prepared by Dr. Michael L. Marlow.

<sup>38</sup> Tr. 152. Trial Court Exhibit "Ohio Smoking Ban Has Decreased Bar Employment in Franklin County," prepared by Dr. Michael L. Marlow.

<sup>39</sup> Tr. 125, 142-143.

<sup>40</sup> Tr. 138, 148.

<sup>41</sup> *Norwood* at ¶ 115, quoting *State ex rel. Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 462, 715 N.E.2d 1062.

<sup>42</sup> *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health* (2002), 96 Ohio St.3d 250, 773 N.E.2d 536, ¶ 41.

agency exceeds its grant of authority when it creates rules that reflect a public policy not expressed in the governing statute.”<sup>43</sup>

When agencies pursue policies that are beyond or different from what is articulated in legislation, “they go beyond their administrative powers and exercise a legislative function which, under our Constitution, belongs exclusively to the General Assembly.”<sup>44</sup> “A rule which is unreasonable, arbitrary, discriminatory, or in conflict with law is invalid and unconstitutional because it surpasses administrative power and constitutes a legislative function.”<sup>45</sup> Further, “[i]f an administrative rule, whether written or not, exceeds the statutory authority established by the General Assembly, the agency has usurped the legislative function, thereby violating the separation of powers established in the Ohio Constitution.”<sup>46</sup>

Applying these principles to the record, the Trial Court correctly found that ODH’s unwritten policy usurped the legislative policymaking function. Specifically, while ODH’s unwritten policy imposes strict liability on proprietors, this is not what the law requires: a proprietor is required to *abstain from permitting* smoking. Pursuant to *Pour House, Inc. v. Ohio Department of Health*, a proprietor violates R.C. 3794.02(A) only by *affirmatively* allowing smoking by failing to post “no smoking” signs or notify smoking patrons that smoking is not permitted.<sup>47</sup>

While the law provides a safe harbor for proprietors who have posted signs, pulled ashtrays, and notified smoking patrons of the ban, ODH’s enforcement acknowledges no such safe harbor, and indiscriminately fines patrons whenever smoking is present, on the basis that the proprietor has failed to prohibit it. First it fines proprietors for “smoking present” and “smoking in prohibited area” which is not the same standard as forbidding a proprietor from permitting smoking. Under the latter, the

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<sup>43</sup> *State v. Bodyke* (2010), 126 Ohio St.3d 266, 933 N.E.2d 753, 2010 -Ohio- 2424.

<sup>44</sup> *City of Cincinnati v. Cook* (1923), 107 Ohio St. 223, 140 N.E. 655.

<sup>45</sup> *Weber v. Bd. of Health* (1947), 148 Ohio St. 389, 396, 74 N.E.2d 331, 335-36.

<sup>46</sup> *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 384-385, 329 N.E.2d 693.

<sup>47</sup> *Pour House, Inc. v. Ohio Dept. of Health*, 2009 Ohio 5475.

proprietor is only liable if he permits the smoking, while under the latter, the proprietor is liable any and every time that smoking occurs on his premises, irrespective of whether he permits it.

Meanwhile, ODH abstains from enforcing R.C. 3794.02(D), which dictates that a patron should be cited for smoking if he or she continues to smoke in a public place once asked to stop. Neither ODH nor its designees have ever issued one fine for a violation of R.C. 3794.02(D),<sup>48</sup> even though smokers routinely continue to smoke once notified of the ban and/or asked to stop.<sup>49</sup> In fact, the smoking ban inspectors do not even ask whether a particular patron has been asked to discontinue smoking and they never speak to the smoking patrons.<sup>50</sup> This policy was implemented against Zeno's.

Because these standards depart from R.C. 3794.02, they exceed ODH's power to enforce the law, rather than to make it. This Court must preclude the Ohio Department of Health and its designees from this continuing this usurpation of legislative authority, and require that they enforce the plain meaning of the statute.

**Proposition of Law No. 2: Inclusion of bars as proprietors subject to R.C. 3794 exceeds the outer limits of the state police power, and unreasonably extinguishes property rights.**

The inclusion of Zeno's as a proprietor subject to R.C. 3794.02(A) surpasses the state's police power and unreasonably transgresses property rights. First, use of the state police power to regulate indoor air allocation preferences by a private business dependent on smoking exceeds boundaries established by the police power:

Private property rights may be limited through the state's exercise of its police power when restrictions are *necessary* for the *public* welfare. Just as private property rights are not absolute, however, neither is the state's ability to restrict those rights. Before the police power can be exercised to limit an owner's control of private property, it must appear that the interests of the *general public require* its exercise and the means of restriction must not be unduly oppressive upon individuals."<sup>51</sup>

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<sup>48</sup> Tr. 45, 66; Mary Clifton Deposition, 22

<sup>49</sup> Tr. at 102.

<sup>50</sup> Id.

<sup>51</sup> *Pizza v. Rezcallah* (1988), 84 Ohio St.3d 116, 702 N.E.2d 81, 1998 -Ohio- 313; *Froelich v. Cleveland* (1919), 99 Ohio St. 376, 124 N.E. 212. (emphasis added).

The police power is rooted in and limited by nuisance theory and public necessity.”<sup>52</sup> Thus, “Government can impose new requirements for using property or prohibit previously lawful usage [only] if its continued unchanged use constitutes a nuisance.”<sup>53</sup> “By contrast, the government cannot impose new requirements for existing property when its continued unchanged use does not constitute a nuisance.”<sup>54</sup> “Nuisance” is defined as “the wrongful invasion of a legal right or interest,”<sup>55</sup> and a public nuisance is “an unreasonable interference with a right common to the general public.”<sup>56</sup>

Here, a bar owner’s permitting of smoking on his or her property is simply not a public nuisance: there is no wrongful invasion of the rights of others, since neither patrons or employees have a property right in dictating how a private property owner allocates his or her indoor air, aside from the right to freely enter and exit. And while “certain conduct may be defined by statute or administrative regulation as being a public nuisance,”<sup>57</sup> the smoking ban stops short of recognizing smoking as such (in fact, it remains legal in many other public and private places). Moreover, even if smoking at bars could be characterized as a public nuisance, principles underpinning the “coming to the nuisance doctrine” mitigate concern over inconvenience to patrons or employees who *voluntarily* frequent private bars,<sup>58</sup> as would-be bar patrons and employees are no doubt aware that consumption of liquor and cigarettes traditionally run hand-in-hand at traditional bars.

Next, property rights limit the state from forbidding a private bar owner from permitting patrons to smoke. In *Direct Plumbing Supply, Pizza, and Correll*, this Court decisively made it clear

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<sup>52</sup> See *State ex. rel. Killeen Realty Co. v. City of East Cleveland* (1959), 169 Ohio St. 375, 160 N.E.2d 1, (“the police power, however, is based on public necessity.”) (emphasis added).

<sup>53</sup> See *Ghaster Properties, Inc. v. Preston* (1964), 176 Ohio St. 425, 27 O.O.2d 388, 200 N.E.2d 328], supra, paragraphs two through four of the syllabus. (emphasis added).

<sup>54</sup> *Gates Co. v. Housing Appeals Bd.* (1967), 10 Ohio St.2d 48 [39 O.O.2d 42, 225 N.E.2d 222], syllabus.

<sup>55</sup> *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 432, 28 O.O. 369, 55 N.E.2d 724.

