ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. Anthony C. Christoff, et al.,	)	**CASE NO. 2011-0235**
	)	
Relators,	)	
vs.	)	
	)	**Original Action**
Earle B. Turner, et al.	)	
	)	
Respondents.	)	

REVISED MOTION OF RESPONDENTS TO DISMISS RELATOR'S COMPLAINT FOR PEREMPTORY AND ALTERNATIVE WRITS OF PROHIBITION AND TO DISMISS CLASS ACTION COMPLAINT FOR PEREMPTORY AND ALTERNATIVE WRITS OF MANDAMUS

Robert J. Triozzi (0016532)
Director of Law

Gary S. Singletary (0037329)
Counsel of Record
Assistant Director of Law
Mark Musson (0081110)
Assistant Director of Law
City of Cleveland
601 Lakeside Avenue- Room 106
Cleveland, Ohio 44114-1077
(216) 664-2737
(216) 664-2663 (Fax)
gsingletary@city.cleveland.oh.us
mmusson@city.cleveland.oh.us

Attorneys for Respondents

Paul M. Greenberger (0030736)
Counsel of Record
Timothy J. Duff (0046764)
Jordan Berns (0047404)
Berns, Ockner & Greenberger, LLC
3733 Park East Drive - Suite 200
Beachwood, Ohio 44122-4334
(216) 831-8838
(216) 464-4489 (Fax)
pgreenberger@bernsockner.com
tduff@bernsockner.com
jberns@bernsockner.com

Attorneys for Relators

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REVISED MOTION OF RESPONDENTS TO DISMISS RELATORS' COMPLAINT FOR PEREMPTORY AND ALTERNATIVE WRITS OF PROHIBITION AND TO DISMISS RELATORS' CLASS ACTION COMPLAINT FOR PEREMPTORY AND ALTERNATIVE WRITS OF MANDAMUS

Now come Respondents, Earle B. Turner, Clerk of Courts, Cleveland Municipal Court; Brian Mahon, Hearing Examiner; Verlin Peterson, Hearing Examiner; The City of Cleveland; Sharon A. Dumas, Director of Finance for City of Cleveland; and James Hartley, Treasurer for City of Cleveland; who move this Court for an order dismissing Relators' Complaint for Peremptory and Alternative Writs of Prohibition and Class Action Complaint for Peremptory and Alternative Writs of Mandamus.

Relators' Complaint fails to state a claim upon which relief may be granted and does not meet requisite showings for the issuance of either the writ of prohibition addressed in Count I or the writ of mandamus addressed in Count II of the Complaint. The grounds for Respondents'

motion are more fully set forth in the attached memorandum in support which is hereby incorporated by reference.

This revised motion is filed per S.Ct.R.8.7 and corrects one inadvertent typographical error on numbered page 23 of the original motion. The revised motion inserts the word "not" after "does" and before "authorize on page 23, in the second line of the second paragraph."

Respectfully submitted,

Robert J. Triozzi (0016532)
Director of Law

Gary S. Singletary (0037329)
Counsel of Record
Assistant Director of Law
Mark Musson
Assistant Director of Law
City of Cleveland
601 Lakeside Avenue- Room 106
Cleveland, Ohio 44114-1077
(216) 664-2737; (216) 664-2663 (Fax)
gsingletary@city.cleveland.oh.us
mmusson@city.cleveland.oh.us

Attorneys for Respondents

REVISED MEMORANDUM IN SUPPORT

I. INTRODUCTION

On February 10, 2011, Relators Anthony C. Christoff and William M. Goldstein filed an original action that is dually captioned as being a "Complaint for Peremptory and Alternative Writs of Prohibition" and a "Class Action Complaint for Peremptory and Alternative Writs of Mandamus, and for Attorney Fees and Costs." Relators' Complaint involves Cleveland Codified Ordinance 413.031 (CCO 413.031) which was enacted by Cleveland City Council to authorize the use of automated-camera systems to impose civil penalties on the owners of cars that have been photographed by an automated-camera system.

It is evident from Relator Christoff's allegations that Respondents are not about to exercise judicial or quasi-judicial power with respect to the August 19, 2010 Notice of Liability he places before this Court. Relator Christoff does not allege in his complaint or otherwise claim that he had ever timely requested the hearing referenced in the notice. See *State ex rel. Wright v. Ohio Bur. of Motor Vehicles*(1999), 87 Ohio St.3d 184, 718 N.E.2d 908. The requested writ of prohibition further fails because this Court has previously recognized that (a) the City does not patently and unambiguously lack jurisdiction to enforce CCO 413.031 and (b) the administrative proceedings set forth in Section 413.031 provide an adequate remedy in the ordinary course of law. *State ex rel. Scott v. Cleveland* 112 Ohio St.3d 324, 859 N.E.2d 923, 2006 -Ohio- 6573.

CCO 413.031 authorizes the use of automated-camera systems to impose civil penalties on the owners of cars that have been photographed by an automated-camera system. The enactment of the City's civil ordinance, and the "quasi-judicial" civil administrative process established therein, does not unconstitutionally usurp the statutory criminal jurisdiction of the

municipal court established by R.C. 1901.20. The camera enforcement ordinance by imposing potential civil liability on the owner of a vehicle for either failing to stop at a red light traffic signal or for speeding does not conflict with or address the separate parking enforcement laws enacted pursuant to Chapter 4521 of the Ohio Revised Code. Rather, CCO 413.031 constitutes a proper exercise of the City's home rule power and authority, and does not exceed the City's authority under the Ohio Constitution.

Likewise, Relator Goldstein's request for a writ of mandamus fails on its face. His allegations of fact do not establish a clear legal right to the refund he seeks nor do the allegations demonstrate a clear legal duty on the Respondents to provide him with a refund for the civil penalty payments and admissions he voluntarily made after receiving notices evidencing that his vehicle had been photographed speeding on four occasions. CCO 413.031 provided Relator with an adequate remedy in the ordinary course of law to contest the notices of liability. Additionally, Relator Goldstein's presumptive reliance on the issuance of the writ of prohibition being requested by Relator Christoff in framing his separate mandamus claim further establishes that he presents no clear legal rights for the consideration of this Court.

II. FACTS

While a court in considering a motion to dismiss is to presume the truth of all factual allegations in the complaint, a court is not required to draw the many conclusions interspersed throughout Relators' Complaint that are not suggested by the factual allegations. *Mitchell v. Lawson Milk Co.* (1989), 40 Ohio St.3d 190, 193. Actual facts presented in Relators' Complaint are rather sparse, with much of the Complaint arguing legal conclusions that are not supportable as a matter of law and which are wholly misplaced in the context of the extraordinary relief being requested.

Respondent City of Cleveland is an Ohio municipal corporation organized under a City Charter and the City has enacted various codified ordinances, including the current versions of the several ordinances that are attached at Exhibit A of the Complaint. Cleveland Codified Ordinance 413.031 (CCO 413.031) is captioned "Use of Automated Cameras to Impose Civil Penalties Upon Red Light and Speeding Violators." See Relators' Complaint at ¶ 12. Respondent Earle B. Turner is the Clerk of the Cleveland Municipal Court and the violations clerk of the Parking Violations Bureau ("Respondent Turner") per R.C. 4521.05(A) and CCO 459.03(b). Complaint at ¶ 13. CCO 413.031 authorizes the Parking Violations Bureau "through an administrative process established by the Clerk of the Cleveland Municipal Court" - Respondent Turner – to hear appeals of contested automated traffic enforcement tickets. Respondents Verlin Peterson and Brian Mahon are Hearing Examiners appointed by Respondent Turner pursuant to the appeals process established in CCO 413.031(K). See Complaint at ¶ 13.

