

STATE OF NORTH CAROLINA  
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
18 CVS \_\_\_\_\_

LEIGH MICHELLE ROCK;  
AARON CANNON; MONICA CANNON;  
HARLEY BRUCE;  
A & M'S RED FOOD TRUCK, INC.;  
and HB FOOD SERVICES, INC.,

Plaintiffs,

vs.

TOWN OF CAROLINA BEACH,  
JOE BENSON, Mayor of the Town of  
Carolina Beach, in his official capacity;  
LEANN PIERCE, Carolina Beach Council  
Member, in her official capacity;  
TOM BRIDGES, Carolina Beach Council  
Member, in his official capacity;  
JORDAN GARZA, Carolina Beach Council  
Member, in his official capacity; and  
STEVE SHUTTLEWORTH,  
Carolina Beach Council Member,  
in his official capacity,

Defendants.

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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Plaintiffs Leigh Michelle Rock, Aaron Cannon, Monica Cannon, Harley Bruce, A & M's Red Food Truck, Inc., and HB Food Services, Inc., by and through their undersigned counsel, hereby file this lawsuit and sue the Town of Carolina Beach, its Mayor Joe Benson, in his official capacity, and the members of its Town Council, LeAnn Pierce, Tom Bridges, Jordan Garza, and Steve Shuttleworth, in their official capacities, as follows:

## INTRODUCTION

1. This lawsuit seeks to vindicate the right under the North Carolina Constitution to earn an honest living free from protectionist government restrictions. Plaintiffs own food trucks and wish to sell their culinary creations to willing customers by operating those trucks on private property in the Town of Carolina Beach. Private property owners in Carolina Beach are ready and willing to have Plaintiffs' food trucks operating on their property. But Plaintiffs are blocked from doing so because Carolina Beach's government has decreed that food trucks are only allowed in Carolina Beach if their owners also happen to have owned brick-and-mortar eateries inside the town for at least one year. In other words, in Carolina Beach, food trucks are legal if owned by local restaurant owners and banned for everyone else.

2. Carolina Beach's brick-and-mortar requirement serves only one purpose: to protect in-town restaurant owners from competition by out-of-town food trucks. Carolina Beach's government has publicly admitted that this is the reason for the requirement.

3. Carolina Beach's government has also admitted that it invented the brick-and-mortar requirement at the request of Carolina Beach's restaurant owners, even though Carolina Beach's government recognized that this type of requirement was not found anywhere else in the region.

4. The North Carolina Constitution prohibits Carolina Beach's effort to use its police power for such an anti-competitive goal. Accordingly, Carolina Beach's brick-and-mortar requirement should be declared unconstitutional and permanently enjoined.

## **JURISDICTION AND VENUE**

5. Plaintiffs bring this lawsuit pursuant to Article I, Sections 1, 19, and 34 of the North Carolina Constitution, as well as North Carolina's Declaratory Judgments Act, N.C. Gen. Stat. §§ 1-253, *et seq.*

6. This Court has jurisdiction over this action pursuant to N.C.G.S.A. §§ 7A-240 and 7A-245.

7. Venue is proper in this Court, as the parties are located in New Hanover County, and the relevant events occurred in New Hanover County.

## **THE PARTIES**

8. Plaintiffs comprise a coalition of food truck owners in New Hanover County who assist each other and other local food truck owners. Plaintiffs operate their food trucks in numerous municipalities across New Hanover County. If allowed to do so, Plaintiffs would also operate their food trucks in Carolina Beach.

9. Plaintiff Leigh Michelle Rock ("Michelle") is a citizen and resident of New Hanover County. She owns the Momma Rock's Desserts and T'Geaux Boys food trucks, both of which she operates in New Hanover County.

10. Plaintiffs Aaron Cannon ("Aaron") and Monica Cannon ("Monica") are citizens and residents of New Hanover County, and they are husband and wife. Together, they own Plaintiff A & M's Red Food Truck, Inc., which is a North Carolina corporation that operates A & M's Red Food Truck in New Hanover County.

11. Plaintiff Harley Bruce ("Harley") is a citizen and resident of New Hanover County. He owns Plaintiff HB Food Services, Inc., which is a North Carolina corporation that operates the Poor Piggy's BBQ truck in New Hanover County.

