

NORTH CAROLINA
COUNTY OF ONSLOW

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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Anthony L. Proctor, Sr.; Nicole Gonzalez;
Octavius Raymond; The Spot Florida Style
Seafood, LLC; The Cheesesteak Hustle LLC;
and Noah and Isidore, L.L.C.,

Plaintiffs,

vs.

City of Jacksonville; Mayor Sammy Phillips;
and Councilmembers Jerry Bittner, Brian H.
Jackson, Logan Sosa, Cindy Edwards, Robert
Warden, and Angelia Washington, in
their respective official capacities,

Defendants.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR
NOMINAL DAMAGES**

Plaintiffs Anthony Proctor, Nicole Gonzalez, Octavius Raymond, The Spot Florida Style Seafood, LLC, The Cheesesteak Hustle LLC, Noah & Isidore, L.L.C., by and through their undersigned counsel, hereby file this lawsuit against the City of Jacksonville, North Carolina; its Mayor in his official capacity; and the members of its City Council in their official capacities. Plaintiffs allege as follows:

INTRODUCTION

1. This lawsuit seeks to vindicate Plaintiffs' fundamental rights under the North Carolina Constitution to use their private property safely and reasonably and to earn an honest living in a safe, reasonable, common occupation. Nicole Gonzalez wants to host food trucks at her general

goods store on property she and her husband own. Anthony Proctor and Octavius Raymond want to accept invitations from property owners like Nicole to come sell their delicious food from their food trucks.

2. But the City Council has largely prohibited food trucks from serving Jacksonville residents by severely and uniquely burdening them with regulations designed to protect brick-and-mortar restaurants from unwanted competition.

3. The relevant city ordinance excludes food trucks from selling food within 250 feet of any parcel containing a brick-and-mortar restaurant, another food truck, or residential property. The proximity bans in that ordinance apply only to food trucks. So, assuming they satisfied any other applicable requirements, a brick-and-mortar restaurant—even one with drive-through service or one with outdoor seating areas and live music—can operate within 250 feet of another restaurant, a food truck (indeed—a restaurant opening there would force the food truck to leave), or residential property, but a food truck cannot.

4. The same ordinance further insulates restaurants from unwanted competition by severely restricting the signage available to food trucks. Food trucks rely on signs and flags to help customers safely and quickly find them, but the ordinance limits food trucks to their on-truck signage and a single sandwich board placed on the ground within 20 feet of the truck. The ordinance, thus, makes it harder for customers to find food trucks safely and to choose them over a brick-and-mortar restaurant. The competitive burden on food trucks is compounded by the fact that, assuming they satisfied any other applicable requirements, restaurants can erect, for example, signs up to 35-feet tall or display flags up to 15-feet tall.

5. The City Council also harms would-be food truck entrepreneurs by charging them at least three hundred dollars each year for a food truck permit. The City's permit fee far exceeds its

own costs to regulate food trucks, as well as the fees charged by other jurisdictions, some of which do not charge annual fees for food truck permits at all.

6. Those severe and unique restrictions on hosting and operating a food truck in the City of Jacksonville are expressly designed to protect brick-and-mortar restaurants from competition, which is not a legitimate governmental interest under the North Carolina Constitution.

7. For that reason and for the additional reasons alleged below, the City Council's severe and unique restrictions on food trucks and the property owners who want to host them violate Plaintiffs' rights under the North Carolina Constitution and, respectfully, should be declared unconstitutional and enjoined from further enforcement.

JURISDICTION AND VENUE

8. Plaintiffs bring this lawsuit pursuant to Article I, Sections 1, 14, and 19 of the North Carolina Constitution, North Carolina's Declaratory Judgments Act, N.C.G.S. §§ 1-253, *et seq.*, and N.C.G.S. §§ 160A-174 and 160A-4.

9. This Court has jurisdiction over this action pursuant to N.C.G.S. §§ 7A-240, 7A-243, and 7A-245.

10. Venue is proper in this Court, as the parties are located primarily in Onslow County, and the relevant events occurred in Onslow County.

THE PARTIES

11. Plaintiffs are a group of food truck owners and a property owner in Jacksonville who want to operate their businesses and use their private property in ways that are currently prohibited under the City's Unified Development Ordinance ("UDO").

12. Plaintiff Anthony Proctor ("Tony") is a citizen and resident of Jacksonville. He and his wife own Plaintiff The Spot Florida Style Seafood, LLC, which is a North Carolina limited

liability company located in Jacksonville that operates The Spot, a food truck serving Florida-style seafood.

13. Plaintiff Octavius Raymond (“Ray”) is a citizen and resident of Jacksonville. He co-owns Plaintiff The Cheesesteak Hustle LLC, which is a North Carolina limited liability company located in Mint Hill, North Carolina, that operates The Cheesesteak Hustle food truck.

14. Plaintiff Nicole Gonzalez (“Nicole”) is a citizen and resident of Jacksonville. Nicole is the managing member of Plaintiff Noah and Isidore, L.L.C., which is a North Carolina limited liability company that operates a general store and small engine repair shop, Northwoods Urban Farm, in Jacksonville. Northwoods Urban Farm is located on property owned by Nicole and her husband, both of whom consent to Nicole inviting food trucks onto the property on behalf of Plaintiff Noah & Isidore, L.L.C.

15. Defendant City of Jacksonville (“Jacksonville” or “the City”) is a municipal corporation organized under the laws of North Carolina and located in Onslow County.

16. Defendant Sammy Phillips is the Mayor of Jacksonville. He is being sued solely in his official capacity.

17. Defendant Jerry Bittner is a member, and the Mayor *Pro Tem*, of the City Council of Jacksonville. He is being sued solely in his official capacity.

18. Defendant Brian H. Jackson is a member of the City Council of Jacksonville. He is being sued solely in his official capacity.

19. Defendant Logan Sosa is a member of the City Council of Jacksonville. He is being sued solely in his official capacity.

20. Defendant Cindy Edwards is a member of the City Council of Jacksonville. She is being sued solely in her official capacity.

21. Defendant Robert Warden is a member of the City Council of Jacksonville. He is being sued solely in his official capacity.

22. Defendant Angelia Washington is a member of the City Council of Jacksonville. She is being sued solely in her official capacity.

FACTUAL ALLEGATIONS

Food trucks are common and beneficial to society.

23. Food trucks are an increasingly common way to earn a living and use private property in the modern economy's ever-developing service industry.

24. From 2014 to 2017, nationwide revenue in the food truck industry more than quadrupled from \$650 million to an estimated \$2.7 billion.

25. Food trucks have relatively low startup and overhead costs, making them an attractive economic opportunity for entrepreneurs and existing small business owners alike.

26. Food trucks benefit their communities in a variety of ways.

27. The mobility of food trucks allows entrepreneurs to reach and serve customers more efficiently. For example, multiple food trucks can travel to a single space, making it easier for customers to find different food options in a single location and making food trucks a more desirable destination for groups with varying culinary preferences.

28. Introducing food trucks to a city gives consumers more food options overall, as well as more convenient food options.

29. Food trucks also create jobs both directly and indirectly for those who build, supply, equip, maintain, and repair the trucks.