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> See *Eller v. Koehler* (1903), 68 Ohio St. 51; (Under the “coming to the nuisance” doctrine, which evolved when courts began to consider the significance of the fact that plaintiff landowners complaining about fumes from industrial plants had voluntarily situated themselves near existing industry, and location and priority of occupation should be factored into the equitable equation).

that Section 19, Article I is transgressed when regulations on property are “unduly oppressive,”<sup>59</sup> or “impos[se] arbitrary, discriminatory, capricious or unreasonable restrictions upon lawful business.”<sup>60</sup>

The subjection of all bars to R.C. 3794.02(A), through R.C. 3794.01(B) and (C) is an arbitrary and unreasonable deprivation of those property owners’ right to use property for an otherwise lawful purpose, and also unduly burdensome upon bars, because (1) smoking bans impact liquor permit-holding taverns, like Zeno’s, far more adversely than they impact restaurants and other types of business;<sup>61</sup> (2) the ban has greatly damaged Zeno’s business and similar businesses;<sup>62</sup> (3) in the absence of such bans, there is a robust market for sorting amongst smokers, both amongst different establishments, and within the same establishments;<sup>63</sup> (4) smoking at businesses based on on-premises liquor consumption, such as Zeno’s, does not endanger children, because only those over the age of 21 are admitted, and they do not cater to families, as would a restaurant,<sup>64</sup> and since 90 to 93% of Zeno’s revenue comes from liquor sales, it is starkly dissimilar from a family-oriented restaurant, sports stadium, or government building.<sup>65</sup>

Meanwhile, expert testimony established that (1) risk of disease from second hand smoke can only be demonstrated for individuals at the highest level of smoke exposure,<sup>66</sup> and bar patrons and employees are only briefly and acutely exposed to secondhand smoke;<sup>67</sup> (2) Since 1912, only one Ohio employee has filed an Ohio BWC claim alleging an occupational disease resulting from workplace exposure to second hand smoke, and this claim was disallowed because Ohio BWC does not view such exposure as an occupational disease;<sup>68</sup> (3) Smoking bans do not cause smoking rates to decrease,<sup>69</sup> and

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<sup>59</sup> *Direct Plumbing Supply*, supra; *Pizza*, supra.

<sup>60</sup> Id. (emphasis added).

<sup>61</sup> Tr. 125, 142-143.

<sup>62</sup> Tr. 88, 201-02; Tr. 138, 148.

<sup>63</sup> See Dr. Marlow, “The Private Market for Accomodation,” in Exhibit entitled “Summaries of Studies.”

<sup>64</sup> Tr. 90.

<sup>65</sup> Tr. 90, 205

<sup>66</sup> Tr. 158; 156.

<sup>67</sup> Tr. 204; 159.

<sup>68</sup> Tr. 185.

because smoking bans do not result in less smoking, admissions to hospitals for tobacco related illnesses and diseases are as likely to increase as they are to decrease after a smoking ban is imposed.<sup>70</sup> Accordingly, a smoking ban causes little to no impact on public health.<sup>71</sup>

Consequently, subjection of bars such as Zeno's to the smoking ban surpasses the public nuisance basis of the police power, unreasonably and arbitrarily invades Zeno's property right to allocate its indoor air for private gain, and unduly burdens Zeno's business beyond the necessities of the situation. Such subjection thus violates Section 19, Article I of the Ohio Constitution.

**Proposition of Law No. 3: Ohio's declaratory judgment statute enables previously-cited Ohioans to challenge the constitutionality of a statute or rule.**

The Appellate Court's dismissal of Zeno's counterclaims for declaratory relief must be reversed. Ohio's declaratory judgment statute, R.C. 2721.03(A), provides that "any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, \* \* \* may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it." The statute exists to "eliminate uncertainty regarding \* \* \* legal rights and obligations,"<sup>72</sup> and to dispose of "uncertain or disputed obligations quickly and conclusively," and thus, is to be construed "liberally."<sup>73</sup>

Here, as outlined in the Statement of the Case, Zeno's counterclaimed for current and prospective declaratory and injunctive relief. The Trial Court concurred with Zeno's position on ODH enforcement policies, finding that "ODH implemented a policy of strict liability amounting to an unwritten policy \* \* \* that exceeds the authority given to [ODH] by R.C. 3794.02."<sup>74</sup> But the Appellate

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<sup>69</sup> Tr. 131.

<sup>70</sup> Tr. 161.

<sup>71</sup> Tr. 163; 23-24.

<sup>72</sup> *Mid-American Fire and Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 863 N.E.2d 142, 2007-Ohio-1248, ¶ 8, citing *Travelers Indemn. Co. v. Cochrane* (1951), 155 Ohio St. 305, 312, 98 N.E.2d 840.

<sup>73</sup> *Id.*, citing *Ohio Farmers Indemn. Co. v. Chames* (1959), 170 Ohio St. 209, 213, 163 N.E.2d 367.

<sup>74</sup> *Id.*, at p. 9.

Court improperly miscast Zeno’s actual claims for relief, claiming Zeno’s counterclaims were only “collateral attacks” on “the ten orders finding violations,” which “the trial court should not have entertained.”<sup>75</sup> Indeed, the Court stated Zeno’s argument is that “ODH’s enforcement policies and practices under R.C. 3794.02 were unlawful,”<sup>76</sup> and elsewhere stated “Bartec is attempting to use a declaratory judgment action to attack the past methods of the entity.”<sup>77</sup> However, Zeno’s always accentuated prospective relief, with the important caveat that if certain policies, statutes, and rules are ostensibly found unconstitutional, Zeno’s past fines *may* be abrogated under this Ohio’s *Sunburst* doctrine jurisprudence.<sup>78</sup>

Further, the Appellate Court mischaracterizes Zeno’s challenge to ODH’s unwritten policies as solely “as-applied” challenges, even though elsewhere, the Court admits that Zeno’s argues that *ODH* should be enjoined “from any *further* unlawful or unconstitutional enforcement of the Smoke Free Act.”<sup>79</sup> However, the Court lamented that it is ‘impossible to develop the factual record necessary for the resolution of the case,’<sup>80</sup> even though a robust factual record *was* developed before the Trial Court, and included bench trial, depositions, lengthy pre-trial briefs, lengthy post-trial briefs, the submission of findings of fact and conclusions of law, and expert testimony. Secondly, the Court admitted the proposition that “declaratory judgment is appropriate when seeking to have a statute or rule declared unconstitutional,” though not to review “if the actions taken by the [state] defendants were lawful,”<sup>81</sup> but then inexplicably placed Zeno’s in the latter camp.

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<sup>75</sup> Id., at p. 11

<sup>76</sup> Id., at 15.

<sup>77</sup> Id., at 17.

<sup>78</sup> See *Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.* (2009), 124 Ohio St.3d 1215, 921 N.E.2d 239 (observing that “The United States Supreme Court recognized in *Great N. Ry. Co. v. Sunburst Oil & Refining Co.* (1932), 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360, that state courts have broad authority to determine whether their decisions should operate prospectively only).

<sup>79</sup> Id., at p. 15.

<sup>80</sup> Id., at p. 10.

<sup>81</sup> Id.

On this front, the Appellate Court lost sight of the principle that “requiring litigants to assert constitutional arguments administratively would be a waste of time and effort for all involved.”<sup>82</sup> Further “exhaustion is not required when there is no administrative remedy available that can provide the relief sought, when resorting to an available administrative remedy would be futile, or when the available administrative remedy is onerous or unusually expensive.”<sup>83</sup> Here, the Court insisted that Zeno’s proper remedy “to develop facts necessary to its as-applied constitutional challenge” was OAC 3701-52-08(F)(2). However, that provision only allows for “review” of “the evidence forming the basis for the proposed violations,” and Zeno’s counterclaim challenges the constitutionality of universally-applied policies, rules, and statutes.

Finally, the Appellate Court’s decision disregards Civ. R. 12(B), which states “[e]very defense, in law or fact, to a claim for relief in any pleading, whether a \* \* \* counterclaim \* \* \* shall be asserted in the responsive pleading;” and Civ. R. 13(A), which states “a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” The Civil Rules actually *required* Zeno’s to raise any counterclaim for declaratory and injunctive relief before the Trial Court, or forever waive that right. Thus, the Appellate Court effectively plowed under Zeno’s separation of powers and property rights claims due to a miscasting of the case’s procedural posture, and a faulty narrowing of the declaratory judgment statute. This action must be reversed.

## CONCLUSION

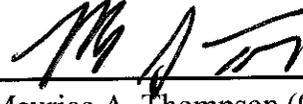
For the foregoing reasons, Appellant’s respectfully request that this Court accept jurisdiction, and adjudicate each of these important matters.

