NORTH CAROLINA
COUNTY OF ONSLOW

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22-CVS-3264

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.	)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Summary judgment should be granted for Plaintiffs in full. The record is overwhelming, and it establishes that the Jacksonville City Council targeted food-truck entrepreneurs like Plaintiffs with burdensome restrictions solely for the constitutionally impermissible purpose of protecting brick-and-mortar restaurants from unwanted competition. The Council singled out food trucks and banned them from operating on a host of properties where all other food businesses are allowed, including within 250 feet of any property with a restaurant. The Council also imposed targeted restrictions on food truck signage—restrictions which apply *only* to food trucks and which have already been preliminarily enjoined in this case. *Proctor v. City of Jacksonville*, No. 22CVS003264-660, 2025 WL 1548345, at *2 (N.C. Super. Ct. May 13, 2025). Lastly, the Council imposed an annual permit fee of $300—much higher than neighboring cities—without conducting the mandatory regulatory-cost analysis. At every step, the Council and its agents admitted that the Council adopted these measures to protect the property-tax base by restricting food trucks from competing with brick-and-mortar restaurants. A unanimous panel of the Court of Appeals ruled that these allegations stated viable claims, *Proctor v. City of Jacksonville*, 296 N.C. App. 665, 678, 910 S.E.2d 269 (2024), and in discovery Plaintiffs have developed an undisputed record proving their allegations.

Binding precedent from the State Supreme Court prohibits this conduct by Defendants. The North Carolina Constitution does not permit the government to use its police powers to choose a marketplace's winners and losers. In other words, the Council's desire to protect restaurants from unwanted competition is not a permissible reason to interfere with Plaintiffs' ability to earn a living, with their rights to equal treatment under the law, or with their rights to communicate with their customers. Nor is protectionism a valid basis on which to establish the annual food truck permit fee. And yet, the undisputed evidence shows that protectionism is exactly the goal that the Council pursued when it targeted food trucks. Further, the undisputed evidence shows there is no other

reason for the Council to have adopted the provisions challenged in this lawsuit. As a result, and as further explained below, Plaintiffs are entitled to summary judgment on all their claims.

STATEMENT OF UNDISPUTED FACTS

I. Plaintiffs are entrepreneurs who want to operate food truck businesses in Jacksonville.

The Plaintiffs here are three individuals and their respective business entities who want to make a living by operating or supporting food truck businesses.

A. Nicole Gonzalez.

One Plaintiff is Nicole Gonzalez and her business entity Noah & Isidore, LLC. Nicole is a lifelong Jacksonville resident. Affidavit of Nicole Gonzalez (Gonzalez Aff.) ¶ 2 (Feb. 18, 2026). Nicole and her husband Jaime, a Marine veteran, own property at 309 Henderson Drive. *Id.* ¶¶ 2–3. Nicole and Jaime purchased the property in August 2022. *Id.* ¶ 3. The property is zoned Corridor Commercial. *Id.* There, Nicole (through Noah & Isidore, LLC) operates a general goods store called Northwoods Urban Farm. *Id.* The store sells home goods and feed for animals. *Id.* In the past, Jaime also operated a small engine repair shop on the property behind the store. *Id.* Also in the past, the property was the site of a restaurant. *Id.* ¶ 7; Ex. 31, Affidavit of Robert Belden (Belden Aff.) ¶ 32 (Feb. 18, 2026).[1] Nicole does not wish to operate a restaurant or a food truck, but she would like to be able to host a food truck in the parking lot at her store. Gonzalez Aff. ¶ 5. This would help her business attract new customers, bring new visitors to the other businesses in her area, and give a fellow entrepreneur the space to operate their food truck business. *Id.*

Nicole's property could host a food truck. It has enough space. The property is .38 acres (or 16,552.8 square feet). *Id.* ¶ 3; Ex. 30 (property record). The parking lot wraps around the store and

[1] Unless otherwise indicated, exhibits are attached to the Belden Affidavit.

has eight designated parking spots in the lot. Gonzalez Aff. ¶ 4.[2] There is ample space at the front of the parking lot where a food truck could park and place its signage without taking up required parking spaces, interfering with ingress or egress from the property, and without obstructing motorists' views. *Id.* ¶ 5. Also, Nicole's property is separated from the residential-zoned property behind it by a tree-line buffer. *Id.* ¶ 3. In short, Nicole could (and wants to be able to) host one food truck at her store from time to time, including the food trucks owned by her co-Plaintiffs Anthony Proctor and Octavius Raymond. *Id.* ¶ 5. But under the regulations challenged here, although she could open a drive-through restaurant or a restaurant with outdoor seating on her property, Nicole cannot even try to host a food truck there. *See* Part III below.

