IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

76 ENTERPRISES, INC., et al., Plaintiffs, v. CITY OF CHICAGO, et al., Defendants.	No. 14 C 8306 Hon. John J. Tharp

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND EXPEDITED DISCOVERY

Defendants the City of Chicago (the "City"), Rahm Emanuel, Bechara Choucair, and Maria Guerra Lapacek ("Defendants"),[1] by their counsel, Stephen R. Patton, Corporation Counsel of the City of Chicago, hereby submit their response in opposition to the Motion for a Temporary Restraining Order ("TRO"), Preliminary Injunction and Expedited Discovery filed by Plaintiffs 76 Enterprises, Inc., KMS Petro Mart, Inc., Kuldip Singh, West Town Mobil, Inc., Mazin Abaulhuda, Balwinder Kaur, and Navi Petroleum USA, Inc. ("Plaintiffs"). Plaintiffs seek to enjoin the enforcement of Municipal Code of Chicago ("MCC") § 4-64-180(b) (the "Ordinance"), which prohibits the sale of flavored tobacco products within 500 feet of a school. Because Plaintiffs' challenges to the Ordinance lack any merit, and they cannot establish the other requirements for injunctive relief, the motion should be denied.

INTRODUCTION

In an effort to combat the problem of youth tobacco use, the City Council passed the

[1] The claims against the individual defendants, all in their official capacity, may be dismissed as redundant because such claims are "treated as a suit against the [municipal] entity." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). *See, e.g., Cruz v. Dart*, No. 11 C 00630, 2012 WL 5512275, at *7 (N.D. Ill. Nov. 13, 2012).

Ordinance on December 11, 2013. *See* Compl. ¶ 16, ECF No. 1; *see also* Ex. A (Ordinance). The Ordinance amends the MCC to include Section 4-64-180(b), which makes it unlawful for any person "to sell, give away, barter, exchange, or otherwise deal in flavored tobacco products . . . at any location that has a property line within 500 feet of the property line of any public, private, or parochial elementary, middle, or secondary school located in the City." *Id*. ¶ 36. The ban "does not apply to retail tobacco stores," defined as stores which earn at least 80% of their gross revenue from the sale of tobacco products. *Id.* (citing MCC § 7-32-010). The Ordinance also adds Section 4-64-098, which defines a "flavored tobacco product" as:

> any tobacco product that contains a constituent that imparts a characterizing flavor. As used in this definition, the term 'characterizing flavor' means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product, including, but not limited to, tastes or aromas of menthol, mint, wintergreen, chocolate, vanilla, honey, cocoa, any candy, any dessert, any alcoholic beverage, any fruit, any herb, and any spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. A public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate such statements, that a tobacco product has or produces a characterizing flavor shall establish that the tobacco product is a flavored tobacco product.

Id. ¶ 63.

Plaintiffs are owners and operators of gasoline stations with convenience stores that sell tobacco products. *See id*. ¶¶ 3-8. In their motion for a TRO, they assert the following claims: (1) the Ordinance is vague, in violation of the Fourteenth Amendment's Due Process Clause; (2) the Ordinance violates procedural due process by denying them "the right to be heard"; (3) the Ordinance interferes with their "vested property rights"; (4) the Ordinance violates the Fourteenth Amendment's Equal Protection Clause; and (5) the Ordinance is preempted by the Family Smoking Prevention and Tobacco Control Act ("FSPTCA"), 21 U.S.C. § 387 *et seq*.

LEGAL STANDARD

In order to obtain preliminary injunctive relief, Plaintiffs must demonstrate that: (1) the underlying case has some likelihood of success on the merits; (2) no adequate remedy at law exists; and (3) they will suffer irreparable harm without the injunction. *Woods v. Buss*, 496 F.3d 620, 622 (7th Cir. 2007). If they establish those three factors, the district court must then balance the harm to the parties and the public interest from granting or denying the injunction. *Korte v. Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013).

ARGUMENT

I. Plaintiffs Have No Likelihood Of Success On the Merits Of Their Claims.

Although Plaintiffs assert a kitchen sink's worth of challenges to the Ordinance, they fail to satisfy the first requirement for a TRO—a likelihood of success on the merits of their claims. As explained below, each of their challenges fails.

