IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
TAX AND MISCELLANEOUS REMEDIES SECTION

ILLINOIS RETAIL MERCHANTS ASSOCIATION; BERKOT, LTD. D/B/A BERKOT SUPER FOODS; FAIRPLAY, INC. D/B/A FAIRPLAY FOODS; CHIQUITA FOOD MARKET, INC. D/B/A FOOD MARKET LA CHIQUITA & TAQUERIA; LEAMINGTON FOODS, INC.; TONY'S FINER FOODS ENTERPRISES, INC. D/B/A TONY'S FRESH MARKET; VALLI PRODUCE, INC.; and WALT'S LAGESTEE, INC. D/B/A WALT'S FOOD CENTERS,	)	
Plaintiffs,	)	
v.	)	**No. 17 L 50596**
THE COOK COUNTY DEPARTMENT OF REVENUE; ZAHRA ALI, as Director of the Cook County Department of Revenue; and the COUNTY OF COOK,	)	
Defendants.	)	

OPINION and ORDER

I. OPINION

This matter is before the Court on Defendants the Cook County Department of Revenue; Zahra Ali, as Director of the Cook County Department of Revenue; and the County of Cook's (collectively, the "County") 2-615 Motion to Dismiss Plaintiffs' Verified Complaint for Injunctive Relief and for Declaratory Judgment. In their Verified Complaint, Plaintiffs the Illinois Retail Merchants Association; Berkot, Ltd. d/b/a Berkot Super Foods; Fairplay, Inc. d/b/a Fairplay Foods; Chiquita Food Market, Inc. d/b/a Food Market La Chiquita & Taqueria; Leamington Foods, Inc.; Tony's Finer Foods Enterprises, Inc. d/b/a Tony's Fresh Market; Valli Produce, Inc.; and Walt's Lagestee, Inc. d/b/a Walt's Food Centers (collectively, the "Merchants") argue that the Cook County Sweetened Beverage Tax Ordinance is unconstitutional because (1) it violates the uniformity clause of the Illinois Constitution and (2) it is unconstitutionally vague and impossible to implement and apply.

The Court begins its analysis of the Verified Complaint and Motion to Dismiss from the perspective that a potential violation of a constitutional right or protectable interest must be scrutinized "with a fine tooth comb" and that the reasoned action of the legislative body (in this

case the County Board and its executive, the County Board President) deserves to be initially viewed as the valid actions of democratically elected officials.

Under the Illinois Constitution, except as limited by article VII, section 6 of the constitution, a home rule unit such as Cook County "may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." Ill. Const. 1970, art. VII, § 6(a). However, the General Assembly "may...preempt the exercise of a municipality's home rule powers by expressly limiting that authority." *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 2013 IL 110505, ¶ 31 (citing *Schillerstrom Homes v. City of Naperville*, 198 Ill. 2d 281, 287 (2001); *Scadron v. City of Des Plaines*, 153 Ill. 2d 164, 185-86 (1996)). The Merchants have not challenged the County's taxing power and the Court is not aware of any statute that would preempt the County's home rule power to impose a tax on sweetened beverages. As such, the Court proceeds with the understanding that the Cook County Sweetened Beverage Tax Ordinance is a valid exercise of the County's home rule power.

Taxation and its incidence and implications were significant irritants that lead to the American Revolution and taxes have been the subject of discussion and debate in our country ever since. The Court is aware that taxes are levied for a purpose and are the principal means by which government, through the budgetary process, fulfills its duty to provide for the common good. This Court also understands that the "common good" is a moving target, determined by a duly elected government, that is seldom, if ever, embraced by all. The Court is also aware that those charged with implementing and collecting the tax for the County are well within their right to challenge this matter and are not responsible for the County's budgetary concerns. Home rule taxing power has been challenged many times, and a review of dozens of relevant cases can lead one to conclude that government's ability to tax is only limited by its creative reasonableness.

This Court is not charged with evaluating the progressive or regressive nature of this tax, or any tax. It is not charged with evaluating and weighing the political wisdom of this tax or any possible alternatives, and it must not speculate as to which consumable product may in fact be next in line to be taxed. Rather, those determinations rest with economists, the County's elected officials, and those who ultimately bear the effect of the tax.

Although this may be unusual, the Court must acknowledge that it is fully aware of the budgetary turmoil that has occurred as a result of this Court's proper and deliberate consideration of this matter. As a member of the judiciary, this Judge has received copies of correspondence regarding planned budget reductions in court personnel, services, and programs. As stated above, this Judge does understand, from personal experience, the budgetary issues that must be addressed. It is with that recognition that the Court set in place an expedited process to address the County's motion. The Court is not party to the County's budget matters and is not moved by its public airing of those matters.

The only question and duty before this Court is to determine if the Merchants have set forth sufficient substance in the Verified Complaint to withstand the County's Motion to Dismiss. For the reasons set forth in this opinion and order, the Court concludes that the Merchants have not and that the County's Motion to Dismiss must be granted.

