

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

CASE NO. 11-33223 CA 25

SILVIO MEMBRENO and
FLORIDA ASSOCIATION OF
VENDORS, INC.,

Plaintiffs,

v.

THE CITY OF HIALEAH, FLORIDA,

Defendants.

**DEFENDANT CITY OF HIALEAH'S MEMORANDUM OF
LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Defendant City of Hialeah (the "City" or "Defendant"), by and through its undersigned counsel and pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, hereby files its memorandum of law in support of its motion for summary judgment (the "Motion") on Plaintiffs' Amended Complaint, and in support thereof states as follows:

I. INTRODUCTION

This case arises out of Plaintiffs' challenges to the constitutionality of sections 18-302 and 18-304 of the City's Code of Ordinances Chapter 18, Article VI, Division 2, codified at sections 18-301 through 18-311 of the City of Hialeah Code of Ordinances (the "Amended Ordinance"). These sections regulate itinerant vendors and peddlers in the City. Plaintiffs, who are peddlers and itinerant vendors in the City, argue that the Amended Ordinance violates

Florida's due process clause and is unconstitutionally vague. In their three count Amended Complaint, Plaintiffs seek declaratory relief and a permanent injunction. All of these claims fail as a matter of law.

As a threshold matter, the City is entitled to summary judgment on these claims because Plaintiffs cannot show that sections 18-302 and 18-304 are not reasonably related to the City's legitimate interests in maintaining pedestrian and vehicular safety on its public roads and thoroughfares. Under the rational basis test, the lowest level of constitutional scrutiny, Plaintiffs bear the burden of demonstrating that these sections bear no reasonable relationship to the City's legitimate public safety interest. Sections 18-302 and 18-304 of the Amended Ordinance simply place reasonable regulations on vendors' activities in order to meet the legitimate State objective of public safety and do not completely interfere with Plaintiffs' right to engage in a lawful occupation. As such, Plaintiffs fail to satisfy their heavy burden.

Furthermore, § 18-302 of the Amended Ordinance is not unconstitutionally vague as it puts individuals of common intelligence and understanding on notice of the conduct that is proscribed. The Amended Ordinance means precisely what it says: peddlers and itinerant vendors may not remain in one location with such regularity and permanency that a reasonable person would believe the location is the vendor's fixed business location. Section 18-302 is clearly worded so as to provide individuals of common intelligence with fair warning of the proscribed conduct. Moreover, courts have routinely upheld the validity of criminal statutes employing the reasonable person standard, and criminal statutes are subject to a higher level of scrutiny than the civil ordinance at issue here. Therefore, the proscriptions of § 18-302 of the Amended Ordinance pass constitutional muster, and Plaintiffs' constitutional vagueness challenge fails as a matter of law.

Finally, Plaintiffs complain that the City has improperly enforced Fla. Stat. § 337.406 by regulating vending on some State roads within the City. Plaintiffs' narrow reading of Fla. Stat. § 337.406 to preclude the applicability of the Statute inside a municipality, ignores established principles of statutory construction and focuses on only one provision of the statute in isolation. Contrary to the meaning ascribed to it by Plaintiffs, when Fla. Stat. § 337.406 is read as a whole, it is clear that the City may seek to prevent certain prohibited uses of a state transportation facility within its incorporated municipality. When read in its entirety, Fla. Stat. § 337.406 demonstrates that it is applicable within a municipality, and thus Plaintiffs' second cause of action for declaratory judgment as to the alleged ultra vires application of this statute must also fail as a matter of law.

II. STATEMENT OF UNDISPUTED FACTS

1. On October 13, 2011, Plaintiffs filed their initial Complaint against the City, challenging the City's Code of Ordinances Chapter 18, Article VI, Division 2, codified at sections 18-301 through 18-311 of the City of Hialeah Code of Ordinances (the "Old Ordinance"). See Complaint, a true and correct copy of which is attached as **Exhibit A**. Plaintiffs asserted three counts based on alleged violations of the basic rights provision, due process clause, and equal protection clause of the Florida Constitution. *Id.*

2. Subsequently, the City amended these provisions on January 9, 2013. A true and correct copy of the Amended Ordinance is attached hereto as **Exhibit B**. The Amended Ordinance begins with the following declaration of its purpose and intent:

WHEREAS, the City has significant government interest in vehicular and pedestrian safety and the free flow of traffic; and...

WHEREAS, street vending is an inherently dangerous activity that compromises both pedestrian and vehicular safety by causing a motorist to obstruct traffic or disregard traffic signals if engaged in buying goods from a street vendor or by

causing a street vendor to remain in the roadway after traffic flow has resumed;
...

WHEREAS, the purpose and intent of this ordinance is to restrict the conduct of street vending on the roadways where the safety of vehicular and pedestrian traffic is paramount; ...

WHEREAS, the purpose and intent of this ordinance is to restrict the conduct of street vending as it concerns the display and storage of their merchandise on the public rights-of-way and public property to preserve safety and order in the use of the public rights-of-way and to equally enforce the provisions of the City's zoning code."

Exh. B at 1-2.

3. Among the primary reasons for enacting the Amended Ordinance are ensuring vehicular and pedestrian safety and maintaining the free flow of traffic on the City's public thoroughfares. *See id.* at 1; *see also* Defendant's Answers to Plaintiff's Second Set of Interrogatories at ¶ 1, attached hereto as **Exhibit C**. In addition, the City enacted the Amended Ordinance to protect the health, welfare, and safety of the community. *See* Exh. C at ¶ 1.

4. The Amended Ordinance defines "*peddlers and itinerant vendors*" as "all persons going from place to place for the purpose of selling or offering for sale, any goods, merchandise, or wares for immediate delivery of the goods, merchandise, or wares at the time the order is taken, whether or not using a wagon, pushcart or other vehicle." *Id.* at 3.

5. Plaintiff Silvio Membreno is a peddler or itinerant vendor within the Amended Ordinance's definition. *See* Amended Complaint. Plaintiff Florida Association of Vendors, Inc. represents a group of persons that are peddlers or itinerant vendors within the Amended Ordinance's definition. *Id.*

6. Section 18-302 of the Old Ordinance was amended to address Plaintiffs' constitutional claims in the original Complaint and remove the prohibition on standing still for more than ten minutes. *See* Exh. B at 3. Section 18-302 of the Amended Ordinance prohibits

peddlers and itinerant vendors from “permanently stop[ping] or remain[ing] at any one location on public property; or private property (unless allowed for by zoning), for the purpose of soliciting, displaying goods, merchandise or wares, or conducting sales.” *Id.* Peddlers and itinerant vendors are also prohibited from “stop[ping] or remain[ing] at any one location with such regularity and permanency that would lead a reasonable person to believe the location is the vendor’s fixed business location.” *Id.*

7. Section 18-304 of the Old Ordinance was amended to remove the blanket prohibition on placing supplies, materials, merchandise, and/or equipment on public or private property. *Id.* at 5. Under the Amended Ordinance, peddlers and itinerant vendors are prohibited from placing or storing their goods, merchandise, or wares on any portion of the public right-of-way. *Id.* In addition, peddlers and itinerant vendors must obtain the prior written approval of the property owner in order to store their goods, merchandise, or wares on private property, and must make the proof of authorization available upon request by a code or license inspector. *Id.*

8. On May 8, 2013, Plaintiffs filed their Amended Complaint based on the Amended Ordinance. Plaintiffs allege that the prohibitions on standing still and on displaying their merchandise contained in sections 18-302 and 18-304 of the Amended Ordinance are violations of the due process clause of the Florida Constitution. Am. Compl. ¶¶ 146-54. Plaintiffs also allege that section 18-302 of the Amended Ordinance is unconstitutionally vague. *Id.* ¶¶ 155-58. Lastly, Plaintiffs allege that the City’s enforcement of Fla. Stat. § 337.406 within the municipality exceeds statutory authority and is thus invalid as an ultra vires application of the law. *Id.* ¶¶ 159-61.

III. LEGAL ARGUMENT

A. Legal Standard

Entry of summary judgment is appropriate where the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c); *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003). The moving party bears the initial burden of showing the Court that there are no genuine issues of material fact that should be decided at trial. *See Clay Elec.*, 873 So. 2d at 1185. The question of whether a challenged statute or ordinance is constitutional is a question of law, and thus is properly adjudicated on a motion for summary judgment. *See Kuvin v. City of Coral Gables*, 62 So. 3d 625, 629 (Fla. 3d DCA 2010) (citing *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n*, 838 So. 2d 492, 500 (Fla. 2003)). “There is a strong presumption in favor of the constitutionality of statutes.” *Budget Rent-A-Car Systems, Inc. v. Bennett*, 847 So. 2d 579, 580 (Fla. 3d DCA 2003) (citing *Burch v. State*, 558 So. 2d 1, 3 (Fla. 1990)). “All doubt will be resolved in favor of the constitutionality of a statute, and an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt.” *Id.* Here, there are no genuine issues of material fact and the City is entitled to judgment as a matter of law. In sum, Plaintiffs’ claims fail because Plaintiffs have failed to satisfy their heavy burden of establishing that sections 18-302 and 18-304 are unconstitutional.