30. Food trucks help bring greater vibrancy and more visitors to communities, as their popularity makes them an attractive destination for both loyal and potential customers. Also,

because food trucks are mobile and sometimes change locations, they rely on effective signage and flags to guide customers safely and effectively to the food truck's location on any given day.

31. Hosting a food truck is also a safe, convenient, and beneficial way for property owners to use their own property.

32. Hosting a food truck allows property owners to open up new revenue streams for themselves, as well as to improve the surrounding area by introducing new, convenient, and safe food options and by attracting people to other nearby businesses as well.

33. The arrangement is a win-win because property owners who host food trucks also provide the food truck entrepreneur with an area to operate.

34. Food trucks complement traditional brick-and-mortar restaurants, they do not replace them. By attracting customers to a neighborhood, food trucks benefit local brick-and-mortar businesses, including restaurants.

35. Research confirms this fact, showing a positive correlation between the number of food trucks and the number of restaurants operating in an area within a given year.

36. Many food truck owners eventually open brick-and-mortar restaurants, and many restaurant owners eventually start operating food trucks.

37. Counties with higher levels of growth in the food truck industry also saw higher growth in brick-and-mortar restaurants and catering businesses.

38. Other local governments have noticed the benefits of food trucks and have taken active steps to make their jurisdictions more accessible to food truck businesses.

39. The surrounding counties of Pender, New Hanover, Duplin, Sampson, Jones, Lenoir, Craven, and Carteret all allow for food trucks to operate in their counties.

40. Other towns and cities in Onslow County also allow for food trucks to operate in their jurisdictions. For example, Holly Ridge allows food trucks to operate in residential areas by

invitation of a homeowners' association, as well as in the town's commercial, neighborhood business, and light industrial districts.

41. Towns and cities in nearby counties allow for food trucks as well, including Wilmington, Burgaw, Kenansville, Trenton, Kinston, New Bern, Beaufort, and Emerald Isle.

42. Other cities in North Carolina also allow for food trucks, including Charlotte, Raleigh, Greensboro, Durham, and Winston-Salem.

Food trucks are safe.

43. Food trucks are subject to the same degree of health and safety requirements as brick-and-mortar restaurants. For example, food trucks are subject to State and County health and safety regulations, as well as to inspections by county health departments and by local fire departments.

44. In Onslow County, food trucks are allowed to operate but must first submit a Mobile Food Unit Plan Review Application.

45. Onslow County reviews the food truck's menu and location schedule.

46. Onslow County requires food trucks to verify they have a commissary and to submit floor plans of the commissary.

47. Onslow County reviews a floor plan for the food truck itself and requires additional information about it, such as finish schedules for surfaces in the food truck and manufacturers' specifications for all food service equipment in the food truck.

48. Onslow County requires food trucks to report daily to their commissary for supplies and servicing; prohibits storing food trucks at a private residence; requires food trucks to use only single-service items (e.g., plates, forks); and requires access to a stem thermometer and a potable hose that can reach from the commissary to the food truck.

49. Onslow County requires all food truck equipment to meet the sanitation standards set by the American National Standards Institute or the National Sanitation Foundation.

50. Onslow County inspects food trucks for compliance with the North Carolina Rules Governing the Food Protection and Sanitation of Food Establishments at least twice per year.

51. Onslow County inspects a food truck's commissary for compliance with the North Carolina Rules Governing the Food Protection and Sanitation of Food Establishments (the "Food Code") at least twice per year.

52. The State of North Carolina Department of Health and Human Services does not issue permits to food trucks, but it does impose standards and regulations on them.

53. The State requires food trucks to inform each county in which they operate about the locations where the food truck will operate in that county, as well as each other county they operate in and where in those counties they operate.

54. The State requires food trucks to operate in conjunction with a commissary and sets certain standards for the commissary facilities, equipment, and sanitation.

55. The State also requires food trucks to obtain and store food in compliance with Chapter 3 of the Food Code.

56. The State requires food trucks to use only single-service items and sets standards for how those items must be acquired and stored.

57. The State sets standards for how food trucks store and dispose of garbage and solid waste.

58. The State requires food truck employees to wear effective hair restraints and clean outer clothing, and to maintain good hygienic practices that comply with Parts 2-4 of the Food Code.

59. The State mandates that food truck employees be knowledgeable about and comply with health and safety reporting requirements.

60. The State requires food trucks to be constructed and arranged so as to avoid exposing food, drink, or materials to insects, dust, or other contamination.

61. The State specifies that food trucks must have hot water and a handwashing sink.

62. The State also regulates sewage disposal by requiring food trucks to use an approved system of disposal or approved storage tanks.

63. Food trucks are just as safe as restaurants, if not safer. For example, research shows food trucks perform as well or better than restaurants do in health and safety inspections.

Plaintiffs are food truck and property owners who want to earn their living and use their private property in Jacksonville.

64. Tony's and Ray's food trucks allow them to support themselves and their families.

65. Nicole, through Plaintiff Noah & Isidore, L.L.C., owns and operates a general store and small engine repair shop, Northwoods Urban Farm, on private, commercial property she and her husband own together. The income from Northwoods Urban Farm allows Nicole and her husband to support themselves and their family.

66. Other than those challenged by this lawsuit, Plaintiffs possess all the necessary licenses and meet all applicable requirements to operate, or host, a food truck on private property in the State of North Carolina and in Onslow County.

67. But for the challenged provisions, Plaintiffs would similarly comply with all other City of Jacksonville ordinances that apply to hosting or operating a permitted food truck business.

Tony serves his "good mood food" from his food truck, The Spot.

68. Plaintiff The Spot is a Florida-style seafood truck that Tony—a Marine veteran and pastor who has lived in Jacksonville for over twenty years—owns and operates under a permit from the City of Jacksonville. He calls his Florida-style seafood "good mood food."

69. Tony paid the City's \$300 annual permit fee for food trucks.

70. Tony's church is located on one of the few properties where a food truck can legally operate in Jacksonville. With the church's permission, Tony sets up there from time to time to serve hungry parishioners and others.

71. On limited occasions in the past, Tony has set up at additional locations in Jacksonville, such as a wholesale club store and a big-box furniture store. At each location, it was difficult for customers to find Tony and The Spot because of where he was required to park and because he was prohibited from displaying signs by the roadway. As a result, if he is not selling food at his church, Tony typically drives to other cities and towns, such as Wilmington or New Bern, to serve his "good mood food" to the hungry customers there.

72. Tony would like to accept invitations from private property owners in Jacksonville, such as Nicole and Noah & Isidore, L.L.C., to come to their property and serve more customers from The Spot.

73. Tony currently displays a single sandwich board sign on the ground by the food truck. He also displays a menu on the side of—but not above—his food truck to provide information about The Spot and its food offerings for any given day. In other jurisdictions, he has displayed a feathered flag near the roadway to guide customers to the food truck.

74. Tony would also like to display a modest, 32" TV as a digital menu on the side of his food truck.

75. Tony would like to display a modest, foldable sign on the top of his food truck.

Ray works hard selling cheesesteaks from his truck, The Cheesesteak Hustle.

