ORIGINAL

IN THE SUPREME COURT OF OHIO

Bradley Walker,	*	13-1277
	*	
Plaintiff-Appellee,	*	On Appeal from the Lucas County
	*	Court of Appeals, Sixth Appellate District
v.	*	
	*	Supreme Court Case No. _____
City of Toledo et. al,	*	
	*	Court of Appeals Case No. L-12-1056
Defendant-Appellants.	*	
	*	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CITY OF TOLEDO

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

On June 28 the Sixth District Court of Appeals ("Sixth District") struck down as unconstitutional the administrative review process established by Toledo Municipal Code ("TMC") § 313.12, "Civil penalties for automated red light system violations," a presumptively valid ordinance that had been on the books for decade. In a 2 to 1 decision, the Sixth District reversed a Civ. R. 12(B)(6) dismissal and found that R.C. §1901.20 provides that only a municipal court has jurisdiction to consider violations of municipal ordinances regardless of whether a "violation" is criminal or civil in nature. In making this determination, the Sixth District has effectively eliminated the ability of a home rule city to establish review processes to review local non-criminal issues except where specifically authorized by the General Assembly. The Sixth District ruling creates issues of great general interest and several substantial constitutional questions that warrant this Court's review. If not reversed, the Sixth District ruling will adversely affect similar municipal ordinances throughout the State and will undermine the well-established principles of home-rule established in the Ohio Constitution. A copy of the Sixth District's ruling is attached as Appendix A.

The primary question presented in this appeal is simply - "Does a home rule city that creates an administrative process to review appeals of civil violations of municipal ordinances unconstitutionally interfere with the jurisdiction of the municipal court and act in violation of R.C. § 1901.20?" While, this question has been previously presented to this Court in the specific context of photo enforcement programs, the question does not appear to have been definitively

decided.[1] Almost certainly, if not considered now, the question will re-appear in the future and begs for an answer. Resolution of this question by this Court is a matter of exceptional public or great general interest and involves a substantial constitutional question.

Certainly, this Court's precedent as discussed below seems to suggest that this Court should reverse the Sixth District Court of Appeals, but in absence of a firm holding, it is likely that this unresolved question will cause disruption as different Courts arrive at potentially different conclusions. Because the same constitutional challenge is pending in several courts in this State and because the outcome of those cases will have statewide impact, this matter begs for review and decision by this Court at this time. Even if this Court affirms the Sixth District ruling, the question will be definitively resolved.

The City of Toledo ("City" or "Toledo") is one of many Ohio municipalities that have adopted an administrative process that issues civil notices of violation to persons that create public danger by running red lights or traveling at excessive speeds.[2] Toledo's Code sets forth the definition of what would constitute a civil photo enforcement violation and establishes an administrative review process. See, TMC 313.12, (copy attached as Appx. B). Toledo's ordinance is substantially similar to the Akron ordinance that was challenged in *Mendenhall v City of Akron*, 117 Ohio St. 3d 33, 2008-Ohio-270, as neither city's ordinance specified that the

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[1] See, *State ex rel Turner v. Brown*, 128 Ohio St. 3d 1479 (2011). *Turner* involved an original action in prohibition and mandamus that claimed enforcement of Columbus's photo enforcement program unconstitutionally violated Ohio Constitution Art. IV, § 1 for reasons similar to the reasons raised by Appellee here. This Court dismissed the action without opinion.

[2] By way of example: Akron Municipal Code 79.01; Ashatabula Municipal Code Ch. 317; Dayton Municipal Code 70.121; Columbus Municipal Code Chapter 2115; Cleveland Municipal Code 413.031; Hamilton Municipal Code Chapter 343, Northwood Municipal Code 414.11, Parma Municipal Code 313.13; and, Youngstown just enacted a similar ordinance with the passage on June 5 of Ordinance 13-193 all have similar programs that could be effected by the Sixth District Ruling. Moreover, similar challenges have been raised to many of these jurisdictions' programs. See, for example, *Jodka v Cleveland*, pending as Case No. C.A. 13-09951 in the Eight District Court of Appeals.

local municipal court would hear all civil violations.[3] Persons that commit civil infractions are not charged criminally and receive no criminal sanctions.

The issues in this case are of great general interest and public concern. If the Court of Appeals decision stands Toledo's photo enforcement ordinance would be, according to the Sixth District's ruling, a "nullity."[4] Decision and Judgment at ¶ 36. Given the reality that many cities throughout the State have enacted similar programs, the impact of the Sixth District ruling could be profound. If other appellate districts rule differently there would be a lack of uniformity throughout the state.

Moreover, this matter involves significant constitutional issues. While certainly the effect of the ruling could be catastrophic to Toledo's photo enforcement program, arguably the greater detriment of the ruling would be the erosion of to the City's home rule powers generally. In other words, the ramifications of the error below would not be limited to the improper invalidation of a municipal photo enforcement program, it would also undermine the ability of any city in the Sixth District's territorial jurisdiction to create or retain an administrative review process by properly enacted ordinance.

It is well established that the City has home rule authority under the Ohio Constitution Article XVIII, Section 3. *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255. Pursuant to its constitutionally granted home rule authority, the City possesses broad legislative powers. *State ex rel. Gordon v. Rhodes,* 156 Ohio St. 81, 100 N.E.2d 225 (1951). As this Court frequently noted, legislation adopted pursuant to the City's home rule powers is

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[3] Similarly, in *State ex rel. Scott v. Cleveland*, 112 Ohio St. 3d 324, 2006-6573, this Court upheld a Cleveland photo enforcement ordinance that contained administrative review processes.

[4] The Sixth District did not undertake an analysis as to whether the entire Ordinance was constitutionally infirm or whether it was capable of severance to save otherwise constitutional provisions.

presumed to be constitutional *Hudson v. Albrecht*, 9 Ohio St.3d 69,71, 458 N.E.2d 852 (1984), and this presumption can only be overcome by proof beyond a reasonable doubt. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 17, *citing Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633, ¶ 4. The City's home rule authority extends to the authority to establish administrative boards, commissions, and hearings. See *Willoughby Hills v. C.C. Bar's Sahara*, 64 Ohio St.3d 24; 591 N.E.2d 1203.

In the case below, a majority of the panel impermissibly wrote in a restraint on the City's home rule authority that is not supported by law when it suggested that the provisions of R.C. Chapter 2506 appeals are only available where City "*** administrative bodies derive their authority from the General Assembly through enabling acts that patently carve out exceptions to municipal court review." Decision and Judgment ¶ 35. The Sixth District ruling would radically rewrite R.C. § 2506.01 and place a previously unheard of restriction on the types of cases that would be subject to administrative appeal.[5] More importantly, however, the concocted requirement of an enabling statute would, if not corrected by this Court, emasculate the City's constitutionally guaranteed home rule authority by eliminating a city's ability to establish administrative boards, commissions, bureaus, etc.

Pursuant to the City's home rule authority, the City, *by ordinance*, created various boards that hear administrative appeals. As Sixth District noted in its decision, for instance, the City has many such administrative bodies, e.g. Boards of Zoning Appeals (BZA), Plan Commission, and

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[5] R.C. § 2506.01 provides, in part, "Except as otherwise provided in sections 2506.05 to 2506.08 of the Revised Code, and except as modified by this section and sections 2506.02 to 2506.04 of the Revised Code, every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code. ***"

Tax Appeal Board (see decision and Judgment pp 15-16). The Court, however, incorrectly concluded that these administrative bodies are creatures of state law ("... are creations of express legislation." Decision and Judgment p. 15). In fact, all municipal administrative bodies in the City were all created by ordinance or charter pursuant to the City's home rule authority- Board of Zoning Appeals (Toledo Municipal Code (TMC) ¶ 1112.02, Plan Commission (TMC § 145.01) Tax Appeal Board of Review (TMC §1905.13). Moreover, the Sixth District acknowledged that other city administrative appellate bodies are not referenced in the Revised Code- e.g. Taxi Cab Review Board (established by TMC §771.01).

The Sixth District's analysis in the June 28 Decision and Judgment is flawed because it makes the City's home rule power to create administrative processes conditional upon state legislative grant. Such a blanket limitation does not exist under Ohio law and is contrary to the authority given to the City by the Ohio Constitution at Article XVIII, Section 3. Under the Sixth District majority's view, home rule authority is dependent upon approval by the General Assembly. Clearly, this has never been the case.

The Sixth District's ruling is also flawed because rather than interpreting legislative enactments in a manner that presumed constitutionality, the majority seems to have strained to interpreted relevant statutes in a manner that would lead to a finding of unconstitutionality. The court, for instance, stretched its reading of R.C. 1901.20 to rewrite that section more restrictively than the legislature or prior court decisions ever could have intended.