B. The Amended Ordinance Does Not Violate Due Process as it is Reasonably Related to the Legitimate State Interest of Public Safety

Plaintiffs simply cannot meet their burden of demonstrating that sections 18-302 and 18-304 of the Amended Ordinance are not reasonably related to the City’s legitimate interest of promoting the safety of vehicular and pedestrian traffic on public rights-of-way. “Under Florida law, ‘[a] regularly enacted ordinance will be presumed to be valid until the contrary is shown, and a party who seeks to overthrow such an ordinance has the burden of establishing its invalidity.’” *Miami-Dade Cnty. ex rel. Walthour v. Malibu Lodging Invs., LLC*, 64 So. 3d 716,

719 (Fla. 3d DCA 2011) (quoting *Lowe v. Broward Cnty.*, 766 So. 2d 1199, 1203 (Fla. 4th DCA 2000)).

The City's purposes in enacting these sections are stated in the various WHEREAS introductory clauses to the Amended Ordinance, and all are recognized as legitimate interests. *See* Exh. A. The sections at issue are reasonably related to these interests by preventing peddlers from interfering with the free flow of vehicular and pedestrian traffic on the rights-of-way. Plaintiffs are unable to show that sections 18-302 and 18-304 of the Amended Ordinance violate the due process clause of the Florida Constitution.

1. The Right to Pursue a Lawful Occupation and to Bargain For Goods and Services Are Not Fundamental Rights

The Plaintiffs' two asserted constitutional rights, the right to pursue a lawful occupation and the right to bargain for goods and services rendered, are not fundamental rights. *See Lane v. Chiles*, 698 So. 2d 260, 264 (Fla. 1997) (approving trial court's finding that the state regulation at issue did not violate a protected liberty interest where it "does not completely prevent the plaintiffs from engaging in their chosen occupation"); *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210 (Fla. 2000) (applying the rational basis test where appellee argued that statute violated a citizen's right to bargain or negotiate for insurance rates). Sections 18-302 and 18-304, which require peddlers to move from place to place and forbid them from placing their merchandise on the ground in a fixed location, do not completely foreclose Plaintiffs' ability to engage in their chosen occupation. *See Brown v. City of Newark*, 552 A.2d 125, 130 (N.J. 1989) ("Although peddling is a legitimate occupation, *the right to peddle is the right to go from place to place selling one's wares, not the right to remain indefinitely at a fixed location.*") (emphasis added). Plaintiffs are seeking to invalidate two sections of the Amended Ordinance that do not infringe on any of Plaintiffs' fundamental rights.

2. The Sections Are Reasonably Related to the City's Legitimate State Interest of the Safety of Pedestrians and Vehicles on Public Roadways.

Where, as here, a due process challenge is raised to a statute that does not infringe upon a fundamental right, the rational basis test applies. *Joseph v. Henderson*, 834 So. 2d 373, 375 (Fla. 2d DCA 2003) (citing *United Yacht Brokers, Inc. v. Gillespie*, 377 So. 2d 668, 671 (Fla. 1979)). “[I]n order to determine whether a statute violates due process, we must determine whether the statute bears a reasonable relationship to a legitimate legislative objective and is not discriminatory, arbitrary or oppressive.” *Nationwide Mut. Fire Ins. Co. v. Pinnacle Med., Inc.*, 753 So. 2d 55, 59 (Fla. 2000). Sections 18-302 and 18-304 are constitutional because these sections bear a reasonable relationship to the City’s legitimate interest of promoting the safety and character of its public rights-of-way.

The power of a municipality to safeguard the character of its streets, sidewalks, and all other common grounds has long been held to be a legitimate state interest. *See Flores v. City of Miami*, 681 So. 2d 803, 805 (Fla. 3d DCA 1996) (citing *State ex rel. Nicholas v. Headley*, 48 So. 2d 80, 81 (Fla. 1950), for proposition that, “a municipality has the power to safeguard and maintain the character of its streets, sidewalks, and all other common grounds for the benefit of the general public through regulation.”); *see also State v. Baal*, 680 So. 2d 608, 610 n. 2 (Fla. 2d DCA 1996) (citing *Headley* for proposition that, “right of a citizen to use public streets not unconditional and absolute but may be controlled and regulated in the interest of the public good[.]”) Furthermore, the City has “strong interests in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting property rights of all Florida citizens.” *Johnson v. Women’s Health Ctr., Inc.*, 714 So. 2d 580, 581 (Fla. 5th DCA 1998) (citing *Operation Rescue v. Women’s Health Ctr., Inc.*, 626 So. 2d 664, 672 (Fla. 1993)).

In fact, the stated purpose of these sections, as evidenced by the introductory clauses to the Amended Ordinance, are: 1) “to restrict the conduct of street vending on the roadways *where the safety of vehicular and pedestrian traffic is paramount*”; and 2) “to restrict the conduct of street vending as it concerns display and storage of [the street vendors’] merchandise on the public rights-of-way and public property to preserve safety and order in the use of the public rights-of-way[.]” Exh. A at 2 (emphasis added). Sections 18-302 and 18-304 bear a reasonable relationship to these legitimate interests by prohibiting street vendors from remaining stationary on the public rights-of-way for extended periods of time and by prohibiting street vendors from impeding the free flow of traffic with their merchandise. Accordingly, Plaintiffs’ due process challenges to two provisions which are in place to promote the legitimate state interests of public safety and order by prohibiting street vendors from interrupting the free flow of vehicular and pedestrian traffic, must fail as a matter of law. Therefore, the City is entitled to summary judgment on Plaintiffs’ claims that sections 18-302 and 18-304 violate the due process clause of the Florida Constitution.

C. Section 18-302 Is Not Unconstitutionally Vague as the Reasonable Person Standard Grounds the Statute in the Norms of the Community

Plaintiffs’ remaining constitutional challenge, that section 18-302 of the Amended Ordinance is unconstitutionally vague, must also fail because the section is specific enough to put a person of common intelligence on notice of the proscribed conduct, namely, remaining in a fixed location for an extended period of time. “The standard for testing vagueness is whether a statute or ordinance ‘gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct.’” *Kuvin*, 62 So. 3d at 639-40 (quoting *Jones v. Williams Pawn & Gun, Inc.*, 800 So. 2d 267, 270 (Fla. 4th DCA 2001)). “The language of the statute [or ordinance] must provide a definite warning of what conduct is required or prohibited, measured by common

understanding and practice.” *Id.* at 640. Great latitude is afforded civil statutes in light of a vagueness challenge, and, therefore, any doubts as to the constitutionality of the statute must be resolved in favor of its constitutionality. *Scudder v. Greenbrier C. Condo. Ass’n, Inc.*, 663 So. 2d 1362, 1367-68 (Fla. 4th DCA 1995) (internal citation omitted). “[I]t is the court’s obligation to find the statute constitutional if the application of ordinary logic and common understanding would permit the same.” *Id.* at 1367 (internal citation omitted).

Plaintiffs’ vagueness challenge is based on the following language from section 18-302:

“No peddler or itinerant vendor soliciting or conducting sales on foot can permanently stop or remain at any one location on public property; or private property (unless allowed for by zoning), for the purpose of soliciting, displaying goods, merchandise or wares, or conducting sales. Nothing in this section shall be interpreted to authorize a peddler or itinerant vendor to stop or remain at any one location on private or public property with such regularity and permanency that would lead a reasonable person to believe the location is the vendor’s fixed business location.”

Exh. A at 3. Based on this provision, Plaintiffs allege that, “[a]n ordinary person of average intelligence would either be unaware or unable to ascertain the scope of section 18-302.” Am. Compl. ¶ 156. Plaintiffs, however, cannot show that the language of this statute is unconstitutionally vague beyond a reasonable doubt, especially in light of the great latitude afforded to civil statutes.