BACKGROUND

On November 10, 2016, the Cook County Board of Commissioners enacted the Sweetened Beverage Tax Ordinance ("Ordinance"), sections 74-850 through 74-859 of the Cook County Code, through Ordinance Number 16-5931. It was approved "in an effort to promote public health, including lowered obesity rates." The Ordinance became effective on March 1, 2017. Thereafter, the County issued and revised Regulations 2017-1, -2, -3, and -4 throughout May and June of 2017 to further the purposes of the Ordinance, as the imposed tax was to be collected beginning July 1, 2017.

The Ordinance imposes a one (1) cent tax per ounce of sweetened beverage purchased in Cook County. Cook County Ordinances § 74-852(a). The Ordinance defines a "sweetened beverage" as "any non-alcoholic beverage, carbonated or non-carbonated, which is intended for human consumption and contains any caloric sweetener or non-caloric sweetener, and is available for sale in a bottle or produced for sale through the use of syrup and/or powder." § 74-851. However, sweetened beverages do not include (1) beverages consisting of 100% natural fruit or vegetable juice; (2) beverages in which milk, or soy, rice, or similar milk substitute, makes up more than 50% of the beverage or is the first listed ingredient on the label of the beverage; (3) beverages to which a purchaser can add, or can request that a retailer add, caloric sweetener or non-caloric sweetener; (4) infant formula; (5) beverages for medical use; (6) any liquid sold as a therapeutic nutritional meal replacement or for use for weight reduction as a meal replacement; or (7) any syrup or powder that the purchaser himself or herself combines with other ingredients to create a beverage. § 74-851. The ultimate incidence of and liability for payment of the tax is imposed upon the purchaser of the sweetened beverage, and not the distributors or retailers. § 74-852(b).

The tax must be included in the sale price of the sweetened beverage. § 74-852(c). The County issued Regulation 2017-2 to clarify how the tax can be displayed when included in the sale price. A retailer may, in its discretion, separately list the base price and the Cook County Sweetened Beverage Tax on its shelf, advertisement, and menu, provided that such a listing is preceded or followed by the total sale price for the sweetened beverage. Additionally, the tax may be separately stated on the invoice or receipt at the point of sale ("POS"). The retailer's POS system may record the base price and add in the tax at the end. Understanding that retailers may need additional time to program their POS systems, the Regulation allows an additional 6-month period, until January 1, 2018, to comply with the display requirements.

The County also issued Regulation 2017-3 to clarify how the tax applies to purchases made with Supplemental Nutrition Assistance Program (SNAP) benefits. The Regulation states that purchases made using SNAP benefits will be exempt from the tax. In such purchases where SNAP benefits are used, the retailer must do one of two things. First, if the tax is separately stated on a retailer's cash register receipts, the POS system should be programmed not to charge the tax. Second, if the tax is included in the selling price on a retailer's cash register receipt, the POS system should be programmed to reduce the price by the amount of tax. If this programming is not possible, the retailer must have a procedure whereby a purchaser who uses SNAP benefits can receive an immediate refund at the customer service desk or other location within the retailer's premises.

As stated in the Ordinance, a distributer of bottled sweetened beverages and syrup and/or powder used to produce a sweetened beverage is required to collect the tax from any retailer to whom the sale of bottled sweetened beverages or syrup and/or powder used to produce a sweetened beverage is made and shall remit the tax to the Department of Revenue. § 74-852(e). The tax on sweetened beverages in a sealed container is calculated based on the number of whole ounces stated on the sealed container. § 74-852(e)(1). The tax on sweetened beverages for purposes of a distributor's collection of the tax from a sale to a retailer of syrup and/or powder used to produce a sweetened beverage is calculated on the amount of sweetened beverage that can be produced from the syrup and/or powder, based on the manufacturer's instructions and with a reduction of five (5) percent of the calculated tax to account for spillage and product preparation at the retail level. § 74-852(e)(2). Any retailer of sweetened beverages shall, in turn, collect the tax from the purchaser of a sweetened beverage. It is a violation of the Ordinance for a retailer or distributor to fail to collect the tax or to otherwise absorb the tax. § 74-852(c). Any person determined to have violated the Ordinance will be subject to a fine of $1,000.00 for the first offense, and a fine of $2,000.00 for the second and each subsequent offense. § 74-857.

The Merchants are retailers located in Cook County, Illinois. They sell various sweetened beverages in retail sales transactions, including ready-to-drink, pre-made sweetened beverages served in sealed containers and from beverage dispensers, as well as on-demand, custom-made sweetened beverages. As such, the Ordinance requires the Merchants to pre-pay to distributors and collect from purchasers on each retail sale of sweetened beverages the sweetened beverage tax.

On June 27, 2017, four days before the tax was to start being collected, the Merchants filed their Verified Complaint for Injunctive Relief and for Declaratory Judgment, arguing that the Ordinance is unlawful because (1) it violates the uniformity clause of the Illinois Constitution, and (2) it is unconstitutionally vague. In response, on June 29, 2017, the County filed a 2-615 Motion to Dismiss Plaintiffs' Verified Complaint for Injunctive Relief and for Declaratory Judgment.

On the same day the Merchants filed their Verified Compliant, they also filed an Emergency Motion for Temporary Restraining Order ("TRO"). The Court issued a TRO on June 30, 2017, temporarily enjoining the County from imposing and enforcing the Ordinance and maintaining the *status quo* until a final determination can be rendered on the issues. The County appealed that order, and on July 10, 2017, the Appellate Court denied the County's Rule 307(d) petition.

