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IOWA DISTRICT COURT FOR JOHNSON COUNTY

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THE SUMMIT RESTAURANT & BAR, INC.,  
AND MIKE PORTER,

PLAINTIFFS,

VS.

CITY OF IOWA CITY,

DEFENDANT.

CASE NO. \_\_\_\_\_

PETITION FOR TEMPORARY AND  
PERMANENT INJUNCTIVE RELIEF,  
DECLARATORY JUDGMENT AND DAMAGES,  
AND REQUEST FOR EXPEDITED HEARING

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Plaintiffs, The Summit Restaurant & Bar, Inc. (“The Summit”) and Mike Porter (“Porter”), pursuant to Rules 1.1501 et. seq. (Injunctions) and 1.1101 (Declaratory Judgment) of the Iowa Rules of Civil Procedure, petition this Court for: (A) temporary and permanent injunctive relief; (B) declaratory judgment that Iowa City Resolution 09-38 is unconstitutional and (C) damages, and in support thereof state:

**Summary. Since 2001, The Summit has operated as a restaurant/bar. It is among a handful of restaurant/bars legally operating in the City that admit patrons 19 and older after 10:00 p.m., but which serve alcohol only to those 21 and older (“19-year-old bars”). In 2007, the City proposed an initiative mandating that all restaurants/bars become “21-year-old bars”, bars that admit only patrons 21 and older. The initiative was defeated. The City then enacted Resolution 09-38, which requires the Police Chief to recommend that the City deny a liquor license renewal application to any establishment allegedly exceeding a vague “PAULA/visit” citation ratio. In July 2009, the City, applying Resolution 09-38 *ex post facto*, voted to deny the liquor licenses of two 19-year-old bars (Etc. and The Fieldhouse). On November 3, 2009, the City notified The Summit that the Police Chief recommended denial of The Summit’s liquor license renewal application based solely on Resolution 09-38. Resolution 09-39 is unconstitutional on its face and in its application. The City’s actions are arbitrary, capricious and/or without reasonable cause, have violated Plaintiffs’ constitutional rights, and will result in irreparable harm to Plaintiffs.**

## **I. PARTIES, VENUE & JURISDICTION**

1. The Summit is an Iowa corporation doing business in the state of Iowa at all times relevant to this action.

2. Porter is the President and sole officer of The Summit. Porter has, at all relevant times, resided in Johnson County, Iowa.

3. The City of Iowa City, Iowa (“City”) is a municipal corporation organized and existing under the laws of the state of Iowa.

4. This Petition seeks declaratory and injunctive relief to prevent violations of Plaintiffs’ rights, privileges and immunities under the Constitution of the United States (U.S. Const. amend. XIV) and Constitution of the State of Iowa (Iowa Const. art. I, § 9), and to prevent the City from exceeding its constitutionally granted authority (Iowa Const. art III, § 38A). The rights sought to be protected in this cause of action arise and are secured under the Fifth and Fourteenth Amendments to the United States Constitution and various federal statutes and the First and Third Articles of the Iowa Constitution.

5. This Court has jurisdiction and power to issue injunctions pursuant to Rules 1.1505, 1.1506, 1.1101 and 1.1102 of the Iowa Rules of Civil Procedure.

6. Venue is proper in the Iowa District Court for Johnson County as the conduct complained of herein occurred within, and all parties are residents of, or have their principal place of business in, or are doing business in Johnson County, Iowa.

7. This action seeks a judicial determination of issues, rights and liabilities embodied in an actual and present controversy between the parties involving the constitutional validity and application of certain City resolutions. There are substantial bona fide disputes and questions to be resolved concerning provisions of the City resolutions that the City alleges apply to Plaintiffs.

8. Plaintiffs seek to obtain temporary and permanent injunctions enjoining the City from enforcing any ordinances which act to illegally deny The Summit its substantive and procedural due process in renewing its liquor license.

9. Plaintiffs further seek a declaratory judgment specifically finding any resolution, ordinance or other regulation designed to prohibit, or which has the effect of wrongfully prohibiting Plaintiffs from renewing their liquor license is unconstitutional. Plaintiffs seek a declaration of unconstitutionality against any resolution, ordinance or other regulation which effectively wrongfully prohibits Plaintiffs from operating its lawful business. Such legislation denies Plaintiffs' substantive and procedural due process in that they unduly interfere with the use of real property, cause deprivation of a protected use, and are arbitrary, capricious and/or unreasonable.