12. Defendant Town of Carolina Beach (“Carolina Beach”) is a municipal corporation organized under the laws of North Carolina and located in New Hanover County.

13. Defendant Joe Benson is the Mayor of Carolina Beach. He is being sued solely in his official capacity.

14. Defendant LeAnn Pierce is a member of the Carolina Beach Town Council. She is being sued solely in her official capacity.

15. Defendant Tom Bridges is a member of the Carolina Beach Town Council. He is being sued solely in his official capacity.

16. Defendant Jordan Garza is a member of the Carolina Beach Town Council. He is being sued solely in his official capacity.

17. Defendant Steve Shuttleworth is a member of the Carolina Beach Town Council. He is being sued solely in his official capacity.

### **FACTUAL ALLEGATIONS**

#### **Food trucks are beneficial to society.**

18. Food trucks can take many different forms. Some only serve food that is prepared and prepackaged. Others are self-sufficient mobile kitchens where people prepare and serve food directly from the food truck.

19. Historically, food trucks served simple products such as sandwiches and tacos, often to construction workers and manual laborers.

20. Today, food trucks serve a wide variety of cuisines to diverse clientele. The general public now benefits from food options that can range from Korean fusion, to cupcakes, to barbecue.

21. Food trucks provide a number of benefits to their communities, including both convenience and a greater number of food choices for consumers.

22. Food trucks, including those operated by Plaintiffs, are job creators. In addition to the job created by the entrepreneur who opens a food truck, food trucks often hire additional staff. Food trucks also provide jobs to those who build, equip, and maintain the trucks.

23. Food trucks enliven communities. The popularity of food trucks often makes them a destination for loyal and prospective customers alike. Food trucks can help bring new energy and tourists to communities.

24. Food trucks also serve as complements to brick-and-mortar restaurants. Many food-truck entrepreneurs go on to open restaurants, and restaurant entrepreneurs may later open food trucks.

25. In recognition of the benefits provided by food trucks, municipalities around the nation, around North Carolina, and around New Hanover County have been taking active steps to encourage food trucks and invite them into their communities.

Plaintiffs' food trucks have a positive impact on every community where they operate.

26. Plaintiffs are beloved by their loyal customers. This allows them to have a positive economic impact on the communities where they operate, as many of their fans follow them from town to town.

27. Plaintiffs' food trucks allow them to support themselves, support their families, and employ over a dozen other people.

28. Plaintiffs possess all of their necessary state and county licenses, and Plaintiffs would similarly comply with Carolina Beach's other ordinances if the brick-and-mortar requirement did not prevent them from operating in Carolina Beach.

29. In addition to being one of the oldest food trucks in the Wilmington area, Momma Rock's Desserts is an important outlet for Michelle's creativity, which she harnesses into her customized cupcakes, cakes, and pastries. She is best known for her banana pudding cupcakes and her award-winning Bananas Foster bread pudding.

30. T'Geaux Boys is a nod to Michelle's Louisiana roots. She and her employees painstakingly create authentic Cajun cuisine for their adoring fans. She even flies in fresh bread from New Orleans.

31. Military veterans, Aaron and Monica met while they were living in San Diego. Together, they fell in love with good tacos, so they decided to recreate them here in eastern North Carolina. A & M's Red Food Truck receives rave reviews.

32. Poor Piggy's BBQ truck is the oldest food truck in the Wilmington area. Harley started off as one of Poor Piggy's BBQ Truck's employees. After working his way up, Harley took over the truck when the original owner retired.

33. Harley cooks his barbecue low and slow, and his labor of love has earned him the adoration of barbecue lovers throughout the area.

34. The positive impact created by Plaintiffs' food trucks is one reason why many communities have gone out of their way to invite them in, and there is no constitutionally legitimate or substantial reason to ban them.

#### Carolina Beach bans outsiders.

35. Rather than invite food trucks into their community, Defendants have done the opposite by enacting the brick-and-mortar requirement.

36. The brick-and-mortar requirement is found in Carolina Beach Code of Ordinances § 14-21(d)(1).

37. The brick-and-mortar requirement mandates that, in order for a food truck to be able to operate in Carolina Beach:

[p]rior to obtaining approval, the food truck operator shall maintain a [sic] eating and drinking establishment for at least one year in the town. The eating and drinking establishment shall be in a building and open at all times when the food truck operates. However, if approved by the health department the food truck's hours of operation may extend beyond the hours of the eating and drinking establishment.

