



INSTITUTE FOR JUSTICE

March 1, 2012

Via Email

Mr. Helder Gil
Legislative Affairs Specialist
Department of Consumer and Regulatory Affairs
1100 Fourth Street, S.W., Room 5164
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RE: Notice of Second Proposed Rulemaking, Rules Concerning Vending Business License Regulations, 59 D.C. Reg. 3 (Jan. 2012)

Dear Mr. Gil:

We are writing on behalf of the Institute for Justice (IJ), a libertarian non-profit law firm that fights for the economic liberty of entrepreneurs across the country. Because anti-competitive restrictions against street vending violate the constitutional right of street vendors to earn an honest living, IJ works to defeat such restrictions through its National Street Vending Initiative. This initiative combines litigating against these restrictions in state and federal courts, helping vendors organize in order to fight these restrictions through activism, and educating the public about the importance—both economically and socially—of street vendors.

In a recent report on street vending,¹ IJ explained that instead of trying to “protect” brick-and-mortar restaurants from food trucks and other vendors, cities like D.C. should instead encourage vibrant vending cultures by drafting clear, simple, and modern rules that are narrowly tailored to address real health-and-safety issues. Then they should get out of the way and let vendors compete.

It is in this spirit that we offer our comments to Rule 24-500, D.C.’s proposed vending business regulations.

¹ STREETS OF DREAMS: HOW CITIES CAN CREATE ECONOMIC OPPORTUNITY BY KNOCKING DOWN PROTECTIONIST BARRIERS TO STREET VENDING (2011), <http://www.ij.org/about/3939>.

Introduction

Food trucks have revolutionized D.C.'s food scene. But they have always existed in a kind of legal limbo due to the failure of the District to issue vending regulations that specifically acknowledge the right of food trucks to operate within the city. The proposed regulations are a major improvement over the current state of affairs because they officially recognize the legality of the food-truck industry and should thus preclude any further attempts by anti-truck groups—*i.e.*, brick-and-mortar restaurants who do not like the competition—to ban food trucks from the city. The proposed regulations are to be further commended for not tying food trucks to specific locations, for eliminating the antiquated “ice-cream truck” rule, and for not requiring that each person who works on a food truck be required to get his or her own vending license.

These are all welcome changes, but there is still room for improvement if D.C. is to have a growing food-truck industry that continues to foster entrepreneurial dynamism, create new jobs, and benefit consumers with increased choices. To make these improvements, the Department of Consumer and Regulatory Affairs (DCRA) need not go back to the drawing board to generate a completely new set of proposed regulations—a process that could keep food trucks in legal limbo for at least another year. Rather, as we will demonstrate, the proposed regulations can be improved simply and easily by removing three specific sets of provisions before the regulations are finalized. These provisions 1) permit the creation of “Vending Development Zones” by those opposed to food trucks;² 2) prohibit food trucks selling “ice cream, confectionary treats, coffee or tea, or other prepared desserts” from occupying a parking spot for the full time allotted by the meter;³ and 3) limit the hours during which food trucks may operate anywhere in the entire city.⁴ The problem with these provisions is that they are not justified by legitimate health-and-safety concerns. Instead, as explained below, their primary effect will be to unconstitutionally insulate brick-and-mortar restaurants from competition. This is particularly true in regard to the provision creating Vending Development Zones. It is to that provision we first turn.

Vending Development Zones

We are most concerned about section 560 in the proposed regulations, which would allow for the creation of Vending Development Zones. As explained below, these zones' primary effect will be to give anti-truck groups—such as the Restaurant Association Metropolitan Washington, the Dupont Circle Merchants and Professionals Association, and the Golden Triangle Business Improvement District—the power to designate areas of the city in which it will be either difficult or impossible to operate a profitable food truck.