Moreover, the Sixth District improperly trivialized this Court's holding in *Mendenhal, supra.*

Finally, if the Sixth District ruling is not reversed, the financial impact upon cities could be significant as, impliedly, the ruling gives a green light to claims for unjust enrichment against cities that have enacted and enforced local ordinances in good faith.

Accordingly, this matter comes to this Court with several significant issues of public or great general interest and involves substantial constitutional questions.

STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff-Appellee Bradley L. Walker ("Walker") owned a vehicle that was cited for a civil violation of Toledo's photo enforced traffic code and was issued a "Notice of Liability" under TMC §313.12. He paid the $120.000 penalty. Walker conceded in his complaint that the "Notice of Liability provides a twenty-one (21) day period to request a hearing on the "Notice of Liability". Walker opted not to pursue the appeal process and did not request a hearing, but instead paid the $120 fine assessed.

The City, pursuant to Ordinance, enacted TMC §313.12 which adopts and provides a civil enforcement system for red light and speeding camera system violations. The Ordinance provides that the City of Toledo Division of Transportation, the Toledo Police Department, and the Department of Law shall be responsible for administering the Automated Red Light and Speeding System.

TMC §313.12(3) provides for the processing and sending of citations for speeding system violation. This provision requires that a citation, known as "Notice of Liability" will clearly state the manner in the violation may be appealed.

TMC §313.12(c) defines the elements and nature of the offense, circumstances which provide an exception for any responsibility or liability for a vehicle owner receiving a citation, and the process by which he or she may assert such exception.

The recipient of a "Notice of Liability" may: 1) pay the administrative fine directed on the Notice of Liability, 2) submit evidence of one of the exceptions to liability listed in code section, or 3) request a hearing within 21 days of the date listed on the Notice of Liability.

TMC §313.12(d) specifies the penalty, administrative appeal and enforcement provisions. Section (d)(4) provides that "A notice of appeal shall be filed with the Hearing Officer within twenty-one (21) days from the date listed on the 'Notice of Liability'. The failure to give notice of appeal or pay the civil penalty within this time period shall constitute a waiver of the right to contest the citation and will be considered an admission. Appeals shall be heard through an administrative process established by the City of Toledo Police Department. A decision in favor of the City of Toledo may be enforced by means of a civil action or any other means provided by the Ohio Revised Code."

On February 24, 2011 ("Walker") filed a complaint in Lucas County Common Pleas Court on behalf of himself and "those similarly situated" seeking return of all monies that the City and Redflex Traffic Systems, Inc. ("Redflex") collected under Toledo's traffic camera enforcement system, codified at Toledo Municipal Code ("TMC") §313.12. [6] Both defendants filed motions to dismiss. Neither defendant answered Walker's complaint nor was discovery undertaken in the case.

In his complaint Walker alleged that TMC § 313.12 was unconstitutional for a variety of reasons. Most significantly, Walker argued that TMC § 313.12 improperly deprived the Toledo Municipal Court of jurisdiction thereby violating Ohio Constitution Art. IV, § 1 and that TMC §313.12 was invalid under the theory that it failed to afford Walker and similarly situated

[6] Redflex is a private contractor that provides photo enforcement equipment a support.

individuals due process and equal protection under the Constitution of the State of Ohio and the United States Constitution.

The City and Redflex timely filed separate motions to dismiss Walker's complaint for pursuant to Ohio R. Civ. P. 12(B)(6). After full briefing, on February 1, 2012 the Lucas County Common Pleas Court granted the City's and Redflex's motions to dismiss, specifically rejecting Plaintiff-Appellant's arguments that Toledo Municipal Code §313.12 was an invalid delegation of the administrative process or that such process violated due process or equal protection under the United States and State of Ohio's Constitutions. The trial court also held that Ohio Revised Code § 1901.20 does not give the Toledo Municipal Court exclusive jurisdiction over violations issued pursuant to Toledo Municipal Code §313.12. Walker appealed.

On June 28, 2013 a divided panel of the Sixth District reversed the trial court's grant of dismissal. The majority opined, *inter alia,* that R.C. § 1901.20 vested municipal courts with exclusive jurisdiction over violations of **all** City ordinances and, therefore, TMC § 313.12 "violates Ohio Constitution, Article IV, Section 1, and is therefore a nullity." Decision and Judgment ¶36. The majority further ruled that Walker's due process challenge was at least sufficient to survive a motion to dismiss. Id. ¶ 39.

In a lengthy dissent, one member of the panel indicated that he would have affirmed the trial court's dismissal. First, argued the dissent, this Court's precedent in *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, suggested a different result as this Court upheld Akron's civil infraction system that also provided for administrative citations. Id. ¶ 43. The dissent also disagreed with the majority's failure to acknowledge that the title of R.C. § 1901.20, "Criminal jurisdiction," was significant as to the legislature's intention as to its meaning. Id. ¶ 46. Likewise the dissent pointed out that the majority's interpretation of R.C. § 1901.20, in essence

rewrote the statute and ignored common definitions. Id. ¶¶ 47-49. R.C. § 1901.20, wrote the dissent, does not provide that municipal courts have *exclusive* jurisdiction over *every* local ordinance.

The matter was remanded and the trial court has stayed proceedings pending the outcome of this appeal.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

Neither R.C. § 1901.20 nor Ohio Constitution, Article IV, Section 1 are offended when a home rule municipality enacts, by ordinance, a civil administrative process for photo enforcement of speed and red light violation.

In relevant part, R.C. § 1901.20 provides:

> "1901.20 Criminal and traffic jurisdiction.
> (A)(1) The municipal court has jurisdiction of the violation of any ordinance of any municipal corporation within its territory, unless the violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521. of the Revised Code, and of the violation of any misdemeanor committed within the limits of its territory. The municipal court has jurisdiction of the violation of a vehicle parking or standing resolution or regulation if a local authority, as defined in division (D) of section 4521.01 of the Revised Code, has specified that it is not to be considered a criminal offense, if the violation is committed within the limits of the court's territory, and if the violation is not required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521. of the Revised Code. The municipal court, if it has a housing or environmental division, has jurisdiction of any criminal action over which the housing or environmental division is given jurisdiction by section 1901.181 of the Revised Code, provided that, except as specified in division (B) of that section, no judge of the court other than the judge of the division shall hear or determine any action over which the division has jurisdiction. In all such prosecutions and cases, the court shall proceed to a final determination of the prosecution or case. ***"

Walker argued below that this provision gives municipal courts exclusive jurisdiction over all violations of all municipal ordinances. While this argument was rejected by the trial court, two

judges on the Sixth District panel agreed with Walker. The dissent, however, got it right. Interpreting the above-quoted language as preventing a home rule city from having civil administrative review processes was simply unprecedented and wrong.

Neither the majority nor Walker cited case law support for the proposition that a city usurps municipal court jurisdiction when it creates a civil administrative review process. That is because there is no such support. The majority's strained interpretation of R.C. § 1901.20 does not withstand scrutiny.

This Court has previously ruled that a municipal ordinance that "provides for a complementary system of civil enforcement that, rather than decriminalizing behavior, allows for the administrative citation of vehicle owners***" is within a City's home rule authority. *Mendenhall* ¶42. Accordingly, there can be no doubt that Toledo, like Akron in *Mendenhall*, has the power to enact an ordinance such as TMC 313.12.

The Sixth District majority, however, dismissed the holding in *Mendenhall* by opining that this Court had specifically not addressed possible due process challenges to civil photo enforcement ordinances. Decision and Judgment ¶13. As the dissent pointed out however, the majority ignores the fact that this Court did definitively hold that enactment of an ordinance substantially similar to the one involved in this case was constitutionally with the City's home rule authority. Id. ¶44.

The City may properly enact ordinances that create administrative bodies to review non-criminal violations of its own code. The Ohio Revised Code recognizes this reality by creating an appeal process for review of local administrative decisions. See, Revised Code Chapter 2506.[7]

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[7] R.C. 2506.01 provides: "Appeal from decisions of agency of political subdivisions.

However, if the Sixth District's reasoning is correct, R.C. Chapter 2506 would only come into play if the Revised Code expressly created the municipal administrative body. This is not the case and, fundamentally, this premise is contrary to the realities of home rule and certainly flies in the face of this Court's holding in *Mendenhall*. The Sixth District's view that administrative review at a local level is only allowed by express legislative grant seems to be contrived as neither R.C. 2506.01 nor R.C. 1901.20 contain such a provision. It also is contrary to the Sixth District's own precedent.

