**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT – CHANCERY DIVISION**

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| LMP SERVICES, INC. | ) | |
| PLAINTIFF | ) | No. 12 CH 41235 |
| V. | ) | Calendar 13 |
| CITY OF CHICAGO | ) | Judge Anna Helen Demacopoulos |
| DEFENDANT | ) | |

## MEMORANDUM OPINION AND ORDER

This case concerns the City of Chicago's regulation of food trucks. Plaintiff LMP Services, Inc. ("LMP"), owner of a food truck known as "Courageous Cupcakes", filed the lawsuit in response to an amended ordinance passed by the Chicago City Council on July 25, 2012. Plaintiff challenges the rule which prohibits food trucks from parking within 200 feet of an existing restaurant, as well as the requirement that each food truck maintain a global-positioning-system (GPS) unit which transmits their location to a third-party vendor. This matter having come before the Court on cross-motions for summary judgment, the Court having reviewed the motions, memoranda in support thereof, statements of undisputed facts and exhibits thereto, and the pleadings, heard arguments of counsel on October 19, 2016, and thereby being fully informed in the premises, finds as follows:

## STATEMENT OF FACTS

On July 25, 2012, the Chicago City Council passed Ordinance 2012-4489, an amended ordinance regarding mobile food vehicles (food trucks) within the City of Chicago (the "City"). Ordinance 2012-4489 introduced numerous changes, such as the ability to obtain a license to sell food that is prepared and served from a mobile food truck, rather than only prepackaged food.

This change resulted in an increase in the number and variety of food trucks wishing to do business in the City of Chicago.

Ordinance 2012-4489 maintained a proximity restriction first passed on September 11, 1991 that prohibits parking within 200 feet of the entrance of a restaurant (the "200-foot rule"). Municipal Code of Chicago ("MCC"), Sec. 7-38-115(f). The definition of a restaurant includes any "place where food and drink is prepared and served for the public for consumption on or off the premises pursuant to a required license." *Id.* Plaintiff alleges that the definition includes businesses such as 7-Elevens (117 locations in Chicago), Starbucks (179 locations), and Dunkin' Donuts (193 locations). The 200-foot rule applies to food trucks whether they are operating on public or private property (except as to restaurants located on the private property to which the food truck is invited). MCC, Sec. 7-38-115(k)(1)(iii). Food trucks are also required to have a GPS device permanently installed on their vehicle "which sends real-time data to any service that has a publicly-accessible application programming interface (API)" ("GPS requirement"). MCC, Sec. 7-38-115(l).

Ordinance 2012-4489 requires the City to establish "mobile food vehicle stands"—designated spaces on the public way where mobile-food vehicles may operate without being subjected to the 200-foot proximity restriction. Ordinance 2012-4489 requires the City to establish at least five mobile food vehicle stands "in each community areas . . . that has 300 or more retail foods establishments." MCC, Sec. 7-38-117. Additionally, a minimum fine of $1,000.00 was set for any violations of sections 7-38-115 and 7-38-117. MCC, Sec. 7-38-128(d) This amount is quadruple the amount for certain violations prior to the amended ordinance.

Laura Pekarik is the sole owner and shareholder of LMP. Ms. Pekarik owns and runs a brick and mortar bakery called "Courageous Bakery" located in Elmhurst, Illinois, as well as a food truck called "Cupcakes for Courage." Plaintiff's food truck travels through the Chicagoland

area serving desserts to customers. Plaintiff complains that due to the 200-foot rule, there are large portions of Chicago that her food truck cannot park and customers she may not serve, even if she is a guest on private property. In the Amended Complaint, Plaintiff alleges the 200-foot rule and the GPS requirement violate constitutional rights provided in Article I, Sections 2 and 6 of the Illinois Constitution—Due Process (Count I) and Searches, Seizures, and Privacy (Count III). Plaintiff's equal protection claim (Count II), also brought under Article I, Section 2, was previously dismissed by the Honorable LeRoy K. Martin Jr.

