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<br>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' AMENDED 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 are not the owners or agents of 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 and its prohibition against special legislation.

Defendant City of Evanston's motion to dismiss Plaintiffs' amended complaint 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 under its home-rule and police powers. But that is not what this case is about. This case challenges one particular provision of the City's food-truck ordinance that does *not* serve the public's health, safety, or

welfare but instead serves and benefits only a private special-interest group: namely, owners of Evanston brick-and-mortar restaurants who do not want competition from food trucks.

Plaintiffs' amended complaint sets forth well-pleaded factual and legal allegations that establish due process, equal protection, and special legislation claims under which Plaintiffs would be entitled to relief. Like plaintiffs in cases where Illinois courts have applied the rational basis test, Plaintiffs are entitled to present evidence to support their claims, and this Court should therefore 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. (Am. Compl. ¶¶ 16-18.) For example, in December 2011, the village of Glenview, Illinois, invited Beavers Donuts to become the first food truck licensed to operate there. (*Id.* ¶ 17.) Plaintiffs also served customers in Evanston on a temporary, limited basis in 2012, when they received a temporary license to provide food and drinks at Northwestern University's "Dillo Day." (*Id.* ¶ 18.) They 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. (*Id.* ¶ 19.)

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.* ¶ 22.) On or about April 29, 2013, the City issued a letter refusing to approve Plaintiff's 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.* ¶¶ 25-26.)

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[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

**The City's Food-Truck 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, 8-23-2. (Am. Compl. ¶¶ 8-9.)

The ordinance imposes numerous requirements on food-truck operators, some of which are related to health and safety. (Am. Compl. ¶ 10.) Specifically, applicants for a license 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." §§ 8-23-2, 8-23-5. (Am. Compl. ¶¶ 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." § 8-23-5. (Am. Compl. ¶ 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. It 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." § 8-23-1. (Am. Compl. ¶ 14.) It is this provision alone that Plaintiffs challenge in this lawsuit.

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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."

## 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 argues that Plaintiffs must present "clear and convincing evidence" to support their claims (Motion at ¶¶ 22, 29), but of course Plaintiffs are not required to present any evidence at the pleading stage. Rather, Plaintiffs must obtain that evidence through discovery and present it on a motion for summary judgment or at trial.

## Argument

The provision of the City's mobile food vendor ordinance that allows only owners and agents of licensed food establishments in Evanston to operate food trucks irrationally discriminates against would-be food-truck operators such as Plaintiffs who do not own an Evanston food establishment. 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, as well as the Illinois Constitution's prohibition on special legislation, and it must be struck down.

## I. The rational basis standard requires courts to strike down irrational, arbitrary ordinances that infringe on the right to earn a living.

More than a century of Illinois Supreme Court case law establishes that any law that infringes on a citizen's right to earn a living must serve the public's health, safety, or welfare. 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, 165 (1995) (regulation "must have a definite and reasonable relationship to the end of protecting the public health, safety and welfare").[2] 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 [must] be reasonabl[y] adapted to obtain the objective intended." *Figura*, 4 Ill. 2d at 49.

Thus, under the rational basis test, the Court must determine (1) whether there is a legitimate state interest behind the restriction on individual liberty and, if so, (2) whether there is a reasonable relationship between that interest and the means the government has chosen to pursue it. *People v. Johnson*, 225 Ill. 2d 573, 584-85 (2007). "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).

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[2] 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").

The City's mere say-so that a provision is intended to protect the public's health, safety, or welfare will not suffice to uphold it. Instead, the courts have the responsibility to determine whether a challenged statute or ordinance actually has a rational basis. 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. 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, due process claim, and special legislation 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."); *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 393 (1997) ("A special legislation challenge generally is judged under the same standards applicable to an equal protection challenge.").

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. For example, in *City of Chicago v. Netcher*, the Illinois Supreme Court struck down two Chicago ordinances that respectively (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 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 people from processing metal springs in their homes because it was not necessary to protect the public's health, safety, morals, or welfare. 4 Ill. 2d at 47-52. And in *Chicago Title & Trust Co. v. Village of Lombard*, the Court struck down an ordinance that prohibited a gas station from locating within 650 feet of another gas station

because it "ha[d] no rational connection with the objects of governmental police power" but instead served only to limit competition. 19 Ill. 2d 98, 104-08 (1960).

Also, in numerous cases, the Illinois Supreme Court has struck down arbitrary occupational licensing requirements that did not serve a legitimate governmental purpose and instead served only to protect certain private parties from competition. For example, 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). In several cases, the Illinois Supreme Court struck down licensing laws for plumbers because they protected established plumbers from competition while providing no corresponding benefit to the public. *See Masters*, 49 Ill. 2d 224; *Schroeder v. Binks*, 415 Ill. 192 (1953); *Brown*, 407 Ill. 565 (same); *see also Church*, 164 Ill. 2d 153 (striking licensing requirement for alarm-system contractors). Similarly, federal courts applying the Equal Protection and Due Process guarantees of the Fourteenth Amendment have also struck down protectionist licensing laws that lacked any rational basis. *See St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (statute that allowed only licensed funeral directors to sell caskets violated equal protection and due process); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (same); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (C.D. Utah 2012) (subjecting hairbraiders to cosmetology licensing requirements irrational); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (same). In all of these cases, as in this case, no one disputed the government's power to regulate and license the businesses and occupations involved for the purpose of protecting the public; rather, the issue in these cases, as in this case, was whether the particular challenged laws actually bore a reasonable relationship to protecting the public. And because the laws bore no such relationship, the courts struck them down.