On July 14, 2017, the Merchants filed their response in opposition to the County's Motion to Dismiss. On July 19, 2017, the County filed its reply brief in support of its Motion to Dismiss, and on July 21, 2017, the Court heard oral argument on the motion.

LEGAL STANDARD

A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. 735 ILCS 5/2-615; *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). In reviewing the sufficiency of a complaint, the Court accepts as true all well-

pleaded facts and all reasonable inferences that may be drawn from those facts. *Ferguson v. City of Chi.*, 213 Ill. 2d 94, 96-97 (2004). The Court construes the allegations in the complaint in the light most favorable to the plaintiff. *King v. First Capital Fin. Servs. Corp.*, 215 Ill. 2d 1, 11-12 (2005). The question presented by a motion to dismiss under section 2-615 is whether sufficient facts are contained in the pleadings which, if established, may entitle the plaintiff to relief. *Stroger v. Reg'l Transp. Auth.*, 201 Ill. 2d 508, 516 (2002). A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover. *Bryson v. News Am. Publ'ns*, 174 Ill. 2d 77, 86-87 (1996). In ruling on a section 2-615 motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered. *Pooh-Bah Enters. v. Cnty. of Cook*, 232 Ill. 2d 463, 473 (2009).

The legal sufficiency of a complaint alleging that a statute or ordinance is unconstitutional may be raised by way of a section 2-615 motion. *DeWoskin v. Lowe's Chicago Cinema*, 306 Ill. App. 3d 504, 513 (1st Dist. 1999) (citing *Terry v. Metro. Pier & Exposition Auth.*, 271 Ill. App. 3d 446, 450 (1st Dist. 1995)); *see also Gatz v. Brown*, 2017 IL App (1st) 160579 (affirming the circuit court's granting of a section 2-615 motion to dismiss a complaint that presented a facial challenge to a statute); *see also DeWoskin*, 306 Ill. App. 3d at 523 ("When the reasonableness of a tax classification is determinable as a matter of law, a uniformity challenge may be decided in the context of a section 2-615 motion."); *Rajterowski v. City of Sycamore*, 405 Ill. App. 3d 1086, 1110 (2d Dist. 2010) (same); *Jacobsen v. King*, 2012 IL App (2d) 110721, ¶ 15 (same); *Friedman v. White*, 2015 IL App (2d) 140942, ¶ 10 (same).

DISCUSSION

In their Verified Complaint, the Merchants allege that the Ordinance is in direct violation of the uniformity clause of the Illinois Constitution because it creates classifications of sweetened beverages that are not based on any real or substantial differences. For example, due to exception (3) in the definition of "sweetened beverage," the Merchants point out that "ready-to-drink, pre-made sweetened beverages," such as a bottled Frappuccino, would be taxable, while "on-demand, custom sweetened beverages," such as a hand-made Frappuccino, would not be subject to the tax. Moreover, the Merchants argue that the Ordinance violates the uniformity clause because the classifications bear no reasonable relationship to the purpose of the tax, which is to promote public health and reduce obesity rates, because the health consequences of identical beverages in the separate classifications are the same. The Merchants also allege that the Ordinance is unconstitutionally vague and impossible to implement with any precision or intelligible application in the circumstances under which it is intended to operate. Specifically, the Merchants contend that the Ordinance is inconsistent with how sweetened beverages in non-pre-determined size containers (such as fountain drinks) are served and is inconsistent and may run afoul of the Supplemental Nutrition Assistance Program ("SNAP"), the Illinois Retailers' Occupation Tax, and the City of Chicago's Alternative Pricing System Rules.

In its Motion to Dismiss, the County argues that (1) the tax imposed by the Ordinance does not violate the uniformity clause, and (2) the Ordinance is not unconstitutionally vague. The Court will address each issue in turn.

A. Uniformity Clause Analysis

Article IX, section 2 of the Illinois Constitution, otherwise known as the uniformity clause, provides that, "[i]n any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable." Ill. Const. 1970, art. IX, § 2.

The uniformity clause was intended to be a broader limitation on legislative power to classify for nonproperty tax purposes than the limitation of the equal protection clause and was meant to insure that taxpayers would receive added protection in the state constitution based upon a standard of reasonableness that is more rigorous than that contained in the federal constitution. *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 153 (2003) (citing *Searle Pharms., Inc. v. Dep't of Revenue*, 117 Ill. 2d 454, 469 (1987); *Milwaukee Safeguard Ins. Co. v. Selcke*, 179 Ill. 2d 94, 102 (1997)). Although the uniformity clause imposes a more stringent standard than the equal protection clause, the scope of a court's inquiry under the uniformity clause remains relatively narrow. *Allegro Services, Ltd. v. Metro. Pier & Exposition Auth.*, 172 Ill. 2d 243, 250 (1996). Statutes bear a presumption of constitutionality, and broad latitude is afforded to legislative classifications for taxing purposes. *Id.* In a uniformity clause challenge, the court is not required to have proof of perfect rationality as to each and every taxpayer. *Geja's Cafe v. Metro. Pier & Exposition Auth.*, 153 Ill. 2d 239, 252 (1992). The uniformity clause was not designed as a straightjacket for the General Assembly. *Id.* Rather, it was designed to enforce minimum standards of reasonableness and fairness as between groups of taxpayers. *Id.*

To survive scrutiny under the uniformity clause, a nonproperty tax classification must (1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy. *Arangold*, 204 Ill. 2d at 153. These two requirements should be considered and treated separately. *Casey's Mktg. Co. v. Hamer*, 2016 IL App (1st) 143485, ¶ 22.