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<sup>82</sup> *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, 460-61.

<sup>83</sup> *GTE Wireless of the Midwest Inc. v. Anderson Twp.* (App. 10 Dist. 1999), 134 Ohio App.3d 352, 359, 731 N.E.2d 201, 206, citing *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 17, 526 N.E.2d 1350, 1355-56.

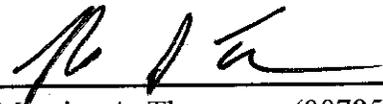
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for  
appellees on 1/3 2011.



\_\_\_\_\_  
Maurice A. Thompson (0078548)

[Cite as *Jackson v. Bartec, Inc.*, 2010-Ohio-5558.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Alvin D. Jackson, M.D.,  
Ohio Department of Health,

Plaintiff-Appellant/  
Cross-Appellee,

v.

Bartec, Inc. et al.,

Defendants-Appellees/  
Cross-Appellants,

Richard Cordray, Attorney General,

Defendant-Cross-Appellee.

No. 10AP-173  
(C.P.C. No. 09CVH08-12197)

(REGULAR CALENDAR)

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D E C I S I O N

Rendered on November 16, 2010

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*Richard Cordray, Attorney General, Angela M. Sullivan and Stacy L. Hannan, for Ohio Department of Health.*

*Ron O'Brien, Prosecuting Attorney, and Tracie M. Boyd, Amicus Curiae, for Franklin County District Board of Health.*

*McTigue & McGinnis LLC, J. Corey Colombo, Donald J. McTigue and Mark A. McGinnis, Amici Curiae, for American Cancer Society et al.*

*Maurice A. Thompson; Cicero Law Office, and Lori R. Withers; and Christopher R. Walsh, for Bartec, Inc. and Richard Allen dba Bartec Victorian Village.*

*Richard Cordray, Attorney General, and Robert C. Moorman, for Ohio Attorney General.*

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant and cross-appellee, Alvin D. Jackson, M.D., Director of Ohio Department of Health ("ODH"), appeals from a judgment of the Franklin County Court of Common Pleas that both denied ODH's request for a permanent injunction and vacated ten existing violations entered against defendants-appellees and cross-appellants, Bartec, Inc., dba Zeno's Victorian Village, and its chief executive officer Richard Allen (collectively "Bartec"), all arising under Ohio's Smoke Free Workplace Act, R.C. Chapter 3794 ("Smoke Free Act"). Because (1) the trial court wrongly vacated Bartec's ten violations of the Smoke Free Act, and (2) ODH is entitled to an injunction against Bartec, we reverse.

#### **I. Facts and Procedural History**

{¶2} On August 13, 2009, ODH filed a complaint in the Franklin County Court of Common Pleas, seeking preliminary and permanent injunctions that order Bartec to comply with R.C. Chapter 3794 and to pay all outstanding fines resulting from past violations of the Smoke Free Act. By the time of trial, Bartec had accumulated fines stemming from ten separate violations of the Smoke Free Act.

{¶3} Bartec responded on September 16, 2009 with an answer and counterclaim requesting the trial court declare that (1) relevant portions of the Smoke Free Act and Ohio Adm.Code Chapter 3701 are unconstitutional, either facially or as applied to Bartec; (2) ODH engaged in unlawful rulemaking; (3) ODH engaged in unlawful policymaking; and (4) ODH's interpretations and applications of the Smoke Free Act and the pertinent administrative code provisions violate the statute. Bartec further requested a permanent

injunction prohibiting "[a]ny further unconstitutional or unlawful enforcement of R.C. 3794 and OAC 3701." (Answer, 25-26.)

{¶4} Bartec also asserted a cross-claim against Richard Cordray, Ohio Attorney General ("Attorney General"), seeking a declaration that the Attorney General's collection efforts effectuate a taking of property without just compensation. Bartec concomitantly sought a permanent injunction prohibiting the Attorney General from any current and further collection efforts against Bartec "and similarly situated proprietors that have been, are, and continue to be issued under an unconstitutional framework." (Answer, 26.)

{¶5} The trial court consolidated all of the parties' claims into a single bench trial held November 23, 2009. ODH filed proposed findings of fact and conclusions of law on December 21, 2009; Bartec filed proposed findings of fact and conclusions of law on December 22, 2009. The parties filed post-trial briefs on January 4, 2010.

{¶6} In a February 22, 2010 decision and entry, the trial court denied ODH's request for an injunction and vacated as unenforceable the ten existing violations against Bartec under the Smoke Free Act. The trial court determined the violations resulted because Bartec was "being held responsible for the decisions of a third-party that are out of [Bartec's] control," ODH "implemented a policy of strict liability against property owners for violations of the SmokeFree Act," and ODH's enforcement of the Smoke Free Act was "stricter than allowed by R.C. 3794.02." (Decision and Entry, 9, 11.) Because it vacated the ten underlying citations, the trial court determined it need not address Bartec's constitutional challenges.

## **II. Assignments of Error**

{¶7} On appeal, ODH assigns the following errors:

**Appellant's First Assignment of Error** – The trial court erred as a matter of law when it failed to apply the plain language of the Smoke Free Act.

**Appellant's Second Assignment of Error** – The trial court erred as a matter of law when it held that ODH engaged in unlawful rulemaking.

**Appellant's Third Assignment of Error** – The trial court abused its discretion by denying ODH's Complaint for a Statutory Injunction.

Bartec assigns the following errors on cross-appeal:

*First Assignment of Error*

The trial court erred by not declaring that enforcement policies and practices of the Ohio Department of Health, pursuant to R.C. 3794.02, to be unlawful.

*Second Assignment of Error*

The trial court erred by not issuing a permanent injunction prohibiting any further unconstitutional or otherwise unlawful enforcement of R.C. Chapter 3794 and Ohio Administrative Code 3701.

*Third Assignment of Error*

The trial court erred by not issuing a permanent injunction against collection efforts of the Ohio Attorney General against Zeno's.

For ease of discussion, we group first ODH's first and second assignments of error and then Bartec's first and second assignments of error on cross-appeal.

### III. Jurisdiction

{¶8} As a preliminary matter, Bartec argues this court lacks jurisdiction to consider the appeal because the trial court did not issue a final appealable order.

{¶9} Pursuant to Section 3(B)(2), Article IV, Ohio Constitution and R.C. 2503.03, appellate courts have jurisdiction to review only final orders, judgments or decrees.

*Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶10. "[T]he entire concept of 'final orders' is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings. A final order, therefore, is one disposing of the whole case or some separate and distinct branch thereof." *Id.*, quoting *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, quoting *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306. Conversely, "[a] judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order." *Id.*, quoting *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, ¶4, quoting *Bell v. Horton*, 142 Ohio App.3d 694, 696, 2001-Ohio-2593.

¶10} Thus, to be a final, appealable order, a judgment entry must meet the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). See *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 21. Civ.R. 54(B) "permits both the separation of claims for purposes of appeal and the early appeal of such claims." *Id.* at 21, quoting *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St.2d 158, 159.

¶11} Here, the trial court expressly denied ODH's request for a permanent injunction against Bartec and vacated the ten violations against Bartec as unenforceable. Bartec notes that although the trial court failed to rule on its request for declaratory judgment or its request for a permanent injunction against the Attorney General, the trial court did not specify "there is no just reason for delay" pursuant to Civ.R. 54(B). See, e.g., *Internatl. Bhd. of Electrical Workers, Local Union No. 8 v. Vaughn Indus., L.L.C.*, 116 Ohio St.3d 335, 2007-Ohio-6439, ¶7, citing *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, ¶5-7. ODH responds that the trial court's decision is final and appealable because it affects a substantial right as defined in R.C. 2505.02(B)(1), it

overruled ODH's motion for statutory injunction, and it granted Bartec's request for declaratory judgment, thus determining all issues.