If the Decision and Judgment of the Sixth District stands, Revised Code Chapter 2506 could be judicially emasculated as review of administrative decisions by municipal boards would, if allowed to occur at all, have to be heard by local municipal courts. For instance, if a dance hall operator's license is revoked, under the current municipal code, that person could seek administrative review by the Dance Hall Board of Appeals. Toledo Municipal Code § 723.08. If the operator is dissatisfied with the decision of the Board of Appeals (a board not addressed in the Revised Code), the operator could appeal to the Common Pleas Court pursuant to R.C. Chapter 2506. See, *La Garza Ballroom, Inc. v. Toledo Bd. of Appeals*, 2000 Ohio App. LEXIS 2877, 2000 WL 864450 (Ohio Ct. App., Lucas County June 30, 2000). But under the ruling of

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(A) Except as otherwise provided in sections 2506.05 to 2506.08 of the Revised Code, and except as modified by this section and sections 2506.02 to 2506.04 of the Revised Code, every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code.
(B) The appeal provided in this section is in addition to any other remedy of appeal provided by law.
(C) As used in this chapter, "final order, adjudication, or decision" means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding."

the Sixth District, the license revocation would have had to start in the municipal court, because it involved an ordinance violation; review by the Dance Hall Review Board would violate R.C. 1901.20 because the board considers ordinance violations that only the municipal court can hear.

State ex rel. Nicholson v. City of Toledo, 2012 Ohio 4325, 2012 Ohio App. LEXIS 3793, 2012 WL 4338489 (Ohio Ct. App., Lucas County Sept. 17, 2012), and *Dixon v. City of Toledo*, 2006 Ohio 4133, 2006 Ohio App. LEXIS 4077 (Ohio Ct. App., Lucas County Aug. 11, 2006) are also illustrative of the Sixth District's prior recognition of the City's powers to create administrative appeals boards. In both cases this Court considered cases involving the City's Nuisance Abatement Housing Board (NAHAB) that was created by Toledo Municipal Code Chapter 1726. In *Dixon*, appellant was cited with a nuisance violation and appealed the notice of violation to the NAHAB. Dissatisfied with the outcome before NAHAB, the appellant brought an appeal to the Lucas County Court of Common Pleas pursuant to R.C. § 2506.01. The Common Pleas Court affirmed NAHAB and an appeal was made to the Sixth District which affirmed.

To be certain, *La Garza, Nicholson* and *Dixon* are not factually identical to the instant case. They all, however, illustrate the long recognition that R.C. Chapter 2506 is available to review decisions by administrative bodies of the City regardless of whether the administrative body was a "creation[s] of express [state] legislation." The *Willoughby Hills* case, supra, in fact, suggests that R.C. Chapter 2506 was made for the purpose of creating an appellate process for municipal administrative decisions. *Willoughby Hills* recognized a charter municipality's right to appeal a decision of its zoning appeals board, which was created by municipal ordinance, to the court of appeals pursuant to Ohio Revised Code Chapter 2506. The Court stated that the "Charter of the city of Willoughby Hills could not create a right to such appellate review had the

General Assembly not enacted R.C. Chapter 2506" and that "the purpose behind R.C. Chapter 2506 is to authorize judicial review of local quasi-judicial decisions." Id. 31.

The Sixth District's ruling calls into question whether the City can have any administrative processes at all to consider non-criminal matters addressed in its Code. If the Sixth District ruling in this case stands, the Toledo Municipal Court will see an increase in its caseload as matters now heard by administrative bodies like NAHAB would now be within the exclusive jurisdiction of the Municipal Court. Such a result could not have been intended by the Revised Code.

Obviously, the example of NAHAB is merely illustrative and is just one of many possible examples the unintended consequences of the Sixth District Court's ruling. The precedential effect of the ruling would not be limited to just Toledo. Other home rule cities within this District would be similarly affected by the restrictive interpretation of R.C. 1901.20.

Meanwhile other Courts of Appeal have upheld similar exercises of home rule authority against challenge. In *City of Parma v. Demsey*, 2011 Ohio 6624, 2011 Ohio App. LEXIS 5455, 2011 WL 6792772 (Ohio Ct. App., Cuyahoga County Dec. 22, 2011), the Eighth District affirmed Parma's similar civil enforcement program in a R.C 2506 appeal. In fact, as recently as July 3, 2013 in *Davis v Cleveland*, 2013-Ohio-2914, the Eight District ruled in Cleveland's favor in another appeal of that originated as a R.C. 2506 administrative appeal from an administrative appeal process.

Proposition of Law II:

R.C. § 1901.20 does not confer exclusive jurisdiction over civil administrative violations of municipal codes to municipal courts.

The Sixth District Majority erred when it interpreted R.C. § 1901.20 as vesting the municipal courts with exclusive jurisdiction over violations of **all** municipal ordinances. While the majority correctly found that, pursuant to R.C. 1.01 a statute's title is not part of the law, the majority erred in not considering the title as indicative of the legislative purpose behind the statute. Further, the majority failed to consider the consequences of its interpretation.

Where a statute is ambiguous, R.C. §1.49 allows a court to consider legislative intent. Here the title sheds some light on the purpose of the statute or, as stated by the dissent, the title of § 1901.20 "suggest some contextual insight into the subject matter it was intended to address." Decision and judgment ¶ 46. Clearly, the intent was that the jurisdiction conferred by R.C. 1901.20 was intended to apply to misdemeanors.

Moreover, the majority below failed to consider the "[t]he consequences of [the] particular construction" it employed. R.C. § 1.49. As discussed above, the consequences of the Sixth District's interpretation are profound. By interpreting R.C. 1901.20 as a grant of plenary and exclusive jurisdiction to municipal courts over **all** municipal ordinances, the Sixth District has re-written the law, undermined home rule, contradicted other statutory processes (e.g. R.C. Chapter 2506) and, possibly, exposed Ohio cities to unforeseen damages for enacting civil processes in good faith for many years.

Finally, as argued below, where the General Assembly intends to confer exclusive jurisdiction it does so unambiguously. *State ex rel. Banc one Corp v Walke*r, 86 Ohio St. 3d 169 (1999). It did not do so in R.C. §1901.20

CONCLUSION

This case presents matters of great general and public interest in that, if allowed to stand, the affect of the Sixth District ruling will be to prevent home rule cities from having

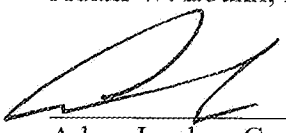
administrative review procedures. Walker's counsel, in a similar case pending before the Eight District Court of Appeals, recently argued the effect of the Sixth District ruling in this case as follows:

> "As in Walker, the issue here is whether a municipality may enforce an ordinance- *no matter what its subject matter*- by unilaterally placing exclusive jurisdiction in the hands of a municipal agency, purposefully negating the municipal court's statutory jurisdiction to adjudicate a particular ordinance violation."[8]

Aside from the Pablum suggesting purposeful negation, Walker's counsel has correctly framed the issue. At stake in this case is whether cities in the State, constitutionally endowed with extensive home rule powers, can continue to maintain and create administrative boards and commissions to consider appeals of civil matters as they have done for almost a century. The question posed here is of monumental importance and it should be answered, definitively, by this Court.

Respectfully submitted,

Adam W. Loukx, Law Director



Adam Loukx, Counsel for Defendant

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[8] *Jodka v Cleveland,* Eighth District Court of Appeals CA 13-099951, Reply Brief of Appellant, p. 4. [Emphasis added.]

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction was served upon the following by first class U.S. mail, postage prepaid, this 9th Day of August, 2013:

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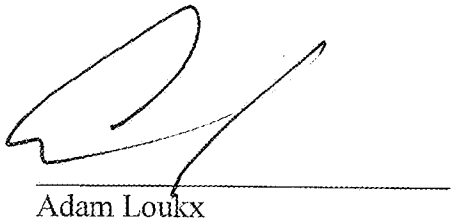

Adam Loukx

APPENDIX

A. Decision and Judgment of the Lucas County Court of Appeals for the Sixth Appellate District (June 28, 2013)

B. Toledo Municipal Code § 313.12

APPENDIX A

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COMMON PLEAS COURT
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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Bradley L. Walker

Appellant

v.

City of Toledo, et al.

Appellees

Court of Appeals No. L-12-1056

Trial Court No. CI0201101922

DECISION AND JUDGMENT

Decided:

JUN 28 2013

* * * * *

Andrew R. Mayle, Jeremiah S. Ray, Ronald J. Mayle and John T. Murray, for appellant.

Adam W. Loukx, Director of Law, and Eileen M. Granata, Senior Attorney, for appellee City of Toledo.