## LEGAL STANDARD

Summary judgment is appropriate where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the non-moving party, reveal that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c). "A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." *Adames v. Sheahan,* 233 Ill.2d 276, 296 (2009)*(citing Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32, 43(2004)). When the parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law. *Steadfast Ins. Co. v. Caremark Rx Inc.*, 359 Ill. App. 3d 749, 755 (1st Dist. 2005). Summary judgment is "a drastic means of disposing of litigation and, therefore, should be granted only when the right of the moving party is clear and free from doubt." *Adames,* 233 Ill.2d at 296.

## ANALYSIS

This dispute pits the interests of the traditional brick-and-mortar restaurant against the young rising pop star—the food truck. The public interest that the City is charged with protecting

and furthering lies somewhere in the uncertain middle. The parties have taken numerous depositions in this matter and the Court has reviewed nearly two thousand pages in supporting exhibits. For the following reasons, the Court grants the City's motion for summary judgment and denies Plaintiff's cross-motion for summary judgment.

**Count I – 200 Foot Rule (Due Process)**

The 200-foot rule provides:

> No operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance to a restaurant which is located on the street level; provided, however, the restriction in this subsection shall not apply between 12:00 a.m. and 2:00 a.m.

MCC, Sec. 7-38-115(f).

The Court notes that the 200-foot rule is not a new regulation. As of the filing of this lawsuit in November 2012, the 200-foot rule had been in place with respect to food trucks for over eleven years.[1] Although, a prior rule containing a 200-foot proximity requirement was struck down by the Circuit Court in 1986, such provision was held unenforceable due to its vagueness—a challenge not raised against the 2012-4489 Ordinance.[2] *See Thunderbird v. Catering Co. v. City of Chicago,* No. 83 L 52921 (Cook Cty. Cir. Ct. Oct. 15, 1986)(O'Brien, T). Though the language of the 200-foot rule has not significantly changed since 1991, the marketplace for food trucks in Chicago has broadened both with a nationwide surge in interest in

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[1] Both the 1991 and 2012 ordinances provide, "No operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance to a restaurant which is located on the street level." Section 7-38-115(f), as amended in 2012, includes the following additional language, "provided, however, the restriction in this subsection shall not apply between 12:00 a.m. and 2:00 a.m."

[2] The predecessor ordinance to the one at issue provided in relevant part, "No operator of (a mobile food dispensing vehicle shall park or stand such vehicle within 200 feet of . . . a place of business which deals in like or similar commodities such as are sold by the mobile unit." MCC, Sec. 130-4.12(d). The Court struck Sec. 130-4.12(d) as "vague and unenforceable," and prohibited the City from enforcing the ordinance. *Thunderbird Catering Co. v. City of Chicago,* No. 83 L 52921 (Cook Cty. Cir. Ct. Oct. 15, 1986).

food trucks, as well as the expanded opportunities for entrepreneurship given the changes effected by Ordinance 2012-4489.

In its motion for summary judgment, Plaintiff asserts that the 200-foot rule violates its due process rights, specifically the right to pursue a trade or business free from arbitrary and irrational regulation. Plaintiff argues that proximity restrictions have been invalidated by numerous courts, including the Illinois Supreme Court. Moreover, Plaintiff further argues that the 200-foot rule does not "definitely and substantially" advance any legitimate government interest as each of the stated bases for the rule are either illusory or improper.

In response and by its cross-motion for summary judgment, the City argues that Plaintiff (not the City) bears the burden to show that the 200-foot rule is unreasonable and has failed to meet that burden. The City contends that balancing the interests of brick-and-mortar restaurants with that of the food trucks is a legitimate governmental interest. Further, the other bases for the restriction, including reducing pedestrian congestion and encouraging food trucks to locate in underserved areas are rationally related to the regulation, as well.

