

LUCAS COUNTY COMMON PLEAS COURT
CASE DESIGNATION

G-4801-CI-0201704676-000

TO: Bernie Quilter, Clerk of Courts

CASE NO. _____

Judge

LINDA J. JENNINGS

JUDGE _____

The following type of case is being filed:

Professional Malpractice

- Legal Malpractice (L)
- Medical Malpractice (M)
- Product Liability (B)
- Other Tort (C)

Workers' Compensation

- State Funded (D)
- Self Insured (K)
- Administrative Appeal (F)

Commercial Docket

By submitting the complaint, with the signature of the Attorney, the Attorney affirms that the name of person with settlement authority and his/her direct phone number will be provided upon request to a party or counsel in this matter

Other Civil

- Consumer Fraud (N)
- Forfeiture
- Appropriation (P)
- Court Ordered
- Other Civil (H)
- Certificate of Title
- Copyright Infringement (W)

This case was previously dismissed pursuant to CIVIL RULE 41 and is to be assigned to Judge _____, the original Judge at the time of dismissal. The previously filed case number was CI _____.

This case is a Declaratory Judgment case with a personal injury or related case currently pending. The pending case number is _____, assigned to Judge _____.

This case is to be reviewed for consolidation in accordance with Local Rule 5.02 as a companion or related case. This designation sheet will be sent by the Clerk of Courts to the newly assigned Judge for review with the Judge who has the companion or related case with the lowest case number. The Judge who would receive the consolidated case may accept or deny consolidation of the case. Both Judges will sign this designation sheet to indicate the action taken. If the Judge with the lowest case number agrees to accept, the reassignment of the case by the Administration Judge shall be processed. If there is a disagreement between the Judges regarding consolidation, the matter may be referred to the Administrative Judge.

Related/companion case number _____ Assigned Judge _____

Approve/Deny _____ Date _____ Approve/Deny _____ Date _____

Attorney Andrew R. Mayle
Address P.O. Box 2635
Perrysburg, Ohio 43552
Telephone 419-~~339~~ 334-8377

ORIGINAL

FILED
LUCAS COUNTY
IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO
2017 NOV -2 PM 3:55

CHERYL MACK)
3507 Oakway Drive)
Toledo, Ohio 43614)
COMMON PLEAS COURT)
BERNIE QUILTER)
CLERK OF COURT)

and)

PROPERTY INVESTOR'S NETWORK, INC.)
3131 Executive Parkway, Suite 100)
Toledo, Ohio 43606)

Plaintiffs,)

vs.)

CITY OF TOLEDO, OHIO)
c/o Adam Loukx)
One Government Center, Suite 2250)
Toledo, Ohio 43604)

and)

TOLEDO-LUCAS COUNTY BOARD OF HEALTH)
635 N. Erie Street)
Toledo, Ohio 43604)

Defendants.)

Case No.

G-4801-CI-0201704676-000

Judge

LINDA J. JENNINGS

Judge

**Complaint for
permanent injunction**

1. Plaintiffs have standing to bring this action under R.C. 733.59, the Toledo charter, and the common law.
2. As shown below, plaintiffs have a personal stake in the outcome since they are active participants in the Toledo residential rental market.
3. Further, R.C. 733.59 provides that, "If the...city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the

taxpayer may institute the action in his own name, on behalf of the municipal corporation.”

4. Toledo’s charter has a substantially identical provision.
5. Plaintiff Cheryl Mack is a taxpayer, resident, and real-estate investor in the Toledo residential rental market.
6. Plaintiff Property Investor’s Network, Inc. (“PIN”) is a non-profit trade group consisting of substantial investors in the Toledo rental market. PIN’s members formed the group to protect their investments in Toledo by maintaining and attracting quality investors and property managers into the Toledo market. As a consequence, Toledoans have good choices in the residential market for single-family homes, duplexes, small apartment complexes, and other small-scale housing units.
7. PIN’s members maintain good landlord-tenant relations and rent housing units to Toledoans of all ethnicities, ages, socio-economic classes, and backgrounds regardless of family status.
8. Still, PIN and Mack do not wish to be subjected to unconstitutional commands.
9. Both Ms. Mack and PIN and its membership have an interest in the enforcement of Toledo’s “lead ordinance,” codified at Toledo Municipal Code Chapter 1760.
10. This court may and should take judicial notice of that local legislative scheme.
11. Mack and PIN’s membership are subject to the ordinance because of its requirements, which include substantial “inspection” and governmental fees.