10. The constitutional deprivations and irreparable harm that would result from following the administrative process would make judicial review of any final agency action an inadequate remedy. Agencies cannot decide issues of statutory validity or constitutional challenges, and The Summit's constitutional issues as to Resolution 09-38's validity are collateral to its substantive claims of its right to a liquor license. Regardless of the administrative agency ultimate finding regarding The Summit's liquor license, the issue of whether Resolution 09-38 is constitutional would remain ripe and subject to at least three challenges (The Summit, The Fieldhouse and Etc.). There is a significant public interest in reaching a final determination of the constitutional issues raised in this case.

11. Plaintiffs incorporate by reference the Affidavit of Mike Porter, the Affidavit of Dave Carey, and Exhibits 1 through 20.

## II. STATEMENT OF FACTS

12. Approximately 110 establishments in the City currently hold Class “C” liquor licenses. The downtown area of the City is known for its eating, drinking, and live entertainment establishments, as well as retail and other stores.

13. The Summit holds a Class “C” liquor license, and has owned and operated a restaurant/bar at 10 S. Clinton St. in downtown Iowa City since December 2001.

14. The Iowa Alcoholic Beverages Division (the “Division”) is tasked with enforcing Iowa Code Chapter 123, known as the “Iowa Alcoholic Beverage Control Act” (the “Act”).

15. The Administrator of the Division is required to issue a liquor license if the Administrator determines that the applicant complies with all requirements for holding a license. *See Iowa Code Section 123.32(6).*

16. To hold a liquor license, the applicant must be a “person of good moral character” as defined by [Iowa Code Chapter 123].” Iowa Code Section 123.30(1)(a) (2007).

17. Iowa Code Section 123.3(26) defines a “person of good moral character” as a person who meets the following requirements:

a. The person has such financial standing and good reputation as will satisfy the administrator that the person will comply with this chapter and all laws, ordinances, regulations applicable to the person’s operations under this chapter. However, the administrator shall not require the person to post a bond to meet the requirements of this paragraph.

b. The person is not prohibited by section 123.40 from obtaining a liquor control license or a wine or beer permit.

c. Notwithstanding paragraph “e”, the applicant is a citizen of the United States and a resident of this state, or licensed to do business in this state in the case of a corporation. Notwithstanding paragraph “e”, in the case of a partnership, only one general partner need be a resident of this state.

d. The person has not been convicted of a felony. However, if the person’s conviction of a felony occurred more than five years before the date of the

application for a license or permit, and if the person's rights of citizenship have been restored by the governor, the administrator may determine that the person is of good moral character notwithstanding such conviction.

18. To guide a local authority or administrator in its determination of an applicant's "financial standing" and "good reputation" the Division adopted certain regulations. Iowa Administrative Code Section 185-4.2(4) provides:

A local authority or the administrator may consider an applicant's financial standing and good reputation in addition to the other requirements and conditions for obtaining a liquor control license, wine or beer permit, or certificate of compliance, and the local authority or the administrator shall disapprove or deny an application for liquor control license, wine or beer permit, or certificate of compliance if the applicant fails to demonstrate that the applicant complies with the lawful requirements and conditions for holding the license, permit or certificate of compliance.

a. In evaluating an applicant's "financial standing", the local authority or the administrator may consider the following: An applicant's "financial standing" may include, but is not limited to, verified sources(s) of financial support and adequate operating capital for the applicant's proposed establishment, a record of prompt payment of local or state taxes due, a record of prompt payment to the local authority of fees or charges made by local authority for municipal utilities or other municipal services incurred in conjunction with the proposed establishment, and a record of prompt payment or satisfaction of administrative penalties imposed pursuant to Iowa Code chapter 123.

b. In evaluation an applicant's "*good reputation*," the local authority or the administrator may consider such factors as, but not limited to, the following: *pattern or practice of sales of alcoholic beverages to 19- and 20- year-old- persons for which the licenses or permittee, the licensee's or permittee's agents or employees, have pled or have been found guilty*, pattern and practice by the licensee or permittee, or the licensee's or permittee's agents or employees, of violating alcoholic beverages laws and regulations for which corrective action has been taken since the previous license or permit was issued, sales to intoxicated person, licensee or permittee convictions for violations of laws relating to operating a motor vehicle while under the influence of drugs or alcohol, the recency of convictions under laws relating to operating a motor vehicle while under the influence of drugs or alcohol, licensee or permittee misdemeanor convictions, the recency of the misdemeanor convictions."

(emphasis added).