Rational Basis Test

When considering a substantive due process challenge, "a statute is unconstitutional if it impermissibly restricts a person's life, liberty or property interest." *People v. Johnson*, 225 Ill.2d 573, 584 (2007). Well-settled is the constitutional principle that every citizen has the right to pursue a trade, occupation, business or profession. *Coldwell Banker Residential Real Estate Services, Inc. v. Clayton*, 105 Ill.2d 389, 397 (1985). "This inalienable right constitutes both a property and liberty interest entitled to the protection of the law as guaranteed by the due process clauses of the Illinois and Federal constitutions." *Id.* Ordinance 2012-4489, as with other ordinances regulating mobile food vendors or peddlers addressed by previous courts, "concerns regulation in the socio-economic sphere, and neither encroaches upon a fundamental right nor

draws lines which create an inherently suspect classification." *See Triple A. Servs. v. Rice,* 131 Ill.2d 217, 226 (1989). Accordingly, the rational basis test will apply. *Napleton v. Vill. of Hinsdale*, 229 Ill.2d 296, 307 (2008).

Under the rational-basis test, the Court's inquiry is twofold: (1) the Court "must determine whether there is a legitimate state interest behind the legislation" and, (2) "if so, whether there is a reasonable relationship between that interest and the means the legislature has chosen to pursue it." *Johnson,* 225 Ill.2d at 584. "One who challenges an ordinance as failing this test of minimum rationality bears the burden of proving 'by clear and affirmative evidence that the ordinance constitutes arbitrary, capricious and unreasonable municipal action; that there is no permissible interpretation which justifies its adoption, or that it will not promote the safety and general welfare of the public.'" *Triple A Servs.*, 131 Ill.2d at 225-226 (*quoting City of Decatur v. Chasteen*, 19 Ill.2d 204, 210 (1960)). "If there is any conceivable set of facts to show a rational basis for the statute, it will be upheld." *Johnson,* 225 Ill.2d at 585. "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Harris v. Manor Healthcare Corp.,* 111 Ill.2d 350, 368-369 (1986) *(quoting Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88, 99 (1955)).

The City has offered three rational bases for the 200-foot rule: "(1) it fosters restaurants – which provide important economic, cultural, and neighborhood benefits to the City- while at the same time allowing food trucks to prosper; (2) it helps spread retail food options to blocks or entire communities of the City that lack enough restaurants, and (3)it manages sidewalk congestion caused by lines of food truck customers." (Def.'s. Mem. in Supp. Summ. J. 1). As noted above, it is Plaintiff's burden to show that the regulation is unreasonable, arbitrary or capricious rather than the City's burden to prove that it is reasonable. *Triple A Servs.*, 131 Ill.2d

at 226. As discussed below, the Court finds that at least two rational bases exist for the 200-foot rule, namely the balancing of interests and reducing pedestrian congestion.

**(1) Balancing of Interests**

The City argues that Ordinance 2012-4489 serves the dual purpose of balancing the needs of both restaurants and food trucks. Plaintiff contends that the ordinance is intended to protect brick-and-mortar restaurants from competition, which is not a legitimate government purpose. Following review of Illinois law and the supporting exhibits to the cross-motions for summary judgment, the Court agrees that food trucks may be regulated in a manner that balances the needs of the community, which includes the interests of the brick-and-mortar restaurants.

Plaintiff relies upon *Chicago Title & Trust Co. v. Village of Lombard*, 19 Ill.2d 98 (1960) and cases from foreign jurisdictions in support of its contention that Illinois courts do not favor barriers to competition such as proximity limitations. In *Chicago Title,* the Illinois Supreme Court struck down an ordinance barring the construction of a gas station within 650 feet of another existing gas station. Noting that the ordinance permitted existing service stations situated within 650 feet of each other to continue, the court found the proximity restriction arbitrary and unreasonable. The Court further concluded that the ordinance "exempts from its requirements businesses already established, and, in operation and effect, tends to promote monopoly." *Id.* at 107.

