

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

76 ENTERPRISES, INC., KMS PETRO MART, )  
INC., KULDIP SINGH, WEST TOWN MOBIL, )  
INC., MAZIN ABAULHUDA, BALWINDER )  
KAUR, and NAVI PETROLEUM USA, INC. )

Plaintiff, )

v. )

No. 14 C 08306

THE CITY OF CHICAGO, RAHM EMMANUEL, )  
Mayor of the City of Chicago, BECHARA )  
CHOUCAIR, Commissioner of the City of Chicago )  
Department of Health, and MARIA GUERRA )  
LAPACEK, Commissioner of the City of Chicago )  
Department of Business Affairs and Consumer )  
Protection, )

Judge John J. Tharp, Jr.

Defendants. )

**ORDER**

For the reasons explained in the Statement section of this order, the plaintiffs’ motion for a temporary restraining order, preliminary injunction and expedited discovery [5] is denied in part, granted in part, and continued in part. The motion for a TRO is denied. The motion for preliminary injunction is continued. The motion for expedited discovery is granted. The parties may begin discovery immediately. A status hearing is set for 10:00 a.m. on November 12, 2014, at which the parties should be prepared to discuss the scope of expedited discovery necessary for further proceedings on the plaintiffs’ motion for preliminary injunction.

**STATEMENT**

Plaintiffs 76 Enterprises, Inc., KMS Petro Mart, Inc., Kuldip Singh, West Town Mobil, Inc., Mazin Abaulhuda, Balwinder Kaur, and Navi Petroleum USA, Inc. (“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. 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. “Flavored tobacco products” include any tobacco product that contains a constituent that imparts a characterizing flavor,” *id.* at ¶ 63, including, the parties appear to agree, menthol cigarettes. 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 plaintiffs assert that the Ordinance violates their constitutional rights and is preempted by federal law. Specifically, 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.*

A temporary restraining order or a preliminary injunction is an extraordinary and drastic remedy, which should not be granted unless the movant carries the burden of persuasion by a clear showing." *Recycled Paper Greetings, Inc. v. Davis*, 533 F. Supp.2d 798, 803 (N.D.Ill.2008) (citing *Goodman v. Illinois Dept. of Fin. & Prof'l Regulation*, 430 F.3d 432, 437 (7th Cir.2005)). The standard governing temporary restraining orders is the same as that for preliminary injunctions. *Lee v. Orr*, 13-CV-8719, 2013 WL 6490577, at \*2 (N.D. Ill. Dec. 10, 2013) (citation omitted). In determining whether to grant injunctive relief, courts consider whether the moving party has demonstrated: (1) some likelihood of success on the merits, (2) there is no adequate remedy at law, and (3) irreparable injury will occur without obtaining the relief sought. *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962, 972 (7th Cir.2012); *Woods v. Buss*, 496 F.3d 620, 622 (7th Cir. 2007); *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir.1992). If the moving party meets these requirements, courts then balance the harm to the non-moving party if injunctive relief is granted against the harm to moving party if relief is denied. *Korte v. Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013); *Planned Parenthood of Indiana, Inc.*, 699 F.3d at 972. The Seventh Circuit uses a sliding scale when weighing the harm to a party against the merits of the case. "The more likely it is that [the moving party] will win its case on the merits, the less the balance of harms need weigh in its favor." *Id.* (quoting *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1100 (7th Cir.2008)). Finally, courts consider the public interest involved, including the effects of the injunctive relief on non-parties. *Id.*; *Credit Suisse First Boston, LLC v. Vender*, 2004 WL 2806191, at \*1 (N.D. Ill. December 3, 2004).

Here, the Court concludes that the plaintiffs have not established that they will suffer an irreparable injury if the Ordinance is upheld. The direct effect of the Ordinance is that the plaintiffs will be unable to sell flavored tobacco products, but lost sales of such products constitute economic damages that can be readily estimated. The plaintiffs also argue that they will lose sales of other products, because customers will be less likely to shop at their convenience stores if the stores do not offer flavored tobacco products for sale. They have offered no data, however, to substantiate their claim that sales of flavored tobacco are generally accompanied by sales of groceries or other products offered at the stores and, in any event, the loss of related sales can also be estimated reasonably through regression analysis of the correlation between tobacco sales and the sales of other products, both at the plaintiffs' stores and more generally. The plaintiffs also posit that their stores will be unable to survive a ban on selling flavored tobacco products, but they offer only unsupported estimates of the portion of their convenience store sales consist of "tobacco sales" (not "flavored tobacco sales"), and those estimates range from a high of 50 percent to only 5 percent. Further, they offer no data as to what contribution "convenience store sales" make to their overall sales, much less profits. The claim that the Ordinance will put the plaintiffs out of business presently is little more than speculation; even were it supported adequately, moreover, the plaintiffs would still need to show that the loss

of their business could not be compensated by monetary damages. The value of businesses that have a track record and many comparators can be estimated reasonably; the plaintiffs have not attempted to explain why the value of their businesses cannot be.