12. The ordinance is causing uncertainty in the Toledo rental market.
13. Mack and PIN's membership would further invest in the Toledo market depending in part upon the status of the ordinance, which is unconstitutional. The status of the ordinance will affect future rents and property values and related sales transactions.
14. Because of its unconstitutionality, on October 23, 2017, counsel for Mack and PIN sent the attached correspondence to Adam Loukx, the Toledo law director. For purposes of brevity, that letter is hereby incorporated by reference as if it were fully rewritten herein.
15. As shown by the letter, both Mack and PIN requested that Mr. Loukx file litigation seeking to enjoin enforcement of the lead ordinance.
16. Because of the impending deadlines approaching in June of 2018 and because of the ongoing market uncertainty caused by the ordinance, Mack and PIN requested that Loukx take action by October 30, 2017.
17. The law director has the power to seek the requested relief under both the Revised Code and Toledo's charter.
18. Mr. Loukx promptly acknowledged receipt of the request, but stated that he did not see merit in the complaint and that he would not act before November 7, 2017—Election Day.
19. And since October 30th he's taken no action in court to enjoin the ordinance.
20. Waiting for action—or the inevitable “no action”—from the law department would be wholly futile since: (a) the law department helped craft the ordinance, (b) at least one attorney from the law department attended a public

meeting since the October 23, 2017 letter, which the attorney knew of, yet did not mention the letter or a potential legal challenge and instead gave a presentation that presumed the ongoing nature of the ordinance, and (c) Mr. Loukx himself has publicly commented in the local news media that a challenge to the ordinance would be without merit. See <http://www.toledoblade.com/local/2017/05/29/Area-lawyers-confident-in-Toledo-lead-laws.html>

21. Finally, the Toledo Blade reported on October 26, 2017 that several members of Toledo city council proclaimed that the lead law would not be amended and is “here to stay.”
22. This court should enjoin enforcement of the lead law because it is unconstitutional in at least two respects as outlined in the attached letter.
23. *First*, the Toledo-Lucas County Health Department is a creature of statute.
24. Therefore, the health department and its board have only limited powers as enumerated by state statute. *D.A.B.E. Inc. v. Toledo-Lucas County Board of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172.
25. Thus, “local boards cannot act in any area of public health without prior legislative approval.” *Id.* at ¶46.
26. No prior legislative approval exists with respect to the disputed measures.
27. As explained in the attached letter, no statute endows the department or defendant board of health with the power to be a licensing agency for residential housing units.

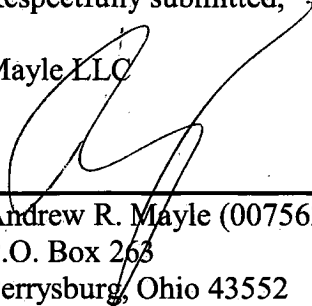
28. Nor does any statute endow the department or board with any of the powers contemplated by the ordinance. Indeed, if the board had such powers, duties, or obligations under a state statute, then the ordinance wouldn't exist because its existence would be superfluous. That is, a reason the ordinance exists is precisely because no statute gives the health department or its board the powers to act as contemplated by the ordinance.
29. Therefore, enforcement of the ordinance should be enjoined.
30. Similarly, Toledo city council has no power to issue edicts or mandates to the health department, its board, or any other creature of state statute.
31. The city council's attempts to vest the health department or its board with certain powers—and attempts to mandate that the department or its board take certain actions—is an arrogation of the General Assembly's exclusive powers under Ohio Const. Art. II., Sec. 1 and is therefore a nullity. Thus, this court should yet again enjoin the ordinance.
32. The city and health department purports to act under R.C. 3709.281. However, as explained in the attached letter, Toledo city council has only legislative powers. Therefore, the statute contemplates that Toledo city council may delegate its *legislative* power to the board of health, which could then write certain rules. But here, council seeks to retain its legislative power and “delegate” executive or administrative powers to the health department that neither the council nor the health department enjoy in the first instance. Further, the R.C. 3709.281 “agreement” came after enactment of the