The use of a reasonable person standard in a statute does not render the statute unconstitutionally vague. In fact, Florida courts have consistently upheld the use of the reasonable person standard in criminal statutes, which are subject to even greater scrutiny than civil statutes when challenged for vagueness. *See, e.g., Sult v. State*, 906 So. 2d 1013, 1033 (Fla. 2005) (“We have regularly upheld against vagueness challenges statutes using a ‘reasonable person’ or objective standard.”); *Bouters v. State*, 659 So. 2d 235, 238 (Fla. 1995) (upholding a stalking statute, holding that a reasonable person standard provided an objective standard for

determining guilt); *see also State v. Manfredonia*, 649 So. 2d 1388 (Fla. 1995) (upholding a statute requiring an individual to take reasonable steps to avoid criminal liability). In fact, the City's use of the reasonable person standard "appeal[s] to the norms of the community, which is precisely the gauge by which vagueness is to be judged." *L.B. v. State*, 700 So. 2d 370, 372 (Fla. 1997).

Moreover, section 18-302 is not unconstitutionally vague merely because it is subject to differing interpretations. *See State v. Pavon*, 792 So. 2d 665, 667 (Fla. 4th DCA 2001). By prohibiting street vendors from remaining at one location, "with such regularity and permanency that would lead a reasonable person to believe the location is the vendor's fixed business location," section 18-302 is grounded in the norms of the community, which is "precisely the gauge by which vagueness is to be judged." Therefore, the City is entitled to summary judgment on Plaintiffs' claim that section 18-302 is unconstitutionally vague.

**D. The Plain Language of Fla. Stat. § 337.406(1)
Demonstrates That it Is Applicable Within A Municipality**

In Count II, Plaintiffs seek a declaration that the City's application of Fla. Stat. § 337.406 is *ultra vires*, claiming that the City inappropriately enforces this statute within municipal limits. The City is entitled to summary judgment on Plaintiffs' second cause of action because the language of Fla. Stat. § 337.406(1), when read as a whole, makes clear that it is, in fact, applicable within a municipality. "[A] 'statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts.'" *Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008) (quoting *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001)). "Related statutory provisions must be read together to achieve a consistent whole, and ... where possible, courts must give full effect to all statutory provisions and construe related

statutory provisions in harmony with one another.” *Id.* (quoting *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 199 (Fla. 2007)).

Despite Plaintiffs’ selective quoting from the statute, the complete language of Fla. Stat. § 337.406(1) evidences that the City may grant permits for certain uses of state transportation facilities within the municipality that would be absolutely prohibited uses of a state transportation facility outside of a municipality. The statute states, in pertinent part, that,

[L]ocal government entities may issue permits of limited duration for the temporary use of the right-of-way of a state transportation facility for any of these prohibited uses if it is determined that the use will not interfere with the safe and efficient movement of traffic and the use will cause no danger to the public. The permitting authority granted in this subsection shall be exercised by the municipality within incorporated municipalities and by the county outside an incorporated municipality.

Thus, the statute authorizes the City to grant permits for uses of a state transportation facility inside the municipality that would be absolutely prohibited otherwise. Despite Plaintiffs’ contentions, the City is simply exercising its statutorily-delegated authority under Fla. Stat. § 337.406 to “issue permits or limited duration for the temporary use of the right-of-way of a state transportation facility for any of these prohibited uses,” where the City has “determined that the use will not interfere with the safe and efficient movement of traffic and the use will cause no danger to the public.” Absent such a permit, the use is prohibited both within and without a municipality.

As the plain language of the statute, when read as a whole, makes clear that Fla. Stat. § 337.406 grants the City the exclusive authority to grant permits for certain uses of state transportation facilities within its municipality, Plaintiffs’ *ultra vires* claim must fail as a matter of law. Therefore, the City is entitled to summary judgment on Plaintiffs’ second cause of action for declaratory judgment.

E. Plaintiffs are not Entitled to a Permanent Injunction

In Count III, Plaintiffs seek to permanently enjoin the City from enforcing Sections 18-302 and 18-304 of the Amended Ordinance and from enforcing Fla. Stat. §337.406 within the City. Plaintiffs have fail to establish an entitlement to a permanent injunction.

Under Florida law, it is well established that in order to obtain a permanent injunction, a party must prove: (1) actual success on the merits; (2) irreparable injury to the plaintiff in the absence of an injunction and the absence of an adequate remedy at law; (3) a clear legal right; and (4) that granting the injunction will not disservice the general public. *See Cordis Corp. v. Prooslin*, 482 So. 2d 486 (Fla. 3d DCA 1986); *Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County*, 616 So. 2d 562, 564 (Fla. 5th DCA 1993).. Count III fails as a matter of law because, as discussed *supra*, Plaintiffs' claims will not succeed on the merits. Nor can Plaintiffs establish irreparable harm as they could simply recover monetary damages to compensate them for harm to their respective businesses. *Barclays American Mortgage Corp. v. Holmes*, 595 So. 2d 104, 105 (Fla. 5th DCA 1992) (irreparable injury does not exist if alleged injury is compensable by money damages). An inadequate remedy at law exists when legal damages cannot provide full and complete relief. *See State Department of Environmental Regulation v. Kaszyk*, 590 So. 2d 1010, 1012 (Fla. 3d DCA 1991). Plaintiffs have also failed to show that the public's interest would best be served by enjoining the City from regulating vendors in the manners set forth in the Amended Ordinance. For all of these reasons, the City is entitled to summary judgment on Count III for a permanent injunction.

WHEREFORE, defendant The City of Hialeah respectfully requests that the Court enter an Order: (i) granting Defendant's Motion for Summary Judgment; (ii) dismissing Plaintiffs'

Complaint with prejudice; and (iii) granting Defendant such other and further relief as the Court deems just and proper.

Respectfully submitted,

Dated: January 13, 2014

AKERMAN LLP

Attorneys for Defendant CITY OF HIALEAH
One Southeast Third Avenue
25th Floor
Miami, FL 33131-1704
Phone: (305) 374-5600
Fax: (305) 374-5095
Email: michael.fertig@akerman.com
Email: jennifer.glasser@akerman.com

By: : s/Jennifer C. Glasser
Michael Fertig, Esq.
Florida Bar No. 358754
Jennifer Glasser, Esq.
Florida Bar No.: 123145

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically this 13th day of January, 2014 upon: **Claudia Murray, Esq.**, Institute for Justice, Florida Chapter, 999 Brickell Avenue, Suite 720, Miami, FL 33131.

: s/Jennifer C. Glasser
Attorney

EXHIBIT "A"

IN THE ELEVENTH JUDICIAL CIRCUIT COURT FOR MIAMI-DADE COUNTY

STATE OF FLORIDA

SILVIO MEMBRENO

AND

FLORIDA ASSOCIATION
OF VENDORS, INC.

ORIGINAL FILED

ON OCT 13 2011

11-33228 CA 25

Plaintiffs,

IN THE OFFICE OF
CIRCUIT COURT DADE CO
FAMIL DIVISION

CIVIL ACTION NO. _____

vs.

THE CITY OF HIALEAH,
FLORIDA,

Defendant.

Served
10/17/11
2:06pm
AD
#1135

COMPLAINT FOR DECLARATORY JUDGMENT, PERMANENT INJUNCTION, AND
OTHER RELIEF

Plaintiffs, SILVIO MEMBRENO and the FLORIDA ASSOCIATION OF VENDORS,
INC. sue Defendant, the CITY OF HIALEAH, FLORIDA, and allege:

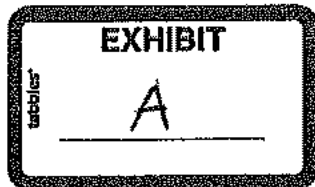
This is a constitutional lawsuit to vindicate Plaintiffs' fundamental right under the Florida Constitution to earn an honest living free from unreasonable and anticompetitive government restrictions. The City of Hialeah has violated that right by enacting an ordinance that, among other things: (1) requires a minimum distance separation of 300 feet from brick-and-mortar establishments that sell "the same or similar merchandise"; (2) requires any vendor selling items from other than an Inspected brick-and-mortar store to be constantly in motion "except when

INSTITUTE FOR JUSTICE
Florida Chapter
999 Brickell Ave., Suite 720
Miami, FL 33131
(305) 721-1600
Page 1 of 23

RECEIVED

OCT 18 2011

MAYOR'S OFFICE



10/13

actually involved in the completion of a sales transaction with a member of the public . . . and then for no more than ten minutes"; and (3) prohibits vendors' placement of merchandise or equipment on either public or private property (even with the consent of the property owner).

The City of Hialeah's vending ordinance is not only irrationally destructive of economic opportunity, but it also violates the Florida Constitution.

