

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

FILED  
2014 APR 9 11 31 AM '14  
FILED  
2014 APR -9 11 31 AM '14

JAMES NUCCIO, GABRIEL WIESEN, )  
and AFTER HOURS PIZZA, LLC, an )  
Illinois Limited Liability Company, )  
d/b/a BEAVERS DONUTS, )

Plaintiffs, )

v. )

Court No: 12 CH 30062

CITY OF EVANSTON, a municipal )  
corporation, )

Defendant. )

**DEFENDANT CITY OF EVANSTON'S ANSWER AND AFFIRMATIVE DEFENSES  
TO PLAINTIFFS' SECOND AMENDED COMPLAINT**

Now Comes Defendant City of Evanston ("Evanston"), by and through its attorneys, City of Evanston Law Department, and for its Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint, states as follows:

**Introduction**

1. This civil rights lawsuit seeks to vindicate entrepreneurs' rights to earn an honest living free from anticompetitive, arbitrary, and irrational government regulation. Plaintiffs James Nuccio, Gabriel Wiesen, and After Hours Pizza LLC (d/b/a Beavers Coffee & Donuts) want to serve coffee and gourmet donuts to the public from their food truck in the City of Evanston. Plaintiffs are legally barred from doing so, however, for just one reason: Evanston City Code § 8-23-1 prohibits anyone who does not own a brick-and-mortar restaurant in Evanston from operating a food truck there.

**ANSWER:** Evanston states that Plaintiffs' lawsuit speaks for itself, so no response is needed to the conclusory allegations contained in the first two sentences of Paragraph 1. To the extent that an answer is required to these allegations, Evanston denies the same and demands strict proof thereof. Concerning the allegations contained in the last sentence of Paragraph 1, Evanston

states that City Code § 8-23-1 speaks for itself and is the best evidence of its content, and on that basis denies the remaining allegations contained in the last sentence of Paragraph 1 and demands strict proof thereof.

2. Section 8-23-1 of the City's mobile food vehicle ordinance serves no health or safety concern; rather, it is a special law that exists only to protect established restaurants from competition.

**ANSWER:** Evanston denies the allegations contained in Paragraph 2.

3. The City's unequal treatment of people who are not licensed food establishment owners deprives Plaintiffs of their rights to due process of law and equal protection.

**ANSWER:** Evanston denies the allegations contained in Paragraph 3.

#### Parties

4. Plaintiff James Nuccio is a resident of Cook County, Illinois.

**ANSWER:** Upon information and belief, Evanston admits the allegations contained in Paragraph 4.

5. Plaintiff Gabriel Wiesen is a resident of Cook County, Illinois.

**ANSWER:** Upon information and belief, Evanston admits the allegations contained in Paragraph 5.

6. Plaintiff After Hours Pizza LLC d/b/a Beavers Donuts is an Illinois limited-liability company co-owned by Plaintiffs Nuccio and Wiesen, based in Cook County, Illinois.

**ANSWER:** Upon information and belief, Evanston admits that After Hours Pizza d/b/a Beavers Donuts is an Illinois limited-liability company, but it lacks sufficient information to admit or deny the remaining allegations contained in Paragraph 6.

7. Defendant City of Evanston (the "City") is an Illinois municipal corporation.

**ANSWER:** Evanston admits the allegations contained in Paragraph 7.

**Factual Allegations**

**Evanston's Mobile Food Vendor Ordinance**

8. The Evanston City Code (the "Code") regulates the operation of a mobile food vehicle, defined as a "commercially manufactured, motorized mobile food unit in which ready-to-eat food is cooked, wrapped, packaged, processed, or portioned for service, sale or distribution." Evanston City Code § 8-23-1.

**ANSWER:** Evanston states that City Code § 8-23-1 speaks for itself and is the best evidence of its content. To the extent that an answer is required to the allegations contained in Paragraph 8, Evanston admits.

9. The Code requires that anyone who seeks to operate a mobile food vehicle in Evanston obtain a license from the City. Evanston City Code § 8-23-2.

**ANSWER:** Evanston states that City Code § 8-23-2 speaks for itself and is the best evidence of its content. To the extent that an answer is required to the allegations contained in Paragraph 9, Evanston admits.

10. The Code imposes numerous requirements on mobile-food-vehicle operators, some of which are related to health and safety.

**ANSWER:** Evanston states that Title 8 Chapter 23 of the City Code contains the requirements for mobile food vehicles and its vendors to operate in Evanston. Further answering, Evanston states that the requirements contained in Title 8 Chapter 23 of the City Code speaks for themselves, and such *requirements are all related* to Evanston's home rule authority and Evanston's powers to protect the public health, safety, and welfare of its citizens. To the extent that an answer is required to the allegations contained in Paragraph 10, Evanston admits that Title 8 Chapter 23 of the City Code contains requirements for mobile food vehicle vendors,

which are related to health and safety, but it denies the remaining allegations contained therein.