B. Anthony (Tony) Proctor.

Nicole's co-Plaintiff Anthony (Tony) Proctor operates (through his business entity and co-Plaintiff The Spot Florida Style Seafood LLC) a food truck called The Spot Florida Style Seafood. Affidavit of Anthony Proctor (Proctor Aff.) ¶¶ 2–3 (Feb. 17, 2026). Tony is a Marine veteran who has called Jacksonville home for over 25 years. *Id.* ¶ 5. He has operated his food truck for 6 years and recently opened a brick-and-mortar seafood restaurant. *Id.* ¶ 6. He typically travels to the Marine base at Camp Lejeune or to other jurisdictions to set up and sell food. *Id.* ¶ 7. But in the past, he has paid the required permit fee and has set up and sold his food in Jacksonville. *Id.* ¶ 8.

Tony wants to be able to sell his food at more locations in Jacksonville. He has set up at big-box stores on occasion, but these locations were not viable. *Id.* ¶ 9. He also has set up in the parking lot at his church in Jacksonville, but this location also is not viable for business because there are not a lot of customers in that part of town. *Id.* ¶ 10. Instead of taking his business out of town, he wants to be able to accept Nicole's invitation and invitations from other property owners to set up at their

[2] Nicole's store is 1,392 square feet. Ex. 30. Accordingly, Nicole's "retail sales establishment" must have at least seven parking spots. Ex. 1 § 5.1.D.2.

locations and sell his food. *Id.* ¶ 11. If he could do that, Tony would use signs that businesses other than food trucks are allowed to use. *Id.* ¶ 12. But, again because of the regulations challenged in this lawsuit, Tony cannot even try to sell food at Nicole's property. Part III below.

C. Octavius Raymond (Ray).

Nicole and Tony's co-Plaintiff Octavius Raymond (Ray), through his business entity The Cheesesteak Hustle LLC, runs the Cheesesteak Hustle food truck. Affidavit of Octavius Raymond (Ray Aff.) ¶ 4 (Feb. 18, 2026). Ray, also a Marine veteran, often travels to the Marine base and to other cities to sell his food. *Id.* ¶¶ 5, 10. He has obtained a Jacksonville food truck permit in the past and tried to set up in Jacksonville at big-box stores, but these locations were not viable for the same reasons the locations didn't work for Tony. *Id.* ¶¶ 12–13. He wants to be able to accept invitations from property owners in Jacksonville, like Nicole, to set up and sell food at their locations. *Id.* ¶ 17. But Ray is not allowed to try to set up at Nicole's store because, under the regulations challenged here, the store is too close to brick-and-mortar restaurants. *Id.* ¶¶ 14, 19; *see also* Part III below.

II. Food truck businesses like the ones Plaintiffs want to operate are safe, common, ordinary businesses that are good for the community.

Food truck businesses are common, safe, and beneficial businesses. Food trucks rose in popularity in the 2010s and are commonplace throughout the country, including in North Carolina. For example, in addition to Jacksonville, food trucks operate in Durham, Wilmington, Asheville, Greenville, Cary, Raleigh, Kinston, Ogden, Swansboro, Surf City, Emerald Isle, Morehead City, and many other places. Ex. 18 at 52:17–20, 57:11–13; Ex. 2 at 314:8–10; Ex. 3 at 18:24, 113:24–25; Ex. 5 at 16:3–9; Ex. 11 at 9:23–25; Ex. 14 at 9:13–16, 10:24–11:3; Ex. 15 at 12:20–22, 13:9–11; Ex. 16 at 9:23–24; *see also* Ex. 4 at 13:1–2 (Myrtle Beach).

