

IN THE SUPREME COURT OF OHIO

11-0019

BARTEC, INC. <i>et al.</i> ,	:	ON APPEAL FROM THE
	:	FRANKLIN COUNTY COURT
Defendants-Appellants,	:	OF APPEALS, TENTH
v.	:	APPELLATE DISTRICT
	:	
ALVIN JACKSON,	:	COURT OF APPEALS
OHIO DEPARTMENT OF HEALTH	:	CASE NO. 10AP-173
	:	
Defendant-Appellee	:	TRIAL COURT
	:	CASE NO. 09CVH08-12197
	:	
RICHARD CORDRAY,	:	
ATTORNEY GENERAL	:	
	:	
Defendant-Appellee	:	

MERIT BRIEF OF APPELLANTS BARTEC, INC AND RICHARD M. ALLEN

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TABLE OF CONTENTS

Table of Authorities

Statement of the Case.....	1
Statement of the Facts.....	2
Argument.....	4
<u>Proposition of Law No. 1: The Health Department’s method of enforcing the smoking ban violates the separation of powers, and must be discontinued.....</u>	4
A. This is a permissible facial challenge to an invalid unwritten policy.....	4
B. Separation of Powers principles prohibit an agency from making public policy....	6
C. In enforcing the smoking ban, ODH imposes a policy of strict liability on proprietors.....	8
i. ODH ignores an integral division of the statute.....	10
ii. ODH rules promote citation of the proprietor in all instances.....	10
iii. ODH policies and practices promoted citation of proprietors in all instances.....	11
iv. Evidence of how the ban was enforced against Zeno’s corroborates the existence of this policy.....	12
v.	
D. The Agency’s strict liability enforcement policy violates Separation of Powers principles.....	15
E. Upon finding an unlawful agency rule or policy, this Court may vacate fines issued pursuant thereto, or abstain from foreclosing those fines from being later vacated....	20
<u>Proposition of Law No. 2: Inclusion of Zeno’s, and bars, as proprietors subject to R.C. 3794 exceeds the outer limits of the state police power, and unreasonably extinguishes property rights.....</u>	24
A. The Smoking Ban is a land use restriction.....	24
B. Heightened scrutiny is required when assessing the deprivation of property rights.....	24
C. The Police Power does not permit imposition of the restrictions on indoor air use articulated in the state smoking ban on bars such as Zeno’s.....	32
D. Application of R.C. 3794 to adults-only liquor-licensed establishments, including Zeno’s, effects a taking.....	41

Proposition of Law No. 3: Ohio’s declaratory judgment statute enables previously-cited Ohioans to challenge the constitutionality of a statute or rule.....42

A. Zeno’s Separation of Powers Claim is a facial claim only.....44

B. Zeno’s is entitled to defend itself by challenging the smoking ban both facially and as applied to its property.....44

C. Zeno’s was required to raise its constitutional challenges or forever waive them.

D. Exhaustion of administrative remedies would have been futile..... 47

E. The rationale for exhaustion relied upon by the Appellate Court does not apply in this case... 48

F. The “collateral attack doctrine” does not bar Zeno’s claims.....49

CONCLUSION50

TABLE OF AUTHORITIES

Cases

Ackerman v. Port of Seattle (1960), 55 *Wish.2d* 400, 348 *P.2d* 664, 77 *A.L.R.2d* 1344 48

Aristo-Craft, Inc. v. Evendale (1974), 69 *Ohio Op.2d* 118 [322 *N.E.2d* 309] 41

Arnold v. Cleveland, (1993), 67 *Ohio St.3d* 35, 616 *N.E.2d* 163 32

Baker v. City of Cincinnati (1860), 11 *Ohio St.* 534 30

Bank of Toledo v. Toledo (1853), 1 *Ohio St.* 622, 664 35

Becker v. Beaudoin (1970), 106 *R.I.* 562, 573, 261 *A.2d* 896, 902 28

Bexley v. Selcer (1998), 129 *Ohio App.3d* 72 24

Board of Educ. of South-Western City Schools v. Kinney (1986), 24 *Ohio St.3d* 184, 494 *N.E.2d* 1109
..... 55

Bresnick v. Beulah Park Ltd. Partnership (1993), 67 *Ohio St.3d* 302, 303, 617 *N.E.2d* 1096 42

Bresnick v. Beulah Park Ltd. Partnership (1993), 67 *Ohio St.3d* 302, 303, 617 *N.E.2d* 1096, 36

Brown v. Scioto Cty. Bd. of Commrs., 87 *Ohio App.3d* at 712, 622 *N.E.2d* 1153 42

Burger Brewing Co. v. Thomas (1975), 42 *Ohio St.2d* 377, 384-385, 329 *N.E.2d* 693 12, 15, 22

California v. Greenwood (1988), 486 *U.S.* 35, 43, 108 *S.Ct.* 1625, 1630, 100 *L.Ed.2d* 30 32

City of Cincinnati v. Cook (1923), 107 *Ohio St.* 223, 140 *N.E.* 655 15, 22

City of Cincinnati v. Correll (1943), 141 *Ohio St.* 535, 539, 49 *N.E.2d* 412, 31, 36

City of Mesquite v. Aladdin's Castle, Inc. (1982), 455 *U.S.* 283, 293, 102 *S.Ct.* 1070 32

Cleveland Gear Co. v. Limbach (1988), 35 *Ohio St.3d* 229, 520 *N.E.2d* 188 55

Colley v. Bazell (1980), 64 *Ohio St.2d* 243, 247, 18 *O.O.3d* 442, 416 *N.E.2d* 605 29

Com. v. Hicks (2002), 264 *Va.* 48, 563 *S.E.2d* 674 12

Condee v. Lindley, (1984), 12 *Ohio St.3d* 90, 465 *N.E.2d* 450 21

County of Lake v. MacNeal (1962), 24 *Ill.2d* 253, 181 *N.E.2d* 85 52

Crosby v. Rath (1940), 136 *Ohio St.* 352, 355-356, 16 *O.O.* 496, 497, 25 *N.E.2d* 934, 935 36

DeHart v. Aetna Life Ins. Co. (1982), 69 *Ohio St.2d* 189 51

<i>Direct Plumbing Supply v. City of Dayton</i> (1941), 138 Ohio St. 540, 38 N.E.2d 70	33, 36, 38, 44
<i>Eastwood Mall v. Slanco</i> (1994), 68 Ohio St.3d 221	36, 42
<i>Eller v. Koehler</i> (1903), 68 Ohio St. 51	43
<i>Estate of Orth v. Inman</i> , Franklin App. No. 99AP-504, 2002-Ohio-3728	29
<i>Fawn Lake Apts. v. Cuyahoga Cty. Bd. of Revision</i> (1999), 85 Ohio St.3d 609, 611, 710 N.E.2d 681 .	56
<i>Froelich v. Cleveland</i> (1919), 99 Ohio St. 376, 124 N.E. 212	39
<i>Gates Co. v. Housing Appeals Bd.</i> (1967), 10 Ohio St.2d 48.....	41
<i>Ghaster Properties, Inc. v. Preston</i> (1964), 176 Ohio St. 425, 27 O.O.2d 388, 200 N.E.2d 328	41
<i>Great N. Ry. Co. v. Sunburst Oil & Refining Co.</i> (1932), 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 ...	27
<i>GTE Automatic Elec., Inc.</i> , 47 Ohio St.2d 146, 1 O.O.3d 86, 351 N.E.2d 113.....	29, 30
<i>GTE Wireless of the Midwest Inc. v. Anderson Twp.</i> (App. 10 Dist. 1999), 134 Ohio App.3d 352, 359, 731 N.E.2d 201	54
<i>Hageman v. Board of Trustees of Wayne Township</i> (1970), 20 Ohio App.2d 12, 251 N.E.2d 507	48
<i>Hale v. State</i> (1896), 55 Ohio St. 210, 214, 45 N.E. 199, 200.	14
<i>Henry v. Dubuque Pacific RR. Co.</i> (1860), 10 Iowa 540, 543.	35
<i>Holytz v. Milwaukee</i> (1962), 17 Wis.2d 26, 115 N.W.2d 618.....	28
<i>Hoover v. Franklin Cty. Bd. of Commrs.</i> (1985), 19 Ohio St.3d 1, 9, 19 OBR 1, 482 N.E.2d 575	28
<i>Hopkins v. Quality Chevrolet, Inc.</i> (1992), 79 Ohio App.3d 578, 583, 607 N.E.2d 914	29
<i>Jackson v. Bartec</i> , 2010 Ohio 5558	9, 12
<i>Johnson's Island v. Board of Twp. Trustees of Danbury Twp.</i> (1982), 69 Ohio St.2d 241, 431 N.E.2d 672.....	52
<i>Jones v. Chagrin Falls</i> (1997), 77 Ohio St.3d 456.....	54
<i>Karches v. Cincinnati</i> (1988), 38 Ohio St.3d 12, 17, 526 N.E.2d 1350	54
<i>Kay v. Marc Glassman, Inc.</i> (1996), 76 Ohio St.3d 18, 20, 665 N.E.2d 1102	29
<i>Kingsborough v. Tousley</i> (1897), 56 Ohio St. 450, 47 N.E. 541.....	56
<i>Kitto v. Minot Park District</i> (N.D.1974), 224 N.W.2d 795	28

<i>Kroplin v. Truax</i> (1929), 119 Ohio St. 610, 165 N.E. 498	41
<i>Lebron v. AMTRAK</i> , 69 F.3d 650, 659, amended by 89 F.3d 39, 39 (2d Cir.1995).....	12
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> (1982), 458 U.S. 419, 435, 102 S.Ct. 3164.....	36, 42
<i>Metropolitan Life Insurance Co. v. Department of Insurance</i> (1985), 373 N.W.2d 399.....	27
<i>Mid-American Fire and Cas. Co. v. Heasley</i> , 113 Ohio St.3d 133, 863 N.E.2d 142, 2007-Ohio-1248	49
<i>Molitor v. Kaneland Community Unit District No. 302</i> (1959), 18 Ill.2d 11, 163 N.E.2d 89.....	28
<i>Moore v. Middletown</i> (2010), 2010-Ohio-2962	34, 48
<i>Niemotko v. Maryland</i> , 340 U.S. at 271-73, 71 S.Ct. 328	12
<i>Norwood v. Horney</i> , 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115	passim
<i>OAMCO v. Lindley</i> (1987), 29 Ohio St.3d 1, 29 OBR 122, 503 N.E.2d 1388.....	28
<i>Ohio Farmers Indemn. Co. v. Chames</i> (1959), 170 Ohio St. 209, 213, 163 N.E.2d 367.....	49
<i>Ohio Nurses Assn., Inc. v. Ohio State Bd. of Nursing Edn. & Nursing Registration</i> (1989), 44 Ohio St.3d 73, 76, 540 N.E.2d 1354	16
<i>Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal</i> , 115 Ohio St.3d 375, 875 N.E.2d 550, 2007-Ohio-5024.....	56
<i>Olds v. Klotz</i> (1936), 131 Ohio St. 447, 451, 3 N.E.2d 371, 373	37, 38
<i>Operation Evangelize v. Kinney</i> (1982), 69 Ohio St.2d 346, 347, 452 N.E.2d 200.....	55
<i>Palmer v. Tingle</i> (1896), 55 Ohio St. 423, 36 W.L.B. 315, 45 N.E. 313	34
<i>Paramount Film Distributing Corp. v. Tracy</i> (1963), 175 Ohio St. 55, 191 N.E.2d 839, 23 O.O.2d 352	30
<i>Parham v. Justices of Decatur Cty. Inferior Court</i> (Ga.1851), 9 Ga. 341, 348	35
<i>Petrocon v. Kosydar</i> (1974), 38 Ohio St.2d 264, 313 N.E.2d 373	55
<i>Pizza v. Rezcallah</i> (1998), 84 Ohio St.3d 116, 702 N.E.2d 81, 1998 -Ohio- 313	38
<i>Pour House, Inc. v. Ohio Dept. of Health</i> , 10th Dist. No. 09AP-157, 2009-Ohio-5475, ¶ 14, 185 Ohio App.3d 680, 925 N.E.2d 621	20, 23
<i>Proprietors of Spring Grove</i> , 1 Ohio Dec. Reprint 316	35
<i>Pruneyard Shopping Ctr. v. Robins</i> (1980), 447 U.S. 74, 81, 100 S.Ct. 2035.....	32, 36

<i>Rose Chevrolet, Inc. v. Adams</i> (1988), 36 Ohio St.3d 17, 21, 520 N.E.2d 564.....	30
<i>S. Euclid v. Jemison</i> (1986), 28 Ohio St.3d 157, 158-159, 28 OBR 250, 503 N.E.2d 136	14
<i>Sentinel Communications Co. v. Watts</i> , 936 F.2d 1189, 1197-99 (11th Cir.1991).	12
<i>Smith v. Erie RR. Co.</i> (1938), 134 Ohio St. 135, 142, 16 N.E.2d 310.....	35, 48
<i>Smith v. State</i> (1970), 93 Idaho 795, 473 P.2d 937	28
<i>State ex rel. Duncan v. Middlefield</i> , 120 Ohio St.3d 313, 898 N.E.2d 952, 2008-Ohio-6200	48
<i>State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.</i> , 122 Ohio St.3d 260, 910 N.E.2d 455, 2009-Ohio-2871.....	48
<i>State ex rel. Kahler-Ellis Co. v. Cline</i> (C.P.1954), 69 Ohio Law Abs. 305, 309, 125 N.E.2d 222	39
<i>State ex rel. Saunders v. Indus. Comm.</i> (2004), 101 Ohio St.3d 125, 128, 802 N.E.2d 650	16
<i>State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.</i> , 115 Ohio St.3d 337, 875 N.E.2d 59, 2007-Ohio-5022	48
<i>State ex. rel. Killeen Realty Co. v. City of East Cleveland</i> (1959), 169 Ohio St. 375, 160 N.E.2d 1....	31, 40, 41
<i>State v. Bodyke</i> (2010), 126 Ohio St.3d 266, 933 N.E.2d 753, 2010 -Ohio- 2424.....	13, 14, 15
<i>State v. Bodyke</i> (2010), 126 Ohio St.3d 266, 933 N.E.2d 753, 2010 -Ohio- 2424.....	22
<i>State v. Cline</i> , 125 N.E.2d 222.....	35
<i>State v. Gardner</i> (2008) 118 Ohio St.3d 420, 889 N.E.2d 995	33, 48
<i>Steele, Hopkins & Meredith Co. v. Miller</i> , 92 Ohio St. 115, 110 N.E. 648.....	33
<i>Sun Finance & Loan Co. v. Kosydar</i> (1976), 45 Ohio St.2d 283, 284, fn. 1, 344 N.E.2d 330	55
<i>Sun Oil Co. v. Upper Arlington</i> (1977), 55 Ohio App.2d 27 [9 O.O.3d 196, 379 N.E.2d 266	41
<i>Taylor v. Cincinnati</i> (1944), 143 Ohio St. 426, 432, 28 O.O. 369, 55 N.E.2d 724.....	42
<i>Tipton v. University of Hawaii</i> , 15 F.3d 922, 927-28 (9th Cir.1994)	12
<i>Town of Londonderry v. Faucher</i> (1972), 112 N.H. 454, 299 A.2d 581	52
<i>Travelers Indemn. Co. v. Cochrane</i> (1951), 155 Ohio St. 305, 312, 98 N.E.2d 840	49
<i>United States v. Williams</i> (D.C.Ark.1952), 109 F.Supp. 456	29

<i>Weber v. Bd. of Health</i> (1947), 148 Ohio St. 389, 396, 74 N.E.2d 331, 335-36.....	15, 22, 26
<i>Wells v. City & County of Denver</i> , 257 F.3d 1132, 1150-51 (10th Cir.); <i>cert. denied</i> , *59 534 U.S. 997, 122 S.Ct. 469, 151 L.Ed.2d 384 (2001).....	12

Statutes

R.C. 1.47(B).....	26
R.C. 1.47(C).....	26
R.C. 2723.01.....	30
R.C. 3794.01(B).....	44
R.C. 3794.02.....	50
R.C. 3794.02(A).....	passim
R.C. 3794.02(B).....	22
R.C. 3794.02(D).....	10, 17, 18, 27
R.C. 3794.03.....	47
R.C. 3794.07.....	25, 26

Rules

OAC 3701-52-02(B).....	18
OAC 3701-52-08(D).....	17
OAC 3701-52-08(F)(2).....	54
OAC 3701-52-08(E).....	25

Constitutional Provisions

Section 1, Art. I, Ohio Constitution.....	34
Section 19, Art. I, Ohio Constitution.....	34

Civil Rules

Civ. R. 12(B)..... 53
Civ. R. 13(A) 53
Civ. R. 13(B)..... 53
Civ. R. 13(C)..... 53
Civ. R. 60(B)..... 29, 50, 56

Other Authorities

Black’s Law Dictionary (8th Ed. 2004)..... 16
Webster’s New School & Office Dictionary (1951) 16

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 Bartec, Inc. DBA Zeno's Victorian Village ("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.¹

Due to a dispute over the meaning of R.C. 3794, its enforcement, and its lawfulness, Zeno's filed an Answer and Counterclaim asserting constitutionally-based affirmative defenses and 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."²

The trial court conducted bench trial, which was held on November 23, 2009.³ 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,"⁴ concluding that "the Department of Health's policy of strict liability against property owners exceeds the authority granted to it by R.C. 3794.02,"⁵ and "the citations levied against Defendants pursuant to that policy are invalid."⁶ On appeal and cross-appeal, the Appellate Court concluded "[t]he trial court should not have considered Bartec's as

¹ See ODH's Complaint, at p. 10.