*Chicago Title* is readily distinguishable from the facts of the instant matter. In particular, the businesses to be separated by the Village of Lombard ordinance—gas stations—were the exact same type of business and in direct competition with one another. Here, the City has designed its regulation to separate two different types of business with different business needs. Plaintiff's expert, Dr. Henry Butler, Dean of George Mason University School of Law with a Ph.D. in economics, testified that the risk taken in opening a new restaurant "is a lot higher for

the brick and mortar" than for a food truck. (City's MSJ, Ex. 7, Butler Dep. at 74:1-22). As to costs, according to *Streets of Dreams,* a report published by the Institute for Justice ("IFJ), "[s]treet vending allows entrepreneurs to establish their own businesses at a fraction of the cost of other potential ventures." (City's MSJ, Ex. 8 at IJ0169). The IFJ report illustrates this point with the example of Stephan Boillon, a chef in Washington, D.C., who lost his job in 2008. Mr. Bouillon wanted to start his own business, specifically a restaurant serving only cold sandwiches. *Id.* at IJ0170. This simple concept obviated the need to buy expensive cooking equipment. *Id.* However, setting up a brick and mortar restaurant would have cost $750,000, "not including operating costs such as rent, utilities and insurance," whereas the mobile food truck he "put on the road cost only $50,000 to get up and running." *Id.* Were the City to bar new brick and mortar restaurants from opening within a certain distance of existing brick and mortar restaurants or food trucks from other food trucks, *Chicago Title* would be on point.

Moreover, Ordinance 2012-4498 does not tend to promote the monopoly criticized in *Chicago Title* as the 200-foot rule does not come close to excluding entire areas of Chicago, including the Loop. Plaintiff's principal, Ms. Pekarik, testified that although there are areas in the City from which she may not sell, she has been able to find appropriate places to vend in the Loop and her business is thriving such that she opened a brick-and-mortar bakery, purchased a second food truck, and now has 15 employees. (City's MSJ, Ex. 9, Pekarik Dep. at 20:1-3; 59:2-17; 74-79). Additionally, the amended ordinance specifically allows for more food trucks in specially designated areas known as mobile food vehicle stands, which are exempt from the 200-foot rule. MCC, Sec. 7-38-117(f).

About 19 years after *Chicago Title*, the Illinois Supreme Court addressed a mobile food vending ordinance much more restrictive than the ordinance before this Court today. In *Triple A Services v. Rice*, 131 Ill.2d 217 (1989), the Court upheld a complete ban of mobile food vending

companies in the Medical District, challenged on both due process and equal protection grounds. The stated purpose of the ordinance was to "enhance[] the professional appearance and ambience of the District. . . . [and] serve[] to protect against a decline in property values and to attract professional medical personnel and medical clients to the District." *Id.* at 228. Further, the ordinance prevented pedestrian and vehicular congestion, and acted to prevent sanitation problems arising from discarded food wrappers. *Id.* The Court found all of these purposes to be "legitimate governmental objectives." *Id.* at 228. While the appellate court had concluded that total ban of mobile food vendors from the Medical District was overly broad as a portion of the area designated in the ordinance was used for nonmedical purposes, the Illinois Supreme Court disagreed. The Court held that it did not find "that the means adopted by the Chicago city council to further the aforementioned objectives is so grossly overly broad as to render the ordinance arbitrary, capricious and unreasonable." *Id.* Noting that "[t]he fit between the means and the end to be achieved need not be perfect" and "rational distinctions may be made with substantially less than mathematical exactitude" the Court upheld the ordinance. *Id.* at 228-229.

In reaching its decision in *Triple A Services,* the Illinois Supreme Court relied upon *City of New Orleans v. Dukes,* 427 U.S. (1976), in which the Supreme Court upheld an ordinance which prohibited vendors from selling foodstuffs from pushcarts in the French Quarter of the City of New Orleans. While the ordinance grandfathered vendors who had continuously operated within the French Quarter for eight years prior to enactment of the ordinance, the Court rejected petitioner's equal protection argument, holding that the ordinance rationally furthered the purpose of preserving "'the appearance and custom valued by the Quarter's residents and attractive to tourists." The Supreme Court found that the legitimacy of that objective was "obvious." 427 U.S. at 304.