1. Whether the tax classification is based on a real and substantial difference between the people taxed and those not taxed.

When a plaintiff challenges a legislative classification, he has the burden of showing that the classification is arbitrary or unreasonable. *Geja's Cafe*, 153 Ill. 2d at 248. If a set of facts can reasonably be conceived that would sustain the legislative classification, the classification must be upheld. *Id.* In a uniformity clause challenge, the plaintiff is not required to negate every conceivable basis that might support the tax classification. *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62, 72 (2008). Rather, once the plaintiff has established a good-faith uniformity clause challenge, the burden shifts to the taxing body to produce a justification for the tax classification. *Id.* If the taxing body does so, the burden shifts back to the plaintiff to persuade the court that the justification is insufficient, either as a matter of law or as unsupported by the facts. *Id.* If the plaintiff fails to meet that burden, judgment is proper for the taxing body as a matter of law. *Id.*

The Merchants have brought a good-faith uniformity clause challenge by arguing that the

classification created by exception (3) in the definition of "sweetened beverage" is arbitrary and unreasonable. They claim there is no real and substantial difference between the people taxed, who purchase ready-to-drink, pre-made sweetened beverages, and those not taxed, who purchase on-demand, custom sweetened beverages. The sweetened beverages in both classifications are substantially similar, if not identical. Thus, the burden shifted to the County to produce a justification for the tax classification.

The reasons justifying a classification need not appear on the face of the statute, and the classification must be upheld if any state of facts reasonably can be conceived that would sustain it. *Empress Casino*, 231 Ill. 2d at 76. This is true even if the justification offered is "after-the-fact." *Am. Bev. Ass'n v. City of Chi.*, 404 Ill. App. 3d 682, 691 (1st Dist. 2010). The County advances primarily two justifications to support the Ordinance's classification. First, the County argues the classification is justified because ready-to-drink sweetened beverages are more widely available for purchase and consumption than made-to-order beverages. Second, the County argues the classification is justified because collection of the tax for made-to-order beverages would be administratively burdensome as the collector or its agent would need to make an "on the spot" determination of taxability at the point of sale. The Court is persuaded by these arguments.

The Ordinance taxes ready-to-drink sweetened beverages that are more widely available and therefore more likely to be purchased and consumed. This, in turn, would mean that the taxed classification is likely to produce more revenue than that of the non-taxed classification. Illinois courts have found that differences in revenue between classifications constitute a real and substantial difference. *See Empress Casino*, 231 Ill. 2d at 78 (there was a real and substantial difference between downstate casinos' average intake of $2 to $6 million per month and upstate casinos' average intake of $20 to $40 million per month); *Empress Casino Joliet Corp. v. Giannoulias*, 406 Ill. App. 3d 1040, 1044-45 (3d Dist. 2011) (there was a real and substantial difference between adjusted gross receipts under $200 million and adjusted gross receipts in excess of $200 million); *Midwest Gaming & Entm't, LLC v. Cnty. of Cook*, 2015 IL App (1st) 142786, ¶ 107 (there was a real and substantial difference between gambling devices that average $800 a day in revenue and video gaming terminals that average $200 a day in revenue). Additionally, it is acceptable for the Ordinance to tax beverages more widely available for purchase and consumption as it has been found permissible to take into account the frequency with which one engages in the activity upon which taxation is imposed. *See DeWoskin*, 306 Ill. App. 3d at 521.

The Ordinance does not tax made-to-order beverages as collection of the tax in such purchases would be administratively burdensome. It would require the collector or its agent to discern at the point of sale whether the tax applies and at what amount. This is more labor intensive and would require additional resources. The administrative burden of collecting a tax has been recognized as a "valid justification for assessing a tax in one instance but not in another" for purposes of uniformity. *Container Corp. of Am. v. Wagner*, 293 Ill. App. 3d 1089, 1098 (1st Dist. 1997) (citing citing *Commc'ns & Cable of Chi., Inc. v. City of Chi.*, 282 Ill. App. 3d 1038, 1049-50 (1st Dist. 1996)); *see also Williams v. City of Chi.*, 66 Ill. 2d 423, 435 (1977) (upholding a city transaction tax ordinance and stating that the classifications may have been based on considerations of administrative convenience and expense of collection).

