PIZZA DI JOEY, LLC, et. al.	*** IN THE**
Plaintiffs,	*** CIRCUIT COURT**
v.	*** FOR**
MAYOR AND CITY COUNCIL OF BALTIMORE	*** BALTIMORE CITY**
	*** Case No. 24-C-16-002852**
Defendant.	

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MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Plaintiffs, Pizza di Joey, LLC, and Madame BBQ, LLC, filed an Amended Complaint for Declaratory Judgment and Injunctive Relief to enjoin the Mayor and City Council of Baltimore from enforcing , Article 15, Section 17-33 of the Baltimore City Code. Plaintiffs allege that the challenged regulation violates their rights to due process and equal protection that are guaranteed to them by Article 24 of the Maryland Declaration of Rights. This matter came before this Court for trial on September 28 and 29, 2017.

II. PROCEDURAL HISTORY

On May 5, 2016, the Plaintiffs filed a Complaint for Declaratory Judgment and Injunctive Relief against the Mayor and City Council of Baltimore (hereinafter "Defendant"). On July 5, 2016, the Defendant filed a Motion to Dismiss, which was subsequently denied by Judge Jones. Plaintiffs filed an Amended Complaint for Declaratory Judgement and Injunctive Relief on October 17, 2016.

On June 21, 2017, Plaintiffs filed a Motion for Summary Judgment, which was denied by Judge Tanner on August 11, 2017. The Defendant filed a Motion for Summary Judgment as well on June 21, 2017, which Judge Tanner denied on August 11, 2017. The Plaintiffs filed a Motion

to Exclude Anirban Basu as an Expert Witness on June 21, 2017 and Judge Tanner denied this motion on August 11, 2017.

On September 15, 2017, Plaintiffs filed a Motion in Limine to Exclude Anirban Basu as an Expert Witness at Trial, and on September 27, 2017, the Defendant filed two additional motions: a Motion in Limine to Exclude Deposition Transcripts, and a Motion in Limine to Exclude Documents Produced on September 22, 2017. The parties appeared before this Court on September 28, 2017, to argue the above-mentioned motions. On September 28, 2017, this Court ruled as follows: (1) Plaintiff's Motion in Limine to Exclude Anirban Basu as an Expert Witness was denied; (2) Defendants Motion to in Limine Exclude Documents Produced on September 22, 2017, was denied; and (3) Defendant's renewed Motion for Summary Judgment was denied. Defendant's Motion in Limine to Exclude Deposition Transcripts was also heard but was thereafter withdrawn.

The trial began on September 28, 2017 and concluded on September 29, 2017.

III. FINDINGS OF FACT

a. Pizza di Joey, LLC

Plaintiff Pizza di Joey, LLC ("Pizza di Joey") is a closely held Maryland-based limited liability company that has its principal place of business in Baltimore, Maryland. Joseph Salek-Nejad, d.b.a. Joey Vanoni, is the owner of Pizza di Joey. Pizza di Joey owns and operates the Pizza di Joey food truck, which is licensed to operate in the city of Baltimore. The Pizza di Joey food truck has operated in Baltimore on public property, and on private property with the consent of the property owner. The Pizza di Joey food truck serves primarily authentic New York-style pizzas, and supplements its pizza offerings with meatball subs, pasta salads, and other Italian-American food products.

b. Madame BBQ, LLC

Plaintiff Madame BBQ, LLC ("Madame BBQ") is a closely held Maryland-based limited liability company that has its principal place of business in Baltimore, Maryland. Nicole McGowan is the owner of Madame BBQ. Madame BBQ owns and operates the Mindgrub Café food truck, which is licensed to operate in the city of Baltimore. Initially, Madame BBQ primarily operated the Madame BBQ food truck in Howard County, Maryland. It periodically operated the truck at special events in the city of Baltimore pursuant to a temporary permit obtained from the City of Baltimore. The Madame BBQ food truck primarily served barbeque fare, such as pulled pork sandwiches. While this case was pending, Madame BBQ rebranded its food truck as "MindGrub Café" and expanded its menu to include not just barbeque, but a variety of healthier food products, including salads, soups, and sandwiches.

c. Mobile Vending in Baltimore

The City regulates all mobile vendors, including food trucks, under Article 15, Subtitle 17 of the Baltimore City Code, pursuant to the Street Vendor Program Rules and Regulations promulgated by the Baltimore Department of Transportation. The Baltimore City Code, Art. 15 § 17-1, *et seq.*, ("the Code") went into effect on February 28, 2015.