A. The Ordinance Is Not Unconstitutionally Vague.

Plaintiffs first argue that the Ordinance is "unconstitutionally vague," in violation of due process. Pls.' Mem. in Supp. Mot. TRO at 3, ECF No. 7. They claim that the Ordinance is vague in a variety of ways: the 500-foot rule is difficult to measure, no "grandfather" provision exempts existing tobacco licensees from compliance, the definition of "school" is uncertain, and the phrases "otherwise deal in flavored tobacco products" and "characterizing flavor" are unclear. *See id.* at 3-6.

"The void for vagueness doctrine rests on the basic principle of due process that a law is unconstitutional 'if its prohibitions are not clearly defined.'" *Karlin v. Foust*, 188 F.3d 446, 458 (7th Cir. 1999) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). The doctrine requires that a statute be written "with sufficient definiteness that ordinary people can understand

what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). But the Constitution requires a lesser degree of vagueness in enactments "with criminal rather than civil penalties because the consequences of imprecision" are more severe. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 498-99 (1982). Furthermore, when no constitutionally protected conduct is involved, a facial vagueness challenge will succeed only if the plaintiff "demonstrate[s] that the law is impermissibly vague in all of its applications." *Id.* at 497. Outside of the First Amendment context, "vagueness challenges . . . . must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975).

Plaintiffs have not alleged that the Ordinance is vague as applied to any of their locations, products, or activities. They therefore fail to allege that the Ordinance is vague in all of its applications. Moreover, the Ordinance is simply not vague. The 500-foot rule does not allow for arbitrary or discriminatory enforcement. The Ordinance clearly specifies that the distance is to be measured from one property line to another: it applies "at any location that has a property line within 500 feet of the property line of any public, private, or parochial elementary, middle, or secondary school located in the City." MCC § 4-64-180(b). It would be hard to draft an ordinance with greater precision. *See, e.g., Cox v. State of La.*, 379 U.S. 559, 568 n.1 (1965) (citing a statute "proscribing certain acts within 500 feet" of certain buildings as an example of a precise limitation); *Easter Enters., Inc. v. Ill. Liquor Control Comm'n*, 114 Ill. App. 3d 855, 859, 449 N.E.2d 1013, 1017 (Ill. App. Ct. 1983) (holding the Illinois Liquor Control Act, prohibiting the retail sale of liquor within 100 feet of a school, not unconstitutionally vague). And "mathematical certainty" is not expected from statutory language. *Grayned*, 408 U.S. at 110.

Nor is the Ordinance "standardless" as to the definition of "school." Pls.' Mem. in Supp.

Mot. TRO at 4. Even if hypothetical circumstances might exist wherein a retailer was unsure of whether it was located within 500 feet of a "school," in most cases, the application of the Ordinance to a particular location will be clear, and any uncertainties are appropriately handled on a case-by-case basis through the objection procedures set out in the City's Rules and Regulations for Tobacco Retailers (the "Regulations"). *See* Compl. Ex. 1 § 7. Plaintiffs' facial challenge fails accordingly. *See Levas & Levas v. Vill. of Antioch, Ill.*, 684 F.2d 446, 451 (7th Cir. 1982) ("Unconstitutional vagueness cannot be based on uncertainty at the margins.").

As to the lack of a "grandfather" provision, Plaintiffs merely argue that existing licensees may not be allowed to sell flavored tobacco products in the future if a school opens within 500 of feet of their business. They allege no facts demonstrating that this renders the Ordinance vague. And Plaintiffs' arguments that the words "otherwise deal in" and "characterizing flavor" are vague fare no better. The Ordinance makes it unlawful for any person "to sell, give away, barter, exchange, or otherwise deal in flavored tobacco products." MCC §4-64-180(b). A reasonable person would understand "otherwise deal in" to refer to any other manner in which flavored tobacco products might be distributed. "Characterizing flavor" is also readily understood. The Regulations provide a long list of examples of prohibited tobacco flavors, as well as a process for objecting to the classification of particular products as having a "characterizing flavor." *See* Regulations § 6 and Exhibit A. *See also Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, C.A. No. 12–96–ML, 2012 WL 6128707 (D.R.I. Dec. 10, 2012) (term "characterizing flavors" in flavored tobacco ordinance was not vague where ordinance listed "clear examples of conduct covered by [the] law") (internal quotation marks omitted).