In *Container Corporation of America*, the plaintiff corporation fabricated boxes used to package consumer products. 293 Ill. App. 3d at 1091. The boxes were made, in part, of paperboard, ink and lacquers. *Id.* The base ingredient for the inks and lacquers were purchased in one of two ways, either in a pre-mixed, ready-to-use liquid, or in an unmixed, concentrated form. *Id.* When using the inks and lacquers that were made from concentrate, the corporation diluted the concentrate with various solvents before applying them to the paperboard. *Id.* Following an audit, the Department of Revenue assessed past-due use tax on the solvents purchased in bulk, but not on the pre-mixed inks and lacquers containing solvents. *Id.* The Department did so on the basis that the corporation was the ultimate "user" of the solvent for purposes of assessing use tax. *Id.* The Department took the same position with regard to the solvent which existed as a component of the pre-mixed ink and lacquers, but declined to assess tax on these ingredients, asserting that it was too difficult to calculate what percentage of the pre-mix was composed of evaporates and what percentage was composed of other ingredients. *Id.*

The corporation filed a claim against the Department and argued, *inter alia*, that the Department's failure to tax the solvents contained in the ready-mix inks and lacquers violated the uniformity clause because the distinction between pre-mixed solvents and bulk solvents resulted in an "illegal classification." *Id.* at 1098. The Appellate Court disagreed, however, and held that the administrative burden of collecting a tax may be a valid justification for assessing a tax in one instance but not in another. *Id.* Just as it was for the tax collectors in *Container Corporation of America*, the administrative burden placed on the tax collectors in this case would be too onerous. Therefore, the Court finds that the County has satisfied its burden of producing justification for the Ordinance's tax classification.

Since a justification has been produced, it is incumbent upon the Merchants to establish that the justification is insufficient as a matter of law or that it is unsupported by the facts. The Merchants contend that the County's justifications are factual justifications that cannot be considered in a section 2-615 motion to dismiss. The Court disagrees with this contention. The County is required to produce a justification for its classifications, but is not required to produce evidentiary support. *See Midwest Gaming*, 2015 IL App (1st) 142786, ¶ 102 (analyzing *Wirtz v. Quinn*, 2011 IL 111903, ¶ 83); *see also Arangold*, 204 Ill. 2d at 156.

The Merchants also rely heavily on *North Sheffield, Inc. v. Chicago*. In *North Sheffield*, the Appellate Court found the Chicago Alcoholic Beverage Tax Ordinance to be in violation of the uniformity clause. 144 Ill. App. 3d 913, 923 (1st Dist. 1986). That ordinance imposed a tax upon the purchase of alcoholic beverages that were immediately consumed on the premises where they were purchased, but did not impose a tax upon the purchase of alcoholic beverages consumed off the premises where they were purchased. *Id.* at 915-16. The court found that there was no real or substantial difference between the classifications, and therefore held the ordinance unconstitutional and unenforceable. *Id.* at 919-20. In its reasoning, the court noted that the nature of the commodity (*i.e.*, the alcohol contained in the beverages) did not serve as the basis for the classifications. *Id.* at 920. Rather, it was *where* the commodity was to be consumed *after* the purchase which determined whether the purchase was a taxable event. *Id.* (emphasis in original). The court viewed this as an arbitrary distinction. *Id.* Unlike *North Sheffield*, the nature of the commodity in this case does serve as a basis for the classifications. Ready-to-drink sweetened

beverages are taxed because they are more widely available for purchase and consumption. Moreover, made-to-order beverages are not taxed because collection of the tax would be administratively burdensome. Thus, the Court finds *North Sheffield* to be inapplicable to the case at bar.

This case is more analogous to *American Beverage Association v. City of Chicago*. In *American Beverage Association*, the Appellate Court rejected the plaintiffs' contention that the City of Chicago's bottled water tax ordinance violated the uniformity clause. 404 Ill. App. 3d at 690-92. That ordinance taxed "bottled water," which was defined as "all water which is sealed in bottles offered for sale for human consumption," but did not tax soft drinks as well as vitamin water, mineral water, and other products having features such as flavoring, vitamins, caffeine, or nutritional additives. *Id.* at 683. The court found that a real and substantial difference existed between those items taxed and those not taxed, and therefore the bottled water tax satisfied the first prong of the uniformity clause. *Id.* at 691. While the exempt items were arguably similar to the taxed items because they both contained water and came in plastic bottles, the differences were nevertheless sufficient for uniformity clause purposes. Similarly, in this case, the ready-to-drink sweetened beverages that are taxed are arguably "similar, if not identical" to the made-to-order beverages that are not taxed. However, due to the differences in availability and administrative burden, there is a real and substantial difference between the items taxed and not taxed.

Considering all of the above, the Court must find that the Merchants have failed in their burden to establish that the County's justification is insufficient as a matter of law or that it is unsupported by the facts. The County has set forth a real and substantial difference between the people taxed, who purchase ready-to-drink, pre-made sweetened beverages, and those not taxed, who purchase on-demand, custom sweetened beverages.

2. Whether the tax classification bears some reasonable relationship to the object of the legislation or to public policy.

The next step in the uniformity clause analysis is to determine whether the tax classification bears some reasonable relationship to the object of the legislation or to public policy. The first task is to identify the purpose of the tax. *See Grand Chapter, Order of the Eastern Star v. Topinka*, 2015 IL 117083, ¶ 12. In the case at bar, the legislature has provided express findings regarding the necessity of the tax. The Ordinance states that the Board of Commissioners has determined that a tax should be imposed on the sale of sweetened beverages in Cook County "in an effort to promote public health, including lowered obesity rates." The Ordinance also lists many findings from studies, agencies, and organizations explaining the adverse health impact of sweetened beverage consumption. Counsel for the County has argued that the Ordinance's recitals make clear that the County is enacting the tax to raise revenue in a manner that discourages consumers from purchasing beverages that contribute to the development of serious health conditions. Counsel has also argued that the County has a significant interest in the health and welfare of the County's residents and specifically point to the significant amount of the County's budget dedicated to healthcare.