11. For example, applicants for a mobile-food-vehicle license must describe their food-preparation methods. Evanston City Code § 8-23-2.

**ANSWER:** Evanston states that City Code § 8-23-2(B)(3) speaks for itself and is the best evidence of its content. That section of the City Code provides in relevant part that an application for a mobile food vehicle license shall include “[a] description of the preparation methods and food product offered for sale...” To the extent that an answer is required to the allegations contained in Paragraph 11, Evanston admits.

12. The Code also requires food vehicle operators to submit to "such inspections as may be necessary to ensure all mobile food vehicles are kept in a safe and sanitary condition." Evanston City Code § 8-23-5.

**ANSWER:** Evanston states that City Code § 8-23-5 speaks for itself and is the best evidence of its content, and on that basis denies the allegations contained in Paragraph 12 to the extent those allegations are inconsistent with the City Code.

13. The Code also requires that all "food storage, preparation and distribution of food, and vehicle equipment ... meet applicable Illinois Department of Health Standards and requirements, as well as standards to be determined by the City Manager or his/her designee," and it includes detailed requirements regarding handling of waste liquids, garbage, litter, and refuse. Evanston City Code § 8-23-5.

**ANSWER:** Evanston states that City Code § 8-23-5 speaks for itself and is the best evidence of its content, and on that basis denies the allegations contained in Paragraph 13 to the extent those allegations are inconsistent with the City Code.

14. In addition to those regulations related to health and safety - which are not the subject of this Complaint - the Code also restricts who can own and operate a food truck: It decrees that a "mobile food vehicle must be owned and operated by the owner or agent of a licensed food establishment in the City, and must be affiliated with that establishment." Evanston City Code § 8-23-1.

**ANSWER:** Evanston states that City Code § 8-23-1 speaks for itself and is the best evidence of its contents, and on that basis denies the allegations contained in Paragraph 14. Further answering, Evanston denies the allegations contained in Paragraph 14 since Plaintiffs' Second Amended Complaint is a direct challenge to a home rule municipality's ability to enact legislation that protects the public health, safety, and welfare of its citizens.

15. The Code also restricts where a food truck may operate: It prohibits a food truck from operating within 100 feet of a licensed food establishment unless (1) the food truck is "affiliated" with the licensed food establishment, or (2) the food truck has the consent of the food establishment's owner but did not pay to receive such consent. Evanston City Code § 8-23-3(C).

**ANSWER:** Evanston states that City Code § 8-23-3(C) speaks for itself and is the best evidence of its content, and on that basis denies the allegations contained in Paragraph 15.

16. The "owner or agent" requirement of Evanston City Code § 8-23-1 and the 100-foot proximity ban of Evanston City Code § 8-23-3(C) were included in Evanston's mobile food vendor ordinance for the sole purpose of protecting Evanston brick-and-mortar food establishments from competition.

**ANSWER:** Evanston denies the allegations contained in Paragraph 16.

17. Indeed, Evanston Alderman Melissa Wynne, who voted in favor of the ordinance, has stated that these provisions were included in the ordinance because the City Council "wanted to make sure we didn't cannibalize our own restaurant community we have here."

**ANSWER:** Because Plaintiffs do not reference a date or source for the comments, Evanston lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 and therefore denies the same.

**Beavers Coffee & Donuts**

18. Plaintiffs James Nuccio and Gabriel Wiesen (through their company, Plaintiff After Hours Pizza LLC) operate Beavers Coffee & Donuts, a food truck that serves gourmet donuts and coffee, which are prepared on board the truck.

**ANSWER:** Evanston lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 and therefore denies those allegations. Specifically, the averment of “gourmet” is conclusory and irrelevant to the subject matter of this complaint.

19. Plaintiffs operate their business legally outside of Evanston. For example, they became the first food truck licensed to operate in Glenview, Illinois on December 9, 2011, at that village's invitation.

**ANSWER:** Evanston lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 and therefore denies those allegations. Answering further, allegations concerning Plaintiffs’ truck’s activities outside of Evanston are immaterial and irrelevant.

20. Plaintiffs have also operated their business legally within Evanston on a limited, temporary basis. For example, they received a temporary food vending license to operate their food truck at Northwestern University's "Dillo Day," held on Memorial Day weekend in 2012.

**ANSWER:** Evanston states that Plaintiffs have the ability to operate in its municipality as a temporary food establishment with the requisite license as provided in Title 8 Chapter 6 of the City Code. Upon information and belief, Evanston states that Plaintiffs applied for a temporary food establishment license for “Dillo Day” at Northwestern University in 2012 and it is looking into whether Plaintiffs’ application was approved. Therefore on that basis, Evanston currently lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 and it denies the same.