B. The Ordinance Does Not Violate Plaintiffs' Procedural Due Process Rights.

Plaintiffs next argue that the Ordinance "places an undue burden on the retailers' right to

object and obtain a hearing," in violation of the Fourteenth Amendment. Plaintiffs contend that the Ordinance violates their due process rights because, under Section 7 of the Regulations, (1) an objection to the determination that a retailer is within 500 feet of a school requires a "cost prohibitive" plat of survey, (2) the objection is reviewed by an anonymous City official; and (3) only the retail tobacco dealer may file an objection, "seemingly disallow[ing] representation by counsel." Pls.' Mem. in Supp. Mot. TRO at 6-7.

An essential principle of due process "is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'"). Due process, however, "is a flexible concept that varies with the particular situation." *Doherty v. City of Chicago*, 75 F.3d 318, 323 (7th Cir. 1996).

Plaintiffs' due process claim fails for several reasons. First, as to the allegedly "prohibitive" cost of a land survey, Plaintiffs fail to point out that "[t]he City will reimburse retail tobacco dealers for the usual and customary cost of a land survey associated with an objection . . . , provided the retail tobacco dealer prevails." Regulations § 7(d).[2] Second, there is no basis for Plaintiffs' contention that representation by counsel is prohibited. The Regulations merely state that only tobacco dealers—as opposed to, for example, manufacturers or neighbors—have standing to make an objection under this section. *See* Regulations § 7(a).

[2] The Regulations attached to Plaintiffs' Memorandum are not the official version, but rather a draft submitted for public comment. The final, signed version is attached to Plaintiffs' Complaint. In the final version of the Regulations, Section 7 allows reimbursement for a land survey when an objection is successful. *See* Compl. Ex. 1 at § 7(d).

Finally, Plaintiffs cannot state a due process claim based on the review process itself, because they have not elected to engage in that process, nor have they shown that it would be inadequate. Plaintiffs contend that they have no effective means to object to the application of the Ordinance to their establishments. But not only may Plaintiffs contest the City's determination that they are located within 500 feet of a school by filing an objection with the City pursuant to Section 7 of the Regulations, they may also avail themselves of the avenues for review of the City's final decision under Illinois law—remedies that have been held to "comport with procedural due process." *See Holstein v. City of Chicago*, 29 F.3d 1145, 1148 (7th Cir. 1994) ("In Illinois, a party disappointed in a determination made by a municipality's administrative agency may seek review in the circuit court by the common law writ of certiorari."). Plaintiffs' due process claim therefore fails. *See Veterans Legal Def. Fund v. Schwartz*, 330 F.3d 937, 941 (7th Cir. 2003) ("Given the availability of state remedies that have not been shown to be inadequate, plaintiffs have not availed themselves of the processes by which a disappointed party may seek review of a municipal agency's decision in state court.").

C. Plaintiffs Have No "Vested Right" To Sell Flavored Tobacco.

Plaintiffs claim that they "have a vested property right" in their licenses to sell tobacco products and that the Ordinance constitutes a "taking" of those vested rights "without just compensation." Pls.' Mem. in Supp. Mot. TRO at 8. But Plaintiffs have no "vested right" to sell flavored tobacco products. Whether a party has a vested property right is a question of state law. *See United States v. Ill. Pollution Control Bd.*, 17 F. Supp. 2d 800, 808 (N.D. Ill. 1998). Illinois courts recognize that, in limited circumstances, a property owner may have a vested right in a *building permit* issued before a zoning classification change, where the property owner made "a substantial change of position" "in good-faith reliance" on the permit. *Morgan Place of Chicago*

v. City of Chicago, 2012 IL App (1st) 091240, ¶ 44, 975 N.E.2d 187, 198 (1st Dist. 2012). But that doctrine pertains to zoning changes, not to licenses to sell regulated products.

Under Illinois law, it is well settled that "[t]he legislature has an ongoing right to amend a statute," and "there is no vested right in the mere continuance of a law." *First of Am. Trust Co. v. Armstead*, 171 Ill. 2d 282, 291, 664 N.E.2d 36, 40 (1996) (citing *Envirite Corp. v. Illinois E.P.A.*, 158 Ill. 2d 210, 215, 632 N.E.2d 1035, 1037 (1994)). In the analogous context of retail liquor licenses, Illinois courts have held that a license to sell liquor does not create a vested right. *See, e.g., Cnty. of Cook v. Kontos*, 206 Ill. App. 3d 1085, 1088, 565 N.E.2d 249, 252 (1st Dist. 1990) ("The right to deal in intoxicating liquors is not an inherent or alienable right, or a property right, or a contract right, or a vested right."); *Duncan v. Marcin*, 82 Ill. App. 3d 963, 967-68, 403 N.E.2d 653, 656 (1st Dist. 1980) (quoting *People v. McBride*, 234 Ill. 146, 178, 84 N.E. 865, 873 (1908) ("Licenses to sell liquor . . . create no vested rights.")).