Quintin F. Lindsmith, Sommer L. Sheely and James P. Schuck, for appellee RedFlex Traffic Systems, Inc.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals a judgment of the Lucas County Court of Common Pleas dismissing a putative class action unjust enrichment suit against a city and traffic

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JUN 28 2013

enforcement camera company. Because we conclude the trial court's dismissal of the suit improper, we reverse and remand for further proceedings.

{¶ 2} In 2003, appellee city of Toledo ("city") instituted an automated red light enforcement system. Appellee RedFlex Traffic Systems, Inc. ("RedFlex") provided a camera system that synchronized with traffic signals to take pictures of automobiles that entered an intersection after the traffic light turned red. Speed measuring devices were later added. RedFlex installed, maintains and monitors the cameras. Appellees allegedly share the revenues generated from auto owners that are sent a civil "notice of liability" after having been photographed during a red light or speed violation.

{¶ 3} Appellant, Bradley L. Walker, was one of those who received such a notice and paid a $120 "civil penalty." On February 24, 2011, appellant brought suit on behalf of himself and those similarly situated to recover the "civil penalty" he, and the others, paid. Appellant did not contest the validity of red light cameras. He concedes they are legal. Rather he asserted that the legal structure by which such penalties were extracted violated the Ohio Constitution, making the penalties collected unlawful. Appellant sought return of such money taken under the doctrine of unjust enrichment.

{¶ 4} Appellant advanced three theories as a basis for recovery. First, he maintained that by enacting the ordinance governing red light cameras, Toledo Municipal Code 313.12, the city unconstitutionally usurped the jurisdiction of the Toledo Municipal Court by diverting challenges to the violation notices to an administrative hearing officer set up within the police department. Second, appellant suggested the ordinance is

unconstitutionally vague because it delegates adjudicatory authority to the Toledo Police without articulating intelligible governance principles. Finally, appellant alleged, the Toledo Police failed to establish any administrative procedures by which a violation notice could be challenged, denying due process to those who received such notices.

{¶ 5} Both appellees filed a motion to dismiss appellant's complaint for failure to state a claim for which relief can be granted, pursuant to Civ.R. 12(B)(6). After briefing, the trial court granted appellees' motion and dismissed appellant's complaint.

{¶ 6} From this judgment, appellant brings this appeal. Appellant sets forth a single assignment of error:

> The trial court erred in ruling that Mr. Walker failed to state a claim upon which relief can be granted.

{¶ 7} Review of a judgment granting a Civ.R. 12(B)(6) motion is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. When ruling on a motion to dismiss for a failure to state a claim upon which relief can be granted, a court must presume the truth of the factual allegations in the complaint and must make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). It must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him or her to recover. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. For these reasons, motions to dismiss for failure to

state a claim are rarely successful. *Tri-State Computer Exchange v. Burt*, 1st Dist. No. C-020345, 2003-Ohio-3197, ¶ 12.

Toledo Municipal Code 313.12

{¶ 8} With the enactment of Toledo Municipal Code 313.12, the city adopted what is characterized in the code as a "civil enforcement system for red light and speeding camera system violations." The plan imposes "monetary liability" on the owner of a vehicle for failure to comply with traffic lights or posted speed limits. City transportation, police and law departments are charged with the administration of the system. Police and the transportation division are tasked with choosing the location of automated red light and speed monitoring devices and maintaining the devices once installed. Apparent violations are to be processed by city officials or its agents. When a violation is recorded, the registered owner of the offending vehicle is sent a "Notice of Liability," Toledo Municipal Code 313.12(a), indicating that he or she is liable for a "civil penalty" of $120. Toledo Municipal Code 313.12(d)(1)(2).

{¶ 9} The ordinance declares that the fact an individual is the registered owner of a vehicle is "prima-facie evidence" that he or she was operating the vehicle at the time of the offense. Toledo Municipal Code 313.12(c)(3). An owner of a vehicle may be absolved of such presumptive liability only if, within 21 days of the notice, he or she furnishes a hearing officer with an affidavit identifying the person operating the vehicle at the time of the offense (at which point, presumably, liability shifts to the person

informed upon) or a police report showing that the vehicle was reported stolen prior to the offense. Toledo Municipal Code 313.12(c)(4).

{¶ 10} Toledo Municipal Code 313.13(d)(4) describes an appeal process. The provision, in its entirety, provides:

> A notice of appeal shall be filed with the Hearing Officer within twenty-one (21) days from the date listed on the "Notice of Liability." The failure to give notice of appeal or pay the civil penalty within this time period shall constitute a waiver of the right to contest the citation and will be considered an admission. Appeals shall be heard through an administrative process established by the City of Toledo Police Department. A decision in favor of the City of Toledo may be enforced by means of a civil action or any other means provided by the Ohio Revised Code.

{¶ 11} In their motion to dismiss, appellees maintained that the ordinance is constitutional. Moreover, appellee city argued that unjust enrichment claims cannot be maintained against a municipality, since appellant did not appeal his violation there could be no due process violation and appellant lacked standing to bring an action. Appellee RedFlex also asserted that appellant waived a challenge to the law because he paid his fine and did not appeal, and that a constitutional challenge does not apply to RedFlex because it is not a state actor.

I. *Mendenhall v. Akron*

{¶ 12} Appellee city first sought dismissal on the ground that the Ohio Supreme Court has approved the use of speed and red light detection devices in a civil administrative liability context in *Mendenhall v. City of Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255. The trial court properly ruled *Mendenhall* not dispositive of this matter. The question certified to the court in *Mendenhall* was whether, under home rule, a municipality may enact civil penalties for acts deemed criminal offenses by the state. *Id.* at ¶ 2. The court ruled that, since Akron's ordinance did not alter or supersede Ohio law, it was compatible with the city's home rule powers. *Id.* at ¶ 43. The question of the constitutionality of the ordinance in other respects was not before the court.

{¶ 13} We note that the *Mendenhall* court issued a caveat to its decision when, at ¶ 40, the court stated, "[a]lthough there are due process questions regarding the operation of the Akron Ordinance and those similar to it, those questions are not appropriately before us at this time and will not be discussed here." The trial court concluded that this remark was a "passing comment." We view the statement rather as an express limitation on the scope of the *Mendenhall* decision.

II. Standing—Immunities

{¶ 14} Appellee city suggested to the trial court that appellant lacked standing to bring the suit and that a municipality cannot be liable in quasi-contract. Appellee RedFlex argued appellant is barred from challenging the ordinance because he failed to exhaust administrative remedies. In any event, appellee RedFlex insisted, it could not be

held liable for constitutional infirmities because it is not a state actor. The trial court rejected all of these arguments, and properly so.

{¶ 15} A party who has been or will be adversely affected by the enforcement of an ordinance has standing to attack its constitutionality. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 30. Appellant alleges that he has received a notice of civil liability for a red light violation and has paid the penalty. This monetary injury produces sufficient interest in the operation of the ordinance to challenge its constitutionality.

{¶ 16} With respect to a suit in unjust enrichment, the general rule is that "all governmental liability ex contractu must be express and must be entered into in the prescribed manner." *Perrysburg Twp. v. City of Rossford*, 149 Ohio App.3d 645, 2002-Ohio-5498, 778 N.E.2d 619, ¶ 58 (6th Dist.), quoting *Kraft Constr. Co. v. Cuyahoga Cty. Bd. of Commrs.*, 128 Ohio App.3d 33, 44, 713 N.E.2d 1075 (8th Dist.1998). Nevertheless, it has been held that a suit seeking the return of specific funds wrongfully collected or held by the state may be maintained in equity. *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, syllabus. *Accord Judy v. Ohio Bur. of Motor Veh.*, 100 Ohio St.3d 122, 2003-Ohio-5277, 797 N.E.2d 45; *Ohio Hosp. Assn. v. Ohio Dept. of Human Serv.*, 62 Ohio St.3d 97, 579 N.E.2d 695 (1991). *Santos* concerned money withheld in subrogation under a statute deemed unconstitutional. *Judy* and *Ohio Hospital Assn.* were about money wrongfully withheld under misinterpreted or unconstitutional regulations. The allegation of appellant is that

the city's collection of automated fines was wrongfully premised on an unconstitutional ordinance. This is in the nature of those actions held to be permitted.