Food trucks are also safe. The State of North Carolina and County Health Departments regulate food trucks for health and safety. Ex. 18 at 56:3–4; Ex. 2 at 46:19–23. To be allowed to operate in Jacksonville, food trucks must comply with these State and County regulations. Ex. 1

§ 4.3.C.5(10). Food trucks also must pass an annual fire inspection. *Id.* § 4.3.C.5(13). It is therefore unsurprising that the City's personnel conceded that none of them have encountered—or are even aware of—any health or safety issues with food trucks. Ex. 2 at 234:9–13, 282:22–283:2, 319:6–13; Ex. 3 at 21:12–15; Ex. 4 at 89:17–20; Ex. 7 at 16:2–15; Ex. 8 at 15:4–7; Ex. 9 at 19:16–20:8; Ex. 10 at 17:5–8; Ex. 11 at 15:1–7; Ex. 12 at 15:10–14; Ex. 13 at 15:4–15; Ex. 14 at 39:25–40:25; Ex. 16 at 11:25–12:3, 13:4–12; Ex. 33 at 12:4–7; *see also* Ex. 6 at 16:12–23:7.

Food trucks are also good for the surrounding community. Customers enjoy them. For example, all the City's personnel have said their experiences with food trucks were positive. Ex. 2 at 299:16–22, 314:22–24; Ex. 3 at 113:17–22; Ex. 4 at 13:3–9; Ex. 5 at 17:10–16; Ex. 6 at 8:5–23; Ex. 7 at 9:14–22; Ex. 8 at 10:17–23; Ex. 9 at 8:19–9:21; Ex. 11 at 11:2–9; Ex. 12 at 8:20–9:13; Ex. 14 at 11:4–10; Ex. 33 at 11:13–15; *see also* Ex. 10 at 9:25–10:2. Food trucks also are good for surrounding businesses, including restaurants. Ex. 34 at 7 ("[T]he evidence suggests that food trucks may *help* the restaurant industry."). For example, Nicole wants to host a food truck to attract new potential customers to her store. Gonzalez Aff. ¶ 5. A Councilmember acknowledged other instances where businesses invited food trucks to their property to help drive business. Ex. 20 at 26:15–21, 48:16–18 (describing a brewery hosting a food truck to "create some kind of synergy" between businesses).

In sum, food trucks are common, safe, and beneficial businesses.

III. In January 2021, the Council adopted an ordinance that burdened food trucks specifically to protect brick-and-mortar restaurants from unwanted competition.

The Council adopted the Food Truck Ordinance (Ex. 1 § 4.3.C.5) in January 2021, but prior to then, food trucks were essentially banned in Jacksonville. Ex. 20 at 10:21–25, 36:17–18. In 2020, at the urging of food truck entrepreneurs who wanted to meet their Jacksonville customers' demands, the Council began the process to adopt an ordinance that would allow food trucks to

operate in Jacksonville. After meetings in October 2020 and January 2021, the City Council adopted the Food Truck Ordinance, which includes three provisions challenged in this lawsuit.

But before describing the three provisions challenged in this lawsuit, Plaintiffs must note that they do not challenge most of the provisions in the Food Truck Ordinance. Under those unchallenged provisions, food trucks can sell food *only* on corridor commercial- or industrial-zoned properties. Ex. 1, Table 4.3.1. In other words, food trucks cannot sell food while on residential properties, public streets, or government property. Similarly, food trucks can sell food *only* on properties where there is already an existing property use (i.e., an operating business) and *only* where the property owner provides written, notarized permission. *Id.*; *see also id.* §§ 4.3.C.5(6), (11). Food trucks cannot sell food while parking in any of the parking spaces required for the principal property use, nor can food trucks block pedestrian or vehicular pathways or fire hydrants. *Id.* §§ (4), (5), (14). Food trucks can sell food *only* when the primary business on the property is open and operating. *Id.* § (6); *see also* Ex. 2 at 40:8–15. Additionally, food trucks must follow county/state health regulations; pass an annual fire inspection; provide adequate trash receptacles and sanitize them daily; and clean and clear their area every day. Ex. 1 §§ 4.3.C.5(8), (10), (13), (18). Plaintiffs don't challenge these or many other provisions in the Food Truck Ordinance.

Plaintiffs instead challenge just three restrictions in the Food Truck Ordinance: The 250-foot proximity bans, the Signage Restrictions, and the $300 annual permit fee.

A. <u>The 250-foot proximity bans.</u>

Under the Food Truck Ordinance, food trucks are prohibited from selling food within 250 feet of any property with a restaurant, another food truck, or residential-zoned property of any kind. *Id.* § 4.3.C.5(2). The 250 feet is measured from the property line with the restaurant, other food truck, or residential zoning, to the location of the truck. Ex. 2 at 69:9–70:4. The areas where a food truck can sell food change if and when, for example, a new restaurant opens. *Id.* at 79:16–20.

