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

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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,	)	In Chancery Injunction/Temporary Restraining Order
v.	)	
CITY OF EVANSTON, a municipal corporation,	)	
Defendant.	)	

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

Introduction

Plaintiffs James Nuccio and Gabriel Wiesen want to operate their food truck in the City of Evanston. The City, however, will not grant them a license simply because they do not happen to own a brick-and-mortar restaurant or other "licensed food establishment" in Evanston. This case challenges the City's arbitrary policy, which discriminates against Plaintiffs in violation of the Illinois Constitution's guarantees of equal protection and due process of law.

On September 21, 2012, Defendant City of Evanston filed a motion to dismiss Plaintiffs' complaint that appears to be premised on the incorrect notion that Plaintiffs are challenging the City's authority to license and regulate food trucks to protect the public's health, safety and welfare. But that is not what this case is about. This case challenges a provision of the City's food-truck ordinance that serves and benefits only a private special-interest group – namely, owners of brick-and-mortar restaurants who do not want competition from food trucks – not the

public's health, safety or welfare. The City also argues that Plaintiffs' claims are not ripe because Plaintiffs have not applied for a license and cannot show that doing so would be futile. But because the Ordinance itself expressly prohibits the granting of a license to Plaintiffs, any such exhaustion would be futile. To suggest that Plaintiffs' application would be anything but futile is to suggest that the City would apply the Ordinance in a manner that contradicts its express terms.

Plaintiffs' complaint sets forth well-pleaded factual and legal allegations that establish an actual controversy under which Plaintiffs would be entitled to relief. Further, because Plaintiffs have stated due process and equal protection claims that are ripe and not foreclosed by the City's home rule or other powers, this Court should deny the City's motion to dismiss.

I. Facts

Plaintiffs operate Beavers Donuts, a food truck that serves gourmet coffee and donuts to customers in Chicago and the surrounding area. (Compl. ¶¶ 13-15.) For example, in December 2011, the village of Glenview, Illinois, invited Beavers Donuts to become the first food truck licensed to operate there. (*Id.* ¶ 14.) Plaintiffs have also served customers in Evanston on a temporary, limited basis, including earlier this year when they received a temporary license to provide food and drinks at Northwestern University's "Dillo Day." (*Id.* ¶ 15.)

Plaintiffs want to operate their business in Evanston as other food trucks do, but the Evanston City Code bars them from receiving a license for just one reason: they are not owners or agents of a brick-and-mortar restaurant or other "licensed food establishment"[1] in Evanston. (*Id.* ¶ 18.) Plaintiffs are prepared to satisfy all other requirements the City has established for licensing: their truck meets or exceeds all applicable Illinois Department of Health standards and

[1] The Code 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." § 8-6-2.

requirements, and they are willing to submit to an inspection of their truck by the Evanston City Manager at any time. (*Id.* ¶¶ 16-17.) But the City's prohibition on licenses for people who are not owners or agents of licensed food establishments blocks their way. (*Id.* ¶ 18.)

The Ordinance

The Evanston City Council passed the City's food-truck ordinance in 2010. It requires food-truck operators to obtain a license from the City to operate a "mobile food vehicle," defined as a "commercially manufactured, motorized mobile food unit in which ready-to-eat food is cooked, wrapped, package processed, or portioned for service, sale or distribution." Evanston City Code § 8-23-1.[2] (Compl. ¶¶ 6-7.)

The Ordinance imposes numerous requirements on food-truck operators, some of which are related to health and safety. (Compl. ¶ 8.) Specifically, applicants for a license must describe their food-preparation methods and must provide proof that employees will have access to restrooms. § 8-23-2. (Compl. ¶ 9.) Food-vehicle operators must also submit to "such inspections as may be necessary to ensure [that their] vehicles are kept in a safe and sanitary condition." § 8-23-5. (Compl. ¶ 10.) 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 designees." § 8-23-5. (Compl. ¶ 11.) 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. It decrees that a "mobile food vehicle must be owned and operated by the owner or agent of a brick-and-mortar

[2] The City recently recodified its mobile-food-vendor ordinance, moving it from Title 8, Chapter 26 of the Evanston City Code to Title 8, Chapter 23. Plaintiffs' complaint cited the old code sections; this response cites the new ones. The substance of the ordinance has not changed.

food establishment in the City, and must be affiliated with that establishment." § 8-23-1. (Compl. ¶ 12.) It is this provision – and only this provision – that Plaintiffs challenge in this lawsuit.