{¶ 17} With respect to appellee RedFlex's assertion that it cannot be required to return money collected by an unconstitutional ordinance because it is not a state actor, appellant asserts no federal claims against RedFlex. He only maintains that RedFlex is in possession of funds it is not properly entitled to hold. Unjust enrichment exists when there is:

> (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment (i.e., the "unjust enrichment" element). Ohio law does not require that the benefitted party act improperly in some fashion before an unjust enrichment claim can be upheld; instead, unjust enrichment can result "from a failure to make restitution where it is equitable to do so. That may arise when a person has passively received a benefit which it would be unconscionable for him to retain" without paying compensation. (Citations omitted.) *Advantage Renovations, Inc. v. Maui Sands Resort, Co., L.L.C.*, 6th Dist. No. E-11-040, 2012-Ohio-1866, ¶ 33.

{¶ 18} A defendant in a suit seeking compensation for unjust enrichment need not be a state actor.

{¶ 19} With respect to exhaustion of administrative remedies, as the trial court noted, an administrative agency possesses no authority to determine the constitutionality of a statute or ordinance. *Herrick v. Kosydar*, 44 Ohio St.2d 128, 130, 339 N.E.2d 626 (1975). As a result, exhaustion of administrative remedies is unnecessary when the gravamen of the suit is a constitutional attack on an underlying ordinance.

{¶ 20} This leads us to the merits of appellant's allegations. Appellant argues that Toledo Municipal Code 313.12 is unconstitutional in three respects. If any of these assertions is correct, the trial court's judgment dismissing the case must be reversed and the matter remanded for further proceedings.

{¶ 21} Municipal ordinances, like other legislative enactments, are entitled to the presumption of constitutionality. *Hudson v. Albrecht*, 9 Ohio St.3d 69, 71, 458 N.E.2d 852 (1984). The burden is on the party challenging the ordinance to prove otherwise beyond a reasonable doubt. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 17, *citing Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633, ¶ 4.

III. Municipal Court Jurisdictional Infringement

{¶ 22} Appellant submits that Ohio Constitution, Article IV, Section 1, vests judicial power in this state to "a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law." Municipal courts, and expressly the Toledo Municipal Court, have been established by the General Assembly in R.C. Chapter 1901.

Home rule municipalities have no power to regulate the jurisdiction of a municipal court. *Amer. Fin. Services Assn. v. Toledo*, 161 Ohio App.3d 477, 2005-Ohio-2943, 830 N.E.2d 1233, ¶ 76 (6th Dist.), citing *Cupps v. Toledo*, 170 Ohio St. 144, 163 N.E.2d 384 (1959), paragraph one of the syllabus.

{¶ 23} In R.C. 1901.20(A)(1), the legislature has defined the jurisdiction of a municipal court:

> The municipal court has *jurisdiction of the violation of any ordinance of any municipal corporation within its territory*, unless the violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to [R.C. Chapter 4521], and of the violation of any misdemeanor committed within the limits of its territory. The municipal court has jurisdiction of the violation of a vehicle parking or standing resolution or regulation if a local authority, as defined in [R.C. 4521.01], has specified that it is not to be considered a criminal offense, if the violation is committed within the limits of the court's territory, and if the violation is not required to be handled by a parking violations bureau or joint parking violations bureau pursuant to [R.C. Chapter 4521]. The municipal court, if it has a housing or environmental division, has jurisdiction of any criminal action over which the housing or environmental division is given jurisdiction by [R.C. 1901.181], provided that, except as specified in division (B) of that section, no judge of the court other than the

judge of the division shall hear or determine any action over which the division has jurisdiction. In all such prosecutions and cases, the court shall proceed to a final determination of the prosecution or case. (Emphasis added.)

{¶ 24} Appellant reasons that Toledo Municipal Code 313.12 is an ordinance of a municipal corporation within the territory encompassed by the Toledo Municipal Court and is not a parking violation; therefore, the violation of Toledo Municipal Code 313.12 is subject to the jurisdiction of the Toledo Municipal Court. Any attempt, in whole or in part, to divest the court of that jurisdiction violates the authority of the General Assembly to set the jurisdiction of the court, thus violating Ohio Constitution, Article IV, Section 1.

{¶ 25} Appellant insists that the effect of Toledo Municipal Code 313.12 is to divest the municipal court of jurisdiction by setting up a wholly extrajudicial scheme that grants to a hearing officer, chosen in an unspecified manner by the police department, the authority to adjudicate violations of the ordinance. Such usurpation of jurisdiction violates the Ohio Constitution and should be declared a nullity, appellant maintains. Appellant seeks the return to himself and others similarly situated of all monies collected by the city and RedFlex by virtue of this unconstitutional plan.

{¶ 26} RedFlex responds, characterizing appellant's argument as being that R.C. 1901.20 confers exclusive jurisdiction to municipal courts to the exclusion of all alternative means of enforcement. RedFlex then attacks this argument, suggesting that when the legislature bestows exclusive or original jurisdiction it must do so expressly and

unambiguously. Moreover, RedFlex maintains, appellant's argument is "fatally flawed" because R.C. 1901.20, titled "Criminal and traffic jurisdiction," applies only to criminal ordinances, not civil matters such as "civil penalties" like the one at issue.

{¶ 27} Appellee city concedes that home rule does not provide a municipality with the authority to alter the jurisdiction of a municipal court. Nevertheless, the city asserts, R.C. 1901.20 does not grant exclusive jurisdiction to the municipal court for all matters contained in the city code. R.C. 1901.20(A)(1) states that the municipal court has jurisdiction over the "violation of any ordinance." "Any," according to the city, "is not 'all.'" Had the legislature intended the municipal court to have exclusive jurisdiction over all municipal ordinances, appellee city argues, it could have easily have done so as it did with juvenile courts in R.C. 2151.23(A) or in providing for a building code appeal board in R.C. 3781.20(B). Indeed, the city suggests, if appellant's interpretation is correct, hearings before the Board of Zoning Appeals, Plan Commissions, Taxi Cab Review Boards, Tax Appeal Boards and Boards of Revision would have to be heard by municipal courts.

{¶ 28} The trial court, citing *State ex rel. Banc One Corp. v. Walker,* 86 Ohio St.3d 169, 712 N.E.2d 742 (1999), concluded that the legislature had not included the necessary express language in R.C. 1901.20 to vest exclusive jurisdiction over all municipal ordinances in the municipal court. "[T]his court does not interpret the use of the word 'any' to be an expression of 'all' or 'exclusive.'"

{¶ 29} In his brief to this court, appellant characterizes the question of whether R.C. 1901.20 confers exclusive jurisdiction on a municipal court a "red herring." Even if the statute confers only concurrent jurisdiction on the municipal court, a municipality has no power whatsoever to place any regulation on the jurisdiction of the court. Moreover, appellant insists, for any local administrative body to have concurrent jurisdiction with the court, such jurisdiction must be conferred by the General Assembly. Since the legislature has provided no enabling legislation for a municipal traffic-camera agency, Toledo Municipal Code 313.12 is ultra vires and monies collected in reliance of the ordinance were wrongfully taken.

{¶ 30} It is a rule of statutory construction that, with exceptions inapplicable here, "Title, Chapter, and section headings * * * do not constitute any part of the law as contained in the 'Revised Code,'" R.C. 1.01, thus, consideration of a statute's title in ascertaining its meaning is "unnecessary and improper." *State v. Beener*, 54 Ohio App.2d 14, 16, 374 N.E.2d 435 (2d Dist.1977). We can attach no significance to the heading "Criminal and traffic jurisdiction" in R.C. 1901.20.

{¶ 31} It is also a rule of construction that words and phrases that have not been legislatively defined or acquired a technical meaning "shall be read in context and construed according to the rules of grammar and common usage." R.C. 1.43. Common usage may be ascertained by reference to a dictionary. *See Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 122 Ohio St.3d 557, 2009-Ohio-3628, 913 N.E.2d 421, ¶ 15-16.

{¶ 32} "Any" means "every —used to indicate one selected without restriction" and "all —used to indicate a maximum or whole." *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/any (accessed Mar. 26, 2013.) Construing the language of the first sentence of R.C. 1901.20(A)(1) in context and according to common usage, the legislature has unambiguously granted to municipal courts jurisdiction over a violation of every and all municipal ordinances within its territory, unless, in certain circumstances, the offense is a parking violation.[1] The maxims of construction forbid the substitution of inferences or implications when the language of a statute is unequivocal. *Ashley Tri-County Mut. Tel. Co. v. New Ashley Tel. Co.*, 92 Ohio St. 336, 341, 110 N.E. 959 (1925), applying the maxim "expressum facit cessare tacitum."