The Code defines a "mobile vendor" as, "any person that sells, distributes, or offers to sell or distribute food products, other merchandise of any kind, or services from a motor vehicle on City streets or private property within the City of Baltimore." Art. 15, § 17-1(e)(1). A "vendor truck" is defined as, "any motor vehicle for the purpose of selling any food product, other merchandise, or service by a mobile vendor." *Id.* § 17-1(k).

Mobile vendors cannot operate: (1) within two blocks of a mobile vending zone (Art. 15 § 17-32); (2) within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food product, other merchandise, or services as that offered by the mobile vendor (Art. 15 § 17-33); (3) within a residential area (Art. 15 § 17-35); (4) within two blocks of a City Market, designated in City Code, Art. 16 § 1-2 (Ar. 15 § 17-37); (5) from the hours of 7:00 am to 8:00 pm, within two blocks of any public or private kindergarten, elementary school, or secondary school or any public transit stop serving a kindergarten, elementary school, or secondary school (Art. 15 § 17-38); and (6) within two blocks of a farmers' market when the market is in operation, except with express permission from the market organizer (Art. 15 § 17-39).

It is important to note that a violation of the 300-foot rule is a crime. Art. 15, Section 17-42 is labeled "Criminal Penalties" and states, "[a] person who violates any provision of this subtitle or of a rule or regulation adopted under this subtitle is guilty of a misdemeanor and, on conviction, is subject to a penalty of $500 for each offense." Additionally, the Code authorizes the City to revoke a mobile vendor's license for violating the 300-foot rule, and it further provides that if a mobile vendor commits three Code violations within a one-year period (including violations of the 300-foot rule) the City is required to revoke that vendor's license. Art. 15, § 17-44(a)-(b).

IV. CONCLUSIONS OF LAW

A. PER SE UNCONSTITUTIONAL

Plaintiffs challenge the 300-foot rule on the ground that economic favoritism is an illegitimate, per se unconstitutional government interest. The Plaintiffs assert in their trial memorandum that the Maryland Court of Appeals has established two principles in decisions

striking down similar discriminatory regulations: (1) economic favoritism is per se unconstitutional; and (2) when evaluating an Article 24 challenge to an economic regulation, the Court must apply the "real and substantial test," look past pretextual government interests, and declare invalid any arbitrary regulations that do not meaningfully further a legitimate government interest.

In support of their "per se unconstitutional" argument, the Plaintiffs cite three cases: (1) *Verzi v. Baltimore County*, 333 Md. 411 (1994); (2) *Bruce v. Director, Department of Chesapeake Bay Affairs*, 261 Md. 585 (1971); and (3) *Maryland State Board of Barber Examiners v. Kuhn*, 270 Md. 496 (1973). Each of those cases involved an ordinance or a statute that created a perceived economic favoritism. In each case, however, the Court analyzed the legislation under a "rational basis" review, and did not strike down the legislation as per se unconstitutional, but rather because the legislation could not survive rational basis scrutiny.

The *Verzi* Court reiterated that, although not all discriminatory classifications are per se unconstitutional, "a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone." *Verzi*, 333 Md. at 417. The use of the word "may" is significant in this Court's analysis, because the Court of Appeals has made it clear that not every discriminatory classification is per se unconstitutional. Therefore, this Court concludes that the 300-foot rule is not per se unconstitutional.

B. DUE PROCESS AND EQUAL PROTECTION

Plaintiffs also challenge the City's 300-foot rule under Article 24 of the Maryland Declaration of Rights, specifically arguing the rule violates Plaintiffs' right to Due Process and Equal Protection.

The Fourteenth Amendment of the Untied Stated Constitution, in pertinent part, provides: "No State shall deny to any persons within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Even though the Maryland Constitution does not contain an express equal protection clause, the Court of Appeals has deemed it "settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights." *Attorney General of Maryland v. Waldron*, 289 Md. 683, 704 (1981).

Article 24 of the Maryland Declaration of Rights provides, "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." The Court of Appeals has held that since Article 24 "has been interpreted to apply 'in like manner and to the same extent as the fourteenth amendment of the Federal Constitution'," an Article 24 equal protection claim follows the "basic analysis provided by the United States Supreme Court in interpreting the like provision contained in the fourteenth amendment." *Waldron*, 289 Md. at 705, 714.

The Supreme Court has identified two different standards of review for Due Process and Equal Protection Challenges. The first standard of review is "strict scrutiny," and the second standard of review is the "rational basis" test. Strict scrutiny is triggered when a statute creates a distinction based upon clearly "suspect" criteria, or when that enactment infringes upon personal rights or interests deemed to be "fundamental." *Waldron*, 289 Md. at 706.