38. Food-truck owners who cannot meet these requirements cannot obtain a permit to operate their food trucks in Carolina Beach.

39. Plaintiffs cannot meet these requirements.

40. Carolina Beach enforces the brick-and-mortar requirement.

41. Carolina Beach's enforcement includes the denial of food truck permits and citations for violations.

42. Violating the brick-and-mortar requirement is a misdemeanor.

43. The penalties for misdemeanors include fines and up to 150 days of incarceration per offense.

44. Protectionism is the reason the brick-and-mortar requirement exists.

45. Carolina Beach has admitted that protectionism is the reason the brick-and-mortar requirement exists.

46. Carolina Beach's government officials have publicly stated that the purpose of the brick-and-mortar requirement is to prevent "outsider" food trucks from competing with Carolina Beach's restaurant owners.

47. When Carolina Beach created the brick-and-mortar requirement, it was in response to concerns from Carolina Beach restaurant owners that they did not want to compete with food trucks coming into town from outside Carolina Beach.

48. Carolina Beach restaurant owners' concerns included that food trucks from Wilmington's vibrant food-truck culture might "drive over the bridge" to Carolina Beach.

49. Carolina Beach's government officials have publicly admitted that these concerns from Carolina Beach's restaurant owners were the reason for the brick-and-mortar requirement.

50. Carolina Beach's government officials have publicly admitted that the reason the brick-and-mortar requirement exists is to prevent "outsider" competition with Carolina Beach's restaurants.

51. Carolina Beach's town planner has stated: "The direction from council as far as food trucks in the past has been they did not want it to be seen as competition for . . . brick and mortar businesses[.] We would not let an outsider come over the bridge and set up shop when they're not an existing business."

52. During the town council's April 10, 2018 meeting, Carolina Beach's Mayor explained that the reason for the brick-and-mortar requirement was that the town's government "queried local brick-and-mortars, and that's what they proposed or came back with."

53. When the town's government "queried local brick-and-mortars," the town's government did not also query the town's other residents and property owners who want outside food trucks to come to Carolina Beach; nor did the town's government speak to any food-truck owners.

Carolina Beach has no constitutionally legitimate objection to food trucks.

54. Carolina Beach does not object to food trucks in general, just to outsiders competing with Carolina Beach's restaurants.



55. Carolina Beach allows food trucks to be operated in Carolina Beach if the food truck is owned by an existing Carolina Beach restaurant owner who has owned the restaurant for at least one year.

56. If Carolina Beach had any constitutionally legitimate concerns about food trucks, then it would not have chosen to allow them to be operated by Carolina Beach restaurant owners who have owned their restaurants for at least one year.

57. Carolina Beach allows food trucks from outside Carolina Beach to operate in Carolina Beach at special events.

58. If Carolina Beach had any constitutionally legitimate concerns about food trucks from outside Carolina Beach, then it would not have chosen to allow them to operate in Carolina Beach at special events.

59. Carolina Beach allows food trucks from outside Carolina Beach to be used for private catering events.

60. If Carolina Beach had any constitutionally legitimate concerns about food trucks from outside Carolina Beach, then it would not have chosen to allow them to be used in Carolina Beach for private catering events.

61. Food trucks are a generally safe business.

62. Carolina Beach recognizes that food trucks are a generally safe business.

Carolina Beach is violating the North Carolina Constitution.

63. Protectionism is neither a substantial nor a legitimate governmental interest under the North Carolina Constitution.

64. Discrimination against “outsiders” is neither a substantial nor a legitimate governmental interest under the North Carolina Constitution.

65. The brick-and-mortar requirement does not further any substantial or legitimate governmental interest under the North Carolina Constitution.

66. The brick-and-mortar requirement is not rationally or reasonably related to any substantial or legitimate governmental interest under the North Carolina Constitution.

67. Banning food trucks without a constitutionally legitimate and substantial basis for doing so violates the North Carolina Constitution.

68. Limiting food trucks without a constitutionally legitimate and substantial basis for doing so violates the North Carolina Constitution.

69. The brick-and-mortar requirement, both facially and as applied to Plaintiffs, violates several provisions of the North Carolina Constitution.

