Garfield Heights Municipal Court
Cuyahoga County, Ohio

STATE OF OHIO CITY OF MAPLE HEIGHTS	)	CASE NO. CRB 0700016
-vs-	)	**JUDGMENT ENTRY**
THELMA EPHRAIM	)	

This cause came on for oral hearing on April 16, 2007, upon the defendant's motion to dismiss.

The facts of this case are straightforward. On November 15, 2006, the defendant, Thelma Ephraim, was cited for failure to supervise a minor under Maple Heights Codified Ordinance Section 648.20. The City alleges that on September 22, 2006, the defendant's son, Melvin, led Maple Heights police officers on a high-speed chase. The incident ended with the minor's vehicle crashing into a tree, with its five occupants attempting to flee on foot. In the scuffle to place Melvin under arrest, a police officer was injured.

Maple Heights Codified Ordinance Section 648.20 is entitled "Parental Responsibility to Supervise a Minor". It reads:

> (a) A person commits the offense of failing to supervise a minor if: the person is the parent, legal guardian, or person with legal responsibility for the safety and welfare of a child under 18 years of age, and the child has committed a status offense, unruly act or a delinquent act that would be a misdemeanor or felony of any degree if committed by an adult.
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> (b) It shall be a defense to the offense of failure to supervise a minor if the person took reasonable steps to control the conduct of the child at the time

the person is alleged to have failed to supervise.

(c) In addition to any fine or penalty imposed pursuant to this section, the court may order the person to pay restitution to a victim of the minor's conduct. The amount of restitution ordered pursuant to this section shall not exceed three thousand dollars ($3,000).

(d) Whoever violates division (a) of this section is guilty of failing to supervise a minor, a minor misdemeanor for a first offense. For a second offense, such person is guilty of a misdemeanor of the fourth degree. For a third and subsequent offense, such person is guilty of a misdemeanor of the first degree. The penalty shall be as provided in Section 698.02.

(e) The first time a person is convicted of an offense described in division (a). the person shall not be required to pay a fine (other than court costs) if the person successfully participates and completes a parent effectiveness program to the satisfaction of the court.

The defendant asserts three due process arguments in her motion. First, the ordinance affects a fundamental right to raise and rear children and cannot pass a strict scrutiny test. Second, it is vague and overbroad. Finally, its subject matter is preempted by existing Ohio law.

For the reasons stated below, the court finds that Maple Heights Codified Ordinance Section 648.20 is in conflict with state law and an identical local ordinance, and violates due process.

The ordinance is modeled after Section 9.24 of the Criminal Code of Silverton, Oregon, establishing the offense of failing to supervise for a parent who has a child under 18 years of age and the child is found on private property or premises open to the public in violation of the Silverton Code. There is a defense if the child's violation occurred in the person's presence or on the person's private property. Other affirmative defenses are that the person took reasonable steps to control the child's conduct at the time of the alleged failure to supervise, or reported the child's act to the authorities. The Silverton ordinance was the prototype for Oregon Revised

Statute 163.577.[1] As of the date of this writing, neither law has been successfully challenged or upheld in court. However, the Silverton ordinance and laws akin to it are discussed in various law review articles tending to be critical of their efficacy and legality.[2]

No Ohio case can be found to provide guidance on the specific issues presented in this matter. Although the idea of holding parents civilly or criminally responsible for the acts of their children is by no means novel, the manner in which the Maple Heights ordinance does so appears to be one of first impression in this State.

The ordinance has a strong presumption of constitutionality. State v. Collier (1991), 62 Ohio St.3d 267, 269, 581 N.E.2d 552, 553. In interpreting an ordinance, a court is to give it such construction as to permit it to operate in a lawful and constitutional manner. Hausman v. City of Dayton (1995), 73 Ohio St.3d 671, 678, 653 N.E.2d 1190, 1195, citing Schneider v. Laffoon (1965), 4 Ohio St.2d 89, 97, 212 N.E.2d 801, 806. The defendant bears the burden of demonstrating, beyond a reasonable doubt, that the ordinance is unconstitutional. State v. Anderson (1991), 57 Ohio St.3d 168, 171, 566 N.E.2d 1224, 1226.

Article XVIII, Section 3 of the Ohio Constitution sets forth municipal "home rule" powers subject to certain limitations:

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[1] Oregon Revised Statute 163.577 provides for the offense of failing to supervise a child for a parent of a child under 15 years of age who has committed an act bringing the child within the jurisdiction of juvenile court, or who violated a curfew or school attendance law. There is an affirmative defense if the person is the victim of the child's act or reported the act to the authorities.

[2] See Leslie Joan Harris, An Empirical Study of Parental Responsibility Laws: Sending Messages, But What Kind and to Whom? (2006), 2006 Utah L.Rev.5; James Herbie DiForizo, Parental Responsibility for Juvenile Crime (2000), 80 Or.L.Rev. 1; Pamela K. Graham, Parental Responsibility Laws: Let the Punishment Fit the Crime (2000), 33 Loy.L.A.L.Rev. 1719; Tami

> Municipalities shall have the 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.

