INSTITUTE FOR JUSTICE

July 23, 2024

VIA EMAIL

Catherine Rowell
City Council Member, District 1
catherine.rowell@cityofsouthfultonga.gov

Carmalitha Gumbs
City Council Member, District 2
carmalitha.Gumbs@cityofsouthfultonga.gov

Helen Willis
City Council Member, District 3
helen.willis@cityofsouthfultonga.gov

Jaceey Sebastian
Mayor Pro Temp
City Council Member, District 4
jaceey.sebastian@cityofsouthfultonga.gov

Keosha Bell
City Council Member, District 5
keosha.bell@cityofsouthfultonga.gov

Natasha Williams-Brown
City Council Member, District 6
natasha.williams@cityofsouthfultonga.gov

Linda Bequer-Pritchett
City Council Member, District 7
linda.pritchett@cityofsouthfultonga.gov

Khalid Kamau
City Mayor
khalid.kamau@cityofsouthfultonga.gov

Vincent D. Hyman
City Attorney
vincent.hyman@cityofsouthfultonga.gov

Re: Constitutional Concerns Regarding Potential Denial of Awa Diagne's SUP Application to Open her African Hair Braiding Shop/ Supplement to Awa Diagne's SUP Application

Dear City Council members, Mayor Kamau, and City Attorney Hyman,

My name is Erica Smith Ewing. I am a senior attorney at the Institute for Justice, a national civil-liberties law firm. I am writing to you on behalf of Awa Diagne

901 N. Glebe Road, Suite 900 Arlington, VA 22203 P: (703) 682-9320 F: (703) 682-9321
general@ij.org www.ij.org

regarding her special use application to open her braiding shop in a shopping center at 5370 Campbellton Fairburn Road (Case No. U24-011).[1] While both city staff and the Planning Commission recommended approval of Awa's application, some City Council members at the July 9 council meeting seemed hesitant to approve Awa's application after opposition from a nearby hair salon and beauty supply store. The nearby businesses say they do not want to compete with Awa.

We strongly urge you to approve Awa's application at the City Council vote tonight. Awa's husband recently passed away and she is a single woman trying to support her twin girls. She already invested about $20,000 to open her new business, and if the City prevents it from opening, Awa and her girls will be financially and emotionally devastated.

Moreover, denying Awa's application would be unconstitutional. Numerous state and federal courts have held that restricting a business to protect other businesses from competition violates both the state and federal constitutions' protections for economic liberty. The Georgia Supreme Court just reiterated this principle last year in our case, *Raffensperger v. Jackson*, 316 Ga. 383, 391, 397 (2023).

We want to resolve this issue amicably and avoid going to court. We thus ask that this letter be viewed as a supplement to Awa's special use application. We also ask that if the City Council is inclined to deny Awa's application, that it first allow her a new hearing in front of City Council during which Awa would have the opportunity to be represented by a lawyer. Awa, however, would obviously prefer to have her application immediately granted, which would make any court appeal or new hearing unnecessary.

I. 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 at the U.S. Supreme Court twelve times and in state and federal appellate courts around the country.

One of our areas of expertise is economic liberty—the constitutionally protected right to engage in a lawful occupation, free from unreasonable government interference. We have sued dozens of state and local governments for their infringement of this right.

We have a particular interest in protecting businesses' economic liberty from unjust zoning laws, especially laws that would prevent those businesses from opening. *See, e.g.*, *Sepulveda v. City of Pasadena,* No. 2021-80180, 2022 WL 952888 (Tex. Dist. Ct. Mar. 21, 2022) (granting a temporary restraining order against city after it tried to prevent the opening of an auto repair shop in violation of its rights to economic liberty). We also fight laws that restrict businesses in order to protect other businesses from competition. *White Cottage Red Door, LLC v. Town of Gibraltar*, No. 18 CV 191, 2020 WL 1296078 (Wis. Cir. Ct. Sept. 3, 2020) (invalidating ordinance's restrictions on food trucks after finding restrictions "were enacted by the Defendant's Town Board in an effort to protect brick-and-mortar restaurants in the downtown Fish Creek area from

[1] We just learned of this matter late last week and do not currently represent Awa. We hope to amicably resolve this matter so that formal representation will be unnecessary.

competition.")[2]; *Diaz v. City of Fort Pierce*, Case No. 2018-CA-2259, 2019 WL 1141117 (St. Lucie Cnty. Cir. Ct. 2019) (granting a temporary restraining order against a city that tried to prevent food trucks from being 500 feet away from restaurants).