² Zeno's Answer, Counterclaim and Cross Claim at 25-26.

³ Trial Court Decision and Entry, *supra* at 1.

⁴ 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.

⁵ *Id.*

⁶ *Id.* at 8.

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.”⁷

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.”⁸ 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.⁹

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.”¹⁰

On April 6, 2011, this Court agreed to review each of the three propositions of law proposed in Zeno’s Jurisdictional Memorandum, i.e. that the Health Department’s Enforcement of the Ohio statewide smoking ban violates separation of powers and must cease; that inclusion of bars as proprietors subject to R.C. 3794 exceeds the police power and extinguishes property rights, and Ohio’s declaratory judgment statute permits previously-cited Ohioans to challenge the constitutionality of a statute.

STATEMENT OF THE FACTS

For 25 years, Mr. Allen has owned and operated “Zeno’s” in Columbus, Ohio. Zeno’s is a liquor permit-holding establishment that only permits entry to those over the age of 21, i.e a “bar.” The Record establishes that to comply with the smoking ban, Zeno’s posted “no smoking” signs, pulled ashtrays,

⁷ *Jackson v. Bartec*, 2010 Ohio 5558, p. 16.

⁸ *Id.*, at p. 11.

⁹ *Id.*, at p. 17.

¹⁰ *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,¹¹ communicated this policy to Zeno's employees, and enforced and witnessed the enforcement of this policy.¹² 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,¹³ 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,¹⁴ meaning that proprietors are liable at the instant when smoking is "present" on premises.¹⁵ 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.¹⁶ Those charged with enforcing the ban never investigate whether proprietors ask the patrons to discontinue smoking prior to issuing a fine.¹⁷ Instead they maintain "if there's smoking in the establishment in an enclosed area, that's a violation."¹⁸

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),¹⁹ even though smokers routinely continue to smoke once notified of the ban and/or asked to stop.²⁰

Meanwhile, the ban, fines aside, has caused tremendous damage to Zeno's business,²¹ and this damage is attributable to the enforcement of R.C. Chapter 3794.²² One surrogate for such damage is

¹¹ Tr. 96-97, 195, 201.

¹² Tr. 100-101.

¹³ Tr. 99.

¹⁴ Tr. 44. October 27, 2009 Deposition of Lance Himes, pp. 32-33, 24, 17; Tr. 72-76.

¹⁵ See "Ohio Smoking Ban Frequently Asked Questions," and also Tr. 74-75; Lance Himes Deposition, p.

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

¹⁶ Tr. 53-60.

¹⁷ *Id.* at 69.

¹⁸ *Id.* at 71.

¹⁹ Tr. 45, 66; Mary Clifton Deposition, 22

²⁰ Tr. at 102.

²¹ Tr. 148-49, 194-95.

employment figures, and in Franklin County alone, bar employment has decreased by 869 employees, or 29 percent, between 2006 and 2008 due to the ban.²³ 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.²⁴ Thus, the ban caused Zeno's revenue to diminish by \$160,000 from 2006 to 2009, and this in conjunction with the cost of smoking ban fines, leaves the economic viability of a once robust establishment in doubt. 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.²⁵

ARGUMENT

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

ODH Enforcement Actions against Proprietors since 2007(R.C. 3794.02(A)): 33,347

ODH Enforcement Actions against Patrons since 2007 (R.C. 3794.02(D)): - 0-

The above statistic is not a typo. The Ohio Department of Health and its designees ("ODH") have and continue to exceed their limited executive branch authority by imposing an unwritten policy of strict liability for the presence of smoking upon Ohio's business and property owners. This is a valid facial challenge to that policy, on the grounds that it violates Ohio's Separation of Powers and exceeds agency rulemaking strictures. The policy must be declared invalid, further enforcement must be enjoined, and this court may abrogate fines imposed pursuant to this policy.

A. This is a permissible facial challenge to an invalid unwritten policy.

²² Tr. 83, 86-87, 144-45;. Trial Court Exhibit on "Impact of Ban on Zeno's Revenue," prepared by Dr. Michael L. Marlow.

²³ Tr. 152. Trial Court Exhibit "Ohio Smoking Ban Has Decreased Bar Employment in Franklin County," prepared by Dr. Michael L. Marlow.

²⁴ Tr. 125, 142-143.

²⁵ Tr. 138, 148.

Zeno's is entitled to challenge the validity of unwritten agency rules and policies, and has properly done so in this case. First, a litigant is "entitled to assert a facial constitutional challenge to [an administrative authority's] policy, even though that policy is unwritten."²⁶ The United States Supreme Court and the various United States Courts of Appeals have routinely permitted litigants to assert facial challenges to unwritten government policies.²⁷ The rationale for permitting such challenges is compelling: "[t]o hold otherwise would permit the government to violate a citizen's [constitutional] protections by simply refusing to memorialize unconstitutional policies in a written document."²⁸ Ohio precedent implicitly acknowledges this rule and rationale, indicating "[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."²⁹

Further, both the Appellate Court and ODH have already conceded that such a challenge is proper. While the Appellate Court cited *East Carroll Nursing Home* for the proposition that "an as applied constitutional challenge must be raised, though not determined, before the administrative agency when administrative review is an option,"³⁰ it also cited with approval a passage from that case indicating "declaratory judgment is appropriate when seeking to have a statute or rule declared unconstitutional."³¹ Meanwhile, in its jurisdictional brief, ODH concedes that nothing forecloses Zeno's "from properly bringing a facial challenge to the Smoke Free Act or ODH's enforcement policies."³²

Here, Zeno's claims and defenses, from the outset, have facially challenged ODH enforcement policy. In its Answer and Counterclaim, Zeno's specifically averred, as affirmative defenses, that "R.C.

²⁶ *Com. v. Hicks* (2002), 264 Va. 48, 563 S.E.2d 674.

²⁷ See *Niemotko v. Maryland*, 340 U.S. at 271-73, 71 S.Ct. 328; *Wells v. City & County of Denver*, 257 F.3d 1132, 1150-51 (10th Cir.); *cert. denied*, *59 534 U.S. 997, 122 S.Ct. 469, 151 L.Ed.2d 384 (2001); *Lebron v. AMTRAK*, 69 F.3d 650, 659, *amended by* 89 F.3d 39, 39 (2d Cir.1995); *Tipton v. University of Hawaii*, 15 F.3d 922, 927-28 (9th Cir.1994); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1197-99 (11th Cir.1991).

²⁸ *Com. v. Hicks* (2002), 264 Va. 48, 563 S.E.2d 674.

²⁹ *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 384-385, 329 N.E.2d 693. (Emphasis added).

³⁰ *Bartec v. Jackson*, 2010-Ohio-5558, Appeals Court Opinion, p. 10.

³¹ *Id.* The court made no reference to Zeno's affirmative defenses.

³² February 1, 2011 Memorandum of Alvin Jackson * * * Opposing Appellant's Memorandum in Support of Jurisdiction, p. 12.

3794 has been systematically enforced in an unconstitutional manner,” and “Health Departments * * * have systematically enforced R.C. 3794 in a manner that is inconsistent with its plain language.”³³ Count II of Zeno’s Counterclaim, entitled “Unlawful Administrative Rulemaking or in the Alternative, Unlawful Exercise of Policymaking Authority,” specifically avers (1) “[t]he Health Department has adopted, promulgated, and enforced certain Smoking Ban enforcement policies without utilizing mandatory agency rulemaking procedures;” (2) “these rules are made in lieu of a case by case basis,” (3) “the Health Department’s policy of not enforcing R.C. 3794 is a rule;” (4) “the Health Department’s policy of imposing citation [on the proprietor] whenever smoking is present is a rule,” and (5) “the Health Department has utilized and continues to utilize the aforementioned rules and policies in enforcing the smoking, and therefore has and continues to violate key structural protections of the Ohio Constitution and R.C. 119.”³⁴ Accordingly, Zeno’s demanded a declaration that “relevant policies of the Ohio Department of Health constitute unlawful agency policymaking,” or at minimum, unlawful agency rulemaking.³⁵ Thus, Zeno’s has adequately asserted a facial constitutional challenge to Health Department smoking ban enforcement policies, as further expressed below. And for the reasons articulated below, these policies are invalid, and must be declared as such.

B. Separation of Powers principles prohibit an agency from making public policy.

The “first, and defining, principle of a free constitutional government is the separation of powers,”³⁶ which mandates that “the persons intrusted with power in any one branch 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.”³⁷ This principle prohibits Ohio’s executive agencies from exercising legislative powers by making policy. “While Ohio, unlike other jurisdictions, does not have a constitutional provision specifying the concept of separation of powers this

³³ September 16, 2009 Answer, Counterclaim, and Cross-Claim of Bartec, Inc., DBA Zeno’s Victorian Village, *et al.*, at Paragraphs 68, 69.

³⁴ *Id.*, at Paragraphs 142, 145, 147, 148, and 153.

³⁵ *Id.*, at pp. 25, 26 (Demand for Judgment).

³⁶ See *State v. Bodyke* (2010), 126 Ohio St.3d 266, 933 N.E.2d 753, 2010 -Ohio- 2424.

³⁷ *Id.*

doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.”³⁸ This is in large part because “[t]he people possessing all governmental power, adopted constitutions, completely distributing it to appropriate departments.”³⁹

Enforcement of this model of government is critical: it is intended to serve as “a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”⁴⁰ This “concern of encroachment and aggrandizement *animates judicial decisions* on the separation of powers and *arouses vigilance* against the ‘hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.’”⁴¹ Thus, this Court has “not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.”⁴²

This Court must be particularly scrutinizing with respect to politically-unaccountable agencies, since the constitution “divides power among sovereigns and branches of government precisely so that we may resist the temptation to concentrate power in one location *as an expedient solution to the crises of the day.*”⁴³ Avoiding expedient solutions for enforcement ease “serve[s] to prevent the accumulation of power in any one branch,” the executive, butt further serves to “reduce the risk of tyranny and abuse,” and “secure to citizens the liberties that derive from the diffusion of sovereign power.”⁴⁴ Indeed, even enforcement ease in policing of the “crisis” *de jure*, second-hand smoke, must bow to the separation of powers.

³⁸ *S. Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 158-159, 28 OBR 250, 503 N.E.2d 136

³⁹ *State v. Bodyke* (2010), 126 Ohio St.3d 266, 933 N.E.2d 753, 2010 -Ohio- 2424, citing *Hale v. State* (1896), 55 Ohio St. 210, 214, 45 N.E. 199, 200.

⁴⁰ *State v. Bodyke* (2010), 126 Ohio St.3d.266, 933 N.E.2d 753, 2010 -Ohio- 2424 *Mistretta*, 484 U.S. at 382, 109 S.Ct. 647, 102 L.Ed.2d 714, quoting *Buckley v. Valeo* (1976), 424 U.S. 1, 122, 96 S.Ct. 612, 46 L.Ed.2d 659.

⁴¹ *Id.* (Emphasis added).

⁴² *State v. Bodyke* (2010), 126 Ohio St.3d 266, 933 N.E.2d 753, 2010 -Ohio-2424.

⁴³ See *New York v. United States* (1992), 505 U.S. 144, at 181, 187-188.

⁴⁴ *Id.*, at 181, 182, citing to *Federalist* No. 51. See also *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 114 (“the doctrine was a deliberate design to secure liberty by simultaneously fostering autonomy and comity, as well as interdependence and independence, among the three branches.”)

More specifically, through Section 1, Article II of the Ohio Constitution, the people vested the legislative power of the state in the General Assembly *only*.⁴⁵ The General Assembly sets public policy, and administrative agencies, when granted rulemaking power, may only “develop and administer” those policies.⁴⁶ They may not alter the substance of those policies to effectuate a policy that differs from what the General Assembly has decreed. Thus, Ohio precedent is clear that (1) “[a]n agency exceeds its grant of authority when it creates rules that reflect a public policy not expressed in the governing statute;”⁴⁷ (2) when agencies do in fact 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;”⁴⁸ (3) “[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;”⁴⁹ (4) “[i]t is axiomatic that administrative agency rules * * * must have a reasonable relation to a proper legislative purpose and be neither arbitrary nor discriminatory in their effect;”⁵⁰ and ultimately, (5) “[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.”⁵¹

Here, the ODH smoking ban enforcement policy of imposing strict liability on Ohio’s business owners for the presence of smoking may render enforcement easier, but it transgresses each of these integral principles.

C. In enforcing the smoking ban, ODH imposes a policy of strict liability on proprietors.

⁴⁵ *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.

⁴⁶ *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health* (2002), 96 Ohio St.3d 250, 773 N.E.2d 536, ¶ 41.

⁴⁷ *State v. Bodyke* (2010), 126 Ohio St.3d 266, 933 N.E.2d 753, 2010 -Ohio- 2424.

⁴⁸ *City of Cincinnati v. Cook* (1923), 107 Ohio St. 223, 140 N.E. 655.

⁴⁹ *Weber v. Bd. of Health* (1947), 148 Ohio St. 389, 396, 74 N.E.2d 331, 335-36.

⁵⁰ *Oswalt v. Ohio Adult Parole Auth.*, *supra* at 3.

⁵¹ *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 384-385, 329 N.E.2d 693.

An agency's approach to enforcement, through a course of conduct, constitutes a policy or rule where it constitutes a standard, having general or uniform operation.⁵² For instance, R.C. 119.01 defines "rule" as "any * * * standard having a general and uniform operation, adopted, promulgated, and enforced by any agency * * *." In determining whether a "standard" is a rule or policy, an agency label is irrelevant; the proper focus instead shifts to the nature and effect of the requirement.⁵³ A rule has a general and uniform operation when it operates "in lieu of a case-by-case analysis" of the person or entity subject to the rule.⁵⁴ Next, Webster's Dictionary defines "adopt" as "to choose * * * an opinion, or a course of action."⁵⁵ Black's Law Dictionary defines "promulgate" as "[t]o put (a law or decree) into force or effect."⁵⁶ It defines "enforce" as "[t]o give force or effect to (a law, etc.); *to compel obedience to*."⁵⁷

Sworn testimony of ODH representatives, ODH enforcement documents, evidence and results of ODH smoking ban enforcement policies and practices, and ODH's own legal briefings, and administrative rules demonstrate a policy of portray a policy whereby ODH imposes strict liability on Ohio property owners for the presence of smoke, and abstain from investigating or enforcing key provisions of the law demanding alternate liability for patrons.

One must be cognizant that statewide smoking ban enforcement originates with ODH, and is communicated to those who enforce the ban from the top down: ODH (1) performs numerous seminars educating local health departments on the statewide smoking ban laws and regulations and how to enforce them; (2) provides *ad hoc* guidance to local health departments on the requirements of the statewide smoking ban, and how to enforce them; and (3) drafts the form letters that are used and relied upon in

⁵² See R.C. 119(C) (defining "rule"). A "rule" is tantamount to a "policy."

⁵³ *State ex rel. Saunders v. Indus. Comm.* (2004), 101 Ohio St.3d 125, 128, 802 N.E.2d 650, quoting *Ohio Nurses Assn., Inc. v. Ohio State Bd. of Nursing Edn. & Nursing Registration* (1989), 44 Ohio St.3d 73, 76, 540 N.E.2d 1354 (brackets in original) ("It is the effect of the [document], not how the [agency] chooses to characterize it, that is important.").

⁵⁴ *Condee*, supra at 92-93, 465 N.E.2d at 452.

⁵⁵ Webster's New School & Office Dictionary (1951) (Black's Law Dictionary (8th Ed. 2004) does not define the term).

⁵⁶ Supra (parenthetical in original). (*vb.* 1. To declare or announce publicly; to proclaim. 2. To put (a law or decree) into force or effect. 3. (Of an administrative agency) to carry out the formal process of rulemaking by publishing the proposed regulation, inviting public comments, and approving or rejecting the proposal. --).

⁵⁷ Supra (parenthetical in original). (*vb.* 1. To give force or effect to (a law, etc.); to compel obedience to. 2. Loosely, to compel a person to pay damages for not complying with (a contract).). Emphasis added.

enforcing the smoking ban against Zeno's.⁵⁸ For instance, local designee Columbus Public Health relies upon and/or uses the Ohio Department of Health's position that a proprietor is required to "*prohibit smoking*" under R.C. 3794.02(A).⁵⁹

i. ODH ignores an integral division of the statute.