A state law has precedence over a local enactment, "***when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law". City of Canton v. State (2001), 95 Ohio St.3d 149, 151, 766 N.E.2d 963, 966.

The Maple Heights ordinance is a criminal law enacted under the City's police power. Revised Code 2901.21 is a statute of general application that pertains to the requirements of criminal liability. See City of Canton, 95 Ohio St.3d 153, 766 N.E.2d 968. The issue presented is whether the local ordinance is in conflict with the statute.

The established test for determining whether a local exercise of police power conflicts with a state law is whether it "permits or licenses that which the statute forbids and prohibits, and vice versa." Village of Struthers v. Sokol (1923), 108 Ohio St. 263, 140 N.E. 519, paragraph two of the syllabus. That case notes the definition of "conflict" as, " '[d]iscord of action, feeling or effect; antagonism, as of interests or principles; counteraction, as of causes, laws, or agencies of any kind; opposing action or tendency; opposition; collision.' " Sokol, 108 Ohio St. at 268, 140 N.E. at 521, citing The Century Dictionary.

Revised Code 2901.21 provides, in part:

> (A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

Scarola, Creating Problems Rather Than Solving Them: Why Criminal Parental Responsibility Laws Do Not Fit Within Our Understanding of Justice (1997), 66 Fordham L. Rev. 1029.

(1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing.

(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

(B) When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense.* * * (Emphasis added.)

Maple Heights Codified Ordinances Section 606.07 mirrors this language.

According to the 1974 Committee Comments to its original H.B. 511 version, R.C. 2901.21 codifies "the fundamental distinction between criminal conduct on one hand and innocent conduct or accident on the other." Generally, there is no offense unless a person "does a forbidden act or fails to meet a prescribed duty" and possesses a certain guilty state of mind. Id. This squares with the elements of criminal liability set forth in Pamela K. Graham, Parental Responsibility Laws: Let the Punishment Fit the Crime (2000), 33 Loy.L.A.L.Rev. 1719, 1731:

> * * * criminal liability is not invoked based solely upon the parent-child status. In order to be categorized as criminal conduct, the following generally must be implicated: (1) actus reus, an act or omission: (2) mens rea: (3) causation: and (4) harm.

Maple Heights Codified Ordinance Section 648.02 is entitled "Parental Responsibility to Supervise a Minor". There are two elements of the offense, both contained in division (a). They are that the person be the parent, legal guardian, or person with legal responsibility for the safety and welfare of a child under 18 years of age, and that the child has committed an enumerated violation.

The City argues that the ordinance is intended to impose strict liability and, as such, a guilty mental state is not required. Even if that is so, the threshold problem is that the ordinance

fails to specify any voluntary act or omission to act on the part of the person charged. While an omission to act is suggested by the title of the ordinance, to infer an actus reus in the body of the ordinance would offend due process. A law that does not afford fair notice to a person of ordinary intelligence that his contemplated conduct is forbidden is void for vagueness under the due process clauses of the Fourteenth and Fifth Amendments to the United States Constitution and Article 1, Section 16 of the Ohio Constitution. State v. Tanner (1984), 15 Ohio St. 3d 1, 3. 472 N.E.2d 689, 691.

Noting that R.C. 2919.24[3] has been found to be constitutional[4], the City asserts that the ordinance is analogous to that statute which prohibits contributing to unruliness or delinquency of a child. That argument is dispelled by a review of R.C. 2919.24 which lists prohibited acts such as "aid", "abet", "induce", "cause", "encourage", "contribute" or "act in any way tending to cause". In contrast, the Maple Heights ordinance cites no action or failure to act. While the two laws may have a similar objective, the means to accomplish the same differs markedly.

The City cites a number of cases throughout the country that have upheld laws intended to impose some form of responsibility upon parents for the acts of their children. However, the criminal cases cited deal with laws more similar to R.C. 2919.24 than to the ordinance at hand. The others review laws imposing civil liability upon parents, a subject area that poses different considerations than those involved here.

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[3] Revised Code 2919.24 states, in part: (A) No person, including a parent, guardian, or other custodian of a child, shall do any of the following: (1) Aid, abet, induce, cause, encourage, or contribute to a child ***becoming an unruly child *** or a delinquent child***. (2) Act in a way tending to cause a child *** to become an unruly child***or a delinquent child***. (B) Whoever violates this section is guilty of contributing to the unruliness or delinquency of a child***."

[4] See In Re Popovich (7th Dist. 1993), 1993 Ohio App. LEXIS 498. See, also, State v. Garfield (1986), 34 Ohio App.3d 300, 518 N.E.2d 568, upholding former R.C. 2151.41 and R.C. 2151.022(C).

The court must conclude that there is discord between the Maple Heights ordinance and R.C. 2901.21. As such, the ordinance contravenes state law, and in so doing, violates Article XVIII, Section 3 of the Ohio Constitution and due process. Moreover, it violates Section 606.07 of the same codified ordinances.