D. The Ordinance Does Not Violate The Equal Protection Clause.

Plaintiffs allege that the Ordinance violates their equal protection rights by treating tobacco retailers located within 500 feet of a school differently from both retailers outside that zone and "retail tobacco stores." Plaintiffs contend that the Ordinance results in "arbitrary and irrational discrimination" against the retailers affected by the Ordinance.

As Plaintiffs acknowledge, tobacco retailers located near schools are not a suspect class, for purposes of a heightened level of scrutiny, so only rational basis scrutiny applies to Plaintiffs' claim. *See City of Cleburne v. Cleburne Liv. Ctr., Inc.*, 473 U.S. 432, 446 (1985) (where equal protection challenge does not involve suspect class or fundamental right, classification need only bear a rational relationship to legitimate governmental ends); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007). Under rational basis scrutiny, Plaintiffs

must negate every conceivable basis for the challenged distinction. *Chicago Bd. of Realtors v. City of Chicago*, 819 F.2d 732, 740 (7th Cir. 1987). They cannot possibly meet that burden.

As set out at length in the preamble to the Ordinance, attached hereto as Exhibit A, the City has a legitimate interest in reducing smoking among youth; tobacco use is the single most preventable cause of disease and death in Chicago, and tobacco use almost always begins before children graduate from high school. The Ordinance is rationally related to that interest because flavored tobacco products have particular appeal to children and facilitate early smoking behavior, and reducing the availability and visibility of tobacco products near schools is a strategy rationally calculated to limit children's exposure to those products. Plaintiffs challenge as "arbitrary" the City's decisions to draw a line at 500 feet from a school and to exempt retail tobacco stores. But "governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied." *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626, 651 n. 14 (1985). Where the City chooses to draw a line, "the Constitution does not require [it] to draw the perfect line nor even to draw a line superior to some other line it might have drawn. It requires only that the line actually drawn be a rational line." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2083 (2012). Plaintiffs' argument based on the difference between 500 and 501 feet, Pls.' Mem. in Supp. Mot. TRO at 9-10, an argument that could be made with respect to any line or other statutory category or distinction, is too facile and wholly unpersuasive.

E. The Ordinance Is Not Preempted By The FSPTCA.

Plaintiffs' final argument is that the Ordinance is preempted by the FSPTCA because it establishes a tobacco standard "different from, or in addition to" the standards for flavored tobacco products established by the Food and Drug Administration (the "FDA"). Pl.'s Mem. in

Supp. of Mot. for TRO at 11-12. The FSPTCA was enacted in 2009 to grant authority to the FDA to regulate tobacco products. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 430 (2d Cir. 2013). The FSPTCA contains a section entitled "Tobacco Product Standards," *id.* (citing 21 U.S.C. § 387g(a)(1)(A)), which Plaintiffs refer to as the "Federal Flavor Standard." That section disallows cigarette flavorings "other than tobacco and menthol," § 387g(a)(1)(A), and grants the FDA authority to establish additional standards for tobacco products, § 387g(a)(4)(B)(i). Plaintiffs argue that because the FSPTCA's "Federal Flavor Standard" prohibits the use of "characterizing flavors" other than tobacco or menthol in cigarettes, it preempts the Ordinance's restriction on the *sale* of tobacco products that include menthol and other characterizing flavors. Plaintiffs' argument, however, misreads the FSPTCA's preemption clause and mischaracterizes the Ordinance.

1. The FSPTCA Does Not Preempt Local Regulation Of Tobacco Sales.

In determining whether a state or local law is preempted by a federal law, the Court must assume "that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). "These historic powers include the protection of the health and welfare of the state's citizens." *Nat'l Assoc. of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 79 (1st Cir. 2013) (citing *Napier v. Atl. Coast Line R.R.*, 272 U.S. 605, 610 (1926)). If there is any ambiguity as to whether federal and local law may coexist, the local law should be upheld. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). State and local laws may be supplanted by federal law in three ways: express preemption, field preemption, and conflict preemption. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 576-78 (7th Cir. 2012). Where the federal statute contains an express preemption provision, the Court should look first to the wording of

that provision. *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

The FSPTCA contains an express preemption provision, included in a section entitled "Preservation of State and Local Authority." 21 U.S.C. § 387p(a). The section consists of three parts. It first provides, in relevant part:

> (a) In general
>
> (1) Preservation
>
> Except as provided in paragraph (2)(A), nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of . . . a State or political subdivision of a State . . . to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure *relating to or prohibiting the sale*, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age . . . .