{¶ 33} With respect to the argument of appellees, as adopted by the trial court, that the legislature should have, but did not, confer "exclusive" jurisdiction on the court, appellees' reliance on *State ex rel. Banc One Corp.*, 86 Ohio St.3d 169, 712 N.E.2d 742 (1999), is perplexing. The case was an appeal from the judgment of this court denying a petition for a writ of prohibition to prevent a common pleas court judge from continuing to hear a suit arising from a business dispute. Relators, defendants in a suit alleging interference with an insurance contract, believed the suit could not be resolved without

[1] We note that, when the city of Cleveland enacted an automated camera ordinance, it directed that appeals of notices of liability be directed to the city's Parking Violations Bureau. Cleveland Codified Ordinances 313.031(k).

administrative consideration. Relators claimed the common pleas court was divested of jurisdiction over the matter by the doctrine of primary jurisdiction.

{¶ 34} The Supreme Court of Ohio rejected this assertion. The court explained:

> The doctrine of primary jurisdiction applies where a claim is originally cognizable in a court and enforcement of the claim requires the resolution of issues that have been placed within the special expertise of an administrative body. Under this doctrine, the judicial process is suspended pending referral of the issues to the administrative body for its views. (Citations omitted.) *Id.* at 171.

The court explained that this process did not divest a court of general jurisdiction from hearing the case and added that this was because the legislature had not vested exclusive jurisdiction of the issue to an administrative agency. *Id.* The court went on to say that a legislative intent to confer exclusive jurisdiction to an agency or special court must be done "patently and unambiguously," which was not the case with the Department of Insurance. *Id.* at 172.

{¶ 35} If anything, *State ex rel. Banc One Corp.* favors appellant's argument that if the legislature intended to divest municipal courts of jurisdiction over some municipal ordinance, it would have enacted legislation to that effect. Appellant also gains support from appellee city's argument that, if appellant's position is correct, then the municipal court would need to preside over numerous municipal boards. In fact, most of the board appellee city enumerates are the creations of express legislation. Boards of Zoning

Appeals are the creation of R.C. 713.11, Plan Commissions are provided for in R.C. 713.01, Tax Appeal Boards by R.C. 718.11. These administrative bodies derive their authority from the General Assembly through enabling acts that patently carve out exceptions to municipal court review. We must admit, we found no legislative enabling provision for a Taxi Cab Review Board.

{¶ 36} It is clear that the legislature has vested the municipal court with the jurisdiction to adjudicate the violation of any municipal ordinance, including Toledo Municipal Code 313.12. The plain language of the ordinance also reveals that appellee city has attempted to divest the municipal court of some, or all, of its jurisdiction by establishing an administrative alternative without the express approval of the legislature. Such usurpation of jurisdiction violates Ohio Constitution, Article IV, Section 1, and is therefore a nullity.

IV. Void for Vagueness/Due Process Violations

{¶ 37} Appellant claims the delegation of authority to the police department stating that "[a]ppeals shall be heard through an administrative process established by the City of Toledo Police Department" is not a proper delegation of administrative authority. Neither does it provide to the police any fixed standards for such delegation, nor does it provide a mechanism for a review of the police decision.

> It is the function of the legislative body to determine policy and to fix the legal principles which are to govern in given cases. However, it is not possible for the legislature to design a rule to fit every potential

circumstance. As such, legislation may be general in nature, and discretion may be given to an administrative body to make subordinate rules, as well as to ascertain the facts to which the legislative policy applies. In order to be valid, however, the legislative enactment must set forth sufficient criteria to guide the administrative body in the exercise of its discretion. (Citations omitted.) *Hudson v. Albrecht, Inc.*, 9 Ohio St.3d 69, 73-64, 458 N.E.2d 852 (1984).

{¶ 38} Appellant's view of the delegation of administrative authority may be too circumspect. The definition of the offense itself found in Toledo Municipal Code 313.12(c) creates a presumption that the owner of the vehicle was its operator and defines two narrow exceptions to the presumption. The proceeding is expressly non-criminal. While there appears to be, at least inferentially, an irrefutable presumption as to the accuracy of these devices, this is not a facial defect and does not affect the delegation of authority. The delegation of authority is extremely Spartan,[2] but does not, in our view, rise to the level of constitutional vagueness.

{¶ 39} Finally, appellant complains that the trial court's finding that he had conceded the existence of an administrative process was both unsupported in the record and beyond the breadth of what may be considered in contemplation of a Civ.R. 12(B)(6) motion. The complaint alleges that Toledo police never established an administrative

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[2] *Compare* Columbus Code of Ordinances 2115.04(D) which expressly enumerates six affirmative defenses, including that the recording device was not operating properly.

appeal process. This is an allegation in the complaint and must be considered as true on a motion to dismiss for failure to state a claim. *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 6. Since at a minimum, due process of law requires notice and a meaningful opportunity to be heard, *Ohio Assn. of Pub. School Emp. v. Lakewood Cty. School Dist.*, 68 Ohio St.3d 175, 177, 624 N.E.2d 1043 (1994), it would seem the absence of any process would be problematic. Thus, this branch of appellant's constitutional argument does not warrant dismissal.

{¶ 40} Accordingly, appellant's sole assignment of error is well-taken.

{¶ 41} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings. Appellees are ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

Stephen A. Yarbrough, J.
DISSENTS AND WRITES SEPARATELY.

YARBROUGH, J., dissenting.

{¶ 42} Because my reading of the statute at issue, R.C. 1901.20, differs from the interpretation adopted by majority, I respectfully dissent and would find Walker's sole assigned error not well-taken.[3]

{¶ 43} In *Mendenhall v. Akron,* 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, the Ohio Supreme Court held that "[a]n Ohio municipality does not exceed its home-rule authority when it creates an automated system for enforcement of traffic laws that imposes civil liability upon violators, *provided that the municipality does not alter statewide traffic violations*." (Emphasis added.) *Id.* at syllabus. In upholding Akron's creation of a civil infraction system to deal with traffic offenders, the court reasoned, in pertinent part:

> Akron Ordinances 461-2005, which provides for implementation of an automated mobile speed-enforcement system, does not conflict with state law because it does not alter or supersede state law. *The Ordinances provides for a complementary system of civil enforcement that, rather than decriminalizing behavior, allows for the administrative citation of vehicle*

[3] I agree with majority and the trial court that Walker has standing to challenge the constitutionality of Toledo Municipal Code 313.12.

owners under specific circumstances. Akron has acted within its home rule authority granted by the Constitution of Ohio. *Id.* at ¶ 42.

{¶ 44} Here, Toledo Municipal Code 313.12 creates a civil-infraction system for enforcing red-light and speed-limit ordinances by means of automated cameras. Per *Mendenhall*, enactment of the ordinance is fully within the city of Toledo's home rule authority as a chartered municipality and its provisions are presumptively constitutional. In working around this starting point, the majority first reads certain dicta to be "an express limitation on the scope of the *Mendenhall* decision." Yet the language which the majority cites for that statement[4] does not detract at all from the basic constitutionality of a *concurrent* administrative scheme that treats specified traffic violations as civil infractions. Nor does that language speak to Walker's claim that the civil-infraction system created by Toledo Municipal Code 313.12 "usurps" the jurisdiction of the municipal court, as set forth in R.C. 1901.20(A)(1), over "all red light ordinance violations."

{¶ 45} R.C. 1901.20 was formerly entitled "Criminal and traffic jurisdiction," but is now entitled, "Criminal jurisdiction." Subsection (A)(1) reads, in pertinent part:

> The municipal court has *jurisdiction* of the *violation of any ordinance* of any municipal corporation within its territory, unless the

[4] The majority quotes ¶ 40 of the *Mendenhall* opinion which states: "Although there are due process questions regarding the operation of the Akron Ordinance and those similar to it, those questions *are not appropriately before us* at this time and *will not be discussed here.*" (Emphasis added.)

violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521 of the Revised Code, *and of the violation of any misdemeanor* committed within the limits of its territory. (Emphasis added.)

{¶ 46} Initially the majority opinion incorrectly cites R.C. 1.01 as "a rule of statutory construction" in order to ignore the subject-matter that R.C. 1901.20 was intended to cover. *See State ex rel. Cunningham v. Industrial Comm.*, 30 Ohio St.3d 73, 76, 506 N.E.2d 1179 (1987) ("R.C. 1.01 is not an 'ordinary rule of statutory construction.' Rather, it is a law which, by its terms, applies specifically to statutes enacted as part of the Ohio Revised Code [and] only require[s] that the 'title' or 'section heading' * * * be disregarded.") While the title or heading of a statute forms no part of the statutory text, it can reveal the legislative purpose or scope of the statute and suggest some contextual insight into the subject-matter it was intended to address.