We also advise state and local governments on how they can ensure their statutes, codes, and processes respect this constitutional right and reflect good policy generally.

II. Awa's SUP Application

The City required Awa to submit a special use application to open her business, even though she just wanted to open a simple African hair braiding studio in a shopping center. Awa paid to submit her application in March and has been anxiously waiting since to see if her business could open.

The process has been incredibly stressful, with many sleepless nights. Awa overcame her application's initial hurdles after both City staff and the City Planning Commission recommended approval of her application. Awa then had her City Council hearing on July 9. There, Awa and her twin daughter passionately spoke in support of Awa's business, as did Awa's supporters. Meanwhile, the owners of a nearby hair salon and a beauty supply shop spoke out in opposition. They said they didn't want to compete with Awa. Two City Council members seemed receptive to these concerns, while the other members remained silent. The City Council is scheduled to vote on Awa's application tonight (July 23) at 7pm.

It is unclear why the City even required Awa to undergo the special use application process. The City has an unusual and uniquely burdensome requirement in its zoning ordinance requiring "beauty salons" to have a special use permit to open anywhere in the city. South Fulton Code of Ordinances, Appendix C Zoning, § 207.06 (Use Table). That means that any time a beauty salon wants to open, no matter where they want to open, they must undergo this complicated process. Notably, the special use criteria give City Council members tremendous and troubling discretion to deny applications for a variety of reasons, including how the new business will affect existing (and even politically or personally favored) businesses. *Id*. at Sec. 803.06(b).

At the City Council hearing, however, one city council member stated that the reason for requiring Awa to apply for a special use permit was because the city ordinance bans "like use" businesses from operating within 1.5 miles of each other unless they have a special use permit. The existence of this provision was similarly reported by local media stories covering the City Council hearing. We haven't been able to find this provision in the code and reached out to City Attorney Hyman yesterday so that he could point us to it. We are waiting to hear back.

In any event, whether the special use application was required because Awa is operating a beauty salon, because of a "like use" provision, because of both provisions, or because of some other reason entirely, we have serious constitutional concerns. Fortunately, our concerns will be assuaged if the City grants Awa her permit. If,

[2] Opinion available here https://ij.org/wp-content/uploads/2018/10/Fish-Creek-MSJ-Opinion.pdf.

however, the City denies Awa's permit, the City will likely be in violation of both the Georgia and Federal Constitutions.

A. Denying Awa's application because she is operating near similar businesses is unconstitutional.

Denying Awa's application because of the existence of other hair businesses nearby would be unconstitutional. A denial would violate Awa's economic liberty, found in the Georgia and U.S. Constitution's substantive due process clause.

As the Georgia Supreme Court recently held in our case, *Raffensperger v. Jackson*, the Georgia Constitution protects economic liberty from "unreasonable government interference." 16 Ga. 383, 391, 388 (2023). The Court then detailed what it means for government interference to be "unreasonable:" While the government can restrict a business when "reasonably necessary to advance a specific health, safety, or welfare concern," the government cannot restrict a business for "protectionism", i.e., protecting other businesses from competition. *Id.* at 392.

In *Raffensperge*r, we represented lactation consultants who challenged a licensing law that required them to take two years of colleges courses and earn professional certifications if they wished to continue working. We argued that the law didn't benefit the public but was instead designed to protect other lactation consultants from competition. The Georgia Supreme Court struck down the licensing law after holding that the law infringed lactation consultants' economic liberty because the law was not "reasonably necessary" to protect the public from harm since lactation consultants did not need to be college educated to safely and effectively do their work. *Id*. at 399. The Court also emphasized that "certain interests are decidedly *not* sufficient to justify a burden on the ability to practice a lawful profession. These include (1) protectionism." *Id*. at 392.