PARTIES

1. Plaintiff Silvio Membreno is an adult resident of Hialeah, Florida.
2. Mr. Membreno vends in several locations in and around the City of Hialeah, including West 49th Street and West 4th Avenue.
3. Mr. Membreno has operated his vending business in Hialeah for approximately fifteen years.
4. Mr. Membreno has a current vending license from the City of Hialeah that expires in September 2012.
5. Plaintiff Florida Association of Vendors, Inc. ("FAV") is a non-profit corporation chartered, organized, and created under the laws of Florida.
6. The FAV is composed of members, many of whom are vendors on both public and private property in the state of Florida, including the City of Hialeah, Florida.
7. The FAV is formed for the purposes of ensuring the rights of Florida street vendors; to aid and support Florida street vendors in their fight for vendors' rights; and to engage in any and all lawful business to accomplish these purposes.
8. Nearly all the members of the FAV vend in Hialeah and have been affected by the Ordinance.

9. Defendant City of Hialeah is a municipality chartered, organized, and created under the laws of the State of Florida.

JURISDICTION

10. At all times pertinent to this action, the acts complained of have occurred in or are occurring in Hialeah, Miami-Dade County, Florida.

11. This action arises under Article I, Section 2 of the Florida Constitution (Basic Rights) and Article I, Section 9 of the Florida Constitution (Due Process). Accordingly, this Court has subject matter jurisdiction over this action.

12. This court has jurisdiction over declaratory judgment actions pursuant to Section 86.011, Florida Statutes.

13. Venue properly lies in this court pursuant to Section 47.011, Florida Statutes.

FACTS

Plaintiff Silvio Membreno

14. Plaintiff Silvio Membreno immigrated to the United States from Nicaragua in 1998.

15. For over fifteen years, Mr. Membreno has been selling flowers to support himself and his family.

16. Mr. Membreno chose to sell flowers because it allowed him to earn an honest living while pursuing the American dream of owning and growing his own business.

17. Mr. Membreno has successfully grown his flower business over the years, becoming not only a vendor but also an importer and distributor of flowers.

18. Mr. Membreno also operates a business that supplies flowers to approximately 30 other vendors, most of whom sell the flowers in the City of Hialeah, Florida.

19. In so doing, Mr. Membreno provides economic opportunity for many others seeking to live the American dream.

20. Mr. Membreno's vending business not only supports himself and his family, but also provides economic opportunity for many others while expanding consumer choice and generating healthy competition within the City of Hialeah.

21. Mr. Membreno buys his flowers in bulk, prepares bouquets, and sells his bouquets of flowers in the City of Hialeah.

22. More than five times, Mr. Membreno has been approached by police officers in Hialeah who have ordered him to leave his vending location.

23. Most of the times Mr. Membreno has been approached by police, he has been ordered to keep moving, and has not been allowed to remain stationary for more than ten minutes at a time.

24. Mr. Membreno often keeps his excess merchandise in one place for more than ten minutes at a time while he walks and sells flowers in Hialeah.

25. Mr. Membreno sells flowers within 300 feet of a flower shop when he sometimes sells at the intersection of West 68th Street and West 4th Avenue in Hialeah.

26. Nearly every Valentine's Day, Mr. Membreno is approached in Hialeah by police who prohibit him from vending flowers on that day.

27. At least once on Mother's Day, on the corner of West 49th Street and West 4th Avenue in Hialeah, Mr. Membreno was approached by a police officer who ordered Mr. Membreno to refrain from vending flowers on that day.

28. When Mr. Membreno was ordered on Mother's Day to refrain from vending flowers, he lost thousands of dollars' worth of merchandise.

Plaintiff Florida Association of Vendors, Inc.

29. Nearly all of the current members of the FAV vend within the City of Hialeah and have been adversely affected by Hialeah's vending ordinance.

30. The members of the FAV sell a variety of goods, including flowers, trinkets, produce, and other items, in a variety of locations throughout Hialeah.

31. The members of the FAV have chosen vending as a means to support their families and to pursue the American dream of owning their own businesses.

32. Some members of the FAV vend on private property in Hialeah with the permission of the private property owner.

33. The members of the FAV who vend on private property in Hialeah generally stay in one place while selling their merchandise.

34. The members of the FAV who vend on private property in Hialeah display their merchandise for sale on their vehicles or on specially-made stands.

35. Some members of the FAV who sell on private property in Hialeah have been ordered by police to keep moving if they are not selling their merchandise.

36. Members of the FAV who sell in private parking lots in Hialeah have been ordered by police not to remain parked in the private parking lots if they are not selling their merchandise.

37. Some members of the FAV vend on public property in Hialeah.

38. The members of the FAV who vend on public property in Hialeah sometimes remain in one location for more than ten minutes at a time while vending.

39. Some members of the FAV who sell on public or private property sell within 300 feet of a brick-and-mortar store in Hialeah that sells the same or similar merchandise.

40. Conversely, some members of the FAV avoid selling near a brick-and-mortar store in Hialeah that sells the same or similar merchandise for fear of citation for violating the proximity restrictions challenged in this suit.

41. Some members of the FAV who are flower vendors vend within 300 feet of a brick-and-mortar store that sells flowers, such as the CVS store on West 49th Street and West 16th Avenue in Hialeah.

42. Mr. Membreno and the members of the FAV provide a service to the community of Hialeah by selling goods in the places where customers want to buy.

43. Mr. Membreno and the members of the FAV provide a service by selling goods at reasonable prices to the residents of Hialeah.

44. Mr. Membreno and the members of the FAV provide a service by bringing their goods to their customers in Hialeah, some of whom do not have cars or cannot drive.

45. A vendor can often start his business with less capital investment than he would need for a brick-and-mortar business. Vending is thus a relatively easy means of becoming an entrepreneur.

46. The members of the FAV organized to defend the rights of vendors to pursue their lawful occupation, thereby expanding consumer choice and competition.

City of Hialeah Vending Ordinance

47. Defendant City of Hialeah, through its governing authority, has enacted Code of Ordinances Chapter 18, Article VI, Division 2, titled "Peddlers, Itinerant Vendors," codified at Sections 18-301-18-311 of the Hialeah, Florida, Code of Ordinances (the "Ordinance").

48. Under the Ordinance, "peddlers" and "itinerant vendors" are required to obtain a license.

49. Violation of the Ordinance is a civil infraction, punishable by a penalty of up to \$500 per day. Hialeah Code Section 1-11.

50. Section 18-301 of the Ordinance declares that "Peddlers and itinerant vendors include all retail, wholesale, and/or service providers when conducting business other than from an inspected building constructed and maintained in accordance with the South Florida Building Code and all applicable life safety codes."

A. Proximity Restriction (Section 18-306)

51. Section 18-306 of the Ordinance states, "There shall be a minimum distance separation of 300 feet for peddlers and itinerant vendors to conduct business from the physical location of a leased or owned space or premises in which the same or similar merchandise, goods

or services are being offered for sale or sold as that offered for sale or sold by the peddler or itinerant vendor."

52. The City of Hialeah, through its officials, regularly enforces Section 18-306 of the ordinance.

53. Under Section 18-306, a vendor is allowed to vend within 300 feet of a brick-and-mortar store, but only if the brick-and-mortar store is not competing with the vendor by offering the same or similar merchandise for sale.

54. Mr. Membreno is allowed to vend flowers within 300 feet of a brick-and-mortar store that sells only pet supplies.

55. Mr. Membreno is not, however, allowed to vend flowers within 300 feet of a brick-and-mortar store that sells flowers.

56. Moreover, Mr. Membreno is not allowed to vend flowers within 300 feet of a brick-and-mortar store that sells anything else "similar to" flowers.

57. Mr. Membreno presents no greater risk to traffic safety by vending flowers near a brick-and-mortar flower store than would be the case if he were vending near a brick-and-mortar pet supply store.

58. Because Section 18-306's proximity restriction applies only to vendors selling "the same or similar merchandise" as competing brick-and-mortar stores, it bears no rational relation to public safety concerns such as traffic flow or pedestrian safety.

59. Vendors who are members of the FAV have been forced to avoid many locations or move their locations because of the proximity restriction of Section 18-306.

60. One FAV member has been selling flowers in the same location for 15 years.

61. Fifteen years ago, there was no store that sold flowers near his location on West 49th Street.

62. At some point in the last 15 years, CVS built a store near his location.

63. Because CVS sells flowers, he is now in violation of the Ordinance and risks substantial fines and police orders to leave his location.

64. Similarly, flower vendors who are members of the FAV move away from or avoid vending near grocery stores, gas stations, and other stores that sell flowers.

65. Members of the FAV have also had to avoid vending within 300 feet of brick-and-mortar stores that sell "similar" items, in order to vend legally within Hialeah.

66. Unfortunately, the Ordinance does not define "similar," leaving vendors' ability to vend in any location uncertain.

67. Upon information and belief, the City of Hialeah possesses no evidence that there are public health or safety benefits to preventing vendors from selling their merchandise near stores that sell the same or similar goods. As such, the only purpose of the Ordinance is to protecting brick-and-mortar stores from healthy competition by vendors.

