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SEP 16 2009

JOAN P. WHITE
SAN JUAN COUNTY, WASHINGTON

**SUPERIOR COURT OF WASHINGTON
FOR SAN JUAN COUNTY**

GARY FRANCO,

Plaintiff,

v.

SAN JUAN COUNTY,

Defendant.

No. 09 2 05163 2

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. This is a constitutional lawsuit to vindicate produce vendor Gary Franco's right, under the Privileges or Immunities Clause of the Washington Constitution, to earn an honest living free from unreasonable government interference. In July 2009, at the urging of brick-and-mortar business owners, the County passed an ordinance requiring certain vendors to obtain a costly and unnecessary permit to sell in public places. A vendor must pay \$50 for each day he wishes to sell—that is, \$50 per day for the right to earn a living. Worse, a vendor can only get the permit if he receives the written consent of competing business owners. In other words, government has given business owners the power to veto their competition.

1 21. The Ordinance makes it unlawful for a vendor to operate in certain
2 geographic areas of the county—specifically, the unincorporated urban growth areas of
3 Eastsound and Lopez Village and the activity centers of Olga, Deer Harbor, and Orcas—
4 without first obtaining a permit from the government. *Id.* §§ 3, 4.
5

6 22. To obtain a permit, a vendor must, among other things, pay a fee of \$50
7 for each day he wishes to sell—that is, \$50 per day for the right to earn a living. *See id.* §
8 6(F) (“The applicant . . . shall provide . . . [p]ayment of a fee of \$50.00 per day.”).

9 23. The daily fee was set at \$50 to make it “as difficult as possible” to vend in
10 the areas covered by the ordinance. *Hearing on Ordinance 21-2009 Before the San Juan*
11 *County Council* (July 14, 2009) (statement of Councilmember Howie Rosenfeld).
12

13 24. In addition to paying the County \$50 per day, a vendor must obtain written
14 permission from competing business owners in order to obtain a permit. Specifically, the
15 vendor must provide the County “[w]ritten consent of all business owners within 25 feet
16 of the application site.” San Juan County Ordinance 21-2009 § 6(E).
17

18 25. This business-owner consent requirement gives brick-and-mortar business
19 owners the power to veto their competition (and a vendor’s right to earn an honest
20 living).
21

22 26. In addition to paying \$50 per day and obtaining the written consent of
23 competing business owners, a vendor must provide the following documentation to the
24 County Administrator in order to obtain a permit: “[t]he applicant’s name, home address,
25 business address, state business license, and contact information”; “[a] site plan showing
26 the proposed location which shall not exceed 50 square feet”; “[a] list of the goods or
27 wares to be offered for sale”; and “[t]he dates for which the applicant seeks permission to
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1 use the public place for sales, which period shall not exceed 6 months.” *Id.* § 6(A), (B),
2 (C), (D).

3 27. Even if a vendor provides all of the documentation, consent, and fees
4 required for a permit, however, the Ordinance does not require the County Administrator
5 to actually issue one. *See id.* § 7.

6 28. The penalty for vending without a permit is \$250 *per hour.* *Id.* § 9.

7 29. Although the Council claimed the Ordinance was necessary “to protect the
8 public health, safety and welfare” and “the interests of the County in providing for the
9 orderly use of County-owned property for its intended purpose,” *id.* ¶ A, the text of the
10 Ordinance—especially the requirement to obtain business-owner consent—indicates that
11 its true purpose is to protect brick-and-mortar businesses at the expense of vendors.
12

13 30. Comments made during the public hearing on the Ordinance confirm that
14 the Ordinance was the result of such economic protectionism. For example:
15

- 16 • A councilmember maintained that consent of neighboring business owners
17 should be required for a permit because “the business owners are the
18 people who are really concerned about this.” *Hearing on Ordinance 21-*
19 *2009 Before the San Juan County Council* (July 14, 2009) (statement of
20 Councilmember Rich Peterson).
- 21 • The sheriff testified that his office had received numerous calls from
22 business owners complaining that vending was “peeling off some of their
23 own business.” *Id.* (statement of Sheriff William Cumming).
- 24 • A shop owner insisted that, because vendors don’t have the same
25 expenses, such as rent and utilities, that brick-and-mortar businesses have,
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27

1 the council should “level [the] playing field.” *Id.* (statement of Michael
2 Rivkin).