Under CCO 413.031 (Attached to Relators' Complaint at Exhibit A), each ticket ("Notice of Liability") is reviewed and sent to the vehicle's registered owner's address. CCO 413.031(h). To contest the Notice of Liability, the recipient must perfect an appeal to the Parking Violations Bureau by filing notice of appeal within 21 days from the ticket notice date. CCO 413.031(k). The failure to invoke the appellate jurisdiction of the Parking Violations Bureau by filing a notice of appeal waives the right to contest the Notice of Liability and is considered an admission. *Id.*

Relator Christoff attached an affidavit to his Complaint with Exhibit B wherein he claims personal knowledge and acknowledges at ¶ 3: "The copy of the first page of the attached Notice of Liability is a true and accurate copy of the original I received." (See, Relators' Complaint at ¶ 14, Exhibit B, attached and referenced therein). The Notice of Liability attached at Exhibit B

informed Relator Christoff that "Your vehicle was photographed violating City of Cleveland codified ordinances on the date and time listed below." (Ex. B to Complaint). The "Violation Information" contained on the Notice of Liability received by Relator identified that on 7/17/10 Relator Christoff's vehicle speed was 49 MPH while travelling on Carnegie Avenue where the posted speed is 35 MPH. (Exhibit B to Complaint). The Notice of Liability further provided "YOUR ANSWER TO THIS NOTICE MUST BE RECEIVED BY THE PAYMENT DUE DATE LISTED BELOW." (Ex. B to Complaint). Additionally, the Notice of Liability instructed Relator Christoff as follows:

> Failure to pay the fine or otherwise answer within 20 days of the notice date in the manner and within the time required is an admission of liability. This will also result in additional penalties and the loss of your right to a hearing."

(Ex. B to Complaint) The "Notice Date" is specifically identified in the Notice of Liability as follows: "**Notice Date: 08/19/10.**" (Ex. B to Complaint). The Notice of Liability further identified: "**Payment/Hearing Request Due Date: 09/08/2010**". (Ex. B to Complaint).

Relators' Complaint includes no allegations addressing whether, after receiving the Notice of Liability attached at Exhibit B, Relator Christoff requested a hearing on or before September 8, 2010. Relator alleges without specificity: "Respondent Clerk and Respondent Hearing Examiners and Peterson are about to, or are about to continue to, unlawfully exercise judicial power pursuant to §413.031(k), §459.03(b) and R.C. 4521.08(C), for which Relator Christoff has no adequate remedy in the ordinary course of the law." Complaint at ¶ 14. Relator further alleges in similar fashion in the Complaint at ¶ 48 that the "Respondent Clerk and

Respondent hearing Examiners already have, or are about to determine issues of fact and law over Relator Christoff's alleged violation of §413.031..."[1]

Facts contained in "Relators' Class Action Complaint for Peremptory and Alternative Writs of Mandamus" include that Relator Goldstein, the purported class representative, had received four Notices of Liability for alleged violations under CCO § 413.031 and that on November 10, 2010 Relator made payments totaling Four Hundred Dollars ($400.00) to satisfy the civil penalties associated with the four notices of liability. See Complaint at ¶ 15 and Exhibit C (Goldstein affidavit) attached thereto. Relator Goldstein seeks to represent a class of individuals consisting of himself "and of all others who have paid money to Respondent Clerk for violating or allegedly violating §413.031..." Complaint at ¶ 16.

It is not contested for purposes of this motion that the allegations that the money received by Respondent Turner for the civil enforcement of violations of Cleveland's speeding and red light ordinances through CCO §413.031 is periodically disbursed by said Respondent Clerk to Respondent James Hartley as the City's Treasurer, Respondent Sharon A. Dumas as the City's Director of Finance or the Respondent City of Cleveland. See Complaint at ¶ 18. There is no dispute for purposes of this motion that pursuant to City Charter §94 Respondent Dumas as the City's Director of Finance has charge of the Department of Finance and administers the City's financial affairs. Complaint at ¶ 19. Respondents do not dispute that Respondent Hartley as the City's Treasurer is the custodian of all public money of the City pursuant to City Charter §99 and that in conformance with City Charter §100 Respondent Hartley, under the supervision of the Director of Finance, receives and disburses public money pursuant to regulations prescribed

[1] Relator alleges in the same way at ¶ 52 of the Complaint "Respondent Clerk and Respondent Hearing Examiners have exercised, and are about to continue to exercise , judicial power over Relator Christoff's Notice of Liability..."

by authorities having lawful control over such funds. Complaint at ¶¶ 20-21.

As addressed below, the discernible facts placed before this Court by Relators in light of the governing law establish without question that the complaints for writ of prohibition and writ of mandamus are not well taken and should be summarily dismissed.

III. LEGAL ARGUMENT

A. OPPOSITION TO WRIT OF PROHIBITION

1. A WRIT OF PROHIBITION IS TO BE ISSUED ONLY WITH GREAT CAUTION AND NOT IN DOUBTFUL CASES.

Dismissal of a complaint is appropriate where, as in the present matter, "after presuming the truth of all factual allegations of the complaint and making all reasonable inferences in ...[Relators'] favor, it appear[s] beyond doubt that ...[Relators] could prove no set of facts entitling ...[them] to the requested extraordinary writ of prohibition. *State ex rel. Buck v. Maloney,* 102 Ohio St.3d 250, 809 N.E.2d 20, 2004-Ohio-2590, ¶ 6, citing *State ex rel. Conkle v. Sadler,* 99 Ohio St.3d 402, 2003-Ohio-4124, 792 N.E.2d 1116, ¶ 8. As noted above this Court is not required to draw legal conclusions contained in Relators' Complaint, and such conclusions are not supported, much less suggested, by the limited factual allegations placed before the Court. See *Mitchell,* supra, 40 Ohio St.3d at 193. See also *Ashcroft v. Iqbal* (2009), 129 S.Ct. 1937, 1940, 173 L.Ed.2d 868:[2]

> "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.,* at 555, 127 S.Ct. 1955. Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. *Id.,* at 556, 127 S.Ct. 1955. A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth."

[2] The "*Id.*" citations contained in the *Iqbal* quotation are referencing *Bell Atlantic Corp. v. Twombly* (2007), 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929

In order to be entitled to the requested peremptory and alternative writs of prohibition, Relators are required to establish that (1) Respondents are about to exercise judicial or quasi-judicial power, (2) the exercise of that power was unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Brady v. Pianka* (2005), 106 Ohio St.3d 147, 832 N.E.2d 1202, 2005 -Ohio- 4105, ¶ 7, citing *Tatman v. Fairfield Cty. Bd. of Elections,* 102 Ohio St.3d 425, 2004-Ohio-3701, 811 N.E.2d 1130, ¶ 14.