B. Prohibition on Standing Still (Section 18-302)

68. Section 18-302 of the Ordinance provides that vendors are "prohibited from stopping and/or parking or doing any business at any one location, except when actually involved in the completion of a sales transaction with a member of the public and then for no more than ten minutes."

69. The City of Hialeah, through its officials, regularly enforces Section 18-302 of the ordinance.

70. A vendor does not create greater problems for traffic or pedestrian safety if he is standing still in a parking lot than if he is moving through that same parking lot at two miles per hour.

71. A vendor who circulates around a parking lot at two miles per hour is not violating the Ordinance.

72. A vendor who stands still in that same parking lot while he is waiting for customers is violating the Ordinance.

73. The constant movement of vendors from place to place, required by Section 18-302, could reasonably be expected to result in greater traffic and pedestrian congestion, as customers are forced to travel to locate their favorite vendors, and vendors are forced to keep moving along the streets, sidewalks, and parking lots, stopping and starting as customers appear.

74. Mr. Membreno and members of the FAV want to be able to stay put, sell, and be safe.

75. The law requiring Plaintiffs to keep moving prevents Plaintiffs from building up a regular, reliable clientele, and thereby prevents them from effectively pursuing and expanding their businesses.

76. Upon information and belief, the City of Hialeah possesses no evidence that a stationary vendor poses a greater threat to safety than a moving vendor.

**C. Prohibition on Displaying Supplies, Materials, Merchandise and/or Equipment on
Private or Public Property (Section 18-304)**

77. Section 18-304 of the Ordinance provides that "All supplies, materials, merchandise, and/or equipment used by a peddler and/or itinerant vendor or within the mobile

unit from which the peddler and/or itinerant vendor is conducting business shall not be permitted to be placed upon either public or private property for the purpose of facilitating the offering of merchandise and/or services to the public."

78. The City of Hialeah, through its officials, regularly enforces Section 18-304 of the ordinance.

79. As interpreted and enforced by Hialeah, the prohibition on displaying goods applies on private property as well as public. Even though some members of the FAV vend on private property with full permission from the property owners, Hialeah authorities prohibit them from displaying their merchandise.

80. Similarly, Mr. Membreno and members of the FAV who vend flowers are prohibited by Section 18-304 from placing a bucket of flowers on the ground at their feet when they vend on public property.

81. Mr. Membreno and members of the FAV who vend flowers have been ordered not to place a bucket of flowers on the ground at their feet when they vend on private property with the permission of the property owners.

82. Certain types of vendors are exempted from Section 18-304, including Christmas tree vendors, fireworks vendors, tent sales, and door-to-door vendors. These exempted vendors are thus allowed to place their materials, supplies and equipment on the ground.

83. Brick-and-mortar stores, e.g., Home Depot, place flowers or other merchandise that vendors typically sell on the ground outside their stores for the purpose of facilitating their offer to the public.

84. Mr. Membreno and the vendors of the FAV must display and temporarily store their merchandise to sell their merchandise effectively.

85. But for the Ordinance, Mr. Membreno and the vendors of the FAV would place their equipment, merchandise, or supplies on the ground.

Exemptions

86. Under Sections 18-308-18-311, the Ordinance exempts several types of vending—such as the sale of Christmas trees, fireworks, direct sales, and tent sales—from compliance with Sections 18-302, 18-304, and 18-306 of the statute. These exemptions reveal that the Ordinance's restrictions on Plaintiffs' businesses are unrelated to any legitimate purpose relating to public safety.

87. Upon information and belief, the City of Hialeah possesses no evidence that plaintiffs Silvio Membreno or members of the FAV pose any greater threat to public safety by setting their supplies, merchandise or equipment on the ground than exempted vendors who are permitted to do so, such as vendors of Christmas trees or fireworks.

88. Upon information and belief, the City of Hialeah possesses no evidence that a vendor who places merchandise on the ground poses any greater threat to public safety than a brick-and-mortar store that places the same or similar merchandise on the ground.

INJURIES TO PLAINTIFFS

89. Because of the Ordinance, Plaintiffs have suffered and continue to suffer irreparable harm.

90. Mr. Membreno wants to continue to sell his flowers in Hialeah.

91. Mr. Membreno has been told by Hialeah police that he must keep his flowers inside his van and cannot display them on the ground.

92. Storing flowers inside a hot vehicle has caused the flowers sold by Mr. Membreno to wilt and become unsellable.

93. Mr. Membreno wants to be able to display his flowers for sale in Hialeah.

94. But for the Ordinance, Mr. Membreno would display his flowers, either on public or private property, for sale in Hialeah.

95. The members of the FAV want to continue to sell their wares in Hialeah.

96. The members of the FAV want to display their wares for sale either on public or private property in Hialeah.

97. But for the ordinance, members of the FAV would display their wares for sale in Hialeah.

98. Some members of the FAV display their wares, on public or private land, for sale in Hialeah.

99. Any member of the FAV who displays his wares for sale in Hialeah is in violation of the Ordinance.

100. Because of Section 18-306's proximity restriction, Mr. Membreno and members of the FAV have avoided, and continue to avoid, selling their goods within 300 feet of any competing brick-and-mortar store, even though such locations may be more lucrative.

101. When Mr. Membreno and members of the FAV have strayed within the forbidden zone 300 feet around a competing brick-and-mortar store, they have been warned or cited by Hialeah police officers and told to leave.

102. The City of Hialeah has issued tickets to vendors for violating the 300-foot proximity restriction.

103. Because of Section 18-302 (prohibiting stopping or parking to do business in one location), Mr. Membreno and members of the FAV have been told by Hialeah authorities that they must move.

104. Because of Section 18-304 (prohibiting placing supplies, merchandise or equipment on public or private property), Mr. Membreno and members of the FAV have been told by Hialeah police to pack up or hide their merchandise from public view.

105. Enforcement of the Ordinance has been noticeably more aggressive on holidays on which brick-and-mortar stores face greater competition from vendors.

106. Hialeah police have been notably more aggressive in enforcing the Ordinance against flower vendors such as Mr. Membreno and members of the FAV on holidays such as Mother's Day and Valentine's Day, when brick-and-mortar competitors sell a high volume of flowers.

107. Such skewed enforcement, exemplified by the preceding two paragraphs, bolsters the conclusion that the Ordinance is motivated by economic protectionism and a desire to suppress healthy competition with brick-and-mortar stores.

108. Because of the burdens the Ordinance imposes, some members of the FAV have stopped vending altogether in the City of Hialeah.

109. But for the Ordinance, some members of the FAV would sell their goods within 300 feet of a store selling similar merchandise.

110. But for the Ordinance, some members of the FAV would sell their goods from a fixed location.

111. But for the Ordinance, some members of the FAV would place their supplies, materials, merchandise and/or equipment on either public or private property for the purpose of facilitating the offering or sale of their merchandise to the public.

COUNT I

(Violation of Florida Constitution—Basic Rights Provision)

112. Plaintiffs incorporate Paragraphs 1 through 111 by reference.

113. Article I, Section 2 of the Florida Constitution declares, "All natural persons, female and male alike, are equal before the law, and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, and to be rewarded for industry, and to acquire, possess and protect property"

114. Article I, Section 2's recognition of an inalienable right to "enjoy and defend . . . liberty, to pursue happiness, and to be rewarded for industry" protects the liberty to pursue a lawful occupation free from arbitrary and unreasonable government interference.

Proximity Restriction (Section 18-306)

115. By prohibiting Mr. Membreno and members of the FAV from vending within 300 feet of a brick-and-mortar store selling the same or similar merchandise, Section 18-306 of the Ordinance unreasonably interferes with Plaintiffs' ability to pursue their lawful vending occupation.

116. The only purpose of Section 18-306's proximity restriction is to prevent vendors from competing with brick-and-mortar stores selling the same or similar merchandise.

117. As such, Section 18-306 serves no legitimate purpose and violates the liberty to pursue a lawful occupation and right to be rewarded for industry protected by Article I, Section 2 of the Florida Constitution.

Prohibition on Standing Still (Section 18-302)

118. By prohibiting Mr. Membreno and members of the FAV from standing still to vend, Section 18-302 of the Ordinance unreasonably interferes with Plaintiffs' ability to pursue their lawful vending occupation.

119. There is no legitimate purpose served by Section 18-302's prohibition on standing still.

120. As such, Section 18-302 serves no legitimate purpose and violates the liberty to pursue a lawful occupation and right to be rewarded for industry protected by Article I, Section 2 of the Florida Constitution.

