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

JAMES NUCCIO; GABRIEL WIESEN and AFTER HOURS PIZZA LLC, an Illinois limited liability company, d/b/a BEAVERS DONUTS,	)	Case No. 12 CH 30062
Plaintiffs,	)	Judge Jean Prendergast Rooney
v.	)	
CITY OF EVANSTON, a municipal corporation,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S § 2-615 MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Introduction

Plaintiffs challenge a provision of Defendant City of Evanston's mobile food vehicle ordinance that denies a license to operate a food truck to anyone who is not the owner or agent of a "licensed food establishment" in Evanston as a violation of due process, equal protection, and the constitutional prohibition on special legislation.

Plaintiffs' Second Amended Complaint makes the factual basis for Plaintiffs' claims clear: Plaintiffs allege that, in fact, this restriction provides no benefit to the public's health, safety, or welfare and was enacted for the improper purpose of protecting brick-and-mortar restaurants from competition. Like plaintiffs in other rational basis cases, Plaintiffs are entitled to pursue and present evidence to prove these factual allegations. Accordingly, because Plaintiffs have properly pleaded

claims for relief, they respectfully ask the Court to deny the City's motion to dismiss.

Facts

Plaintiffs' Food-Truck Business

Plaintiffs operate Beavers Donuts, a food truck that serves gourmet coffee and donuts to customers in Chicago and the surrounding area. (Second Am. Compl. ¶¶ 18-20.) They also prepare and sell coffee and donuts at a fixed location in Chicago's French Market, which has been licensed and inspected by the City of Chicago Department of Public Health. (*Id.* ¶ 21.)

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. (*Id.* ¶ 24.) On or about April 29, 2013, the City issued a letter refusing to approve Plaintiffs' application for just one reason: Plaintiffs are not owners or agents of a brick-and-mortar restaurant or other "Food Establishment licensed by the City of Evanston."[1] (*Id.* ¶¶ 27-28.)

The City's Food-Truck Ordinance

In 2010, the Evanston City Council passed a "mobile food vehicle" ordinance, which established a scheme of licensing and regulation for food trucks in Evanston. (*Id.* ¶¶ 8-9.) The ordinance imposes numerous requirements on food-truck operators, some of which are related to health and safety. (*Id.* ¶ 10.) For example,

[1] Evanston City Code § 8-6-2 defines a "food establishment" as an "operation that stores, prepares, packages, serves, vends or otherwise provides food for human consumption" – such as a restaurant, caterer, grocery store, vending location, conveyance, food bank, or other institution – "that relinquishes possession of food to a consumer directly, or indirectly through a delivery service."

license applicants must describe their food-preparation methods and must submit to "such inspections as may be necessary to ensure [that their] vehicles are kept in a safe and sanitary condition." (*Id.* ¶¶ 11-12.) The ordinance 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 and his/her designee." (*Id.* ¶ 13.) It also includes detailed requirements for the handling of waste liquids, garbage, litter, and refuse. (*Id.*)

In addition to those regulations related to health and safety – which Plaintiffs do not challenge – the ordinance also restricts *who* can operate a food truck in Evanston. Section 8-23-1 decrees that a "mobile food vehicle must be owned and operated by the owner or agent of a brick-and-mortar food establishment in the City, and must be affiliated with that establishment." (*Id.* ¶ 14.) It is that "owner or agent" requirement alone that Plaintiffs challenge in this lawsuit.

Lack of Health, Safety, or Welfare Benefit from "Owner or Agent" Requirement

The "owner or agent" requirement makes mobile food vehicles and the food they serve no safer than they otherwise would be under ordinance's provisions that actually address health and safety. (*Id.* ¶¶ 38-40.) Indeed, the "owner or agent" requirement allows the City to give licenses to individuals who do not necessarily have any experience or knowledge relevant to safely preparing food or operating a food truck, let alone experience or knowledge relevant to operating any particular type of food truck. (*Id.* ¶¶ 44-45.) For example, the City can grant a license to the

owner or agent of a gas station that sells milk along with prepackaged candy and snacks, a business that only sells beverages, or a business that only sells food in vending machines. (*Id.* ¶¶ 41-43.)