While the cases from foreign jurisdictions of New York, New Jersey, and California cited by Plaintiff, do tend to show a strong disapproval of proximity limitations or any geographic restraints on mobile food vendors as unfair attempts to regulate competition, they stand in contrast with Illinois law. [3] Other Illinois cases cited by Plaintiff in support of its theory that government regulation that affect competition in the marketplace is unconstitutional are unavailing as they concern specific zoning decisions or licensure. Finally, in considering the particular needs and characteristics of the City of Chicago—a city which is noted for its culture, uniquely diverse neighborhoods, and even popularity with culinary tourists, the Court finds that the balancing of interests between food trucks, brick-and-mortar restaurants, and other needs of the city is a rational basis for the 200-foot rule.

**(2) Spreading Retail Food Options to Underserved Areas**

The City contends that the 200-foot rule will encourage food trucks to locate to areas which are presently underserved by restaurants. Plaintiff argues that this reason is unfounded under basic principles of economics. The Court finds that Plaintiff has met its burden in showing that the 200-foot rule does not encourage food trucks to locate in areas lacking restaurants. Dr.

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[3] In *People v. Ala Carte Catering Co.*, a California appellate court struck down a Los Angeles ordinance that barred catering trucks from selling within 100 feet of a restaurant. 98 Cal. App. 3d Supp. 1, 9 (Cal. App. Dep't Super. Ct. 1979). The basis for the ordinance was the potential "hazard to traffic" and "nuisance to pedestrians" created by the "unregulated stopping of vehicles for the sale of foods and beverages." *Id.* In striking down the ordinance, the court held it was a "naked restraint of trade," that was "arbitrarily made for the mere purpose of classification." *Id.* at 13. *See also Duchein v. Lindsay,* 345 N.Y.S.2d 53, 55-57 (N.Y. App. Div. 1973)(invalidating law prohibiting vending within 100 feet of businesses selling the same goods); *Mister Softee v. Mayor of Hoboken,* 186 A.2d 513, 519-20 (N.J. Super. Ct. Law Div. 1962)(invalidating law preventing vending within 200 feet of business selling similar merchandise). Although the preceding cases tend to show the aversion of courts in certain jurisdictions to any proximity limitations, this Court is bound by Illinois precedent which has expressly permitted proximity restrictions and even the total ban of food trucks and the like. *See e.g. Triple A Servs. v. Rice,* 131 Ill. 2d 217 (1989); *Good Humor Corp. v. Mundelein*, 33 Ill. 2d 252 (1965)(upholding ordinance banning ice cream trucks from village streets); *Chicago v. Rhine*, 363 Ill. 619 (1936)(upholding ban of the sale of all goods on the street except newspapers).

Butler concluded that "[e]conomic theory predicts that the 200-foot rule cannot and will not achieve the City's stated goal of encouraging food trucks to operate in community areas lacking sufficient retail food options." (Plt. MSJ, Butler Aff. ¶15). This is because food truck operators are entrepreneurs who wish to maximize their profits and will go where the demand is the highest. *Id.* ¶14. Food trucks will focus on dense areas where consumers have relatively high levels of disposable income. *Id.* ¶17. Because "underserved" areas generally lack these features, economic theory predicts little food-truck activity in such areas. *Id.* ¶21. Expert analysis also showed no evidence that food trucks were visiting the underserved areas since the passage of the amended ordinance. Professor Butler analyzed over 48,000 tweets of Chicago food trucks from November 26, 2013 to November 26, 2014, and concluded that food trucks do not often operate in the areas identified as underserved by the City such as Auburn Gresham, Beverly, Engelwood, Humbolt Park Morgan Park, and South Shore. *Id.* ¶¶ 39. For these reason, the Court finds the 200-foot is not rationally related to the purpose of spreading retail food options to underserved areas of the City.

**(3) Managing Sidewalk Congestion**

Lastly, the City argues that the 200-foot rule is rationally related to the City's interest "reducing congestion and delays on sidewalks because it creates a buffer between food truck customer lines and the congestion that can arise outside restaurants." (City's MSJ p. 11). Plaintiff responds that the 200-foot rule as between restaurants and food trucks is arbitrary because other businesses can be sources of pedestrian congestion such as theatres. Further, the exemption for food trucks serving construction workers or operating at food truck stands undermines the City's position because food truck stands and construction also may create pedestrian congestion. Finally, Plaintiff's expert, Renia Ehrenfeucht, Professor of Community and Regional Planning at the University of New Mexico, avers that in her observational study of seven food truck

locations, four of which were within 200 feet of a restaurant's principal entrance and the rest food truck stands, no difference in congestion was observed. (Plt.'s MSJ, Ehrenfeucht Aff., ¶¶27-28). Moreover, no one complained of the lines caused by food trucks.

