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**MOTION AND MEMORANDUM IN SUPPORT OF APPELLANTS' MOTION TO  
EXTEND TIME FOR ORAL ARGUMENT**

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Now come appellants, Richard M. Allen and Bartec, Inc. (collectively "Zeno's"), and respectfully requests that this Court extend time for oral argument in this matter, recently scheduled for October 19, 2011 in Highland County, Ohio, from 15 minutes per side to 25 minutes per side, or in the alternative, 20 minutes per side. Due to scheduling considerations associated with the selection of this case for this Court's October 19, 2011 off-site program in Highland County, this Motion is posited well in advance of the filing deadline mandated by Supreme Court Practice Rule 9.5(B).

I. FACTS

Through its April 6, 2011 Entry, this Court accepted for review each of the three propositions of law articulated by Appellants in their Motion for Jurisdiction. They are as follows:

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

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

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

Although each of these propositions has been briefed, each features a number of subtle distinctions and complexities. Moreover, the parties' briefs reveal wide divergences that will no doubt be subjects of discussion at oral argument.

## II. LAW AND ANALYSIS

While standard time allotment for oral argument is fifteen minutes per side, Supreme Court Practice Rule 9.5(B) provides as follows: “Either *sua sponte* or upon motion, the Supreme Court may vary the time for oral argument permitted by this rule. Motions to vary the time for oral argument shall be filed at least seven days before the date scheduled for oral argument.” This rule exists to accommodate cases embracing multiple complex issues. Extending the time for oral argument allows counsel sufficient time to more fully address each of the issues before the Court, and the Court more time to question counsel on applicable constitutional parameters, precedent, statute and administrative code provisions, and facts in dispute.

In this case, the Court has accepted for review each of the three propositions of law articulated above. As Appellants’ Motion for Jurisdiction and subsequent briefings demonstrate (and this Court tacitly acknowledged in accepting each issue), this matter presents three issues of great public importance and constitutional significance. Each of these issues is entirely separate from the other, complex, and of first impression. Moreover, nestled within each of the first two issues are important distinctions between facial and as-applied claims, which the parties briefings demonstrate to be in dispute.<sup>1</sup>

The first of these substantive issues is whether the Ohio Department of Health and its designees are violating Ohio’s separation of powers principles by abstaining from enforcing an integral part of the Smoke Free Act, and enforcing the remainder in a strict liability fashion. This issue contains several sub-issues ranging from the extent to which an agency may promulgate rules and abstain from formal rulemaking to whether the facts in the record,

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<sup>1</sup> See Appellants’ Reply Brief, p. 1-2, citing Appellee’s Brief.

including properly promulgated provisions in the Ohio Administrative Code, constitute sufficient evidence of such an enforcement policy.<sup>2</sup>

Secondly, this case requires delineation of the disjunctive relationship between Ohio's constitutional protection of property rights, and the outermost boundary of the state's police powers, i.e. the ultimate question of constitutional law: the extent to which Ohioans are to be free from government interference. This issue encompasses sub-issues ranging from takings, physical seizures, and fines to whether the right to use property is a "fundamental right," the historical and current extent of the police power, and very meaning of the test Ohio has employed in the past when adjudicating the police power as against property rights.<sup>3</sup> On this issue, the parties' respective analyses greatly diverge on nearly every front.

This Court also accepted a threshold issue, which, though perhaps not as substantively important as the two issues above, is of great significance in its own right: whether an Ohioan loses his right to raise and vindicate his constitutional rights, as against a statute or regulatory policy, simply because he has been fined under that statute or policy, and not availed himself of an available administrative procedure, in the past. This seemingly narrow procedural issue has very substantive real-world implications: affirmative defenses and the declaratory judgment statute are the most common gateways to an Ohioan's vindication of his or her constitutional rights, and parties who have been fined are the most likely to attempt to vindicate their rights. On this front, the parties' briefs demonstrate sub-issues ranging from the rationales behind the exhaustion of administrative remedies, "collateral attack," and *Sunburst* doctrines to the effect of Civ. R. 12, Civ. R. 13, and Civ. R. 60(b).<sup>4</sup>

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<sup>2</sup> See Appellants' June 27, 2011 Merit Brief., at pp. 6-20, generally.

<sup>3</sup> Id., at pp. 24-41, generally.

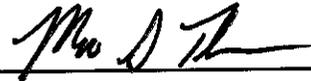
<sup>4</sup> Id., at pp. 44-50.

### III. CONCLUSION

Appellants bring this matter to the Court's attention well before oral argument due to this Case's selection for this Court's "off-site session" in Highland County, Ohio. Tentative scheduling of events surrounding this off-site session indicate that this Court would wish to take immediate attention of this Motion, so as to account for considerations that may not usually exist when in Columbus. Specifically, the Court's administration, in conjunction with the Highland County Court of Common Pleas, appears to be scheduling question and answer sessions and a luncheon subsequent to oral arguments.

However, as articulated above, each Proposition of Law in this case is substantial, and has the capacity to raise a great number of questions amongst the Court. To ensure that each side has ample opportunity to address as many of these disputes as is possible, Appellants respectfully request that this Court extend time for oral argument in this matter from 15 minutes per side to 25 minutes per side, or in the alternative, 20 minutes per side.

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 9/13 2011.



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