



INSTITUTE FOR JUSTICE

April 11, 2024

VIA EMAIL

Mayor Debbie Kling
mayor@cityofnampa.us

Victor Rodriguez, City Councilman, District 1
rodriguezv@cityofnampa.us

Natalie Jangula, City Councilman, District 2
jangulan@cityofnampa.us

David Bills, City Councilman, District 3
billsd@cityofnampa.us

Dale Reynolds, City Councilman, District 4
reynolds@cityofnampa.us

Randy Haverfield, City Councilman, District 5
haverfield@cityofnampa.us

Sebastian Griffin, City Councilman, District 6
griffins@cityofnampa.us

Victor Villegas, City Attorney
victor@borton-lakey.com

RE: The City's Enforcement of its Food Truck Regulations and New Proposals

Mayor Kling, Members of the City Council, and City Attorney Villegas:

My name is Erica Smith Ewing and I'm a senior attorney at the Institute for Justice. We are concerned about the City's recent enforcement of its mobile food vendor regulations, as well as its enactment of new regulations. Both threaten to put hardworking food truck entrepreneurs, like Rae-Ann Birney and Sonia Champlin, out of business. As discussed below, the regulations also pose serious constitutional problems under both the state and federal constitutions.

Rae-Ann and Sonia are best friends with a popular mobile food trailer, The Perking Spot. The Perking Spot has been operating on private property for over three years with a very loyal customer base. Rae-Ann is a single mother of three boys and has put her life savings into The Perking Spot; both her and Sonia are distraught at the thought that they might no longer be able to support their families with their business. Yet the City's enforcement of regulations preventing overnight parking, connecting to a power pole, and having only one food truck per lot would make

The Perking Spot—the type of business cities should be welcoming and fostering—unviable. Forcing The Perking Spot to continue without its drive-thru also puts the business at risk for closure.

We hope that these constitutional violations can be avoided. We ask that the City refrain from enforcing current and proposed regulations against The Perking Spot and other currently existing mobile food vendors and food trailers who have been doing business on private property, as long as they comply with the safety precautions currently in the code. This would honor the economic liberty rights of these vendors, as well as the private property rights of the property owners with whom they have a lease.

About the Institute for Justice

The Institute for Justice (IJ) is a national nonprofit law firm that has fought to protect individuals’ constitutional rights for over 30 years. We have litigated our cases at the U.S. Supreme Court twelve times, as well as at multiple state supreme courts. Two rights we fight to protect are economic liberty and property rights.

We have special expertise in protecting the economic liberty of mobile food vendors when it is threatened by regulatory efforts that are not related to public health and safety. To that end, we launched our National Street Vending Initiative almost 15 years ago. As part of that Initiative, we have sued multiple cities for imposing unreasonable and burdensome restrictions on food trucks and other street vendors.

These suits include those against Fort Pierce, Florida (2019) (state trial court issuing preliminary injunction enjoining city’s proximity restrictions on food trucks because they were likely unconstitutional); Fish Creek, Wisconsin (2020) (state trial court striking down town’s restrictions on food trucks as unconstitutional),¹ Louisville, Kentucky (2018) (federal district court issuing consent decree in favor of food trucks),² Atlanta, Georgia (2012) (state trial court holding that city had acted illegally by giving only one company the authority to vend on public property),³ and El Paso, Texas (2011) (city repealing law restricting food trucks after federal lawsuit filed).⁴ We are currently suing Parksley, Virginia,⁵ and Jacksonville, North Carolina,⁶ for their restrictions on food trucks. In addition, we are currently suing Meridian, Idaho, regarding their zoning code’s burdensome restrictions on tiny homes.⁷

We have also helped dozens of cities and states reform their food truck laws. We have a model food truck law⁸ and expertise⁹ in food truck regulations nationwide. We are always happy to

¹ <https://ij.org/case/fish-creek-wi-vending/>

² <https://ij.org/case/louisville-vending/>

³ <https://ij.org/case/atlanta-vending/>

⁴ <https://ij.org/case/el-paso-vending/>

⁵ <https://ij.org/case/virginia-retaliation/>

⁶ <https://ij.org/case/north-carolina-food-trucks/>

⁷ <https://ij.org/case/meridian-idaho-tiny-homes/>

⁸ See <https://ij.org/legislation/mobile-food-vendor-freedom-act/>.