§ 387p(a)(1) (emphasis added). The "preservation" clause is followed by a "preemption" clause:

> (2) Preemption of certain State and local requirements
>
> (A) In general
>
> No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter *relating to tobacco product standards*, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

§ 387p(a)(2)(A) (emphasis added). The preemption clause is modified by a "saving" clause:

> (B) Exception
>
> Subparagraph (A) *does not apply to requirements relating to the sale*, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products. . . .

§ 387p(a)(2)(B) (emphasis added).

As the language quoted above demonstrates, the FSPTCA's preemption clause prevents states and local governments from establishing requirements related to the list of categories set out in § 387p(a)(2)(A): "tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products." As stated in the preservation clause, apart from these preempted categories of regulations, "nothing in" the statute "shall be construed to limit the authority of" a local government to enact "any law, rule, regulation, or other measure with respect to tobacco products." § 387p(a)(1). The preservation clause expressly preserves the traditional power of a local government to adopt measures "relating to or prohibiting the sale" of tobacco products. *Id.*

Not only does the FSPTCA explicitly preserve in § 387p(a)(1) the authority of local governments to regulate, and even prohibit, the sale of tobacco products, the saving clause further provides that even if a local law might otherwise impose requirements falling within the categories listed in the preemption clause, the law is exempt from preemption if it imposes "requirements relating to the sale" of tobacco products. § 387p(a)(2)(B). Thus, even if a local regulation relating to tobacco sales could be construed as related to tobacco product standards, it would be exempt from preemption under the plain language of the saving clause. In summary, it was by no means the "clear and manifest purpose of Congress" to supercede the historic power of local governments to regulate tobacco sales in order to protect the public health and welfare. *Altria Grp.*, 555 U.S. at 76.

2. The Ordinance Does Not Establish "Tobacco Product Standards."

Plaintiffs argue that the FSPTCA preempts the Ordinance because the preemption clause of the federal statute, § 387p(a)(2)(A), forbids local governments from imposing requirements "relating to tobacco product standards." Pl.'s Mem. in Supp. of Mot. for TRO at 11. They claim

that the Ordinance prohibits the sale of all flavored tobacco products, including cigarettes that contain menthol, resulting in local requirements different from the standards set by the FDA. *Id.*

The Ordinance, however, is entirely silent as to "tobacco product standards." It creates no manufacturing or production requirements, nor does it specify the ingredients cigarettes or other tobacco products may contain. It does not deem any products to be adulterated or misbranded. It merely regulates where certain tobacco products may be sold. As explained above, the FSPTCA specifically distinguishes between the authority to regulate the *manufacture* of tobacco products (reserved to the federal government pursuant to § 387p(a)(2)(A)) and the authority to regulate their *sale* (preserved by state and local governments pursuant to § 387p(a)(1)).[3] Because the Ordinance does not impose requirements related to the categories of regulation preempted by the FSPTCA, the City's authority to enact and enforce it is preserved. And even if the Ordinance could be construed as related to tobacco product standards, it imposes a sales restriction, which the saving clause explicitly exempts from preemption.

3. The First And Second Circuits Have Held That Local Ordinances Restricting Flavored Tobacco Sales Are Not Preempted By The FSPTCA.

Plaintiffs fail to acknowledge in their memorandum that the First and Second Circuits have both reached the conclusion that Defendants advocate here. In *National Association of Tobacco Outlets, Inc. v. City of Providence*, the First Circuit addressed a Providence, Rhode Island, ordinance limiting the sale of flavored tobacco products other than cigarettes to smoking bars. 731 F.3d at 82-83. The court concluded that Providence's ordinance was "a regulation 'relating to' sales specifically allowed by the savings clause, which overrides the standards

[3] Plaintiffs also mischaracterize the Ordinance as a "prohibition" on flavored tobacco products. *See* Pls.' Mem. in Supp. of Mot. for TRO at 12. The Ordinance is not a "ban." It restricts the sale of flavored tobacco products only within 500 feet of a school, and it allows retail tobacco stores to sell the products, even within such proximity to schools.

provision" of the FSPTCA. *Id.* at 82. The Second Circuit likewise held in *U.S. Smokeless Tobacco Manufacturing Co. v. City of New York* that a similar New York City ordinance was not preempted by the FSPTCA. 708 F.3d at 436. It explained that, although New York's ordinance imposed very strict limitations on the sale of flavored tobacco products, it was "a regulation limiting the businesses at which flavored tobacco may be sold" and thus "establishe[d] a 'requirement[] relating to the sale . . . of . . . tobacco products' within the plain meaning of the saving clause." *Id.* The reasoning of the First and Second Circuits applies equally to the City's Ordinance, which similarly places restrictions of the sale of flavored tobacco products.