{¶12} The trial court did not expressly "declare" anything unconstitutional, primarily because the trial court decided the case on other grounds. See *Greenhills Home Owners Corp. v. Greenhills* (1966), 5 Ohio St.2d 207, paragraph one of the syllabus (stating a court "will not exercise its power to determine the constitutionality of a legislative enactment where other issues are apparent in the record, the determination of which will dispose of the case on its merits"). Nonetheless, the trial court, by vacating Bartec's ten existing violations, necessarily found some of the arguments in Bartec's request for declaratory judgment to be persuasive. Similarly, although the trial court did not expressly rule on Bartec's cross-claim against the Attorney General for permanent injunction, the trial court's decision to vacate Bartec's ten existing violations rendered the Attorney General unable to collect any fines resulting from those violations.

{¶13} Where a judgment in an action determines some claims and renders all other claims moot, the judgment is a final appealable order pursuant to R.C. 2505.02, making the language from Civ.R. 54(B) unnecessary. *Wise v. Gursky* (1981), 66 Ohio St.2d 241, 243. See also *Lehtinen v. Drs. Lehtinen, Mervart & West, Inc.*, 99 Ohio St.3d 69, 2003-Ohio-2574, ¶13, n.1. Accordingly, this court has jurisdiction to consider ODH's assignments of error as well as Bartec's assignments of error on cross-appeal.

#### **IV. Overview of Smoke Free Act**

{¶14} The Smoke Free Act, central to the errors the parties assigned on appeal, prohibits smoking in public places or places of employment, with certain exceptions that include private residences, designated smoking rooms in hotels, nursing homes, retail

tobacco stores, outdoor patios, and private clubs. R.C. 3794.02 and 3794.03. Pursuant to R.C. 3794.07, ODH promulgated rules for ODH, or its designee, to use in enforcing the statutory provisions of the Smoke Free Act.

{¶15} Upon receipt of a reported violation, ODH or its designee provides the proprietor of an establishment with a written notice of the reported violation; the proprietor may submit in writing statements or evidence to contest the report. Ohio Adm.Code 3701-52-08(D). ODH reviews the report, the evidence the proprietor submitted to contest the report, as well as other information the investigation yielded, such as interviews and on-site investigations, to determine whether a violation occurred. Ohio Adm.Code 3701-52-08(F)(1)(a). If the violator has no previous violations within the past two years, ODH issues the warning letter contemplated under R.C. 3794.09(A). Ohio Adm.Code 3701-52-08(F)(1)(a). If, however, the alleged violator has a prior violation in the past two years, a fine may issue pursuant to R.C. 3974.09(B) and a more comprehensive administrative review commences, including a hearing that provides the alleged violator with the opportunity to present its case and cross-examine any adverse witnesses. Ohio Adm.Code 3701-52-08(F)(2). See generally *Deer Park Inn v. Ohio Dept. of Health*, 185 Ohio App.3d 524, 2009-Ohio-6836, ¶11.

#### **V. ODH's First and Second Assignments of Error – Vacating Existing Violations**

{¶16} Challenging the trial court's decision to vacate Bartec's ten existing violations, ODH's first and second assignments of error together dispute the trial court's determinations regarding both the plain language of, and ODH's administrative enforcement of, the Smoke Free Act. ODH's first assignment of error thus asserts the trial court erred when it failed to apply the plain language of the Smoke Free Act. ODH

contends the Smoke Free Act places on proprietors the responsibility of enforcing its provisions, but the trial court, ignoring the plain language of the Smoke Free Act, held ODH offended the "basic notions of justice and fair play" when it "implemented a policy placing the burden of enforcing the [Smoke Free] Act against individuals on private property owners such as [Bartec]." (Decision, 9.)

{¶17} Whether the trial court erred in its statutory interpretation is a question of law. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶8. We address questions of law de novo, which requires that we independently review the trial court's decision with no deference granted to the trial court's determination. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108; *Ohio Hosp. Assn. v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 06AP-471, 2007-Ohio-1499, ¶8.

{¶18} R.C. 3794.02(A) places on proprietors falling under the provisions of the Smoke Free Act at least some responsibility to enforce its terms, stating "[n]o proprietor of a public place or place of employment \* \* \* shall permit smoking in the public place or place of employment." R.C. 3794.02(A). Bartec argues that requiring a proprietor to "not permit" smoking is different than requiring a proprietor to "prohibit" smoking.

{¶19} This court addressed the meaning of the statutory language and held the word "permit" is not vague, "clearly gives notice of the conduct it prohibits and does so in comprehensible, ordinary language not subject to misinterpretation." *Deer Park Inn* at ¶22. The corresponding administrative code section, Ohio Adm.Code 3701-52-08(B), requires a proprietor to take "reasonable steps" to prevent smoke from entering smoke-free areas. The plain language of the Smoke Free Act and corresponding administrative

code provision thus expressly require proprietors to assume a level of responsibility for the conduct occurring at their premises.

{¶20} In what it asserted as a related argument in the trial court, Bartec on appeal strenuously disputes the legality of ODH's enforcement efforts under the statute, an argument the trial court embraced when Bartec raised it there. Accordingly, ODH's second assignment of error asserts the trial court erred when it held ODH engaged in unlawful rulemaking in its enforcement efforts under the statutory provisions, a holding that caused the trial court to vacate Bartec's ten existing violations.

{¶21} The trial court determined ODH implemented a policy of strict liability amounting to an unwritten policy that the trial court treated as an administrative rule. The trial court further concluded such policy "exceeds the authority given to [ODH] by R.C. 3794.02" to enforce the Smoke Free Act. (Decision, 7.) Having concluded ODH "exceeded the authority given to it by R.C. 3794.02 by implementing a policy of strict liability," the trial court also held the citations levied against [Bartec] pursuant to that policy are invalid." (Decision, 8.) The trial court thus effectively granted Bartec's request for a declaratory judgment that ODH unconstitutionally enforced the Smoke Free Act as applied to Bartec in the context of its prior ten violations.

{¶22} In general, a party to an administrative proceeding who challenges "the constitutional application of legislation to particular facts is required to raise that challenge at the first available opportunity during the proceedings before the administrative agency." *Bd. of Edn. of South-Western City Schools v. Kinney* (1986), 24 Ohio St.3d 184, 185-86, citing *Sun Finance & Loan Co. v. Kosydar* (1976), 45 Ohio St.2d 283, 284. Failure to fully exhaust administrative remedies by not requesting an administrative hearing, which

would provide the necessary opportunity to develop a factual record for consideration of the constitutional challenge on appeal, results in waiver of as applied constitutional challenges. *Derakhshan v. State Med. Bd. of Ohio*, 10th Dist. No. 07AP-261, 2007-Ohio-5802, ¶¶30-32. *Kinney* at 185-86, citing *Petrocon v. Kosydar* (1974), 38 Ohio St.2d 264 (noting that if a party does not raise an as applied constitutional challenge during the proceedings before the administrative agency, but instead asserts the as applied challenge at a later stage, it is "impossible to develop the factual record necessary for the resolution of the case").

{¶23} The exhaustion requirement applies also to a party seeking a declaratory judgment, with some exceptions. *Leslie v. Ohio Dept. of Dev.*, 171 Ohio App.3d 55, 2007-Ohio-1170, ¶62. Thus, even though exhaustion of administrative remedies is not necessary for a declaratory judgment that challenges the facial constitutionality of a statute, an as applied constitutional challenge must be raised, though not determined, before the administrative agency when administrative review is an option. See *Wilt v. Turner*, 8th Dist. No. 92707, 2009-Ohio-3904, ¶¶12-14, citing *Grossman v. Cleveland Heights* (1997), 120 Ohio App.3d 435, 441. See also *East Carroll Nursing Home v. Creasy* (May 3, 1984), 10th Dist. No. 83AP-247 (noting that while a declaratory judgment is appropriate when seeking to have a statute or rule declared unconstitutional, the nursing home here was instead asking "the court to interpret the applicable statutes and determine if the actions taken by defendants were lawful," which required exhaustion of administrative remedies).