19. Since 2001, the City has recommended to the Division that The Summit's liquor license renewal application be granted every year, and the Division renewed The Summit's liquor license in 2002, 2003, 2004, 2005, 2006, 2007 and 2008. *See Exhibit 1.* The Summit has never had a liquor license denied, suspended, or revoked. *See Exhibit 1.*

20. The City has, for quite some time, desired to change the make up of the downtown district. In particular, it wants to decrease the number of bars and either put the 19-year-old bars out of business or force them to convert to 21-year-old bars. As stated by Michael Lombardo, City manager, at an October 20, 2008 City Council work session:

One of the things that I think is universally mentioned was that, um, and I think this came up in our retreat, is that there's acknowledgement that the mix of use downtown has...the balance has tipped, and that there's a strong interest on behalf of Council to change that mix and find that balance. And I think...if I may, if that's correct, then one of the tools that we would suggest and we haven't really thought through the strategy, would be, uh, an effective way of reducing the number of licensed, uh, bars and so *it would probably come as a recommendation that somehow we tighten up on the renewal process because if the interest is in getting it the mix back, we have to find a way of ferreting out the bad bars, if you will, and reducing that number, other than through zoning and some other things that we likely recommend to you all. It has to be a combination of...of approaches to get that number and that balance, uh, to where you're all comfortable.*

*See Exhibit 3 (emphasis added).*

21. The means chosen by the City to "change the mix" and "ferret[] out the bad bars" were twofold. First, the City adopted guidelines re-defining Iowa law's definition of "a person of good moral character." Second, the City added an initiative to the 2007 election ballot that would prohibit 19-year-old bars.

22. At least as early as 2001 the City had contemplated using PAULA (Possession of Alcohol Under Legal Age) citation ratios as a basis for determining good moral character. Even then, however, the City acknowledged that PAULA citations could not, in and of itself, be a basis for denial of a liquor license. *See Exhibit 4 at pg. 3, line 3 (memorandum from then-and-*

current City Attorney Eleanor Dilkes sent to the City Council addressing alcohol regulations stating that “[t]he number of possession of alcohol under legal age charges (PAULAs) against under age persons is not in and of itself sufficient for administration of a civil penalty.”) (emphasis added).

23. Enforcement and interpretation of the City’s PAULA’s standard proved problematic for the police department and in 2006 the City Police Chief requested that the City Council provide him with a set of guidelines or criteria to assist him with his obligations under Iowa City Ordinance 4-2-3(B)<sup>1</sup> in determining whether an applicant for a liquor license was “a person of good moral character.”

24. On June 27, 2006, the City Council adopted Resolution No. 06-216, which set forth factors to be considered by the Chief of Police or designee when determining whether an applicant is “a person of good moral character.” See Exhibit 5. One of the factors set forth in Resolution 06-216 provides:

A pattern of *convictions* of persons within the establishment for PAULA (Possession of Alcohol Under Legal Age) and/or the local law prohibiting persons under 19 from being in the licensed establishments, which suggest that the licensee or permittee does not have measures in place to adequately control access of persons under legal age to alcohol. The Police Chief or Designee shall review the establishment’s rate of PAULAs per visit. A rate of 1.5 PAULAs per visit may be grounds for disapproval of the application.

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<sup>1</sup> Iowa City Ordinance Sec. 4-2-3(B) provides:

The Iowa City fire chief, the Iowa City building official, and the Iowa City chief of police must approve or disapprove the application. The fire chief and building official must determine if the premises complies with all applicable state and local laws, rules, and regulations and will, if necessary to make such determination, inspect the premises. The chief of police shall make an investigation to determine if the applicant is of good moral character as defined in section 123.3(26) of the Iowa Code, the rules of the Iowa alcoholic beverages division and guidelines developed by the chief of police and approved by the city council. Each official must approve or disapprove a completed application and if applicable, provide a memo setting forth the reasons for disapproval no later than seven (7) calendar days prior to the expiration of the current license in the case of renewals, or within seven (7) days of completion of the application, including the state requirements, in the case of applications for a new license. Renewal applications will not be accepted more than seventy (70) days prior to expiration of the present license. The application must be reviewed and approved or denied by the city council.

See Exhibit 5 (emphasis added).

25. In 2007, the City added an initiative prohibiting 19-year-old bars to the November ballot. The initiative failed.

26. The City found that its PAULA standard was not having the intended effect of putting 19-year-old bars out of business or forcing them to convert to 21-year-old bars. As of December 31, 2008, it is verily believed that the Police Chief did not recommend any restaurant/bar be denied a liquor license based upon excessive PAULA citations.

27. On February 10, 2009, the City passed Resolution No. 09-38. Resolution 09-38 rescinded Resolution 06-216 and adopted new Guidelines for Police Chief's Review of Applications for Initial and Renewal Liquor Licenses. See Exhibit 6.

28. The new guidelines under Resolution 09-38 went into effect July 1, 2009.

29. The purported purpose of Resolution 09-38 was stated to adopt guidelines "to determine if the applicant is of 'good moral character' as that term is defined in the State Code and Rules of the Iowa Alcoholic Beverages Division." See Exhibit 6, unnum. pg. 3).