21. Plaintiffs also prepare and sell coffee and donuts legally at a fixed location in Chicago's French Market, which has been licensed and inspected by the City of Chicago Department of Public Health.

**ANSWER:** Evanston lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21 and therefore denies those allegations. Answering further, allegations concerning Plaintiffs' truck's activities outside of Evanston are immaterial and irrelevant.

22. Plaintiffs' preparation, storage and distribution of their coffee and donuts meet or exceed applicable Illinois Department of Health Standards and Requirements, and Plaintiffs are willing to submit to an inspection of their food truck by the Evanston City Manager at any time.

**ANSWER:** Evanston lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 22 and therefore denies those allegations.

23. Plaintiffs have never been the subject of any complaints or citations for violations of state or local laws or regulations, either in their food truck or at their French Market location.

**ANSWER:** Evanston lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 23 and therefore denies those allegations. Answering further, allegations concerning Plaintiffs' truck's activities outside of Evanston and complaint/citation history about the same are immaterial and irrelevant.

24. On March 22, 2013, Plaintiffs submitted an application to the City of Evanston for a mobile food vehicle license, using an application form provided by the City.

**ANSWER:** Evanston admits the allegations contained in Paragraph 24.

25. In support of their application, Plaintiffs submitted, among other information, detailed diagrams and photographs of Plaintiffs' food truck, specifications for Plaintiffs' equipment, information regarding the food Plaintiffs would sell, and proof that Plaintiffs satisfy the Code's insurance requirements.

**ANSWER:** Evanston states that Plaintiffs' mobile food vehicle vendor license application and

the documents attached thereto, instruments in writing, speak for themselves and are the best evidence of their contents, and on that basis denies the allegations contained in Paragraph 25.

26. Where the City's application form requested "Name and License Number of Evanston Food Establishment that Operates the Vehicle," Plaintiffs entered "NIA" because Plaintiffs are not the owners or agents of an "Evanston Food Establishment."

**ANSWER:** Evanston states that Plaintiffs' mobile food vehicle vendor license application, an instrument in writing, speaks for itself and is the best evidence of its contents, and on that basis denies the allegations contained in Paragraph 26.

27. On or about April 29, 2013, Carl Caneva, Assistant Director of the City of Evanston Department of Public Health, issued a letter to Plaintiffs stating that the Health Department had "performed a review" of their application and that the application "cannot be approved" because Plaintiffs did not "list any affiliations with a Food Establishment licensed by the City of Evanston." The letter stated that "[u]ntil [that] information is received the Health Department will be unable to approve the application."

**ANSWER:** Evanston admits that Carl Caneva, Assistant Director of Evanston's Health Department, sent a letter dated April 29, 2013, to Plaintiff Gabriel Wiesen. Mr. Caneva's April 29, 2013 letter, an instrument in writing, speaks for itself and is the best evidence of its contents, and on that basis denies the allegations contained in Paragraph 27 to the extent those allegations are inconsistent with that document..

28. As the City's letter indicates, Plaintiffs satisfy all City requirements to be licensed to operate in Evanston except that they are not owners or agents of a licensed food establishment in Evanston.

**ANSWER:** Evanston states that Mr. Caneva's April 29, 2013 letter, an instrument in writing, speaks for itself and is the best evidence of its contents, and on that basis denies the allegations contained in Paragraph 28 to the extent those allegations are inconsistent with that document.



29. Plaintiffs want to operate their food truck in the City of Evanston, as they requested in their license application, and, if granted a license, would do so.

**ANSWER:** Evanston lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29, including allegations concerning Plaintiffs' "wants" and what they would do if granted a license, and therefore denies those allegations.

**Harm to Plaintiffs**

30. But for the provision of Evanston City Code § 8-23-1 restricting ownership and operation of food trucks to owners and agents of "licensed food establishment[s]," Plaintiffs are ready, willing, and able to operate their food truck in full compliance with the law.

**ANSWER:** Evanston states that the allegations contained in Paragraph 30 ("*But for the provision of Evanston City Code 8-23-1 restricting ownership and operation of food trucks to owners and agents of 'licensed food establishment[s]...;'*" and "Plaintiffs are ready, willing, and able to operate their food truck in *full compliance* with the law") contain legal conclusions to which an answer is not required. To the extent that an answer is required, Evanston denies the allegations contained in Paragraph 30 and demand strict proof thereof.

31. The City's mobile-food-vehicle ordinance therefore harms Plaintiff by preventing them from engaging in their occupation and operating their business in Evanston.

**ANSWER:** Evanston denies the allegations contained in Paragraph 31. Answering further, there are no specific averments regarding what purported "harm" exists. Therefore, this conclusory allegation should be stricken.