76. Plaintiff The Cheesesteak Hustle is the food truck Ray opened after serving in the Marines. He typically sells his cheesesteaks to the Marines at Camp LeJeune, but the restrictions

challenged by this lawsuit otherwise force Ray to drive his food truck to other cities and towns, such as Wilmington or Holly Ridge.

77. Ray owns a commissary in leased space in Jacksonville on Wilmington Highway. That commissary is located on private, commercial property, and it is where Ray prepares the food served from Plaintiff The Cheesesteak Hustle.

78. Ray would like to set up his food truck in front of the commissary and has the property owner's permission to do so.

79. Ray would like to accept invitations from other private property owners in Jacksonville, such as Plaintiff Nicole, to set up and sell food on their properties.

80. Ray currently displays only the signage that fits on the side of the food truck, but he would like to use additional signs and flags to guide customers to the food truck.

81. Because anticompetitive regulations prohibit Ray from setting up and selling food at his commissary, he does not currently have an annual food truck permit from the City of Jacksonville.

82. Ray has twice applied for and received a food truck permit from the City of Jacksonville. On both occasions, he paid the applicable permit fee.

83. The food truck permits Ray acquired did not allow him to set up the food truck and sell food at his commissary.

84. Ray was able to sell food at a couple of locations, such as a wholesale club store or big-box electronics store that allowed only one food truck to serve food at a time in the parking lot to the side of the store.

85. Those locations were not consistently available because many food trucks wanted to set up at them, so Ray frequently had to drive outside Jacksonville to cities like Wilmington, Holly Ridge, and Cedar Point, to sell food from his food truck.

86. If the challenged protectionist regulations did not prohibit Ray from operating his food truck at his commissary, Ray would apply for an annual food truck permit and would pay the City's annual permit fee.

Nicole wants to invite food trucks to Northwoods Urban Farm to help bring in new customers.

87. Plaintiff Noah & Isidore, L.L.C., is the company that Nicole created to own the general goods store and small engine repair shop (Northwoods Urban Farm) that she and her husband operate. Nicole, a lifelong Jacksonville resident, is the business's managing member, and the store is located on commercial property owned by Nicole and her husband.

88. The building on the property was a restaurant before Nicole's store opened there, and Jacksonville's zoning laws would allow her to open a restaurant there if she wanted to do so.

89. Because it used to be the site of a restaurant, Nicole's store features an oversized parking lot that would be perfect for food trucks.

90. Nicole would like to host a food truck at her store to serve her current customers while they wait for their engines to be repaired, to bring in new customers, and to benefit her community.

91. The property where Nicole's store is located has enough room for a food truck to operate and for customers to wait for (and eat) their food. Neither the food truck nor the customers would be on the sidewalk or in the public right-of-way. And the food truck's signs would be entirely on the private property where Nicole's store is located.

92. Nicole would like to invite Plaintiffs Tony and The Spot to sell food at her store on the property she and her husband own.

93. Nicole would like to invite Plaintiffs Ray and The Cheesesteak Hustle to sell food at her store on the property she and her husband own.

94. Nicole previously tried to host a food truck selling coffee, tea, and small snacks at her store. But City code enforcement ordered her to stop. She was visited by a City code enforcement officer and a trainee officer on or about December 9, 2021. The code enforcement officer told Nicole that the food truck could not serve food in the store's parking lot, and the code enforcement officer ordered the food truck to leave.

95. If Nicole was allowed to invite a food truck to operate at her store, she would also like the food truck to use more signage than is currently allowed to guide customers to the truck.

96. Nicole would also like to allow a potential food truck at her store to display signage above the top of the truck.

97. Tony and Ray would like to accept invitations from property owners like Nicole to set up on private, commercial properties in Jacksonville, and Nicole would like to invite Tony's and Ray's food trucks and others like them to sell food at her store on her private, commercial property.

98. Although each of the ways Plaintiffs want to run their businesses or use their property is entirely safe, reasonable, and socially beneficial, the City Council imposes unreasonable restrictions on them without any constitutionally legitimate justification for doing so.

The City of Jacksonville essentially banned food trucks until January 2021.

99. The City adopted its Unified Development Ordinance in 2014.

100. From 2014 to 2021, food trucks were not allowed to sell food in any district in Jacksonville, except for limited "special events," such as Jacksonville's city-run Oktoberfest or National Night Out.

Responding to public demand, the City Council considered amending the UDO to allow for food trucks.

101. Food trucks were common in the region well before 2014, and they continued to grow in popularity from that time onward.

102. Jacksonville residents enjoyed the special events involving food trucks and expressed their desire to see more food trucks operating in the City.

103. In 2020, the City Council considered whether to allow food trucks to serve Jacksonville's residents the efficient, safe, quality food that food trucks had, by then, been delivering to other communities for years.

104. At its February 18, 2020, regular meeting, the City Council heard from a food truck entrepreneur who wanted to be able to serve his food to his neighbors in Jacksonville, rather than having to drive to Camp LeJeune or to other cities to earn a living and support his family.

105. He also told the City Council that food trucks were constantly invited to set up and serve food at school functions, parks, and fairs in Jacksonville, but that food trucks could not accept those invitations because food trucks technically were not allowed to operate in the City.

106. At that meeting, Mayor Sammy Phillips directed the City Manager to set up a meeting with the food truck entrepreneur who spoke that evening and stated that the City would take under advisement whether to amend the UDO to allow food trucks.

107. Demand for food trucks grew even more after that meeting due to the Covid-19 pandemic. Consumers demanded greater access to food trucks because, for example, food trucks could, if allowed to do so, travel to consumers and sell them food outside a building and in the open air.

108. But that was not an option in Jacksonville because the City still banned food trucks at the time.

109. The City received a formal application to amend the UDO to allow for food trucks in April 2020.

The City instead considered how to protect restaurants from unwanted competition while seeming to allow for food trucks in Jacksonville.

110. On information and belief, after the February 18, 2020, City Council meeting, the City Council was under pressure from brick-and-mortar restaurants to protect them from competition from food trucks.

111. On information and belief, the City Council responded to the pressure from restaurant owners by allowing food trucks to operate only to the extent that they did not compete with restaurants.

112. In August 2020, City staff proposed a UDO amendment to allow for food trucks but restrict them to areas in an “overlay” map, which was designed to keep them away from restaurants.

113. The proposal also further burdened food trucks with signage limitations and a large annual permit fee.

114. On information and belief, in the restaurant owners’ view, the original overlay map did not sufficiently insulate them from competition.

115. To address the restaurant owners’ concerns, the City Council considered allowing food trucks only if they did not operate within 250 feet of, among other things, any other parcel with a restaurant. It kept the signage restriction and annual permit fee from the original proposal.

The City Council first considered an “overlay” map expressly designed to keep food trucks away from restaurants.

116. On August 31, 2020, City staff met with food truck owners to propose an “overlay” map that would allow food trucks to operate in the Commercial Corridor or Industrial zones, if a property owner agreed to host the food truck.

117. At the Planning Advisory Board’s public meeting on October 12, 2020, Ryan King, the Director of Planning & Inspections (“Director King”) presented the “overlay” map for discussion as a potential UDO amendment.