With this in mind, first, ODH has utterly ignored an entire provision of the smoking ban. R.C. 3794.02(D) addressed patron liability, and states "[n]o person shall refuse to immediately discontinue smoking in a public place, place of employment, or establishment * * * declared nonsmoking * * * when requested to do so by the proprietor or any employee of an employer of the * * * place * * *." The numbers speak for themselves: 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.⁶⁰ Meanwhile neither ODH nor its designees have ever issue one fine for a violation of R.C. 3794.02(D),⁶¹ even though smokers routinely continue to smoke once notified of the ban and/or asked to stop.⁶² 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 or obtain their names or other contact information.⁶³

ii. ODH rules promote citation of the proprietor in all instances.

The Agency's position is that it *must* ignore Division (D), because *it has tied its own hands*, deliberately structuring its formal enforcement scheme so as to only result in proprietor violations. It does this through its reporting system and through expanding proprietor obligations beyond the legislation. First, the agency promulgated OAC 3701-52-08(D), which permits members of the public to report a putative violation of the smoking ban, and only permits citations after an "on-site" interview and investigations.⁶⁴ Even if a non-recalcitrant patron is smoking when ODH performs the on-site

⁵⁸ Tr. 44. October 27, 2009 Deposition of Lance Himes, pp. 32-33, 24, 17; Tr. 72-76.

⁵⁹ Tr. at 74-75.

⁶⁰ 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>.

⁶¹ Tr. 45, 66; Mary Clifton Deposition, 22

⁶² Tr. at 102.

⁶³ Id.

⁶⁴ OAC 3701-52-08(D).

investigation, and all evidence points to a violation of R.C. 3794.02(D) instead of (A), the proprietor is cited, because no previous anonymous complaint has been lodged against the individual, rendering him ineligible for citation. The proprietor is cited instead -- there is simply no way to initiate a Division (D) citation, other than by a proprietor calling ODH on itself, and hoping that the same patron is present when ODH comes to investigate, months later.

This policy is further compounded by OAC 3701-52-02(B), which states “a *proprietor shall take reasonable steps* including, but not limited to, requesting individuals to cease smoking, to ensure that tobacco smoke * * * does not enter any area in which smoking is prohibited.” This vague extra-statutory mandate allows for *ad hoc* and arbitrary determinations of when the presence of smoke equates to employer liability, even where R.C. 3794.02(D) should instead be invoked (OAC 3701-52-02(B) even explicitly preface its requirements as “*in addition to* the [legislative] requirements that [no proprietor shall permit smoking]).

iii. ODH policies and practices promoted citation of proprietors in all instances.

These rules reflect and are in harmony with the less formalized features of ODH’s strict liability schematic, whereby the presence of smoke is everywhere and always a Division (A) proprietor liability. ODH’s legal counsel, proffered enforcement expert,⁶⁵ and enforcement documents demonstrate that ODH and its designees interpret and enforce the ban so as to require proprietors like Zeno’s to *prohibit* smoking,⁶⁶ meaning that proprietors are liable at the instant when smoking is “present” on premises.⁶⁷ To be clear, ODH and its designees read R.C. 3794.02(A) to require that proprietors *prohibit* smoking; communicate that the statewide smoking ban requires proprietors to *prohibit* smoking; and enforce the ban in such a way that requires proprietors to *prohibit* smoking. ODH concedes that this interpretation,

⁶⁵ Zeno’s attempt to depose then-Director Alvin Jackson; ODH refused, and instead pursuant to Civ. R. 30(B)(5), chose Mary Clifton to represent ODH as to its enforcement policies.

⁶⁶ Tr. 44. October 27, 2009 Deposition of Lance Himes, pp. 32-33, 24, 17; Tr. 72-76.

⁶⁷ See “Ohio Smoking Ban Frequently Asked Questions,” and also Tr. 74-75; Lance Himes Deposition, p. 10. Mary Clifton Deposition, pp. 34, 37.

communication, and enforcement render a property owner liable any time that smoking is merely present at his establishment.⁶⁸

Enforcement letters, drafted by ODH and used in enforcement, apply the unlawful standard for R.C. 3794.02(A) of “smoking present,” or “smoking in prohibited area,” while ODH and applicable designee website pages, also introduced as exhibits at trial, featuring smoking ban “FAQs,” state that it is the proprietor’s duty “to prohibit smoking.”⁶⁹ ODH also interprets R.C. 3794.02(A) so as to fine proprietors whenever there is “smoking in a prohibited area,” and it substitutes this phrase for the language of R.C. 3794.02(A), prohibiting permission of smoking only, during enforcement.⁷⁰

Accordingly, those charged with enforcing the ban *never investigate* whether proprietors ask the patrons to discontinue smoking prior to issuing a fine.⁷¹ Instead they maintain “*if there's smoking in the establishment in an enclosed area, that's a violation [by the proprietor].*”⁷² It was admitted on cross examination and in deposition that although R.C. 3792.02(A) prohibits a property owner from permitting smoking, the Ohio Department of Health and its designees enforce the ban in such a way that if a person is smoking in an enclosed area, the proprietor has violated the law.⁷³ Thus, ODH does not enforce Division (A) as written, so as to only fine proprietors when they actually permit smoking; nor does it ever implement Division (D).

iv. Evidence of how the ban was enforced against Zeno’s corroborates the existence of this policy.

Zeno’s proprietors corroborated the existence of this policy by submitting evidence consistent with its existence. The only evidence before the Trial Court and now this Court is that Zeno's does not permit smoking on its premises. Specifically, Richard and Mitchell Allen, proprietors of Zeno’s, testified that Zeno’s has posted “no smoking” signs, has pulled ashtrays, and has a policy of informing patrons of the

⁶⁸ See “Ohio Smoking Ban Frequently Asked Questions,” and also Tr. 74-75; Lance Himes Deposition, p. 10. Mary Clifton Deposition, pp. 34, 37.

⁶⁹ See Trial Exhibits M and N.

⁷⁰ Tr. 53-60; See Trial Exhibits M and N.

⁷¹ *Id.* at 69.

⁷² *Id.* at 71.

⁷³ Tr. at 42-43, 45; Mary Clifton Deposition at 21-22, 26.

smoking ban upon seeing them light cigarettes, and asking smoking patrons to discontinue smoking.⁷⁴ The policy has been communicated to Zeno's employees, and Mr. Allen, management, and employees have all enforced this policy, and Mr. Allen has also witnessed his employees enforcing this policy.⁷⁵

Meanwhile, smoking ban investigators have issued fines to Zeno's for permitting smoking in instances where Zeno's had, prior to the arrival of the investigators, asked the smoking patron not to smoke.⁷⁶ Occasionally, patrons who are asked by Zeno's to discontinue smoking or informed by Zeno's of the smoking ban nevertheless continue to smoke or resume smoking later.⁷⁷ Unfortunately, some patrons 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.⁷⁸

However, head of City of Columbus smoking ban enforcement Calvin Collins testified that as a matter of policy, he had never investigated whether or not Mr. Allen (or other proprietors) had asked the patrons to discontinue smoking prior to issuing the fine.⁷⁹ Mr. Collins described his enforcement of the ban as follows: 'if there's smoking in the establishment in an enclosed area, that's a violation [by the proprietor].'⁸⁰ Thus, even though the Ohio Administrative Code places the burden of proving each element of a violation on the enforcement agency, ODH does not investigate whether a patron has been asked to discontinue smoking,⁸¹ and thus does not investigate whether the proprietor has "permitted" smoking: enforcement agents shoot first and ask questions later, if at all, requiring Ohio's business and property owners hire an attorney and pursue a through hearing to contest each unsubstantiated fine.

v. ODH has acknowledged and defended its unwritten strict liability policy in court.

Moreover, ODH has even conceded implementing this policy, and vociferously defended it in court. In April of 2009, before filing its action against Zeno's and also before the policy was invalidated

⁷⁴ Id.
⁷⁵ Tr. at 100-101
⁷⁶ Tr. at 102.
⁷⁷ Tr. at 99.
⁷⁸ Tr. at 99.
⁷⁹ Tr. at 69, 71.
⁸⁰ Tr. at 71.
⁸¹ Tr. at 66; Deposition of Mary Clifton at 22.

for the first time by the Court of Appeals for the Tenth District of Ohio, in *Pour House v. Ohio Department of Health*, ODH argued in its merit brief in that case that a proprietor could be cited upon the mere presence of smoke because “the Smoke Free Act is a strict liability statute,” and “culpability is not required to show a violation of the statute.”⁸²

Further, ODH argued, “it is appropriate to apply strict liability. Holding otherwise would impede the statute’s purpose.”⁸³ Further yet, “the Smoke Free Act regulate[s] dangerous behavior that affects the public’s health and safety and therefore, strict liability is an appropriate way to enforce the statute,” particularly since “[proprietors have] the best chance of enforcing the statute policies and procedures to keep such dangers out of the reach of the public.”⁸⁴ Similarly, ODH argued “the serious health consequences endured by the public as a result of being exposed to secondhand smoke demonstrates that the drafters intended to impose liability without fault * * *.”⁸⁵

Next, ODH asserted that anything other than a policy of strict liability, i.e. instantaneous citation of the proprietor upon presence of smoke, “would leave the public interest and welfare (health and safety) to the mercy of the unscrupulous.”⁸⁶ Finally and most egregiously, ODH then concluded “[a]fter ODH proved that *smoking occurred in a prohibited area, in violation of R.C. 3794.02(A)*, the burden shifted to Appellant to set forth an affirmative defense.”⁸⁷ ODH pursued and continues to pursue this policy even though its own administrative rule, OAC 3701-52-08(E) affixes the burden of proving smoking ban violations upon the Health Department (stating “[a]ll findings of violation by the department, including continuing violations, shall be supported by a preponderance of the evidence”).

⁸² *Pour House, Inc. v. Ohio Dept. of Health*, 10th Dist. No. 09AP-157, 2009-Ohio-5475, ¶ 14, 185 Ohio App.3d 680, 925 N.E.2d 621, April 20, 2009 Merit Brief of Defendant-Appellee the Ohio Department of Health, p. 8.

⁸³ *Id.*, at p. 12.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*, at p. 13.

⁸⁷ *Id.*, at 14.

It was upon these predicates that Zeno's and so many others were cited without investigation, forced to bear the burden of contesting each unfounded citation, and sued in this case and others. Thus ODH clearly maintains the standard, rule, and/or policy when enforcing the smoking ban.⁸⁸

D. The Agency's strict liability enforcement policy violates Separation of Powers principles.

Ohio precedent is clear that (1) "[a]n agency exceeds its grant of authority when it creates rules that reflect a public policy not expressed in the governing statute;"⁸⁹ (2) when agencies do in fact 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;"⁹⁰ (3) "[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;"⁹¹ (4) "[i]t is axiomatic that administrative agency rules * * * must have a reasonable relation to a proper legislative purpose and be neither arbitrary nor discriminatory in their effect;"⁹² and ultimately, (5) "[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."⁹³

⁸⁸ Zeno's challenge implicitly include the claim that the ODH policy identified herein is also an invalid agency rule, meaning that the agency has engaged in unlawful rulemaking: R.C. 119.02 states "[T]he failure of any agency to comply with [the agency rule-making procedures contained in R.C. 119.01 to 119.13, inclusive] shall invalidate any rule." In *Condee v. Lindley*, (1984), 12 Ohio St.3d 90, 465 N.E.2d 450, the Ohio Supreme Court concluded that a policy that "was adopted in lieu of a case-by-case analysis of each taxpayer's liability," was a rule, and accordingly, that "[if the agency desired] to continue application of the policy in question, only compliance with [the rule-making procedures in] R.C. Chapter 119 and R.C. 5703.14 may permit it to do so." The Court in that case further noted "It is * * * necessary that rules and regulations be adopted as such, and they cannot be established by 'unwritten, unpublished criteria or guidelines.'" Consequently: [A]lthough [an agency] is empowered to adopt rules and regulations, it must do so by the appropriate manner. It may not substitute *unwritten* and *unpublished* criteria or guidelines for the adoption of rules and regulations in the appropriate manner. It is unnecessary in this case to determine the reasonableness or validity of the *unwritten, unpublished criteria or guidelines inasmuch as they are unenforceable in any event.*" However, this implicit claim is only relevant if this Court finds that ODH (1) has promulgated a policy; (2) that it has the authority, rather than a lack of authority, to promulgate.

⁸⁹ *State v. Bodyke* (2010), 126 Ohio St.3d 266, 933 N.E.2d 753, 2010 -Ohio- 2424.

⁹⁰ *City of Cincinnati v. Cook* (1923), 107 Ohio St. 223, 140 N.E. 655.

⁹¹ *Weber v. Bd. of Health* (1947), 148 Ohio St. 389, 396, 74 N.E.2d 331, 335-36.

⁹² *Oswalt v. Ohio Adult Parole Auth.*, supra at 3.

⁹³ *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 384-385, 329 N.E.2d 693.

i. ODH's imposition of strict liability on proprietors "reflects a policy not expressed in the governing statute."

R.C. 3794.02(A) provides in pertinent part that "[n]o proprietor * * * shall permit smoking in the public place or place of employment." Rendering R.C. 3794.02(A) a strict liability offense is inconsistent with the legislative intent behind the statute.

First, the legislature deliberately avoided creating a strict liability offense, even though it had the opportunity to do so. For instance, the legislature created a strict liability offense in R.C. 3794.02(B), which requires a proprietor to "ensure that tobacco smoke does not enter any area in which smoking is prohibited." If the legislature had intended for the proprietor to be subject to liability *where only smoking is present in his establishment*, it simply could have indicated as much through its drafting. For example, it could have written R.C. 3794.02(A) to read "a proprietor shall be liable whenever smoking is present within the indoors of premises under its control."

However, instead of mimicking the strict liability approach of subsection (B), the legislature used a word that creates a standard, and thus cannot be without meaning. The term "permit" must be construed as having *some* meaning. A construction whereby liability is imposed upon a proprietor who takes a myriad of steps to preclude smoking both prior to and after the lighting of the cigarette within its establishment leaves the term "permit" with no meaning at all.

Thus, while ODH's unwritten policy imposes strict liability on proprietors, this is not what the law requires: a proprietor is not required to *prohibit* smoking. Instead it 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.⁹⁴ While the law provides a safe harbor for proprietors who have posted signs, pulled ashtrays, and notified smoking patrons of the ban, the Department of Health'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.

⁹⁴ *Pour House, Inc. v. Ohio Dept. of Health*, 2009 Ohio 5475.

Further, the mere observation of “smoking in prohibited area” is not the same standard as forbidding a proprietor from permitting smoking, because, under the latter, the proprietor is only liable if he permits the smoking, while under the former, the proprietor is liable each and every time that smoking occurs on his premises, regardless of whether he permits it. Again, the Health Department’s standard of enforcement extinguishes the safe harbor for proprietors, and requires that they do something more than abstain from permitting smoking. Because these standards depart from R.C. 3794.02, and because they are utilized without agency rulemaking, they constitute not only a *departure from the law*, but also *the Ohio Department of Health’s exceeding of its power to enforce the law*, rather than to make it.

Next, the legislative intent to impose a standard other than strict liability on proprietors is further evidenced by the existence of R.C. 3794.02(D). That subsection states that “[n]o person shall refuse to immediately discontinue smoking in a public place, place of employment, or establishment * * * declared nonsmoking * * * when requested to do so by the proprietor or any employee of an employer of the * * * place * * *.”

Clearly, R.C. 3794.02(A) and R.C. 3794.02 (D) are mutually exclusive. That is, under Division (D), the patron, and not the proprietor, is subject to liability where the patron has refused to discontinue smoking once the proprietor has posted “no smoking” signs, pulled ashtrays, and asked that the patron no longer smoke (these are the only legislative mandates in the statute to inform what constitutes the permission of smoking). This provision evidences the legislative intent to protect the proprietor from liability where the patron acts in defiance of the proprietor’s efforts to stop the smoking.

Consequently, pursuant to the plain language of R.C. 3794, a proprietor does not “permit” smoking, so as to establish liability, the very second that a non-compliant patron lights a cigarette within the proprietor’s establishment, or once it complies with all R.C. 3794 mandates. This scheme of alternate liability differs dramatically from ODH’s policy of imposing strict liability on the proprietor: in light of the 33,000 to zero disparity in enforcement actions taken under two co-equal divisions of the law, this Court must ask itself “why did the legislature promulgate Division (D)?”

One court has even made precisely this point. Soon after ODH sued Zeno's over fines issued pursuant to this policy, the Court of Appeals for the Tenth District rebuffed the policy, observing "the word 'permit' connotes some affirmative act or omission," and a tavern owner does not permit smoking where it posts no-smoking signs and removes ashtrays.⁹⁵ Accordingly, "[a] proprietor violates R.C. 3794.02(A) only when the proprietor permits smoking," and "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."⁹⁶ Put another way:

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."⁹⁷

And further, the ODH or its designee "must prove each of the elements of a smoking violation."⁹⁸ Thus Pour House invalidated the ODH policy of refusing to investigate the facts of the matter, and simply levying a \$5,000 fine under the extra-legal premise that "smoking is present." However, it did not do so until several months after ODH had filed its Complaint against Zeno's.