A "suspect class" has been categorized as a group of "people who have experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Waldron*, 298 Md. at 706. The Supreme Court has placed classifications based on race, ancestry, and national origin in the

suspect category applicable to strict scrutiny. *Id.* Fundamental rights or interests have been defined as those "explicitly or implicitly guaranteed" by the federal constitution, such as, the right to vote, the right of equal access to a criminal appeal, the right to procreate, and the right of interstate travel. *Id.*

Laws subject to strict scrutiny violate the equal protection clause "unless the State can demonstrate that such laws are 'necessary to promote a compelling government interest.'" *Waldron*, 289 Md. at 706. This Court concludes that strict scrutiny review should not be applied to the 300 foot rule since neither a suspect class nor a fundamental right or interest, as outlined above, have been infringed upon by the rule.

The second standard of review is the rational basis test, also known as the fair and substantial relation test. The rational basis test applies when neither a suspect class nor a fundamental right or interest is implicated. *Waldron*, 289 Md. at 707. The rational basis test requires, at a minimum, that a statutory classification bear some 'rational relationship' to a legitimate state purpose. *Maryland State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496, 507 (1973). Under this standard, a statutory classification is struck down only if the means chosen by the legislative body are "wholly irrelevant to the achievement of the State's objective." *Waldron*, 289 Md. at 707. The Supreme Court "has been willing to uphold the constitutionality of an enactment when 'any state of facts reasonably may be conceived to justify it.'" *Id.*

The rigid two tier analysis established by the Supreme Court caused dissatisfaction among various courts for two reasons: (1) strict scrutiny determined beforehand "the invalidation of nearly every classification involving such analysis. . . the Court has thus far declined to expand the group of fundamental interests and suspect classes that will trigger analysis under this standard;" and (2) statutes reviewed under the rational basis test receive "minimal scrutiny in

theory and virtually none in fact." *Waldron*, 289 Md. at 708. Therefore, the Supreme Court identified two general groupings of statutes that would receive a higher level of review than rational review, but not quite as high as strict scrutiny. *Id.* First, "are those enactments which impact upon sensitive, although not necessarily suspect criteria of classification . . . this group clearly encompasses gender discriminations, and probably includes those classifications based on illegitimacy." *Id.* 710-11; *see also* n.17 (illegitimacy refers to illegitimate children). The second category of statutes triggering heightened rational review "are those which affect 'important' personal interests or work a 'significant interference with liberty or a denial of a benefit vital to the individual.'" *Id.* at 711. Thus, "when important personal rights, not yet held to merit strict scrutiny but deserving of more protection than perfunctory review would accord, are affected by a legislative classification, a court should engage in review consonant with the importance of the personal right involved. This latter judicial inquiry does not tolerate random speculation concerning possible justifications for a challenged enactment; rather it pursues the actual purpose of the statute and seriously examines the means chosen to effectuate that purpose." *Id.* at 713. Under this heightened rational review, the statute "must serve an important governmental objective and must be substantially related to the achievement of those objectives." *Murphy v. Edmonds*, 325 Md. 342, 358 (1992).

In order to determine which standard of review applies to the challenged ordinance in this case, this Court must decide whether the Plaintiffs' choice in operating a food truck is a guaranty implicit in Article 24 of the Maryland Declaration of Rights. "Property, within the meaning of Article 24 guaranties, includes the right to engage in those common occupations or callings which involve no threat to the public welfare, to exercise a choice in selection of an occupation, and to pursue that occupation in his own way so long as he does not interfere with the rights of

others." *Waldron*, 289 Md. at 719. Therefore, the right to engage in a chosen calling enjoys a more stringent standard of review. *Id.* at 718. Although the ordinance does not ban food trucks entirely and allows the Plaintiffs to operate food trucks in Baltimore City, due to the layout of the City and the concentration of various types of brick-and-mortar restaurants in high traffic areas, the Plaintiffs argue that this ordinance in essence makes it virtually impossible for them to operate. According to the Plaintiffs, because they are forced to operate in less populated areas of the City, thereby limiting their potential for customers, the ordinance places an unconstitutional burden on their opportunity to earn a livelihood in the City.

The *Waldron* Court applied the following analysis to an enactment burdening the exercise of one's occupation:

> "(T)his general principle emerges with some degree of certainty, that the state may for purposes of revenue, tax any occupation or business, but that, except for revenue, it may not annex any burdensome conditions on the common callings of life or the right of the individual to engage therein, unless such regulation is required for the protection of the public health, safety, or morals, and that where justified on that ground any classification, adopted for the purposes of that regulatory measure, must be reasonable, uniform in its operation within the class, and based upon some legitimate principle of public policy."