Prohibition is to be used with great caution and will not issue in a doubtful case. *State ex rel. Merion v. Tuscarawas County Court of Common Pleas* (1940), 137 Ohio St. 273. A writ of prohibition may not be employed as a short cut to a final determination of the rights of litigants and is not a substitute for error or for ordinary available remedies. *State ex rel. Caley v. Tax Commission of Ohio* (1934), 129 Ohio St. 83, 88-89 citing *State ex rel. Knights Templar & Masonic Mutual Aid Ass'n v. Common Pleas Court of Meigs County*, 124 Ohio St. 493, 499, 179 N. E. 415. A court "will not issue a writ of prohibition unless it clearly appears that a lower court possesses no jurisdiction of the cause which it is attempting to adjudicate or the lower court is about to exceed its jurisdiction." *Rivers v. Ramsey*, 8th Dist. No. 87763, 2006-Ohio-1744, ¶ 4, citing *State ex rel. Ellis v. McCabe* (1941), 138 Ohio St. 417.

2. RELATOR CHRISTOFF DOES NOT IDENTIFY THAT RESPONDENTS ARE ABOUT TO EXERCISE JUDICIAL OR QUASI-JUDICIAL AUTHORITY OVER HIM.

As noted in the facts above Relator Christoff alleges non-specifically in his Complaint that Respondent Hearing Examiners have exercised, and are about to continue to exercise,

judicial power[3] over Relator Christoff's Notice of Liability.

CCO 413.031(k), as attached at Exhibit B to the Complaint, provides the following with regard to contesting a notice of liability:

> (k) *Appeals*. A notice of appeal shall be filed with the Hearing Officer within twenty-one (21) days from the date listed on the ticket. 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 ticket and shall be considered an admission.
>
> Appeals shall be heard by the Parking Violations Bureau through an administrative process established by the Clerk of the Cleveland Municipal Court. At hearings, the strict rules of evidence applicable to courts of law shall not apply. The contents of the ticket shall constitute a prima facie evidence of the facts it contains. Liability may be found by the hearing examiner based upon a preponderance of the evidence. If a finding of liability is appealed, the record of the case shall include the order of the Parking Violations Bureau, the Ticket, other evidence submitted by the respondent or the City of Cleveland, and a transcript or record of the hearing, in a written or electronic form acceptable to the court to which the case is appealed.

Relator Christoff alleges he received the Notice of Liability he attached as Ex. B. In addition to identifying the violation captured by the City's camera system the Notice of Liability as attached at Exhibit B provided him with the following information:

> "Failure to pay the fine or otherwise answer within 20 days of the notice date in the manner and within the time required is an admission of liability. This will also result in additional penalties and the loss of your right to a hearing."
>
> * * *
>
> **Notice Date: 08/19/10.**
>
> * * *
>
> YOUR ANSWER TO THIS NOTICE MUST BE RECEIVED BY THE PAYMENT DUE DATE LISTED BELOW.
>
> * * *

[3] A following section separately addresses the issue that the administrative hearing under CCO 413.031 is the exercise of "quasi-judicial" authority, not "judicial" power. In any event, Relator Christoff does not allege that a hearing under CCO 413.031 resembling a judicial trial was requested by him or scheduled.

Payment/Hearing Request Due Date: 09/08/2010

Relator Christoff's Complaint does not allege that he took any action to answer the Notice of Liability or that he requested a hearing on or before 9/08/09. Relator filed his complaint seeking a writ of prohibition on February 10, 2011- five months after the **Payment/Hearing Request Due Date** identified in the Notice of Liability he attached to his complaint.

The allegations addressing Respondents' exercise of judicial or quasi-judicial authority as contained in the complaint are insufficient and akin to the circumstance presented to the Court in *State ex rel. Wright v. Ohio Bur. of Motor Vehicles*(1999), 87 Ohio St.3d 184, 718 N.E.2d 908 wherein the appellate court's dismissal of appellant-relator's complaint for a writ of prohibition was affirmed where the complaint had contained no allegation that an available hearing made known to the relator had been timely requested before seeking a writ of prohibition:[4]

> The Registrar had neither exercised nor is about to exercise quasi-judicial authority in issuing the suspension order against Wright pursuant to R.C. 4509.101(A)(3)(c) and Ohio Adm.Code 4501:1-2-08. Quasi-judicial authority is the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial. *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*

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[4] The facts in *Wright* included the recognition that relator had filed his complaint for writ of prohibition on February 23, 1999, 18 days after notice from the Registrar, and past the ten days allowed by the law for requesting a hearing, but prior to the actual license suspension to be accomplished by the Registrar:

> "On or about February 5, 1999, appellee, Registrar of the Ohio Bureau of Motor Vehicles, notified appellant, Donald M. Wright, that his driving and vehicle registration privileges would be suspended beginning February 24. The Registrar informed Wright that his suspension resulted from Wright's failure to provide proof of automobile liability insurance or other financial responsibility coverage for December 21, 1998, as previously requested by the Registrar during a random sampling of motor vehicles registered in Ohio. The Registrar further notified Wright that he could avoid the suspension by sending proof of insurance or other financial responsibility coverage within fifteen days or request a hearing within ten days." *Wright,* supra , 87 Ohio St.3d 184.

(1995), 72 Ohio St.3d 69, 71, 647 N.E.2d 769, 771; *State ex rel. Hensley v. Nowak* (1990), 52 Ohio St.3d 98, 99, 556 N.E.2d 171, 173. The Registrar issued an administrative suspension, which did not require a hearing resembling a judicial trial unless Wright requested a hearing within ten days following the issuance of the suspension order. Ohio Adm.Code 4501:1-2-08. ***Wright did not allege in his complaint or otherwise claim that he had ever timely requested such hearing pursuant to Ohio Adm.Code 4501:1-2-08(F). Therefore, the Registrar is not exercising or about to exercise quasi-judicial authority in this matter.***

Id., 187 Ohio St.3d at 186 (emphasis added).

The Notice of Liability attached to Relator Christoff's Complaint informed him that the Hearing Request date was September 8, 2010, and that his failing to answer by that date would result in an admission of liability as to the ticket. As in *Wright*, there is nothing left to hear and Respondents are not exercising or about to exercise quasi-judicial authority. Relator Christoff does not meet the first of the three steps required for obtaining a writ of prohibition

3. THIS COURT HAS PREVIOUSLY DECIDED THAT JURISDICTION FOR ADMINISTERING CCO 413.031 IS NOT PATENTLY AND UNAMBIGUOUSLY LACKING.

The Court's "duty in prohibition cases is limited to determining whether jurisdiction is patently and unambiguously lacking." *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 881 N.E.2d 224, 2007 -Ohio- 6754, ¶ 12, citing *State ex rel. Florence v. Zitter,* 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003, ¶ 28; *Goldberg v. Maloney,* 111 Ohio St.3d 211, 2006-Ohio-5485, 855 N.E.2d 856, ¶ 45.