**COUNT I- VIOLATION OF SUBSTANTIVE DUE PROCESS**  
**(ILLINOIS CONSTITUTION ARTICLE I, SECTION 2)**

32. Plaintiffs reallege Paragraphs 1 through 31 of this Complaint as though fully set forth herein.

**ANSWER:** Evanston restates its answers to the allegations contained in Paragraphs 1-31 as

though fully set forth herein.

33. Article I, Section 2 of the Illinois Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

**ANSWER:** Evanston states that Article I, Section 2 of the Illinois Constitution speaks for itself and is the best evidence of its content, and on that basis denies the allegations contained in Paragraph 33 to the extent those allegations are inconsistent with that provision of the Illinois Constitution. To the extent Paragraph 33 purports to be a conclusion of law applicable to the allegations pled by Plaintiffs, Evanston denies the same.

34. The Due Process Clause of the Illinois Constitution protects the right of Illinoisans to pursue legitimate occupations, subject only to regulations that are rationally related to the public's health, safety, or welfare.

**ANSWER:** Evanston admits that Plaintiffs' substantive due process claim challenging Evanston's ordinance at issue will be examined by the Court under the rational basis standard. Concerning the remaining allegations in Paragraph 34, Evanston denies said allegations since they contain Plaintiffs' interpretation of the Due Process Clause of the Illinois Constitution and what said law purports to protect.

35. Accordingly, the City of Evanston's power to regulate the use of its streets under its home-rule authority and police powers does not entitle it to enact regulations that bear no relationship to the public's health, safety, or welfare.

**ANSWER:** Evanston states that Paragraph 35 contains legal conclusions to which no answers are required. To the extent that an answer is required, Evanston denies the allegations contained in Paragraph 35.

36. Section 8-23-1 of the Evanston City Code violates Plaintiffs' right to due process of law under the Illinois Constitution both on its face and as applied to the extent that it prohibits them from operating a mobile food vehicle in Evanston because they are not also the owners or agents of a licensed food establishment in Evanston.

**ANSWER:** Evanston denies the allegations contained in Paragraph 36.

37. The "owner or agent" requirement of Evanston City Code Section 8-23-1 is not rationally related to any legitimate government interest and therefore is not a valid exercise of the City's police power to protect the public's health, safety, or welfare.

**ANSWER:** Evanston denies the allegations contained in Paragraph 37.

38. The requirement of Section 8-23-1 that mobile food vehicle operators be owners or agents of licensed food establishments makes mobile food vehicles and the food they serve no safer than they otherwise would be.

**ANSWER:** The allegations contained in Paragraph 38 are vague and contain legal conclusions to which no answers are required. To the extent that an answer is required, Evanston denies the allegations contained in Paragraph 38.

39. Regardless of whether a mobile food vehicle is operated by the owner or agent of a licensed food establishment:

- a. its operators must provide the city with a description of food-preparation methods and submit to "such inspections as may be necessary to ensure [that their] vehicles are kept in a safe and sanitary condition," Evanston City Code §§ 8-23-2, 8-23-5;
- b. all "food storage, preparation and distribution of food, and vehicle equipment ... must meet applicable Illinois Department of Health standard and requirements, as well as standards to be determined by the City Manager and his/her designee," Evanston City Code § 8-23-5;
- c. the vehicle is subject to the same detailed requirements for the handling of waste liquids, garbage, litter, and refuse, see Evanston City Code § 8-23-5; and
- d. its operators must carry insurance with coverage of at least \$1,000,000 per occurrence for any harm to the public, Evanston City Code § 8-23-2(8)(8).

**ANSWER:** Evanston states that Evanston City Code §§ 8-23-2 and 8-23-5 speak for themselves and are the best evidence of the contents, and on that basis denies the allegations contained in

Paragraph 39.

40. Accordingly, requiring food-truck owners to be owners or agents of an Evanston licensed food establishment provides no additional protection for the public's health, safety, or welfare.

**ANSWER:** Evanston states that Paragraph 40 contains legal conclusions to which no answer are required. To the extent that an answer is required, Evanston denies the allegations contained in Paragraph 40.

41. The irrationality and arbitrariness of the ordinance's "owner or agent" requirement are further evinced by the types of businesses that qualify as "licensed food establishments," whose brick-and-mortar operations may not even involve food preparation at all, but whose owners are nonetheless eligible to prepare and serve food from a mobile food vehicle.

**ANSWER:** Evanston states that Paragraph 41 contains legal conclusions to which no answers are required. To the extent that an answer is required, Evanston denies the allegations contained in Paragraph 41.

42. For example, the ordinance would allow the owner or agent of a "market" that sells any food item other than "prepackaged foods that are not potentially hazardous" - such as a gas station that sells milk along with prepackaged candy and snacks - to operate a food truck, even though the owner of such a market may have no experience in food preparation or safety that is relevant to operating a food truck. See Evanston City Code § 8-6-2.