In fact, the Evanston City Council did not enact the "owner or agent" requirement to serve a health or safety purpose. (*Id.* ¶ 16.) Rather, the City's sole purpose in enacting the "owner or agent" requirement was to protect brick-and-mortar restaurants in Evanston from food-truck competition. (*Id.*) An Evanston Alderman who voted for the ordinance, Melissa Wynne, has admitted as much, stating that the City Council included the "owner or agent" requirement – along with a provision banning food trucks within 100 feet of a licensed food establishment – to "make sure we didn't cannibalize our own restaurant community we have here." (*Id.* ¶¶ 15-17.)

Procedural History

Plaintiffs filed their Second Amended Complaint on October 22, 2013, after the Court dismissed their Amended Verified Complaint on the basis that it contained "inadequate facts."

In its motion to dismiss, the City incorrectly asserts that the Second Amended Complaint "contains only two (2) new allegations of fact," citing paragraphs 16 and 17. (Motion at 3.) To the contrary, Count I of Plaintiff's Second Amended Complaint includes numerous additional factual allegations, which are, in turn, incorporated by reference in Counts II and III. These include paragraphs 38 through 45, 47, 48, 56, and 59.

Legal Standard Under § 2-615

"A cause of action should not be dismissed under section 2-615 unless it is clear that no set of facts can be proved under the pleadings that would entitle the plaintiff[s] to recover." *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 392 (2008). In ruling on a motion to dismiss, the Court may consider "facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record." *Newman, Raiz & Shelmadine, LLC v. Brown*, 394 Ill. App. 3d 602, 605 (1st Dist. 2009). The Court must accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Id.*

The City asserts that Plaintiffs "cannot muster clear and convincing evidence" to support their claims (Motion at 9), but of course Plaintiffs are not required to "muster" any evidence at the pleading stage. "At this stage, the plaintiff is not required to prove his or her case; rather, the plaintiff need only allege sufficient facts to state all of the elements of the cause of action." *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (1st Dist. 2008).

Argument

Plaintiff has alleged facts that, if proven, would establish that the "owner or agent" rule of Evanston's mobile food vehicle ordinance violates the due process and equal protection guarantees of the Illinois Constitution, as well as its prohibition on special legislation. Accordingly, the Court should deny the City's motion to dismiss.

I. Plaintiffs have alleged facts that, if proven, demonstrate that Evanston's "owner or agent" rule violates substantive due process.

Contrary to the City's argument in its motion to dismiss, Count I of Plaintiffs' Second Amended Complaint alleges facts that, if proven, establish a violation of substantive due process under the rational basis test.

A. The rational-basis test considers whether a challenged provision bears a rational relationship to a legitimate governmental purpose.

Under the rational basis test, a party challenging an ordinance for violating substantive due process must show that the ordinance bears no rational relationship to a legitimate governmental purpose – i.e., that it is not rationally related to protecting the public's health, safety, or welfare. *See Chicago Title & Trust Co. v. Village of Lombard*, 19 Ill. 2d 98, 101 (1960). A plaintiff therefore states a cause of action under the rational basis test if he or she alleges facts that, if proven, would rebut the law's presumption of validity by showing that the law is not rationally related to a legitimate governmental purpose. *See Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 389, 393-409 (1997) (tort-reform act failed rational basis test based on plaintiffs' evidence refuting purported bases for act).

B. The Illinois Supreme Court strikes down laws that do not bear a rational relationship to the public's health, safety, or welfare.

Numerous Illinois Supreme Court decisions illustrate how courts should consider substantive due process claims under the rational basis test. The Court has consistently applied rational basis analysis to strike down laws that did not serve the public's health, safety, or welfare and instead served only to protect established businesses from competition.

For example, in *Chicago Title & Trust Co. v. Village of Lombard*, the Court reviewed a village ordinance that prohibited a gas station from locating within 650 feet of an existing gas station. 19 Ill. 2d 98 (1960). After the village denied an applicant permission to build a gas station on a piece of property within 650 feet of an existing station, he and his title company sued, alleging that the 650-foot rule served no health or safety purpose. *Id.* at 100-01.