70. The brick-and-mortar requirement violates Article I, Sections 1, 19, and 34 of the North Carolina Constitution.

Carolina Beach is harming Plaintiffs.

71. Plaintiffs do not own brick-and-mortar restaurants in Carolina Beach.

72. But for the brick-and-mortar requirement, Plaintiffs would operate their food trucks in Carolina Beach and would be able to provide increased food options to Carolina Beach's residents and visitors.

73. But for the brick-and-mortar requirement, Plaintiffs would be able to strengthen business relationships with the business owners and property owners who would otherwise be able to invite Plaintiffs to their premises.

74. But for the brick-and-mortar requirement, there would be locations in Carolina Beach where Plaintiffs could operate their food trucks.

75. Carolina Beach's actions require Plaintiffs to seek declaratory relief under the Uniform Declaratory Judgment Act as to their rights under the North Carolina Constitution and as to whether the brick-and-mortar requirement is invalid and unenforceable due to its conflict with provisions of the North Carolina Constitution.

76. The brick-and-mortar requirement is causing ongoing irreparable harm to Plaintiffs.

Carolina Beach is harming its own residents, visitors, and property owners.

77. Numerous residents of, and visitors to, Carolina Beach have stated that they would like Plaintiffs to operate in Carolina Beach.

78. Numerous residents of other communities who are fans of Plaintiffs' food trucks have stated that they would travel to Carolina Beach if Plaintiffs' food trucks were allowed to operate there.

79. Carolina Beach's property owners have repeatedly invited food truck owners to operate on their properties in the past and would do so again in the future but for the brick-and-mortar requirement.

80. These Carolina Beach property owners include, but are not limited to, the local Hampton Inn and the Good Hops Brewery.

81. Carolina Beach's overzealous enforcement of the brick-and-mortar requirement included an erroneous attempt to cite Aaron in May, 2018, for having his A & M Red's Food Truck parked at the Hampton Inn, even though Aaron was only there for a private catering event in compliance with Carolina Beach's ordinances.

82. Good Hops Brewery is located over a mile from any restaurant. During their April, 2018, town council meeting, this led some members of Carolina Beach's town council to observe that "obviously, Good Hops is the ideal place for a food truck."

83. This did not prevent the town from sending code enforcement to Good Hops Brewery to enforce the brick-and-mortar requirement when a Carolina Beach restaurant owner complained that Michelle was operating her T'Geaux Boys food truck on the property.

84. The brick-and-mortar requirement, as well as Carolina Beach's overzealous enforcement of the requirement, is preventing Carolina Beach's property owners from inviting food trucks back to their properties.

85. Consequently, the brick-and-mortar requirement, as well as Carolina Beach's enforcement of the requirement, is causing ongoing harm to the community.

## **CAUSES OF ACTION**

### **Count I – Fruits of Their Own Labor**

86. Plaintiffs reassert and reallege paragraphs 1 through 85 as if fully stated herein.

87. Article 1, Section 1 of the North Carolina Constitution protects Plaintiffs' fundamental right to earn a livelihood and to "the fruits of their own labor."

88. The brick-and-mortar requirement prevents Plaintiffs from earning income in Carolina Beach.

89. But for the brick-and-mortar requirement, Plaintiffs would be better able to earn their livelihood and obtain the fruits of their own labor.

90. Preventing competition is not a constitutionally legitimate or substantial reason to prevent Plaintiffs from earning income.

91. There is no constitutionally legitimate or substantial reason to prevent Plaintiffs from earning income in Carolina Beach.

92. The brick-and-mortar requirement is not reasonably nor rationally related to any legitimate or substantial governmental interest, nor can it meet the heightened scrutiny which protects fundamental rights.

93. The brick-and-mortar requirement, both on its face and as applied to Plaintiffs, violates Plaintiffs' right to reap the fruits of their own labor.

94. The brick-and-mortar requirement violates Article I, Section 1 of the North Carolina Constitution.

### **Count II – Substantive Due Process**

95. Plaintiffs reassert and reallege paragraphs 1 through 85 as if fully stated herein.

96. Article I, Section 19 of the North Carolina Constitution protects Plaintiffs' substantive due process right to earn an honest living free from arbitrary, irrational, and protectionist legislation by declaring: "No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land."