118. According to Director King, City staff drew the overlay map to include areas zoned Commercial Corridor or Industrial where there were “not a whole lot of restaurants” so “there wouldn’t necessarily be a competition.”

119. Director King expressly repeated that staff looked at whether there were “bricks and mortar restaurants” in the overlay areas and tried to select spaces without restaurants.

120. The overlay district was designed to protect restaurants from competition with food trucks.

121. At the time, however, the overlay district did not expressly prohibit food trucks from operating within a specific distance of a parcel with a restaurant.

122. One member of the Planning and Advisory Board, Defendant Councilmember Logan Sosa (“Councilmember Sosa”), responded that the overlay district was insufficiently protective of brick-and-mortar restaurants. He called for guidelines to prohibit food trucks from “competing directly with a brick-and-mortar [restaurant] right next to [the food truck].”

123. Councilmember Sosa also called for “guidelines and restrictions” on “how close [food trucks] can get to a competitor,” giving as an example a chicken-and-biscuit food truck parking too closely to a brick-and-mortar fast-food chain that sells chicken and biscuits.

124. At the close of that meeting, Defendant Councilmember Robert Warden (“Councilmember Warden”), the City Council liaison to the Planning Advisory Board, warned the City Council and Planning Advisory Board about allowing food trucks to operate in Jacksonville at all and that they were likely to “hear from some brick-and-mortar restaurants, too, opposing this.”

125. Director King presented the overlay district proposal to the full City Council at its public meeting on October 20, 2020.

126. During that meeting, Director King explained again that the overlay districts were drawn to allow food trucks in areas where there were “no[] or very few” restaurants so the City’s restaurants “wouldn’t have that competing situation.”

127. Defendant Mayor Sammy Phillips asked about “distances from other businesses,” suggesting the City follow jurisdictions that require food trucks be a “substantial distance away from brick-and-mortar restaurants.”

128. The then-City Manager, Dr. Richard Woodruff, told the City Council that the City of Jacksonville gets its revenues by taxing property and said, therefore, “We have to protect the brick-and-mortar restaurant.”

129. Then-City Manager Woodruff went on, “As your manager, I will tell you, to allow food trucks in the heart of the restaurant district on Western Boulevard, I do not support that.” He said that is why City staff recommended the overlay district, which was designed to keep food trucks away from brick-and-mortar restaurants.

130. Then-City Manager Woodruff also said City staff made the overlay map “intentionally” restrictive to prevent food trucks competing with restaurants to protect the tax base.

131. But, on information and belief, restaurant owners wanted more protection from competition than the overlay map provided, so the City Council went even further.

The City Council then considered an even more protectionist “spacing requirement” for food trucks.

132. On information and belief, objections from restaurant owners led City staff to develop a new proposed UDO amendment following the October 20, 2020, City Council meeting, which would be even more protective of brick-and-mortar restaurants.

133. Under that proposed amendment, food trucks faced a “spacing requirement.” For example, food trucks could not operate within 250 feet of a property with a restaurant on it.

134. City staff presented that proposed UDO amendment at the Planning Advisory Board's regular meeting on January 11, 2021.

135. Jeremy Smith, a Senior Planner in the Planning & Inspections Department, told the Planning Advisory Board that City staff replaced the overlay map with the "spacing requirement" based on discussion with the City Council.

136. The City Council considered the new proposed UDO amendment at its regular meeting on January 19, 2021.

137. Twenty to 25 members of the public attended the meeting, and several Jacksonville citizens commented on the proposed UDO amendment and how it would harm food trucks.

138. The City Council and other officials again expressly acknowledged at the meeting that their purpose was to protect brick-and-mortar restaurants from competition from food trucks.

139. The Planning & Inspection Department's Request for City Council Action described the "Financial Impact" of the proposed amendment, writing food trucks "[m]ay impact conventional restaurants operating from buildings in the City and ultimately the City's tax base."

140. The Planning & Inspection Department's Request for City Council Action identified the supposed "cons" of amending the UDO as: "Food trucks do not contribute to the property tax base and do not create the employment opportunities the way bricks and mortar restaurants do. May negatively impact bricks and mortar restaurants."

141. The Planning & Inspection Department's Request for City Council Action identified the supposed "pros" of declining to amend the UDO as: "Food trucks do not contribute to the property tax base and do not create the employment opportunities the way bricks and mortar restaurants do. Could negatively impact bricks and mortar restaurants."

142. At that same meeting, Director King told the City Council that the proposed spacing requirement was designed “to make sure that we don’t have [food trucks] on every single parcel or direct conflict with restaurants.”

143. At that same meeting, Councilmember Warden asked about prohibiting a property owner from hosting a restaurant and food truck on the same parcel: “Aren’t we interfering with a little bit of personal, private rights? Wouldn’t it be up to the property owner to decide whether they want to allow a food vendor on their property? Even though it might be competing against a brick-and-mortar restaurant, I mean that would be between the owner and the restaurant owner and the food vendors. Are we interfering a little bit in this case, I guess, with private property?”

144. At that same meeting, Director King acknowledged that Councilmember Warden raised a “good point,” but he never answered Councilmember Warden’s question. Instead, City Attorney John Carter asserted the City would risk its ability to regulate parking or landscaping in strip malls if it allowed a property owner to host a food truck on the same parcel as a restaurant.

145. City Attorney Carter’s assertion that the City would risk its right to regulate parking or landscaping if it allowed a property owner to host a food truck was incorrect.

146. At that same meeting, Director King explained that City staff developed the proposed annual permit fee for food trucks by considering the City’s potential “Food Truck Revenue Sources,” including “Application Fees” for the permit, “Sales Tax” on anything the food truck sells in the City, “Personal Property Tax” on things like kitchen equipment, the “Motor Vehicle Tax” on the truck or trailer itself, and “Property Tax.” Director King continued, “The biggest issue is property tax: Your bricks and mortar [restaurants] pay them; your mobile food vendors are not.”

147. Director King's statement was incorrect. Property taxes are paid by property owners, including both property owners who rent to restaurants and property owners who host food trucks or their commissaries.

148. At that same meeting, Director King further stated: "We felt that \$500 was fair in comparison to what our other brick-and-mortar restaurants pay in terms of property taxes annually. So, that's kinda where staff arrived at that [\$500] number."

149. Director King continued, "We looked at the tax revenue and based on that we're recommending City Council at the \$500 annual permit fee."

150. Then-Councilmember Randy Thomas stated he disagreed with the proposed \$500 permit fee and explained, "I understand the local restaurant's contribution, or their property tax. But they're 24/7, 365. I mean these [food truck] people are there trying to make some revenue on an intermittent basis. They're not there every day."

151. Then-Councilmember Thomas said, "The basics of business and economics is . . . If you want more of something, you make it less expensive; if you want less of something, you make it more expensive. I think that . . . we're trying to help them, but I'm thinking we're going to miss the mark and not really give [food trucks] the opportunity to survive . . . or thrive, or even survive."

152. Later in that same meeting, then-Councilmember Thomas said the City was "making it so complicated" that food trucks would face "enough barriers that it's not gonna work anyway."

153. The City Council settled on an annual permit fee of \$300 for residents and \$500 for non-residents.

154. The City Council adopted the proposed UDO amendment unanimously on January 19, 2021. It remains in effect today and is enforced by the City.