Like the City in this case, the village moved to dismiss the complaint "on the ground that it failed to allege facts sufficient to rebut the presumption of validity," but the trial court denied the motion. *Id.* at 100. At trial, the plaintiffs presented evidence to support their claim. For example, witnesses testified to the lack of any threat to public safety posed by two gas stations located near one another. *Id.* at 102-03. A member of the village trustees also testified that the board considered no facts related to fire hazards in passing the ordinance. *Id.* at 103. Because the evidence at trial negated any health or safety justification for the ordinance, the court struck it down, and the Illinois Supreme Court affirmed. *Id.* at 103-07. The Court observed that if the village were actually motivated by a concern for fire safety, it was "clearly unreasonable" to require 650 feet between gas stations but only 150 feet between a gas station and a hospital or church. *Id.* at 104-05. It also rejected traffic congestion as a justification because "the problems of traffic . . . were not shown to be any different with respect to filling stations than with respect to other businesses." *Id.* at 105. Thus, because the ordinance "ha[d] no rational

connection with the objects of governmental police power" and existed only to limit competition, the Court struck it down. *Id.* at 107.

The Court has also struck down numerous other licensing requirements that had only a protectionist purpose. For example, in *Gholson v. Engle*, the Court struck down a law requiring a funeral director to also be a licensed embalmer; after reviewing the evidence, the Court concluded that no public health considerations justified tying one occupation to the other. 9 Ill. 2d 454, 459-60 (1956). In *Church v. State*, the Court struck down a licensing statute for alarm contractors because it protected established contractors from competition and its requirements were not "calculated to enhance the expertise of prospective licensees." 164 Ill. 2d 153, 169-72 (1995). *Church* followed a long line of decisions striking down licensing laws that protected established plumbers from competition without providing any benefit to the public. *See People v. Johnson*, 68 Ill. 2d 441 (1977); *People v. Masters*, 49 Ill. 2d 224 (1971); *Schroeder v. Binks*, 415 Ill. 192 (1953); *People v. Brown*, 407 Ill. 565 (1950).

C. Plaintiffs have alleged facts that, if proven, would show that the City's "owner or agent" rule bears no rational relationship to the public's health, safety, or welfare and thus violates substantive due process.

Here, Plaintiffs have made sufficient factual allegations to support their claim that the "owner or agent" rule violates substantive due process because it is not rationally related to any legitimate governmental interest. (Second Am. Compl. ¶ 37.) Although the City has not offered any health, safety, or welfare justification

for the "owner or agent" requirement, Plaintiffs have alleged facts that refute any hypothetical health or safety justification.

Plaintiffs allege that the "owner or agent" requirement "makes mobile food vehicles and the food they serve no safer than they otherwise would be" and thus does not serve the public's health, safety, or welfare. (*Id.* ¶¶ 38, 40.) Regardless of whether a mobile food vehicle is operated by the owner or agent of a licensed food establishment, the vehicle and its operators will be subject to the same health and safety requirements, which ensure that the food trucks and the food they serve will be safe and sanitary, ensure that food-truck operators will be financially responsible for any harm they cause, and are enforceable regardless of whether a food-truck operator is the owner or agent of a licensed food establishment. (*Id.* ¶ 39.)

Plaintiffs further allege that the "owner or agent" rule does nothing to ensure that food-truck operators will have the knowledge or ability to operate a food truck safely. (*Id.* ¶ 45.) 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. (*Id.* ¶ 44.) Indeed, the rule allows an owner or agent of a licensed food establishment to operate a food truck even if his or her licensed food establishment does not actually engage in food preparation *at all*. (*Id.* ¶ 41.) For example, the ordinance would allow the owner or agent of a gas station that sells milk along with prepackaged candy and snacks to operate a food truck, even though he or she may have no relevant experience in food preparation or safety. (*Id.* ¶ 42.)

It 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. (*Id.* ¶ 43.) Meanwhile, the law bars otherwise-qualified applicants, such as Plaintiffs, who have extensive experience operating both a food truck and a licensed food establishment outside of Evanston, simply because they do not happen to be owners or agents of a licensed food establishment in Evanston. (*See id.* ¶¶ 18-21, 27-28.) If proven, these facts show that excluding people from the food-truck business for not being owners or agents of a licensed food establishment is arbitrary, unreasonable, and unrelated to the public's health, safety, or welfare.