In State v. Akers (1979), 119 N.H. 161, 400 A.2d 38, the New Hampshire Supreme Court struck down a parental responsibility statute which had similar infirmity. The defendants were fathers whose sons were found guilty of operating snowmobiles in violation of provisions relating to off-highway recreational vehicles (OHRV). The statute provided that parents would be responsible "for any damages incurred or for any violations of the law" committed by a minor. The majority opinion concluded that this language evinced the legislature's intention to hold parents criminally responsible for the OHRV violations of their children. Citing a New Hampshire statute which provides that a person is not guilty of a crime unless his liability is based upon conduct that involves a voluntary act or voluntary omission to perform an act he is physically capable of performing, the court held that any attempt to impose criminal liability on parents simply due to their status as parents offends the due process provisions of the New Hampshire Constitution. State v. Akers, 119 N.H. at 162, 400 A.2d at 39. The court noted:

> * * * Even if the parent has been as careful as anyone could be, even if the parent has forbidden the conduct, and even if the parent is justifiably unaware of the activities of the child, criminal liability is still imposed under the wording of the present statute. There is no other basis for criminal responsibility other than the fact that a person is the parent of one who violates the law. Id. 119 N.H. 164, 400 A.2d 40.

A law is also void for vagueness if it encourages arbitrary and erratic arrests and convictions. Papachristou v. Jacksonville (1972), 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110. As between the requirements of actual notice to citizens and arbitrary

enforcement. the more important is the second. that the lawmaker establish minimal guidelines to govern law enforcement. Kolender v. Lawson (1983), 461 U.S. 352, 358, 103 S.Ct. 1855, 1858. 75 L.Ed.2d 903, citing Smith v. Goguen (1974) , 415 U.S. 566, 575, 4 S.Ct. 1242, 1242, 39 L.Ed.2d 605. " ' It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.' " Kolendar, supra at footnote 7, citing United States v. Reese, (1875), 92 U.S. 214, 221, 23 L.Ed. 563.

Here, the defendant argues that the ordinance is not being evenly applied, as not every parent whose child is charged with a crime, including something as minor as jaywalking, is being cited. Moreover, the defendant cites several instances where it would be foolish to charge a parent such as when the child is in school and not under the parent's care, where the victim of the child's crime is the parent, or where the parent files unruly charges against the child.

In light of the authorities cited above, the court finds this argument to be compelling. During oral remarks on the motion to dismiss, the state in essence conceded that the ordinance is being sparingly applied. It was noted that the prosecutor has reviewed pending cases, resulting in the dismissal of seventeen citations. It was noted that trials are designed to weed out ridiculous hypotheticals.

This type of discretion on the part of the police or prosecutor, and latitude on the part of a fact finder, seems to be precisely the evil that the void-for-vagueness doctrine is designed to prevent.

It is also troubling that nothing in Codified Ordinance 648.02 requires that the accused be a person with capacity to supervise a child. The terms "parent", "legal guardian", and "person

with legal responsibility for the safety and welfare of a child" are used disjunctively.[5] The accused's status as a parent satisfies the first element, whether or not the accused has actual oversight of the child. This too violates the requirements of a "voluntary act" or "omission" under R.C. 2901.21 and Maple Heights Codified Ordinances Section 606.07.

The City argues that the duty to supervise is addressed in division (b) of the ordinance, which provides an affirmative defense if the person took reasonable steps to control the conduct of the child at the time of the alleged offense. Not only does that provision fail to cure the essential conflict mentioned above, it creates an additional concern.

The due process clause of the United States Constitution requires proof beyond a reasonable doubt of every fact necessary to constitute the offense charged. In re Winship (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368. See, also, State v. Frost (1979), 57 Ohio St. 2d 121, 125, 387 N.E.2d 235, 238. This is consistent with R.C. 2901.05(A) which states:

> Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

The substance of the Maple Heights offense is the failure to supervise a minor. However, the ordinance presumes a violation where a parent has a child who has committed an offense. It is up to the parent to demonstrate that reasonable steps were taken to control the child's conduct. As such, it is the accused's burden to demonstrate there was no failure to supervise. This contravenes R.C. 2901.05(A) and the due process requirements that underpin it.

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[5] Ordinarily, rules of construction provide that terms connected by a disjunctive be given separate meanings, unless the context would dictate otherwise. Reiter v. Sonotone Corporation (1979),

There is no doubt that the City of Maple Heights, as well as communities throughout the State, have a real and valid interest in curbing juvenile crime and in holding parents and guardians responsible for supervising and controlling their children. It would be untenable to suggest that those who have undertaken the serious responsibility of parenting a child can simply turn a blind eye to the criminal actions of the child. Communities ought to have some means of holding parents accountable for their acts and failure to act in controlling their children. Drafted properly, this could include the imposition of criminal sanctions. However, such ordinance must comport with statutory and due process requirements which the current ordinance fails to do.

Based upon the foregoing, the within matter is dismissed. There is no just reason for delay.

IT IS SO ORDERED.

June 29, 2007

Judge Jennifer P. Weiler

442 U.S. 330, 339. 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931.