II. Legal Standard

"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.*

III. Plaintiffs have stated claims on which relief can be granted.

The City's Ordinance that restricts operation of mobile food vehicles to owners and agents of licensed food establishments in Evanston irrationally discriminates against Plaintiffs. Because it bears no reasonable relationship to protecting the public's health, safety, or welfare, this provision violates both the equal protection and due process guarantees of the Illinois Constitution and must be struck down.

A. An ordinance that irrationally discriminates against a class of people violates the Equal Protection and Due Process Clauses of the Illinois Constitution.

Illinois has a "firmly entrenched constitutional principle that every citizen is guaranteed the right to engage in any lawful, useful and harmless business or trade, and that it is not within the constitutional authority . . . of the police power to interfere with that right of the individual where no interest of the public safety, welfare or morals is damaged or threatened." *Figura v.*

Cummins, 4 Ill.2d 44, 48 (1954); *see also Church v. State*, 164 Ill.2d 153, 164 (1995) (regulation "must have a definite and reasonable relationship to the end of protecting the public health, safety and welfare").[3] Even where a restriction on the right to engage in a business or occupation is necessary to protect the public, it must be "a reasonable one, and be reasonabl[y] adapted to obtain the objective intended." *Figura*, 4 Ill.2d at 49. "In determining whether an ordinance is reasonable, [a] court will take into consideration the object to be accomplished, the means provided to that end, and the conditions and circumstances to which the ordinance is made applicable." *Koos v. Saunders*, 349 Ill. 442, 448 (1932).

The City's mere say-so that a provision is intended to protect the public's health, safety, or welfare will not suffice, and that is all the City does here. The government "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*, 4 Ill.2d at 49. "The mere fact that the legislature 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.* "[I]n determining that question the courts will disregard mere forms and interfere for the protection of rights injuriously affected by arbitrary and unreasonable action." *Koos*, 349 Ill at 447. For the restriction on individual rights to stand, it must be apparent that preservation of the health, morals, safety or welfare is the end "*actually intended* and that there is some connection between the provision of the law and such purpose." *Metro. Trust Co.*

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[3] Illinois cases include several formulations of what constitutes a legitimate governmental purpose, but all involve some combination of the public health, safety, welfare, morals, and comfort. *See, e.g., Church*, 164 Ill.2d at 164 ("health, safety, and welfare"); *People v. Johnson*, 68 Ill.2d 441, 447 (1977) ("health or safety"); *Figura*, 4 Ill.2d at 48 ("safety, welfare or morals"); *Metro. Trust Co. v. Jones*, 384 Ill. 248, 255 (1943) ("health, morals, safety or welfare"); *Koos v. Saunders*, 349 Ill. 442, 447 (1932) ("health, comfort, safety, or welfare").

v. Jones, 384 Ill. 248, 255 (1943) (emphasis added). "The rights of property cannot be invaded 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).

Moreover, the City may not invoke its police power "to serve a purely private purpose." *Koos*, 349 Ill. at 449. It can never use an ordinance to bestow "special and exclusive favors" on a particular group. *People v. Brown*, 407 Ill. 565, 584 (1950). If the government treats groups of people differently, the classification "must rest on material distinctions in the situation and in the circumstances" of the individuals whom the law affects. *Id.*