{¶ 47} R.C. 1901.20 was intended to establish the jurisdiction of the municipal court over criminal offenses (misdemeanors) and traffic code violations that carry criminal penalties. Had the General Assembly intended to vest an *exclusive* jurisdiction in the municipal court over criminal violations of traffic ordinances *and* any parallel scheme that would treat the same violations as civil infractions, it would have used that word—"exclusive"—as an adjectival modifier preceding the primary subject-noun of the sentence, "jurisdiction." In grammatical parlance, the use of such an adjective is intended

to denote more specifically the quality, quantity, or extent of the noun it modifies, or to distinguish the noun from its unmodified sense.

{¶ 48} The majority then engages in rewriting the first sentence of R.C. 1901.20(A)(1) to find "exclusive" jurisdiction by interpreting the word "any" as if it somehow modified the word "jurisdiction," which it does not. The majority opinion states:

> "Any" means "every—used to indicate one selected without restriction" and "all—used to indicate a maximum or whole." *Merriam-Webster Dictionary* * * *[.] Construing the language of the first sentence of R.C. 1901.20(A)(1) in context and according to common usage, the legislature has unambiguously granted to municipal courts jurisdiction over a violation of every and all municipal ordinances within its territory, unless, in certain circumstances, the offense is a parking violation. The maxims of construction forbid the substitution of inferences or implications when the language of the statute is unequivocal.

{¶ 49} But the same maxims of construction forbid us, under the guise of construing or interpreting a statute, from interpolating a word not used, like "exclusive," or expanding on the meaning of an existing word to accomplish the same thing, like "any," in disregard of its placement in the sentence or of the context in which it is used. *See State v. Peters*, 9 Ohio App.2d 343, 344, 224 N.E.2d 916 (2d Dist.1965) (Rejecting defendant's argument that the word, "any," should be construed to mean "every" or "all":

"Although the word, 'any,' is sometimes used to mean 'every,' this is not its preferred dictionary definition. Actually, *it is a general word* and may have a diversity of meanings *depending upon the context and subject-matter of the statute in which it is used.*" (Emphasis added.)); *see also State v. Taniguchi*, 74 Ohio St.3d 154, 156, 656 N.E.2d 1286 (1995) ("A court should give effect to the words actually employed in a statute, and should not delete words used, *or insert words not used, in the guise of interpreting the statute.*" (Emphasis added.))

{¶ 50} Given how the word "any" is actually placed in R.C. 1901.20(A)(1), it modifies only the word "ordinance," which is not the primary subject-noun of the sentence. Because "any" does not in any way modify the word "jurisdiction," it cannot support a conclusion of exclusivity for the municipal court to adjudicate *all* violations of city traffic ordinances. The majority has improvidently accepted Walker's invitation to "imagine" that the first sentence of the statute reads other than it does.[5]

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[5] In *Johns v. Univ. of Cincinnati Med. Assoc., Inc.*, 101 Ohio St.3d 234, 2004-Ohio-824, 804 N.E.2d 19 (2004), the Ohio Supreme Court rejected just this sort of interpretive slight-of-hand in "construing" a sentence in R.C. 2743.02(F), the jurisdictional statute for the court of claims, where "exclusive" *is* used as an adjectival modifier, the converse of the situation here. At that time R.C. 2743.02(F) stated, in pertinent part:

> A civil action against an officer or employee [of the state] * * * shall first be filed against the state in the court of claims, which has *exclusive, original* jurisdiction to determine, *initially,* whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. (Emphasis added.)

{¶ 51} When the General Assembly intends to grant a court or agency exclusive jurisdiction over particular cases, claims or matters, "it provides it by appropriate statutory language." *State ex rel. Banc One Corp. v. Walker*, 86 Ohio St.3d 169, 171-172, 712 N.E.2d 742 (1999). Such jurisdiction has long been signaled by the enabling statute's use of the terms "exclusive," "original," or both, or by certain forms of absolutist language indicating exclusivity. *See, e.g., State ex rel. Sanquily v. Lucas Cty. Court of Common Pleas*, 60 Ohio St.3d 78, 80, 573 N.E.2d 606 (1991) (under R.C. 2743.02(F), court of claims has "exclusive original jurisdiction" to determine whether public employee is immune from suit); *State ex rel. Ohio Edison Co. v. Parrott,* 73 Ohio St.3d 705, 708-709, 654 N.E.2d 106 (1995) (under R.C. 4903.12, the language "*no court*

The proponent had argued that the word "initially," which appears in a non-modifying position in the sentence, recast the scope of the jurisdiction granted to the court of claims such that a common pleas court could also determine the employee's immunity. The Supreme Court held:

> Exclusive jurisdiction is "[a] court's power to adjudicate an action or class of actions *to the exclusion of all other courts*." Black's Law Dictionary (7th Ed.1999) 856. Original jurisdiction is "[a] court's power to hear and decide a matter *before* any other court can review the matter." *Id.* Therefore, to interpret the word "*initially*" in R.C. 2743.02(F) to mean that a second determination of immunity can be made by a court of common pleas *would nullify the plain language of R.C. 2743.02(F), which bestows "exclusive jurisdiction"* to determine immunity on the Court of Claims. (Emphasis added.) *Id.* at ¶ 26.

That plain language made the court of claims "the *only* court with authority to determine whether a state employee is immune from personal liability under R.C. 9.86." *Id.* at ¶ 30.

other than the supreme court" gave the Supreme Court exclusive jurisdiction to suspend or enjoin orders of the PUCO. (Emphasis added.))

{¶ 52} Thus, for example, R.C. 2151.23(A) states that the "juvenile court has *exclusive original* jurisdiction under the Revised Code as follows," and then delineates sixteen categories of cases by subject-matter. Commenting on this statutory language in *Pula v. Pula-Branch*, 129 Ohio St.3d 196, 2011-Ohio-2896, 951 N.E.2d 72, the Ohio Supreme Court observed that grants of exclusive and non-exclusive jurisdiction over certain cases are easily distinguished, stating:

> [C]ases brought pursuant to R.C. Chapter 3115 are explicitly excluded from the juvenile court's exclusive jurisdiction. R.C. 2151.23(A)(11) grants *exclusive* jurisdiction to juvenile courts to "hear and determine a request for an order for the support of any child *if the request is not ancillary to* an action for divorce, dissolution of marriage, annulment, or legal separation * * * *or an action for support brought under Chapter 3115 of the Revised Code*." * * * Thus, if the sought-after support order arises in a domestic relations case or an R.C. Chapter 3115 case, the juvenile court *does not have exclusive jurisdiction* over support orders. Since juvenile courts do not have exclusive jurisdiction under R.C. Chapter 3115 claims, *other courts may hear those cases*. (Emphasis added.) *Id.* at ¶ 7-8.

{¶ 53} R.C. 2101.24(A)(1) likewise directs that "except as otherwise provided by law, the probate court has *exclusive* jurisdiction" of certain cases and thereafter enumerates 32 species of actions for which such jurisdiction is granted. Notably, 2101.24(B)(1) expressly grants the probate court "*concurrent* jurisdiction" with the general division of the common pleas court for certain purposes.

{¶ 54} In the administrative context, the General Assembly has employed identical language in statutes creating a board or agency. R.C. 3781.20(B), pertaining to boards of building appeals, states that "[a] certified local board of building appeals has *exclusive* jurisdiction to hear and decide all adjudication hearings arising from rulings of the local chief enforcement official concerning the provisions of this chapter and Chapter 3791." (Emphasis added.)

{¶ 55} Finally, the General Assembly's use of these same terms—"exclusive" and "original"—in other sections of R.C. Chapter 19 only reinforces the conclusion that the "jurisdiction" of the municipal court specified in R.C.1901.20(A)(1) is non-exclusive.

{¶ 56} In pertinent part, R.C. 1901.181(A)(1) states:

> [I]f a municipal court has a housing or environmental division, the division has *exclusive jurisdiction* within the territory of the court in any civil action to enforce any local building, housing, air pollution, sanitation, health, fire, zoning, or safety code, ordinance, or regulation applicable to premises used or intended for use as a place of human habitation, buildings, structures, or any other real property[.] (Emphasis added.)

{¶ 57} R.C. 1901.185(B) also states that the environmental division of a municipal court "shall * * * exercise *exclusive original* jurisdiction to hear actions arising under section 3767.50 of the Revised Code * * * pertaining to blighted parcels." (Emphasis added.)