These facts support the following finding by the trial court: "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 where it was authorized to issue citations."⁹⁹

⁹⁵ Id., citing *Bexley v. Selcer* (1998), 129 Ohio App.3d 72, 77,(citing Black's Law Dictionary (5th ed.rev.1979).

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ 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.

⁹⁹ Decision and Entry Denying Plaintiff's Request for Permanent Injunction at 8.

Finally, to remove all doubt, R.C. 3794.07 requires that the smoking ban be enforced by the Health Department and its designees, rather than by proprietors, by stating “[t]his chapter shall be enforced by the department of health and its designees.” This signifies that the legislature explicitly rejected ODH’s position that responsibility for enforcement lays with the proprietor, and that the proprietor is thus liable each and every time a patron smokes.

ii. The Agency’s strict liability policy is “unreasonable, arbitrary, and discriminatory.”

The ODH policy of imposing strict liability on proprietors for the presence of smoke is discriminatory. “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.”¹⁰⁰ Similarly, “[I]t is axiomatic that administrative agency rules *** must have a reasonable relation to a proper legislative purpose and be neither arbitrary nor discriminatory in their effect.”¹⁰¹ These principles dovetail with the requirements in Ohio’s codified rules of construction that “the entire statute is intended to be effective;” and “[a] just and reasonable result is intended,”¹⁰² and the axiom that “(i)n determining the legislative intent of a statute it is the duty of this court to give effect to the words used in a statute, *not to delete words used*, or to insert words not used.”¹⁰³

ODH’s policy of imposing strict liability on proprietors violates R.C. 1.47(B) and discriminates against certain divisions of the statute, and against Ohio’s business and property owners in so doing. First, ODH only cites *one* party responsible for the presence of smoke, even though R.C. 3794 creates *two* classes of parties responsible for the presence of smoke: proprietors *and* patrons. Likewise, it creates distinct scenarios under which each class is liable. These are outlined in Divisions (A) and (D) of R.C. 3794.02. Clearly, R.C. 3794.02(A) and R.C. 3794.02 (D) are mutually exclusive. That is, under subsection (D), the patron, and not the proprietor, is subject to liability where the patron has refused to discontinue smoking.

¹⁰⁰ *Weber v. Bd. of Health* (1947), 148 Ohio St. 389, 396, 74 N.E.2d 331, 335-36.

¹⁰¹ *Oswalt v. Ohio Adult Parole Auth.*, *supra* at 3.

¹⁰² R.C. 1.47(B); R.C. 1.47(C).

¹⁰³ *Columbus-Suburban Coach Lines*, *supra*.; *Wheeling Steel Corp.*, *supra*. Emphasis Added.

This provision evidences the legislative intent to protect the proprietor from liability where the patron acts in defiance of the proprietor's efforts to stop the smoking. However, ODH has created a system whereby it only cites, and in fact, is only able to cite, proprietors. The discriminatory results are unsurprising: 33,000 citations to proprietors under Division (A), and not a single citation to a patron under Division (D). The Ohio Constitution does not permit ODH, for enforcement ease or due to a "deep-pockets" strategy, to pick and choose which divisions of the law it must enforce.

Further, R.C. 3794.07 makes this clear, stating "[t]his chapter [i.e., the *entire* chapter] shall be enforced by the department of health and its designees." ODH's enforcement of only those parts of the chapter that it likes, or that are easy to enforce, violates this provision and R.C. 1.47 in the process, and is discriminatory and arbitrary. Likewise, ODH's attempt to transfer enforcement obligations for the entire chapter to Ohio's business and property owners is discriminatory and arbitrary.

Indeed, 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,"¹⁰⁴ and in reading R.C. 3794.02(A) together with R.C. 3794.02(D), concluded "[a]s 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."¹⁰⁵ This Court must find that ODH has implemented an unlawful policy of strict liability in enforcing the smoking ban, preclude it from continuing this usurpation of legislative authority, and require that it instead enforce the plain meaning of the statute.

E. Upon finding an unlawful agency rule or policy, this Court may vacate fines issued pursuant thereto, or abstain from foreclosing those fines from being later vacated.

It is not an indispensable element of Zeno's claims for current and prospective relief that fines imposed pursuant to this unlawful policy be negated. However, incidental to Zeno's prevailing on such claims, this Court should do so, or at minimum, not foreclose rightful remedies for doing so. Mechanisms

¹⁰⁴ 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.

¹⁰⁵ *Id.* at 9, emphasis added.

are available to this court to (1) abrogate such fines; (2) merely permit such fines to be abrogated in subsequent Civ. R. 60(B) proceedings; or (3) simply enjoin collection actions upon unpaid fines.

i. This Court should abrogate Zeno's fines pursuant to the *Sunburst Doctrine*.

The default position is that taxes, assessments, or fines imposed pursuant to an unconstitutional statute or rule are not owed, and if paid, must be refunded.¹⁰⁶ However, as recognized by the United States Supreme Court in *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, state courts have broad authority to determine whether their decisions shall operate prospectively only.¹⁰⁷ Ohio acknowledges this, stating, “[c]onsistent with what has been termed the *Sunburst Doctrine*, state courts have * * * recognized and used prospective application of a decision as a means of avoiding injustice in cases dealing with questions having widespread ramifications for persons not parties to the action.”¹⁰⁸ The Court then outlined the limited factors that, in aggregate, may justify not authorizing a refund or abrogating a fine assessed under an ultimately unconstitutional assessment: (1) whether the Court’s holding amounts to a new rule of law; (2) whether the state justifiably relied on the availability of funds because of the presumptive validity of the statute or its actions; (3) the length of time between the statute’s enactment and any judicial challenge to the law; and (4) whether the aggrieved party has suffered financial harm.¹⁰⁹ Here, there is no “injustice” to be avoided for those not party to this action. Consequently, this Court’s holding should have retroactive effect - - no rule has ever been promulgated, and ODH’s enforcement policy has exceeded its authority since its inception.

The best rationale for such an approach is provided Justice Douglas, in his concurrence in *Hoover*:

I am firmly convinced that the rule enunciated in this case should also have application to the parties in this action. Such an approach finds widespread support. Indeed, the parties to this appeal should not be the recipients of a Pyrrhic victory. If this court were to merely announce this new rule without applying it, such announcement could be considered mere dictum. Application of this decision to the parties in this action will not only remove this decision from the status of obiter dictum, it will also serve, in keeping with our system of private enforcement of legal rights, to reward the present parties for their industry, expense,

¹⁰⁶ *Metropolitan Life Insurance Co. v. Department of Insurance* (1985), 373 N.W.2d 399.

¹⁰⁷ *Great N. Ry. Co. v. Sunburst Oil & Refining Co.* (1932), 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360.

¹⁰⁸ *Hoover v. Franklin Cty. Bd. of Commrs.* (1985), 19 Ohio St.3d 1, 9, 19 OBR 1, 482 N.E.2d 575; *OAMCO v. Lindley* (1987), 29 Ohio St.3d 1, 29 OBR 122, 503 N.E.2d 1388, syllabus

¹⁰⁹ *Hoover*, supra.

and effort for having given to this court the opportunity to rid the body of our law of an unjust rule. The resolution of issues having broad public interest should be encouraged. As was stated in *Willis v. Dept. of Conservation & Economic Dev.* (1970), 55 N.J. 534, 541, 264 A.2d 34, 38, “ * * * case law is not likely to keep up with the needs of society if the litigant who successfully champions a cause is left with only that distinction.”¹¹⁰

ii. This Court need not abrogate Zeno’s fines, but should not foreclose subsequent Civ. R. 60(B) proceedings from doing so.

If this Court finds an unlawful policy, Zeno’s s cannot be foreclosed from using Civ. R. 60(B) to challenge past administrative findings of violation imposed pursuant to the unlawful policy and rule articulated above. Specifically, Civ. R. 60(B)(5) permits an Ohio court to relieve a party from a final judgment, order, or proceeding for “any other reason justifying relief from the judgment.”

This court has also held that Civ.R. 60(B) is a “remedial rule to be liberally construed so that the ends of justice may be served.”¹¹¹ “Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits.”¹¹² Indeed, the law does not favor judgments by default, and it is “a general tenet of Ohio jurisprudence * * * that cases should be decided on their merits whenever possible.” *Hopkins v. Quality Chevrolet, Inc.* (1992), 79 Ohio App.3d 578, 583, 607 N.E.2d 914. Moreover, “[m]atters involving large sums [of money] should not be determined by default judgments if it can reasonably be avoided. * * * Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits.”¹¹³

¹¹⁰ *Hoover v. Franklin Cty. Bd. of Commrs.* (1985), 19 Ohio St.3d 1, 9, 19 OBR 1, 482 N.E.2d 575 (Douglas, concurring), citing *Molitor v. Kaneland Community Unit District No. 302* (1959), 18 Ill.2d 11, 163 N.E.2d 89 (and cases cited therein); *Holytz v. Milwaukee* (1962), 17 Wis.2d 26, 115 N.W.2d 618; *Smith v. State* (1970), 93 Idaho 795, 473 P.2d 937; *Becker v. Beaudoin* (1970), 106 R.I. 562, 573, 261 A.2d 896, 902; *Kitto v. Minot Park District* (N.D.1974), 224 N.W.2d 795, 804. (Internal citations omitted).

¹¹¹ *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, 665 N.E.2d 1102.

¹¹² *GTE Automatic Elec., Inc.*, 47 Ohio St.2d 146, 1 O.O.3d 86, 351 N.E.2d 113, paragraph three of the syllabus.

¹¹³ *Estate of Orth v. Inman*, Franklin App. No. 99AP-504, 2002-Ohio-3728, 2002 WL 1626149, ¶ 30, quoting *United States v. Williams* (D.C.Ark.1952), 109 F.Supp. 456, 461; *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 247, 18 O.O.3d 442, 416 N.E.2d 605, fn. 5.

Here, due to the expense of appealing each separate improper citation imposed pursuant to ODH's strict liability policy, Zeno's and many other proprietors have been unable to challenge each citation, effectively submitting to default judgment by not appealing citations to ODH. Moreover, Zeno's and others could not have known of ODH's unwritten policy of strict liability until they had already received a great number of fines in identical scenarios not constituting violations. To the extent that failure to contest these fines to the agency constitutes a default, Zeno's and others should be permitted to abrogate these fines through Civ. R. 60(B).

This method of the Court affording prospective relief only, and permitting the parties to employ Civ. R. 60(B) to address fines issues pursuant to an unlawful agency policy, extinguishes the greatest concerns raised by both the Appellate Court and ODH, i.e. that this action is nothing more than a "collateral attack" on "final judgments." Indeed, as this Court stated in *Ohio Pyro*, a case heavily relied upon by ODH and the Appellate Court,

In civil cases, a motion under Civ.R. 60(B) is one procedure available to a party (or a party's legal representative) to attempt to obtain relief from a final order or judgment in the issuing court. A proceeding under Civ.R. 60(B) technically falls within the definition of a collateral attack, but it is governed by the specific provisions of that rule.¹¹⁴

Further, Civ.R. 60(B) relief is appropriate when "the interests of justice demand the setting aside of a judgment normally accorded finality"¹¹⁵ Thus, this Court may choose to only act as to Zeno's claims and defenses requesting prospective relief, but if it does so, it should not create a result whereby Ohio's business and property owners are forced to pay assessments that never should have been imposed - - Civ. R. 60 (B) is one adequate method of defending against this injustice.

iii. Neither this Court nor any subsequent proceeding need disturb "final judgments" to provide relief from unlawfully imposed fines.

In cases where fines issued pursuant to an unlawful policy have not yet been paid, this Court may simply enjoin the Ohio Attorney General from continuing to pursue collection of those fines. It is a firm principle of Ohio law that "courts may enjoin the illegal levy or collection of taxes and assessments," and

¹¹⁴ *Ohio Pyro*, infra, citing *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 1 O.O.3d 86, 351 N.E.2d 113, paragraph two of the syllabus.

¹¹⁵ See *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 21, 520 N.E.2d 564, 566.

even “entertain actions to recover them when collected.”¹¹⁶ And this Court can construe the terms “taxes” and “assessments” broadly, so as to include the imposition of smoking ban fines.¹¹⁷ Here, the Ohio Attorney General has threatened to foreclose on and seize assets of businesses who cannot afford to pay smoking ban fines. Enjoining these collection efforts affords a just result without disturbing any prior judgment, whether civil or administrative.

Proposition of Law No. 2: Inclusion of Zeno’s, and 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 a complete ban on indoor smoking is an unprecedented expansion of the state’s police power, which surpasses the recognized boundaries of that power and unreasonably transgresses property rights. 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.”¹¹⁸ In determining whether an interference with property rights is beyond the necessities of the situation, Ohio courts must be “extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power.”¹¹⁹ 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.”¹²⁰

Inclusion of bars such as Zeno’s 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. R.C. 3794.02(A)

¹¹⁶ See R.C. 2723.01.

¹¹⁷ See *Paramount Film Distributing Corp. v. Tracy* (1963), 175 Ohio St. 55, 191 N.E.2d 839, 23 O.O.2d 352 (“It is difficult to believe that the General Assembly would have intended to provide an injunctive remedy only with respect to illegally levied taxes and assessments other than license fees.”); *Baker v. City of Cincinnati* (1860), 11 Ohio St. 534, 543, 544.

¹¹⁸ *State ex. rel. Killeen Realty Co. v. City of East Cleveland* (1959), 169 Ohio St. 375, 160 N.E.2d 1.

¹¹⁹ *City of Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539, 49 N.E.2d 412, 414.

¹²⁰ *Id.*, at 546.

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 permissible channel: formal constitutional amendment.

A. The Smoking Ban is a land use restriction

The smoking ban is a restriction on the use of property, and must be analyzed as such. Its prohibitions only apply to proprietors of certain “public places” and “places of employment” as defined in R.C. 3794.01(B) and R.C. 3794.01(C), respectively, who are not exempted by R.C. 3794.03. Thus the ban does not prohibit the harmful act of smoking, but rather, prohibits certain property owners from permitting smoking.

B. Heightened scrutiny is required when assessing the deprivation of property rights.

ODH invokes the “*Lochner* era,” and pleads with this Court to apply the equivalent of rational basis review in scrutinizing state power over Zeno’s property, and Zeno’s rights. However, this matter is governed by significantly more protective state constitutional law.

i. The Ohio Constitution permits greater protection of rights.

The United States Supreme Court has repeatedly reminded state courts that they are free to construe their state constitutions so as to provide different, and broader, protections of individual liberties than those offered by the federal Constitution.¹²¹ Accordingly, Ohio courts are free to interpret the Ohio Constitution

¹²¹ *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing, e.g., *City of Mesquite v. Aladdin's Castle, Inc.* (1982), 455 U.S. 283, 293, 102 S.Ct. 1070, 1077, 71 L.Ed.2d 152, 162 (“ * * * [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.”); and *California v. Greenwood* (1988), 486 U.S. 35, 43, 108 S.Ct. 1625, 1630, 100 L.Ed.2d 30, 39 (“Individual States may surely construe their own constitutions as imposing

without adherence or deference to federal court decisions-- the United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by state citizens.”¹²² Put another way, “states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution. *However, there is no prohibition against granting individuals or groups greater or broader protections.*”¹²³

This Court has not hesitated to recognize this capacity: [W]e believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. * * * [S]tate courts are unrestricted in according greater civil liberties and protections to individuals and groups.¹²⁴ In 2008, the Ohio Supreme Court reaffirmed this axiom, acknowledging in *State v. Gardner*, that “[w]e are, of course, free to determine that the Ohio Constitution confers greater rights on its citizens than those provided by the federal Constitution, and we have not hesitated to do so in cases warranting an expansion,”¹²⁵ and recognized that “state constitutions are a vital and independent source of law.”¹²⁶ The Ohio Supreme Court’s 1941 ruling in *Direct Plumbing Supply v. City of Dayton* stresses the importance using the Ohio Bill of Rights as an independent basis for protecting individual rights:

‘The guaranties of sections 1, 2, and 19 of the Bill of Rights in the Constitution of Ohio are similar to those contained in the amendment to the federal Constitution referred to [the 14th Amendment].’ If in the midst of current trends toward regimentation of persons and property, this long history of parallelism seems threatened by a narrowing federal interpretation of federal guaranties, it is well to remember that Ohio is a sovereign state and

more stringent constraints on police conduct than does the Federal Constitution.”). See, also, *Pruneyard Shopping Ctr. v. Robins* (1980), 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741, 752.

¹²² *PruneYard Shopping Ctr. v. Robbins* (1980), 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741; *State v. Brown* (1992), 63 Ohio St.3d 349, 588 N.E.2d 113.

¹²³ *Arnold*, supra.