- 3 • A commercial landlord grumbled that it was “very frustrating” for him “to
4 have a vendor set up within thirty feet of the rental space that I can’t rent .
5 . . . and make lots of money.” *Id.* (statement of Rick Hughes).
6

7 31. A newspaper editorial published the morning of the public hearing on the
8 Ordinance likewise described the Ordinance’s protectionist purpose: “Because sidewalk
9 vendors don’t have the costs of maintaining a storefront, they can often charge less for
10 their products—sometimes just a few feet away from a local shop. . . . The county
11 ordinance is intended to help level the playing field.” *County needs to adopt street*
12 *peddling ordinance—now*, Islands’ Sounder (July 14, 2009).
13

14 32. In addition to protecting brick-and-mortar businesses, the Council sought
15 to protect certain vendors favored by the County, including farmers who sell their own
16 produce; ice cream trucks; and non-profit and charitable groups, such as the Lions Club
17 or Kiwanis.
18

19 33. Accordingly, the Council exempted vendors engaged in the following
20 activities from the permit requirement, including the \$50-per-day fee and the need to
21 obtain business-owner consent:

- 22 • “Sales of newspapers”;
23 • “Transient vendors who do not remain in the same place for more than
24 five minutes, such as peddlers and ice cream trucks where goods and
25 wares are carried from place to place”;
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- 1 • “Sales and activities of charitable, religious or fraternal, nonprofit
- 2 organizations, corporations which have received tax exempt status under
- 3 26 USC Section 501(c)(3), or other similar civic, charitable or nonprofit
- 4 organizations (such as Girl Scouts, Lions, Kiwanis, youth groups, school
- 5 groups, child lemonade stands, etc.)”;
- 6
- 7 • “Farmers, gardeners and other persons who produce and offer for sale
- 8 their own fruits, vegetables, berries, eggs or any farm produce and which
- 9 edibles are raised, harvested, produced or manufactured by such persons,
- 10 and resale and consignment is not exempt”; and
- 11
- 12 • “Sales by persons approved in connection with County-authorized events
- 13 such as farmer’s markets, fairs, art fairs, parades.”

14 San Juan County Ordinance 21-2009 § 5.

15 34. These exemptions undermine the Council’s claim that the Ordinance was
16 necessary to protect the “public health, safety and welfare,” or the “orderly use of
17 County-owned property.”

18 35. Gary Franco and vendors like him pose no more of a problem than
19 favored, exempt vendors. For example, vending to earn a living, as Gary did, presents no
20 greater danger than vending to raise money for the Kiwanis or Lions Club. Vending fruit
21 from a friend’s farm, as Gary did, is no more hazardous or disruptive than vending fruit
22 from one’s own farm. And vending from a table, as Gary did, is just as safe as, if not
23 safer than, vending from an ice cream truck that moves every few minutes.

24 36. Like the \$50-per-day fee and requirement that a vendor obtain the written
25 consent of competing business owners in order to earn an honest living, the exemptions

1 make clear that the Ordinance was motivated by economic protectionism—not protection
2 of public health, safety, and welfare or the orderly use of County-owned property.

3
4 **INJURY TO GARY FRANCO**

5 37. The County has succeeded in its purpose: Because of Ordinance 21-2009
6 and its placement of a vendor's right to earn an honest living at the mercy of government
7 officials and politically-connected competitors, Gary has stopped vending. Thus, the
8 Ordinance has harmed, and continues to harm, him.

9 38. Having to pay \$50 per day—or \$300 per six-day work week—in order to
10 vend is commercially infeasible for Gary. The problem is compounded by the fact that
11 Gary at times sold at two locations during the course of a day, which, under the
12 Ordinance, would require payment of \$100 per day, or \$600 per week.

13 39. Having to obtain written consent of business owners in order to vend is
14 likewise infeasible. It subjects Gary's ability to earn a living to the whim of competing
15 business owners and places it in complete uncertainty. Moreover, identifying such
16 business owners and attempting to obtain their consent would consume considerable
17 amounts of time and energy that Gary would otherwise devote to earning a living. The
18 mere fact that Gary must obtain their consent, while they need not obtain his, creates an
19 asymmetrical distribution of government burdens and benefits among the government's
20 favored and disfavored businesses.
21
22

23 40. Although Gary's recent vending focused on Eastsound, he has sold in each
24 of the five geographic areas covered by the ordinance. Based in part on where he thought
25 business would be best, he periodically moved his vending location within or between
26 these geographic areas. Attempting to obtain consent of new business owners with each
27

1 such move would prevent Gary from being able to timely and effectively respond to
2 changing market conditions. It would also compound the uncertainty regarding his
3 ability to vend and multiply the time and effort he would have to spend on matters other
4 than earning a living.