{¶24} Here, with respect to its as applied challenge, Bartec could have requested an administrative hearing to contest the citations issued against it, at which point it could

have developed the facts necessary to its as applied constitutional challenge. Ohio Adm.Code 3701-52-08(F)(2). Of the ten underlying Smoke Free Act violations, Bartec did not request an administrative hearing or otherwise pursue administrative remedies for eight. Bartec requested an administrative hearing for two of the underlying citations that resulted in fines. Pursuant to R.C. 119.12, Bartec appealed those two adverse administrative decisions to the Franklin County Court of Common Pleas, which affirmed the administrative decisions that found violations and imposed fines. (Tr. 55, 56.) Bartec pursued no further appeals from those two violations. Bartec did not raise in any administrative hearing the constitutional issues it seeks to have determined at this time. Nor did it exhaust its administrative remedies for any of the violations. As a result, they all are final judgments. *New Richmond v. Byrne*, 12th Dist. No. CA2010-01-004, 2010-Ohio-4948.

{¶25} Because the ten orders finding violations are final, the trial court should not have entertained Bartec's collateral attack on them. See *Freedom Mtge. Corp. v. Mullins*, 10th Dist. No. 08AP-761, 2009-Ohio-4482, ¶17, n.1 (stating a court must dismiss an appeal filed "solely to collaterally attack an earlier, unappealed final judgment"); *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶22 (stating because "final judgments are meant to be just that—final," direct attack by appeal is the proper way to challenge a final judgment and "collateral or indirect attacks are disfavored"). The trial court erred as a matter of law in vacating Bartec's ten existing final violations of the Smoke Free Act. With that determination, we need not consider whether ODH actually adopted a policy of strict liability in enforcing the Smoke Free Act because the issue was not properly before the trial court.

{¶26} Although Bartec's argument included an assertion that the statute is unconstitutional on its face, the trial court refused to decide the issue in light of its other holdings. No purpose is served in remanding the matter to the trial court to consider the issue, as this court previously upheld the facial constitutionality of the Smoke Free Act. *Deer Park Inn*, supra.

{¶27} Accordingly, we sustain ODH's first and second assignments of error and conclude the trial court erred in vacating Bartec's ten existing violations.

#### **VI. ODH's Third Assignment of Error – Permanent Injunction**

{¶28} ODH's third assignment of error asserts the trial court erred in denying ODH's complaint seeking a statutory injunction against Bartec due to Bartec's repeated violations of the Smoke Free Act. ODH sought injunctive relief pursuant to R.C. 3794.09(D), which states "[t]he director of health may institute an action in the court of common pleas seeking an order in equity against a proprietor or individual that has repeatedly violated the provisions of this chapter or fails to comply with its provisions." ODH urges us to apply *Ackerman v. Tri-City Geriatric & Health Care* (1978), 55 Ohio St.2d 51 to the statutory injunction it seeks and to reject the equitable analysis typically associated with injunctions.

{¶29} In *Ackerman*, the Supreme Court of Ohio held "that when an injunction is authorized by statute, normal equity considerations do not apply, and a party is entitled to an injunction without proving the ordinary equitable requirements, upon a showing that the party has met the requirements of the statute for issuance of the injunction." *Hydrofarm, Inc. v. Orendorff*, 180 Ohio App.3d 339, 2008-Ohio-6819, ¶26, n.2, quoting *Procter & Gamble Co. v. Stoneham* (2000), 140 Ohio App.3d 260, 273-74 (Painter, J.,

concurring separately), cause dismissed (2001), 91 Ohio St.3d 1478, citing *Ackerman* at 56. Accordingly, this court has recognized "*Ackerman* clearly states that 'statutory injunctions should issue if the statutory requirements are fulfilled.'" *State ex rel. Scadden v. Willhite*, 10th Dist. No. 01AP-800, 2002-Ohio-1352 (noting "that statutory actions granting government agents the right to sue to enjoin activities deemed harmful by the General Assembly are not designed primarily to do justice to the parties but to prevent harm to the general public"), quoting *State ex rel. Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116, 123, quoting *Ackerman* at 57.

{¶30} ODH characterizes R.C. 3794.09(D) primarily as a tool not to remedy injustice between the parties but to prevent harm to employees and the general public from violations of the Smoke Free Act. See R.C. 3794.04 (stating "it is in the best interests of public health that smoking of tobacco products be prohibited in public places and places of employment and that there be a uniform statewide minimum standard to protect workers and the public from the health hazards associated with exposure to secondhand smoke from tobacco"); see also *State ex rel. Brown v. Chase Foundry & Mfg. Co.* (1982), 8 Ohio App.3d 96 (finding that an injunction prescribed under R.C. 3704.06, through Ohio's implementation of the federal Clean Air Act, does not require a weighing of the equities because the General Assembly had already determined that illegal emissions into the air were worthy of injunctive relief). ODH thus argues it met the requirements of R.C. 3794.09(D) when it demonstrated Bartec incurred ten citations and did not pay any of its accumulated fines. According to ODH, the trial court, when presented with such facts, erred in not issuing the requested statutory injunction.

{¶31} Not all statutory injunctions fall within the *Ackerman* rule. See, e.g., *Hydrofarm* at ¶26, n.2, citing *Stoneham* at 274 (construing *State ex rel. Jones v. Hamilton Cty. Bd. of Commrs.* (1997), 124 Ohio App.3d 184, 189, appeal not allowed (1998), 81 Ohio St.3d 1457). Rather, the holding in *Ackerman* "is limited to those statutes that contain specific criteria that the court must use in determining entitlement to an injunction." *Stoneham*, supra. If "a statute merely provides that a party is entitled to injunctive relief as well as other types of relief, there is no 'statutory injunction' within the meaning of *Ackerman*, and the party requesting the injunction must use the general equitable principles governing the issuance of injunctive relief." *Id.*

{¶32} Here, we need not decide whether the injunctive relief contemplated in R.C. 3794.09(D) is a "statutory injunction" within the meaning of *Ackerman* with the evidence presented at the evidentiary hearing the trial court held, ODH demonstrated not only that it met the statutory requirements for an injunction but also that the equities supported the requested injunction. ODH presented the trial court with copies of the ten violations previously found against Bartec, eight of which were intentional. Bartec neither objected to the trial court's admitting the violations into evidence nor presented mitigating evidence suggesting the injunction should not issue. Rather, Bartec attempted to reargue the merits of ten underlying violations that already were final orders.

{¶33} On this record, the evidence is overwhelming that Bartec repeatedly and intentionally violated the Smoke Free Act, failed to comply with its provisions as R.C. 3794.09(D) requires, and in so doing exposed patrons and employees to the very harm the statute is designed to prevent. Due to the hearing the court conducted and the evidence adduced as a result of the hearing, the trial court could reach no other

conclusion than that ODH is entitled to the statutory injunction it requested. We thus sustain ODH's third assignment of error and remand with instructions to issue an injunction against Bartec pursuant to R.C. 3794.09(D).

## **VII. Bartec's First and Second Assignments of Error on Cross-Appeal – Declaratory and Injunctive Relief against ODH**

{¶34} In its first assignment of error, Bartec asserts the trial court erred in not declaring ODH's enforcement policies and practices under R.C. 3794.02 were unlawful. In its second assignment of error, Bartec contends the trial court erred in not granting its request for a permanent injunction that enjoins ODH from any further unlawful or unconstitutional enforcement of the Smoke Free Act. The trial court instead vacated the ten underlying citations which, it determined, rendered moot the need for such an injunction. Bartec's assignments of error reargue in different context many of the same issues addressed in ODH's first two assignments of error.

### **A. Declaratory Judgment**

{¶35} A declaratory judgment action is a civil action that provides a remedy in addition to other legal and equitable remedies available. *Aust v. Ohio State Dental Bd.* (2000), 136 Ohio App.3d 677, 681. "The essential elements for declaratory relief are (1) a real controversy exists between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties." *Walker v. Ghee*, 10th Dist. No. 01AP-960, 2002-Ohio-297, quoting *Aust* at 681. Whether to grant or deny declaratory relief is a matter within the sound discretion of the trial court. *State v. Brooks* (1999), 133 Ohio App.3d 521, 525, citing *Arbor Health Care Co. v. Jackson* (1987), 39 Ohio App.3d 183, 185. "A trial court properly dismisses a declaratory judgment action

when no real controversy or justiciable issue exists between the parties." *Id.*, citing *Weyandt v. Davis* (1996), 112 Ohio App.3d 717, 721.