In the absence of any relationship to the public's health, safety, or welfare, the "owner or agent" requirement only serves to protect brick-and-mortar establishments in Evanston from competition – an illegitimate purpose. *See Brown*, 407 Ill. at 584 (government cannot bestow "special and exclusive . . . favors" on a particular group); *Koos v. Saunders*, 349 Ill. 442, 449 (1932) (government cannot invoke police power "to serve a purely private purpose"). Plaintiff alleges that this was the City's sole purpose for enacting the "owner or agent" requirement. (Second Am. Compl. ¶ 16.) This improper purpose is evidenced by an Evanston City Council member's statement that the City Council included the rule "to make sure we didn't cannibalize our own restaurant community we have here." (*Id.* ¶ 17.)

The City's argument that Plaintiff's allegations are "mere conclusions" (Motion at 8) is incorrect. Plaintiffs' allegations explaining how the "owner or agent" rule does not benefit the public's health and safety are allegations of fact that, if

proven, would establish a violation of substantive due process under the principles the Illinois Supreme Court applied in the cases discussed above. (*See* Second Am. Compl. ¶¶ 38-45, 47, 48, 56, 59.) Plaintiffs' allegations that the "owner or agent" requirement serves to protect Evanston brick-and-mortar restaurants, and that the Evanston City Council enacted the rule for that purpose, are factual allegations that further support Plaintiffs' claim that the law does not serve a legitimate purpose. (*See id.* ¶¶ 16, 17.)

Accordingly, Plaintiffs' allegations are not like those the Court found to be insufficient in *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296 (2008). There, the plaintiff only alleged that the ordinance amendments she challenged were "arbitrary, irrational and capricious" and "passed to satisfy the desire of a few individuals absent benefit to the general public," that "there was no community need" for the amendments she challenged, and that the village took "no, or insufficient, care in planning" them. 229 Ill.2d at 320. Those conclusory allegations left critical questions about the plaintiff's claims unanswered, such as why it was irrational, why it did not benefit the public, why there was "no need," and what "insufficient care" means.

Plaintiffs' Second Amended Complaint, in contrast, gives rise to no similar unanswered questions; the legal and factual bases of Plaintiffs' claims are clear, and they are consistent with the legal and factual bases for the Illinois Supreme Court's decisions striking down statutes and ordinances under the rational basis test.

Accordingly, the Court should deny the City's motion to dismiss Plaintiffs' substantive due process claim.

II. Plaintiffs have stated a claim for violation of equal protection.

Plaintiffs have also stated a claim for violation of equal protection. Under the rational basis test, a party states a claim for a violation of equal protection where it alleges that the government has treated similarly situated people differently and that the different treatment does not serve a legitimate governmental purpose. *See People ex rel. Lumpkin v. Cassidy*, 184 Ill.2d 117, 123-24 (1998).

Here, Plaintiffs have alleged that people who own licensed food establishments in Evanston and people who do not own such establishments are similarly situated inasmuch as neither group is inherently less capable than the other of safely operating a mobile food vehicle. (Second Am. Compl. ¶¶ 56-57.) As discussed above, an owner or agent of a licensed food establishment does not necessarily have any knowledge or abilities relevant to the safe operation of a food truck. (*Id.* ¶¶ 41-45.) On the other hand, an experience food-truck operator who is not an owner or agent of a licensed food establishment in Evanston, such as Plaintiffs, may be fully capable of satisfying the ordinance's health and safety requirements. Accordingly, denying people food-truck licenses simply because they are not owners or agents of a licensed food establishment in Evanston violates their right to equal protection. (*Id.* ¶¶ 56-60.)

The City cites Judge Flynn's ruling in *Burke v. City of Chicago*, No. 12 CH 41235, to argue that brick-and-mortar restaurants and food trucks are not similarly

situated. (Motion at 9.) That argument fails, however, because the relevant comparison in this case is not between brick-and-mortar restaurants and food trucks but between (1) people who are owners or agents of a licensed food establishment in Evanston and (2) people who are not. (*See* Second Am. Compl. ¶¶ 3, 56-57.) The City has not given any reason why it is not arbitrary to treat those two groups differently in deciding who may operate a food truck. In addition, the City's argument fails because whether two groups are similarly situated is a question of fact and thus cannot be resolved on a motion to dismiss. *See Marcavage v. City of Chicago*, 659 F.3d 626, 631-32 (7th Cir. 2011).