30. Its actual purpose, however, was to change the definition of "good moral character" and further the City's intent to shut down 19-year-old bars or force them to convert to 21-year-old bars.

31. Resolution 09-38 revised the factors considered by the Chief as follows:

*Citations issued on the premises for PAULA (Possession of Alcohol Under Legal Age) which indicate that the licensee or permittee knows that such activity is taking place on the premises and does not have measures in place to adequately control access of persons under legal age to alcohol. The Police Chief or Designee shall review the establishment's rate of PAULAs per visit. For renewals after July 1, 2009, the Police Chief will recommend denial for any establishment with a rate of 1.0 or more PAULAs per visit assuming at least 18 visits in the 12 month renewal period. A rate of less than 1.00 or a rate based on less than 18 visits may be grounds for disapproval of the application.*

See Exhibit 6 (emphasis added). The “rate of 1.0 or more PAULAs per visit assuming at least 18 visits in the 12 month renewal period” is hereinafter referred to as the “PAULA Ratio.”

32. In sum, Resolution 09-38 made the following material revisions to Resolution No. 06-216:

- A. The numerator of the PAULA Ratio changed from “PAULA *convictions*” to “PAULA *citations issued*”;
- B. Only those citations “*which indicate* that the licensee or permittee knows that [PAULA] activity is taking place on the premises and does not have measure in place to adequately control access of persons under legal age to alcohol” are supposed to be considered;
- C. The PAULA Ratio was dropped from *1.5* to *1.0*; and
- D. The Police Chief is now *required*, instead of *permitted*, to recommend denial of the renewal application for any establishment with a PAULA Ratio 1.0 or more per visit assuming at least 18 visits in the 12 month renewal period.

33. Unlike Resolution No. 06-216 and the failed 2007 initiative, Resolution 09-38 is well on its way of having its intended effect of putting 19-year-old bars out of business or forcing them to convert to 21-year-old bars.

34. On or about July 6, 2009, the Fieldhouse completed an application for renewal of its Class “C” liquor license as provided by the Division and City addendum.<sup>2</sup> Although the Iowa City Fire Chief and Iowa City building official approved the Fieldhouse’s application<sup>3</sup>, the Chief

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<sup>2</sup> Iowa City, Iowa Ordinance Sec. 4-2-3(A) provides:

It shall be the responsibility of the applicant for a liquor control license, beer permit, or wine permit, or a renewal of any of those, to complete the applications provided by the state alcoholic beverages division and the city addendum. The city's addendum shall require a listing of all persons with an ownership or management interest in the applicant, identification of any administrative sanctions imposed, and authorization of each such person for an Iowa criminal history report from the division of criminal investigation.

<sup>3</sup> Iowa City Ordinance Sec. 4-2-3(B) provides:

The Iowa City fire chief, the Iowa City building official, and the Iowa City chief of police must approve or disapprove the application. The fire chief and building official must determine if the

of Police disapproved the application stating “[b]ased on an excessive PAULA citation rate of 1.55 per visit I am mandated to recommend denial of The Field House liquor license renewal.” *See* Exhibit 7. On July 28, 2009, the City Council disapproved the Fieldhouse’s liquor license renewal application.

35. Likewise, on or about July 17, 2009, Etc. completed an application for renewal of its Class “C” liquor license. Although the Iowa City Fire Chief and Iowa City building official approved Etc.’s application, the Chief of Police disapproved the application stating “Per the GUIDELINES FOR POLICE CHIEF’S REVIEW OF APPLICATIONS FOR INITIAL AND RENEWAL LIQUOR LICENSES,” PD must deny. Recommend denial [per PAULA rate standard].” *See* Exhibit 8. On July 28, 2009, the City Council disapproved Etc.’s liquor license renewal application.

36. The sole reason for the disapprovals was the PAULA Ratio as mandated by Resolution 09-38. *See* Exhibit 9 at pg. 37, lines 6-13 and pg. 43, line 23 – pg. 44, line 4.

37. As a result of the City’s disapproval of the Fieldhouse’s and Etc.’s liquor license renewal applications, these businesses have suffered severe economic loss. It is verily believed that The Fieldhouse’s gross receipts decreased nearly 80% in the two months immediately following the City’s disapproval of their liquor license renewal application. *See* Exhibit 2.

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premises complies with all applicable state and local laws, rules, and regulations and will, if necessary to make such determination, inspect the premises. The chief of police shall make an investigation to determine if the applicant is of good moral character as defined in section 123.3(26) of the Iowa Code, the rules of the Iowa alcoholic beverages division and guidelines developed by the chief of police and approved by the city council. Each official must approve or disapprove a completed application and if applicable, provide a memo setting forth the reasons for disapproval no later than seven (7) calendar days prior to the expiration of the current license in the case of renewals, or within seven (7) days of completion of the application, including the state requirements, in the case of applications for a new license. Renewal applications will not be accepted more than seventy (70) days prior to expiration of the present license. The application must be reviewed and approved or denied by the city council.