¹²⁴ *Arnold*, supra. After making this paradigmatic statement, the Ohio Supreme Court, recognized an obligation “not to disturb the clear protections provided by the drafters of [the Ohio] Constitution.” As such, in *Arnold*, it interpreted the Ohio Constitution’s protection of the Right to Bear Arms, articulated in Section 4, Article I of the Ohio Constitution, as more protective of that right than the Second Amendment. Emphasis added.

¹²⁵ *State v. Gardner* (2008) 118 Ohio St.3d 420, 889 N.E.2d 995, citing *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (holding that the Ohio Constitution’s Takings Clause affords greater protection than the corresponding federal provision).

¹²⁶ *Gardner*, supra, citing generally William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights* (1986), 61 N.Y.U.L.Rev. 535. asdf

that the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality. Decision here may be and is bottomed on those guaranties.¹²⁷

Consequently, this Court is in no manner bound by federal standards.

ii. The Ohio Constitution and this Court's precedent afford heightened protection to property rights.

One of the faults of the 1802 Ohio Constitution identified by the drafters of the 1851 Ohio Constitution was that its clauses were deemed insufficient to properly protect the private property rights of landowners.¹²⁸ As a result, in the revision, the drafters changed the placement and rewrote the property clauses, and strengthened the eminent domain clause, and these protections were placed at the forefront of the constitution.¹²⁹

Section 1, Article 1 of the Ohio Constitution provides the following: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."¹³⁰ The 1896 Ohio Supreme Court case of *Palmer v. Tingle*,¹³¹ obviously of a closer proximity in time to the drafting of the 1851 Constitution, illuminates the vitality of Section 1, Article 1: "The inalienable right of enjoying liberty and *acquiring property*, guaranteed by the first section of the bill of rights of the constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are *necessary* for the common welfare."¹³²

Meanwhile, Section 19, Article I states "Private property shall ever be held inviolate, but subservient to the public welfare."¹³³ In aggregating this provision with Section 1, Article I, "Ohio has

¹²⁷ *Direct Plumbing Supply v. City of Dayton* (1941), 138 Ohio St. 540, 38 N.E.2d 70, 137 A.L.R. 1058, 21 O.O. 422, citing *Wilson v. City of Zanesville*, supra; *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 110 N.E. 648, at p. 651.

¹²⁸ *Moore v. Middletown* (2010), 2010-Ohio-2962 (Ringland, concurring and dissenting), citing Fischel, *The Offer/Ask Disparity and Just Compensation for Takings: A Constitutional Choice Perspective*, 15 *International Rev.L. & Econ.* 187, 197.

¹²⁹ *Moore v. Middletown* (2010), 2010-Ohio-2962 (Ringland, concurring and dissenting), citing 2 *Liberty U.L.Rev.* at 264.

¹³⁰ Section 1, Art. I, Ohio Constitution.

¹³¹ *Palmer v. Tingle* (1896), 55 Ohio St. 423, 36 W.L.B. 315, 45 N.E. 313

¹³² *Id.*

¹³³ Section 19, Art. I, Ohio Constitution.

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, no matter how great the weight of other forces.”¹³⁴

In Ohio, these “venerable rights associated with property” are not confined to the mere ownership of property. Rather, this Supreme Court recently acknowledged that “[t]he rights related to property, i.e., to *acquire, use, enjoy, and dispose of property*, are among the most revered in our law and traditions.”¹³⁵ And this is as it must be: merely protecting *ownership* of property becomes a hollow and illusory right when regulations of that same property are permitted to eat away at the owner’s capacity to use and enjoy the property, while concomitantly diminishing its value.

For this very reason, “the free use of property is guaranteed by Section 19, Article I of the Ohio Constitution,”¹³⁶ and this Court has previously ruled “any substantial interference with the elemental rights growing out of ownership of private property is considered a taking.”¹³⁷

Believed to be derived fundamentally from a higher authority and natural law, property rights were so sacred that they could not be entrusted lightly to “the uncertain virtue of those who govern.”¹³⁸ As such, property rights were believed to supersede even constitutional principles. Thus, “[t]o be * * * protected and * * * secure in the possession of [one’s] property is a right inalienable, a right which a written constitution may recognize or declare, but which existed independently of and before such recognition, *and which no government can destroy.*”¹³⁹ As this Court noted in *Norwood*, quoting Chief Justice Bartley:

The right of private property is an *original and fundamental* right, existing anterior to the formation of the government itself; * * *. Government is the necessary burden imposed on man as the only means of securing the protection of his rights. And this protection—the

¹³⁴ *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1129 (internal citations omitted).

¹³⁵ *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1128 (internal citations omitted).

¹³⁶ *State v. Cline*, 125 N.E.2d 222, 69 Ohio Law Abs. 305.

¹³⁷ *Smith v. Erie RR. Co.* (1938), 134 Ohio St. 135, 142, 16 N.E.2d 310.

¹³⁸ *Norwood*, *supra.*, citing *Parham v. Justices of Decatur Cty. Inferior Court* (Ga.1851), 9 Ga. 341, 348. See, also, *Bank of Toledo v. Toledo* (1853), 1 Ohio St. 622, 664; *Proprietors of Spring Grove*, 1 Ohio Dec. Reprint 316; Joseph J. Lazzarotti, *Public Use or Public Abuse* (1999), 68 U.M.K.C.L.Rev. 49, 54; J.A.C. Grant, *The “Higher Law” Background of the Law of Eminent Domain* (1932), 6 Wisc.L.Rev. 67.

¹³⁹ *Norwood*, *supra.*, citing *Henry v. Dubuque Pacific RR. Co.* (1860), 10 Iowa 540, 543.

primary and only legitimate purpose of civil government, is accomplished by protecting man in his rights of personal security, personal liberty, and private property. The right of private property being, therefore, an *original right*, which it was one of the primary and most sacred objects of government to secure and protect, *is widely and essentially distinguished in its nature, from those exclusive political rights and special privileges * * * which are created by law and conferred upon a few * * **. The fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, * * * were evidently designed to protect the right of private property as one of the primary and original objects of civil society * * *.¹⁴⁰

For these reasons, “the founders of our state expressly incorporated individual property rights into the Ohio Constitution in terms that reinforced the sacrosanct nature of the individual’s “inalienable” property rights.”¹⁴¹

In cases implicating property uses by business, this right to use property should be in considered in conjunction with the Supreme Court of Ohio’s acknowledgment that, in Ohio, “the right to do business” is a right “equally sacred” to “free speech.”¹⁴² Thus even the right to free speech “cannot be used to the exclusion of other constitutional rights.”¹⁴³ These rights include the individual “strands in an owner’s bundle of property rights” such as “the right to exclude,” and the right to use the property.¹⁴⁴ Thus, as against property rights, “the law is well settled that there is no right under [even] the First Amendment to the United States Constitution for any person to use a privately owned shopping center as a forum to communicate on any subject without the permission of the property owner.”¹⁴⁵

In *Direct Plumbing Supply v. City of Dayton*, this Court decisively struck down the regulation of property at issue, concluding that “[t]he burdens of the ordinance are unduly oppressive upon individuals and interfere with the rights of private property * * * beyond the necessities of the situation. The ordinance

¹⁴⁰ *Norwood*, supra., citing *Bank of Toledo*, 1 Ohio St. at 632. (Emphasis added).

¹⁴¹ *Norwood*, supra.

¹⁴² *Eastwood Mall v. Slanco* (1994), 68 Ohio St.3d 221, citing *Crosby v. Rath* (1940), 136 Ohio St. 352, 355-356, 16 O.O. 496, 497, 25 N.E.2d 934, 935.

¹⁴³ *Id.* See also *Pruneyard Shopping Ctr. v. Robins* (1980), 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741. (“A state may adopt greater protections for free speech on private property than the First Amendment does, so long as those broader protections do not conflict with the private property owner’s constitutional rights under the First, Fifth and Fourteenth Amendments to the United States Constitution.”)

¹⁴⁴ *Eastwood Mall*, supra, citing *Bresnick v. Beulah Park Ltd. Partnership* (1993), 67 Ohio St.3d 302, 303, 617 N.E.2d 1096, 1097 (citing *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 419, 435, 102 S.Ct. 3164, 3176, 73 L.Ed.2d 868, 882).

¹⁴⁵ *Eastwood Mall*, supra.

is therefore held to be invalid as in contravention of Section 19, Article I, of the Constitution of Ohio.”¹⁴⁶ In analyzing infringements on property rights, 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.”¹⁴⁷ 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.”¹⁴⁸ Consequently a high level of scrutiny must be applied to the state’s deprivation of a critical use of Zeno’s property, rather than permissive deference.¹⁴⁹

iii. This Court has traditionally protected property rights from the police power.

This Court’s precedent is replete with examples of appropriate invalidations of the police power. In *City of Cincinnati v. Correll*, the Supreme Court of Ohio held that a regulation unduly interfered with property rights and small business. The Court began by noting “Legislative bodies may not, under the guise of protecting the public interest, interfere with private business by imposing arbitrary, discriminatory, capricious or unreasonable restrictions upon lawful business.”¹⁵⁰ In addition to articulating a stringent test for application of the police power to property rights and small business, *Correll* stands for the principle “the judgment of the general assembly in such cases is not conclusive.”¹⁵¹ In other words, Ohio Courts must carefully scrutinize the regulation rather than rubber-stamping a legislative infringement¹⁵² upon property rights.¹⁵³ There, this Court struck down a restriction on barber shop hours, as it “observed that the

¹⁴⁶ *Direct Plumbing Supply*, supra.

¹⁴⁷ *City of Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539, 49 N.E.2d 412, 414.

¹⁴⁸ *Id.*, at 546.

¹⁴⁹ See *Cline*, supra, citing *State ex rel. Synod of Ohio of United Lutheran Church v. Joseph*, supra, 139 Ohio St. at page 246, 39 N.E.2d at page 523 (“Nor does the usual presumption of validity of the acts of public boards apply where, as here, the act seeks to deprive a person of the free use of his property. In such a case the burden of showing such relationship is upon the board adopting and seeking to enforce its rule.”).

¹⁵⁰ *Id.* (emphasis added).

¹⁵¹ *Id.*

¹⁵² Although R.C. 3794 was drafted in response to an affirmative vote on a ballot issue, this history does not influence the calculation of whether the statute is constitutional as-applied to Zeno’s.

¹⁵³ See also *Olds v. Klotz* (1936), 131 Ohio St. 447, 451, 3 N.E.2d 371, 373, where the Court considered a law limiting the hours of retail food sales, the Ohio Supreme Court stated “This court cannot protect the rights of property and liberty of contract if it allows the passage of an ordinance of the character involved here. Constitutional rights cannot be frittered away little by little until the substance is gone and only the shadow remains. Such a regulation would open the way to the extension of government regulation and

business of barbering is a lawful business, and that the right to carry on such business is a property right constitutionally protected against unwarranted and arbitrary interference by legislative bodies.”¹⁵⁴ The Court concluded “[t]he burdens of the ordinance are unduly oppressive upon individuals and interfere with the rights of private property and the freedom to contract beyond the necessities of the situation,”¹⁵⁵ and “[t]he ordinance is therefore held to be invalid as in contravention of Section 19, Article I, of the Constitution of Ohio.”¹⁵⁶

Similarly, in *Olds v. Klotz*, the Court struck down a statute regulating the hours of retail grocery stores as an invalid exercise of the police power. The Court observed that the regulation of business is only within the police power when “*the relation to the public interest and the common good is substantial and the terms of the law or ordinance are reasonable and not arbitrary in character.*”¹⁵⁷ In striking the regulation the Court articulated a concern over property rights being “frittered away” by virtue of the police power:

This court cannot protect the rights of property * * * if it allows the passage of an ordinance of the character involved here. Constitutional rights cannot be frittered away little by little until the substance is gone and only the shadow remains. Such a regulation would open the way to the extension of government regulation and control to businesses of all kinds and could only result in restrictions on the right of private property and liberty of contract contrary to the principles of constitutional government as they have been interpreted by the courts of the states and nation from the inception of free government in America.¹⁵⁸

Further, in *Direct Plumbing Supply, Inc. v City of Dayton*, the Court struck down the a regulation requiring the labeling, registration, and licensing of plumbing equipment and inventory, noting that the burden imposed by the regulation was “unduly oppressive upon individuals and in excess of the benefits conferred upon the public,” and “unreasonably interfere[d] with rights of private property * * * beyond the necessities of the situation.”¹⁵⁹

control to businesses of all kinds and could only result in restrictions on the right of private property and liberty of contract contrary to the principles of constitutional government as they have been interpreted by the courts of the states and nation from the inception of free government in America.

¹⁵⁴ *Id.* at 540.

¹⁵⁵ *Id.* at 549.

¹⁵⁶ *Id.* (the ordinance “bears no real and substantial relation to the health, safety, morals or general welfare of the public, that it is not a valid exercise of the police power, that the ordinance is arbitrary, discriminatory and unreasonable and upon reason and authority must be condemned.”).

¹⁵⁷ *Olds v. Klotz* (1936), 131 Ohio St. 447, 451, 3 N.E.2d 371, 373.

¹⁵⁸ *Id.* at 452, 3 N.E.2d at 374.

¹⁵⁹ *Direct Plumbing Supply*, supra.

While the Court frequently cites the above precedents, and they are anything but antiquated, more recent rulings also provide guidance. In *Pizza v. Rezcallah*, this Court held that a mandatory closure-order provision was unconstitutional as applied to the defendants under Section 19, Article I of the Ohio Constitution.¹⁶⁰ In doing so, it comprehensively outlined the principles to be applied in the instant matter: “[p]rivate 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.”¹⁶¹

Further, “the free use of property guaranteed by the Ohio Constitution can be invaded by an exercise of the police power only when the restriction thereof bears a substantial relationship to the public health, morals and safety.”¹⁶² But, a regulation cannot be imposed when “unduly oppressive against an individual owner.”¹⁶³ Taken in aggregate, these provisions, principles, and precedents demonstrate that this Court must employ its traditional heightened scrutiny when assessing whether this exercise of the police power justifies the smoking ban’s considerable burden on property rights: the Court cannot simply permit ODH to without more, waive the banner of “public health,” and rely on unsupported conjecture and theory.

C. The Police Power does not permit imposition of the restrictions on indoor air use articulated in the state smoking ban on bars such as Zeno’s.

i. The Police Power has intrinsic limits.

This state’s police power has outer limits that apply to prohibit imposition of the smoking ban upon Zeno’s and others. Ohio Courts have always recognized the police power’s limitations:

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

¹⁶⁰ *Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116, 702 N.E.2d 81, 1998 -Ohio- 313

¹⁶¹ *Id.*, citing *Froelich v. Cleveland* (1919), 99 Ohio St. 376, 124 N.E. 212.

¹⁶² *Id.*, citing *State ex rel. Kahler-Ellis Co. v. Cline* (C.P.1954), 69 Ohio Law Abs. 305, 309, 125 N.E.2d 222, 225.

¹⁶³ *Id.*

of the *general public require* its exercise and the means of restriction must not be unduly oppressive upon individuals.”¹⁶⁴

While this Court’s precedent has vested the state with considerable leeway in promulgating regulations pursuant to its police powers, it has also recognizes distinct inherent limitations on police powers:

Under the police power, society may restrict the use of property without making compensation therefor, if the restriction be reasonably necessary for the protection of the public health, morals, or safety. *This is so, because all property within the state is held subject to the implied condition that it will be used as not to injure the equal right of others to use and benefit of their own property* * * * The police power, however, is based upon public necessity. There must be essential public need for the exercise of the power in order to justify its use.”¹⁶⁵

The longstanding principle delineating proper use of the police power, italicized in the passage above, is expressed by the maxim that can be traced back to its origin, “sic utere tuo ut alienum non laedas,” meaning “one ought to use one’s property in such a way as not to injure that of another,” or “so use your own so as not to harm that of another.”¹⁶⁶ This was commonly understood at the time Ohio’s 1851 Constitution was drafted - - that same year, in *Commonwealth v. Alger*, the Massachusetts Supreme Court expressed the principle as “every holder of property, however, absolute may be his title, holds it under the implied liability that the use of its may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property.”¹⁶⁷ Put another way by the era’s most influential authority, author of several treatises on the police power, Christopher Tiedeman, “the object of the police power is the prevention of crime, the protection of rights against the assault of others.”¹⁶⁸ To defy these intrinsic limits on the police power is to create a government of powers not limited by constitutional delegation, but only by the outer boundaries of expressed constitutional rights - - Sections 1 and 20 of

¹⁶⁴ *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).

¹⁶⁵ *State ex. rel. Killeen Realty Co. v. City of East Cleveland* (1959), 169 Ohio St. 375, 160 N.E.2d 1, citing *Pritz v. Messer*, 112 Ohio St. 628, at 637, 149 N.E. 30, at 33; *City of Youngstown v. Kahn Bros. Building Co.*, 112 Ohio St. 654, at 661.

¹⁶⁶ Scott M. Reznick, *Empiricism and the Principle of Conditions in the Evolution of the Police Power: A Model for Definitional Scrutiny*, 1978 Wash U.L.Q 2, 4.