Under the proposed regulations, these business associations (and other groups) can apply to the DCRA to create a Vending Development Zone in different areas within the city. Once a Vending Development Zone is approved, it will give existing brick-and-mortar restaurants a way to manage the zone in order to protect themselves from competition. For example, restaurants opposed to the presence of food trucks could limit how many trucks can operate in the zone, prevent those trucks from operating within a certain distance from restaurants (with the end

² Proposed Washington D.C. Vending Regulations (Proposed Regulations) § 560.

³ *Id.* at § 556.2.

⁴ *Id.* at § 541.1.

result being that most commercial areas in the zone become off limits), forbid trucks from selling types of food offered by restaurants in the zone, severely restrict the number of days and hours in which trucks within the zone may operate, and prevent trucks from moving freely in order to accommodate customer demand. These kinds of restrictions could make it practically impossible to operate a profitable food truck—with the result that many trucks are forced to go out of business.

Nothing in section 560 forbids these kinds of restrictions. Indeed, these types of restrictions actually appear to be authorized by the broad language of the provision.⁵ They also appear to be envisioned by Mr. Nicholas Majett, the head of DCRA, who told a restaurateur who called into The Kojo Nnamdi Show that he could apply to create a zone “that would limit the amount of trucks” in the area.⁶ Thus, any assertion that the DCRA can be counted upon to protect food truck operators from anti-competitive rules that brick-and-mortar restaurants may propose cannot be taken seriously. The political reality is this: Anti-truck groups have the money and political power necessary to wage a series of neighborhood-by-neighborhood political battles to create Vending Development Zones; food truck operators simply do not have the resources to continue to fight a drawn-out series of battles, let alone win enough of them to keep D.C. neighborhoods from ending up with a patchwork of anti-competitive rules. The District should not put local food trucks in this untenable situation, in which the industry will be severely crippled, if not killed, by a thousand cuts from its adversaries.

In short, allowing groups that have been hostile to food trucks to create and manage Vending Development Zones is the equivalent of letting the fox guard the henhouse. Furthermore, because the process of creating Vending Development Zones will inevitably result in rules that protect restaurants from competition from food trucks, it raises grave constitutional concerns. This is because protectionism is not a legitimate government interest that allows the government to infringe upon the constitutional right of Americans to earn an honest living free from arbitrary government interference. Accordingly, courts regularly strike down laws that are designed to serve protectionist ends. *See, e.g., Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (striking down regulatory regime because it “was designed to favor economically certain constituents at the expense of others similarly situated, such as Merrifield”); *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (invalidating a rule permitting only funeral directors to sell caskets because it was a “naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers”); *St. Joseph Abbey v. Castille*, No. 10-2717, 2011 U.S. Dist. LEXIS 79327, at *2 (E.D. La. July 21, 2011) (invalidating a similar law in Louisiana and noting “that the sole reason for these laws is the economic protection of the funeral industry”).⁷ In January 2011, IJ brought suit against a law in El Paso, Tex., which prohibited food trucks

⁵ Section 560.2 of the proposed regulations says that “the Director shall allow a [Vending Development Zone] greater flexibility in complying with regulations governing the . . . [l]ocation of vendors in public space, provided, that no category of Vending Business License is specifically excluded; [m]ethod for assigning Vending Locations, including the exclusion of any [food truck] that is not expressly included by Vending Site Permit in the VDZ; . . . [h]ours of operation; [and] [l]ength of time for which a Vending Site Permit shall be issued.” Furthermore, a proposal to create a vending zone must include an implementation plan that may discuss how the zone will affect “the diversity of products or services offered.” *See* Proposed Regulations § 560.5(b)(3)(D).

⁶ *Rewriting The Rules for D.C.’s Food Trucks*, THE KOJO NNAMDI SHOW (Jan. 25, 2012), <http://thekojonnamdishow.org/shows/2012-01-25/rewriting-rules-dcs-food-trucks>.