ordinance, which was unconstitutional at its inception, is improperly executed, and is itself a nullity.

33. *Second*, as explained in the attached letter, the ordinance violates Ohio Const. Art. I, Sec. 2, the equal-protection clause, by (a) singling out rental—as opposed to all—residential properties constructed prior to 1978 and (b) discriminating on the number of units (4 or less). As explained in the letter, this distinction is not related to the ostensible purpose of the legislative scheme and is hence unconstitutional under *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124 (a classification unrelated to the purpose of the law violates constitutional equal-protection guarantees).
34. The ordinance’s classifications concerning residential housing, residential *rental* housing, and ultimately of only a certain segment of rental units flouts the ordinance’s plain—and mandatory—presumption that “*all* paint on the interior or exterior of *any* residential building on which the original construction was completed prior to January 1, 1978 *shall* be presumed to be lead-based.” In sum, the ordinance creates an irrationally unequal playing field, is unconstitutional, and should be enjoined.
35. *Wherefore*, this court should enjoin enforcement of the “lead ordinance,” codified at Toledo Municipal Code Chapter 1760, and award plaintiffs their costs and attorney fees under R.C. 733.61.

Respectfully submitted,

Mayle LLC



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Counsel for plaintiffs

INSTRUCTIONS FOR SERVICE

To the clerk:

Serve defendants by certified mail at the addresses listed in the complaint. And as required by R.C. 2721.12(A), serve a copy by certified mail upon the Ohio attorney general:

Richard M. DeWine, Esq.
Ohio Attorney General
30 E. Broad Street
Columbus, Ohio 43215



Andrew R. Mayle (0075622)
Counsel for plaintiffs



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Bellevue, Ohio 44811
Phone: 419.483.5744
Fax: 419.483.5750

Ronald J. Mayle
Jeremiah S. Ray
Andrew R. Mayle

October 23, 2017

VIA REGULAR and ELECTRONIC MAIL

Adam Loukx, Esq.
Toledo Law Director
One Government Center, Suite 2250
Toledo, Ohio 43604

Re: Municipal Code Chapter 1760/ Request for Injunction Lawsuit

Dear Mr. Loukx:

I write on behalf of my clients, Toledo taxpayer and rental-property owner Cheryl Mack and the Property Investor's Network, Inc., which is a non-profit trade group whose membership consists of people who invest substantial monies in the Toledo housing market in pursuit of the American Dream: entrepreneurs who aim to provide reasonably-priced housing to Toledo families and individuals while either earning a profit or building equity for retirement. As explained below, they request that you apply in a court of competent jurisdiction to enjoin enforcement of Toledo's so-called "lead ordinance," codified at Toledo Municipal Code Chapter 1760. While the ordinance may have a noble purpose, it is unconstitutional. We bring this matter to your attention now in the hopes that this dispute can be resolved in advance of the ordinance's various 2018 deadlines.

The ordinance will cause increased rents in the single-family home, duplex, and small apartment marketplace because its attendant inspection and application fees will be passed on to tenants. And if landlords are unable to pass on the increased operating costs caused by the ordinance, profitability necessarily decreases. Decreased profitability in the Toledo rental market means fewer capable people will be willing to invest in the market, which harms tenants, property values, and the real-estate market as a whole. Further, the ordinance could be used to abuse and invade the privacy of tenants. Beyond these concerns, the ordinance is unconstitutional. Here's why.