⁹ For the relevant Institute for Justice publications see “Food-Truck Freedom,” (Nov. 1, 2012), available at <https://ij.org/report/food-truck-freedom/>; “Seven Myths and Realities About Food Trucks,” (Nov. 1, 2012), available at: <https://ij.org/report/seven-myths-and-realities-about-food-trucks/>; “Street Eats, Safe Eats,” (June 1, 2014), available at <https://ij.org/report/street-eats-safe-eats/>; “Upwardly Mobile,” (Oct. 6, 2015), available at:

help local governments reform their laws.

About The Perking Spot

Rae-Ann Birney and her best friend Sonia Champlin started The Perking Spot in 2019. Throughout the pandemic, their families made many sacrifices to get their business up and running and turn it into the successful coffee vendor that it is today. The Perking Spot has now been in business for over three years and serves hundreds of customers who keep coming back.

The Perking Spot is more than just a local coffee spot—it is a business that is deeply invested in supporting the local economy. Many of its suppliers are Nampa small businesses, often brick-and-mortars that rely on The Perking Spot to stay in business themselves. Since opening, The Perking Spot has contributed nearly \$200,000 to the economy through local wholesale purchases.

Rae-Ann and Sonia are also constantly seeking out ways to contribute to the Nampa community. The Perking Spot is involved in the Nampa Boys & Girls Club, Teacher Appreciation Week, PTO fundraisers, high school sporting events, and Nampa’s Coffee with Cops, in addition to raising and matching donations for local causes.

Rae-Ann and Sonia chose to work in Nampa because they saw it as the ideal place to make their dream a reality. Nampa empowered Rae-Ann and Sonia to achieve their entrepreneurial dreams. But now those dreams are in danger of being ripped away due to the City’s vending ordinances.

The City’s Mobile Food Vending Ordinances

Until recently, the City was not enforcing many of its mobile food vendor regulations. Many vendors weren’t even aware they existed. But all that changed last year.

The City sent out a letter on October 1, 2023, to vendors recognizing the need “for more transparency and better understanding” of the mobile food vendor regulations. It stated that it was working to adopt new regulations, but that in the meantime, it would start enforcing the current ordinance. The current ordinance includes a license requirement, reasonable restrictions on vendors to prevent congestion and ensure safe driving conditions for other vehicles, a ban on vendors parking overnight, and a prohibition on plugging into utilities.¹⁰ The letter gave vendors until November 1, 2023, to comply with the overnight parking ban.

On March 29, 2024, the City sent out another letter saying compliance with the current ordinance would “start now,” but that it was delaying enforcement of the overnight parking ban until November 1, 2024.

<https://ij.org/report/upwardly-mobile/>; “Food Truck Truth,” (Feb. 10, 2022), available at <https://ij.org/report/food-truck-truth/>.

¹⁰ See section 10-1-12(A)(2)(b)(ii) (stating that food vendors shall not be or stay parked overnight (12:00 midnight to 6:00 a.m.) in any of those locations where they may legally sell food products.”). Section 10-1-12(A)(2)(b)(i) also prohibits vendors from being “used/set up as permanent,” which city officials have suggested that food trucks that remain parked in one location are.

The City also drafted amendments to the code in Chapters 5 and 10. They:

- Maintain prohibition on overnight parking;
- Maintain prohibition on mobile food vendors connecting to power poles;
- Prohibit mobile food vendors from having more than one vendor in one lot, except in a mobile food court; and
- Prohibit mobile food vendors from having drive-thrus.