¹⁶⁷ 61 Mass. (7 Cush) 53, 84-85 (1851).

¹⁶⁸ Tiedeman, *Treatise on the Limitation of Police Power in the United States*, Section 30 (1886).

Ohio's Bill of Rights suggest that to do so without use of the amendment process would be inconsistent with the Ohio Constitution's design.

ii. Ohio precedent explicitly predicates the Police Power on nuisance theory.

In *Pizza*, this Court specified that “a state may use its police power to enjoin a property owner from activities akin to public nuisance without offending either the Due Process or takings Clause.”¹⁶⁹ Therefore, a mandatory closure-order provision of R.C. 3767.06(A) was stricken as “an improper exercise of police power under Section 19, Article I of the Ohio Constitution when it is imposed and enforced against a property owner who lacks any culpability in the creation or perpetuation of a nuisance on the property.”¹⁷⁰

In *Kroplin v. Truax*, this Court stated that the police power was for “the abatement of public nuisance.”¹⁷¹ Because the police power is limited by nuisance theory and public necessity,¹⁷² “government can impose new requirements for using property or prohibit previously lawful usage [only] *if its continued unchanged use constitutes a nuisance.*”¹⁷³ “By contrast, the government cannot impose new requirements for existing property *when its continued unchanged use does not constitute a nuisance.*”¹⁷⁴ Thus, this court has found that a city cannot prohibit previously lawful signs if their continued presence does not create a nuisance.¹⁷⁵

Thus, the state may preemptively enjoin uses of property that interfere with others uses of their own private property before such actual interference occurs. However, since it is predicated on public nuisance theory, this is the limit of the police power. Even the current outer limits of the police power, such as aesthetic regulation and highway billboard regulation, are predicated upon a concern over neighboring

¹⁶⁹ *Pizza*, supra.

¹⁷⁰ Id.

¹⁷¹ *Kroplin v. Truax* (1929), 119 Ohio St. 610, 165 N.E. 498.

¹⁷² 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).

¹⁷³ 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).

¹⁷⁴ *Gates Co. v. Housing Appeals Bd.* (1967), 10 Ohio St.2d 48 [39 O.O.2d 42, 225 N.E.2d 222], syllabus.

¹⁷⁵ *Sun Oil Co. v. Upper Arlington* (1977), 55 Ohio App.2d 27 [9 O.O.3d 196, 379 N.E.2d 266]; *Aristo-Craft, Inc. v. Evendale* (1974), 69 Ohio Op.2d 118 [322 N.E.2d 309].

property values, distractions to drivers, and the threat of blight, and an acknowledgment that roads and highways are purely public.

iii. A property owner does not commit a nuisance by permitting indoor smoking at an adults-only liquor-licensed establishment.

Use of the state police power to regulate the allocation of indoor air at an adults-only liquor licensed establishment exceeds the nuisance predicate for the power, is unprecedented, and goes too far. “Nuisance” is defined as “the wrongful invasion of a legal right or interest.”¹⁷⁶ “Wrongful invasion” encompasses the use and enjoyment of property or of personal rights and privileges.¹⁷⁷ Nuisance may be designated as “public” or “private.”¹⁷⁸ A public nuisance is “an unreasonable interference with a right common to the general public.”¹⁷⁹ A public nuisance will not arise because a large number of people are affected; rather, it arises only when a public right has been affected.¹⁸⁰

It is axiomatic that there is no “legal right or interest” or “right common to the general public” to frequent an adults-only liquor-licensed establishment such as Zeno’s - - to hold otherwise would plainly transgress this Court’s recent reminder that “[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”¹⁸¹ Moreover, those under the age of 21 are forbidden from entry, and patrons who do not approve of the atmosphere, and do not wish to monetarily patronize the establishment, are unwelcome. Furthermore, there is less of a right yet to dictate the indoor air allocation of a purely private establishment - - whether a patron or employee, one’s right is to freely enter or exit, “vote with his feet,” and allow market forces to punish or reward the establishment, protects the rights of all involved. And there is no dispute that such rights exist.

¹⁷⁶ *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 432, 28 O.O. 369, 55 N.E.2d 724.

¹⁷⁷ *Id.*

¹⁷⁸ *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d at 712, 622 N.E.2d 1153

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Eastwood Mall*, *supra*, citing *Bresnick v. Beulah Park Ltd. Partnership* (1993), 67 Ohio St.3d 302, 303, 617 N.E.2d 1096, 1097 (citing *Loretto v. Teleprompter Manhattan CATV Corp.* [1982], 458 U.S. 419, 435, 102 S.Ct. 3164, 3176, 73 L.Ed.2d 868, 882).

And while “certain conduct may be defined by statute or administrative regulation as being a public nuisance,”¹⁸² the smoking ban stops short of recognizing smoking as such (in fact, pursuant to R.C. 3794.03, *indoor smoking 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,¹⁸³ 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. 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, “location and priority of occupation should be factored into the equitable equation.”¹⁸⁴ In *Eller*, this Court emphasized the “ever varying circumstances which may make that a nuisance in one case which is not one in another.”¹⁸⁵ Here, as opposed to government buildings and parks, and perhaps even restaurants, grocery stores, and place of occupancy, there is simply no *need* to enter an adults-only liquor-licensed establishment - - in fact a great number of Americans, for religious, moral, or other personal reasons, avoid such places entirely.

Finally, there is no evidence to suggest that indoor second-hand smoke from Zeno’s has polluted or would pollute other’s properties - - there are simply no involuntary externalities. Were this the case, the state would be well within its police power to enjoin such unwanted pollution. Consequently, the permission of indoor smoking at adults-only liquor-licensed establishments (1) has not been designated as a

¹⁸² Id.

¹⁸³ 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).

¹⁸⁴ *Eller v. Koehler* (1903), 68 Ohio St. 51; *Pre-Club, Inc. v. Elliot Inv. Corp.* Not Reported in N.E.2d, 1996 WL 122086, App. 9 Dist., 1996.

¹⁸⁵ *Eller v. Koehler* (1903), 68 Ohio St. 51 (*Eller* involved a nuisance action brought by the owner of a residence adjacent to the defendant's manufacturing business. The nuisance alleged was the noise and vibration which was caused by defendant's drop hammers. At trial, the defendant presented evidence that its manufacturing business was built in a manufacturing district, hoping that the jury would be allowed to infer that the disturbance to the plaintiff was not unreasonable because a certain level of noise and vibration was to be expected in this area).

nuisance; (2) is not a nuisance in fact, as ODH presented no evidence at trial demonstrating smoking at Zeno's or other bars to be a nuisance; and even if it were (3) it is immensely easy for any and every member of society to avoid harm from second-hand smoke by avoiding entering such establishments.

iv. Forbidding adults-only liquor-licensed establishments such as Zeno's from permitting smoking within their property is unreasonable, arbitrary, and unduly oppressive.

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 that Section 19, Article I is transgressed when regulations on property are "unduly oppressive,"¹⁸⁶ or "impos[e] arbitrary, discriminatory, capricious or unreasonable restrictions upon lawful business."¹⁸⁷

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 the rights of bar owners. First, Zeno's presented uncontroverted expert testimony and exhibits demonstrating that smoking bans have significantly adverse economic effects on liquor-licensed adults-only establishments such as Zeno's – effects far more adverse than those on restaurants and other types of business.¹⁸⁸ As tobacco policy expert Dr. Michael Marlow explains, studies demonstrate that "locations that focus on alcohol and social gathering are much more strongly associated with smoking than other locations."¹⁸⁹ Thus it is no surprise that, nationwide, bar employment falls by 4% following smoking bans, while there is an insignificant effect for restaurants. And "the degree of harm in bars [is] positively and significantly associated with smoking prevalence: jobs [decrease] by 12% in high-prevalence locations."¹⁹⁰

¹⁸⁶ *Direct Plumbing Supply*, supra; *Pizza*, supra.

¹⁸⁷ Id. (emphasis added).

¹⁸⁸ Tr. 125, 142-143.

¹⁸⁹ Van Gucht, Dinska; Omer Van den Bergh, Tom Beckers, and Debora Vansteenwegen, "Smoking Behavior in Context: Where and When Do People Smoke?," *Journal of Behavior Therapy and Experimental Psychiatry* Vol. 41, Issue 2, pages 172-177, June 2010.

¹⁹⁰ Adams, Scott and Chad D. Cotti, "The Effect of Smoking Bans on Bars and Restaurants: An Analysis of Changes in Employment," *The B.E. Journal of Economic Analysis and Policy*, vol. 7, issue 1, 2007.

To illustrate this point, Zeno's presented uncontroverted expert testimony and exhibits demonstrating that the ban has greatly damaged Zeno's business and similar businesses.¹⁹¹ Specifically, Zeno's gross revenue has decreased by \$160,000 from the time of the ban's implementation to 2009, a percentage drop of 16%, and alongside over \$30,000 in fines, enough to wipe out all profits for such an establishment, while Zeno's rate of growth slowed from 29.7% in 2005 and 28.7% in 2006 to 11.8% in 2007 and 7.8% in 2008.¹⁹² Accordingly, the smoking ban has caused Zeno's to reduce employee's hours, and employees earn less money in tips than they otherwise would.¹⁹³

Expert testimony isolated variables and determined that this damage is attributable to the enforcement of R.C. Chapter 3794 alone,¹⁹⁴ as is the dramatic downturn in bar employment 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), solely due to the ban.¹⁹⁵ 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.¹⁹⁶ Finally, the economic injury imposed on a tavern owner by the smoking ban is higher when the establishment traditionally 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.¹⁹⁷

Meanwhile, Zeno's presented uncontroverted expert testimony and exhibits demonstrating that the ban goes beyond the necessities of the situation and provides no *substantial* benefits to public health. First, in the absence of smoking bans on bars, there is a robust market for sorting amongst smokers and non-smokers to avoid unwanted subjection to second-hand smoke, both amongst different establishments, and

¹⁹¹ Tr. 88, 201-02; Tr. 138, 148.

¹⁹² Id., see also Exhibits A and B, introduced at trial.

¹⁹³ Tr. 88, 201-02.

¹⁹⁴ Tr. 83, 86-87, 144-45; Trial Court Exhibit on "Impact of Ban on Zeno's Revenue," prepared by Dr. Michael L. Marlow.

¹⁹⁵ Tr. 152. Trial Court Exhibit "Ohio Smoking Ban Has Decreased Bar Employment in Franklin County," prepared by Dr. Michael L. Marlow.

¹⁹⁶ Tr. 125, 142-143.

¹⁹⁷ Tr. 138, 148.

within the same establishments.¹⁹⁸ Secondly, 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,¹⁹⁹ 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.²⁰⁰

Further, uncontroverted expert testimony and exhibits established that there is no basis in epidemiological science for the claim that brief, acute, and transient exposure to second hand smoke, such as the type experienced at a liquor permit-holding establishment, increases heart attack risk for those without coronary disease, or that it represents any other significant acute cardiovascular health hazard to non-smokers.²⁰¹ Risk of disease from second hand smoke can only be demonstrated for individuals at the highest level of smoke exposure,²⁰² and bar patrons and employees are only briefly and acutely exposed to secondhand smoke.²⁰³ This evidence is supported by the state's own worker's compensation system: Since 1912, over the course of one hundred years, only one Ohio employee has ever 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.²⁰⁴

Finally, smoking bans do not cause smoking rates to decrease,²⁰⁵ and 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.²⁰⁶ Accordingly, a smoking ban causes little to no impact on public health.²⁰⁷ To the contrary, smoking adults are more likely to smoke at home, exposing their children to more second-hand smoke than otherwise. This evidence was not contested by

¹⁹⁸ See Dr. Marlow, "The Private Market for Accomodation," in Exhibit entitled "Summaries of Studies."
¹⁹⁹ Tr. 90.
²⁰⁰ Tr. 90, 205
²⁰¹ Tr. 156.
²⁰² Tr. 158; 156.
²⁰³ Tr. 204; 159.
²⁰⁴ Tr. 185.
²⁰⁵ Tr. 131.
²⁰⁶ Tr. 161.
²⁰⁷ Tr. 163; 23-24.

ODH at trial, and ODH introduced no evidence mitigating it. It is the only evidence before this court as to the burdens, benefits, and reasonableness of the smoking ban, in its application to Zeno's and other bars.

Moreover, the ban is arbitrary. While it provides no exemptions for easily-avoidable establishments dependent on smoking patrons, it *does* provide exemptions for retail tobacco stores, hotels, motels, family-owned bars, nursing homes, and private clubs.²⁰⁸ No rationale, such as the harm that second-hand smoke poses in different environments, could justify such distinctions on the basis of any discernable principle. Concomitantly, ODH has been at a loss to identify such a principle.

Likewise, The Ohio ban is the strictest in the nation, as to bars, and differs from smoking bans in many other states in that it fails to make distinctions between liquor-oriented establishments and other businesses. As just a few examples, while all of the following states declare a public purpose to protect the health of the patron and/or employee, Arkansas exempts 21 years of age and over bars and restaurants;²⁰⁹ Louisiana's smoking ban does not apply to bars;²¹⁰ Pennsylvania's ban contains an exception for "drinking establishments,"²¹¹ which includes liquor establishments that admit only those persons over the age of 18 years and derives 20% or less of gross sales from food;²¹² Nevada allows a business operator to designate his establishment as a smoking area in its entirety if more than 50% of the businesses gross receipts are derived from the sale of alcohol;²¹³ North Dakota's smoking ban exempts bars;²¹⁴ Tennessee exempts age-restricted venues from its smoking ban;²¹⁵ and Florida contains exemptions for stand-alone bars that deal primarily in liquor sales.

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, without

²⁰⁸ See R.C. 3794.03(A) through (G), respectively.

²⁰⁹ A.C.A. § 20-27-1805(8).

²¹⁰ LSA-R.S. 40:1300.256(B)(5).

²¹¹ 35 P.S. § 637.3(b)(10).

²¹² 35 P.S. § 637.2.

²¹³ N.R.S. 202.2491.

²¹⁴ NDCC, 23-12-10(2)(f).

²¹⁵ T. C. A. § 39-17-1804(1).

providing *substantial* health benefits. Meanwhile, the ban is anything but “necessary” or “clearly required” to benefit the public health - - the right to a pleasant nightlife experience simply cannot trump the property rights that governments are formed to secure. Such subjection thus violates Section 19, Article I of the Ohio Constitution, and must be annulled.

D. Application of R.C. 3794 to adults-only liquor-licensed establishments, including Zeno’s, effects a taking.

As this Court stated in *Hageman*, “when private property rights are actually destroyed through a governmental act, then police power rules are usually applicable. But, when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable.”²¹⁶ To the extent application of R.C. 3794 takes a proprietor’s control over its indoor air and allocates it to the public, it effects a regulatory taking for which compensation is owed.

This Court has continued to apply *Penn Central* in recent Ohio regulatory takings cases.²¹⁷ Through the repudiation of the *Agins* test in Ohio and the application of *Penn Central*, this court’s regulator takings jurisprudence has evolved into “a narrow standard unrelated to the stronger protection of private property guaranteed by the Ohio Constitution.”²¹⁸ The protection of Ohioans private property rights as against regulatory takings is precisely a “*case warranting an expansion*,” of constitutional protections through use of the Ohio Constitution: in fact, this Court has already held that Ohio’s taking clause warrant expansion of rights beyond federal guarantees.²¹⁹

This case presents this Court with an opportunity harmonize Ohio’s regulatory takings jurisprudence with the original meaning of the Ohio Constitution and Ohio’s historical fidelity to the protection of private property. This Court must ultimately acknowledge that “any substantial interference

²¹⁶ *Hageman v. Board of Trustees of Wayne Township* (1970), 20 Ohio App.2d 12, 251 N.E.2d 507, 49 O.O.2d 7, citing . See *Ackerman v. Port of Seattle* (1960), 55 *Wish.2d* 400, 348 *P.2d* 664, 77 *A.L.R.2d* 1344.

²¹⁷ See *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 122 Ohio St.3d 260, 910 N.E.2d 455, 2009-Ohio-2871, ¶ 16; *State ex rel. Duncan v. Middlefield*, 120 Ohio St.3d 313, 898 N.E.2d 952, 2008-Ohio-6200, ¶ 17; *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 875 N.E.2d 59, 2007-Ohio-5022, ¶ 19.

²¹⁸ *Moore v. Middletown* (2010), 2010-Ohio-2962 (Ringland, concurring and dissenting).

²¹⁹ *State v. Gardner* (2008) 118 Ohio St.3d 420, 889 N.E.2d 995, citing *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (holding that the Ohio Constitution's Takings Clause affords greater protection than the corresponding federal provision).

with the elemental rights growing out of ownership of private property is considered a taking.”²²⁰ Applying these principles to the record in this matter, as articulated above, if not an exercise of the police power, or if an improper exercise of the police power, the smoking ban effectuates a taking of private property without compensation, as against Zeno’s.