The City's protectionist regulations severely and uniquely burden food trucks and property owners who want to host them on their private property.

155. The UDO amendment created a new accessory use called “Food Vendor (mobile),” which it defined as “[a]ny type of motorized vehicle or mobile food unit which is temporarily parked or placed on privately owned property where food and or beverages are sold to the general public from a nonpermanent location.”

156. The new “Food Vendor (mobile)” category is comprised of multiple kinds of mobile food vendors, including food carts, food trucks, and food trailers (collectively “food trucks”).

157. The UDO amendment requires a food truck owner to acquire an annual permit to sell food in Jacksonville and to pay the permit fee each year.

158. Currently in Jacksonville, food trucks are allowed to sell food only in the Corridor Commercial and Industrial districts.

159. Plaintiffs are not challenging the requirement that food trucks operate only in the Corridor Commercial and Industrial districts.

160. Even then, food trucks are allowed to sell food only as an “accessory use,” which limits food trucks to selling food only on property with an existing “principal use.”

161. Plaintiffs are not challenging the requirement that food trucks operate only as an “accessory use.”

162. But the City Council imposes other restrictions (the “Restrictions”) on food trucks that severely burden them and the property owners who want to host them on their property.

163. The Restrictions require food trucks to sell food only on privately owned property where the property owner has given written, notarized consent for the food truck to operate.

164. The Restrictions limit food trucks’ operating hours to the lesser of the operating hours of the principal use or from 6:00 a.m. to 2:00 a.m.

165. The Restrictions prohibit food trucks selling food within the public right-of-way, on public sidewalks or landscaped areas, within required parking spaces, in a spot that obstructs pedestrian or vehicular travel ways, or within 15 feet of any fire hydrant.

166. The Restrictions prohibit any permanent improvements to the site of a food truck.

167. The Restrictions prohibit outdoor seating unless outdoor seating already exists for the principal use and occurred with all appropriate permits.

168. The Restrictions require food truck owners to provide trash receptacles, clean and sweep the area daily, and remove the food truck, equipment, and all other items daily.

169. The Restrictions limit the food trucks' location and signage and impose an annual permit fee of \$300 for residents and \$500 for non-residents for each food truck.

170. Plaintiffs are not challenging most of the Restrictions, but rather only the location restrictions, the signage restrictions, and excessive annual permit fee described below.

171. But for the challenged restrictions, Plaintiffs would either operate their food trucks in places in Jacksonville where they do not currently operate or, in the case of Plaintiff Nicole and her business Noah & Isidore, L.L.C., host a food truck where she is not currently allowed to do so.

172. But for the challenged restrictions, Nicole would host Tony and The Spot, as well as Ray and The Cheesesteak Hustle, at Nicole's store on the property she and her husband own.

173. But for the challenged restrictions, Tony and The Spot would accept Nicole's invitation to set up and sell food at the store on Nicole's private, commercial property.

174. But for the challenged restrictions, Ray and The Cheesesteak Hustle would accept Nicole's invitation to set up and sell food at the store on Nicole's private, commercial property.

The Restrictions impose 250-foot proximity bans only on food trucks.

175. Under the requirements that Plaintiffs do not challenge, a food truck could sell food on privately owned property in the Commercial Corridor or Industrial districts where there is already

an existing principal use and where the property owner gives notarized, written permission for the food truck to sell food (“Eligible Property”).

176. The Restrictions further limit food trucks to selling food only on Eligible Property that is “at least 250 feet from any other parcel containing: 1) a food vendor, 2) a low density, medium density, high density residential or downtown residential zoning district, and or 3) a restaurant” (collectively, the “City’s 250-foot proximity bans”).

177. The 250-foot proximity bans do not bar a food truck from parking on Eligible Property within 250 feet of a restaurant, another food truck, or a residentially zoned property, only from selling food while they are there.

178. The 250-foot proximity bans do not bar a food truck from giving away free food while parked on Eligible Property within 250 feet of a restaurant, another food truck, or a residentially zoned property, only from selling the food while they are there.

179. The 250-foot proximity bans apply only to food trucks and the Eligible Property owners who would like to host them.

180. The 250-foot proximity bans do not apply to other businesses offering food and drink for sale to the general public, such as restaurants with indoor and/or outdoor seating, drive-through restaurants, specialty-eating establishments, produce stands, bars, taverns, clubs, convenience or drug stores, gas stations, bed and breakfasts, or museums.

181. The 250-foot proximity bans do not apply to the Eligible Property owners who want to host food vendors other than food trucks.

182. A specialty-eating establishment like a bakery, a coffee shop, or an ice cream shop could open on Eligible Property next door to a restaurant, residential property, or a food truck (although this would mean that the food truck would be required to leave), but a food truck offering the very same baked goods, coffee, or ice cream could not.

183. A brick-and-mortar restaurant—even one with an outdoor seating area that has live music until 10:00 p.m. and that stays open until 2:00 a.m.—could open on Eligible Property next door to another restaurant, a residential property, or a food truck, but a food truck could not.

184. A restaurant with drive-through service could open on Eligible Property next door to a restaurant, a residential property, or a food truck, but a food truck could not.

185. Even without the ban on food trucks within 250 feet of each other, the bans on food trucks within 250 feet of a restaurant and within 250 feet of residentially zoned property limit food trucks to Eligible Properties comprising no more than roughly 3.3 percent of Jacksonville.

The Restrictions also severely limit food truck signage.

186. The Restrictions also limit the signage food trucks can display.

187. The UDO generally regulates signage for all businesses, but the Restrictions on food truck signage are different from the other sign code regulations.

188. The Restrictions uniquely restrict the signage a food truck can display.

189. The Restrictions on food truck signage reduce food trucks' ability to guide and attract customers to their location safely and effectively.

190. The Restrictions limit food trucks to: “i. Up to one 5’ x 5’ ‘A’ frame sign within 20 feet of the food truck/trailer/cart; [and] ii. Signage that can be placed on the food vendors [sic] truck/trailer/cart including back lit menu boards. No signage may be placed above the height of the food vendors [sic] truck/trailer/cart[.]” The Restrictions also provide that “[a]ll other signage is prohibited[,] including LED, rope or strings of lights” or any “[p]rogrammable electronic message center signs.” The Restrictions prohibit “any source of exterior lighting for the purposes of advertising” the food truck (collectively, the “Signage Restrictions”).

191. The Signage Restrictions apply only to food trucks and the Eligible Property owners who host them.

192. The Signage Restrictions do not apply to any other food vendor or to any other business, nor do the Signage Restrictions apply to the property owners who host those food vendors or businesses.

193. Any food vendors other than food trucks could erect a 35-foot sign in the Commercial Corridor or Industrial districts to advertise their food and could use external lighting for that sign.

194. Under the Signage Restrictions, a food truck's signs cannot extend above the top of the truck no matter the height (or lack thereof) and cannot use external lighting to help advertise.

195. Other than food trucks, any other food vendor could display a "flag" 15-feet tall to advertise its food or as many as two inflatable balloons to advertise a special event, but a food truck is always limited to a single 5'x5' A-frame sign on the ground within 20 feet of the food truck.