The City Council approved the draft amendments to Chapter 10 on August 7, 2023, but they have not yet been adopted as an ordinance. The amendments to Chapter 5 are still under consideration and will be considered at a hearing on April 15, 2024.

The City’s Vending Regulations Raise Serious Constitutional Concerns

We are concerned about both the current and proposed regulations. While some of the regulations are perfectly reasonable—such as measures imposing sensible restrictions on vendors to prevent congestion and ensure safe driving conditions for other vehicles—we are primarily concerned about three of the regulations in both the current and proposed regulations: the provisions (1) banning overnight parking, (2) banning connections to power poles, and (3) banning more than one vendor per lot. The enforcement of these regulations threatens to put The Perking Spot and other vendors out of business, and for no good reason. The Perking Spot has a lease to operate on private property and has been doing so for almost four years with no problem or safety concerns; The Perking Spot should be able to continue doing so. We also ask that The Perking Spot be able to continue its drive-thru. This drive-thru has not caused any problems and is essential to its business.

These regulations create problems under the substantive due process protections of the Idaho and U.S. Constitutions. Article 1, Section 13 of the Idaho Constitution provides that “[n]o person shall . . . be deprived of life, liberty or property without due process of law.” Idaho Const. art. I, § 13. The clause protects both economic liberty and property rights. *See, e.g., Eddins v. City of Lewiston*, 150 Idaho 30, 34–36 (2010); *Pace v. Hymas*, 111 Idaho 581, 586 (1986). The 14th Amendment provides similar protections in the U.S. Constitution.

A law violates substantive due process when a plaintiff can show it lacks a “rational basis” to a legitimate government interest, such as health or safety. After plaintiffs present their evidence and arguments, “it is incumbent upon the judicial department to examine the ordinance and to determine whether or not the legislators have overreached their prerogative If the act is found to be unreasonable, capricious, arbitrary, or discriminatory, it will be held void.” *Heck v. Comm’rs of Canyon Cnty.*, 123 Idaho 826, 830 (1993) (citation omitted) (remanding for factual determination on whether ordinance violated due process); *Cole-Collister Fire Prot. Dist. v. Boise*, 93 Idaho 558, 569 (1970) (invalidating zoning ordinance preventing placement of gas station when evidence did not support the argument that the ordinance met its stated goals).

Here, the mobile food vendor regulations preventing overnight stays and allowing only one food truck per lot are not sufficiently connected to a legitimate government interest. This is underscored by the fact that the City has been allowing vendors, including The Perking Spot, to engage in these activities for years with no safety problems. It is unclear why the City is now trying to prevent vendors from engaging in these activities. While it may make sense to impose these regulations on vendors on *public* property, there is no good reason to apply the same prohibitions to

vendors on *private* property. If a private property owner allows vendors to park overnight and to have more than one vendor on the same property, why should the City prohibit this?

Similarly, the City has no genuine interest in preventing connections to power poles when the power pole is privately installed and paid for by the vendor on private property, as is the case with The Perking Spot. Any prohibition should be limited to vendors connecting to city-owned utilities.

In addition, while we understand that there needs to be some regulation of drive-thrus to protect safety, The Perking Spot had been operating its drive-thru for over three years with no problems. The Perking Spot would be more than happy to accept reasonable rules regarding reestablishing its drive-thru operation. But depriving them of their drive-thru entirely with a blanket ban has upset customers, and will do so especially during the harsh winter months when drivers don't want to leave their car to order coffee.

Thus, the City seems to lack a sufficient rationale to impose the regulations on The Perking Spot and other existing vendors on private property. As a result, the regulations are questionable under substantive due process.