These principles control Plaintiffs' equal protection claim as well as their due process claim. *See People ex rel. Lumpkin v. Cassidy*, 184 Ill.2d 117, 123-24 (1998) ("[T]he standard used to determine whether a statute violates substantive due process is identical to the standard for assessing whether a statute denies equal protection."); *see also People v. Masters*, 49 Ill.2d 224, 227 (1971) (licensing requirements that bore no relationship to public health violated due process and equal protection clauses).[4] For more than a century, the Illinois Supreme Court has applied these principles to strike down statutes and ordinances that arbitrarily infringed the right to engage in a business or occupation. In *City of Chicago v. Netcher*, the Illinois Supreme Court struck down two Chicago ordinances that: (1) prohibited a seller of dry goods, jewelry and drugs from also selling "any meats, fish, butter, cheese, lard, vegetables, or other provisions," and (2) prohibited sellers of dry goods, jewelry or hardware from selling liquor. 183 Ill. 104, 108 (1899). The Court found these prohibitions – which protected traditional retailers from department-store

[4] The City incorrectly states that Plaintiffs assert a "class-of-one" equal protection violation. (Motion at ¶ 25.) A "class-of-one" violation occurs where a plaintiff does not allege membership in a class or group but instead claims that he or she in particular was treated differently from others similarly situated. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Plaintiffs, in contrast, allege that the Ordinance discriminates against a class consisting of everyone who is not an owner or agent of an Evanston brick-and-mortar food establishment.

competition – unjustified because they lacked any relationship to the public's health, morals, safety, or welfare. The Court found the first prohibition "purely arbitrary" because it "permit[ted] a person to sell in any place or manner, provided, only, that he does not at the same time sell certain other things." *Id.* at 109. Because "[p]ublic health and public comfort [were] in no way affected by the different kinds of merchandise enumerated [being sold] in different departments of the same buildings" the ordinance was a "mere attempt to deny a property right to a particular class in the community" and was therefore invalid. *Id.* at 111-12.

Similarly, in *Figura*, the Court struck down a statute that prohibited the processing of metal springs in one's home because it was not necessary to protect the public's health, safety, morals, or welfare. 4 Ill.2d at 47-52. In *Gholson v. Engle*, the Court struck down a law requiring a funeral director to also be a licensed embalmer upon finding that no public health considerations could justify tying one occupation to the other. 9 Ill.2d 454 (1956); *see also Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (statute that allowed only licensed funeral directors to sell caskets violated equal protection and due process); *St. Joseph Abbey v. Castille*, 835 F.Supp.2d 149 (E.D. La. 2011) (same), *certified to state court*, __ F.3d __, 2012 WL 5207465 (5th Cir. Oct. 23, 2012); *Clayton v. Steinagel*, __ F.Supp. __, 2012 WL 3242255 (C.D. Utah 2012) (subjecting hairbraiders to cosmetology licensing requirements irrational); *Cornwell v. Hamilton*, 80 F.Supp.2d 1101 (S.D. Cal. 2001) (same). The Court has also struck licensing laws that arbitrarily protected privileged classes of people from competition and provided no corresponding benefit to the public. *See Church*, 164 Ill.2d 153 (striking licensing requirement for alarm-system contractors); *Masters*, 49 Ill.2d 224 (plumbers); *Schroeder v. Binks*, 415 Ill. 192 (1953) (same); *Brown*, 407 Ill. 565 (same). And it has struck down "frontage laws" that arbitrarily granted property owners on a street the power to veto another property owner's choice

to use his property in a particular manner with no connection to the public's health, safety or welfare. *See, e.g., Wolford v. City of Chicago*, 9 Ill.2d 613 (1956); *Koos*, 349 Ill. at 450; *People ex rel. Deitenbeck v. Village of Oak Park*, 331 Ill. 406, 411-12 (1928).

B. The Ordinance violates equal protection and due process because it irrationally discriminates against food truck operators who do not own a licensed food establishment in Evanston.