It mandates that the Toledo-Lucas County Health Department enforce the ordinance and fulfill other dictates of city council. The problem is that the Toledo-Lucas County Health Department is a creature of statute and therefore has no power to "enforce" ordinances as dictated by Toledo city council since no statute grants the department that power. As a logical corollary, council has no general power to dictate by

ordinance that a health department undertakes action that is not within its statutory powers. Indeed, "It is well settled that an administrative agency has only such regulatory power as is delegated to it by the General Assembly. Authority that is conferred by the General Assembly cannot be extended by the administrative agency." *D.A.B.E. Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶38. We are unaware of any statute that vests a health department with the powers contemplated by the lead ordinance, such as serving as the licensing agency for a particular residential-housing market at the mandate of a municipality, determining whether to issue a license under criteria set by ordinance, or performing any of the other many mandates in this ordinance.

We are also unaware of any authority permitting a municipality to issue dictates to a statutory agency with limited enumerated statutory powers.

The statutory powers of boards of health illustrate the point. For instance, as provided in R.C. 3734.04, a board of health may "provide for the inspection, licensing, and enforcement of sanitary standards for solid waste facilities" We are not aware of any similar statute respecting residential properties.¹ The point is this: the General Assembly knows how to write laws and vest agencies with enumerated powers—yet here it has *not* granted the health department with powers necessary to act under Toledo's lead ordinance. So, the ordinance is an invalid arrogation of the General Assembly's legislative powers under Article II, Section 1 of the Ohio constitution² because the lead ordinance purports to endow certain powers upon the health department that do not exist in the Revised Code. This delegation is a nullity akin to the unlawful "smoking-ban" in *D.A.B.E.* As such, the ordinance was "void *ab initio*" since an unconstitutional ordinance "is not a law...it imposes no duties...it is, in legal contemplation, as inoperative as thought it had never been passed." *Middletown v. Ferguson*, 25 Ohio St.3d 71, 80 (1986).

We are aware that the city and board of health purport to have an agreement under R.C. 3709.281 for the health department to "enforce" the ordinance. But this agreement is yet another nullity. Significantly, R.C. 3709.281 permits a "board of health" and the "legislative authority" of a municipality to enter into an agreement whereby the board of health is granted authority to exercise any power, perform any function, or render any service on behalf of a "legislative authority" that the legislative authority may itself exercise, perform, or render. That is, the statute enables a board of health under certain circumstances to stand in the shoes of a municipality's legislative—not executive—authority. Here, the relevant legislative authority is Toledo city council since Toledo's

¹ The Ohio Department of Health, under its own rulemaking authority enabled by the General Assembly, has promulgated comprehensive rules for local health departments to address dangers caused by lead. See Ohio Administrative Code Chapter 3701-30, entitled "Childhood Lead Poisoning Prevention." Still, we have found no statewide regulation or statute permitting local health departments to carry out the license regime contemplated under Toledo's ordinance.

² Article II, Section 1 provides in relevant part that, "The legislative power of the state shall be vested in a general assembly..."

charter vests the “legislative power” of the city in the council.³ Notably, the charter vests city council with legislative powers only—the charter vests council with no enforcement powers. Indeed, Section 61 of the charter vests the Mayor with executive and administrative power. Thus, Toledo city council cannot delegate to the board of health the power to enforce the lead ordinance under R.C. 3709.281 because council itself lacks such power. But even if it could, the agreement with the health department came after enactment of the ordinance, which is void *ab initio* under *Middletown* and therefore cannot be revived by subsequent agreement. In sum, the agreement is a nullity. Thus, the issue becomes the appropriate judicial remedy.