Id. at 720. Applying the Waldron Court's analysis, this Court concludes that the Plaintiffs' right to operate their business in Baltimore City is encompassed within the guarantees of Article 24 of the Maryland Declaration of Rights and the U.S. Constitution. Therefore, heightened rational review is warranted here and, as directed by *Murphy v. Edmonds*, this Court must determine whether the 300-foot ordinance serves an (1) important governmental objective, and (2) is substantially related to the achievement of that objective.

The Supreme Court and Maryland Court of Appeals decisions indicate that, "where personal interests (other than those impacted by wholly economic regulations) are substantially affected by a statutory classification, courts should not reach out and speculate as to the existence

of possible justifications for the challenged enactment." *Waldron*, 289 Md. at 717. The legislature has the right to regulate "a business, trade, or occupation, where such regulation is required for the protection of the public health, safety, or morals … is settled, it may not exercise that power arbitrarily or capriciously, or in such a manner as to deprive the individual of rights, privileges, immunities, or property to which he is entitled as a matter of natural justice and common usage…" *Id.* at 719. To evaluate this ordinance, this Court must look to the purposes for enacting this ordinance as identified by the Plaintiffs and Defendant.

The Defendant argues that the purpose of the ordinance is to promote the general welfare of Baltimore City. Brick-and-mortar retail establishments contribute to vibrant commercial districts by: (1) preventing vacant properties, (2) generating revenue through property taxes, (3) providing more job opportunities, and (4) promoting long-term real estate investments.

The Defendant's expert witness, Anirban Basu (hereinafter "Mr. Basu"), an expert in applied economics, has researched the economic considerations underlying the 300 foot rule. Mr. Basu explained that the ordinance attempts to maximize commercial activity and commercial investment, thus maximizing customer expendability. Unlike restaurants which are committed to a location, food trucks have the ability to move and do not commit to the city through a lease. The following transpired when the Court questioned Mr. Basu on some of his theories;

Q: - - Doesn't the Royal Farms on the corner that sells a slice of pizza way cheaper than a brick-and-mortar pizza shop does, doesn't that also undercut them and there's no regulations on that.

A: - - You're right that's absolutely true. But the Royal Farms cannot roll up right in front of my restaurant. The Royal Farms is going to be over here and the restaurant is over there. There is a physical separation, that's true Your Honor. The food truck, though, what we're talking about, can roll up right in front of the restaurant.

The hope is that the restaurant will produce a different type of pizza than Royal Farms. But a food truck may have the capacity to produce excellent pizza. It

would not surprise me if the pizza is excellent. We're talking about a commercial kitchen on wheels.

Q: Why should the City concern themselves about what a restaurant is concerned about?

A: -- Because the City cares about its tax base, because the City cares about 15 to 20 to 25 jobs. Because the City wants to avoid commercial vacancies. Because the City wants to attract visitors, and, um, and enhance reputation. . .
Restaurants are a really important element of economic environment. The quality of life environment. So - -

Q: If going to busy areas like Hampden or Harbor East, etc., it is not like that (referring to Little Italy's unique atmosphere). There can be four (4) pizza shops on one (1) block and the City wouldn't say boo about it. Four (4) pizza shops in Harbor East on that one (1) block cannot survive. . . The City is not going to regulate it. If you're going to open a pizza shop there and make sure it's the best on the block, you'll be okay. That's the philosophy. So why is that different? Why are food trucks different?

A: Because in your hypothetical example. It is still the case that those pizza restaurants, four (4) on the same block, which I think is unusual but conceivable, so let's talk about it. They would have similar cost structures. So to the extent that they have similar cost structures, they are renting on the same block, so the rent is not that different. They may be renting more or less space vis-a-vis one another. They're drawn from the same labor pool, asking the same from staff, they have waitstaff, and so on and so forth. And so, there's a similarity there in cost structure. That is different against from food trucks - - and therefore, I would argue to a pizzeria as an example the food truck sitting in front is a greater commercial threat than the pizza shop right next door.

Thus, the Defendant argues that although brick-and-mortar restaurants naturally engage in competition with one another, this competition does not threaten the vitality of brick-and-mortar restaurants in the way that food trucks do. Food trucks siphon away customers through "free-riding," which harms commercial activity and the City's economy as a whole. Mr. Basu summarized the concept of free riding,

> ". . . so one (1) economic actor is engaging in a certain level of investment or expenditure, and, I, am able to free ride on those efforts without having to expend my own resources. And in that sense it is unfair because I'm being subsidized involuntarily by this other economic actor. . ."