The Ordinance provides that any amount of sugar or sweetener in a beverage makes the

beverage subject to the tax. The Ordinance does not establish a correlation between the volume of the beverage and the amount of sweetener in the beverage, or a causal effect of the sweetener-to-ounces ratio of beverage consumed and the corresponding health effects. However, that broad-stroke application does not defeat the reasonable relationship of the tax to the stated pubic purpose. Based on the findings set forth in the Ordinance and the healthcare function performed by the County, the Court finds that there is a reasonable relationship between the tax classification and the object of the legislation. The tax applies to purchasers of widely available sweetened beverages. It is within reason for the Court to conclude that the Ordinance sets forth sufficient grounds to find that the tax will deter some level of consumption of such sweetened beverages and will promote public health, while at the same time raise revenue for the County.

The Merchants argue that the express purpose of the Ordinance is inconsistent with the classification drawn by the County because it generally excludes sweetened beverages that are not ready-to-drink. They point out that there is no difference in health consequences from a ready-to-drink sweetened beverage versus a sweetened beverage made on-demand. Therefore, because the beverages are substantially similar, if not identical, the Merchants argue that the tax violates the uniformity clause.

The Merchants correctly point out the similarity of the products but their argument is misplaced. The Court is not constrained by the question of whether the legislature should have taxed all sweetened beverages that may contribute to obesity. The Court need only consider whether there is a reasonable relationship between the tax classification and the objective of the Ordinance. Although it may be a reasonable objection, perfect rationality is not required as to each taxpayer. *Arangold*, 204 Ill. 2d at 155. A minimum standard of reasonableness is all that is required. *Id.*; *see also Casey's Mktg.*, 2016 IL App (1st) 143485, ¶ 25 ("Although the result of a change in taxation produces some inequality, if its framework is reasonably drawn, the law does not violate the uniformity clause.").

Therefore, the Court finds that the tax classification does not violate the uniformity clause of the Illinois constitution.

B. Constitutional Vagueness Analysis

The notion that an ordinance is void for vagueness is a concept derived from the notice requirement of the due process clause. *Wilson v. Cnty. of Cook*, 2012 IL 112026, ¶ 21. As the Illinois Supreme Court recognizes, "[a] statute can be impermissibly vague for either of two independent reasons: (1) if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or (2) if it authorizes or even encourages arbitrary and discriminatory enforcement." *City of Chi. v. Pooh Bah Enters., Inc.*, 224 Ill. 2d 390, 441 (2006) (citing *Hill v. Colo.*, 530 U.S. 703, 732 (2000)).

Although vagueness claims that implicate the first amendment require a greater degree of specificity, "'perfect clarity and precise guidance have never been required'" of statutes challenged as unconstitutionally vague. *Wilson*, 2012 IL 112026, ¶ 22 (quoting *U.S. v. Williams*, 553 U.S. 285, 304 (2008)). The test for determining vagueness varies with the nature and context of the legislative enactment, but the Constitution requires more specificity in statutes with

criminal penalties, particularly statutes that lack a *scienter* requirement. *Wilson*, 2012 IL 112026, ¶ 23. In contrast, statutes with civil penalties that regulate economic matters are subject to a "less strict" vagueness test because they typically involve more narrow subject matter, and business interests are better placed to address, and possibly shape, regulations that will impact them. *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

When reviewing a statute for vagueness, courts apply familiar rules of statutory construction to examine the plain statutory language in light of its common understanding and practice. *Wilson*, 2012 IL 112026, ¶ 24 (citing *Pooh-Bah Enters.*, 232 Ill. 2d at 492). If the plain language of the statute sets forth clearly perceived boundaries, the vagueness challenge fails, and the court's inquiry ends. *Id.*

A statute is not unconstitutionally vague if it is explicit enough to serve as a guide to those who must comply with it. *Gen. Motors Corp. v. State Motor Vehicle Review Bd.*, 224 Ill. 2d 1, 24 (2007). Courts will deem a legislative act unconstitutional when it is so vague, indefinite, and uncertain that the courts are unable, by accepted rules of construction, to determine with any reasonable degree of precision the legislature's intent. *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill. 2d 389, 402 (1987). A statute is considered unconstitutionally vague only if its terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 291 (2003); *People v. Burpo*, 164 Ill. 2d 261, 266 (1995). Mathematical certainty in the language is, however, not required. *People v. Boclair*, 202 Ill. 2d 89, 103 (2002). A statute will not be rendered unconstitutionally vague merely because one could imagine hypotheticals that question the meaning of certain terms. *Id.* Moreover, the fact that a statute might be susceptible of misapplication or varying interpretations does not necessarily make it unconstitutional. *Id.* at 105.