This implicates the three-part severance test. Applying that test here, the remedy is to strike and enjoin the entire lead ordinance because (1) the constitutional and unconstitutional parts aren’t capable of separation so that each may be read and may stand by themselves, (2) the unconstitutional parts are so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the legislature if the offending provisions are stricken by themselves, and (3) the insertion of words or terms would be necessary in order to separate the constitutional part from the unconstitutional part and to give effect to the former only. *Cf.*, *State ex. rel. Whitehead v. Sandusky County Board of Commissioners*, 133 Ohio St.3d 561, 2012-Ohio-4837, ¶28. Of course, city council may attempt to re-draft a constitutional ordinance. *Id.*, ¶41.

Next, apart from the Art. II, Sec. 1 problems addressed above, this ordinance also violates equal-protection guarantees under Ohio Const. Art. I, Sec. 2. The ordinance plainly establishes a presumption that “all paint on the interior or exterior of any residential building on which the original construction was completed prior to January 1, 1978, shall be presumed to be lead-based.”⁴ Despite this broad presumption, the ordinance goes on to become narrow in scope since §1760.02(a) applies only to each “Residential Rental Property” and “Family Child Care Home” in the city as narrowly defined by the ordinance,⁵ subject to even further exemptions under §1760.17. This classification is not related to the ostensible purpose of the ordinance: to prevent lead poisoning caused by lead paint, which the ordinance presumes to exist inside and outside of any residential building on which the original construction was completed prior to 1978. The ordinance is therefore unconstitutional even under a rational-basis standard of review since the classification is based upon criteria (four rental units or less in one building) that are unrelated to the purpose of the law. *Cf.*, *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, (a classification unrelated to the purpose of the law violates constitutional equal-protection guarantees). As such, the ordinance creates an unequal playing field among owners of the regulated and unregulated housing units and benefits the larger-unit owners, which are *not* subject to the ordinance’s inspection and licensing fees despite the presumption that paint on the interior any

³ Toledo’s Charter at Chapter IV, entitled “Legislative Powers and Duties,” provides at Section 26 that, “Except as reserve to the people by this Charter, the legislative power of the City shall be vested in a Council of twelve (12) members...”

⁴ See TMC 1760.05(a).

⁵ See TMC 1760.03; 1760.04(a)(6); 1760.04(a)(7); 1760.04(a)(22).

exterior of the unregulated buildings constructed prior to 1978 is in fact lead-based. If Toledo seeks to regulate the housing market generally, or the rental market in particular, it should ensure a level playing field among owners. Further, if the goal is to prevent lead-paint poisoning, it is irrational to not apply the ordinance to *all* properties in Toledo constructed prior to 1978, which all presumptively contain lead paint—the claimed cause of the problem that the ordinance purportedly seeks to rectify.

In closing, my clients and their tenants share a mutual interest in safe housing for all. They are not out to cause harm to anyone, but are proud investors in Toledo. Without my clients' investment and the investments of people like them, rental options in Toledo for single-family homes, duplexes, and other smaller housing units would be limited and therefore more residents would have to live in larger rental complexes, which are completely unregulated by the lead ordinance despite the presumption that they also contain lead-based paint inside and out. We recognize that bad landlords exist, but that's why my clients created the Property Investor's Network: to maintain a membership consisting of good landlords who strengthen and encourage investment in Toledo. Like anyone, property owners do not want to be subjected to unlawful regulation. Therefore, my clients request that under R.C. 733.56 you apply to a court of competent jurisdiction for orders declaring the lead ordinance unconstitutional and restraining its enforcement.

If you file a lawsuit, have the clerk serve the complaint upon the attorney general as required by R.C. 2721.12(A). At minimum, the city and board of health should be named as defendants. Further, name my clients as party defendants under R.C. 733.581. You may serve Ms. Mack at 3507 Oakway Drive, Toledo, Ohio 43614 and P.I.N. at 3131 Executive Parkway, Suite 100, Toledo, Ohio 43606. If by October 30, 2017 you do not apply for an injunction in a court of competent jurisdiction we intend to file our own lawsuit under R.C. 733.59 and seek reimbursement under R.C. 733.61.

Thank you for your consideration, Adam.

Very truly yours,


Andrew R. Mayle