Mr. Basu provided the following example of the free rider problem:

> "So an actual restaurant, let's say a pizzeria, creates a reputation. People say, "I wanna go to BOP pizza. I love BOP pizza in Fells Point, I wanna go there." But in the process of making that exquisite pizza that they make, they generate some expense. So, pizza is not inexpensive. And now, a food truck can come in during the busiest hours? That restaurant is essentially paying property taxes all day and night. But, I, as a food truck, can come in to an aggregate part of the day just when the market is hottest, just when BOP pizza can generate the most revenues on a per hour basis. So I'm going to sit in front of BOP pizza at that time. Is that fair? I have created the market as BOP pizza. I've made a commitment over the long-term. I've bought equipment, hired staff, and now I have patrons coming in my direction and they can be siphoned off by a food truck that is going to be gone in two (2) hours. To me, that is not a satisfying outcome. And it doesn't strike me as fair competition, and it very much strikes me as the free rider problem. That food truck is free riding upon the efforts of that pizzeria. And, in my mind, policy makers shouldn't support that."

Mr. Basu continued to describe the free rider impact on commercial activity:

> "Free rider harms commercial activity for the following reason. If I'm a restaurateur, or would be, prospective restaurateur and I know this could happen to me, that a food truck selling primarily the same item can locate right in front of my restaurant, I may not open up the restaurant in the first place. Why would I spend so much capital? Hundreds of thousands of dollars, take on all kinds of liability (there's risks when you operate a business) . . . So why would I do that and spend that money so a food truck that moves right in front of me can be successful for a few hours of the day before they move on to Baltimore County or wherever they are going? That doesn't make sense to me. That's the kind of thing counselor that creates commercial vacancies. That's the kind of thing that produces unemployment and we have enough of that in this City."

The Defendant reiterated that commercial vacancies are harmful to this City's economy, quality of life, and that Baltimore City collects three times as much revenue from property taxes than from income taxes. Vacant properties caused by the threat of food trucks, as laid out by Mr. Basu, invite crime, decrease job opportunities, and decrease the City's collection of property taxes. If restaurateurs are deterred from investing because food trucks have a right to park in front of their restaurant, the City will not receive those long-term commitments guaranteed by leases, and there will be more vacant commercial properties. Mr. Basu stated, "my conclusion very firmly is that [the 300 foot] rule is to the benefit of the people of Baltimore and benefit the

level of commercial transactions that will take place in this City over the long term. That it supports entrepreneurship, and that is supports street level vitality."

The Plaintiffs argue that the 300-foot rule is not protecting the general welfare, and that its purpose is to financially benefit brick-and-mortar retailer by restricting the Plaintiffs' right to conduct their businesses. The Plaintiffs maintain that the 300-foot rule is more clearly anti-competitive because it restricts mobile vendor operations only when they sell the "same type of food product" as a nearby brick-and-mortar retailer.

According to the Plaintiffs, the cases of *Verzi v. Baltimore County*, 333 Md. 411 (1994), *Attorney Gen. v. Waldron*, 289 Md. 683 (1981), and *State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496 (1973), have established the following elements of Maryland's real-and-substantial test (also known as the rational basis test): (1) what the rule accomplishes must be legitimate; (2) the rule's purported objectives must be based in reality, not fantasy, and must not be pretextual; and (3) the facts and circumstances in evidence should allow the Court to reasonably conclude that the rule can be viewed as meaningfully accomplishing something in the real world. The Plaintiffs claim that the 300-foot ordinance violates all of the above listed elements since: (1) its purpose is to confer a financial benefit to a distinct and private interest group; (2) Defendant's hypothesized parade of horribles flowing from mobile vending competition is not reasonably conceivable; and (3) the manner in which the rule is interpreted and enforced means its cannot be viewed as furthering any government interest in a real-and-substantial manner. In sum, Plaintiffs argue that protectionism is not a legitimate government interest, whether as an end in itself or as a means to promote the "general welfare."

Applying the heightened rational standard of review to the 300 foot rule this Court concludes that this provision is not unconstitutional because it (1) protects the contributions

brick-and-mortar retail establishments make to the City's commercial districts; (2) promotes entrepreneurial investments and opportunity by eliminating the potential risk of food trucks; and (3) diversifies the marketplace to maximize positive economic effect by creating meaningful choices for the consumer. The 300-foot rule promotes brick-and-mortar establishments throughout the City by eliminating the threat of mobile vendors, and ensuring brick-and-mortar establishments become a permanent fixture in the City. Promoting brick-and-mortar restaurants provides jobs, property tax revenue, and prevents a growing number of vacant properties. The commercial district of this City is dependent upon these brick-and-mortar establishments' long-term real estate investments. The City's economic vitality is dependent upon the flourishment of its commercial district.