38. In late October, 2009, The Summit completed an application for renewal of its Class “C” liquor license.

39. In accordance with Iowa City Ordinance 4-2-3(B)2, the Iowa City Fire Chief and the Iowa City Building Inspector approved The Summit’s application.

40. On November 3, 2009, the Chief of Police, however, disapproved the application stating “[b]ased on an excessive PAULA [Possession of Alcohol Under the Legal Age] citation rate of 1.925 per visit I am mandated to recommend denial of The Summit’s liquor license renewal.” *See* Exhibit 10.

41. The Police Chief further stated “[l]icense renewals after July 1, 2009 that have a rate greater than 1.0 require the Police Chief to recommend denial.” *See* Exhibit 10.

42. Pursuant to Iowa City Ordinance 4-2-4, the City Council has scheduled a hearing on November 17, 2009 to vote on The Summit’s liquor license renewal application.<sup>4</sup>

43. Based on the City’s stated intention to put establishments such as The Summit out of business and the City’s prior disapproval of the Fieldhouse’s and Etc.’s liquor license renewal applications based solely on PAULA citations, it is a foregone conclusion that the City will deny The Summit’s liquor license renewal application.

44. The actions taken by the City against Plaintiffs are willful, wanton and done with malice.

45. The Summit cannot suffer the same harms suffered by the Fieldhouse and Etc. (including, but not limited to economic loss and loss of good will sustained) when their

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<sup>4</sup> Iowa City Ordinance Sec. 4-2-4 provides:

The city council shall provide the licensee or permittee an opportunity to be heard prior to the imposition of a civil penalty, suspension or revocation or disapproval of an application for renewal. Notice may be given by personal service or first class mail directed to the manager or contact person of the applicant as listed on the application. Notice by personal service must be given at least five (5) days before the hearing. Notice by first class mail is effective on mailing and must be given at least six (6) days before the hearing.

respective liquor license renewal applications were denied and remain solvent. *See* Exhibit 1.

The Summit and Mike Porter will be irreparably harmed if the City denies Plaintiffs' application for renewal of The Summit's liquor license.

46. The actions of the City are arbitrary, capricious and/or without reasonable cause and a denial of rights guaranteed by the Constitution of the United States (U.S. Const. amend. XIV), Constitution of the State of Iowa (Iowa Const. art. I, § 9; art III, § 38A).

47. Plaintiffs will suffer harm, including but not limited to economic harm in the form of a tangible loss of profits as well as the loss of good will and the harm from improper impingement upon its Constitutional rights, unless the Court temporarily and permanently enjoins the City from denying Plaintiffs' liquor license application and enjoins the City from enforcing Resolution 09-38.

48. The harm suffered by Plaintiffs, including, but not limited to economic and Constitutional harm, should the Court not intervene far outweighs any harm incurred by the City in being forced to grant the requested liquor license renewal application and being enjoined from enforcing an unconstitutional ordinance.

49. The rights of Plaintiffs under the United States Constitution and the Iowa Constitution are violated in the actions of the City, because, among other things, the City's actions:

- A. Are vague and indefinite and fail to set out distinct criteria, thus leaving persons of common intelligence to guess as to the meaning and differ as to its application;
- B. Violate Plaintiffs' procedural and substantive due process rights;
- C. Usurp statutorily grants of constitutionally limited authority; and
- F. Are unconstitutional as applied to the Plaintiffs.

50. The public interest clearly weighs in favor of intervening on behalf of Plaintiffs and “protecting the public from the dangers to liberty which lurk in insidious encroachment by men of zeal.” *Doctor John’s, Inc. v. City of Sioux City, Iowa*, 305 F. Supp.2d 1022, 1042 (N.D. Iowa 2004).

51. The grounds for the temporary, permanent injunctive relief, declaratory judgment and damages, argued in the alternative, are set out in the following paragraphs.

#### **COUNT I - REQUEST FOR DECLARATORY JUDGMENT**

***A. Declaratory Judgment that the City’s Conduct is Unconstitutional as Resolution 09-38 is Preempted by State Law and the Rules Promulgated by the Division.***

52. Plaintiffs incorporate paragraphs 1 through 51, as applicable.

53. The City has illegally exceeded the scope of its authority when it defined the term “good moral character” to include a “PAULA Ratio” in Resolution 09-38.

54. While local authorities may regulate matters of local concern, they may do so only when those regulations are not inconsistent with the laws of the general assembly.

55. Resolution 09-38 is preempted by state law because the legislature reserved to itself the power to define “a person of good moral character”, a term is expressly defined in the Act and rules promulgated by the Division.