Prohibition on Displaying Supplies, Materials, Merchandise and/or Equipment on Private or Public Property (Section 18-304)

121. By prohibiting Mr. Membreno and members of the FAV from placing any supplies, materials, merchandise, and/or equipment on the ground, Section 18-304 of the Ordinance unreasonably interferes with Plaintiffs' ability to pursue their lawful vending occupation.

122. Mr. Membreno and members of the FAV cannot effectively sell their products if they cannot display or store them temporarily.

123. There is no legitimate purpose served by the prohibition contained in Section 18-304.

124. Accordingly, Section 18-304 violates the liberty to pursue a lawful occupation and right to be rewarded for industry protected by Article I, Section 2.

COUNT II
(Violation of Florida Constitution—Due Process)

125. Plaintiffs incorporate Paragraphs 1 through 111 by reference.

126. Article I, Section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law" Among the liberties secured by this provision is the right to earn an honest living in the occupation of one's choice, free from arbitrary or unreasonable government regulation.

The Substantive Liberty to Pursue a Lawful Occupation

127. The due process guarantee of Article I, Section 9 protects individuals from unreasonable or arbitrary deprivations of substantive liberty, including the liberty to pursue a lawful occupation.

A. Proximity Restriction (Section 18-306)

128. The proximity restriction of Section 18-306 of the Ordinance unreasonably interferes with Plaintiffs' ability to pursue their lawful vending occupation.

129. The only purpose of Section 18-306's proximity restriction is to prevent vendors from competing with brick-and-mortar stores selling the same or similar merchandise.

130. As such, Section 18-306 serves no legitimate purpose and violates the liberty to pursue a lawful occupation protected by Article I, Section 9 of the Florida Constitution.

B. Prohibition on Standing Still (Section 18-302)

131. By prohibiting Mr. Membreno and members of the FAV from standing still to

vend, Section 18-302 of the Ordinance unreasonably interferes with Plaintiffs' ability to pursue their lawful vending occupation.

132. There is no legitimate purpose served by Section 18-302's prohibition on standing still.

133. As such, Section 18-302 serves no legitimate purpose and violates the liberty to pursue a lawful occupation protected by Article I, Section 9 of the Florida Constitution.

C. Prohibition on Displaying Supplies, Materials, Merchandise and/or Equipment on Private or Public Property (Section 18-304)

134. By prohibiting Mr. Membreno and members of the FAV from placing any supplies, materials, merchandise, and/or equipment on the ground, Section 18-304 of the Ordinance unreasonably interferes with Plaintiffs' ability to pursue their lawful vending occupation.

135. Mr. Membreno and members of the FAV cannot effectively sell their products if they cannot display or store them temporarily.

136. There is no legitimate purpose served by the prohibition contained in Section 18-304.

137. Accordingly, Section 18-304 violates the liberty to pursue a lawful occupation protected by Article I, Section 9 of the Florida Constitution.

Overbreadth and Vagueness

138. The due process guarantee of Article I, Section 9 also protects individuals against the harm inherent in vague and overbroad laws.

139. The requirements and restrictions in Sections 18-302, 18-304, and 18-306 are unconstitutionally overbroad, thereby violating the due process guarantee of the Florida Constitution.

140. Because an ordinary person of average intelligence would either be unaware of or unable to ascertain the scope of Sections 18-302, 18-304, and 18-306, they are void for vagueness in violation of the due process guarantee of Article I, Section 9 of the Florida Constitution.

COUNT III

(Violation of Florida Constitution—Equal Protection Guarantee)

141. Plaintiffs incorporate Paragraphs 1 through 111 by reference.

142. Article I, Section 2's recognition of equality before the law prohibits irrational or arbitrary government-imposed discrimination between individuals.

Exemptions

143. The Ordinance grants favored status to certain types of vendors and exempts them from the proximity requirement (Section 18-306), the prohibition on standing still (Section 18-302), and the prohibition on placing supplies, merchandise or equipment on the ground (Section 18-304).

144. Exempted vendors include sellers of Christmas trees and fireworks, as well as door-to-door sellers and tent sales by brick-and-mortar stores.

145. There is no rational basis for exempting Christmas tree, fireworks, tent or direct vendors while simultaneously imposing the onerous restrictions on vendors such as Mr. Membreno and the members of the FAV.

146. Accordingly, the Ordinance violates the equal protection guarantee of Article I, Section 2 of the Florida Constitution.

Proximity Restriction (Section 18-306)

147. The proximity restriction of Section 18-306 violates the equal protection guarantee of Article I, Section 2 of the Florida Constitution because it irrationally discriminates between vendors such as Plaintiffs and competing brick-and-mortar stores.

148. Under Section 18-306's proximity restriction, vendors such as Mr. Membreno and the members of the FAV cannot lawfully operate their businesses within 300 feet of any brick-and-mortar store that sells or offers to sell the same or similar merchandise.

149. There is no similar proximity restriction applicable to brick-and-mortar stores, however; thus, the owner of a brick-and-mortar store is free to open up his business within 300 feet of another brick-and-mortar store selling the same or similar merchandise.

150. For example, there is nothing prohibiting a home improvement store such as Lowe's from opening a store next to Home Depot, or prohibiting a grocery store such as Publix from operating next to Sedano's.

151. There is no rational basis for prohibiting competition between vendors and brick-and-mortar stores that sell the same or similar merchandise, yet allowing such competition between brick-and-mortar stores.

Prohibition on Displaying Supplies, Materials, Merchandise, and/or Equipment on Private or Public Property (Section 18-304)

152. The prohibition on placing supplies, materials or equipment on the ground contained in Section 18-304 of the Ordinance violates the equal protection guarantee of Article I,

Section 2 of the Florida Constitution because it irrationally discriminates between vendors such as Plaintiffs and brick-and-mortar stores.

153. Under Section 18-304, vendors such as Mr. Membreno and the members of the FAV cannot place any supplies, materials, merchandise, equipment and/or supplies on the ground, even with the property owner's consent.

154. There is no similar prohibition on placing supplies, materials, merchandise, equipment, and/or supplies on the ground that is applicable to brick-and-mortar stores; thus, the owner of a brick-and-mortar store is free to place any and all such items on the ground in front of his store.

155. Brick and mortar stores like Home Depot regularly (and legally) display flowers or other plants on the ground in front of the store.

156. There is no rational basis for prohibiting a vendor—particularly a vendor vending on private property with the owner's permission—from placing his supplies, materials, merchandise or equipment on the ground while allowing brick-and-mortar stores that sell the same or similar merchandise to do so.

RELIEF REQUESTED

(Declaratory Judgment, Permanent Injunction, and Other Just Relief)

WHEREFORE Plaintiffs respectfully request relief as follows:

157. A declaratory judgment by the Court that the proximity restriction contained in Section 18-306 of the Ordinance violates Article I, Section 2 of the Florida Constitution ("Basic Rights").

158. A declaratory judgment by the Court that the prohibition on standing still contained in Section 18-302 of the Ordinance violates Article I, Section 2 of the Florida Constitution ("Basic Rights");

159. A declaratory judgment by the Court that the prohibition on placing supplies, materials, merchandise, and/or equipment on public or private property contained in Section 18-304 of the Ordinance violates Article I, Section 2 of the Florida Constitution ("Basic Rights");

160. A declaratory judgment by the Court that the proximity restriction contained in Section 18-306 of the Ordinance violates Article I, Section 9 of the Florida Constitution ("Due Process");

161. A declaratory judgment by the Court that the prohibition on standing still contained in Section 18-302 of the Ordinance violates Article I, Section 9 of the Florida Constitution ("Due Process");

162. A declaratory judgment by the Court that the prohibition on placing supplies, materials, merchandise, and/or equipment on public or private property contained in Section 18-304 of the Ordinance violates Article I, Section 9 of the Florida Constitution ("Due Process");

163. A permanent injunction prohibiting the City of Hialeah from enforcing Sections 18-302, 18-304, and 18-306 of the Ordinance;

164. That Plaintiffs be awarded their reasonable attorneys' fees and costs in this action;
and

165. That Plaintiffs receive such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this 13th day of October, 2011.

INSTITUTE FOR JUSTICE
Florida Chapter
999 Brickell Ave., Suite 720
Miami, FL 33131
(305) 721-1600
Page 22 of 23

INSTITUTE FOR JUSTICE, FLORIDA CHAPTER

By: 

Elizabeth Price Foley (Bar No. *pending*)
Claudia S. Murray (Bar No. *pending*)
999 Brickell Avenue, Suite 720
Miami, FL 33131
Tel: (305) 721-1600
Fax: (305) 721-1601
Email: cfoley@ij.org, cmurray@ij.org