The Eighth District previously dismissed an original action seeking a writ of prohibition that made similar jurisdictional arguments concerning CCO 413.031 to those being advanced by Relator Christoff in the present original action. In that matter, *State ex rel. Scott v. Cleveland,* 166 Ohio App.3d 293, 850 N.E.2d 747, 2006 -Ohio- 2062, the Eighth District defined the relators' arguments in part as follows:

Relators argue that Codified Ordinances 413.031 violates a variety of provisions in the

> Ohio Constitution requiring equal protection, due process, and confrontation of witnesses, ***and also violates the separation-of-powers doctrine. They assert that only the Cleveland Municipal Court has jurisdiction over speeding infractions in Cleveland. They also contend that R.C. 4521.04 permits a municipal corporation or township to create a parking violations bureau "to handle all parking infractions," not moving violations such as speeding.*** *Id.* at ¶ 11 (emphasis added).

On appeal, this Court in *State ex rel. Scott v. Cleveland* 112 Ohio St.3d 324, 859 N.E.2d 923, 2006 -Ohio- 6573, at ¶ 2, recognized that the City's camera based civil enforcement system was authorized by Cleveland's City Council's enactment of CCO 413.031:

> In July 2005, the Cleveland City Council enacted Cleveland Codified Ordinances 413.031 ("Section 413.031"), which authorizes the use of automated-camera systems to impose civil penalties on the owners of cars that have been photographed by an automated-camera system. "This civil enforcement system imposes monetary liability on the owner of a vehicle for failure of an operator to stop at a traffic signal displaying a steady red light indication or for the failure of an operator to comply with a speed limitation." Section 413.031(a). The imposition of liability under Section 413.031 is not deemed a conviction and is not made a part of the car owner's driving record. Section 413.031(d). In addition, no points are assessed against the owner or driver. Section 413.031(i).

This Court affirmed the Eighth District's dismissal of the writ of prohibition in *Scott* recognizing that "***Because the city does not patently and unambiguously lack jurisdiction to impose these penalties, we affirm.***" *Id.* at ¶ 1 (emphasis added). Relators' arguments are contrary to this Court's affirmation in *Scott* and the second requirement for seeking a writ of prohibition is not met.

4. THIS COURT HAS PREVIOUSLY RECOGNIZED THAT CCO 413.031 PROVIDES RELATOR WITH ADEQUATE REMEDY IN THE ORDINARY COURSE OF THE LAW.

Not only must the relator establish that the exercise of quasi-judicial authority is unauthorized by law, but also that that "the denial of the writ will result in injury for which no other adequate remedy exists in the ordinary course of law." *State ex rel. Consumers' Counsel v. Pub. Util. Comm.,* 102 Ohio St.3d 301, 809 N.E.2d 1146, 2004 -Ohio- 2894, ¶ 17, citing *State ex*

rel. Hunter v. Summit Cty. Hum. Res. Comm. (1998), 81 Ohio St.3d 450, 451, 692 N.E.2d 185.

After previously concluding in *Scott* that Respondent City did not patently and unambiguously lack jurisdiction to enforce CCO 413.031, this Court further recognized that the appellant-relators challenging the ordinance had "an adequate remedy in the ordinary course of law by way of the administrative proceedings set forth in Section 413.031 and by appeal of the city's decision to the common pleas court." *Scott, supra,* 2006 -Ohio- 6573, at ¶ 24. citing See, e.g., *State ex rel. Chagrin Falls v. Geauga Cty. Bd. of Commrs.,* 96 Ohio St.3d 400, 2002-Ohio-4906, 775 N.E.2d 512, ¶ 14. See also *M. J. Kelley Co. v. City of Cleveland* (1972), 32 Ohio St.2d 150, 153, 290 N.E.2d 562 (This Court recognized "quasi-judicial proceedings of administrative officers and agencies are now appealable pursuant to Section 4(B), Article IV, [and] it follows that in order for an administrative act to be appealable under R.C. 2506.01 such act must be the product of quasi-judicial proceedings.")[5] A common pleas court "determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. *Henley v. Youngstown* (2000), 90 Ohio St.3d 142, 147.

Relator Christoff fails to meet the third requirement, and his attempt to avoid this Court's earlier *Scott* holdings (See e.g. Complaint at ¶ 3) does not alter the recognized reality that the administrative proceedings established by CCO 413.031 provided him with an adequate remedy in the ordinary course of law. "The proposition that where a right of appeal exists there is an adequate remedy at law is too well established to require citation of authorities." *State ex rel.*

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[5] The Court in *M.J. Kelly* recognized "Section 4(B), Article IV of the Ohio Constitution, states in part:

'* * * courts of common pleas shall have * * * such powers of review of proceedings of administrative officers and agencies as may be provided by law.'" *Id.*

Kendrick v. Masheter (1964), 176 Ohio St. 232, 233, 199 N.E.2d 13.[6]

5. RESPONDENTS EXERCISE OF QUASI JUDICIAL POWER UNDER CCO 413.031 IS AUTHORIZED.

In concluding that the City did not patently and unambiguously lack jurisdiction to impose penalties under CCO 413.031, this Court in *Scott* reviewed the elements necessary for entry of a writ of prohibition. As noted above the first element involves whether Respondents are about to exercise judicial or quasi-judicial power. This Court understood and recognized in considering *Scott* that "Section 413.031(k) provides an administrative appeal process." *Scott, supra,* 2006 -Ohio- 6573, at ¶4. Given the administrative process involved it was without question understood by this Court that the City's enforcement of CCO 413.031 involved the exercise of "quasi-judicial" authority:

> As the court of appeals recognized, the city concedes that the first requirement for the writ has been satisfied because the civil hearing process provided by Section 413.031(k) involves the exercise of quasi-judicial authority. See *State ex rel. Wright v. Ohio Bur. of Motor Vehicles* (1999), 87 Ohio St.3d 184, 186, 718 N.E.2d 908 ("Quasi-judicial authority is the power to hear and determine controversies between the public and individuals that require a hearing ***resembling*** a judicial trial").

Scott, supra, 2006 -Ohio- 6573, at ¶ 15 (emphasis added).

The exercise of quasi-judicial authority by administrators is distinguished from the exercise of court-based judicial authority. "Judicial power consists in interpreting and applying the law by a duly authorized court to the facts involved in a contention between parties respecting their rights." *State v. Guckenberger* (1937) 57 Ohio App. 13, 16, 11 N.E.2d 277; affirmed (1937), 133 Ohio St. 27, 10 N.E.2d 1001. Quasi-judicial authority is exercised by administrative officers:

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[6] Relators' argument at ¶¶ 36-41 concerning appeals from municipal courts has no application to quasi-judicial hearings and appeals authorized by Section 4(B), Article IV of the Ohio Constitution.

> So it is only when there is conferred upon administrative officers the power to hear and determine controversies between the public and individuals which require a hearing resembling a judicial trial that it can be said that quasi judicial power has been conferred. And it is only when that sort of power has been usurped by an administrative officer that he is amenable to the writ of prohibition.

Id. at 16-17. Relator Christoff's conclusory allegations that the administration of CCO 413.031 involves the unlawful "exercise [of] judicial power" (See e.g. Complaint at ¶¶14, 48, and 53) is not a fact to be accepted by the Court but constitutes an incorrect conclusion of law and should be disregarded.