5
6 41. Having to provide, with a permit application, a list of all the “goods or
7 wares” that Gary would offer for sale is likewise infeasible. When Gary was still
8 vending, he usually did not know what he would sell on a given day until that morning,
9 when he traveled to Skagit Valley and determined what was available and fresh. Gary’s
10 success as a vendor rested largely on his ability to provide his customers the freshest
11 produce possible, a practice he cannot continue if he must inform the County in advance
12 what he plans to sell each day.

13
14 42. Having to provide, with a permit application, a “site plan showing the
15 proposed location” at which Gary would vend is likewise infeasible. As noted above,
16 depending on where he thought business would be best, Gary periodically changed his
17 vending location. Having to notify the County in advance of each move and submit a
18 “site plan” for each new location would prevent him from being able to timely and
19 effectively respond to changing market conditions.

20
21 43. The fact that there is no guarantee under the Ordinance that a permit
22 would issue, even if Gary were to submit the required payment, consent, and
23 documentation, imposes yet another level of uncertainty on his ability to earn an honest
24 living.

25
26 44. Because of the infeasibilities and uncertainties that the Ordinance imposes
27 on him—infeasibilities and uncertainties not imposed on brick-and-mortar businesses and

1 favored, exempt vendors—Gary has stopped vending and is no longer able to earn the
2 living he had been for decades.

3 45. But for the Ordinance, Gary would continue to sell produce in the public
4 places of San Juan County covered by the Ordinance.
5

6 **COUNT I: WASHINGTON PRIVILEGES OR IMMUNITIES CLAUSE**

7 46. By this reference, Plaintiff incorporates each and every allegation and
8 averment set forth above as though fully set forth herein.

9 47. Article I, section 12 of the Washington Constitution—the Privileges or
10 Immunities Clause—provides, “No law shall be passed granting to any citizen, class of
11 citizens, or corporation other than municipal, privileges or immunities which upon the
12 same terms shall not equally belong to all citizens, or corporations.”
13

14 48. The purpose of the Privileges or Immunities Clause is to prohibit
15 government from granting favoritism by conferring “privileges or immunities” on certain
16 citizens or corporations that are not available to others.

17 49. The right to carry on or engage in business—that is, to earn an honest
18 living—is one of the “privileges or immunities” with respect to which Article I, section
19 12 prohibits government favoritism.
20

21 50. Ordinance 21-2009 confers privileges and/or immunities on brick-and-
22 mortar businesses and favored, exempt vendors to the disadvantage of others, including
23 Gary Franco. Among other things, the Ordinance subjects the right of most vendors to
24 earn an honest living to an onerous, costly, and unnecessary permit requirement not
25 imposed on favored, exempt vendors, and it permits brick-and-mortar business owners to
26 veto a non-exempted vendor’s right to earn an honest living.
27

ATTACHMENT A

**AN ORDINANCE REQUIRING A USE PERMIT FOR VENDORS
ON PUBLIC WAYS AND ESTABLISHING REGULATIONS FOR ALL VENDORS**

BACKGROUND

A. The County Council finds the need to implement reasonable regulation of vendors using public places in the County in order to protect the public health, safety and welfare of the people of San Juan County, and the interests of the County in providing for the orderly use of County-owned property for its intended purpose; and

B. The County conducted a duly advertised public hearing and has received public testimony.

NOW, THEREFORE, BE IT ORDAINED by the County Council of San Juan County, state of Washington, as follows:

Section 1. Purpose. The purpose of this ordinance is to require vendors using public places in the County to obtain a use permit from the County in order to prevent the creation of a nuisance and to establish rules for the operation of vending on public property.

Section 2. Definitions. In construing the provisions of this chapter, the following definitions shall apply:

"Public place" shall include any County-owned property including public parks, streets, sidewalks and rights-of-way.

"Vendor" shall include any person engaged in selling or offering for sale any goods or wares from any public place.

Section 3. Geographic applicability. This ordinance shall apply to those areas of the County located within the exterior boundaries of the unincorporated urban growth areas of Eastsound and Lopez Village and within the exterior boundaries of the activity centers of Olga, Deer Harbor, and Orcas.

Section 4. Use Permit Required. It shall be unlawful for any vendor to sell or offer to sell any items or products while located on any County-owned public property without first having obtained and prominently posted a Public Place Use Permit from the County Administrator, or a designee in accordance with this chapter.