56. The City has, however, through Resolution 09-38, unconstitutionally usurped the Division by purporting to re-define “a person of good moral character” as an applicant with a PAULA Ratio less than the arbitrary number 1.0 with at least 18 visits.

57. Moreover, the factors used in the definition of “a person of good moral character” in both the Act and the rules established by the Division relate specifically to criminal wrongdoing – “*sales of alcoholic beverages to 19- and 20- year-old-persons*” on the part of the applicant or its employees, for which they “*have pled or have been found guilty.*”

58. The PAULA Ratio utilized by the City in Resolution 09-38, however, uses as its main criteria alleged *possession* by (not *sales* to) and *citations* issued to (not *convictions*) third persons through no culpability on Plaintiffs part.

59. Additionally unlike the Act, Resolution 09-38 has nothing to do with alleged violations by the applicant or its employees, but is instead based upon mere unsubstantiated allegations against third parties.

***B. Declaratory Judgment that Resolution 09-38 is Unconstitutionally Vague Violating Plaintiffs' Right to Due Process***

60. Plaintiffs' incorporate paragraphs 1 through 59, as applicable.

61. An enactment is void for vagueness if its prohibitions are not clearly defined.

62. Persons of ordinary intelligence do not have fair notice of what is prohibited under Resolution 09-38. Among other things:

A. The term "visit" is not defined in either Resolution 09-38 or any other document, nor has the City defined this term.

B. The City Police Department does not have any written policy or guidelines as to what is defined as a visit for purposes of the PAULA Ratio.

C. The City Police Department has a varying understanding of the word "visit" as used in Resolution 09-38, resulting in "visits" that are not uniformly recorded or enforced. *Compare* Exhibit 9, pg. 18, line 3 – pg. 22, line 4 and pg. 67, line 2 – pg. pg. 75, line 8 and pg. 85, line 24 – pg. 97, line 2 and pg. 101, line 23 – pg. 103, line 16 *with* Exhibit 11, pg. 20 line 1 – pg. 25 line 20 and pg. 30, line 4 – pg. 37, line 14.

D. Resolution 09-38 clearly does not provide an explicit standard for Police Officers or the establishments' owners, resulting in unequal enforcement.

**C. *Declaratory Judgment that Resolution 09-38 is Unconstitutional as it Violates Plaintiffs' Substantive Due Process Rights Because it Does Not Require Any Culpability on Behalf of the Permittee or Licensee***

63. Plaintiffs' incorporate by reference paragraphs 1 through 62, as applicable.

64. Iowa Code section 123.50(3) authorizes suspension of an establishment's liquor, wine or beer license for various reasons, including proof that an employee has been *convicted* of *selling* alcohol to a minor.

65. Under Resolution 09-38, the Police Chief must recommend denial of an establishment's liquor license if the PAULA Ratio exceeds 1.0 over at least 18 "visits." *See* Exhibit 6.

66. The numerator in the PAULA Ratio is "[c]itations issued on the premises for PAULA which indicate that the licensee or permittee knows that such activity is taking place on the premises and does not have measures in place to adequately control access of persons under legal age to alcohol." *See* Exhibit 6.

67. The City, however, admits that none of the PAULA citations allegedly issued due to activity "on the premises" at a business during the 12 month renewal period indicate that the licensee or permittee knows that such activity is taking place or that the licensee or permittee does not have measure in place to adequately control access to alcohol of persons under the legal age. *See* Exhibit 9 at pg. 52, line 10 – pg. 53, line 1.

68. Resolution 09-38 does not contain any requirement that the City observe an underage patron in actual possession of alcohol or that the person was served alcohol by the restaurant/bar.

69. The Police Department has stated that if not mandated by Resolution 09-38 to recommend denial of a liquor license based on the PAULA Ratio, it would focus on the number

of times the bar has been convicted of selling alcohol to a minor as a priority in its determination. *See* Exhibit 9 at pg. 37, lines 6-23.

70. During The Summit's twelve month review period, October 30, 2008 through October 29, 2009, not a *single* Summit employee was cited for selling alcohol to a minor. *See* Exhibit 10, pg. 2. There is no evidence of any culpability whatsoever on Plaintiffs' behalf pertaining to any of the PAULA citations.

71. Because there is no requirement of any culpability on Plaintiffs' behalf in Resolution 09-38, Resolution 09-38 denies Plaintiffs their due process rights.

***D. Declaratory Judgment that Resolution 09-38 is Unconstitutional as it Violates Plaintiffs' Substantive Due Process Rights Because it Does Not Require a PAULA Conviction, Only a Citation***

72. Plaintiffs incorporate paragraphs 1 through 71, as applicable.

73. The PAULA Ratio utilized by the City in Resolution 09-38 uses as its main criterion *citations* – not convictions – issued to third persons allegedly on the premises. *See* Exhibit 6.