Relators mistakenly argue that that the present case does not implicate "home rule, traffic regulations, nor this Court's decisions in *State ex rel Scott* v. city of Cleveland, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 n.E.2d 923, and *Mendenhall v. City of Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255." See Complaint at ¶3. In this vein, Relators posit that R.C. 1901.20(A)(1) provides municipal courts with mandatory jurisdiction over all ordinances – to include 413.031. Relators rely (see Complaint at ¶¶ 3-4) on the following language from R.C. 1901.20(A)(1) in this regard:

> "(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,..."

Contrary to Relators conclusion that "the term 'any' ordinance means 'every' and 'all' ordinances" (See Complaint at ¶ 4), it is well understood that R.C. 1901.20 establishes the ***criminal*** jurisdiction of municipal courts. Municipal courts are courts of limited jurisdiction and the separate criminal and civil jurisdiction of municipal courts are established by separate statutes as was recognized in *State v. Cowan* 101 Ohio St.3d 372, 805 N.E.2d 1085, 2004 -Ohio-1583 wherein this Court in reviewing the jurisdiction of municipal courts allowed that:

> "Municipal courts are creatures of statute and have limited jurisdiction. R.C. 1901.18 and 1901.20 provide for their creation, with the ***former statute relating to civil matters*** and the latter relating to criminal and traffic matters." Id. at ¶ 11 (emphasis added).

See also *State v. Human* (Crawford Co. Municipal Court 1978) 56 Ohio Misc. 5, 8, 381 N.E.2d 969 ("The extent of the criminal jurisdiction of a municipal court is specified in R.C. 1901.20 which provides, in part, '(t)he municipal court has jurisdiction of the violation of any ordinance of any municipal corporation within its territory and of any misdemeanor committed within the limits of its territory.'"); *State v. Wise,* unreported, 4th Dist. No. 89-CA-19 Dec. 13, 1990, 1990 WL 253037, at *3, (recognizing that R.C. 1901.20 sets forth criminal subject matter jurisdiction); *Falls v. Kuzman*, unreported, 8th Dist. No. 40527, February 22, 1980, 1980 WL 354584, at FN2 ("Revised Code 1901.20 vests jurisdiction over certain criminal matters in municipal courts."); *City of Cleveland Heights v. Midland Title Security, Inc.*, unreported, 8th Dist. No. 40500, February 14, 1980. (Revised Code 1901.20 defines the limits of jurisdiction of municipal courts in criminal actions); *City of Cleveland v. Cleveland Electric illuminating Co.*, 8th Dist Nos. 41808, 41809, 41810, 41811, December 22, 1981, 1981 WL 4710 at *19, reversed on other grounds, ("R.C. § 1901.20 provides that a municipal court has jurisdiction over the violation of any criminal ordinance of any municipal corporation within its territory.").[7]

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[7] That violations of local ordinances are handled by civil administrative procedures throughout the State is well known and firmly established. See e.g. *State v. Lyons,* Ohio App. 1st Dist. Case No. C-060448, 2007 -Ohio- 652, ¶ 7, (recognizing a hearing conducted on the violation of the city ordinances by an administrative hearing examiner who concluded that the city had presented sufficient evidence to establish that Lyons had violated CMC 759-4.); *Hogan v. City of Mansfield Planning Comm.* Slip Copy, 2009 WL 765193, 05th Dist. No. 2008CA0099, 2009 -Ohio- 1342, ¶¶ 2-3, (administrative appeal before Mansfield City Planning Commission was filed by salvage dealer eight days after he received notice of violations of codified ordinances involving appeal of Mansfield code violations); *1476 Davenport Limited Partnership v Cleveland*, 8th Dist. Case No. 85872, 2005 -Ohio- 3731 (appeal of administrative board's determination whether property owner violated various City ordinances); *Banks v. Upper Arlington*, 10th Dist. Case No. 03AP-656, 2004 -Ohio- 3307 (administrative board had jurisdiction to hear appeal of whether fence violated city ordinance); *Davis v. Village of Malvern,*

CCO 413.031 "authorizes the use of automated-camera systems to impose civil penalties on the owners of cars that have been photographed by an automated-camera system. 'This civil enforcement system...." *Scott, supra,* 2006 -Ohio- 6573, at ¶ 2. *Cowan* was decided in 2004, at a time when all traffic offenses were considered criminal, and the decision predated the City's enactment of CCO 413.031 in July, 2005.

Subsequent to *Scott*, this Court recognized with its syllabus holding in the 2008 *Mendenhall* decision 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 regulations." In deciding *Mendenhall* this Court well understood that the Akron Municipal Court was not exercising judicial authority over Akron's civil camera enforcement ordinances under the auspices of R.C. 1901.20(A) or any other statute:

> The criminal justice system is not involved in penalizing violations of the speed limit captured by an automated camera. Unlike those who receive speeding citations from a police officer who has observed the infraction, speeders caught by the automated enforcement system do not receive criminal citations, are not required to appear in traffic court, and do not have points assessed against their driving records.

7th Dist. No. 03 CA 791, 2004 -Ohio- 6796 (recognizing administrative appeal process involving violation of local safety ordinance); *Prairie Tp. Bd. of Trustees v. Hay*, 10th Dist. No. 01AP-1198, 2002 -Ohio- 4765 (addressing affirmative defense of failure to exhaust administrative remedies in civil action filed to stop asserted violations); *Ksiezyk v. City of Cleveland*, 8th Dist. No. 80895, 2002 -Ohio- 4439 (appellant's acquittal of criminal charges does not bar the appellee from pursuing an administrative remedy to enforce its zoning ordinances); *Carver v. Deerfield Tp. Bd. of Zoning Appeals*, Aug. 27, 1999, unreported, 11 Dist. No. 98-P-0062 (violation of zoning ordinance heard by BZA, RC 2506 Appeal filed in Common Pleas). See also, *Toledo Division of Inspection v. Szutienko*, unreported, 6th Dist. Case No. L-90-136, 1991 WL 49989 (affirming municipal court's dismissal for lack of jurisdiction over challenge to administrative board's determination that property violated nuisance ordinance.).

Mendenhall, supra, 2008 -Ohio- 270, ¶ 6. This Court further understood that the administrative hearings established by ordinance in Akron were overseen by a third party hearing officer appointed by the Mayor:

> Administrative appeals of notices of liability are overseen by a hearing officer, who is an independent third party appointed by the mayor of Akron. After administering the oath to any witnesses and reviewing all the evidence, the hearing officer determines whether a violation of Section 79.01 of the Codified Ordinances of the city of Akron is established by a preponderance of the evidence and whether the owner of the vehicle is liable for that violation. The images of the vehicles and their license plates, the ownership records of the vehicles, and the speed of the vehicles on the date in question are considered prima facie proof of a civil violation and are made available to the appealing party.

Id. at ¶ 8.

In upholding the right of municipalities to enact camera enforcement ordinances levying civil penalties for moving violations this Court allowed in *Mendenhall* that "although the General Assembly has enacted a detailed statute governing criminal enforcement of speeding regulations, it has not acted in the realm of civil enforcement. Indeed, R.C. Chapter 4511, which deals broadly with traffic laws, is silent on the matter." *Id.* at ¶ 32. Before *Mendenhall* this Court had earlier recognized in considering Cleveland's civil camera enforcement ordinance - "Section 413.031 authorizes an administrative proceeding that does not require compliance with statutes and rules that, by their own terms, are applicable only to courts." *Scott, supra,* 2006 -Ohio- 6573, at ¶ 21.