Even if all of Plaintiff's arguments are true, this does not invalidate the 200-foot rule as a rational basis exists for reducing sidewalk congestion. Photos and notes collected through Professor Ehrenfeucht's study, as well by photos retrieved from Twitter, clearly show that food trucks result in significant sidewalk congestion. Moreover, restaurants often have sidewalk cafes during the warmer months, which further reduce available sidewalk space and cause congestion. (Plt.'s MSJ, Ex. 16, Hamilton Dep. at 36:8-11). It is well-settled that "[a] local ordinance aimed at remedying a problem need not entirely eliminate the problem." *Vaden v. Maywood,* 809 F.2d 361, 365 (7th Cir. 1987). Rather, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id. (quoting Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955).

The Illinois Supreme Court in *Triple A Services* relied upon *Vaden v. Village of Maywood*, 809 F.2d 361 (7th Cir. 1987), which upheld an ordinance banning the operation of mobile food vending businesses in Maywood from 8 a.m. to 4 p.m. on any day between August 25 and June 30 when a public elementary or secondary school was in operation. Plaintiff Vaden, who sold snacks primarily to school children, challenged the ordinance on due process, equal protection, and other grounds. Noting that "[i]n determining the constitutionality of the ordinance, [the Court] cannot consider whether the Village Board acted wisely in regulating the business of its street vendors or whether it could have accomplished its goals more effectively; [the Court] consider[s] only whether the ordinance is wholly arbitrary." *Id.* at 364-365. Finding that the restriction was rationally related to the legitimate goal of preventing children from being

delayed and distracted while traveling to and from school, the Seventh Circuit upheld the ordinance.

Though other businesses are sources of pedestrian congestion, lines at food trucks and traditional restaurants are more likely to occur at the same time than, perhaps, another business such as a theatre at lunch time. A "legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. *In re Adopt O.J.M.*, 293 Ill. App. 3d 49, 64 (1st Dist. 1997)(*quoting McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969)(internal quotes, citations omitted). In this case, although the 200-foot rule does not solve all sources of pedestrian congestion, the evidence shows that food trucks are a significant source of congestion, as are restaurants. Accordingly, the Court finds that the 200-foot rule is rationally related to the City's legitimate goal to reducing sidewalk congestion.

**Count III – GPS Requirement (Unreasonable Search/Violation of Privacy)**

The GPS requirement is a combination of MCC Section 7-38-115(l), created by Ordinance 2012-4489, and the regulations enacted by the City's Department of Public Health ("DPH") on December 21, 2012. The ordinance provides:

> Each mobile food vehicle shall be equipped with a permanently installed functioning global-positioning-system (GPS) device which sends real-time data to any service that has a publicly-accessible application programming interface (API). For purposes of enforcing this chapter, a rebuttable presumption shall be created that a mobile food vehicle is parked at places and times as shown in the data tracked from the vehicle's GPS device.

MCC, Sec. 7-38-115(l).

The DPH regulations state that the GPS need only transmit location data "while the vehicle is vending food or otherwise open for business to the public, and when the vehicle is being serviced at a commissary. . ." (Plt.'s MSJ, Ex. K, CITY000703). When required to function, the GPS device must transmit the vehicle's location at least once every five minutes. *Id.*

City personnel may request location information from a GPS Service Provider if the information is sought to investigate a food-related threat to public health, "in connection with establishing compliance with Chapter 7-38 of the Municipal Code of Chicago or the regulations promogulated thereunder" or "for purposes of emergency preparation or response." *Id.* The GPS Service Provider must maintain at least six months of historical location data for a mobile food vehicle. *Id.*