74. A criminal defendant, even in a quasi-criminal proceeding, is entitled to the presumption of innocence and must be proven guilty beyond a reasonable doubt.

75. A plain reading of the “good moral character” requirement of the Act supports the conclusion that it is the licensee's or permittee's behavior which must be analyzed.

76. The City's Legal Department has admitted that a conviction, and not a citation, is necessary to deny an initial or renewal application for liquor license. *See* Exhibit 12 at pg. 3 (Memo from City Attorney Linda Newman Gentry stating “The court does make clear that a conviction, rather than a charge, of violating Chapter 123 or a comparable local ordinance is required to trigger the revocation and suspension provisions. **I think it must also be clear that**

**a conviction would be required to deny an initial or renewal application.”**) (emphasis in original).

77. The City is denying Plaintiffs’ liquor license based on unproven allegations in contravention of Plaintiffs’ substantive due process rights.

***E. Declaratory Judgment that Resolution 09-38 is Unconstitutional because the City is Intentionally Targeting Certain Establishments for Enforcement at the Exclusion of Others.***

78. Plaintiffs incorporate by reference paragraphs 1 through 77.

79. The City admits that it is “possible to find an underage drinker just about anywhere at any bar in Iowa City.” *See* Exhibit 13 at pg. 28.

80. Yet, the Police Department does not have a policy or mandate that requires all bars to be “visited” for potential alcohol violations. *See* Exhibit 9 at pg. 25, lines 10-15.

81. The Police Department asserts that scheduled checks of establishments should be done evenly and has even designated an officer to see that every bar is checked and checks are done evenly. *See* Exhibit 9 pg. 26, line 18 and pg. 27, lines 19-24. However, fewer than 20 of the City’s 110 businesses with Class “C” liquor licenses have been visited 18 or more times in 2009, meaning the PAULA Ratio could not even be used against more than 82% of the City’s establishments under Regulation 09-38. *See* Exhibit 9 pg. 26, lines 7-10; Exhibit 20.

82. In 2009, 45 establishments (41% of the City’s 110 businesses with liquor licenses) have *never* been visited by the Police Department. *See* Exhibit 20. The City has visited the majority of its 110 establishments holding Class “C” liquor licenses three or fewer times in 2009. *See* Exhibit 20.

83. In 2004, the City did not visit 47% of its establishments *a single time*. See Exhibit 15. This figure was 44% in 2005, 45% in 2006, 44% in 2007 and 49% in 2008. See Exhibits 16, 17, 18, 19, respectively.

84. From 2003 to 2009, the City had approximately 158 establishments holding Class “C” liquor licenses. See Exhibits 14-20. The City did not visit 48 of these establishments (30% of the total), *a single time* in the seven years from 2003 to 2009. See Exhibits 14-20. The City visited another 11 establishments only one time during this seven year period. See Exhibits 14-20.

85. Without clear standards and approximately equal policing of establishments, there is too much discretion left to officers to target certain establishments, including The Summit. See Exhibit 9 at pg. 27, lines 1-4.

86. The Police Department admits the City is targeting certain establishments. See Exhibit 9 at pg. 28, lines 19-23.

87. By impermissibly targeting only certain establishments – including The Summit – for enforcement the City has violated Plaintiffs’ substantive due process rights.

***F. Declaratory Judgment that Resolution 09-38 is Void for being Unconstitutional as Applied***

**1. The Numerator of the PAULA Ratio is Inaccurate**

88. Plaintiffs incorporate paragraphs 1 through 87, as applicable.

89. In Resolution 09-38 the numerator in the PAULA Ratio is supposed to be “[c]itations issued *on the premises* for PAULA which indicate that the licensee or permittee knows that such activity is taking place *on the premises* and does not have measures in place to adequately control access of persons under legal age to alcohol.” See Exhibit 6.

90. Despite the fact that Resolution 09-38 expressly requires citations on the premises, the City has used information that may have occurred outside the premises. See

Exhibit 10, pg. 3 (stating “Statistics were calculated by querying databases for the address, 10 S Clinton St. Some of these events possibly occurred outside the establishment.”)

91. The PAULA Ratio, therefore, is unconstitutional as applied because the numerator includes citations for violations that may not have occurred “on the premises” at The Summit as mandated by Resolution 09-38.

## **2. The Denominator of the PAULA Ratio is Inaccurate**

92. Plaintiffs incorporate paragraphs 1 through 91, as applicable.

93. The City admits that police officers are sometimes present in an establishment but do not record their “visit” because they use the terms “visit” and “bar check” interchangeably. *See* Exhibit 9 at pg. 19, lines 12 – 17 and pg. 34, lines 8 – 20.