{¶36} Here, Bartec brought an as applied challenge to the enforcement of the Smoke Free Act. See generally *Deer Park Inn*, *supra* (upholding Smoke Free Act over various constitutional challenges). The trial court should not have considered Bartec's as applied challenge to the enforcement of the Smoke Free Act, as Bartec wrongly attempted to use declaratory judgment as a means to collaterally attack the ten final orders finding violations against Bartec. Similarly, to the extent Bartec argues the trial court erred in not declaring the policies and procedures that ODH used in citing Bartec to be unlawful, Bartec's argument is unpersuasive. The trial court exceeded its authority both in vacating the ten existing violations and in ruling on ODH's past enforcement of the Smoke Free Act. Indeed, Bartec points to no authority, either case law or statutory, that suggests its request is an appropriate use of a declaratory judgment action.

{¶37} Instead, Bartec's argument invokes comparison to a defendant attempting to use a declaratory judgment action to attack a conviction that allegedly violated his or her rights. "A declaratory judgment action \* \* \* cannot be used as a substitute for an appeal or as a collateral attack upon a conviction." *Moore v. Mason*, 8th Dist. No. 84821, 2004-Ohio-1188, ¶14 (holding criminal defendant could not obtain declaratory judgment action against the prosecutor in his criminal case on argument that his sentence was unenforceable because the prosecutor and trial court allegedly violated his due process rights during his criminal trial). "Declaratory relief 'does not provide a means whereby previous judgments by state or federal courts may be reexamined, nor is it a substitute for appeal or post conviction remedies.'" *Id.*, quoting *Shannon v. Sequeechi* (C.A.10, 1966),

365 F.2d 827, 829. *State v. Brooks* (1999), 133 Ohio App.3d 521, 525, citing *Carter v. Walters* (Mar. 22, 1990), 3d Dist. No. 11-88-24 (noting "[a] declaratory judgment action is not part of the criminal appellate process" because "[n]either [the declaratory judgment act] nor Civ.R. 57 convert[s] a claimed error at law by a trial judge acting as a judge in a criminal case into a justiciable controversy between the defendant and the judge subject to resolution by declaration"); see also *Moore* at ¶15.

{¶38} Like the defendant in *Moore*, Bartec is attempting to use a declaratory judgment action to attack the past methods of the entity charged with proving violations of a statute. As in *Moore*, "[t]his is not a justiciable controversy capable of resolution by declaration" under the declaratory judgment act. *Moore* at ¶16. To the contrary, it is an argument properly raised on appeal. *Id.* The holding in *Moore*, though rendered in a criminal case, is particularly apt here where testimony at the trial court indicated ODH investigates claimed violations of the Smoke Free Act on a case-by-case basis. (Tr. 44.) The declaratory relief Bartec sought is inappropriate.

#### B. Permanent Injunction

{¶39} A "party seeking a permanent injunction 'must demonstrate by clear and convincing evidence that [it is] entitled to relief under applicable statutory law, that an injunction is necessary to prevent irreparable harm, and that no adequate remedy at law exists.'" *McDowell v. Gahanna*, 10th Dist. No. 08AP-1041, 2009-Ohio-6768, ¶9, quoting *Acacia on the Green Condominium Assoc., Inc. v. Gottlieb*, 8th Dist. No. 92145, 2009-Ohio-4878, ¶18, citing *Stoneham* at 268. The decision whether to grant or deny an injunction is solely within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Id.*, citing *Danis Clarkco Landfill Co. v. Clark Cty.*

*Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 1995-Ohio-301, paragraph three of the syllabus.

{¶40} Bartec sought injunctive relief, in the event Bartec were to be charged with future violations of the Smoke Free Act, that would enable it prospectively to bypass any enforcement issues during the administrative appeals process provided under the statute. Injunctive relief, however, is appropriate only when the party seeking the injunction has no adequate remedy at law. See *McDowell* at ¶9. The administrative appeals process is an adequate remedy at law, albeit one Bartec has chosen not to pursue in the past. See *State ex rel. Natl. Emps. Network Alliance, Inc. v. Ryan*, 125 Ohio St.3d 11, 2010-Ohio-578, ¶1 (stating "[a]n administrative appeal generally constitutes an adequate remedy in the ordinary course of law"), citing *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati*, 118 Ohio St.3d 131, 2008-Ohio-1966, ¶23. Bartec's argument presents no need for a permanent injunction for any future attempts of ODH to enforce the Smoke Free Act against Bartec because Bartec may use the administrative appeals process to challenge the violation or argue the enforcement process itself is unlawful. Thus, regardless of any other deficiencies in Bartec's request for injunctive relief, Bartec has not demonstrated it has no adequate remedy at law.

{¶41} Based on the foregoing, Bartec is not entitled to either declaratory or injunctive relief against ODH. Thus, we overrule Bartec's first and second assignments of error on cross-appeal.

#### **VIII. Bartec's Third Assignment of Error on Cross-Appeal – Permanent Injunction Against Attorney General**

{¶42} In its third assignment of error, Bartec asserts the trial court erred in failing to grant its request for a permanent injunction against the Attorney General. Bartec

argues that because the trial court vacated the underlying citations, the trial court should have granted Bartec a permanent injunction against the Attorney General that barred the Attorney General from attempting to collect any fines stemming from those citations.

{¶43} Because we concluded the trial court wrongly vacated the ten underlying valid violations, Bartec is not entitled to a permanent injunction against the Attorney General. Bartec's third and final assignment of error on cross-appeal is overruled.

#### **IX. Disposition**

{¶44} In the final analysis, the trial court wrongly vacated Bartec's ten underlying violations of the Smoke Free Act, as those violations are valid, final orders. With that premise, the injunctive relief ODH seeks pursuant to R.C. 3794.09(D) against Bartec is proper. Bartec is not entitled to either declaratory or injunctive relief against ODH or against the Attorney General. Accordingly, we sustain ODH's three assignments of error, overrule Bartec's three assignments of error on cross-appeal, reverse the judgment of the Franklin County Court of Common Pleas, and remand with instructions to issue, in accordance with this decision, the injunction ODH requested.

*Judgment reversed and case  
remanded with instructions.*

TYACK, P.J., and SADLER, J., concur.

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FILED  
COMMON PLEAS COURT

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

ALVIN D. JACKSON, M.D.,

2010 FEB 22 AM 7:51

TERMINATION NO. 18  
BY [Signature]

Plaintiff,

CLERK OF COURTS

vs.

: Case No. 09CVH08-12197

BARTEC, INC., et al.,

: Judge Cain

Defendants.

: FINAL APPELLABLE ORDER

DECISION AND ENTRY DENYING PLAINTIFF'S REQUEST FOR PERMANENT INJUNCTION

DECISION AND ENTRY VACATING JUDGMENTS AGAINST DEFENDANTS

Rendered this 19<sup>th</sup> day of February 2010.

CAIN, J.

This matter was originally filed by Plaintiff, the Ohio Department of Health (hereinafter the "Department of Health"), to obtain a permanent injunction against Defendants prohibiting them from violating the Ohio SmokeFree Workplace Act (hereinafter the "SmokeFree Act"). Defendants own and operate a bar located in the Victorian Village area known as Zeno's. Defendants have been cited ten times for violating the SmokeFree Act since it took effect on May 3, 2007. In response to the Department of Health's request for a permanent injunction, Defendants filed Counterclaims asking the Court to declare the citations against them invalid and to declare the SmokeFree Act unconstitutional as applied to Defendants. Upon request of Defendants, the Court consolidated all of the claims in this matter into one bench trial held on November 23, 2009. The Court allowed the parties to file post-trial briefs, which they have now done. Pursuant to this trial, the briefs of the

parties, and the evidence, the Court is now ready to render its decision as to the Department of Health's original claims and as to Defendants' Counterclaims.