**ANSWER:** Evanston states that the allegations contained in Paragraph 42 concern a vague hypothetical. Therefore, Evanston lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 42 and therefore denies those allegations. Further answering, Evanston states that City Code § 8-6-2 speaks for itself and is the best evidence of its contents, and on that basis denies the allegations contained in Paragraph 42. Answering further, conclusory allegations regarding other businesses are immaterial and

irrelevant to what Plaintiffs do or not do in their business.

43. The ordinance would even allow the owner of a brick-and-mortar business that only sells beverages or that only provides certain items in vending machines to operate a food truck. See Evanston City Code §§ 8-6-2, 8-6-7.

**ANSWER:** Evanston states that the allegations contained in Paragraph 43 concern vague hypotheticals. Therefore, Evanston lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 43 and therefore denies those allegations. Further answering, Evanston states that City Code §§ 8-6-2 and 8-6-7, instruments in writing, speak for themselves and are the best evidence of the contents and, on that basis, denies the allegations contained in Paragraph 43. Answering further, conclusory allegations regarding other businesses (beverage businesses; vending machine businesses) are immaterial and irrelevant to what Plaintiffs do or not do in their business.

44. The ordinance includes no requirement that the owner or agent of a brick-and-mortar restaurant have any experience or knowledge relevant to operating a food truck, let alone experience or knowledge relevant to operating any particular type of food truck.

**ANSWER:** Evanston states that Title 8 Chapter 23 of the City Code, an instrument in writing, speaks for itself and is the best evidence of its contents and, on that basis, denies the allegations contained in Paragraph 44. Answering further, conclusory allegations regarding the purported “food truck experience” of the owner/agent of a brick-and-mortar restaurant are immaterial and irrelevant to what Plaintiffs do or not do in their business.

45. There is no necessary connection between being the owner or agent of a licensed food establishment and having the requisite knowledge or ability to safely operate a mobile food vehicle.

**ANSWER:** Evanston states that Paragraph 45 contains legal conclusions to which no answers are required. To the extent that an answer is required, Evanston denies the allegations contained

in Paragraph 45. Answering further, the conclusory allegation regarding “necessary connection” should be stricken.

46. The ordinance's "owner or agent" requirement is therefore unreasonable and arbitrary.

**ANSWER:** Evanston states that Paragraph 46 contains legal conclusions to which no answers are required. To the extent that an answer is required, Evanston denies the allegations contained in Paragraph 46.

47. The City of Evanston has not identified and cannot identify a rational basis for the "owner or agent" requirement in Section 8-23-1 of the Evanston City Code.

**ANSWER:** Evanston denies the allegations contained in Paragraph 47.

48. In the absence of any rational relationship to the public's health, safety, or welfare, the only purpose of the "owner or agent" requirement is to protect brick-and-mortar food establishments in Evanston from competition.

**ANSWER:** Evanston states that Paragraph 48 contains legal conclusions to which no answers are required. To the extent that an answer is required, Evanston denies the allegations contained in Paragraph 48.

49. Protecting brick-and-mortar food establishments from competition at the expense of mobile food vehicle operators such as Plaintiffs is not a valid exercise of the City's police power to protect the public's health, safety, and welfare.

**ANSWER:** Evanston states that Paragraph 49 contains legal conclusions to which no answers are required. To the extent that an answer is required, Evanston denies the allegations contained in Paragraph 49.

50. The Evanston City Code's "owner or agent" requirement therefore violates the right to due process of law guaranteed by Article I, Section 2 of the Illinois Constitution on its face and as applied to Plaintiffs.

**ANSWER:** Evanston denies the allegations contained in Paragraph 50.

**COUNT II- EQUAL PROTECTION**  
**(ILLINOIS CONSTITUTION ARTICLE I, SECTION 2)**

51. Plaintiffs reallege Paragraphs 1 through 50 of this Complaint as though fully set forth herein.

**ANSWER:** Evanston restates its answers to the allegations contained in Paragraphs 1-50 as though fully set forth herein.

52. The Equal Protection Clause of the Illinois Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

**ANSWER:** Evanston states that the Equal Protection Clause of the Illinois Constitution speaks for itself and is the best evidence of its content, and on that basis, denies the allegations contained in Paragraph 52 to the extent those allegations are inconsistent with that provision of the Illinois Constitution. To the extent Paragraph 52 purports to be a conclusion of law applicable to the allegations pled by Plaintiffs, Evanston denies the same.

53. The Equal Protection Clause of the Illinois Constitution prohibits "the government from according different treatment to persons who have been placed by statute into different classes on the basis of criteria wholly unrelated to the purpose of the legislation." *Jacobson v. Dep't of Public Aid*, 171 Ill. 2d 314, 322 (1996).