6. CCO 413.031 AUTHORIZES RESPONDENT CLERK OF COURT AND THE RESPONDENT HEARING EXAMINERS TO ADMINSITER THE CIVIL ENFORCEMENT OF THE MOVING VIOLATIONS DOCUMENTED BY THE CAMERA SYSTEM AND THERE IS NO CONFLICT WITH NON-MOVING PARKING VIOLATIONS ADDRESSED BY R.C. CHAPTER 4521.

Notwithstanding the recognition in *Scott* that the City does not patently and unambiguously lack jurisdiction to impose civil penalties under CCO 413.031, Relators argue

that involvement of the Respondent Clerk and Respondent Hearing Examiners in the civil enforcement of CCO 413.031 violates Ohio Const. Art IV, Sec 1, R.C. 1901.20(A)(1), R.C. 1901.31(E), and Chapter 4521. Relators argue that these Respondents "lack jurisdiction to adjudicate anything beyond 'parking infractions'." See e.g Complaint at ¶ 8. This is incorrect for the simple reason that the City Council with the legislative enactment of CCO 413.031 authorized Respondents involvement in the quasi-judicial hearings authorized by the ordinance.

As noted above, City Council's adoption of the "quasi-judicial" civil enforcement measures enacted with CCO 413.031 did not violate municipal court criminal authority as established by R.C. 1901.20(A)(1). Nor did the City's enactment of an administrative civil enforcement measure violate Ohio Const. Art IV, Sec 1, as the City was not attempting to establish a "court" that would be exercising judicial power with the ordinance. In considering *Scott*, this Court duly recognized at ¶ 6 of the decision that the operation of CCO 413.031 involved an administrative process established by the Clerk of Court involving hearing examiners:

> "Appeals shall be heard by the Parking Violations Bureau through an administrative process established by the Clerk of the Cleveland Municipal Court. At hearings, the strict rules of evidence applicable to courts of law shall not apply. The contents of the ticket shall constitute a prima facie evidence of the facts it contains. Liability may be found by the hearing examiner based upon a preponderance of the evidence. If a finding of liability is appealed, the record of the case shall include the order of the Parking Violations Bureau, the Ticket, other evidence submitted by the respondent or the City of Cleveland, and a transcript or record of the hearing, in a written or electronic form acceptable to the court to which the case is appealed."

The Eighth District recognized that relators in the *Scott* original action had also presented a R.C. Chapter 4521 jurisdictional argument: "[Relators] also contend that R.C. 4521.04 permits a municipal corporation or township to create a parking violations bureau "to handle all parking

infractions," not moving violations such as speeding." *Scott, supra*, 2006 -Ohio- 2062, ¶ 11.

R.C. 4521.04 (A)(1) provides:

> The legislative authority of a municipal corporation or township, by ordinance or resolution, may request the municipal court or county court having territorial jurisdiction over the municipal corporation or township to authorize the municipal corporation or township to establish a parking violations bureau to handle all parking infractions occurring within the territory of the municipal corporation or the unincorporated area of the township, including parking infractions that are violations of ordinances, resolutions, or regulations of other local authorities and that occur within the territory of the municipal corporation or the unincorporated area of the township.

The Eighth District with its dismissal of the prior request for prohibition recognized in *Scott* at ¶ 15 summarized the City's response to such argument:

> Respondents also assert that Codified Ordinances 413.031 is a proper exercise of local authority. "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Section 3, Article XVIII, Ohio Constitution (Home Rule Amendment). "Thus, a municipality may regulate in an area such as traffic whenever its regulation is not in conflict with the general laws of the state." *Linndale v. State* (1999), 85 Ohio St.3d 52, 54, 706 N.E.2d 1227. Respondents contend that there is no conflict between Codified Ordinances 413.031 and R.C. Chapter 4521 (which governs local, noncriminal parking violations and, in R.C. 4521.04, authorizes the creation of a parking violations bureau) because R.C. Chapter 4521 is not a general law. Also, respondents argue that Codified Ordinances 413.031 does not permit what R.C. Chapter 4521 prohibits or vice versa.

It remains true today that "[a] municipality may regulate in an area such as traffic whenever its regulation is not in conflict with the general laws of the state." *Linndale v. State* (1999), 85 Ohio St.3d 52, 54, 706 N.E.2d 1227, see also *Mendenhall*, supra 2008 -Ohio- 270, ¶¶ 33 -34. CCO 413.031 in regulating the civil enforcement of speeding and red light moving violations authorized with section (k) that appeals would be heard by the City's existing Parking Violations Bureau through an administrative process established by the Clerk of the Cleveland Municipal Court. A conflict would potentially arise only if CCO 413.031 permitted something that was forbidden by Chapter 4521 or if the City's ordinance forbids something that the statute

permitted. *Fondessy Enters., Inc. v. Oregon* (1986), 23 Ohio St. 3d 213 (syllabus ¶ 2); *Struthers v. Sokol* (1923), 108 Ohio St. 263 (syllabus ¶ 2).

CCO 413.031 establishes a civil enforcement system that imposes monetary liability on the owner of a vehicle for failure of an operator to stop at a traffic signal displaying a steady red light indication or for the failure of an operator to comply with a speed limitation." Section 413.031(a). Speeding and failing to stop at traffic signals do not involve parking laws regulated by R.C. Chapter 4521 and R.C. 4521.04. The separate and supplemental authorization contained in CCO 413.031 allowing for the participation of the Respondent Clerk and Respondent hearing officers in CCO 413.031 appeals process does not alter or even relate to their separate parking enforcement duties arising under CCO 459.03 (attached in Exhibit A to the Complaint) and Chapter 4521 of the Ohio Revised Code.

Relators argument (See Complaint at ¶¶ 46-49) that under the guise of CCO 413.031(k) the City may enforce "decisions in favor of the City" by the means of default judgments separately authorized for parking violations at R.C. 4521.08(C) is not well reasoned and the argument has no application to the enforcement of CCO 413.031. Review of R.C. 4521.08 makes clear that paragraph (C) of the statute facially relates only to parking violations. The provision is not independent but is defined within and must be read within the context of the totality of the language incorporated in R.C. 4521.08. R.C. 4521.08(B)(2) provides:

> If a person for whom a hearing is to be conducted under division (A) of this section fails to appear at the scheduled hearing and fails to submit evidence in accordance with that division, the hearing examiner or referee shall, if he determines from any evidence and testimony presented at the hearing, by a preponderance of the evidence, that the person committed the parking infraction, enter a default judgment against the person and require the person to pay the appropriate fine and any additional penalties. A default judgment entered under this division shall be entered in the records of the parking violations bureau, joint parking violations bureau, or traffic violations bureau, or the juvenile court, whichever is applicable.

Division (A) of R.C. 4521.08 refers to hearings arising where a person has been served "with a parking ticket charging the commission of a parking infraction." The General Assembly's authorization for handling default judgments for parking violations has no relation to CCO 413.031, as the City's ordinance regulates moving violations and does not regulate parking infractions. Relators' citation to *Hocking V.R. Co. v. Cluster Coal & Feed Co.* (1918), 97 Ohio St. 140, 119 N.E. 207 for the apparent premise that a statute or ordinance cannot authorize a clerk to exercise judicial power has no application to this case.