Similarly, in *Diaz v. City of Fort Pierce*, we persuaded a Florida trial court to preliminarily enjoin a city from enforcing an ordinance that prevented food trucks from being 500 feet away from restaurants. Case No. 2018-CA-2259, 2019 WL 1141117 (St. Lucie Cnty. Cir. Ct. 2019). The court held that the restriction was arbitrary, had nothing to do with any legitimate health or safety concern, and was instead motivated to protect certain businesses from competition. As a result, the Court stated that "Plaintiffs have a substantial likelihood of succeeding on their argument that the ban is facially unconstitutional under Florida's Constitutional Due Process Clause." *Id.* at *2. The city later repealed the restriction. *See also White Cottage Red Door, LLC v. Town of Gibraltar*, No. 18 CV 191, 2020 WL 12969078 (Wis. Cir. Ct. Sept. 3, 2020) (invalidating restrictions on food trucks 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").

The Federal Constitution also protects economic liberty. Accordingly, several federal courts have struck down laws that were designed not to protect public health and safety, but for economic protectionism.[3]

Here, like in the above cases, preventing Awa from opening would not further public health or safety. No one has suggested that Awa would pose any harm to her customers. On the contrary, both City staff and the City's Planning Commission recommended that she be allowed to open. Yet as City Council members already made clear, they are concerned about letting her open because of the existence of similar businesses nearby. As two City Council members stated, they don't want her "competing with" or being in "conflict" with other shops. These statements show concern with protecting a few businesses from competition, not with the public welfare. Indeed, far from hurting the public, more competition and choice benefits the public. And Awa chose this location after being asked to open by would-be customers who wanted more options for their hair needs.

While one Council member suggested that perhaps there are other reasons to deny Awa's application, these reasons are wholly inadequate. The City Council member suggested that Awa had perhaps violated the City's sign ordinance by temporarily hanging a banner in front of her shop as she waited to open. This city council member also stated that Awa may not have yet secured her business license. But even assuming these allegations are true[4], they are simple mistakes that are easily corrected (and as stated in the hearing, common mistakes made by many local businesses). They are not grounds to deny Awa's permit and prevent her from opening entirely.[5] Denying Awa on such grounds would violate Awa's economic liberty and would not hold up in court.

Notably, the City's code should not have even required Awa to submit a special use application in the first place. She should instead have been allowed to open her braiding shop as of right. Especially since other comparable businesses (including even braiding schools) with similar traffic impacts and parking needs would have been allowed as of right in that same exact location. South Fulton Code of Ordinances, Appendix C Zoning, § 207.06 (Use Table). Requiring Awa to undergo the special use process thus violates her rights to equal protection under both the state and federal constitutions.

I'll add that if the City is applying an ordinance to Awa that prevents "like uses" from being near each other, the ordinance is impermissibly vague and thus invalid. Both the state and federal due process clauses require that a law be sufficiently clear so that an average person can understand that law. And what constitutes a "like use" as compared

---

[3] *E.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (holding law that was designed to protect funeral directors from competition to be unconstitutional); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (same); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) (holding licensing scheme for pest controllers to be unconstitutional when it had the primary purpose of protecting certain pest controllers from competition); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014) (holding 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) (holding ban on jitneys lacked a rational basis and was "economic protectionism in its most glaring form").

[4] We have yet to look into these matters.

[5] If the City wishes, it could simply condition Awa's special use permit on her securing a business license.

to an African hair braiding shop (or any other establishment, for that matter) is not sufficiently clear. It is far from obvious that an all-purpose hair salon, beauty supply store, or barber shop would be a "like use" to a salon that exclusively braids.

Thus, we strongly urge City Council to avoid exacerbating the above detailed constitutional violations, and instead grant Awa's special use permit so she can open her business as soon as possible.

III. Conclusion

We ask that the City Council grant Awa's permit tonight. Doing so will satisfy the serious constitutional concerns addressed in this letter and allow Awa to finally move forward with opening her business. If, however, the City Council is inclined to deny Awa's application, we ask for a new hearing in front of the City Council in which Awa would have the opportunity to be represented by a lawyer, allowing these constitutional concerns to be thoroughly discussed.

Moreover, we ask that City Council reform its zoning laws to address these concerns and prevent other businesses from having to undergo the same turmoil as Awa. We have would be happy to provide you with any guidance and drafting assistance.

Awa and I remain available to discuss this matter further if needed. My phone number is (631) 383-5302, and my email is esmith@ij.org.

Sincerely,

Erica Smith Ewing
Senior Attorney
INSTITUTE FOR JUSTICE