II. Plaintiffs Cannot Satisfy The Other Requirements For A TRO.

As explained above, Plaintiffs identify no violation of their rights that could form the basis for injunctive relief. Nor can they satisfy the other requirements for a TRO. They cannot establish that they have no adequate remedy at law. Although Plaintiffs claim that the economic losses they will suffer under the Ordinance are "too difficult to calculate," Pl.'s Mem. in Supp. of Mot. for TRO at 15, lost sales are not unquantifiable, and monetary damages constitute an adequate remedy at law. *See Meridian Mut. Ins. Co. v. Meridian Ins. Grp.*, 128 F.3d 1111, 1120 (7th Cir. 1997). Nor will Plaintiffs suffer irreparable harm without the injunction. An injury is "irreparable" for purposes of granting preliminary injunctive relief only if it cannot be remedied through monetary relief at trial. *East St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 703 (7th Cir. 2005).

Finally, Plaintiffs cannot demonstrate that the harm they will suffer should the injunction be denied outweighs that which the public would suffer were it granted. This "equitable balancing proceeds on a sliding-scale analysis; the greater the likelihood of success on the merits, the less heavily the balance of harms must tip in the moving party's favor." *Korte*, 735

F.3d at 665. Here, as Plaintiffs fail to show that they are likely to succeed on the merits of their claim, the balance of harms must tilt heavily in their favor to justify relief. It does not. As set out in the preamble to the Ordinance, Defendants—and the public—have a strong and well-founded interest in attempting to prevent youth smoking by limiting young people's access to menthol cigarettes and other flavored tobacco products that appeal to young smokers, who are profoundly vulnerable to forming a lifelong addiction to products causing cancer, heart disease, pulmonary disease, and myriad other ills. *See* Ex. A. Were the Ordinance enjoined, Defendants would be denied an important tool to address a serious health problem.

CONCLUSION

Defendants respectfully request that the Court deny Plaintiffs' Motion for a Temporary Restraining Order, Preliminary Injunction and Expedited Discovery and grant Defendants such further relief as the Court deems just and appropriate.

Date: November 3, 2014

Respectfully submitted,

STEPHEN R. PATTON,
Corporation Counsel for the City of Chicago

By: Ellen W. McLaughlin
Assistant Corporation Counsel

Andrew S. Mine
Ellen W. McLaughlin
City of Chicago, Department of Law
Constitutional and Commercial Litigation Division
30 North LaSalle Street, Suite 1230
Chicago, Illinois 60602
(312) 744-7220 / 742-5147
Attorneys for Defendant City of Chicago

Such sign(s) shall comply with all applicable provisions of Title 17 of the Chicago Zoning Ordinance and all other applicable provisions of the Municipal Code of the City of Chicago governing the construction and maintenance of outdoor signs, signboards and structures.

4000 E. 106th St.
(169 Sq. Ft.)
(Application No. 100501446)

[Or2013-665]

Ordered, That the Commissioner of Buildings is hereby directed to issue a sign permit to Olympic Signs, Inc., 1130 North Garfield, Lombard, Illinois 60148, for the erection of a sign/signboard over 24 feet in height and/or over 100 square feet (in area of one face) at O'Reilly Auto Parts, 4000 East 106th Street, Chicago, Illinois 60617:

Dimensions: length, 32 feet, 3 inches; height, 5 feet, 3 inches
Height Above Grade/Roof to Top of Sign: 15 feet, 3 inches
Total Square Foot Area: 169 square feet.

Such sign(s) shall comply with all applicable provisions of Title 17 of the Chicago Zoning Ordinance and all other applicable provisions of the Municipal Code of the City of Chicago governing the construction and maintenance of outdoor signs, signboards and structures.

JOINT COMMITTEE.

COMMITTEE ON FINANCE

AND

COMMITTEE ON HEALTH AND ENVIRONMENTAL PROTECTION.