Section 5. Exemptions from Use Permit. Vendors shall be exempt from the license required under this chapter when engaged in the following activities:

A. Sales of newspapers;

B. Transient vendors who do not remain in the same place for more than five minutes, such as peddlers and ice cream trucks where goods and wares are carried from place to place;

C. Sales and activities of charitable, religious or fraternal, nonprofit organizations, corporations which have received tax exempt status under 26 USC Section 501(c)(3). or other

similar civic, charitable or nonprofit organizations (such as Girl Scouts, Lions, Kiwanis, youth groups, school groups, child lemonade stands, etc.);

D. Farmers, gardeners and other persons who produce and offer for sale their own fruits, vegetables, berries, eggs or any farm produce and which edibles are raised, harvested, produced or manufactured by such persons, and resale and consignment is not exempt, and;

E. Sales by persons approved in connection with County-authorized events such as farmer's markets, fairs, art fairs, parades.

Section 6. Application for Public Place Use Permit. The applicant for a Public Place Use Permit shall provide the County Administrator or his designee with the following:

- A. The applicant's name, home address, business address, state business license, and contact information;
- B. A site plan showing the proposed location which shall not exceed 50 square feet;
- C. A list of the goods or wares to be offered for sale;
- D. The dates for which the applicant seeks permission to use the public place for sales, which period shall not exceed 6 months;
- E. Written consent of all business owners within 25 feet of the application site; and
- F. Payment of a fee of \$ 50.00 per day.

Section 7. Approval, Revocation or Denial. The County Administrator shall have the authority to grant, revoke or deny any public place use permit. Upon receipt of a complete application, a decision to grant or deny the permit must be made within 14 business days. The County shall notify the applicant or vendor in writing of the approval or denial of an application or the revocation of an existing use permit and the reasons therefor. Any Public Place Use Permit issued under this chapter may be revoked after notice and opportunity for a hearing based on one or more of the following grounds:

- A. The vendor has violated or failed to meet any provision of this chapter;
- B. The public place use permit was procured by misrepresentation or fraud; or
- C. The location or operation interferes with foot or street traffic.

Section 8. Restrictions applicable to all vendors. All vendors, including persons exempt from the use permit shall:

- A. Assure that the location of the vending space shall not reduce or obstruct pedestrian passage on the sidewalk to less than four (4) feet to the nearest street, trees, utility poles, traffic control signs and devices, fire hydrants, buildings, etc.;
- B. Not occupy parking spaces on county property and improved county rights-of-way reserved for vehicular traffic;
- C. Not solicit or conduct business with persons in motor vehicles;
- D. Not leave unattended any portion of the vending unit on a sidewalk, nor remain on the public property between midnight and 6 a.m.;
- E. Comply with applicable health regulations; and
- F. Display prominently any permit required by the ordinance.

Section 9. Violation. Any violation of this ordinance is a civil infraction and shall be punished by a fine of not more than \$250.00. Each hour upon which a violation occurs shall constitute a separate offense.

Section 10. Severability. The provisions of this ordinance are severable. If any provision is held invalid, such invalidity shall not affect the remaining provisions of this ordinance.

Section 11. Effective Date.

This ordinance is effective on the 10th working day after adoption.

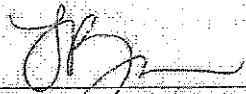
Section 12. Codification.

Sections 2 through 9 shall be codified in Title 5 of the San Juan County Code.

ADOPTED this 4th day of July 2009.

**COUNTY COUNCIL
SAN JUAN COUNTY, WASHINGTON**

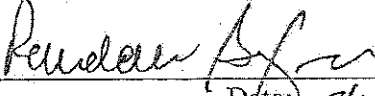
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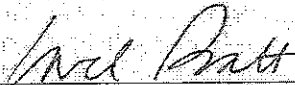
By: 
LISA BROOKS, Deputy, Clerk
Date: 7/14/09

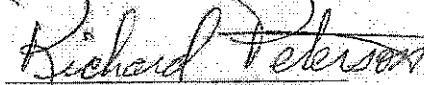
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ADMINISTRATOR

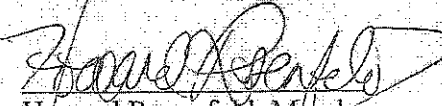

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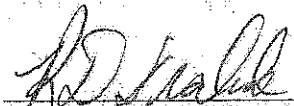
APPROVED AS TO FORM ONLY
RANDALL K. GAYLORD

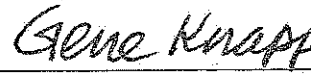
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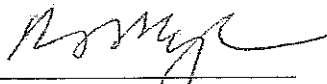

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