**ANSWER:** Evanston states that the Equal Protection Clause of the Illinois Constitution and *Jacobson v. Dep't of Public Aid*, 171 Ill. 2d 314, 322 (1996), instruments in writing, speak for themselves and are the best evidence of their contents and, on that basis, denies the allegations contained in Paragraph 53 to the extent those allegations are inconsistent with that provision of

the Illinois Constitution. To the extent Paragraph 53 purports to be a conclusion of law applicable to the allegations pled by Plaintiffs, Evanston denies the same.

54. The City of Evanston's power to regulate the use of its streets under its home-rule and police powers does not entitle it to engage in irrational discrimination that does not serve the public's health, safety, or welfare.

**ANSWER:** Evanston states that Paragraph 54 contains legal conclusions to which no answer are required. To the extent that an answer is required, Evanston denies the allegations contained in Paragraph 54.

55. Section 8-23-1 of the Evanston City Code violates Plaintiffs' right to equal protection under the Illinois Constitution both on its face and as applied because it bars them from operating a mobile food vehicle based solely on the irrelevant fact that they are not owners or agents of a licensed food establishment in Evanston.

**ANSWER:** Evanston denies the allegations contained in Paragraph 55.

56. People who are not owners or agents of licensed food establishments in Evanston are not less capable of safely operating a mobile food vehicle than people who are owners or agents of licensed food establishments in Evanston.

**ANSWER:** The allegations contained in Paragraph 56 are vague and contain legal conclusions to which no answers are required. To the extent that an answer is required, Evanston denies the allegations contained in Paragraph 56.

57. Accordingly, the two groups are similarly situated, and the ordinance's discrimination against people who are not owners or agents of licensed food establishment does not serve the public's health, safety, or welfare.

**ANSWER:** Evanston states that the allegations contained in Paragraph 57 contain legal conclusions to which no answers are required. To the extent that an answer is required, Evanston denies the allegations contained in Paragraph 57.



58. The City of Evanston has not identified and cannot identify a rational basis for the "owner or agent" requirement in Section 8-23-1 of the Evanston City Code.

**ANSWER:** Evanston denies the allegations contained in Paragraph 58.

59. Indeed, the sole purpose of the "owner or agent" requirement is to protect brick-and-mortar food establishments in Evanston from competition by mobile vendors, including Plaintiffs.

**ANSWER:** Evanston denies the allegations contained in Paragraph 59.

60. The "owner or agent" requirement of Evanston City Code Section 8-23-1 therefore violates the right to equal protection of the law guaranteed by Article I, Section 2 of the Illinois Constitution on its face and as applied to Plaintiffs.

**ANSWER:** Evanston denies the allegations contained in Paragraph 60.

**COUNT III - SPECIAL LEGISLATION**  
**(ILLINOIS CONSTITUTION ARTICLE IV, SECTION 13)**

61. Plaintiffs reallege Paragraphs 1 through 60 of this Complaint as though fully set forth herein.

**ANSWER:** Evanston states that no answer is required to Paragraph 61 since Count III of the Second Amended Complaint was dismissed with prejudice by court order dated March 11, 2014. Therefore, this paragraph should be stricken.

62. Evanston City Code § 8-23-1 constitutes special legislation prohibited by Article IV, Section 13, of the Illinois Constitution because it grants agents and owners of Evanston "licensed food establishment[s]" the exclusive right to operate food trucks in Evanston without any rational relationship to public's health, safety or welfare. Instead, it serves only to protect licensed food establishments from competition, which is not a legitimate governmental purpose.

**ANSWER:** Evanston states that no answer is required to Paragraph 62 since Count III of the Second Amended Complaint was dismissed with prejudice by court order dated March 11, 2014. Therefore, this paragraph should be stricken.

## Affirmative Defenses

### FIRST AFFIRMATIVE DEFENSE – Home Rule Authority

1. Without prejudice to Evanston’s answers previously stated in this matter, the Illinois Supreme Court provides that “[i]f a subject pertains to local government and affairs, and the [Illinois] legislature has not expressly preempted home rule, municipalities may exercise their power.” *Palm v. 2800 Lake Shore Drive Condominium Ass’n*, 988 N.E.2d 75, 82-83 (2013), citing *City of Chicago v. StubHub, Inc.*, 979 N.E.2d 844 (2011).
2. The provisions provided in Evanston’s Code of Ordinances (“City Code”) Title 8 Chapter 23, including § 8-23-1, which concern mobile food vehicle vendors, are a valid exercise of Evanston’s home rule authority.
3. Article VII, § 6 of the Illinois Constitution sets forth the powers of home rule units of government, and Evanston is a home rule unit of government.
4. Namely, that section of the Illinois Constitution provides that a home rule unit 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. art. VII, § 6.
5. The powers of a home rule unit such as Evanston are to be construed liberally pursuant to Article VII, § 6(m) of the Illinois Constitution, and Evanston’s powers as a home rule authority are: “...to be given the broadest powers possible.” *Scadron v. City of Des Plaines*, 153 Ill. 2d 164, 174 (1992).
6. Home rule municipalities, such as Evanston, are constitutionally conferred with tremendous authority and latitude to address local issues and concerns. A city’s power to regulate and license for the protection of public health and safety is drawn directly from