As noted above, the enforcement of CCO 413.031 involves the recognized exercise of "quasi-judicial" authority, and does not authorize the exercise of judicial powers which would be reserved to courts. It is evident from the allegations in Relator Christoff's Complaint that he can prove no set of facts entitling him to the requested extraordinary writ of prohibition and Respondents request that the Complaint be dismissed.

B. DIMSISSAL OF WRIT OF MANDAMUS

1. RELATOR HAS THE HEAVY BURDEN OF DEMONSTRATING HIS ENTITLEMENT TO THE REQUESTED WRIT OF MANDAMUS THROUGH PLAIN, CLEAR, AND CONVINCING EVIDENCE.

In Count II of the Complaint, Relator Goldstein seeks a writ of mandamus compelling the Respondents to "refund" money that Relator alleges were wrongfully collected through the automated traffic enforcement program established under CCO 413.031. See, Complaint at ¶¶ 66-68. Relator Goldstein's complaint makes clear that the requested writ of mandamus is contingent upon this Court first granting a writ of prohibition to Relator Christoff. ¶ 67.Because Relator Christoff's request for a writ of prohibition is unsupportable as a matter of law and because Relator Goldstein fails to satisfy the heavy burden placed on him the Court should

dismiss Relator Goldstein's writ of mandamus concurrently with its dismissal of the compliant for writ of prohibition.

Dismissing a writ of mandamus "is required if it appears beyond all doubt, after presuming the truth of all material factual allegations of [the relator's] complaint and making all reasonable inferences in his favor, that he is not entitled to the requested extraordinary relief in mandamus." *State ex rel. Husted v. Brunner* (2009) 123 Ohio St.3d 119, 914 N.E.2d 397 at ¶ 8, citing, *State ex rel. Finkbeiner v. Lucas Cty. Bd. of Elections,* 122 Ohio St.3d 462, 2009-Ohio-3657, 912 N.E.2d 573, ¶ 10. Relator Goldstein bears the burden of proving that he is entitled to the extraordinary relief of mandamus. *State ex rel. Sekermestrovich v. Akron* (2001) 90 Ohio St.3d 536, 740 N.E.2d 252, citing, *State ex rel. Dehler v. Sutula* (1995), 74 Ohio St.3d 33, 34, 656 N.E.2d 332, 333; *State ex rel. BSW Dev. Group v. Dayton* (1998), 83 Ohio St.3d 338, 344, 699 N.E.2d 1271, 1276.

To show that he is entitled to a writ of mandamus, "[t]he burden is on the [relator] to 'demonstrate that there is plain, clear, and convincing evidence which would require the granting of the writ.' " *State ex rel. Henslee v. Newman* (1972) 30 Ohio St.2d 324 at 325, 285 N.E.2d 54 at 55. For a writ of mandamus to lie, Relator Goldstein must show (1) that there is a clear legal right to the relief, (2) a clear legal duty on the Respondents to provide the relief, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Fain v. Summit Cty. Adult Probation Dept.* (1995), 71 Ohio St.3d 658, 646 N.E.2d 1113, 1114. Even after presuming the truth of the few actual material factual allegations in the Complaint and making all reasonable inferences in his favor, not only does Relator Goldstein fail to show through plain, clear, and convincing evidence that there is a legal right to the relief he seeks, but he fails to make allegations demonstrating in clear and convincing fashion that Respondents have a clear legal

duty to refund to him his payment of four hundred dollars ($400.00) for the Notices of Liability he received, and he fails to demonstrate the a lack of an adequate remedy through the ordinary course of the law.

2. RELATOR'S ALLEGATIONS FAIL TO SHOW A CLEAR LEGAL RIGHT MANDATING A REFUND.

Relator Goldstein received four Notices of Liability for speeding infractions ranging from 15 to 11 miles-an-hour over the speed limit. (Complaint at ¶ 15 and Exhibit C attached thereto.) Relator Goldstein also paid the corresponding $100 penalty associated with each Notice of Liability. *Id.* Relator Goldstein seeks to represent a class of all individuals that have ever paid a civil penalty assessed under CCO 413.031, the automated traffic camera ordinance.

Relator Goldstein clearly bootstraps his mandamus claim, that he, and the purported class he wishes to represent, are entitled to a writ ordering the refund of all money ever paid to the City for civil CCO 413.031 violations, on a mistaken legal conclusion that Relator Christoff is entitled to the writ of prohibition he requested. That Relator Goldstein attempts to establish his mandamus claim by wholly relying on the unsupportable writ of prohibition requested by Relator Christoff is sufficient to disprove the existence of any "clear" legal right to mandamus and the refund he seeks.

Relator Christoff is clearly attempting to collaterally attack the civil liability he conceded by paying the penalties assessed against him for violating CCO 413.031. On four occasions, Relator Christoff acknowledged liability and paid the penalty for each photographed speeding infraction. If Relator Christoff's mandamus claim is supported by plain, clear, and convincing evidence, it is "unclear" why he voluntarily paid the penalties and now attempts to rely upon a writ of prohibition that, as addressed above, has no legal support.

3. RELATOR'S ALLEGATIONS FAIL TO SHOW A CLEAR LEGAL DUTY ON RESPONDENTS TO MAKE THE REQUESTED REFUND.

Similar to Relator Goldstein's failure to meet his evidentiary burden showing that he has a clear legal right to a refund, he further fails to demonstrate that Respondents have a clear legal duty to provide him with a refund of the money he voluntarily paid for admitted speeding infractions. Respondent merely assumes CCO 413.031 is unconstitutional and claims that the Respondents are subject to a clear legal duty to refund any money received under the ordinance. (See, Complaint at ¶¶ 73-74).

Even considering, arguendo, Respondent's erroneous legal conclusion that CCO 413.031 is unconstitutional, it simply does not follow Respondents would be required to refund Relator Christoff's payments as a mandated constitutional course of action. The Courts' decision in *State ex rel. Zone Cab Corp. v. Industrial Commission* (1937), 132 Ohio St. 437, as relied upon by Relator Goldstein, is clearly distinguishable from the allegations presented herein. In *Zone Cab*, the Court determined that employers were entitled to a refund of workers compensation premiums paid on the behalf of individual workers that were later determined to be independent contractors and not employees. *Zone Cab Corp, supra* at 444. The Court granted a writ of mandamus for the refund of those premiums that had been paid and set aside to provide for potential employee liability compensation after recognizing "that there is not and never could have been any liability because the claims grew out of an independent contractual relation, the overpayment should be refunded." *Id.* The facts alleged in Relators' Complaint establish no such obvious "mistake" with regard to payments voluntarily made for uncontested speeding infractions identified on the Notices of Liability issued to Relator under CCO 413.031. The argument at ¶ 78 of the Complaint equating such payment with the workers compensation risk-sharing benefit issues presented in *Zone Cab* is incongruous. Relator does not allege any facts

establishing that Respondents Dumas and Hartley in their financial administrative capacities are under a duty to refund his or anyone else's payments for violations of CCO 413.031, much less allegations that meet the clear and convincing burden he assumed in filing his complaint.