The Restrictions also include an unreasonable fee for the annual food truck permit.

196. The Restrictions also impose an unreasonable annual permit fee.

197. The annual food truck permit runs from July 1 to June 30.

198. Each year, the City's Planning and Permitting department sets a schedule of fees for the services that department provides, including fees for annual food truck permits.

199. The annual food truck permit fee for Jacksonville residents is \$300.

200. The annual food truck permit fee for non-residents is \$500.

201. The annual permit fee must be paid at the same time the permit application is submitted.

202. The City reviews food truck permit applications and collects the permit fee.

203. The amount of the fee makes no sense, as the City does almost nothing regarding the oversight of food trucks.

204. Almost all regulatory oversight of food trucks is conducted by other governmental groups.
205. The City does not inspect food trucks, aside from an annual inspection by the Fire Department.
206. The Fire Department separately charges fees for the services it provides.
207. The fees charged by the Fire Department cover its annual inspection of a food truck.
208. Therefore, the separate annual permit fee charged by the City is not to pay for the Fire Department's inspection.
209. Plaintiffs are not challenging the Fire Department's fee.
210. The City does not otherwise regulate the health and safety of food trucks.
211. Onslow County and the State of North Carolina Health Department regulate the health and safety of food trucks.
212. Onslow County collects only a \$75 fee from food trucks.
213. The State does not collect a permit fee from food trucks.
214. The City's cost to regulate food trucks, when calculated on a per-food truck basis, is less than \$300.
215. The \$300 permit fee charged by the City to resident food truck owners exceeds the permit fees imposed by many other jurisdictions in the area.
216. The cities and towns of Charlotte, Greensboro, Wilmington, Cedar Point, Durham, Raleigh, Kenansville, Trenton, Kinston, Havelock, New Bern, Holly Ridge, Emerald Isle, Burgaw, Winston-Salem, and Carolina Beach, for example, charge less than \$300 for their annual food truck permits. Emerald Isle, for example, charges no fee at all.
217. On January 19, 2021, then-City Manager Richard Woodruff acknowledged at a public meeting of the City Council that some other jurisdictions set their permit fees as low as \$50.

But he nonetheless told the City Council it could set its fees at “anything you want to select. Whatever you think is reasonable.”

218. The Restrictions place a severe burden only on food trucks even though they have no distinguishing features that legitimately justify their disparate treatment under the Restrictions.

219. The City Council enacted the 250-foot proximity bans, Signage Restrictions, and annual permit fee to protect brick-and-mortar restaurants from competition by food trucks.

220. Not only have Defendants publicly admitted this during their meetings, but the protectionist purposes are apparent from the Restrictions themselves.

221. The City Council bans food trucks within 250 feet of any parcel containing a restaurant, and it allows restaurants to operate on properties where food trucks are prohibited.

222. The Signage Restrictions reduce the number of customers who might find and opt for the food truck rather than a restaurant.

223. The City Council’s excessive annual permit fee for food trucks reduces their competitive advantages compared to restaurants, such as food trucks’ lower start-up costs.

224. The City enforces the City Council’s protectionist Restrictions.

225. Furthermore, the City’s enforcement of the City Council’s protectionist Restrictions can be harsh.

226. Violation of the Restrictions is a misdemeanor.

227. Violations of the Restrictions can result in criminal and civil penalties.

228. The criminal penalties include a fine of up to \$500 per violation.

229. The civil penalties are \$500 per violation for each day a violation exists.

With no administrative remedy available, Plaintiffs filed this lawsuit.

230. There are no administrative remedies that would provide Plaintiffs adequate relief.

231. The UDO defines food trucks as an accessory property use.
232. The UDO does not allow variances for accessory property uses.
233. The UDO does not allow for reasonable accommodations to allow food trucks.
234. The UDO does not allow for food trucks as special uses in any district.
235. The UDO does not allow for food trucks as conditional uses in any district.
236. It would be futile for Plaintiffs to pursue any administrative remedy other than

bringing this lawsuit.

237. Plaintiffs were not required to exhaust administrative remedies because none were available and would have been futile regardless.

INJURIES TO PLAINTIFFS

238. Plaintiffs want to earn an honest living and, in the case of Plaintiff Nicole Gonzales and her business, to reasonably use their private property in Jacksonville. The 250-foot proximity bans have prevented them from doing so. But for the 250-foot proximity bans, Plaintiffs would be better able to earn an honest living and to use their private property reasonably in Jacksonville.

239. Ray wants to set up The Cheesesteak Hustle food truck in front of his commissary. But for the City's 250-foot proximity bans, Ray would set up The Cheesesteak Hustle food truck and sell food in front of the commissary.

240. Tony and Ray want to be able to accept Nicole's invitation to sell food from their food trucks in the parking lot of Nicole's store on the Eligible Property Nicole and her husband own. But for the 250-foot proximity bans, Tony and Ray could and would accept Nicole's invitation to sell food from their food trucks in the parking lot of Nicole's store on the Eligible Property she and her husband own.

241. Tony and Ray want to be able to accept invitations from other property owners to sell food from their food trucks on Eligible Property. But for the 250-foot proximity bans, Tony and

Ray could and would accept invitations from property owners to sell food on Eligible Property where they currently cannot.

242. Tony and Ray want to be able to serve more customers in Jacksonville. But for the City's 250-foot proximity bans, Ton and Ray would have more options for where to set up their food trucks in Jacksonville and, thus, would be able to sell more food to more customers in Jacksonville.

243. Tony and Ray are often forced to drive their food trucks to cities and towns outside Jacksonville where they are legally allowed to sell food from their food trucks. But for the 250-foot proximity bans, Tony and Ray would not be forced to incur the time and expense of transporting their food trucks to cities and towns outside Jacksonville where they are legally permitted to operate their food trucks.

244. Nicole wants to host Tony and Ray selling food from their food trucks in the parking lot at her store. But for the 250-foot proximity bans, Nicole would host Tony and Ray selling food from their food trucks in the parking lot at her store.

245. Nicole wants to invite other food trucks to sell food in the parking lot at her store. But for the 250-foot proximity bans, Nicole would be able to invite other food trucks to sell their food in the parking lot at her store.

246. Nicole wants to, but currently cannot, promote and grow her own business by using her property safely and reasonably to host food trucks. But for the 250-foot proximity bans, Nicole could and would try to promote and grow her own business by using her property safely and reasonably to host food trucks there.

247. Tony and The Spot would like to display feathered flags to guide customers safely and effectively to the food truck. But for the Signage Restrictions, Tony and The Spot would use such feathered flags.

248. Tony and The Spot would like to display a modest, foldable sign that extends above the top of the food truck. But for the Signage Restrictions, Tony and The Spot would display such a modest, foldable sign that extends above the top of the food truck.

249. Tony and The Spot would like to display a modest, 32" TV as a digital menu on the side of the food truck. But for the Signage Restrictions, Tony and The Spot would display such a modest, 32" TV as a digital menu on the side of the food truck.

250. Ray and The Cheesesteak Hustle would like to display feathered flags to guide customers safely and effectively to the food truck. But for the Signage Restrictions, Ray and The Cheesesteak Hustle would display such feathered flags.