## II. The challenged provision of the City's ordinance violates equal protection and due process and is special legislation because it irrationally discriminates against food-truck operators who do not own a licensed food establishment in Evanston.

Under the rational-basis principles articulated and applied by the Illinois Supreme Court, Evanston's ordinance barring non-owners of Evanston food establishments from operating food trucks must be struck down because it infringes food-truck operators' right to earn a living without serving any legitimate purpose.

In its motion to dismiss, the City invokes the rational-basis test but fails to identify any rational basis for its discriminatory licensing provision. In fact, limiting operation of food trucks to owners or agents of licensed food establishments in Evanston bears no conceivable relationship to the public's health, safety, or welfare. The restriction is not necessary to ensure food safety or quality because the City's mobile-food-vehicle ordinance elsewhere 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). Requiring food-truck operators to be owners or agents of a licensed food establishment in Evanston provides no additional protection for the public's health, safety, or welfare; instead, it only serves to protect licensed food establishments, particularly brick-and-mortar restaurants, from food-truck competition.

The ordinance's irrationality and arbitrariness are 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 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 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. The ordinance would 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 full-service 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 nonetheless 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 in Evanston.

The City's silence on this issue is telling: Its motion to dismiss provides no justification whatsoever for the City's discrimination against food-truck operators such as Plaintiffs and in favor of Evanston brick-and-mortar food establishments. Although the City never even makes the argument, presumably it maintains that the owners or agents of brick-and-mortar establishments and other food-truck operators are not similarly situated and therefore can be treated differently. The City provides no support for that argument, however, and, in any event, the question of whether two groups are similarly situated is a factual question that cannot be resolved on the pleadings. *See, e.g., Marcavage v. City of Chicago*, 659 F.3d 626, 631-32 (7th Cir. 2011).

Plaintiffs have pled facts to show that 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.

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

The City never engages in a rational-basis analysis but instead simply asserts that its home rule powers and its police powers under the Illinois Municipal Code "trump[] Plaintiffs' . . . constitutional claims." (Motion ¶¶ 14, 33.) Instead of explaining how its discriminatory ordinance provision is rationally related to a legitimate governmental purpose, the City just invokes its authority to license and regulate food trucks in general, arguing 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 . . . that protect the public health, safety, and welfare." (Motion ¶¶ 16, 32.) That is true but irrelevant; the Amended 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. (Am. Compl. ¶ 14.) 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." *Triple A Servs., Inc. v. Rice*, 131 Ill. 2d 217, 230 (1989). 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). Another case the City relies on confirms that mobile-food-vending ordinances in particular are subject to constitutional scrutiny. In *Triple A Services v. Rice*, the Illinois Supreme Court considered a Chicago ordinance preventing food truck from operating in Chicago's Medical Center District. 131 Ill. 2d at 222-23. The Court did not hold that the law, as an exercise of the city's home-rule powers, was exempt from scrutiny; rather, it 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 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. Accordingly, they should now be allowed to conduct discovery and then present evidence to support their claims.[3]

Finally, the City's assertion that its "powers to regulate the use of the streets for private gain" somehow foreclose Plaintiffs' claims also fail. (Motion ¶ 34.) As an initial matter, this

[3] Indeed, cases on which the City relies show that this issue is not appropriate for resolution on the pleadings but only on summary judgment or after a trial. *See, e.g., Rice*, 131 Ill. 2d at 224-32 (decided after evidentiary hearing at which expert witnesses testified); *Village of Niles v. City of Chicago*, 82 Ill. App. 3d 60, 71 (1st Dist. 1980) (reversing dismissal, holding that plaintiffs were "entitle[d] . . . to a hearing" on claim of unreasonable, unconstitutional discrimination).

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; the police power must *always* be exercised in a manner that reasonably serves a legitimate governmental interest. *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").

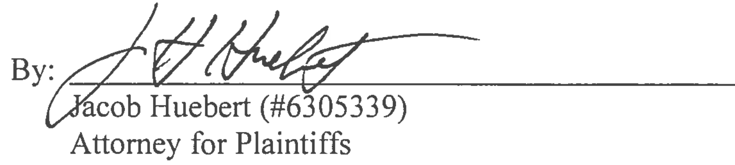
## Conclusion

Contrary to the City's argument, Plaintiffs are not challenging the City's power to license and regulate food trucks, nor are Plaintiffs asking this Court to act as a "super-legislature" and second-guess the City's legitimate policy decisions. Instead, Plaintiffs are asking this Court to subject the discriminatory provision of Evanston's food-truck law to the constitutional scrutiny it deserves under well-established Illinois Supreme Court precedent.

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

Dated: July 9, 2013.

Respectfully Submitted,



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