This is the fourth major case that has come before this Court concerning the SmokeFree Act. The first was a challenge to the validity of signatures on petitions that sought to place the SmokeFree Act on the ballot. The second was a challenge to the regulations that were made pursuant to the SmokeFree Act. The third was an administrative appeal that resulted in the Pour House decision cited heavily by Defendants in support of their arguments. And now this case comes along, and with it a legal situation that the Court is all too familiar with. As will be seen below, this case was decided long before it was ever filed.

The Court is not going to make an elaborate recitation of the facts of this case or the testimony elicited at trial. Suffice it to say that most of the facts and testimony are irrelevant to the Court's ultimate decision. The Court will instead make a short statement of the facts that are pertinent to its decision. At trial the following facts were brought forward: (1) The Department of Health has in the past implemented a policy of strict liability for violations of the SmokeFree Act in regards to property owners such as Defendants; (2) In the case of Defendants, the Department of Health implemented this policy and cited Defendants for violations of the SmokeFree Act without regard to whether Defendants were actually permitting smoking to occur on the premises of Zeno's; (3) If a complaint was filed and the Department of Health found someone smoking at Zeno's, Defendant's were fined; (4) The Department of Health has never once fined an individual for smoking in a public place; and (5) Defendants posted "no smoking" signs in Zeno's, removed all

ashtrays from Zeno's, and would regularly ask patrons who were smoking on the premises to put out their cigarette or take it outside. With all of the testimony given at trial it may seem odd that these are the only important facts, but this is just how it is sometimes.

Before the Court goes into the meat of its decision in this matter, it needs to address two gateway issues. The first is Defendants' request to have the SmokeFree Act declared unconstitutional as applied to them. It is traditional for Courts in Ohio to avoid questions of constitutionality when a matter can be resolved on other grounds. In this case other grounds exist. As will be seen below, it is the Court's opinion that the citations issued to Defendants were invalid at their inception and therefore, are unenforceable. Since this is so, there is no need to address the constitutionality of the SmokeFree Act.

This brings the Court to the second gateway issue. The Department of Health argues that Defendants cannot challenge the citations levied against them because Defendants never appealed such citations via R.C. 119.12. The Court does not agree with this stance. Again, as will be seen below, the Court feels that the citations issued to Defendants were invalid at their inception and are unenforceable. Since this is so, the citations issued to Defendants are void *ab initio*. As such, whether Defendants appealed the citations or whether they exhausted their administrative remedies is a non-issue. With these two issues decided, the Court can move on with its decision.

This case is all about authority; an issue that is not unfamiliar to the Court. In fact, the Court has addressed the issue of authority in regards to the SmokeFree

Act in the past. In the case of Ohio Licensed Beverage Association v. Ohio Department of Health, Case# 07CVH04-5103, this very Court dealt with the Ohio Department of Health's authority to change the definition of the word "employee" as found in the SmokeFree Act. The Court ruled that the Department of Health's interpretation of the word "employee" exceeded the authority given to it by the SmokeFree Act. This case is very similar, except the Court is not addressing the interpretation of a single word. Instead, the Court is addressing an entire enforcement policy. The question for the Court is: Does the implementation of a policy of strict liability as to property owners exceed the authority given to the Department of Health by the SmokeFree Act, most particularly R.C. 3794.02? It is the opinion of the Court that the only possible answer to this question is "Yes".

It is helpful to begin with a basic review of what the SmokeFree Act actually says. The pertinent part of the SmokeFree Act is R.C. 3794.02, which states:

#### Smoking prohibitions

(A) No proprietor of a public place or place of employment, except as permitted in section 3794.03 of this chapter, shall permit smoking in the public place or place of employment or in the areas directly or indirectly under the control of the proprietor immediately adjacent to locations of ingress or egress to the public place or place of employment.

(B) A proprietor of a public place or place of employment shall ensure that tobacco smoke does not enter any area in which smoking is prohibited under this chapter through entrances, windows, ventilation systems, or other means.

(C) No person or employer shall discharge, refuse to hire, or in any manner retaliate against an individual for exercising any right, including reporting a violation, or performing any obligation under this chapter.

(D) No person shall refuse to immediately discontinue smoking in a

public place, place of employment, or establishment, facility or outdoor area declared nonsmoking under section 3794.05 of this chapter when requested to do so by the proprietor or any employee of an employer of the public place, place of employment or establishment, facility or outdoor area.

(E) Lack of intent to violate a provision of this chapter shall not be a defense to a violation.

In interpreting statutory enactments, administrative agencies, such as the Department of Health, are subject to restrictions. The law in this area is clear.

It is well settled that an administrative agency has only such regulatory power as is delegated to it by the General Assembly. Authority that is conferred by the General Assembly cannot be extended by the administrative agency." *D.A.B.E.*, 96 Ohio St. 3d at 259. Administrative rules may not formulate public policy, but rather are limited to developing and administering policy already established by the General Assembly. *Id.* "Implied power is only incidental or ancillary to an express power, and, if there be no express grant, it follows, as a matter of course, that there can be no implied grant." *Id.*, quoting *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47, 117 N.E. 6. "An administrative agency may not legislate by enacting rules which are in excess of legislative policy, or which conflict with the enabling statute." *Taber v. Ohio Dep't of Human Servs.* (1998), 125 Ohio App. 3d 742, 750, 709 N.E.2d 574, quoting *P.H. English v. Koster* (1980), 61 Ohio St.2d 17, 19, 399 N.E.2d 72.

Pacella v. Ohio Dept. of Commerce, Div. Of Real Estate (Franklin, 2003), 2003-Ohio-3432, ¶127. "An administrative rule is not inconsistent with a statute unless the rule contravenes or is in derogation of some express provision of the statute." McAninch v. Crumbley (1981), 65 Ohio St. 2d 31, 34. "It is well established, however, that administrative rules, in general, may not add to or *subtract from* ... the legislative enactment." Central Ohio Joint Vocational School Dist. Bd. of Edu. v. Admr., Ohio Bureau of Employment Serv. (1986), 21 Ohio St. 3d 5, 10. "[A] rule is invalid where it clearly is in conflict with any statutory provision." Id. "An

administrative rule that would preclude the use of a statute must yield to the statute." DLZ Corp. v. Ohio Dept. of Admin. Servs. (Franklin, 1995), 102 Ohio App. 3d 777, 781. While the above case law speaks in terms of written administrative rules, it applies with equal force to situations where there is a department wide policy, even though that policy is not formally written down.

The question now becomes: Does the Department of Health's policy of strict liability add to or subtract from the statute it was made pursuant to, *i.e.* R.C. 3794.02? Recently, the Ohio Tenth District Court of Appeals gave some guidance as to when a property owner is in violation of the SmokeFree Act. In Pour House, Inc. v. Ohio Dep't of Health (Franklin, 2009), 2009 Ohio 5475, the Tenth District held:

We reach the same conclusion in interpreting R.C. 3794.02(A). A proprietor violates R.C. 3794.02(A) only when the proprietor permits smoking. A proprietor permits smoking when the proprietor affirmatively allows smoking or implicitly allows smoking by failing to take reasonable measures to prevent patrons from smoking--such as by posting no smoking signs and notifying patrons who attempt to smoke that smoking is not permitted. *Traditions Tavern*.