94. The City also admits that sometimes the “visits” are miscoded, and the City only finds out about a mis-coding if an establishment informs the Police Department of the miscoding. *See* Exhibit 9 at pg. 20, lines 13 – 24.

95. The PAULA Ratio is unconstitutional as applied because the denominator does not include all Police Department “visits” to The Summit.

## ***G. Declaratory Judgment that Resolution 09-38 is Unconstitutional Because it Punishes Plaintiffs Retroactively***

96. Plaintiffs incorporate paragraphs 1 through 95, as applicable.

97. A statute or resolution is presumed to apply prospectively when a change in law is substantive.

98. Resolution 09-38 was adopted February 10, 2009 and it applies to all license renewal applications after July 1, 2009. *See* Exhibit 6.

99. Resolution 09-38 requires the Police Department to consider the twelve months preceding an application for renewal for purposes of calculating the applicant's PAULA Ratio. *See* Exhibit 6.

100. Resolution 09-38 thus retroactively assess and punishes establishments for conduct occurring before the City announced and implemented the substantive change.

101. PAULA was an offense prior to February 10, 2009, yet a City licensee had no notice prior to that date that past PAULA citations (not convictions) issued in (or possibly outside) their establishments would be later used against them to deny their liquor license renewal application.

102. The Summit's PAULA Ratio is calculated based upon data for the twelve month period preceding the date of application, October 30, 2008 through October 29, 2009. *See* Exhibit 10. The PAULA Ratio thus includes over three months of data for The Summit before the City Council adopted the new policy (October 30, 2008, through February 10, 2009).

103. By applying Resolution No. 09-38 in an *ex post facto* manner the City has violated Plaintiffs' due process rights.

***H. Declaratory Judgment that the City's Enforcement of Resolution 09-38 is Arbitrary, Capricious and/or Unreasonable.***

104. Plaintiffs incorporate paragraphs 1 through 103, as applicable.

105. Resolution 09-38 re-defines "a person of good moral character" as an applicant with a PAULA Ratio less than the 1.0 with at least 18 visits. *See* Exhibit 6.

106. The City acknowledges that the PAULA Ratio of 1.0 and, potentially, the 18 "visit" minimum cutoff were arbitrarily selected. *See* Exhibit 9 at pg. 50, lines 2 – 3 and pg. 26, lines 5 – 6.

107. The PAULA Ratio used by the City fails to take into account the following relevant considerations:

- A. The number of officers involved in the “visit”;
- B. An establishment’s capacity;
- C. The day of the visit;
- D. The duration of the visit; and
- E. The number of patrons the officers ask for identification during a visit.

108. The City has arbitrarily, capriciously and/or unreasonably enforced Resolution No. 09-98 against the Plaintiffs.

**COUNT II – THE CITY HAS VIOLATED PLAINTIFFS’ PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS.**

109. Plaintiffs incorporate paragraphs 1 through 108, as applicable.

110. For the reasons outlined above, the City has violated Plaintiffs’ procedural and substantive due process rights.

111. The City’s conduct was a proximate cause of the Plaintiffs’ damage.

112. The amount of damage sustained by Plaintiffs meets the jurisdictional limits of this Court.

**COMMON REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs The Summit Restaurant & Bar, Inc. and Mike Porter respectfully pray that the Court award judgment against the City of Iowa City as follows:

A. That this Court find that enforcements of the City or any of its subdivisions or administrative departments, agents, officials of City Resolution 09-38 would impose irreparable harm or injury or the threat of such irreparable harm or injury upon the Plaintiffs, arising from a violation of the Plaintiffs’ rights under the United States Constitution and federal law, the Iowa Constitution and state law, and that the Court declare such resolutions and/or ordinances unconstitutional;

B. That this Court temporarily, preliminarily and permanently restrain and enjoin the City of Iowa City from enforcing the unconstitutional Resolution 09-38, from denying The Summit's application for a renewal of its liquor license, and from enforcing rules, resolutions, regulations or ordinances resulting in irreparable harm and damages to Plaintiffs;

C. For damages in an amount to be proved at trial for arbitrary, capricious and/or unreasonable enactment and enforcement of rules, regulations and ordinances designed to unconstitutionally deprive Plaintiffs of their rights;

D. Judgment against the City in a fair and reasonable monetary amount to be determined by the trier of fact, along with attorney fees as provided under federal and/or state law, interest as provided by law and the cost of this action;

E. For lost profits and/or earnings;

G. For incidental and consequential damages to be determined at trial;

H. For exemplary and/or punitive damages; and

I. For such other and further relief as this Court deems appropriate.

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