

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

JAMES NUCCIO; GABRIEL WIESEN)
and AFTER HOURS PIZZA LLC, an Illinois) 2013 OCT 22 PM 4:09
limited liability company, d/b/a) Case No. 12 CH 30062
BEAVERS DONUTS,)
) CLERK
) DOROTHY BROWN
) In Chancery
Plaintiffs,) Injunction/Temporary Restraining Order
)
v.) Judge Mason
)
CITY OF EVANSTON, a municipal)
corporation,)
)
)
Defendant.)

SECOND AMENDED COMPLAINT

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.

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.

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.

Parties

4. Plaintiff James Nuccio is a resident of Cook County, Illinois.
5. Plaintiff Gabriel Wiesen is a resident of Cook County, Illinois.
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.
7. Defendant City of Evanston (the “City”) is an Illinois municipal corporation.

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.

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.

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

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

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.

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.

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.

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).

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.

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.”

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.

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.

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.

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.

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.

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.

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.

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.

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

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.”

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.

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.

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.

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.

**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.

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.”

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.

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.

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.

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.

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.

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(B)(8).

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.

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.

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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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.”

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).

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.

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.

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.

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.

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.

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.

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.

**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.

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.

Relief Requested

WHEREFORE, Plaintiffs request that this Court:

A. Enter a declaratory judgment that the Evanston City Code’s requirement that a mobile food vehicle “must be owned and operated by the owner or agent of a licensed food establishment in the City” is unconstitutional on its face and as applied to Plaintiffs because it violates the due process guarantee of Article I, Section 2 of the Illinois Constitution;

B. Enter a declaratory judgment that the Evanston City Code's requirement that a mobile food vehicle "must be owned and operated by the owner or agent of a licensed food establishment in the City" is unconstitutional on its face and as applied to Plaintiffs because it violates the equal protection guarantee of Article I, Section 2 of the Illinois Constitution;

C. Enter a declaratory judgment that the Evanston City Code's requirement that a mobile food vehicle "must be owned and operated by the owner or agent of a licensed food establishment in the City" is unconstitutional special legislation in violation of Article IV, Section 13 of the Illinois Constitution;

D. Enter a permanent injunction against Defendant prohibiting enforcement of the Evanston City Code's requirement that a mobile food vehicle "must be owned and operated by the owner or agent of a licensed food establishment in the City";

E. Award Plaintiffs their reasonable costs and attorneys fees; and

F. Award Plaintiffs any additional relief it deems just and proper.

Dated: October 22, 2013.

Respectfully submitted,

**JAMES NUCCIO
GABRIEL WIESEN
AFTER HOURS PIZZA LLC**

By: 

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