the Constitution, and any such power must be expressly limited by the General Assembly. *See* Ill. Const. art. VII, § 6(i); *Triple A Services, Inc. v. Rice*, 131 Ill. 2d 217, 230 (1989).

7. The Supreme Court affirmed in numerous cases a municipality's power and right to license occupations. The expansive grant of the home rule mandate in Article VII of the Illinois Constitution is "broad and imprecise in order to allow for great flexibility." *City of Evanston v. Create, Inc.*, 85 Ill. 2d 101, 107 (1981).
8. The Supreme Court opined: "[t]he city of Evanston is a densely populated and highly urbanized community... In accordance with the goals attempted to be achieved by the creation of home rule, the local governing body can create an ordinance specifically suited for the unique needs of its residents and is keenly and uniquely aware of the needs of the community it serves." *Create*, 85 Ill. 2d at 113-14.
9. The evidence and record will show that Plaintiffs cannot legitimately challenge, let alone overcome, the Evanston City Council's keen and unique awareness of the needs of the community it serves in enacting § 8-23-1 of the City Code and the other provisions of Title 8 Chapter 23 dealing with mobile food vehicle vendors. *See id.*
10. In *Rice*, 131 Ill. 2d at 233, the Supreme Court established a city's presumptive right to regulate and license mobile food vendors. That case is squarely on all fours with the facts as alleged in Plaintiffs' Second Amended Complaint since the broad authority of a home rule municipality, like Evanston, to license Plaintiffs' activities here is uncontroverted.
11. The evidence and record will show that Evanston's home rule mandate conclusively trumps Plaintiffs' purported constitutional claims.

SECOND AFFIRMATIVE DEFENSE – Ordinance is Rationally Related to a Legitimate Legislative Purpose

1. Without prejudice to Evanston’s answers and affirmative defenses previously stated in this matter, Plaintiffs’ constitutional attacks on Evanston’s mobile food vehicle vendor ordinance should be examined by the Court under the “rational basis” standard.
2. In construing the validity of a municipal ordinance, the same rules are applied as those which govern the construction of statutes, namely, that statutes are presumed constitutional and the burden of rebutting that presumption is on the party challenging the validity of the statute to clearly demonstrate a constitutional violation. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 306 (2008).
3. The court has a duty to uphold the constitutionality of a statute/ordinance when reasonably possible, and if a statute’s/ordinance’s construction is doubtful, the court will resolve the doubt in favor of the statute’s/ordinance’s validity. *Napleton*, 229 Ill. 2d at 306-07, citing *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 291 (2003).
4. An ordinance will be upheld if it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable. *Napleton*, 229 Ill. 2d at 307, citing *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 122 (2004).
5. Plaintiffs’ constitutional attacks against Evanston’s mobile food vehicle vendor ordinance purport to allege a “class-of-one” claim.
6. To state a cause of action under this theory, Plaintiffs must allege that they were treated differently from others who were similarly situated and that there is no rational basis for the difference in treatment. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, (2000); *In re Adoption of K.L.P.*, 198 Ill. 2d 448, 466 (2002); *Jacobson v. Department of Public Aid*, 171 Ill. 2d 314, 322 (1996).

7. Plaintiffs, as the parties attacking Evanston's mobile food vehicle vendor ordinance, bear the burden of overcoming that presumption by means of clear and convincing evidence. *See Village of Niles v. City of Chicago*, 201 Ill. App. 3d 651, 662 (1st Dist. 1990), *citing City of Evanston v. Ridgeview House, Inc.*, 64 Ill. 2d 40, 66 (1976).
8. If the fundamental challenge is that Plaintiffs were unfairly discriminated against in terms of their classification under the law, the standard of reviewing the legislation is whether any set of facts may reasonably be conceived which would justify the classification. *Niles*, 201 Ill. App. 3d at 662 (emphasis added).
9. The evidence and record will ultimately show that Evanston City Code § 8-23-1 bears a rational relationship to Evanston's legitimate legislative purpose to protect the public health, safety, and welfare of its citizens.
10. For example, Evanston City Code § 8-23-1 is aimed at ensuring proper disposal of food waste, ease of prevention of food borne illness, preventing mobile food vehicle vendor traffic accidents, and to protect the public right-of-ways, which are limited in a municipality the size of Evanston.
11. This is not an exhaustive list and Evanston reserves the right to argue and prove other public health, safety, and welfare arguments that bear a rational relationship to the ordinance at issue.
12. Evanston City Code § 8-23-1 is not an arbitrary and capricious exercise of Evanston's home rule powers.
13. Plaintiffs will not be able to meet their burden of overcoming the presumptively valid Evanston mobile food vehicle vendor ordinance, and they will be unable to provide clear and convincing evidence to survive the rational basis standard of review.