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 affirmative defenses and 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,”²²¹ and to dispose of “uncertain or disputed obligations quickly and conclusively,” and thus, is to be construed “liberally.”²²²

The Appellate Court acknowledged that although the Trial Court “determined ODH implemented a policy of strict liability amounting to an unwritten policy. . . that exceeds the authority give to [ODH] by R.C. 3794.02,” and “thus effectively granted Bartec’s request for a declaratory judgment that ODH unconstitutionally enforced the Smoke Free Act,” it only did so “as applied to Bartec *in the context of its prior ten violations.*”²²³

The Appellate Court then improperly superimposed this factually inaccurate caveat, i.e. that the Trial Court only considered the context of Zeno’s past violations, to distort Zeno’s actual claims for relief, claiming that Zeno’s only sought to use declaratory relief to “re-litigate” past violations, claiming Zeno’s

²²⁰ *Smith v. Erie RR. Co.* (1938), 134 Ohio St. 135, 142, 16 N.E.2d 310.

²²¹ *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.

²²² *Id.*, citing *Ohio Farmers Indemn. Co. v. Chames* (1959), 170 Ohio St. 209, 213, 163 N.E.2d 367.

²²³ Appellate Court Opinion, at p. 9.

counterclaims were only “collateral attacks” on “the ten orders finding violations,” which “the trial court should not have entertained.”²²⁴

This characterization of Zeno’s claims as only for retroactive, rather than prospective relief, saturate the Appellate Court’s opinion: the Court stated Zeno’s argument is that “ODH’s enforcement policies and practices under R.C. 3794.02 were unlawful,²²⁵ and elsewhere stated “Bartec is attempting to use a declaratory judgment action to attack the past methods of the entity,” which is “not a justiciable controversy capable of resolution by declaration. * * * to the contrary it is an argument properly raised on appeal.”²²⁶

However, Zeno’s pleadings and briefs clearly accentuate current and prospective relief, rather than solely past tense relief, with the important caveat that if certain policies, statutes, and rules are ostensibly found unconstitutional, an incidental effect is that Zeno’s past fines may or may not be abrogated under this Ohio’s *Sunburst* doctrine jurisprudence, or pursuant to Civ. R. 60(B)(5).²²⁷

Here, Zeno’s claimed for prospective declaratory and injunctive relief in its counterclaim, requesting, *inter alia*, “[a] declaration that (1) Relevant portions of Ohio Revised Code 3794 and Ohio Administrative Code 3701 are unconstitutional, either facially or as applied to Zeno’s and other similarly situated proprietors; (2) Relevant policies of the Ohio Department of Health require R.C. 119 agency rulemaking, and have been, are, and continue to be invalid in the absence of such rulemaking; (3) Relevant policies of the Ohio Department of Health constitute unlawful agency policymaking; (4) The Ohio Department of Health’s interpretations and applications of relevant provisions of R.C. 3794 and OAC 3701 are in contravention of the language of the statute drafted and handed down by Ohio’s legislative branch of government * * *.” The Trial Court responded by implicitly declaring that ODH policies were unconstitutional, and since they were applied universally, including against Zeno’s with respect to the fines in question, those fines were void.

²²⁴ Id., at p. 11.

²²⁵ Id., at p. 15.

²²⁶ Id., at p. 15.

²²⁷ See Proposition of Law 1, Section F, for greater detail on this.

Even if Zeno's could not assert its claims in a defensive posture, an Ohioan does not lose 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 typically preempt a litigant 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 being, and will be used against them; and (2) challenging application of a statute to themselves and to the unique class to which they belong.

This seemingly narrow procedural issue has very substantive real-world 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, even in a defensive posture, once sued, denies him the benefit that the statute exists to confer. These principles comport with the axioms that "[f]airness and justice are best served when a court disposes of a case on the merits. Only a flagrant, substantial disregard for the court rules can justify a dismissal on procedural grounds."²²⁸

A. Zeno's Separation of Powers Claim is a facial claim only.

As explained in Section A of Proposition of Law 1, Zeno's has consistently challenged ODH's unwritten enforcement policy, seeking to enjoin its further application, and noting, only incidentally, that this claim may permit abrogation of fines. This incidental effect does not, as the Appellate Court maintained, convert Zeno's facial claim into an as-applied claim.

B. Zeno's is entitled to defend itself by challenging the smoking ban both facially and as applied to its property.

²²⁸ *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 193.

Zeno's property rights-based challenge to the ban is both facial and as-applied, and Zeno's is entitled to maintain each. In the seminal case on this matter, *Johnson's Island v. Board of Twp. Trustees of Danbury Twp.* this Court firmly established that "a landowner against whom enforcement of a [property regulation] was sought could assert his defense of unconstitutionality of [the property regulation] as applied to land without necessity of exhaustion of available administrative remedies."²²⁹ In that case, this Court stated "[t]he requirement of exhaustion of administrative remedies is not applicable where the constitutionality of a statute is raised as a defense in a proceeding brought to enforce the statute."²³⁰ This is because "[t]he question of the constitutionality of a zoning ordinance is a *defense which can be raised by a landowner in an injunction action brought against the landowner alleging the landowner is using his land in violation of the zoning ordinance.*"²³¹ The "Appellant, therefore, was not barred from raising this defense in the injunction action brought against appellant by the neighboring landowners."²³²

The Court adopted the rule and rationale from *County of Lake v. MacNeal*, that "[a]lthough there is authority that the rule of exhaustion of administrative remedies has application whether the validity of a zoning ordinance is raised by a defendant or a moving party, * * * there is at the same time the sound principle, based upon the assumption that one may not be held civilly or criminally liable for violating an invalid ordinance, that a proceeding for the violation of a municipal regulation is subject to any defense which will exonerate the defendant from liability, including a defense of the invalidity of the ordinance. Indeed, as one author has observed, 'the tradition is deeply imbedded that * * * statutes may be challenged by resisting enforcement.'"²³³

²²⁹ *Johnson's Island v. Board of Twp. Trustees of Danbury Twp.* (1982), 69 Ohio St.2d 241, 431 N.E.2d 672, 23 O.O.3d 243, Paragraph 2 of Syllabus.

²³⁰ *Id.*, citing See 2 American Jurisprudence 2d 434, Administrative Law, Section 599.

²³¹ *Id.*, citing *Town of Londonderry v. Faucher* (1972), 112 N.H. 454, 299 A.2d 581; *County of Freeborn v. Claussen* (1972), 295 Minn. 96, 203 N.W.2d 323; *County of Lake v. MacNeal* (1962), 24 Ill.2d 253, 181 N.E.2d 85.

²³² *Id.*

²³³ *Id.*, at 676, quoting *County of Lake v. MacNeal* (1962), 24 Ill.2d 253, 181 N.E.2d 85.

Moreover, “there were *substantial differences in the stance of a property owner who initiates such a constitutional query from that of one who is asserting the affirmative defense of the infirmity of the statute.*”²³⁴ As this Court explained, through further quotation of *County of Lake v. McNeal*:

For our part, we believe *there are substantial differences between a property owner who is the moving party in an action to declare an ordinance invalid as to his property, and one who is summoned into court and charged with illegally violating the ordinance.* Whereas, in the first instance, it is the view that zoning litigation should not be initiated until the local authority has a chance to correct the errors that may have occurred in broad comprehensive ordinances, in the latter instance the very act of filing a complaint reflects a judgment on the part of the local authority that, as to the property concerned, they see no particular hardship and no necessity to correct the zoning regulation. *To compel a property owner to first seek local relief in the face of the demonstrated attitude of the local authority, would be a patently useless step which would increase costs, promote circuity of action and delay the administration of justice. So long as local authorities institute an action, a defendant should be entitled to defend on the ground of the invalidity of the ordinance and to have the issue determined. If it were to be otherwise, the result could be that judicial machinery would be used to enforce an ordinance that is unconstitutional.*”²³⁵

This Court concluded by simply noting “[w]e are in agreement with this pronouncement of the Supreme Court of Illinois and hold that a landowner against whom enforcement of a zoning law is sought may assert as a defense the unconstitutionality of the zoning law *as applied to his land* without the necessity of exhausting the available administrative remedies.”²³⁶

The situation here is entirely identical: Zeno’s was sued by ODH in an injunctive action, and defended itself with the affirmative defense that R.C. 3794 and its enforcement are unconstitutional facially and as applied to Zeno’s. Paragraph 67 of Zeno’s Answer and Counterclaim plainly states “R.C. 3794 is unconstitutional both on its face and as applied to Defendants.” Consequently, *Johnson’s Island* governs this matter, and permits Zeno’s to challenge the ban, both facially and as applied to Zeno’s business and property.

C. Zeno’s was required to raise its constitutional challenges or forever waive them.

Next, 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

²³⁴ Id., at 677, quoting *County of Lake v. MacNeal* (1962), 24 Ill.2d 253, 181 N.E.2d 85.

²³⁵ Id., at 677. (Emphasis added).

²³⁶ Id., at 678.

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.” Meanwhile, Civ. R. 13(B) allows permissive counterclaims; and Civ. R. 13(C) provides that “a counterclaim *may* or may not diminish or defeat the recovery sought in the pleading of the opposing party.” Consequently, given the claims made by ODH under the Smoke Free Act, the Ohio Rules of Civil Procedure not only permitted Zeno’s to counterclaim for declaratory relief, but 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.

D. Exhaustion of administrative remedies would have been futile.

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.”²³⁷ 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.”²³⁸

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, a critical phenomenon cannot be ignored: ODH promulgated a policy without placing it in writing. The effect of such a stealth policy is to render a potential litigant unaware that a challenge to the policy needs to be made, until a plethora of identical, frivolous fines have been imposed: Zeno’s was

²³⁷ *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, 460-61.

²³⁸ *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.

without information to challenge ODH's enforcement policy until its opportunity to challenge individual fines had already elapsed.

E. The rationale for exhaustion relied upon by the Appellate Court does not apply in this case.

The Appellate Court and ODH rely extensively upon the rationale that it is impossible to develop the facts necessary for an as-applied challenge without exhausting administrative remedies, even though such facts were in fact developed in this case. This important distinction is driven home by each case's affirmation that if facts aren't developed before appeal, it would be impossible to develop those facts on appeal, and in a manner that doesn't prejudice the opposing party. While this Court stated, in *Kinney*, that "[o]ne 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,"²³⁹ the sole reason for this ruling was that "[o]therwise, it would be impossible to develop the factual record necessary for the resolution of the case."²⁴⁰ "Finally, this court has repeatedly stated that it reviews decisions of the Board of Tax Appeals on appeal, and that it is not a trier of fact de novo."²⁴¹

Identically, in *Cleveland Gear v. Limbach*, this Court held "The question of whether a *tax statute* is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning this question if presented."²⁴² However, the Court again rationalized that this is only the case because "*Kresge, Petrocon* and *Sun Finance* all turned upon the lack of sufficient evidence of record to declare the statute

²³⁹ *Board of Educ. of South-Western City Schools v. Kinney* (1986), 24 Ohio St.3d 184, 494 N.E.2d 1109, citing *Sun Finance & Loan Co. v. Kosydar* (1976), 45 Ohio St.2d 283, 284, fn. 1, 344 N.E.2d 330 [74 O.O.2d 434].

²⁴⁰ *Kinney*, supra, citing *Petrocon v. Kosydar* (1974), 38 Ohio St.2d 264, 313 N.E.2d 373 [67 O.O.2d 332]. (Importantly, the court elaborated as follows: "Had the equal protection issue in this case, for instance, been raised during the proceedings before the attorney examiner, it is entirely possible that the city of Columbus would have developed an evidentiary record sufficient to show that the statute was applied constitutionally. By waiting until now to raise the issue, the school board has deprived the city of an opportunity to develop the record on this point. This itself raises due process considerations. Furthermore, the school board's failure to raise the constitutional issue during the proceedings below has prevented this court from receiving the expert commentary of the Tax Commissioner and the Board of Tax Appeals on the equal protection issue.")

²⁴¹ *Operation Evangelize v. Kinney* (1982), 69 Ohio St.2d 346, 347, 452 N.E.2d 200 [23 O.O.3d 315].

²⁴² *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, 520 N.E.2d 188

unconstitutional as applied to the particular taxpayer involved. * * * When a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view. * * * To accommodate this court's need for extrinsic facts and to provide a forum where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the BTA be that forum.”²⁴³

This Court should note that tax cases are unique, in that Board of Tax Appeals cases are directly appealed to the Ohio Supreme Court, rendering the BTA the de facto trial court. Here, to the contrary, this case originated in a trial court that actually did admit exhaustive facts on Zeno’s as-applied cause of action. Indeed, through discovery, briefings, and trial, here was an opportunity for ODH to introduce any evidence it wanted - - no prejudice was done to it, and no opportunity to defend against this claim was deprived of it. Thus, to claim that it was “impossible to develop the factual record” would be disingenuous at best, since there is an extensive factual record.

F. The “collateral attack doctrine” does not bar Zeno’s claims.

While the Appellate Court raised the specter of “collateral attack,” maintaining that Zeno’s was merely trying to unwind its past fines, this utterly ignores Zeno’s claims for current and prospective declaratory and injunctive relief. A collateral attack has been described as “an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved.”²⁴⁴ “Black’s Law Dictionary (8th Ed.2004) 278, further defines a “collateral attack” as “[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective.”²⁴⁵

²⁴³ Id., at 192.

²⁴⁴ *Fawn Lake Apts. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 609, 611, 710 N.E.2d 681, quoting *Kingsborough v. Tousley* (1897), 56 Ohio St. 450, 47 N.E. 541.

²⁴⁵ *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 115 Ohio St.3d 375, 875 N.E.2d 550, 2007-Ohio-5024, ¶ 17.

Here, however, attack on a judgment is not indispensable to Zeno's claims. To the contrary, Zeno's claims for current and prospective relief are entirely independent of any action this Court may take as to the prior imposition of fines; while at the same time, as explained in Proposition of Law 1, a successful challenge to ODH's enforcement policy by no means necessitates an abrogation of the prior fines of Zeno's or others. At best, for ODH, it may only claim that affording Zeno's relief may incidentally cause past administrative "judgments" to be vacated. However, it's equally conceivable that the matter can be addressed through Civ. R. 60(B)(5), a proper way to address past judgments, or simply through enjoining the Ohio Attorney General's collections activities on unpaid fines. Consequently, the collateral attack doctrine does not forbid Zeno's from pursuing current or prospective relief, or this Court from abrogating past fines.

In conclusion, this Court must consider Zeno's facial and as-applied challenges to ODH's policy of enforcing the state smoking ban, and to the ban's application to it.

CONCLUSION

Appellants Bartec, Inc. and Richard M. Allen have the rights to (1) challenge the application of the smoking ban to their property and type of business; and (2) challenge the Ohio Department of Health and its designees' unwritten enforcement policy. Further, this enforcement policy must be declared as beyond what the statute permits, arbitrary, and unreasonable, and thus it must be enjoined. Finally, application of the smoking ban to Zeno's property, and to liquor-licensed adult establishments in general, must be declared to exceed the state's police power, and unreasonably extinguish property rights. For the foregoing reasons, the Appellate Court's ruling must be reversed

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 June 27, 2011.



Maurice A. Thompson (0078548)

A

IN THE SUPREME COURT OF OHIO

11-0019

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

COURT OF APPEALS
CASE NO. 10AP-173

NOTICE OF APPEAL OF APPELLANTS BARTEC, INC AND RICHARD M. ALLEN

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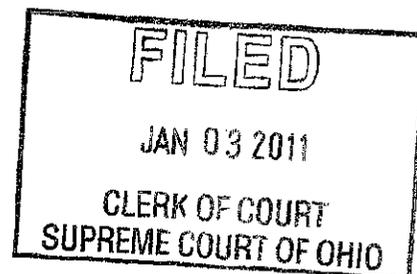
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NOTICE OF APPEAL OF APPELLANTS BARTEC, INC. AND RICHARD M. ALLEN

Appellants Bartec, Inc. and Richard M. Allen hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals case No. 10AP-173 on November 16, 2010.

This case raises a substantial constitutional question and is one of public or great general interest.

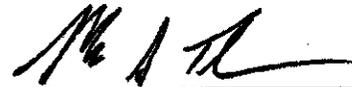
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CERTIFICATE OF SERVICE

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.



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B

[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)

D E C I S I O N

Rendered on November 16, 2010

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.

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. 3794.09(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. Sequechi* (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.

C

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 19th 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, ¶27. "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 rationale. 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?¹ 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

¹ 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.



David E. Cain, Judge

Copies to:

Angela M. Sullivan
Gregory T. Hartke
Stacy L. Hannan
Counsel for Plaintiff

Maurice A. Thompson
Counsel for Defendants

D

APPLICABLE OHIO ADMINISTRATIVE CODE REGULATIONS

3701-52-02 Responsibilities of proprietor

(A) No proprietor, except as permitted in section 3794.03 of the Revised Code, 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) In addition to the requirements of paragraph (A) of this rule, a proprietor shall take reasonable steps including, but not limited to, requesting individuals to cease smoking, to ensure that tobacco smoke, in an area directly or indirectly under the control of the proprietor, does not enter any area in which smoking is prohibited under Chapter 3794. of the Revised Code and this chapter through entrances, windows, ventilation systems, or other means.