Regulations Motivated by Economic Protectionism Are Particularly Suspect

Courts are particularly skeptical of laws that seem to have the purpose of protecting favored businesses from competition. In our experience, cities often restrict vendors for the purpose of protecting brick and mortar restaurants from competition. Such protectionism is blatantly unconstitutional,¹¹ and courts have held as much in vending cases.

For instance, we successfully challenged restrictions on food trucks in Fish Creek, Wisconsin. The trial court invalidated the restrictions after finding that they “were enacted by the Defendant’s Town Board in an effort to protect brick and-mortar restaurants in the downtown Fish Creek area from competition from mobile food trucks or establishments.” See *White Cottage Red Door, LLC v. Town of Gibraltar*, No. 18 CV 191, 2020 WL 1296078 (Wis. Cir. Ct. Sept. 3, 2020).¹² As the Court said, such protectionism served no legitimate government interest and was unconstitutional.

Similarly, in *Diaz v. City of Fort Pierce*, we successfully challenged food truck restrictions in the City of Fort Pierce, Florida. A Florida trial court preliminarily enjoined the city from enforcing the restrictions after finding that the restrictions were arbitrary, had nothing to do with any legitimate health or safety concerns, and were instead motivated by a desire to protect other businesses from competition. Case No. 2018-CA-2259, 2019 WL 1141117 (St. Lucie Cnty. Cir. Ct. 2019).¹³ As the Court stated, “Plaintiffs have a substantial likelihood of succeeding on their argument that the ban is

¹¹ *E.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (finding law that allowed only licensed funeral directors to sell caskets to lack a rational basis and instead just protect funeral directors from competition); *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (same); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) (finding licensing scheme for pest controllers that exempted those dealing with certain pests to lack a rational basis and have the primary purpose of protectionism); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014) (finding regulations on moving companies lacked a rational basis and were instead just protectionist); *Santos v. City of Houston*, 852 F. Supp. 601, 608 (S.D. Tex. 1994) (finding ban on jitneys lacked a rational basis and was “economic protectionism in its most glaring form”).

¹² Opinion available at <https://ij.org/wp-content/uploads/2018/10/Fish-Creek-MSJ-Opinion.pdf>.

¹³ Opinion also available at <https://ij.org/wp-content/uploads/2018/12/Order-Grandting-MPI.pdf>.

facially unconstitutional under Florida's Constitutional Due Process Clause.” *Id.* at *2. The city later repealed the restrictions to avoid further litigation.

Here, there is reason to believe that Nampa's recent enforcement of its current regulations and enactment of new regulations are intended to protect restaurants from competition. We are basing this on statements at city meetings as well as other evidence. This compounds the regulations' constitutional concerns.

Conclusion

For these reasons, imposing these regulations on The Perking Spot is likely unconstitutional. The regulations would violate The Perking Spot's right to economic liberty. It would also violate the property rights of its landlord, who has a private lease with The Perking Spot. As long as vendors comply with the reasonable safety precautions that are already laid out in the current and proposed ordinances, private property owners should be able to make arrangements with vendors as they see fit.

We ask that the City stay enforcement of certain restrictions in both its current and proposed regulations against The Perking Spot and other existing food trucks that operate on private property. Specifically, we ask that the City stay enforcement of the provisions banning overnight parking, connecting to power poles, and having more than one vendor per lot. We also ask that the City allow The Perking Spot to resume its drive-thru, which has posed no safety problems. As we have done in many other cities, the Institute for Justice stands ready to assist you in updating your code.

Staying enforcement would honor the economic liberty rights of food trucks, as well as the private property rights of property owners. This would also avoid serious constitutional problems with both the City's current and pending new regulations.

I am available to discuss further. My number is 631-383-5302 and my email is esmith@ij.org.

Sincerely,



Erica Smith Ewing
Senior Attorney
INSTITUTE FOR JUSTICE

CC:

Rodney Ashby, Planning & Zoning Director, at ashbyr@cityofnampa.us
Char Tim, City Clerk, at Clerks@cityofnampa.us