251. Tony and The Spot would pay a reasonable annual food truck permit fee but do not want to be subjected to the City's unreasonable \$300 annual food truck permit fee. However, they must pay the unreasonable \$300 annual food truck permit fee as a precondition to earning an honest living in Jacksonville.

252. Ray and The Cheesesteak Hustle would pay a reasonable annual food truck permit fee but do not want to be subjected to the City's unreasonable \$300 annual food truck permit fee. However, they must pay the unreasonable \$300 annual food truck permit fee as a precondition to earning an honest living in Jacksonville.

253. But for the City's unreasonable annual permit fee for food trucks, Plaintiffs would be better able to earn an honest living and use their private property in safe and reasonable ways involving food trucks.

254. Tony paid the City \$300 for his annual food truck permit.

255. Ray has paid the City's applicable permit fee on two occasions.

256. The City's unreasonable annual permit fee for food trucks has already caused financial harm to Tony and Ray, and it will continue to do so unless enjoined by this Court.

LEGAL CLAIMS

Count 1: Fruits of Their Own Labor – N.C. Const. art. I, § 1

257. Plaintiffs reassert and reallege Paragraphs 1-256 as if fully stated herein.

258. Article I, Section 1 of the North Carolina Constitution protects, among other things, Plaintiffs' fundamental rights to earn a living and to use their private property by declaring that their "inalienable rights" include "the enjoyment of the fruits of their own labor."

259. The 250-foot proximity bans severely burden Plaintiffs' efforts to earn income by hosting or operating a permitted food truck business on Eligible Property.

260. But for the 250-foot proximity bans, Plaintiffs would be better able to enjoy the fruits of their own labor because they would be better able to earn income by hosting or operating a permitted food truck business on Eligible Property.

261. The purpose of imposing the 250-foot proximity bans is to protect brick-and-mortar restaurants from competition.

262. Protecting the City Council's favored businesses from competition by the City Council's disfavored businesses is not a constitutionally legitimate purpose for a law or ordinance under the North Carolina Constitution.

263. There is no constitutionally legitimate purpose for the 250-foot proximity bans.

264. The 250-foot proximity bans are not reasonably or rationally related to any legitimate purpose, nor can they meet the heightened scrutiny which protects fundamental rights like the right to earn a living and the right to private property.

265. The 250-foot proximity bans, both on their face and as-applied to Plaintiffs, violate Plaintiffs' rights to the enjoyment of the fruits of their own labors.

266. As a result, the Court should find that the 250-foot proximity bans violate Article I, Section 1 of the North Carolina Constitution.

Count 2: Law of the Land – N.C. Const. art I, § 19

267. Plaintiffs reassert and reallege Paragraphs 1-256 as if fully stated herein.

268. Article I, Section 19 of the North Carolina Constitution protects, among other things, Plaintiffs' fundamental rights to earn a living and to use their private property free from arbitrary, irrational, and protectionist government regulations by declaring that no person shall be "in any manner deprived of his life, liberty, or property, but by the law of the land."

269. The 250-foot proximity bans have the purpose and effect of prohibiting Plaintiffs from lawfully hosting or operating a food truck business on Eligible Property.

270. But for the 250-foot proximity bans, Plaintiffs would earn a living and use their private property by hosting or operating a permitted food truck business on Eligible Property.

271. The City Council enacted 250-foot proximity bans because brick-and-mortar restaurants did not want to face competition from food trucks that would otherwise sell food on Eligible Property where food trucks are currently prohibited from selling food.

272. Protecting brick-and-mortar restaurants that the City Council likes from competition by food trucks that the City Council does not like is not a constitutionally legitimate governmental interest under the North Carolina Constitution.

273. There is no constitutionally legitimate reason to prohibit Plaintiffs from hosting or operating a permitted food truck business on Eligible Property.

274. The 250-foot proximity bans are not reasonably or rationally related to any constitutionally legitimate government purpose, nor can they meet the heightened scrutiny which protects fundamental rights like the right to earn a living and the right to private property.

275. The 250-foot proximity bans, both on their face and as applied to Plaintiffs, violate Plaintiffs' rights to earn a living and to use private property free from irrational, arbitrary, and protectionist regulations.

276. As a result, the Court should find that the City's 250-foot proximity bans violate Article I, Section 19 of the North Carolina Constitution.

Count 3: Equal Protection – N.C. Const. art I, § 19

277. Plaintiffs reassert and reallege Paragraphs 1-256 as if fully stated herein.

278. Article I, Section 19 of the North Carolina Constitution protects Plaintiffs' rights not to be subject to unequal treatment on an arbitrary or irrational basis under the City's economic and property regulations by declaring, "No person shall be denied the equal protection of the laws[.]"

279. The 250-foot proximity bans apply only to food trucks and property owners who would host them, not to any other businesses or property owners.

280. Food trucks are engaged in the same business as, or are similarly situated to, other businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, which are not subject to the 250-foot proximity bans.

281. Plaintiffs Tony and The Spot are engaged in the same business as, or are similarly situated to, other businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, which are not subject to the 250-foot proximity bans.

282. Plaintiffs Tony and The Spot are engaged in the same business as, or are similarly situated to, other food trucks which are not subject to the 250-foot proximity bans.

283. Plaintiffs Ray and The Cheesesteak Hustle are engaged in the same business as, or are similarly situated to, other businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, which are not subject to the 250-foot proximity bans.

284. Plaintiffs Ray and The Cheesesteak Hustle are engaged in the same business as, or are similarly situated to, other food trucks which are not subject to the 250-foot proximity bans.

285. The property owners who would host food trucks but for the 250-foot proximity bans are engaged in the same property use as, or are similarly situated to, property owners who host

businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, but are not subject to the 250-foot proximity bans.

286. Plaintiffs Nicole and Noah & Isidore, L.L.C., are engaged in the same property use as, or are similarly situated to, property owners who host businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, but are not subject to the 250-foot proximity bans.

287. Plaintiffs Nicole and Noah & Isidore, L.L.C., are engaged in the same property use as, or are similarly situated to, property owners who host food trucks but are not subject to the 250-foot proximity bans

288. The 250-foot proximity bans do not draw the classification between food trucks and all other businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, based on any legitimate distinguishing feature of food trucks or the property owners who would host them.

289. The 250-foot proximity bans do not draw the classification between food trucks and all other businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, based on any other constitutionally legitimate, permissible, or substantial basis.

290. The 250-foot proximity bans classify food trucks separately from all other businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, solely to further the unconstitutional purpose of protecting brick-and-mortar restaurants from competition.

291. The 250-foot proximity bans classify food trucks separately from all other businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, without substantially or reasonably furthering any constitutionally legitimate, permissible, or substantial government purpose.

292. But for the 250-foot proximity bans, Plaintiffs would host or operate a food truck on Eligible Property where food trucks are currently prohibited from selling food.

293. The 250-foot proximity bans thus create an arbitrary and irrational distinction between (a) food trucks and the property owners who want to host them, and (b) other businesses offering food and drink for sale to the general public, including brick-and-mortar restaurants, and property owners who want to host them.