INSTITUTE FOR JUSTICE

William H. Mellor (DC Bar No. 462072)*
Robert J. McNamara (VA Bar No. 73208)*
901 North Glebe Road, Suite 900
Arlington, VA 22203-1854
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: wmellor@ij.org, rmcnamara@ij.org

**Admission Pro Hac Vice pending*

Attorneys for Plaintiffs

INSTITUTE FOR JUSTICE
Florida Chapter
999 Brickell Ave., Suite 720
Miami, FL 33131
(305) 721-1600
Page 23 of 23

EXHIBIT "B"

ORDINANCE NO. 13-01

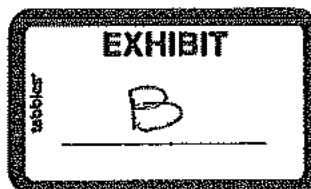
ORDINANCE OF THE MAYOR AND THE CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA AMENDING CHAPTER 18 ENTITLED "BUSINESSES" OF THE CODE OF ORDINANCES AND IN PARTICULAR, AMENDING ARTICLE VI., DIVISION 2, ENTITLED "PEDDLERS, ITINERANT VENDORS" AMENDING THE DEFINITION OF "PEDDLERS AND ITINERANT VENDORS", ESTABLISHING RESTRICTIONS ON THE USE OF THE PUBLIC RIGHTS-OF-WAY BY PEDDLERS WHEN SOLICITING OR ENGAGING IN SALES, EXCLUDING AREAS WHERE PEDDLERS CAN CONDUCT BUSINESS. AMENDING THE GOODS NOT ALLOWED TO BE SOLD; ELIMINATING THE DISTANCE SEPARATION REQUIREMENT, ESTABLISHING RESTRICTIONS ON DISPLAY AND STORAGE OF GOODS SOLD; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH; PROVIDING PENALTIES FOR VIOLATION HEREOF; PROVIDING FOR INCLUSION IN CODE; PROVIDING FOR A SEVERABILITY CLAUSE AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City has significant government interests in vehicular and pedestrian safety and the free flow of traffic; and

WHEREAS, street vending contemplates a transaction between the street vendor afoot and the driver or occupant of a motor vehicle while the vehicle is on the traveled portion of the roadway and is not legally parked or sales conducted by a vendor from a motorized vehicle travelling on the roadways;

WHEREAS, street vending is an inherently dangerous activity that compromises both pedestrian and vehicular safety by causing a motorist to obstruct traffic or disregard traffic signals if engaged in buying goods from a street vendor or by causing a street vendor to remain in the roadway after traffic flow has resumed;

WHEREAS, interstate ramps, under overpasses, and limited access facilities and intersections to interstate highways carry higher volumes of traffic presenting a greater exposure and risk from street vending to motorists and vendors themselves;



WHEREAS, the purpose and intent of this ordinance is to restrict the conduct of street vending on the roadways where the safety of vehicular and pedestrian traffic is paramount;

WHEREAS, the street vendors presently store and display their merchandise openly in the public rights-of-way and on private property without regard to the intended use of the public rights-of-way, safety of the pedestrians using the public rights-of-way, or the general requirement in the City's zoning code in all commercial and industrial districts that all storage of products and materials be entirely within a building and the specific prohibition against the operation of open air markets, bazaars and flea markets in the City's retail commercial district;

WHEREAS, street vendors in the conduct of their lawful business activity should enjoy co-terminous rights on private property as would the owners themselves to display or store merchandise; and

WHEREAS, the purpose and intent of this ordinance is to restrict the conduct of street vending as it concerns the display and storage of their merchandise on the public rights-of-way and public property to preserve safety and order in the use of the public rights-of-way and to equally enforce the provisions of the City's zoning code.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND THE CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, THAT:

Section 1: Chapter 18 entitled "Businesses", of the Code of Ordinances of the City of Hialeah, Florida, is hereby amended to read as follows:

Chapter 18

BUSINESSES

* * *

ARTICLE VI. PEDDLERS, SOLICITORS, ITINERANT VENDORS

* * *

Sec. 18-301. - Definitions.

The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

~~Peddlers and itinerant vendors include all retail, wholesale, and/or service providers, when conducting business other than from an inspected building constructed and maintained in~~

~~accordance with the South Florida Building Code and all applicable life safety codes persons going from place to place for the purpose of selling or offering for sale, any goods, merchandise or wares for immediate delivery of the goods, merchandise, or wares at the time the order is taken, whether or not using a wagon, pushcart or other vehicle. This definition does not include delivery of any item previously ordered, the sale of items along delivery routes, solicitation of orders by sample where the goods are not delivered at the time the order is taken, or food truck operators.~~

Sec. 18-302. – Sales or solicitations on the public right-of-way, stopping or parking to do business in one location.

~~A peddler and/or itinerant vendor, whether operating as a pedestrian or from a fully mobile truck, van, cart, bicycle, or other vehicle, is prohibited from stopping and/or parking or doing business at any one location, except when actually involved in the completion of a sales transaction with a member of the public and then for no more than ten minutes.~~

A peddler or itinerant vendor cannot, as a result of any conduct related to his/her solicitation or sales, obstruct, delay, hinder, interfere with or impede the free flow of vehicular traffic on the roadways or pedestrian traffic on the sidewalks. A peddler or itinerant vendor soliciting or conducting sales on foot must observe all pedestrian traffic regulations. No peddler or itinerant vendor soliciting or conducting sales on foot can permanently stop or remain at any one location on public property; or private property (unless allowed for by zoning), for the purpose of soliciting, displaying goods, merchandise or wares, or conducting sales. Nothing in this section shall be interpreted to authorize a peddler or itinerant vendor to stop or remain at any one location on private or public property with such regularity and permanency that would lead a reasonable person to believe the location is the vendor's fixed business location.

A peddler or itinerant vendor soliciting or engaging in sales of goods, merchandise or wares from a vehicle allowed to be safely operated on public roadways shall observe all rules of traffic. Prior to engaging in the sale of goods, merchandise or wares, the peddler or itinerant vendor must exit the roadway safely and properly park his/her vehicle in an area designated for parking. If parking on private property, the vendor must have the property owner's authorization. Once the sale or sales of goods, merchandise or wares have been completed, the peddler or itinerant vendor must return to circulate on the roadways if he or she intends to continue

~~accordance with the South Florida Building Code and all applicable life safety codes persons going from place to place for the purpose of selling or offering for sale, any goods, merchandise or wares for immediate delivery of the goods, merchandise, or wares at the time the order is taken, whether or not using a wagon, pushcart or other vehicle. This definition does not include delivery of any item previously ordered, the sale of items along delivery routes, solicitation of orders by sample where the goods are not delivered at the time the order is taken, or food truck operators.~~

Sec. 18-302. -- Sales or solicitations on the public right-of-way, stopping or parking to do business in one location.

~~A peddler and/or itinerant vendor, whether operating as a pedestrian or from a fully mobile truck, van, cart, bicycle, or other vehicle, is prohibited from stopping and/or parking or doing business at any one location, except when actually involved in the completion of a sales transaction with a member of the public and then for no more than ten minutes.~~

A peddler or itinerant vendor cannot, as a result of any conduct related to his/her solicitation or sales, obstruct, delay, hinder, interfere with or impede the free flow of vehicular traffic on the roadways or pedestrian traffic on the sidewalks. A peddler or itinerant vendor soliciting or conducting sales on foot must observe all pedestrian traffic regulations. No peddler or itinerant vendor soliciting or conducting sales on foot can permanently stop or remain at any one location on public property; or private property (unless allowed for by zoning), for the purpose of soliciting, displaying goods, merchandise or wares, or conducting sales. Nothing in this section shall be interpreted to authorize a peddler or itinerant vendor to stop or remain at any one location on private or public property with such regularity and permanency that would lead a reasonable person to believe the location is the vendor's fixed business location.

A peddler or itinerant vendor soliciting or engaging in sales of goods, merchandise or wares from a vehicle allowed to be safely operated on public roadways shall observe all rules of traffic. Prior to engaging in the sale of goods, merchandise or wares, the peddler or itinerant vendor must exit the roadway safely and properly park his/her vehicle in an area designated for parking. If parking on private property, the vendor must have the property owner's authorization. Once the sale or sales of goods, merchandise or wares have been completed, the peddler or itinerant vendor must return to circulate on the roadways if he or she intends to continue

Sec. 18-304. -- Display, Storage, or PlacetingPlacement of supplies, merchandise or equipment on public or private property.