With these principles in mind, the Court will address the Merchants' contentions contained in their Verified Complaint. The Merchants argue that the Ordinance is unconstitutionally vague and "impossible to implement and apply in the circumstances it is intended to operate." They contend that the Ordinance is unconstitutionally vague because it is inconsistent with how sweetened beverages in non-pre-determined size containers (such as fountain drinks) are served and is inconsistent and may run afoul of the federal Supplemental Nutrition Assistance Program ("SNAP"), the Illinois Retailers' Occupation Tax, and the City of Chicago's Alternative Pricing System Rules.

1. Sales of sweetened beverages in non-pre-determined size containers.

The Merchants argue that they are unable to calculate the tax with any precision or certainty in the case of fountain drinks. Due to the consumer's preference and control of the amount of ice and refills for sweetened beverage fountain drinks, they contend they will experience unavoidable under- and over-collection in violation of the Ordinance. The Merchants argue that they have no mechanism under the Ordinance to either remit to the County or return to a purchaser any over-collected tax, even if such amounts were identifiable. They contend that the collection of improper amounts and non-compliance with the Ordinance may cause *qui tam*, class action, or criminal liability claims against them.

Due to the nature of the tax collection set forth in the Ordinance, whereby the Merchants are required to pre-pay the tax on syrup and/or powder used to produce a sweetened beverage fountain drink to their distributors and then later collect the tax from the purchasers of such drinks (Cook County Ordinances § 74-852(e)(2), (3)), the Court understands the Merchants' concerns with imprecise tax collection. In the aggregate, purchasers' use of ice in fountain drinks will cause the Merchants to over-collect the tax, while purchasers' use of refills of fountain drinks will cause the Merchants to under-collect the tax.

The Court, however, does not believe that this issue renders the Ordinance unconstitutionally vague. The Ordinance states that, for the purposes of the Merchants' pre-payment of the tax on syrup and/or powder used to produce a sweetened beverage to distributors, the tax is calculated "based upon the largest volume, in whole ounces, of sweetened beverage that could be produced from the syrup or powder, *with a reduction of five percent of the calculated tax to account for spillage and product preparation at the retail level*." § 74-852(e)(2) (emphasis added). This five percent reduction of the calculated tax to account, in part, for product preparation at the retail level suggests that the County is aware that the collection of the tax in cases of fountain drinks made with syrup or powder is an imperfect science. "Mathematical certainty" and "perfect clarity and precise guidance" is not required of statutes challenged as unconstitutionally vague. *Boclair*, 202 Ill. 2d at 103; *Wilson*, 2012 IL 112026, ¶ 22. Additionally, as to the concerns that improper collection of the tax will open the Merchants up to litigation, any such notion is merely speculation at this point and does not render the Ordinance unconstitutionally vague. The fact that a statute might be susceptible of misapplication or varying interpretations does not necessarily make it unconstitutional. *Boclair*, 202 Ill. 2d at 105.

2. Supplemental Nutrition Assistance Program.

The Merchants argue that their POS systems, or cash registers, are unable to correctly charge the tax in connection with the Supplemental Nutrition Assistance Program (7 U.S.C. § 2011 *et seq.*). Under the federal program, "a State may not participate in [SNAP] if the Secretary determines that State or local sales taxes are collected within that State on purchases of food made with benefits issued under this Act." 7 U.S.C. § 2013(a). The federal government has interpreted "State or local sales taxes" to include excise taxes. 7 C.F.R. § 272.1(b)(1). Any retailer participating in SNAP may have its authorization to participate withdrawn if it "is required under State and/or local law to charge tax on eligible food purchased with coupons or to sequence or allocate purchases of eligible foods made with coupons and cash." 7 C.F.R. § 278.1(l)(vii). Since the Ordinance requires the tax to be included in the sale price of the sweetened beverage (Cook County Ordinances § 74-852(c)), the Merchants argue that they cannot practically comply with the tax without violating federal law and risking the loss of the ability to participate in SNAP. The requirement that the tax is a component of the selling price actually gives weight to the Merchants' argument.

However, the Court finds that the Merchants' argument is awkwardly overcome by issued regulations. The Ordinance clearly provides that the tax shall not apply "to purchases that are specifically exempt from taxation under Federal law." § 74-854(b). Moreover, Regulation

2017-3 was issued to clarify how the tax applies to purchases made with SNAP benefits, and it provides that "purchases made using Supplemental Nutrition Assistance Program (SNAP) benefits will be exempt from the tax." Regulation 2017-3 also provides that, when a purchaser uses SNAP benefits to buy sweetened beverages, the retailer must program their POS system to either not charge the tax or reduce the price by the amount of tax. If this programming is not possible, the retailer must put in place a procedure whereby a purchaser who uses SNAP benefits can receive an immediate refund at the customer service desk or other location within the retailer's premises. While the requirement for this programming and procedures may be difficult to implement, and the County does not address how this immediate refund is to be accomplished, the Court does not believe it is unconstitutionally vague. The language provides people of ordinary intelligence a reasonable opportunity to understand what is required and it is explicit enough to serve as a guide to those who must comply with it. *Pooh Bah Enters., Inc.*, 224 Ill. 2d at 441; *Gen. Motors Corp.*, 224 Ill. 2d at 24.