AMENDMENT OF CHAPTER 4-64 OF MUNICIPAL CODE BY ADDING NEW SECTION 4-64-098 AND MODIFYING SECTION 4-64-180 TO PROHIBIT SALE OF FLAVORED TOBACCO PRODUCTS IN PROXIMITY OF SCHOOLS.

[O2013-9185]

A Joint Committee comprised of the members of the Committee on Finance and the members of the Committee on Health and Environmental Protection submitted the following report:

CHICAGO, December 11, 2013.

To the President and Members of the City Council:

Your Joint Committee on Finance and Committee on Health and Environmental Protection, having had under consideration an ordinance amending Chapter 4-64 of the Municipal Code of Chicago concerning the sale of flavored tobacco products, having had the same under advisement, begs leave to report and recommend that Your Honorable Body *Pass* the proposed ordinance transmitted herewith.

This recommendation was concurred in by a viva voce vote of the members of the committee, with no dissenting vote.

Respectfully submitted,

(Signed) EDWARD M. BURKE,
Chairman.

On motion of Alderman Burke, the said proposed ordinance transmitted with the foregoing committee report was *Passed* by yeas and nays as follows:

Yeas -- Aldermen Moreno, Fioretti, Dowell, Burns, Hairston, Holmes, Harris, Beale, Pope, Balcer, Cárdenas, Quinn, Burke, Foulkes, Thompson, Thomas, Lane, O'Shea, Brookins, Muñoz, Zalewski, Chandler, Solis, Maldonado, Burnett, Ervin, Graham, Reboyras, Suarez, Waguespack, Mell, Austin, Colón, Sposato, Mitts, Cullerton, Laurino, P. O'Connor, M. O'Connor, Reilly, Smith, Tunney, Arena, Cappleman, Pawar, Osterman, Moore, Silverstein -- 48.

Nays -- Aldermen Sawyer, Cochran -- 2.

Alderman Pope moved to reconsider the foregoing vote. The motion was lost.

The following is said ordinance as passed:

WHEREAS, The City of Chicago is a home rule unit of government under Article VII, Section 6(a) of the Illinois Constitution; and

WHEREAS, Pursuant to its home rule authority, the City may exercise any power and perform any function pertaining to its government and affairs, including promoting the public health; and

WHEREAS, To this end, the City's "Healthy Chicago" agenda seeks to reduce smoking among adults and youth; and

WHEREAS, Tobacco use is the single most preventable cause of disease and death in Chicago and the United States; and

WHEREAS, Tobacco use kills more people than murders, suicide, illegal drugs, alcohol, AIDS and car crashes combined; and

WHEREAS, A disproportionate number of these deaths occur in minority communities; and

WHEREAS, For each tobacco-related death, another 20 people struggle with one or more serious tobacco-related illnesses, including lung, oral and pharyngeal cancer, heart disease, and lung diseases such as emphysema and bronchitis; and

WHEREAS, Lifetime smoking and other tobacco use almost always begins before children graduate from high school; and

WHEREAS, According to the Surgeon General of the United States, approximately 90 percent of adult smokers started by age 18 and almost no one begins smoking after age 21; and

WHEREAS, The connection between children and tobacco is so strong that the United States Food and Drug Administration (FDA) has declared that smoking is "fundamentally a pediatric disease"; and

WHEREAS, In 2009, after the FDA removed candy-flavored cigarettes from the market, the tobacco industry immediately created candy-and fruit-flavored cigarillos and cigars; and

WHEREAS, White Owl blunts and cigarillos come in a variety of flavors including grape, strawberry, wild apple, pineapple, peach and watermelon; and

WHEREAS, Phillies Sugarillo Cigarillos are advertised with the tagline "When sweet isn't enough"; and

WHEREAS, Swisher Sweets come in kid-friendly flavors like peach, strawberry, tropical fusion, chocolate, grape and blueberry; and

WHEREAS, With colorful packaging and sweet flavors, these products are often hard to distinguish from the candy displays that they are frequently placed near the cash register in retail outlets; and

WHEREAS, Flavored tobacco products are often sold individually or in two-packs, increasing their affordability and appeal to children; and

WHEREAS, These dangerous and addictive products often cost less than a candy bar or an ice cream cone -- at less than $1.00 each, some flavored cigars are affordable to even the youngest customers and are an impulse purchase for many consumers; and

WHEREAS, Like traditional tobacco products, electronic smoking devices, such as e-cigarettes, come in numerous flavors, such as gummy bear, cotton candy, bubble gum, atomic fireball, cherry cola, cherry limeade, caramel candy and orange cream soda; and