The City invokes the rational-basis test (Motion ¶ 24) but fails to show that the Ordinance's discriminatory provision has a rational basis. In fact, limiting operation of food trucks to owners or agents of licensed food establishments bears no conceivable relationship to the public's health, safety, or welfare. It is not necessary to ensure food safety or quality because the Ordinance prescribes stringent health, safety, and sanitary requirements for food preparation on trucks, as described above. *See* Evanston City Code §§ 8-32-2, 8-32-5. The Ordinance also requires food-truck operators to carry insurance with coverage of at least $1,000,000 per occurrence for any harm to the public. § 8-23-2(B)(8). But requiring food-truck operators to be owners or agents of a licensed food establishment does nothing additional to protect the public's health, safety, or welfare; instead, it only serves to protect licensed food establishments, particularly brick-and-mortar restaurants, from competition.

The Ordinance's irrationality and arbitrariness is evident from 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 operate a food truck. For example, the Ordinance would allow the owner or agent of a "market" that sells or distributes 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 such an individual may have no experience in food preparation or safety that

is relevant to operating a food truck. *See* Evanston City Code § 8-6-2. The Ordinance could even allow the owner of a brick-and-mortar business that only sells beverages or only provides certain food items *in vending machines* to operate a food truck. *See* §§ 8-6-2, 8-6-7. And, of course, even the owner or agent of a brick-and-mortar restaurant might not have – and the Ordinance does not require him or her to have any – experience or knowledge relevant to operating a food truck but would still be eligible to receive a license. Meanwhile, Plaintiffs – who operate a food truck that meets or exceeds the City's health and safety standards on a full-time basis – cannot receive a license simply because they also do not happen to own a licensed food establishment.

The City's discrimination in favor of Evanston food-establishment owners – and against everyone else who wants to operate a food truck – lacks a legitimate purpose. Plaintiffs have therefore properly pleaded constitutional claims, and this Court should deny the City's motion to dismiss.

C. Plaintiffs' claims are ripe and present an actual controversy.

The City argues that Plaintiffs' claims are not ripe and do not present an actual controversy because Plaintiffs have not alleged that they applied for a mobile-food-vendor license. (Motion ¶¶ 6-7, 9-11.) But Plaintiffs have not applied for a license only because the Ordinance expressly prohibits them from receiving one and therefore applying would be futile. Their claims are therefore ripe and present an actual controversy.

1. Plaintiffs' claims are ripe.

Plaintiffs were not required to apply for a mobile-food-vendor license from the City before filing their complaint because doing so would have been futile. *See, e.g., Morr-Fitz, Inc. v. Blagojevich*, 231 Ill.2d 474, 499 (2008) (exhaustion of administrative remedies not required where futile); *Drovers Bank of Chicago v. Village of Hinsdale*, 208 Ill.App.3d 147, 153 (2d Dist.

1991) (claim is ripe despite lack of final decision from the city on how regulations would be applied if seeking a decision would be futile). Plaintiffs are per se prohibited from receiving a license; based on the express Ordinance's express language, the City has no choice but to deny any application Plaintiffs file because they are not owners or agents of a licensed food establishment. *See* Evanston City Code § 8-23-1.

The City argues that Plaintiffs' futility argument "must fail" (Motion at ¶ 13), but it does not explain how it could possibly grant Plaintiffs' application when the plain language of the Ordinance requires that the City deny it. If the City's position is that it might grant the application anyway, this only makes the Ordinance *even more* arbitrary in practice than it appears on its face and raises additional constitutional problems.

Moreover, the cases the City cites in support of its conclusory argument are distinguishable from this case. First, *LaSalle Bank Nat'l Ass'n v. City of Oakbrook Terrace* is distinguishable because there, unlike here, the defendant city had *discretion* to act in the plaintiffs' favor. 393 Ill.App.3d 905 (2d Dist. 2009). (*See* Motion ¶ 13.) In that case, the plaintiffs brought a takings claim alleging that the defendant city would not allow them to develop certain real property. Although correspondence from the city planner who reviewed the plaintiffs' development plans indicated that they would "likely meet resistance," the Court concluded that it would not have been futile for plaintiffs to submit their plans for the city's approval. *Id.* at 913. The city planner's comments did not establish to a "reasonable degree of certainty the extent of development" that the city would allow because, among other reasons, the planner who communicated with the plaintiffs was not the city's final decision-maker. *Id.* This case is unlike *LaSalle Bank* because the City lacks discretion to grant Plaintiffs a license; the Ordinance allows no exemptions or variances. In fact, that case stated that a claim "likely" is ripe

where it is "clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable certainty" *Id.* at 911. The *LaSalle Bank* plaintiffs based their futility on the word of a relatively powerless city bureaucrat; Plaintiffs in the present case, on the other hand, have shown that an application would be futile because of an express provision of law.