4. RELATOR'S ALLEGATIONS FAIL TO SHOW A LACK OF A REMEDY THROUGH THE ORDINARY COURSE OF LAW.

Relator Goldstein's Complaint does not even allege that he lacks a remedy through the ordinance course of the law to grant him the relief he seeks, let alone demonstrate by clear and convincing means that such remedy is non-existent. Relator clearly had an available remedy, as did Relator Christoff, that both chose to disregard. In the aforementioned *Scott* decision this Court recognized that one wishing to challenge the City's ordinance had "an adequate remedy in the ordinary course of law by way of the administrative proceedings set forth in Section 413.031 and by appeal of the city's decision to the common pleas court." *Scott, supra,* 2006 -Ohio- 6573, at ¶ 24. Relator Goldstein alleges nothing more than he paid the violations. There are no allegations claiming that CCO 413.031's administrative process and hearings were not offered or available to him and the other members of his purported class.

This Court has characterized an administrative appeal to a common pleas court under R.C. Chapter 2506, as a "remedy [that] is complete, beneficial, and speedy. Any claims of delay or inconvenience from pursuing its administrative appeal do not prevent the [relator]'s appeal from constituting a plain and adequate remedy in the ordinary course of the law." *State ex rel. Chagrin Falls v. Geauga Cty. Bd. of Commrs.* (2002) 96 Ohio St.3d 400 at ¶ 14, citing *State ex rel. Natl. Elec. Contrs. Assn.,* 83 Ohio St.3d at 183, 699 N.E.2d 64; *State ex rel. Willis v. Sheboy* (1983), 6 Ohio St.3d 167, 6 OBR 225, 451 N.E.2d 1200, paragraph one of the syllabus.

Decisions received from the Eighth District Court of Appeals[8] involving administrative appeals brought subsequent to administrative hearings under CCO 413.031 include: *Cleveland Parking Violations Bur. v. Barnes*, 8th Dist. Case No. 94502, 2010 -Ohio- 6164; *City of Cleveland v. Posner*, 8th Dist. Case No. 94689, 2010 -Ohio- 5368; *Davis v. Cleveland*, 8th Dist. Case No. 92336, 2009 -Ohio- 4717; *Wilt v. Turner*, 8th Dist. Case No. 92707, 2009 -Ohio- 3904; *Rapacz v. Cleveland*, 8th Dist. Case No. 91820, 2009 -Ohio- 2038; *Dickson & Campbell*, L.L.C. v. Cleveland, 181 Ohio App.3d 238, 908 N.E.2d 964, 2009 -Ohio- 738; *Golden v. Cleveland*, 8th Dist. Case No. 91169, 2008 -Ohio- 5999; *Stalter v. Cleveland*, 8th Dist. Case No. 89323, 2008 -Ohio- 134; *Wilt v. Turner*, 8th Dist. Case No. 89320, 2008 -Ohio- 141.[9] As recognized in *Scott,* and as demonstrated by the Eighth District's decisions addressing administrative appeals, Relator Goldstein clearly had an available remedy through the ordinary course of the law he failed to exercise before paying money he now seeks to have refunded through mandamus.

Having failed to clearly, plainly, or convincingly establish any of the requirements

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[8] Separately, *Lycan v. Cleveland*, 8th Dist. Case No. 94353, 2010 -Ohio- 6021, pending notice of appeal filed by the City, Sup Ct. Case No. 2011-0358, matter arises from enforcement of CCO 413.031 and involves an attempted class action lawsuit asserting unjust enrichment claims against the City on behalf of certain lessees who had received notices of liability under the ordinance.

[9] See also *Balaban v. City of Cleveland*, unreported, Feb. 5, 2010, USDC Case No. 1:07-cv-1366, 2010 WL 481283 (declaratory judgment action removed to federal court); *Riley v. City of Cleveland*, unreported, June 2, 2006, USDC Case No. 1:06-cv-619, 2006 WL 1561446 (administrative appeal removed to federal court); *Gardner v. City of Cleveland* (N.D. Ohio 2009), 656 F.Supp.2d 751 (Plaintiff did not file an administrative appeal subsequent to Hearing Examiners' findings of liability under R.C. Chapter 2506, but instead filed an action seeking declaratory judgment, a permanent injunction and relief under 42 U.S.C. § 1983.) The *Gardner* Court in granting summary judgment on behalf of the City held in part: "As noted above, the criminal penalties for a speeding or red light violation exceed those that are imposed by C.O. § 413.031. The imposition of a civil fine does not turn a civil action into a criminal action." *Id.* at 763.

entitling him to the a writ of mandamus, the Court should dismiss Relator Goldstein's complaint for the extraordinary writ.

IV. CONCLUSION

The City has authority under the Ohio Constitution to enact laws regulating traffic as long as those laws do not conflict with the general laws of the state. Relators Christoff and Goldstein have filed a dual complaint that should be dismissed for their failure to state a cognizable claim for the writ of prohibition or a writ of mandamus being requested in this original action. The administrative procedures adopted with CCO 413.031 do not violate the criminal jurisdiction of the municipal court and there is no conflict with R.C. Chapter 4521-Ohio's parking enforcement statutes.

For the reasons addressed in their motion, Respondents respectfully request that this Court dismiss Relators' Complaint for Writ of Peremptory and Alternative Writs of Prohibition and the Class Action Complaint for Peremptory and Alternative Writs of Mandamus.

Respectfully Submitted,

ROBERT TRIOZZI (0016532)
DIRECTOR OF LAW

Gary S. Singletary (0037329)
Counsel of Record
Assistant Director of Law
Mark Musson (0081110)
Assistant Director of Law
City of Cleveland
601 Lakeside Avenue- Room 106
Cleveland, Ohio 44114-1077
(216) 664-2737; (216) 664-2663 (Fax)
gsingletary@city.cleveland.oh.us
mmusson@city.cleveland.oh.us

Attorneys for Respondents

CERTIFICATE OF SERVICE

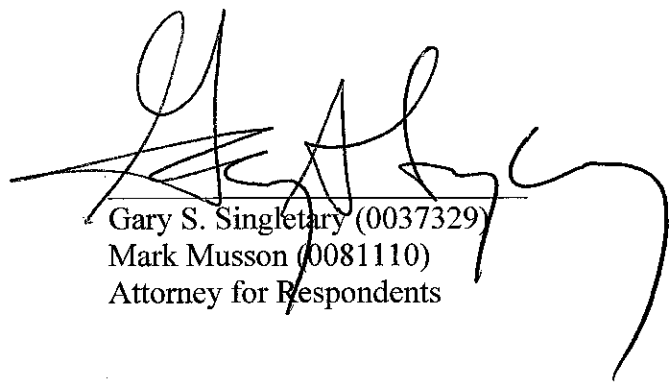
I hereby certify that a true and accurate copy of Respondents Revised Motion to Dismiss was served by regular U.S. Mail this 14th day of March 2011 to:

Paul M. Greenberger, Esq.
Timothy J. Duff, Esq.
Jordan Berns, Esq.
Berns, Ockner & Greenberger, LLC
3733 Park East Drive - Suite 200
Beachwood, Ohio 44122-4334

and by email to:

pgreenberger@bernsockner.com

Attorneys for Relators



Gary S. Singletary (0037329)
Mark Musson (0081110)
Attorney for Respondents