294. The 250-foot proximity bans, both on their face and as applied to Plaintiffs, violate Plaintiffs' rights to equal protection of the laws.

295. As a result, the Court should find that the 250-foot proximity bans violate Article I, Section 19 of the North Carolina Constitution.

Count 4: Freedom of Speech – N.C. Const. art. I, § 14

296. Plaintiffs reassert and reallege Paragraphs 1-256 as if fully stated herein.

297. Article I, Section 14 of the North Carolina Constitution declares that “[f]reedom of speech” is one of “the great bulwarks of liberty and therefore shall never be restrained[.]”

298. Article I, Section 14 of the North Carolina Constitution protects Plaintiffs' right not to have their truthful and accurate commercial speech restricted based on their identities or their speech's content.

299. Plaintiffs' signage for the food trucks they host or operate is a protected form of commercial speech.

300. The Signage Restrictions prohibit food trucks and property owners who would host them from, among other things, truthfully and accurately advertising the food truck business with any sign except for (a) a single A-frame sandwich board sign that may not be larger than 5'x5', placed more than 20 feet from the truck, or externally lighted, and (b) signage attached to the truck so long as it does not extend at all above the top of the truck and is not externally lighted.

301. But for the Signage Restrictions, Plaintiffs, and other food trucks and property owners, would be able to advertise the food trucks they host or operate with signs that are currently prohibited.

302. The Signage Restrictions have harmed Plaintiffs Tony and The Spot, including but not limited to causing them irreparable harm.

303. The Signage Restrictions have harmed Plaintiffs Ray and The Cheesesteak Hustle, including but not limited to causing them irreparable harm.

304. The Signage Restrictions apply only to food trucks and property owners who host them.

305. The Signage Restrictions apply only to food trucks and property owners who would host them because of their identities or because of the content of their speech.

306. The Signage Restrictions prevent food trucks and the property owners who host them from truthfully and accurately advertising food trucks with signage that they could use to advertise other businesses or property uses.

307. The Signage Restrictions prevent food trucks and the property owners who host them from truthfully and accurately advertising food trucks with signage that other food vendors and property owners may use to advertise their other businesses and property uses.

308. The Signage Restrictions prevent food trucks and the property owners who host them from more effectively and safely drawing customers to food trucks.

309. The City Council enacted the Signage Restrictions because brick-and-mortar restaurants did not want to face competition from food trucks.

310. Protecting brick-and-mortar restaurants from competition by food truck businesses is not a constitutionally legitimate, permissible, substantial, or compelling government purpose.

311. The Signage Restrictions are not necessary to, and do not advance, any constitutionally legitimate, permissible, substantial, important, or compelling government purposes.

312. The Signage Restrictions are overly burdensome and not narrowly tailored.

313. On information and belief, the City did not reasonably consider any less-restrictive alternative to the Signage Restrictions.

314. The Signage Restrictions impose speaker- or content-based restrictions on truthful and accurate speech by food trucks and the property owners who host them without being directly related to any substantial or important interest, let alone being narrowly tailored to a compelling government interest.

315. The Signage Restrictions, both on their face and as applied to Plaintiffs, violate Plaintiffs' rights to freedom of speech.

316. As a result, the Court should find that the Signage Restrictions violate Article I, Section 14 of the North Carolina Constitution.

Count 5: Ultra Vires Annual Permit Fee – N.C.G.S. §§ 160A-174 & 160A-4

317. Plaintiffs reassert and reallege Paragraphs 1-256 as if fully stated herein.

318. The North Carolina Supreme Court has held that N.C.G.S. §§ 160A-174 and 160A-4 grant cities “the authority to assess user fees to defray the costs of regulation, [but] such fees will not be upheld if they are unreasonable.” *Homebuilders Ass’n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 46 (1994). The Court explained further that, “[b]ecause the purpose of such a fee or charge is to place the cost of regulation on those being regulated, a rough limit to ‘reasonableness’ is the amount necessary to meet the full cost of the particular regulatory program.” *Id.* (quotation omitted).

319. *Homebuilders Association* protects Plaintiffs from paying a fee for an annual food truck permit that is more than the City of Jacksonville reasonably needs to regulate a food truck because

such a fee would exceed the authority delegated to it by N.C.G.S. §§ 160A-174 and 160A-4 and, thus, would be *ultra vires* and void.

320. The City's annual permit fee for food trucks is \$300 for Jacksonville residents and \$500 for non-residents.

321. The City's annual permit fee for food trucks is a user fee.

322. On information and belief, the annual permit fee for food trucks does not bear any relationship to the City's actual or reasonably anticipated cost to regulate food trucks.

323. The City Council did not set the annual permit fee for food trucks based on its actual or reasonably anticipated costs to regulate food trucks.

324. The City Council set the annual permit fee for food trucks based on a comparison to the approximate property tax burdens on some properties where brick-and-mortar restaurants are located.

325. The City Council's purpose for setting the annual permit fee for food trucks based on approximate property tax burdens on some properties where restaurants are located was to protect brick-and-mortar restaurants from competition by food truck businesses.

326. The \$300 annual permit fee is greater than what it would be if it were based on the City's actual or reasonably anticipated cost to regulate food trucks, calculated on a per-food truck basis.

327. The approximate property tax burdens on the properties where brick-and-mortar restaurants are located bear no logical relationship to the City's actual or reasonably anticipated costs to regulate food trucks, calculated on a per-food truck basis.

328. The City's annual permit fee for food trucks is unreasonable because the fee amount exceeds and bears no relation to the City's actual or reasonably anticipated cost to regulate food trucks, calculated on a per-food truck basis.

329. The City's annual permit fee for food trucks, both on its face and as applied to Plaintiffs, exceeds the statutory authority delegated to the City of Jacksonville under N.C.G.S. §§ 160A-174 and 160A-4.

330. As a result, the Court should find that the City's annual permit fee for food trucks is *ultra vires* and void.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request relief as follows:

A. A declaratory judgment that the 250-foot proximity bans, both on their face and as applied to Plaintiffs, violate Article I, Sections 1 (Fruits of Their Own Labor) and 19 (Law of the Land and Equal Protection) of the North Carolina Constitution.

B. A declaratory judgment that the Signage Restrictions, both on their face and as applied to Plaintiffs, violate Article I, Section 14 of the North Carolina Constitution.

C. A declaratory judgment that the amount of the City's annual permit fee for food trucks is *ultra vires* and void because it exceeds the City's statutory authority under N.C.G.S. §§ 160A-174 and 160A-4.

D. A permanent injunction enjoining Defendants and their officers, employees, and agents from enforcing the 250-foot proximity bans.

E. A preliminary injunction enjoining Defendants and their officers, employees, and agents from enforcing the Signage Restrictions.

F. A permanent injunction enjoining Defendants and their officers, employees, and agents from enforcing the Signage Restrictions.

G. A permanent injunction enjoining Defendants and their officers, employees, and agents from collecting the City's *ultra vires* annual permit fee for food trucks.

H. Nominal damages of one dollar (\$1) to each Plaintiff for the harm caused to Plaintiffs.

I. An award of the costs reasonably incurred by Plaintiffs in pursuing this action; and

J. All further legal and equitable relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED this 7th day of December 2022.



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