Second, *Triple A Services, Inc. v. Rice* is distinguishable because there, unlike here, Plaintiffs challenged an ordinance's application to a place where they did not seek to do business and therefore could allege no injury. (*See* Motion at ¶ 8.) In *Rice*, the plaintiffs challenged an ordinance that barred mobile food vendors from the Chicago Medical Center District, arguing, among other things, that the ordinance was "irrational in its geographic scope" because it encompassed areas used for non-medical purposes, where the city's purported rationale for banning food vendors would not apply. 131 Ill.2d 217, 232-33 (1989). But the *Rice* plaintiffs, who had vended in the District until the challenged ordinance took effect, never alleged or showed that they vended in the non-medical areas, and the Court therefore held that they could not challenge restrictions in those areas. *Id.* The Court did not, however, question the plaintiffs' ability to challenge the restrictions where they actually *did* vend. *See id.* In the present case, the Ordinance applies in Evanston, and Plaintiffs seek to operate in Evanston. (Compl. ¶ 19.)

Plaintiffs' claims are ripe because they are clearly defined and therefore fit for judicial decision, and because requiring Plaintiffs to apply would cause them hardship. *See Peoples Energy Corp. v. Ill. Commerce Comm'n*, 142 Ill.App.3d 917, 934 (1st Dist. 1986). Plaintiffs facially challenge the Ordinance's provision that per se bars people such as Plaintiffs who are not owners or agents of a licensed food establishment from becoming licensed mobile food vendors. Evanston City Code § 8-23-1. As the Illinois Supreme Court has explained in discussing the

related doctrine of exhaustion of administrative remedies, a facial constitutional challenge "presents purely legal questions" and therefore "is not dependent for its assertion or its resolution on [an] administrative record." *Arvia v. Madigan*, 209 Ill.2d 520, 533 (2004). Thus, applying for a license would make Plaintiffs' facial challenges no riper than they already are; the relevant facts and issues would remain the same. Applying for a license would also place unnecessary hardship on Plaintiffs, who would be required to submit detailed "plans and specifications," among other things, when such efforts clearly would be futile. *See* Evanston City Code § 8-32-2.

2. Plaintiffs' claims present an actual controversy.

An actual controversy exists – and an action for declaratory judgment is therefore proper – if "the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion or give legal advice as to future events." *Underground Contractors Ass'n v. City of Chicago*, 66 Ill.2d 371, 375 (1977). "[T]he declaratory judgment statute must be liberally construed and should not be restricted by unduly technical interpretations." *Best v. Taylor Mach. Works*, 179 Ill.2d 367, 382-83 (1997).

This case presents an actual controversy appropriate for declaratory judgment because the "underlying facts and issues" are not moot or premature. Plaintiffs have a food truck, which they operate outside Evanston and have operated legally in Evanston with a temporary license. (Compl. ¶¶ 14-15.) Their truck meets or exceeds all applicable Illinois Department of Health standards and requirements (*id.* ¶ 6), and they are prepared to satisfy all of the City's licensing requirements except the one they challenge here (*id.* ¶ 19). Again, filing an application, only to have it summarily denied, would not make this case any more justiciable than it is now. The issues are clear and concrete, and this Court can resolve them.