Instead, the plaintiffs argue that any violation of constitutional rights is “irreparable.” The case they rely on, however, *Elrod v. Burns*, 427 U.S. 347 (1976), does not stand for that broad proposition. *Elrod* was a case involving governmental restrictions on speech, and it was in that context that a plurality of the Court stated that “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Id.* at 373. Nothing in *Elrod* suggests, however, that no constitutional violation can be remedied, and that broad claim would run smack into the availability of damages in actions asserting claims for damages under 42 U.S.C. § 1983. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 254, 256-57 (1978) (“Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect. ... To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.”). It would, moreover, eliminate the requirement for irreparable injury in seeking injunctive relief in such cases, a result that would be utterly inconsistent with the myriad opinions in cases brought under § 1983 that recite the standard requirements for obtaining injunctive relief, including a showing of irreparable harm, and reject claims for failure to satisfy that requirement. *See, e.g., Wheeler v. Talbot*, ---F.3d---, 2014 WL 5318266, at \*2 (7th Cir. 2014) (affirming denial of injunctive relief in the absence of showing of irreparable harm in § 1983 case); *Judge v. Quinn*, 612 F.3d 537, 557 (7th Cir. 2010) (same).

Finally, on this point, the plaintiffs have also sought to buttress their claim that they will suffer irreparable injuries by asserting that “sovereign immunity” will enable the City to avoid paying any damages that may be awarded. That argument is fatally flawed; the City is not a sovereign and cannot claim immunity from constitutional claims asserted under § 1983. *Monell v. Dep’t of Social Servs.*, 436 U.S. 658, 690 n.54 (1978).

In view of the conclusion that the plaintiffs have adequate remedies at law, it is unnecessary to consider in detail the question of whether the plaintiffs have demonstrated that they have are likely to succeed on the merits of their claims. The Court has reviewed the parties’ briefs on those issues, however, and it is worth noting that there is substantial basis to question the viability of the claims that the plaintiffs have asserted. First, it is difficult even to understand the plaintiffs’ vagueness challenge; this is not a case in which an unsuspecting plaintiff has been snared by an ambiguous standard; the problem presented by the plaintiffs is that (in their view) the plaintiffs have been snared by the imposition of a rule that formerly did not exist. That sounds more like a Due Process claim, but with respect to that claim, the plaintiffs face the problem that a substantive Due Process claim, or a “takings” claim, requires the provision of a property right by the state; a right to sell a heavily regulated product, however, is not such a property right. If, as the defendants argue, the granting of a liquor license does not provide a “vested” right to sell alcoholic beverages, it is difficult to imagine that the plaintiffs should be deemed to have a vested right to sell flavored tobacco. Nor does the plaintiffs’ procedural due process claim seem likely to prevail; while the plaintiffs claim that their ability to challenge application of the Ordinance by the City is imperfect, they do not address the fact that state law

provides them with the means to appeal any adverse determination by a municipal administrative agency. The plaintiffs' Equal Protection challenge also appears quite weak; the Ordinance does not target a suspect class and its ostensible objective—to reduce the use of tobacco by minors by limiting its availability in areas where there tend to be large concentrations of minors, namely around schools—is not irrational, even if it is not necessarily the most effective means of pursuing that goal. And finally, the plaintiffs argument that federal law preempts the Ordinance appears to fly in the face of the express language of the preemption provision in the applicable federal statute (the Family Smoking Prevention and Tobacco Control Act, or “FSPTCA”), which explicitly states that its preemption provision “*does not apply to requirements relating to the sale ... of, tobacco products ...*” 21 U.S.C. § 387p(a)(2)(B) (emphasis added).

None of this is to say that the plaintiffs cannot prevail on any of these claims. These observations are made in the course of ruling on the plaintiffs' motion for a temporary restraining order, which is by its nature an emergency order, and as such are non-binding. Fuller consideration to all of these arguments will be possible in the context of consideration of the plaintiffs' motion for preliminary injunction. At present, however, the Court concludes that the plaintiffs have not made the clear showing necessary to obtain the extraordinary and drastic remedy of a temporary restraining order.



---

John J. Tharp, Jr.  
United States District Judge

Date: November 4, 2014