~~All supplies, materials, merchandise, and/or equipment used by a peddler and/or itinerant vendor or within the mobile unit from which the peddler and/or itinerant vendor is conducting business shall not be permitted to be placed upon either public or private property for the purpose of facilitating the offering of merchandise and/or services to the public.~~

No inventory of goods, merchandise or wares offered for sale, supplies, materials, containers, contraptions, stands, carts, boxes, signs or any other property shall be placed or stored on any portion of the public right-of-way, including the sidewalk or swale. A peddler or itinerant vendor shall not craft, arrange, package or otherwise engage in any activity required to prepare or make the goods, merchandise or wares available for purchase on any portion of the public right-of-way, including the sidewalk or swale.

Any inventory of goods, merchandise or wares, samples, materials or supplies, if stored on private property, must be stored with the prior written approval of the property owner, within the confines of a building or shed erected, kept, and maintained pursuant to Code or in an area lawfully designated for storage and out of the public's view. There shall be no outside storage permitted. A peddler or itinerant vendor soliciting or conducting sales on foot may store inventory, merchandise, samples, materials or supplies within the peddler's or itinerant vendor's vehicle so long as the vehicle is properly parked in an area designated for public parking or properly parked in an area designated for parking on private property as authorized in writing by the property owner. The peddler or itinerant vendor must provide proof of authorization upon request by a code inspector or license inspector. The peddler or itinerant vendor soliciting or conducting sales on foot may display, with the intent of soliciting sales, only as much of the goods, merchandise or wares as the peddler or itinerant vendor can carry on the peddler's or itinerant vendor's person. The prohibition against outside storage or display of goods, merchandise, wares, samples, materials or supplies, does not apply to peddlers or itinerant vendors soliciting or conducting sales from a vehicle driven on the roadway and where the storage or display of goods, merchandise, wares, samples, materials or supplies is incidental to the conduct of a sale while parked on private or public property.

* * *

~~Sec. 18-306. Distance separation.~~

~~There shall be a minimum distance separation of 300 feet for peddlers and itinerant vendors to conduct business from the physical location of a leased or owned space or premises in which the same or similar merchandise, goods or services are being offered for sale or sold as that offered for sale or sold by the peddler or itinerant vendor.~~

Sec. 18-307. Application.

The application for a peddler or an itinerant vendor's license shall include the following information:

- (1) Name, home and business address of the applicant, and name and address of the owner, if other than the applicant, of the vending business, stand or motor vehicle to be used in the operation of the vending business.
- (2) A description of the food goods or merchandise to be sold.
- (3) A description and photograph of any ~~stand~~ or motor vehicle to be used in the operation of the business, including the license and registration number of any motor vehicle used in the operation of the business.
- (4) Three two-inch by two-inch prints of a full-face photograph, taken not more than 30 days prior to the application date, of any person who will sell, or offer for sale, any food or merchandise within the city.
- (5) Written approval from the property owner, or a duly authorized agent of the property owner, for each location where the peddler or itinerant vendor will be storing any inventory, samples, materials or supplies in his/her vehicle or parking his/her vehicle, if applicable.

* * *

Section 2: Repeal of Ordinances in Conflict.

All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

Section 3: Penalties.

Every person violating any provision of the Code or any ordinance, rule or regulation adopted or issued in pursuance thereof shall be assessed a civil penalty not to exceed \$500.00 within the discretion of the court or administrative tribunal having jurisdiction. Each act of

violation and each day upon which any such violation shall occur shall constitute a separate offense. In addition to the penalty prescribed above, the City may pursue other remedies such as abatement of nuisance, injunctive relief, administrative adjudication and revocation of licenses or permits.

Section 4: Inclusion in Code.

The provisions of this ordinance shall be included and incorporated in the Code of Ordinances of the City of Hialeah, as an addition or amendment thereto, and the sections of this ordinance shall be renumbered to conform to the uniform numbering system of the Code.

Section 5: Severability Clause.

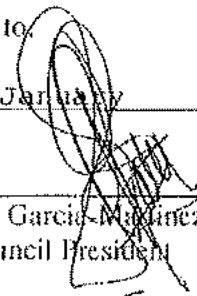
If any phrase, clause, sentence, paragraph or section of this ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

Section 6: Effective Date.

This ordinance shall become effective when passed by the City Council and signed by the Mayor or at the next regularly scheduled City Council meeting, if the Mayor's signature is withheld or if the City Council overrides the Mayor's veto.

PASSED AND ADOPTED this 08 day of January, 2013.

THE FOREGOING ORDINANCE
OF THE CITY OF HIALEAH WAS
PUBLISHED IN ACCORDANCE
WITH THE PROVISIONS OF
FLORIDA STATUTE 166.041
PRIOR TO FINAL HEARING.


Isis Garcia-Martinez
Council President

Attest:

Approved on this 9 day of JAN, 2013.


Marbelys Rulio, Acting City Clerk


Mayor Carlos Hernandez

Approved as to form and legal sufficiency:


William M. Grodnick, City Attorney

Strikethrough indicates deletion. Underline indicates addition.

SALESREGISTRATION.COM ORDINANCE CODE ADMINISTRATION PdfEditor v3.0.0.1

Ordinance was adopted by a unanimous vote with Councilmembers, Caragol, Cisals-Munoz, Cue-Fuente, Garcia-Martinez, Gonzalez, Hernandez and Lozano voting "Yes".

EXHIBIT "C"

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

SILVIO MEMBRENO and FLORIDA
ASSOCIATION OF VENDORS, INC.,

Plaintiffs

General Civil Division

v.

Case No: 11-33223 CA 25

THE CITY OF HIALEAH, FLORIDA,

Defendant. /

**DEFENDANT CITY OF HIALEAH'S ANSWER TO
PLAINTIFFS' SECOND INTERROGATORIES**

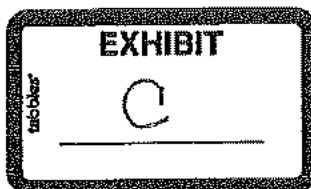
COMES NOW the Defendant, CITY OF HIALEAH, by and through its undersigned
counsel, hereby files its answers to Plaintiff's Second Set of Interrogatories.

Respectfully submitted,

AKERMAN SENTERFITZ
Attorneys for Defendant CITY OF HIALEAH
One Southeast Third Avenue
25th Floor
Miami, FL 33131-1704
Phone: (305) 374-5600
Fax: (305) 374-5095
Email: michael.fertig@akerman.com
Email: jennifer.glasser@akerman.com

By: /s/Jennifer Glasser

Michael Fertig, Esq.
Florida Bar No. 358754
Jennifer Glasser, Esq.
Florida Bar No.: 123145



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically this 30 day of May, 2013 upon: Claudia Murray, Esq., Institute for Justice, Florida Chapter, 999 Brickell Avenue, Suite 720, Miami, FL 33131.

/s/Jennifer Glasser

Attorney

DEFENDANT'S ANSWERS TO PLAINTIFF'S SECOND SET OF INTERROGATORIES

INTERROGATORY № 1: Please describe any and all governmental interest(s) furthered by the newly amended §18-302 and §18-304 of the Vending Code.

ANSWER: Governmental interests include vehicular and pedestrian safety and the free flow of traffic as well as protecting the health, welfare and safety of the community, and providing for the orderly and safe operation of the City's rights-of-way, including streets, swale areas and sidewalks.

INTERROGATORY № 2: Identify any and all person(s) who complained to the City within one week of Valentine's Day 2013 regarding any vendor.

ANSWER: The City is not aware of the identity of any persons who complained during that timeframe.

INTERROGATORY № 3: Provide the badge number of Officer Sandra St. Germain, describe any interactions she has had with street vendors in her capacity as a police officer in the last 5 years, and identify those street vendors.

ANSWER: ID No. 0429. She has engaged in enforcement interactions with street vendors in her capacity as a police officer and a code enforcement officer. The identity of any vendor with whom she had interactions (if such interactions were documented) would be found in the logs produced.

INTERROGATORY № 4: Describe any and all current official policies of the City regarding enforcement of the Vending Code and describe and identify any and all documents related to the City's current official policies regarding enforcement of the Vending Code.

ANSWER: See email dated February 12, 2013 from Commander Hubert Ruiz; See also documents already produced.

INTERROGATORY № 5: Describe the incident that gave rise to police case no. 2013-5391, identify all parties involved, and describe all previous incidents that gave rise to the issuing of an arrest order to vendor Danella Martínez.

ANSWER: See Arrest Affidavit attached (13-5391); Incident Report 12-14356 attached.

INTERROGATORY № 6: Describe the reasons for and the circumstances surrounding the implementation of the "Vendor Warning Log" for police, including but not limited to providing dates of such decisions and identifying any and all decision-maker(s) involved.

ANSWER: The City objects to Interrogatory No. 6 on the grounds that it is vague and ambiguous. Subject to and notwithstanding the foregoing objections, the City states that the police logs are maintained to index all reports and to organize the data in a readily accessible format.