Plaintiff challenges the GPS requirement as an unreasonable search, and that the ordinance and regulations do not serve as an adequate substitute for a warrant. Plaintiff also complains that the data is not collected by the City, but rather by a third party which must hold six months of data open to the world. The City responds that GPS requirement is not a search by the government, and therefore, no warrant is required. Moreover, the City has never obtained Plaintiff's location data from the GPS Service provider, other than during the pendency of this lawsuit pursuant to subpoena issued by the City's counsel. Reviewing the data, however, would not be a search because LMP has no reasonable expectation of privacy when operating its food truck. Even if the requirement constitutes a search, it would be lawful as a reasonable search because the data is limited and serves important City interests. Finally, the City argues that there is no meaningful difference between what it transmitted by the GPS unit and what is routinely communicated by the food truck themselves via social.

The GPS Requirement Does Not Constitute a Search or Seizure

As a preliminary matter, LMP has not been subject to a search or seizure, illegal or not, as the City never requested LMP's location data outside the pendency of this lawsuit. Thus, LMP lacks standing to raise a challenge to the GPS requirement because it was never searched. Even had the City accessed LMP's data via the third-party GPS service provider, Plaintiff's constitutional claims fail as the GPS requirement does not constitute a search.

Plaintiff cites *United States v, Jones*, 565 U.S. 400 (2012), in support of its contention that the GPS requirement constitutes a search. In *Jones,* the defendant came under suspicion of trafficking in narcotics. *Id.* at 402. The government obtained a search warrant in federal court which authorized the installation of a GPS unit on the vehicle registered to Jones' wife (but of which Jones was the exclusive driver), however the warrant expired before the GPS unit was installed. *Id. at* 403. Over the next 28 days, the government collected data using the device and indicted Jones and several alleged co-conspirators with conspiracy to distribute five kilograms or more of cocaine. *Id.* Jones filed a motion to suppress the evidence obtained by the GPS unit which the District Court granted only in part, suppressing the data obtained while the vehicle was parked at Jones' residence. *Id.* Jones was then convicted with the data from the GPS unit having led to the alleged co-conspirators' house that contained $850,000 in cash, 97 kilograms of cocaine, and 1 kilogram of cocaine base. *Id.* at 403-404. Upon review, the Supreme Court noted that the "Government physically occupied private property for the purpose of obtaining information", and found that the installation of a GPS unit was an unconstitutional search. *Id.* at 404. The Court further held that it need not reach the "reasonable expectation of privacy" analysis first articulated in Justice Harlan's concurrence in *Katz v. United States,* 389 U.S. 347 (1967) due to such "physical intrusion" by the Government. *Id.* at 407. Our appellate court relied upon *Jones* in a similar case where special agents working for the Drug Enforcement Agency installed a GPS tracking device on a suspect's car without judicial authorization, and then monitored the suspect for a month. *People v. Bravo*, 2015 IL App (1st) 130145.

*Jones* and *Bravo* are distinguishable most notably because the government did not surreptitiously place the GPS unit on Plaintiff's food truck. There was no physical trespass to LMP's food truck for the purpose of installing the GPS unit. Rather, the GPS unit is a requirement of operations in the City, that is made obvious to Plaintiff by both the Municipal

Code of Chicago and DPH regulations. As such, the GPS requirement does not constitute a search.

Even if the GPS Requirement Were Deemed a Search, It Would Be Reasonable.

Warrantless inspections of closely regulated businesses (such as food service) must meet three criteria as set forth by the United States Supreme Court in *New York v. Burger,* 482 U.S. 691 (1987). First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. *Burger*, 482 U.S. at 702. Second, the warrantless inspections must be necessary to further the regulatory scheme. *Id.* Finally, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *Id.* at 703. The Court finds that the GPS requirement as codified by ordinance and DPH regulations satisfies the *Burger* test.