As stated in *Waldron*, a State may enact regulations that may be burdensome on an individual's right to engage in their choice of occupation, as long as that regulation is required for the protection of the public health, safety or morals. This Court agrees that the vitality of commercial districts is dependent upon the success of brick-and-mortar establishments, which promotes a successful economy. The 300-foot rule serves the legitimate purpose of promoting the City's general welfare by establishing a 300-foot distance between brick-and-mortar establishments and mobile vendors. The City is entitled to protect the general welfare by ensuring the vibrancy of commercial districts.

Thus, this Court declares that Baltimore City Code, Article 15, Section 17, *et seq.*, is constitutional and does not infringe on the Plaintiffs Due Process and Equal Protection rights.

C. VOID FOR VAGUENESS

The Plaintiffs also challenge Baltimore City Code, Article 15, Section 17, *et seq.*, on "void for vagueness" grounds arguing that the terms and phrases used in the 300-foot rule are

undefined and ambiguous. Art. 15, Section 17-33, of the Code reads as follows, "a mobile vendor may not park a vendor truck within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food product, other merchandise, or service as that offered by the mobile vendor."[1] The Plaintiffs challenge this provision on its face and as applied.

The Fifth and Fourteenth Amendments guarantee that "(n)o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Bowers v. State*, 283 Md. 115, 120 (1978) (citations omitted). The fundamental requirement "is that a penal statute be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Id.*

Generally, two elements must be examined to determine if a statute is unconstitutionally vague: (1) the statute must satisfy fair notice; and (2) the statute must provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact and others whose obligation is it to enforce, apply and administer penal laws. *McFarlin v. State*, 409 Md. 391, 410-11 (2009).

The "fair notice" element is required to ensure, "that persons of ordinary intelligence and experience be afforded a reasonable opportunity to know what is prohibited, so that they may govern their behavior accordingly." *McFarlin*, 409 Md. at 411. A statute will not be held vague "under the fair notice principle if the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or

[1] The method of enforcing the 300-foot rule has been explained as follows; first, enforcement officials receive a complaint from a brick-and-mortar restaurant that mobile vendors are violating the rule. Next, a Baltimore official investigates that complaint and instructs the mobile vendor to either stop selling certain products or move further than 300 feet away from any brick-and-mortar business that sells the same type of food product. If a mobile vendor refuses to comply, officials are permitted to issue a citation.

even the words themselves if they possess a common and generally accepted meaning." *Id.* at 411.

The "fixed standards and adequate guidelines" element is required because "a vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an Ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Bowers*, 409 Md. at 121-22. The Bowers Court emphasizes that, "this is not to say, of course, that a criminal statute is void merely because it allows for the exercise of some discretion on the part of law enforcement and judicial officials. It is only where a statute is so broad as to be susceptible to irrational and selective patterns of enforcement that it will be held unconstitutional..." *Id.* at 122.

The Plaintiffs have provided this Court with voluminous evidence regarding the ambiguity of the 300-foot rule. The Plaintiffs deposed two city officials, Gia Montgomery and Babila Lima. These depositions were admitted into evidence in their entirety without objection. *See* Pl. Ex. 30-32. Having reviewed all of the evidence, including these depositions, this Court concludes that the 300 foot rule does not satisfy the requirements established in *Bowers* or *McFarlin.*

1. **"Primarily engaged in"**

This Court's void for vagueness analysis begins with an examination of the phrase "primarily engaged in." Applying the fair notice standard to this terminology, this Court concludes that a reasonable person is not provided an opportunity to know what is prohibited since the meaning of "primarily engaged in" is unable to be accurately interpreted. Although these words can be found in a general dictionary, based on the testimony and depositions

admitted at the hearing it is apparent that the meaning of "primarily engaged in " as applied in this ordinance cannot satisfy the *McFarlin* requirement.

When the Plaintiffs questioned Gia Montgomery about the meaning of "primarily engaged in," she agreed that the meaning of "primarily engaged in" is subjective and defined by common sense. *See* Pl. Ex. 32, Depo. of Gia Montgomery, 163:7-20; 184:4-20.

Additionally, when testifying about his understanding of the 300 foot rule Mr. Joey Vanoni stated that he has never been provided with nor seen anything helpful from the City to define "primarily engaged in selling." He explained that he is hesitant to park near a Subway since Subway sells pizzas and meatball subs as well. Mr. Vanoni explained that although his truck sells mainly pizza and occasionally adds meatball subs to the menu, he is uncertain if Subway qualifies as "primarily engaged in selling" pizza and meatball subs since those items are on Subway's menu.

City Official, Babila Lima, admitted that the definition of "primarily engaged in" was subjective:

Q: Would the City agree that the - - whether a brick-and-mortar retail establishment is primarily engaged in selling a certain product has to be made on a case-by-case basis?
A: Yes.
Q: Would the City agree that determining whether a brick-and-mortar retail establishment is primarily engaged in selling a certain product or service is very subjective?
A: I don't know that I would use the words "very subjective."
Q: How about subjective? Is it subjective in determining whether a retail business establishment is primarily engaged in selling a certain product or service?
A: You could describe it as subjective.