3. In the alternative, Plaintiffs request leave to amend their complaint.

In the alternative, if this Court were to conclude that Plaintiffs' complaint requires more specific allegations about their efforts to obtain a license or about the futility of applying, Plaintiffs would respectfully request leave to amend their Verified Complaint. The amended complaint would state that on November 14, 2011: (1) Plaintiffs picked up an application for a mobile-food-vendor license at Evanston's city hall; (2) Plaintiffs met with the City's Environmental Health Division Manager, Carl Caneva; (3) Mr. Caneva advised Plaintiffs not to bother to file the application because it would be denied, because Plaintiffs are not owners or agents of a licensed food establishment in Evanston; and (4) Plaintiffs did not file the application because Mr. Caneva convinced them that doing so would be futile.

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

The City also contends that its home rule powers and its police powers under the Illinois Municipal Code "trump Plaintiffs' . . . constitutional claims." (Motion ¶¶ 19, 36.) In doing so, the City entirely ignores the substance of Plaintiffs' claim; as discussed above, the City's motion to dismiss does not even attempt to provide a rational basis for the Ordinance's discrimination against people who are not owners or agents of licensed food establishments. Instead, the City rests solely on its authority to license and regulate food trucks – which Plaintiffs do not dispute and thus has no relevance to Plaintiffs' claims. More importantly, the City also fails to recognize that home rule does not preempt the Illinois Constitution.

The City argues that its home-rule powers give it the "presumptive right to regulate and license mobile food vendors" and that the City's police power allows it to "adopt ordinances and to promulgate rules and regulations that . . . protect the public health, safety, and welfare." (Motion ¶¶ 20, 35.) That is irrelevant, however, because the Complaint explicitly states that the

Plaintiffs *do not challenge* the City's authority to license food trucks or the Ordinance's provisions related to the public's health, safety, and welfare. (Compl. ¶ 12.) Instead, Plaintiffs challenge only the provision restricting operation of food trucks to owners or agents of licensed food establishments in Evanston – which does *not* pertain to the public's health, safety, or welfare.

The City's home rule power simply allows it to "exercise and perform concurrently with the State any power or function . . . to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive." Ill. Const. Art. VII § 6(i). In other words, home rule units "have the same powers as the sovereign, except where such powers are limited by the General Assembly." *Rice*, 131 Ill.2d at 230. Those "powers of the sovereign" are, of course, limited by the Constitution as well. *See Kanellos v. County of Cook*, 53 Ill.2d 161, 166 (1972) ("[T]he constitution conferred substantial powers upon home-rule units subject . . . to the restrictions imposed or authorized [by the constitution]."). The City's home rule powers do not place it above the Constitution, and citizens do not forfeit their constitutional rights by living or doing business in a home rule city. Indeed, a case the City relies on in its home rule argument verifies that the Court can strike down an ordinance passed by a home rule unit if it does not "bear[] a rational relationship to a legitimate legislative purpose" or is "arbitrary" or "unreasonable." *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 319 (2008).

Here, Plaintiffs allege that the Ordinance's discrimination does not bear a rational relationship to a legitimate legislative purpose and is arbitrary and unreasonable. That is, Plaintiffs have alleged *exactly what they must allege* to constitutionally challenge the Ordinance.

Finally, the City's assertion that its "powers to regulate the use of the streets for private gain" somehow foreclose Plaintiffs' claims also fail. As an initial matter, this argument fails because the Ordinance does not only regulate the operation of food trucks on public streets; it regulates them everywhere in Evanston, even on private property. *See* Evanston City Code §§ 8-23-2(B)(9); 8-23-3(F), (K); 8-23-6(G). Moreover, the City's authority to regulate use of its streets does not entitle it to irrationally and unconstitutionally discriminate as it has here. *See Shoot v. Ill. Liquor Control Comm'n*, 30 Ill.2d 570, 575 (1964) (although liquor business is "constitutionally subject to more stringent regulation than a business conducted as a matter of right," restraints on it "must nevertheless be in keeping with constitutional restrictions").

Conclusion

For all the foregoing reasons, this Court should deny the City's motion to dismiss.

Dated: October 29, 2012.

Respectfully Submitted,

By: _____

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