The parties do not dispute that the City has a substantial interest in ensuring food safety. Accordingly, as the DPH regulations more than adequately make clear that public health is a substantial basis for the regulation, the first requirement of the Burger test is satisfied. The regulations provide that City personnel will not require location information from a GPS service provider pertaining to a mobile food vehicle unless the information is sought (1) to investigate a complaint of unsanitary or unsafe conditions, (2) to investigate a food-related threat to public health, (3) in connection with establishing compliance with Chapter 7-38 of the MCC (which also includes numerous health and safety requirements), or (4) for purposes of emergency preparation or response. (Plt.'s MSJ, Ex. K, CITY0000703). Second, the warrantless inspections are necessary to further the regulatory scheme. The data required to be maintained enables the City to learn a food truck's current and prior locations for purposes of health inspection or notification of the public. That the City could obtain this information by consulting the food truck's Twitter feed or telephoning the truck is of no matter. Moreover, Ms. Pekarik testified that

there is no requirement as to when or how soon after arrival her employees will post the food truck's location on Twitter or Facebook and there have been times when the driver neglected to post on social media. (City's MSJ, Ex. 9, Pekarik Dep. at 24:23-26:24). As brick-and-mortar restaurants are subject to unannounced health inspections, there is no colorable reason that food trucks should not be subject to the same if the City deems it necessary. Lastly, the third requirement that the GPS requirement must satisfy the basic requirement of a warrant is satisfied as both the ordinance and the DPH regulations clearly inform a food truck licensee what data is collected and when it may be requested by the City. Accordingly, because all elements of the *Burger* test are satisfied, even if the GPS requirement constitutes a "search," it would pass constitutional muster.

LMP Has No Reasonable Expectation of Privacy

Plaintiff also contends that the GPS requirement violates its reasonable expectation of privacy. This contention borders on the absurd. That a business, serving food to the *public* should be permitted to conceal its location from governmental scrutiny, including the public health department, simply because it is on wheels is incomprehensible. The GPS requirement expressly states that the GPS unit only need transmit the food truck's location when the food truck is vending food, otherwise open for business, or being serviced at a commissary. (Plt.'s MSJ, Ex. K, CITY0000703). Plaintiff argues that occasionally keeping the location of the food truck secret may prevent competitor food trucks from coming to the same parking spot and siphoning off customers. Another reason offered is that the GPS requirement will compromise an employee's safety from unwanted attention from members of the public or acquaintances outside the workplace. Neither reason serves as a basis for a reasonable expectation of privacy when operating a food business. Finally, it is well-settled that there is no reasonable expectation of privacy in a vehicle's location when operating in public. *United States v. Knotts*, 460 U.S. 276,

281 (1983)("A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.").

Because LMP has no reasonable expectation of privacy in its location when its food truck is open for business and serving food to the public, there is no constitutional right ceded in exchange for a food truck license. Thus, the Court need not reach the issue of whether the GPS requirement is a permissible condition of licensure. *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 986 (7th Cir. 2012)( "The first step in any unconstitutional-conditions claim is to identify the nature and scope of the constitutional right arguably imperiled by the denial of a public benefit.")

**CONCLUSION**

Because the Court finds the 200-foot rule is rationally related to at least two legitimate government purposes, namely balancing of interests between food trucks and brick-and-mortar restaurants and reducing pedestrian congestion, it finds the 200-foot rule does not violate Plaintiff's due process rights. Summary judgment as to Count I is entered in favor of the City.

The Court further finds that the GPS requirement does not constitute a "search" by the government and no seizure has occurred. That the requirement only applies when the food truck is open for business or being serviced at a commissary is key. There is no reasonable expectation of privacy when the food truck is open for business and serving food to the public. Moreover, as a food truck is a vehicle, there is no reasonable expectation of privacy on the public ways at any time. Finally, even were Plaintiff to have a constitutional right to privacy when open for business and the GPS requirement to constitute a search, such a warrantless search is likely to pass constitutional muster because the ordinance and regulations adequately inform the licensee when and why its location data might be retrieved. For these reasons, summary judgment as to Count III is entered in favor of the City.

**WHEREFORE, IT IS HEREBY ORDERED:**

1) The City of Chicago's Motion for Summary Judgment is granted.

2) Plaintiff's Motion for Summary Judgment is denied.

ENTERED: Judge Anna Helen Demacopoulc

DEC - 5 2016

Judge Anna H. Demacopoulos Circuit Court - 2002