3. Illinois Retailers' Occupation Tax.

The Merchants argue that, because section 74-852(c) of the Ordinance requires the tax to be included in the sale price of sweetened beverages, the Ordinance is internally in conflict and may run afoul of the Illinois retailers' occupation tax. Calculation of the retailers' occupation tax is measured or based on the retailer's "gross receipts," which is defined as "the total selling price" received from sales of tangible personal property at retail. 35 ILCS 120/1. "Selling price" is defined as "the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property...and shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expenses whatsoever." *Id.* Therefore, the Merchants argue that since the Ordinance requires the sweetened beverage tax to be included in the selling price, it is in conflict with the Illinois retailers' occupation tax.

However, not all receipts received by a retailer, even when related to selling tangible personal property, are receipts from the sale of tangible personal property for purposes of calculating the retailers' occupation tax. Local taxes for which the legal incidence falls on the user or consumer of tangible personal property are not part of gross receipts, as retailers are acting as tax collectors of these taxes required by local ordinance. *See* 86 Ill. Admin. Code § 130.435. Thus, the Court finds that the Ordinance is not in conflict with the Illinois retailers' occupation tax. As with the issue regarding the selling price and SNAP, this issue could easily have been avoided if the Ordinance did not make the tax a component of the selling price. However, as with SNAP, this issue is addressed by another one of the County's regulations. Regulation 2017-2 clearly permits retailers to separately list the base price and the sweetened beverage tax on its shelf, advertisement, and menu and on the invoice or receipt at the point-of-sale. As such, the Court does not believe that this issue renders the Ordinance unconstitutionally vague.

4. City of Chicago's Alternative Pricing System Rules.

The City of Chicago's Alternative Pricing System Rules require that shelf tags display a "unit price." Retailer's Rules and Regulations, § I, Rule 5(a) and § 2, Rule 15(b). The "unit

price" is determined by "dividing the total selling price by the total count, measure or weight of the individual item." *Id.* at Definitions. Consequently, the Merchants argue that under Chicago's Alternative Pricing System Rules, the unit price will improperly include the tax because the "total selling price" must include the tax under Cook County Ordinance § 74-852(c).

The Court does not find the Merchants' argument persuasive. Again, this issue could have been avoided if the Ordinance simply did not require the tax to be included in the sale price of the sweetened beverage. However, as with the SNAP and the Illinois Retailers' Occupation Tax concerns, the issue is resolved by Regulation 2017-2 which permits retailers to separately list the base price and the sweetened beverage tax. Furthermore, the Court does not agree with the Merchants' contentions that it would be impractical to comply with both Chicago's Alternative Pricing System Rules and the Ordinance. Even if Regulation 2017-2 was not issued, the sum of the base price and the tax would simply constitute the total selling price for purposes of the city's unit pricing rules. Retailers would then merely need to divide this total by the "total count, measure or weight of the individual item."

Any contention by the Merchants that the Regulations are an impermissible expansion of the Ordinance's plain language or that they impose requirements that are not permitted under the Ordinance is meritless. Along with the power to impose a tax that is locally administered, a municipality has the power to issue reasonable rules and regulations for the administration of the tax. 55 ILCS 5/5-1113. In line with that, section 74-859 of the Ordinance provides that "[t]he Department shall prescribe reasonable rules, definitions, and regulations necessary to carry out the duties imposed upon it." The Court believes Regulations 2017-1, -2, -3, and -4 are consistent with the Ordinance's requirements, do not impose greater burdens upon the Merchants, and therefore, are valid. *See also Granite City Div. of Nat'l Steel Co. v. Ill. Pollution Control Bd.*, 155 Ill. 2d 149, 162 (1993) ("Rules and regulations promulgated by the Board have the force and effect of law [and] are presumed to be valid.").

A review of the Ordinance demonstrates that its provisions provide a person of ordinary intelligence a reasonable opportunity to understand what is required. Likewise, the Ordinance is sufficiently detailed and specific to preclude arbitrary enforcement. Therefore, the Ordinance is not unconstitutionally vague.

CONCLUSION

For the foregoing reasons, the Court grants the County's 2-615 Motion to Dismiss Plaintiffs' Verified Complaint for Injunctive Relief and for Declaratory Judgment. The Ordinance does not violate the uniformity clause of the Illinois Constitution as the tax classification is based on a real and substantial difference between the people taxed and those not taxed, and the tax classification bears a reasonable relationship to the object of the legislation. Additionally, the Ordinance is not unconstitutionally vague as it provides a person of ordinary intelligence a reasonable opportunity to understand what is required and it is sufficiently detailed and specific to preclude arbitrary enforcement.

II. ORDER

This matter having been fully briefed, and the Court being fully apprised of the facts, law, and premises contained herein, it is ordered as follows:

A. Defendants' 2-615 Motion to Dismiss Plaintiffs' Verified Complaint for Injunctive Relief and for Declaratory Judgment is granted.

B. Plaintiffs' Verified Complaint for Injunctive Relief and for Declaratory Judgment is dismissed without prejudice.

C. The Temporary Restraining Order originally entered on June 30, 2017 and continued on July 11, 2017 and July 21, 2017 is dissolved.

Date: July 28, 2017

Judge Daniel J. Kubasiak

JUL 28 2017

Circuit Court - 2072

ENTERED: ______________________
Judge Daniel J. Kubasiak #2072

Judge Daniel J. Kubasiak
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