### THIRD AFFIRMATIVE DEFENSE – Illinois Municipal Code / Police Power

1. Without prejudice to Evanston’s answers and affirmative defenses previously stated in this matter, Evanston City Code § 8-23-1 is valid exercise of Evanston’s police powers under the Illinois Municipal Code.
2. The Illinois Municipal Code provides: that a municipality may license, tax, regulate or prohibit... transient vendors of merchandise... and may license, tax, and regulate all places of eating or amusement. 65 ILCS 5/11-42-5.
3. Evanston’s police power authorizes it to adopt ordinances and to promulgate rules and regulations that pertain to its government and affairs and that protect the public health, safety, and welfare of its citizens.
4. Evanston’s police powers and its authority under the Illinois Municipal Code to regulate Plaintiffs’ business is an alternate source of authority for Evanston City Code § 8-23-1. This authority is independent and complementary to Evanston’s home rule authority.
5. Evanston has the power to regulate or prohibit the use of its streets for private gain. *See Triple A Services v. Rice*, 131 Ill. 2d 217, 229 (1989).
6. Rational restrictions on mobile food vendors can be related to legitimate public safety concerns. *Id.* at 230 (citation omitted).
7. Evanston City Code § 8-23-1 is rationally related to protect the public safety of its citizens.
8. For example, Evanston City Code § 8-23-1 is aimed at ensuring proper disposal of food waste, ease of prevention of food borne illness, preventing mobile food vehicle vendor traffic accidents, and to protect the public right-of-ways, which are limited in a municipality the size of Evanston.

9. This is not an exhaustive list and Evanston reserves the right to argue and prove other public health, safety, and welfare arguments that bear a rational relationship to the ordinance at issue.
10. The evidence will ultimately show that Evanston City Code § 8-23-1 must be liberally construed in Evanston's favor.

#### FOURTH AFFIRMATIVE DEFENSE – No Harm

1. Without prejudice to Evanston's answers and affirmative defenses previously stated in this matter, Plaintiffs suffer no legally cognizable injury or harm as a result of the requirements provided in Evanston City Code § 8-23-1.
2. Plaintiffs are able to operate its mobile food vehicle in Evanston as a temporary food establishment with the requisite license as provided in Title 8 Chapter 6 of the Evanston City Code.
3. Plaintiffs allege in Paragraph 20 of the Second Amended Complaint that they have indeed operated their mobile food vehicle on a temporary basis on a certain occasion in Evanston.
4. In addition to Plaintiffs' allegations concerning operating its mobile food vehicle on a temporary basis at Northwestern University in Evanston, Plaintiffs are also able to operate its business on a temporary basis at Evanston's Farmers Markets for example.
5. To date, there are several Farmers Markets that operate in Evanston on specific timeframes and on a seasonable basis.
6. Upon information and belief, Plaintiffs apparently refuse to operate their mobile food vehicle vendor business at the Farmers Markets in Evanston or at any other establishments in Evanston on a temporary basis, other than what they have alleged in Paragraph 20 of the Second Amended Complaint.

7. Plaintiffs do not have an inherent right to operate their mobile food vehicle on Evanston's streets and right-of-ways for business purposes. *See Triple A Servs., Inc. v. Rice*, 131 Ill. 2d 217, 237 (1989).
8. Accordingly, Plaintiffs are not barred from doing business in Evanston and they have not suffered a legally cognizable injury as a result of Evanston City Code § 8-23-1.
9. Plaintiffs lack standing to challenge Evanston City Code § 8-23-1 and essentially are utilizing the allegations in their Second Amended Complaint to seek an improper advisory opinion from this Court.

**Defendant City of Evanston reserves the right to allege additional affirmative defenses as discovery ripens.**

Dated: April 9, 2014

Respectfully Submitted,  
CITY OF EVANSTON

By:   
One of Its Attorneys

Grant Farrar, Corporation Counsel  
Henry J. Ford, Jr., Assistant City Attorney  
Ghazal Sharifi, Assistant City Attorney  
Evanston Law Department  
2100 Ridge Ave., Suite 4400  
Evanston, IL 60201  
(847) 866-2937  
Attorney No. 46996