R.C. 3794.02(A) is a strict liability statute, but there is no liability unless there has been conduct that violates the statute. Strict liability addresses the mens rea element of a violation, not the conduct itself. *State v. Ferguson*, 10th Dist. No. 07AP-999, 2008 Ohio 6677, P 73; *State v. Squires* (1996), 108 Ohio App.3d 716, 718, 671 N.E.2d 627 (strict liability offense not concerned with actor's purpose, only conduct); *State v. Acevedo* (May 24, 1989), 9th Dist. No. 88CA004423, 1989 Ohio App. LEXIS 1888 (concept of strict liability founded on premise that the mere doing of the act constitutes the offense). Therefore, regardless of the proprietor's intent, a proprietor would be strictly liable under R.C. 3794.02(A) if the proprietor affirmatively allows smoking or implicitly allows smoking by failing to take reasonable measures to prevent it, such as posting no smoking signs and notifying patrons who attempt to smoke that smoking is not permitted. Without evidence that the proprietor permitted smoking, there is no basis for finding the

proprietor violated the statute. Unless there is violative conduct, the strict liability nature of the statute is irrelevant.

Appellee argues on appeal that R.C. 3794.02(A) contemplates a burden shifting analysis. Appellee contends that once it proves that smoking has occurred, the burden shifts to the proprietor to prove it did not permit smoking--much like an affirmative defense. We disagree. Appellee must prove each of the elements of a smoking violation. Ohio Adm.Code 3701-52-08(E) (requiring findings of smoking violations to be supported by preponderance of the evidence). Permitting smoking is an element of the smoking violation, not an affirmative defense.

Id. at ¶¶18-20. This decision clearly shows that a policy of strict liability for the mere act of an individual smoking on the premises is not supported by the wording of R.C. 3794.02. This Court agrees with the Tenth District's interpretation of R.C. 3794.02 and feels that it has direct application to this case.

In implementing a policy of strict liability, the Department of Health primarily relied upon R.C. 3794.02(E), which states: "Lack of intent to violate a provision of this chapter shall not be a defense to a violation." As stated in the Pour House decision, R.C. 3794.02(E) only goes to the issue of *mens rea* and does not dictate when a violation of the SmokeFree act has occurred. All R.C. 3794.02(E) is saying is that if there is a violation, then it does not matter whether such violation was an intended violation or whether it was an accident. Interpreting this section to make the mere presence of a lighted cigarette on the premises a violation of the SmokeFree Act exceeds the authority given to the Department of Health by R.C. 3794.02.

This conclusion can better be seen by looking at R.C. 3794.02(A). The SmokeFree Act states that: "No proprietor of a public place or place of employment... shall permit smoking in the public place ". As noted in Pour

House, the word "permit" entails more than just there being a lighted cigarette on the premises. In the testimony adduced at trial, it was made clear to the Court that in regards to Defendants the Department of Health never made an inquiry as to whether Defendants were permitting smoking at Zeno's. The Department of Health's agents instead saw smoking on the premises and cited Defendants. This policy of enforcement is stricter than the one authorized by R.C. 3794.02(A). By not inquiring as to whether Defendants actually permitted smoking at Zeno's, the Department of Health added to the number of situations when it was authorized to issue citations. The Department further subtracted from Defendants' rights under R.C. 3794.02. The Ohio Department of Health exceeded the authority given to it by R.C. 3794.02 by implementing a policy of strict liability and as such, the citations levied against Defendants pursuant to that policy are invalid.

Furthermore, when R.C. 3794.02(A) is read in conjunction with R.C. 3794.02(D), a limit to a property owner's liability can be seen. R.C. 3794.02(D) states, "No person shall refuse to immediately discontinue smoking in a public place, place of employment, or establishment, facility or outdoor area declared nonsmoking under section 3794.05 of this chapter when requested to do so by the proprietor..." This section shows that in an establishment whose policy is to not permit smoking; when an individual is asked to stop smoking but refuses, liability is transferred from the property owner to the individual. Asking a person to put out a cigarette or leave discharges the property owner's duty under the SmokeFree Act. As noted earlier, the Department of Health has never once cited

an individual for violation of R.C. 3794.02(D). This further demonstrates that the Department of Health's policy of strict liability against property owners exceeds the authority granted to it by R.C. 3794.02.

The Court would like to explain this decision under a simpler non-legal rational. The Ohio Department of Health has implemented a policy placing the burden of enforcing the SmokeFree Act against individuals on private property owners such as Defendants. One just has to look at the present situation to see this. A complaint is filed against Defendants because someone is smoking at Zeno's. An inspector goes out, sees someone smoking, and cites Defendants. The inspector does not care that "no smoking" signs are present or that no ashtrays are out. He/she does not care whether or not Defendants have asked the party smoking put it out or to take it outside. The inspector does not cite the individual smoking. Basically, the Defendants are being held liable for the decisions of a third-party that are out of Defendants' control. This is offensive to basic notions of justice and fair play.

The Court will give an example that helps to illustrate this point better. As many people know, public drunkenness is illegal. Let's say that an individual gets drunk and comes to this very courthouse. The courthouse in which this Court sits is owned by Franklin County. The individual in question decides that he is going to get a little rowdy and starts making trouble in a very sloppy fashion. He is promptly arrested. What happens? The individual is charged with public drunkenness. Franklin County is not fined because there is a drunk inside one of

its buildings. This is because Franklin County had no control over the actions of the drunk, it was just a place where the drunk went.

The Court will give another example that directly applies to the SmokeFree Act. This courthouse has a policy of no smoking on the premises. This policy was in effect long before the passage of the SmokeFree Act. There are numerous "no smoking" signs posted all over the courthouse. However, anyone who walks up or down the stairways will sometimes notice cigarette butts on the landings and the faint smell of cigarette smoke. Under the policy implanted by the Department of Health, it would cite Franklin County for violation of the SmokeFree Act. Is the County to have someone constantly walking up and down the steps making sure no one is smoking? Of course not! Requiring such a thing would be absurd. Though taking the Department of Health's strict liability policy to its logical limits would dictate that Franklin County must hire such a person. Not only does this show that the Department of Health's policy exceeds the authority given to it by the SmokeFree Act, it shows that it is completely unreasonable.

This all comes down to the fact that property owners can only do so much, especially in regards to third-parties. They can put up "no smoking" signs. They can take away ashtrays. They can ask patrons that are smoking to leave. Outside of these things, there is little property owners can do. Would the Department of Health require property owners to pat down visitors for cigarettes before they are allowed to enter? Would it have property owners remove people

via force from the premises at risk of personal injury?<sup>1</sup> Placing the onerous of enforcing the SmokeFree Act against individuals completely on property owners is ludicrous and defies basic notions of fairness.

The Court is aware of what the Department of Health will argue in response to this. It will argue that parties like Defendants are subject to numerous regulations, such as food and alcohol regulations, which they need to follow in order to operate. It would argue that the SmokeFree Act is no different. Contrary to the Department of Health's belief, the SmokeFree Act is very different. Property owners can determine who they give alcohol to on their premises; they can control how food it prepared. Property owners, however, have no control over whether someone rips out a cigarette and lights up. Again, the Department of Health's interpretation of the SmokeFree Act makes property owners liable for the actions of third parties upon which the property owner has little to no control.

In summation, the Court's ruling is as follows. Sufficient evidence has been presented to the Court to show that the Department of Health implemented a policy of strict liability against property owners for violations of the SmokeFree Act. If someone was smoking on the premises, the property owner was cited. The evidence shows that Defendants were cited pursuant to this policy and that there were never inquires made as to whether Defendants were actually "permitting" smoking to occur at Zeno's. The Department of Health's policy of strict liability was stricter then allowed by R.C. 3794.02. Since this is so, the

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<sup>1</sup> This would hardly go along with the SmokeFree Act's stated purpose of creating a safer and more healthy work environment.

Department of Health exceeded its authority in implementing its strict liability policy. As such, the citations issued to Defendants via this policy are invalid and must be vacated. Since this matter has been resolved pursuant to these grounds, there is no need for the Court to address Defendants' constitutional challenge to the SmokeFree Act.

After review and consideration, the Court hereby rules as follows:

Plaintiff's request for a permanent injunction against Defendants is not well-taken, and is hereby DENIED.

The ten citations issued against Defendants for violations of the Ohio SmokeFree Workplace Act are hereby VACATED and are unenforceable.

This decision and entry shall constitute a final appealable order in this matter.

IT IS SO ORDERED.



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David E. Cain, Judge

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