III. Plaintiffs have stated a claim for violation of the Illinois Constitution's prohibition of special legislation.

The City's argument that the special legislation clause only applies to state statutes (Motion at 10-11) is incorrect. *See Rothner v. City of Chicago*, 66 Ill. App. 3d 428, 436-37 (1st Dist. 1978) (considering special legislation challenge to city ordinance). The Constitution plainly intends for home rule units to have powers that are no greater than those of the General Assembly. *See* Ill. Const. art. VII, sec. 6 (g), (h), (i) (allowing the General Assembly to limit home rule units' powers); *Triple A Servs., Inc. v. Rice*, 131 Ill. 2d 217, 230 (1989) (home rule units "have the same powers as the sovereign, except where such powers are limited by the General Assembly"). Accordingly, the Court should deny the City's motion with respect to Plaintiffs' special legislation claim.

IV. Neither home rule powers nor the Illinois Municipal Code authorize the City to violate Plaintiffs' constitutional rights.

The City asserts that its home rule powers and police powers under the Illinois Municipal Code trump Plaintiffs' constitutional claims, as though merely invoking these powers makes any ordinance the City passes related to food trucks immune from constitutional challenge. (Motion at 11-14.) But that is not how home rule and police powers work or how the Constitution works.

As discussed above, any law passed under the City's home rule or police powers is subject to constitutional challenge on the basis that it is not rationally related to serving the public's health, safety, or welfare. *See Napleton*, 229 Ill. 2d at 319 (ordinance unconstitutional if it does not "bear[] a rational relationship to a legitimate legislative purpose" or is "arbitrary" or "unreasonable"). The City's mere assertion that a provision is an exercise of its police power is not enough to defeat such a claim; the City "cannot invoke the police power on the pretense of protecting public interest, where the actual objective . . . is an arbitrary interference with private business, or where the legislation imposes unnecessary or unreasonable restrictions upon lawful occupations." *Figura v. Cummins*, 4 Ill. 2d 44, 49 (1954) (striking statute prohibiting processing of metal springs in home because not rationally related to public health, safety, welfare, morals). "The mere fact that [it] has invoked the police power to restrict or prohibit a particular trade is not conclusive that the power was lawfully exercised, and it is the province of the court[s] to determine that issue." *Id.* The City may not restrict individual rights "under the guise of a regulation for the preservation of health when such is clearly

not the object and purpose of the regulation." *N. Ill. Coal Corp. v. Medill*, 397 Ill. 98, 104 (1947); *see also Metro. Trust Co. v. Jones*, 384 Ill. 248, 255 (1943).

The constitutional analysis does not change when a city regulates food trucks or the use of its streets. In *Triple A Services v. Rice*, the Illinois Supreme Court considered a Chicago ordinance barring food trucks from Chicago's Medical Center District. 131 Ill. 2d at 222-23. The Court did not hold that the ordinance was exempt from scrutiny simply because it was an exercise of home-rule authority involving mobile food vendors and public streets, as the City suggests. (Motion at 12.) Rather, the Court considered the record evidence, including expert testimony, to determine whether the *particular* regulation bore a rational relationship to a legitimate purpose. *Id.* at 224-33. Here, Plaintiffs are likewise entitled to an opportunity to present evidence to support their claims so that the Court can apply rational basis scrutiny.

Conclusion

Plaintiffs have alleged what they must to state substantive due process, equal protection, special legislation claims. Accordingly, they are entitled to support their claims with evidence in a motion for a summary judgment or at trial, and the Court should deny the City's motion to dismiss.

Dated: December 17, 2013.

Respectfully Submitted,

By: _____
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CERTIFICATE OF SERVICE

I, Jacob H. Huebert, an attorney, hereby certify that on December 17, 2013, I served the foregoing Plaintiffs' Response to Defendant's § 2-615 Motion to Dismiss Plaintiffs' Second Amended Complaint on Defendant's counsel of record by regular U.S. mail, postage prepaid, at the following address:

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