WHEREAS, Progress in reducing use of tobacco products among youth is beginning to plateau; and

WHEREAS, Research shows menthol-flavored cigarettes in particular have slowed efforts to reduce youth smoking; and

WHEREAS, There is evidence of the continued advertisement of menthol-flavored products to youth, especially in minority communities; and

WHEREAS, Children aged 12 -- 17 smoke menthol-flavored products more than any other age group; and

WHEREAS, Use of menthol-flavored cigarettes is prevalent among child smokers in the Black (72%), Asian (51%), Hispanic (47%) and White (41%) communities; as well as among young lesbian/gay/bisexual/transgender (LGBT) smokers (71%); and

WHEREAS, The FDA has confirmed that menthol cigarettes are more addictive and harder to quit than unflavored cigarettes; and

WHEREAS, The anesthetic cooling effect of menthol facilitates initiation and early persistence of smoking by youth; and

WHEREAS, Through suppression of respiratory irritation, menthol may facilitate smoke inhalation and promote nicotine addiction and smoking-related morbidities; and

WHEREAS, Researchers at the Harvard School of Public Health have found that the tobacco industry employs "a deliberate strategy to recruit and addict young smokers by adjusting menthol to create a milder experience for the first-time smoker"; and

WHEREAS, Menthol may also inhibit the metabolism of nicotine, resulting in higher rates of addiction; and

WHEREAS, Tobacco retail density around schools has been shown to have a significant impact on the prevalence of youth experimental tobacco use; and

WHEREAS, After controlling for census tract-derived school neighborhood characteristics, Novak & Associates found the density of tobacco retailers in the Chicago area correlated with students' reported tobacco use; and

WHEREAS, A recent study reveals that the tobacco industry engages in predatory targeting of African-American youth by increasing promotions for Newport cigarettes by as much as 42 percent in areas surrounding high schools with predominantly African-American students; and

WHEREAS, This research also reveals that the industry lowers their prices for menthol-flavored cigarettes near schools where African-American students attend; and

WHEREAS, Because the risk of moving from experimental smoking to habitual smoking is greatest for adolescents, new policies are needed to reduce both the availability of cigarettes and the visibility of cigarette ads in adolescents' environments; and

WHEREAS, Health experts recommend that local governments use zoning and licensing laws to limit tobacco retail density, including limiting the proximity of tobacco outlets near schools; and

WHEREAS, After thoroughly researching the issue, the City of Chicago has concluded that prohibiting the sale of flavored tobacco products within 500 feet of schools is the least-burdensome effective tactic to combat the serious problem of youth tobacco use; now, therefore,

Be It Ordained by the City Council of the City of Chicago:

SECTION 1. Chapter 4-64 of the Municipal Code of Chicago is hereby amended by inserting a new Section 4-64-098, as follows:

4-64-098 Flavored Tobacco Product Defined.

As used in this chapter:

"Flavored tobacco product" means any tobacco product that contains a constituent that imparts a characterizing flavor. As used in this definition, the term "characterizing flavor" means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product, including, but not limited to, tastes or aromas of menthol, mint, wintergreen, chocolate, vanilla, honey, cocoa, any candy, any dessert, any alcoholic beverage, any fruit, any herb, and any spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. A public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate such statements, that a tobacco product has or produces a characterizing flavor shall establish that the tobacco product is a flavored tobacco product.

SECTION 2. Section 4-64-180 of the Municipal Code of Chicago is hereby amended by inserting the language underscored, as follows:

4-64-180 Prohibited Locations.

(a) No person shall sell, give away, barter, exchange, or otherwise deal in tobacco products, tobacco product samples or tobacco accessories at any place located within 100 feet of any building or other location used primarily as a school, child care facility, or for the education or recreation of children under 18 years of age.

(b) No person shall sell, give away, barter, exchange, or otherwise deal in flavored tobacco products, samples of such products, or accessories for such products at any location that has a property line within 500 feet of the property line of any public, private, or parochial elementary, middle, or secondary school located in the City of Chicago. This subsection does not apply to retail tobacco stores. For purposes of this subsection, "retail tobacco store" has the meaning ascribed to the term in Section 7-32-010.

(c) The commissioner of business affairs and consumer protection and the commissioner of health are each authorized to promulgate any rules necessary to enforce this section.

SECTION 3. This ordinance shall take effect six months after passage and approval.