See Pl. Ex. 30, Depo. of Babila Lima, 190:15-191:9.

The challenged ordinance does not define "primarily engaged in" and therefore, does not provide the clarity or fair notice that is required to avoid arbitrary and discretionary enforcement.

2. "Same type of food product"

Similarly, "same type of food product" has never been clearly defined. Babila Lima stated that the definition of "same type of food product" is based on common sense. *See* Pl. Ex. 30, Depo of Babila Lima, 209:15-210:13. On the other hand, Gia Montgomery stated that that there can be multiple interpretations of the "same type of food product" such as (1) a type of cuisine like Italian, (2) a food product like starch or vegetable, or (3) each individual item being sold. *See* Pl. Ex. 32, Depo of Gia Montgomery, 149:4-150:4.

Additionally, Mr. Vanoni testified that he has not been able to decipher the broad terminology of "same type of food product." He is unsure if it refers to food as a category, or a style.

Nicole McGowan (owner of MindGrub Café) testified that her understanding of the 300-foot rule is that you cannot operate within 300 feet of a restaurant selling the "same stuff." Mrs. McGowan evolved her menu to be more health conscience, but this menu change has restricted her food truck even more in Baltimore City. During cross-examination, defense counsel used Mrs. McGowan's slogan "Brain Food for Knowledge Workers" as defining her food as a *type* of food product. As defense counsel questioned Mrs. McGowan about her menu items as compared to Royal Farms or Subway, defense counsel focused on the fact that the food truck is primarily engaged in "brain food" and not all food is "brain food." However, Mrs. McGowan testified that she compares her *specific* menu items to brick-and-mortar restaurant menu items. For example, she testified that she is unsure if she can park near a chick-fil-a since they offer gluten free items and grilled chicken as well.

Again, "same type of food product" are words found in a general dictionary. However, *McFarlin* requires that an individual be afforded a reasonable opportunity to know what is

prohibited. Although the Defendant argues that these words are defined in the dictionary, the testimony and depositions admitted at the hearing clearly show that the meaning of "same type of food product" as it applies in the ordinance cannot be clarified by a dictionary alone.

The lack of clarity in how to interpret "same type of food product" constitutes a failure to provide fair notice and creates the danger of arbitrary and discretionary enforcement.

3. Measurement of 300 feet

Article 15, § 17-33 does not provide a definition as to how the 300 foot distance is measured; does it begin at the front door of the restaurant, the sidewalk, or at the edge of the building in which the restaurant is located? This Court finds that the entities enforcing this ordinance do not have guidance as to how to measure the 300 foot distance between brick-and-mortar establishments and food trucks.

Four different entities have authority to enforce the 300-foot rule: the Department of Transportation, the Department of Health, the Baltimore City Police Department, and the University of Maryland Police. These enforcement officials are not provided a uniform standard to measure 300-feet. An official at the Department of Health previously measured the distance by drawing a circle with a 300-foot radius that originates from a complaining restaurant. *See* Pl. Ex. 8. The Department of Transportation has not "coordinated the way in which it enforces or advises mobile vendors about the 300-foot proximity ban with other departments that have similar enforcement authority." Pl. Ex. 31, 38:7-13. Gia Montgomery stated in her deposition that she measures 300-feet by guessing if "someone is parked within two blocks" of a restaurant, using city blocks as her measuring tool. See Pl. Ex. 31, 43:5-44:2. Since the various enforcement officials have not coordinated a uniform method or standard for measuring the 300 foot distance

and the code does not provide any guidance, this provision is clearly susceptible to arbitrary enforcement.

This Court is not particularly concerned with the number of feet that the ordinance established, but rather with the lack of clarity, and therefore the inevitable lack of consistency in how the chosen amount of feet is measured. This Court will resolve the "how to measure" issue by directing that the distance must be measured from the closest point of the space in the building that is occupied by the restaurant- or by the food court in which the restaurant is located (rather than at the closest point of the building in which the restaurant is located) to the closest point of the food truck. So for example, if there is a restaurant within an office building, the measurement must be from the *space* where the restaurant is located, not at the outside of the *building* in which the restaurant is located.