{¶ 58} In my view, R.C. 1901.20(A)(1) cannot reasonably be read as giving the municipal court "exclusive" jurisdiction over violations of particular traffic ordinances that Toledo has chosen to classify separately as civil infractions and to enforce as such. Absent that modifying term, the jurisdiction granted is *non-exclusive* and, hence, a *concurrent* civil enforcement scheme may be established under Toledo's home rule authority. Second, the "violations" referenced in R.C. 1901.20(A)(1) pertain to the commission of *criminal* misdemeanors and to traffic offenses for which *criminal* or quasi-criminal penalties are imposed, such as incarceration, judicial suspension of the offender's driver's license, the assignment of "points" toward the offender's license, the issuance of "warrant blocks" against an offender's license or vehicle registration with the Ohio Bureau of Motor Vehicles, the authority to order a vehicle impounded, etc.[6]

{¶ 59} Toledo Municipal Code 313.12, on the other hand, explicitly classifies the violations it covers as "non-criminal." The scheme created is purely *civil* in nature and imposes no sanction beyond the assessment of an administrative penalty—a $120 fine.

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[6] The Supreme Court has expressly read R.C. 1901.20(A)(1) as conveying to municipal courts "subject-matter jurisdiction in *criminal* matters only when the *crime* was committed 'within its territory' or 'within the limits of its territory.'" *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 2008-Ohio-6323, 900 N.E.2d 601, ¶ 18.

Toledo Municipal Code 313.12, therefore, has no operative effective on the jurisdiction of Toledo Municipal Court to adjudicate *criminal* violations of "any [traffic] ordinance." It is, as the *Mendenhall* court phrased it, wholly a "complementary" enforcement process to that which would occur if a police officer were present, observed the same red light or speed violation, and acted on it. Indeed, *Mendenhall* rejected the claim, similar to the gambit Walker presently couches in jurisdictional garb, that Akron's system of treating traffic violations as civil infractions "decriminalize[d] behavior that is criminal under state law." *Id.* at ¶ 36. In describing Akron's concurrent system, the Supreme Court observed:

> After the enactment of the Akron ordinance, a person who speeds and is observed by a police officer remains subject to the usual traffic laws. *Only when no police officer is present and the automated camera captures the speed infraction does the Akron ordinance apply,* not to invoke the criminal traffic law, but *to impose an administrative penalty* on the vehicle's owner. The city ordinance and state law may target identical conduct - speeding - *but the city ordinance does not replace traffic law. It merely supplements it.* Furthermore, a person cannot be subject to both criminal and civil liability under the ordinance. The ordinance states that if a violation is both recorded by the automated system and observed by a police officer, then the criminal violation takes precedence. The Akron ordinance *complements rather than conflicts* with state law. (Emphasis

added.) *Mendenhall,* 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, at ¶ 37.

{¶ 60} The same is true of the civil-enforcement scheme that Toledo created in Toledo Municipal Code 313.12. It exists independently of its criminal counterparts under municipal and state law. The ordinance does not prevent, interfere with, or usurp the ability of Toledo Municipal Court to deal with red-light and speed-limit violators in that forum, and therefore does not conflict with or abridge that court's criminal jurisdiction under R.C. 1901.20(A)(1).

{¶ 61} Finding no merit in Walker's assigned error, I would affirm the judgment of the trial court in all respects.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

APPENDIX B

313.12. Civil penalties for automated red light system violations.

(a) **Automated red light and speeding system/civil violation – General.**

(1) Notwithstanding any other provision of this Traffic Code, the City of Toledo hereby adopts a civil enforcement system for red light and speeding camera system violations as outlined in this Section. Said system imposes monetary liability on the owner of a vehicle for failure of an operator thereof to comply with traffic control indications in the City of Toledo in accordance with the provisions of this Section.

(2) The City of Toledo Division of Transportation, the Toledo Police Department, and the Toledo Department of Law shall be responsible for administering the Automated Red Light and Speeding System. Specifically, the Toledo Division of Transportation and the Toledo Police Department shall be empowered to install and operate red light and speeding camera systems within the city of Toledo. And, the Toledo Division of Transportation and the Toledo Police Department shall maintain a list of system locations where red light and speeding camera systems are installed. Said departments will make the determination as to which locations will be utilized.

(3) Any citation for an automated red light and speeding system violation pursuant to this Section, known as a "Notice of Liability" shall:

A. Be processed by officials or agents of the City of Toledo;

B. Be forwarded by first-class mail or personal service to the vehicle's registered owner's address as given on the state's motor vehicle registration, and

C. Clearly state the manner in which the violation may be appealed.

(b) **Definitions.**

(1) "Automated red light and speeding system" is the equivalent of "Traffic control signal monitoring device" or "Traffic control photographic system." Said system/device is an electronic system consisting of a photographic, video or electronic camera and a vehicle sensor installed to work alone or in conjunction with an official traffic controller and to automatically produce photographs, video or digital images of each vehicle violating a standard traffic control.

(2) "In operation" means operating in good working condition.

(3) "System location" is the approach to an intersection or a street toward which a photographic, video or electronic camera is directed and is in operation. It is the location where the automated camera system is installed to monitor offenses under this Section.

(4) "Vehicle owner" is the person or entity identified by the Ohio Bureau of Motor Vehicles, or registered with any other State vehicle registration office, as the registered owner of a vehicle.

(5) "Responsible party" is the person or entity named per TMC Subsection (c)(4) A.

(c) **Offense.**

(1) The owner of a vehicle, or the party named per TMC Subsection 313.12 (c)(4)A, shall be liable for the penalty imposed pursuant to this Section if such vehicle crosses a marked stop line or the intersection plane at a system location when the traffic signal for that vehicle's direction is emitting a steady red light.

(2) The owner of a vehicle, or the party named per TMC Subsection 313.12 (c)(4)A, shall be liable for a penalty imposed pursuant to this Section if such vehicle is operated at a speed in excess of those set forth in TMC Section 333.03.

(3) It is prima-facie evidence that the person registered as the owner of the vehicle with the Ohio Bureau of Motor Vehicles (or with any other State vehicle registration office) was operating the vehicle at the time of the offense set out in subsection (c)(1) or (c)(2) above.

(4) Notwithstanding subsection (c)(3) above, the owner of the vehicle shall not be responsible for the violation if, within twenty-one (21) days from the date listed on the "Notice of Liability", as set forth in subsection (d)(4) below, the owner of the vehicle furnishes the Hearing Officer:

A. An affidavit by him, stating the name and address of the person or entity who leased, rented, or otherwise had the care, custody and control of the vehicle at the time of the violation; OR

B. A law enforcement incident report/general offense report from any state or local law enforcement agency/record bureau stating that the vehicle involved was reported as stolen before the time of the violation.

(5) An imposition of liability under the Section shall not be deemed a conviction as an operator and shall not be made part of the operating record upon whom such liability is imposed.

(6) Nothing in this Section shall be construed to limit the liability of an operator of a vehicle for any violation of subsection (c)(1) or (c)(2) herein.

(7) This Section shall not apply to violations involving vehicle collisions.

(d) **Penalty; Administrative Appeal.**

(1) Any violation of subsection (c)(1) herein shall be deemed a noncriminal violation for which a civil penalty of $120.00 shall be assessed and for which no points authorized by Ohio R. C. 4507.021 ("Point system for license suspension") shall be assigned to the owner or driver of the vehicle.

(2) Any violation of subsection (c)(2) herein shall be deemed a noncriminal violation for which a civil penalty of $120.00 shall be assessed and for which no points authorized by Ohio R.C. 4507.021 ("Point system for license suspension") shall be assigned to the owner or driver of the vehicle.

(3) The City of Toledo, via its Division of Transportation, Police Department, Law Department and Municipal Court Clerk may establish procedures for the collection of the civil penalties imposed herein, and may enforce the penalties by a civil action in the nature of a debt.

(4) A notice of appeal shall be filed with the Hearing Officer within twenty-one (21) days from the date listed on the "Notice of Liability." The failure to give notice of appeal or pay the civil penalty within this time period shall constitute a waiver of the right to contest the citation and will be considered an admission. Appeals shall be heard through an administrative process established by the City of Toledo Police Department. A decision in favor of the City of Toledo may be enforced by means of a civil action or any other means provided by the Ohio Revised Code.

(5) The failure to respond to a Notice of Liability in a timely fashion as set forth in subsection (d)(4) of this section shall result in an additional penalty of twenty-five dollars ($25.00).

(6) In lieu of assessing an additional penalty, pursuant to subsection (d)(5) above, the City of Toledo may (i) immobilize the vehicle by placing an immobilization device (e.g. a "boot") on the tires of the vehicle pending the owners compliance with the Notice of Liability, or (ii) impound the vehicle, pursuant to TMC Section 303.08(a)(12). Furthermore, the owner of the vehicle shall be responsible for any outstanding fines, the fee for removal of the immobilization device, and any costs associated with the impoundment of the vehicle.