⁷ IJ represented the plaintiffs in *Craigmiles* and is currently litigating on behalf of the monks of St. Joseph Abbey, who are challenging Louisiana’s casket law.

from operating within a 1,000 feet of a brick-and-mortar food establishment.⁸ As a result of that lawsuit, El Paso quickly recognized that protectionist laws like the ones at issue in *Craigsmiles*, *Merrifield*, and *St. Joseph Abbey* are invalid and changed its vending rules to not discriminate against the city’s vendors.⁹

Rather than running afoul of the caselaw described above, we respectfully suggest that D.C. eliminate section 560 of the proposed vending regulations and delete any reference to Vending Development Zones in the rest of the regulations. Doing so will not have any impact on the remaining provisions and will ensure that food trucks and others will be able to rely on uniform and protectionism-free vending rules throughout the District. Cities across the nation with vibrant food truck cultures—like Austin, Tex. and Los Angeles—have succeeded in part because they have refrained from giving the power to regulate vending to self-interested parties. We suggest that the District follow those cities’ leads and remove this potentially anti-competitive provision from its proposed regulations.

Duration Restrictions: Sweet v. Savory Food Trucks

As noted above, one major improvement in the proposed vending regulations is that they eliminate the antiquated “ice-cream truck” rule, which lets food trucks park only when they are flagged down and requires them to move immediately once all waiting customers have been served.¹⁰ This antiquated rule may have worked fine when the only food trucks were old-fashioned ice-cream trucks that roamed around neighborhoods, using loud music to draw children and parents from their homes. But it does not fit the modern food-truck business model, which calls on trucks to find a parking spot and then use social media tools like Facebook and twitter to let customers know where to come.

Although the elimination of the “ice-cream truck” rule is a welcome change, the proposed regulations unfortunately subject food trucks selling certain types of food to an unnecessary and harmful duration restriction. Under the proposed regulations, food trucks that sell “predominantly ice cream, confectionary treats, coffee or tea, or other prepared desserts” must leave a location once ten minutes has elapsed since they last served a customer.¹¹ This is the case even when the truck is in a legal parking spot and has time remaining on the parking meter.

This proposed rule should be eliminated, and trucks selling sweet foods should—just like those selling savory foods—be able to remain in a parking spot for the full time allowed by the meter at the space in which they have parked. The 10-minute rule as currently envisioned will be incredibly disruptive and will prevent sweet trucks from serving potential customers. For example, under this rule, an entrepreneur selling sweet items would be required to vacate a legal parking space even when he or she knows that more paying customers, responding to social-media advertising, are on the way. (Like the “ice-cream truck” rule, the 10-minute rule appears not to take into account the phenomenon of social media.) The operators of sweet trucks will have to start packing up the equipment and properly storing the food items in the truck as soon as

⁸ *Castaneda v. City of El Paso*, No. 3:11-CV-00035-KC (W.D. Tex. filed Jan. 26, 2011), <http://www.ij.org/economicliberty/3648>.

⁹ Institute for Justice, *Victory for El Paso Mobile Food Vendors*, (Apr. 26, 2011), <http://www.ij.org/about/3790>.

¹⁰ Proposed Regulations § 556.

¹¹ *Id.* at § 556.2.

there is a time window in which there is no line, and will then have to unpack everything in order to serve customers who show up before the expiration of the 10-minute period. If the 10-minute period does lapse, then the trucks will be forced to circle the block until new customers show up. Rather than making the streets safer, this rule would create unnecessary, and potentially dangerous, traffic congestion. Thus, not only is there no health-and-safety concern addressed by the proposed rule—but the rule itself actually creates one!

There is no reasonable health-and-safety rationale for treating sweet trucks more harshly than their savory counterparts. Instead, this provision simply will make it harder for these entrepreneurs to compete with brick-and-mortar restaurants (as well as other food trucks). And rather than benefitting consumers, this distinction hurts them by taking away one more food option. The District should eliminate this distinction and instead allow sweet trucks, like all other food trucks—and indeed, all other vehicles parked in legal parking spot—to remain in their parking spaces for the full amount of time allotted by the parking meter.