The issue of vagueness in the application of this rule is highlighted in Mr. Vanoni's (owner of Pizza di Joey) testimony. He testified about an encounter with a University of Maryland police officer in June of 2015, when he was operating at 801 West Baltimore Street. He was approached by an officer who advised him that a complaint was lodged that he was in violation of the 300 foot rule. Mr. Vanoni believed he was not in violation, and reviewed the text of the rule with the officer to prove he was not within 300 feet of a brick-and-mortar restaurant primarily engaged in selling the same type of food product. He was able to persuade the officer that the brick-and-mortar establishment was incorrect. Although Mr. Vanoni avoided a citation, this encounter illustrates that Mr. Vanoni, the officer, and the brick-and-mortar restaurant all have their own way of interpreting and applying the 300 foot rule.

The fundamental requirement "is that a penal statute be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."

Bowers, 283 Md. at 120. As shown through the evidence, the terms "primarily engaged in," and "same type of food product" are "so broad as to be susceptible to irrational and selective patterns of enforcement..." *Bowers*, 409 Md. at 122. Overall, the terms contained in, and the lack of standards that should be in Art. 15, § 17-33 prevents enforcement officials, brick-and-mortar restaurants, and food trucks from understanding what constitutes a violation of the rule. The Code simply does not provide constitutionally required fair notice and adequate guidelines for enforcement officials, brick-and-mortar establishments, or food trucks.

D. STANDING

In this case, it is true that Plaintiffs have never received a ticket, paid a fine, nor had their license revoked. Therefore, they have not, as of yet, been subjected to the criminal penalty of the ordinance. However, this Court concludes that the Plaintiffs do have standing to argue for injunctive relief. "Under Maryland common law, standing to bring a judicial action generally depends on whether one is 'aggrieved,' which means whether a plaintiff has 'an interest such that he [or she] is personally and specifically affected in a way different from . . . the public generally." *Kendall v. Howard County*, 431 Md. 590, 603 (2013). It is clear based on the testimony of the Plaintiffs that this ordinance personally and specifically affects them in a way that it does not affect the public generally. They testified that this ordinance has in effect barred them from doing business in Baltimore City since it limits their ability to practice their chosen profession in areas of the city that can be profitable.

"Moreover, a plaintiff must satisfy the court that 'the interest sought to be protected by the complainant is arguably within the zones of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 604. The Plaintiffs' livelihood depends on

the success of their food truck business. That is the interest they seek to protect and obviously the challenged ordinance directly regulates and limits that industry.

E. INJUNCTIVE RELIEF

As stated above, this Court concludes that the 300 foot rule is not per se unconstitutional, but that the terms of the ordinance are so vague that fair notice is not provided and enforcement is likely to be subjective and arbitrary until the ordinance has been clarified by amendments. Therefore, this Court **GRANTS** the Plaintiffs' request for **Injunctive Relief,** in an Order filed with this Opinion, and directs that the injunction be **STAYED** for sixty (60) days from date of this Order.

12/20/17
DATE

Judge Karen Friedman
Judge Karen C. Friedman

cc: ALL PARTIES AND COUNSEL OF RECORD
Clerk: Please send copies via U.S. Mail

TRUE COPY
TEST
Marilyn Bentley
MARILYN BENTLEY, CLERK

CIRCUIT COURT FOR BALTIMORE CITY
1983

PIZZA DI JOEY, LLC, et. al.	*** IN THE**
Plaintiffs,	*** CIRCUIT COURT**
v.	*** FOR**
MAYOR AND CITY COUNCIL OF BALTIMORE	*** BALTIMORE CITY**
	*** Case No. 24-C-16-002852**
Defendant.	

* * * * * * * * * * * * *

ORDER

This matter having come before the Court for trial on September 28th through September 29th, 2017, testimony taken and evidence admitted for the reasons stated in this Court's Memorandum Opinion, it is this 20 **day of December 2017**, by the Circuit Court for Baltimore City, Part 29, hereby:

ORDERED that Plaintiffs request to find Baltimore City Code Article 15, Section 17-33 per se unconstitutional is **DENIED**; and it is further

ORDERED that Plaintiffs request for declaratory judgment in favor of the Plaintiffs that the City's enforcement of Baltimore City Code Article 15, Section 17-33 violates their constitutional right to Equal Protection and Due Process is **DENIED;** and it is further

ORDERED that Plaintiffs request for injunctive relief is **GRANTED;** and it is further

ORDERED that this **INJUNCTION** enjoining the City from enforcing Baltimore City Code Article 15, Section 17-33 shall be **STAYED FOR SIXTY (60) DAYS** from the date of this order.

Judge Karen Friedman

Judge Karen C. Friedman
Circuit Court for Baltimore City

TRUE COPY
TEST

MARILYN BENTLEY, CLERK

cc: ALL PARTIES AND COUNSEL OF RECORD
Clerk: Please send copies via U.S. Mail

CIRCUIT COURT FOR BALTIMORE CITY 23 1983