(D) A proprietor shall post signs pursuant to the requirements of Chapter 3794. of the Revised Code and rule 3701-52-06 of the Administrative Code.

(G) No person shall discharge, refuse to hire, or in any manner retaliate against any individual for exercising any right, including reporting a violation, or performing any obligation under Chapter 3794. of the Revised Code or this chapter.

3701-52-03 Responsibilities of individual

(A) No person shall refuse to immediately discontinue smoking in a public place, place of employment, or the areas directly or indirectly under the control of the proprietor or in an establishment, facility, or outdoor area declared nonsmoking under section 3794.05 of the Revised Code 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.

(B) No person shall retaliate in any manner against any individual for exercising any right, including reporting a violation, or performing any obligation under Chapter 3794. of the Revised Code or this chapter.

3701-52-04 Areas where smoking is not regulated

(A) All areas set forth in section 3794.03 of the Revised Code shall be exempt from the provisions of Chapter 3794. of the Revised Code and this chapter.

(B) In accordance with division (A) of section 3794.03 of the Revised Code, a private residence in which an individual is employed only on an intermittent basis is not subject to Chapter 3794. of the Revised Code or this chapter. This includes, but is not limited to, situations where individuals perform services for the owner of the residence or individuals residing in the residence such as those services performed by plumbers, electricians, remodelers, and housekeepers.

(C) In accordance with division (C) of section 3794.03 of the Revised Code, a family owned place of employment, in which contractors or third parties not under the direction and control of the family owned place of employment are intermittently present, is not subject to Chapter 3794. of the Revised Code or this chapter.

(D) A private residence or portion of a private residence that is licensed or certified by the state or federal government to provide overnight accommodations and supervision or personal care services to unrelated individuals is not subject to Chapter 3794. of the Revised Code or this chapter. Notwithstanding this paragraph, smoking may be prohibited by other applicable laws or rules.

(E) An institution, residence or facility that provides for a period of more than twenty-four hours, whether for profit or not, accommodations to three or more unrelated individuals who are dependent upon the services of others, including a nursing home, residential care facility, the Ohio veteran's home, any facility or part of a facility that is

defined as a skilled nursing facility under Title XVIII of the "Social Security Act" 79 Stat. 286 (1965). 42 U.S.C.A. 1395 and 1396, or as a nursing facility as defined in section 5111.20 of the Revised Code, and a county home or district home operated pursuant to Chapter 5155. of the Revised Code are not subject to Chapter 3794. of the Revised Code and this chapter, only to the extent necessary to comply with division (A) (18) of section 3721.13 of the Revised Code.

(1) A designated indoor smoking area, that is separately enclosed and separately ventilated, may be provided for the exclusive use of residents during specific times when the indoor area may be used for smoking. No employees shall be required to accompany a resident into a designated indoor smoking area or perform services in such an area when being used for smoking, unless they have volunteered to do so.

(2) If portions of an institution, residence, or facility are private residences, such as apartments, those private residential portions are governed by rules in this chapter applicable to private residences, unless otherwise prohibited by applicable laws or rules.

(3) Outdoor smoking by residents of institutions, residences or facilities specified in paragraph (D) of this rule is permitted to the extent necessary to comply with division (A) (18) of section 3721.13 of the Revised Code.

(F) Outdoor patios may be located immediately adjacent to locations of ingress or egress to the public place or place of employment, but shall be physically separated from any enclosed area. Notwithstanding this rule, a proprietor shall comply with divisions (A) and (B) of section 3794.02 of the Revised Code and paragraphs (A) and (B) of rule 3701-52-02 of the Administrative Code.

(1) When smoking is permitted, the outdoor patio shall be open to the air. "Open to the air" shall mean the patio has thorough, unobstructed circulation of outside air to all parts of the outdoor patio.

(2) Any outdoor patio that has a structure capable of being enclosed, regardless of the materials or removable nature of the walls or side coverings, shall be regarded as an enclosed area when the walls or coverings are in place. An outdoor patio shall be presumed to be open to the air when not more than fifty per cent of the combined surface area of an outdoor patio's sides is covered by walls or side coverings.

(3) For purposes of division (F) of section 3794.03 of the Revised Code and this paragraph, a "roof or other overhead covering" shall include any structure or arrangement above the outdoor patio, including substantial coverage by umbrellas or awnings, that may impede the flow of air into the patio, regardless of the type or nature of roof or other overhead covering. For the purposes of division (F) of section 3794.03 and this rule, roof or other overhead covering does not include materials provided by a proprietor to ensure security in a confined residential setting when the outdoor patio is otherwise open to the air.

(G) Private clubs shall be exempt from the provisions of Chapter 3794. of the Revised Code and Chapter 3701-52 of the Administrative Code provided all of the following apply: the club has no employees; the club is organized as a not for profit entity; only members of the club are present in the club's building; no persons under the age of eighteen are present in the club's building; the club is located in a freestanding structure occupied solely by the club; smoke from the club does not migrate into an enclosed area where smoking is prohibited under the provisions of this chapter; and, if the club serves alcohol, it holds a valid D4 liquor permit. For purposes of this exemption, the term employees does not include members of the private club who provide services to the private club.

3701-52-08 Reports of violations; investigation; findings of violations; appeals

(A) Reports of violations of the provisions of Chapter 3794. of the Revised Code and this chapter may be submitted to the department by any member of the public by mail, electronic mail, and telephone. A person shall not be required to disclose his or her identity in order to report a violation. An anonymous complaint, alone, shall not be sufficient evidence to support a finding of violation of Chapter 3794. of the Revised Code or this chapter.

(1) If by mail, reports of violations may be directed to the Ohio department of health at the following address:

“Attn: Smoking Complaints

Bureau of Environmental Health

Ohio Department of Health

246 North High Street

Columbus, OH 43215”

(2) If by electronic mail, reports of violations may be sent to the Ohio department of health at: nosmoke@odh.ohio.gov

(3) If by telephone, reports of violations may be reported to 1-866-559-OHIO (6446) or the telephone number of a designee.

(4) A designee may receive reports of violation by mail, electronic mail, or telephone.

(B) The report of violation shall contain at least the following information:

(1) Nature of the violation including date and approximate time;

(2) Name of the business or individual alleged to be in violation;

(3) Complete address with zip code, if known; and

(4) County in which the business or individual is located.

(C) Reports of violations alleging facts that, when construed broadly and accepted as true, would not support a finding of violation shall be dismissed without any investigation. The department may decline to investigate and may dismiss any report of violation if it determines the report of violation is:

(1) Frivolous;

(2) Not made in good faith; or

(3) Too old to be reasonably investigated.

(D) Except as provided in paragraph (C) of this rule, upon receipt of a complete report of violation, the department shall provide a proprietor or individual with written notice of the report of violation, a copy of the report of violation, and the opportunity to present in writing any statement or evidence to contest the report.

(1) If a proprietor or individual submits a written statement or presents evidence to contest a report of violation, such submittal shall be postmarked within thirty days after receipt of the report of violation by the proprietor or individual and shall be sent to the return address provided on the notice of report of violation.

(2) The Ohio department of health may, in its discretion, investigate a complete report of violation or promptly transmit the report of violation to a designee in the jurisdiction where the reported violation allegedly occurred for investigation and enforcement. If the report of violation is transmitted to a designee, the designee shall investigate all complete reports of violation. For the purposes of this chapter, an investigation may include but is not limited to:

(a) A review of report of violation;

(b) A review of any written statement or evidence contesting the report of violation;

(c) Telephone or on-site interviews; and,

(d) On-site investigations.

(3) Prior to issuing a proposed civil fine for a violation of Chapter 3794. of the Revised Code and this chapter, the department's investigation shall include all investigation activities set forth in paragraphs (D)(2)(a) to (D)(2)(d) of this rule.

(E) All findings of violation by the department, including continuing violations, shall be supported by a preponderance of the evidence.

(F) Upon the investigation's conclusion, the department shall determine whether the proprietor or individual violated a provision or provisions of Chapter 3794. of the Revised Code or of this chapter and shall specify the nature and number of violations. Upon request, proprietors or individuals shall have the opportunity to review the evidence forming the basis for the proposed violations.

(1) If the department determines that a proprietor or individual violated a provision of Chapter 3794. of the Revised Code or of this chapter, and the proprietor or individual does not have a finding of violation within the previous two years, the proprietor or individual will be notified of the proposed finding of violation and afforded an opportunity to provide additional evidence. Proprietors and individuals shall submit such additional evidence to the department within thirty days of the proprietor or individual receiving notice of the proposed findings.

(a) After reviewing any additional and timely evidence, the department may affirm, amend, or rescind the proposed findings. The department shall notify, in writing, the proprietor or individual of the department's final decision and if the final decision is to affirm or amend the proposed findings, the written notice shall constitute the department's warning letter.

(b) If no additional and timely evidence is received, the findings are final and constitute the department's warning letter pursuant to division (A) of section 3794.09 of the Revised Code.

(2) If the department determines that a proprietor or individual violated a provision of Chapter 3794. of the Revised Code or of this chapter, and the proprietor or individual has one or more findings of violation within the previous two years, the proprietor or individual will be notified via certified mail, return receipt requested, or by hand delivery, of the proposed finding of violation and proposed civil fine, in accordance with rule 3701-52-09 of the Administrative Code, as well as afforded an opportunity to request an administrative review of the proposed findings and civil fines. If the notice is returned because of failure of delivery, the department shall send the notice by regular mail to the address listed on the report. In such case, the notice shall be deemed to have been received three days from the date it was mailed.

(a) Proprietors and individuals shall submit to the department such request for an administrative review within thirty days of receiving notice of the proposed findings and civil fines. Upon receiving a timely request for an administrative review, the department shall schedule the administrative review to be held before a board of health or its designee pursuant to section 3709.20 of the Revised Code or an impartial decision maker selected by the Ohio department of health.

(i) The impartial decision maker shall be licensed to practice law in Ohio.

(ii) The department shall mail or deliver notice of the date, time, and place of the administrative review to the proprietor or individual not less than ten days before the scheduled date. At the discretion of the department or impartial decision maker, the administrative review may be conducted via telephone.

(iii) Any postponements shall be by agreement of the proprietor or individual and the department and, if applicable, the impartial decision maker.

(iv) At an administrative review, the proprietor or individual shall have the opportunity to present its case and to confront and cross-examine adverse witnesses. The proprietor or individual shall have the opportunity to be

represented by counsel at their own expense. At an administrative review, if the proprietor is a corporation or a limited liability company, it must be represented by an attorney licensed to practice law in Ohio.

(v) The department or impartial decision maker shall prepare a report and recommendation including findings of fact and conclusions of law. The department or impartial decision maker shall mail by certified mail, return receipt requested, or hand deliver the report and recommendation to the proprietor or individual and the department.

(vi) A proprietor or individual may, within ten days of receipt of such copy of such written report and recommendation, file with the department written objections to the report and recommendation, which objections shall be considered by the department before approving, modifying, or disapproving the recommendation.

(b) The recommendation of the impartial decision maker may be approved, modified, or disapproved by the department, and the final decision of the department based on such report, recommendation, and evidence, or objections of the proprietor or individual, shall have the same effect as if such hearing had been conducted by the department. The decision of the department shall be final and not subject to further administrative proceedings.

(G) Upon a final decision of the department, the department shall serve by certified mail, return receipt requested, upon the proprietor or individual affected thereby, a copy of the final decision and a statement of the time and method by which an appeal may be perfected. A copy of such final decision shall, as applicable, be mailed to the attorneys or other representatives of record representing the proprietor or individual. As set forth in division (C) of section 3794.09 of the Revised Code, any proprietor or individual against whom a finding of violation is made pursuant to paragraph (F) of this rule may, within fifteen days, appeal the finding to the Franklin county court of common pleas in accordance with section 119.12 of the Revised Code.

E

Applicable Ohio Constitutional Provisions

ARTICLE I: BILLOF RIGHTS

INALIENABLE RIGHTS. §1 All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

EMINENT DOMAIN. §19 Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

LEGISLATIVEARTICLE II: LEGISLATIVE

IN WHOM POWER VESTED. §1 The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives but the people reserve to them-selves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the General Assembly, except as herein after provided; and independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

APPLICABLE STATUTES

R.C. 3794.01 Definitions

(B) "Public place" means an enclosed area to which the public is invited or in which the public is permitted and that is not a private residence.

R.C. 3794.01(C) "Place of employment" means an enclosed area under the direct or indirect control of an employer that the employer's employees use for work or any other purpose, including but not limited to, offices, meeting rooms, sales, production and storage areas, restrooms, stairways, hallways, warehouses, garages, and vehicles. An enclosed area as described herein is a place of employment without regard to the time of day or the presence of employees.

R.C. 3794.01(G) "Proprietor" means an employer, owner, manager, operator, liquor permit holder, or person in charge or control of a public place or place of employment.

3794.02 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.

(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.

3794.03 Areas where smoking is not regulated by this chapter

The following shall be exempt from the provisions of this chapter:

(A) Private residences, except during the hours of operation as a child care or adult care facility for compensation, during the hours of operation as a business by a person other than a person residing in the private residence, or during the hours of operation as a business, when employees of the business, who are not residents of the private residence or are not related to the owner, are present.

(B) Rooms for sleeping in hotels, motels and other lodging facilities designated as smoking rooms; provided, however, that not more than twenty percent of sleeping rooms may be so designated.

(C) Family-owned and operated places of employment in which all employees are related to the owner, but only if the enclosed areas of the place of employment are not open to the public, are in a free standing structure occupied solely by the place of employment, and smoke from the place of employment does not migrate into an enclosed area where smoking is prohibited under the provisions of this chapter.

(D) Any nursing home, as defined in section 3721.10(A) of the Revised Code, but only to the extent necessary to comply with section 3721.13(A)(18) of the Revised Code. If indoor smoking area is provided by a nursing home for residents of the nursing home, the designated indoor smoking area shall be separately enclosed and separately ventilated so that tobacco smoke does not enter, through entrances, windows, ventilation systems, or other means, any areas where smoking is otherwise prohibited under this chapter. Only residents of the nursing home may utilize the designated indoor smoking area for smoking. A nursing home may designate specific times when the indoor

smoking area may be used for such purpose. No employee of a nursing shall be required to accompany a resident into a designated indoor smoking area or perform services in such area when being used for smoking.

(E) Retail tobacco stores as defined in section 3794.01(H) of this chapter in operation prior to the effective date of this section. The retail tobacco store shall annually file with the department of health by January thirty first an affidavit stating the percentage of its gross income during the prior calendar year that was derived from the sale of cigars, cigarettes, pipes, or other smoking devices for smoking tobacco and related smoking accessories. Any retail tobacco store that begins operation after the effective date of this section or any existing retail tobacco store that relocates to another location after the effective date of this section may only qualify for this exemption if located in a freestanding structure occupied solely by the business and smoke from the business does not migrate into an enclosed area where smoking is prohibited under the provisions of this chapter.

(F) Outdoor patios as defined in Section 3794.01(I) of this chapter: All outdoor patios shall be physically separated from an enclosed area. If windows or doors form any part of the partition between an enclosed area and the outdoor patio, the openings shall be closed to prevent the migration of smoke into the enclosed area. If windows or doors do not prevent the migration of smoke into the enclosed area, the outdoor patio shall be considered an extension of the enclosed area and subject to the prohibitions of this chapter.

(G) Private clubs as defined in section 4301.01(B)(13) of the Revised Code, provided all of the following apply: the club has no employees; the club is organized as a not for profit entity; only members of the club are present in the club's building; no persons under the age of eighteen are present in the club's building; the club is located in a freestanding structure occupied solely by the club; smoke from the club does not migrate into an enclosed area where smoking is prohibited under the provisions of this chapter; and, if the club serves alcohol, it holds a valid D4 liquor permit.

3794.07 Duties of the Department of Health

This chapter shall be enforced by the department of health and its designees. The director of health shall within six months of the effective date of this section:

(A) Promulgate rules in accordance with Chapter 119 of the Revised Code to implement and enforce all provisions of this chapter;

(E) Inform proprietors of public places and places of employment of the requirements of this chapter and how to comply with its provisions, including, but not limited to, by providing printed and other materials and a toll free telephone number and e-mail address exclusively for such purposes;

119.01 Definitions

(C) "Rule" means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule. "Rule" does not include any internal management rule of an agency unless the internal management rule affects private rights and does not include any guideline adopted pursuant to section 3301.0714 of the Revised Code.

119.02 Compliance; validity of rules

Every agency authorized by law to adopt, amend, or rescind rules shall comply with the procedure prescribed in sections 119.01 to 119.13, inclusive, of the Revised Code, for the adoption, amendment, or rescission of rules. Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule.

R.C. 2721.03(A)

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.

Civ. R 60 Relief from judgment or order

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.