97. The purpose and effect of the brick-and-mortar requirement is to prevent Plaintiffs and other "outsider" food trucks from operating in Carolina Beach, merely because local brick-and-mortar restaurants would prefer not to have competition.

98. This type of bare economic protectionism is not a legitimate or substantial basis for preventing Plaintiffs from providing safe, quality, food to willing customers in Carolina Beach.

99. The brick-and-mortar requirement is not reasonably or rationally related to any constitutionally legitimate or substantial basis.

100. The brick-and-mortar requirement, both on its face and as applied to Plaintiffs, violates Plaintiffs' substantive-due-process right to earn an honest living free from arbitrary, irrational, and protectionist legislation, in violation of Article I, Section 19 of the North Carolina Constitution.

### **Count III – Equal Protection**

101. Plaintiffs reassert and reallege paragraphs 1 through 85 as if fully stated herein.

102. Article I, Section 19 of the North Carolina Constitution protects Plaintiffs' right to equal protection of the laws by declaring: "No person shall be denied the equal protection of the laws . . . ."

103. The brick-and-mortar requirement draws an illegitimate, arbitrary, and irrational distinction between food trucks that are owned by people who have owned a restaurant in Carolina Beach for at least one year and food truck owners who do not own a restaurant in Carolina Beach.

104. Under the brick-and-mortar requirement, whether a food truck may operate in Carolina Beach does not turn on the owner's ability to provide legal and safe food to willing customers; it turns on whether the food truck owner is a local restaurant owner.

105. The brick-and-mortar requirement prevents Plaintiffs from operating in Carolina Beach.

106. Whether a food truck owner has owned a brick-and-mortar restaurant for at least one year in Carolina Beach has no real, substantial, or rational relationship to any constitutionally legitimate or substantial government interest.

107. The challenged brick-and-mortar requirement, both on its face and as applied to Plaintiffs, violates Plaintiffs' right to equal protection of the laws in violation of Article I, Section 19 of the North Carolina Constitution.

**Count IV – Anti-Monopoly Clause**

108. Plaintiffs reassert and reallege paragraphs 1 through 85 as if fully stated herein.

109. Article I, Section 34 of the North Carolina Constitution declares that “monopolies are contrary to the genius of a free state and shall not be allowed.”

110. The brick-and-mortar requirement grants certain food truck owners a monopoly by conferring an exclusive privilege to operate a food truck in Carolina Beach to people who also own a brick-and-mortar restaurant in Carolina Beach and flatly prohibiting anyone else from doing so.

111. The purpose of the brick-and-mortar requirement is to protect incumbent restaurant owners from competition.

112. Protectionism is not a constitutionally legitimate or substantial basis for preventing Plaintiffs from providing safe, legal, and tasty culinary options to the residents and tourists of Carolina Beach.

113. The brick-and-mortar requirement prevents Plaintiffs from operating in Carolina Beach merely because incumbent restaurant owners would prefer not to have additional competition.

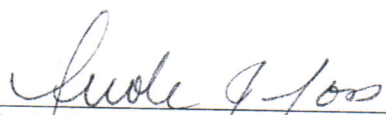
114. The brick-and-mortar requirement, both on its face and as applied, grants certain food truck owners a monopoly in violation Article I, Section 34 of the North Carolina Constitution.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request relief as follows:

- A. A declaratory judgment that Carolina Beach Code of Ordinances § 14-21(d)(1), both on its face and as applied, violates Article I, Section 1 of the North Carolina Constitution.
  - B. A declaratory judgment that Carolina Beach Code of Ordinances § 14-21(d)(1), both on its face and as applied, violates Article I, Section 19 of the North Carolina Constitution.
  - C. A declaratory judgment that Carolina Beach Code of Ordinances § 14-21(d)(1), both on its face and as applied, violates Article I, Section 34 of the North Carolina Constitution.
  - D. A permanent injunction enjoining Defendants and their officers, employees, and agents from enforcing Carolina Beach Code of Ordinances § 14-21(d)(1);
  - E. Nominal damages of one dollar (\$1.00) for the harm caused to Plaintiffs;
  - F. An award of the costs reasonably incurred by Plaintiffs in pursuing this action;
- and
- G. All further legal and equitable relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED this 21st day of August, 2018.

  
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\*Motion for admission *pro hac vice* to be filed

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