Hours of Operation

We also urge that DCRA change the provision setting forth the allowed hours of operation in order to let food trucks operate later into the evening if their operators so choose. Currently, the proposed regulations state that vendors may only operate between 5:00 a.m. to 10:00 p.m. from Sunday to Thursday and until 1:00 a.m. on Friday and Saturday evenings.¹² There is no rule in D.C. that requires restaurants to close their doors at a certain time, and there is no reason for the District to disadvantage vendors as compared to their brick-and-mortar counterparts.¹³ To be sure, there may be certain situations where it would make sense not to allow vendors to operate past a set time in a given area—for example, immediately outside of a concert hall where the District police are attempting to disperse a crowd—but those situations should be addressed on a case-by-case basis. A one-size-fits-all regulation on when vendors may operate is overbroad, unjustified, and unfairly limits the ability of food trucks and other vending entrepreneurs to compete.

Cities with thriving food truck industries do not put onerous restrictions on when trucks can operate. For instance, the City of Los Angeles—which many consider the birthplace of modern gourmet food trucks—does not artificially restrict when those food trucks may serve customers. In New York City, local officials have eschewed a city-wide restriction in lieu of a more narrowly tailored, block-by-block approach that is tied to actual congestion concerns. And while Austin, Tex., regulates mobile food vendors' hours of operation, the default rule it has in place—that vendors must close from 3:00 a.m. to 6:00 a.m.—is far less restrictive than the one these proposed regulations contemplate.¹⁴ Absent some demonstrable health-or-safety concerns, the District should let trucks decide for themselves when to operate. Imposing restrictive hours of operation on food trucks, while allowing restaurants to remain open 24 hours per day, seems less focused on protecting public safety and more about protecting brick-and-mortar businesses from honest competition.

¹² *Id.* at § 541.1.

¹³ Some of the District's 24-hour restaurants include the DINER, <http://www.dinerdc.com/>; Osman and Joe's Steak and Egg Kitchen, <http://www.osmanandjoes.com/>; and The Hamilton, <http://www.thehamiltondc.com/restaurant>.

¹⁴ Austin, Tex. Mun. Code § 25-2-812(C)(4), [http://www.amlegal.com/nxt/gateway.dll/Texas/austin/title25/landdevelopment/chapter25-2zoning?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:austin_tx\\$anc=JD_25-2-812](http://www.amlegal.com/nxt/gateway.dll/Texas/austin/title25/landdevelopment/chapter25-2zoning?f=templates$fn=default.htm$3.0$vid=amlegal:austin_tx$anc=JD_25-2-812).

Conclusion

In sum, we applaud the District of Columbia for proposing a set of regulations that represent a significant overall improvement in the legal landscape. By getting rid of archaic and anti-competitive restrictions—such as the antiquated “ice-cream truck rule”—the proposed regulations make the District of Columbia a more inviting place for vendors of all stripes. And we further applaud the District for officially recognizing the legality of the food truck industry, which has created jobs, served thousands of satisfied customers, and made the District a more fun and inviting destination for everyone in the D.C. Metro area.

At the same time, the provisions that we identify above are unnecessary to protect public health and safety and instead will only have anti-competitive effects that will harm food trucks and their customers. But these problems do not mean that the DCRA needs to go back to the drawing board to create a completely brand new set of proposed regulations—a process that would unnecessarily keep the food trucks in legal limbo. Instead, the DCRA need only take the simple and easy step of removing the offending provisions from the proposed regulations before they are enacted. The result will be a regulatory framework that rejects protectionist and unconstitutional rules in favor of ones that address legitimate concerns about public health and safety. That outcome would be a win for food trucks, their many customers, the local economy, and—most importantly—the right of all D.C. small business owners to earn a living free from anti-competitive restrictions.