But the proximity bans do not apply to food trucks per se. Instead, they apply only to food trucks which are *selling* food. Ex. 1 at 463 (defining "Food Vendor (mobile)"). Food trucks can go to, and park at, just about any property that any other vehicle is allowed to go to, regardless of the proximity bans, provided that the food trucks do not *sell* food while they are there. Ex. 2 at 15:6–21. While food trucks are there, they can even give away free food; they just can't compete. *Id.*

These proximity bans are unique to food trucks. No other food business is subject to the bans. *See* Ex. 1 § 4.3.C.5(2). For example, restaurants may abut residential property, even when they have outdoor seating and live music. *Id.* § 4.2.D.4(a); Ex. 2 at 85:17–20, 95:4–97:8. Restaurants with drive-through service may operate as close as 100 feet from residential properties. Ex. 1 § 4.2.D.4(b); Ex. 2 at 100:1–101:19. Some food businesses, such as coffee shops or ice cream stores ("specialty eating establishments") are allowed *in* residential zones. Ex. 1, Table 4.1.1; Ex. 2 at 106:9–18. Also, aside from "adult establishments" and "automotive wrecker services," no other business is required to be a minimum distance from a similar business. Ex. 1 §§ 4.2.D.1, D.11(e); Ex. 20 at 51:11–19.

The Council adopted the proximity bans over simpler, less-restrictive alternatives. The Council rejected a simpler alternative (an overlay district, which is discussed below) which would have allowed food trucks to operate more freely and in more locations, including near some restaurants. Ex. 17 at 45:17–46:1; Ex. 18 at 60:11–12 (then-City Manager Dr. Richard Woodruff agreeing the overlay would include "one or two restaurants"). The Council also required food trucks to be 250 feet from each other, even though Dr. Woodruff explained that staff "didn't see that there was a need to establish a space between food trucks" because "if two food trucks want to operate on a property that the property owner gives them permission to, . . . that's fine." Ex. 18 at 57:22–58:1. Similarly, the Council rejected the option, which Councilmember Warden expressed, of excepting a food truck from the proximity bans if a restaurant owner consented to the food truck operating closer than 250 feet away. *Id.* at 58:25–59:10. Also, the Council rejected a shorter distance: Planning

Director Ryan King explained that "most of the things that [staff] saw in other areas was like 75 or 50 feet from the front door." Ex. 17 at 45:5–8. But as he explained, food trucks could have met "a standard like that . . . even if they're on the property next door" to a restaurant. *Id.* at 45:8–10.

B. The Signage Restrictions.

Under the Food Truck Ordinance, food trucks are limited to a single external sign. Ex. 1 § 4.3.C.5(12) (the Signage Restrictions)). The sign must be an A-frame design, no larger than five feet by five feet, and located within 20 feet of the food truck. *Id.* All other signage is prohibited. *Id.* As a result, food trucks cannot use flags that are important to their business. Most notably, food trucks may not use feathered flags. Proctor Aff. ¶¶ 45–54; Ray Aff. ¶¶ 32–44. But other businesses can and do use these flags (in addition to others, which are sometimes up to 35 feet tall). Ex. 1 § 5.12.N.4; Gonzalez Aff. ¶ 8 & Ex. 1(photos of businesses with these flags); Proctor Aff. ¶¶ 42–44.

Importantly, the Signage Restrictions apply only to food-truck signage. And the only way to know if a sign relates to a food truck (or to something else) is to "read it." Ex. 2 at 248:15–17. Furthermore, the Council never considered any alternative to the Signage Restrictions. *Id.* at 252:14–18. Unlike the legislative debate over the proximity bans, no member of the Council discussed why food trucks alone should be prohibited from using ordinary advertising methods.

C. The $300 annual permit fee.

Also under the Food Truck Ordinance, food trucks must get an annual permit, and the Council imposes a $300 fee for each permit. Ex. 1 § 4.3.C.5(13); Ex. 22 at 22. The Council set this fee amount based on property taxes that are charged to properties hosting brick-and-mortar restaurants. Ex. 20 at 58:9–59:11; Ex. 35 (reflecting the property taxes on the properties hosting Mr. Bender's restaurant (Jeffs) and then-councilmember Lazzara's pizza restaurant).

This approach aligned with statements that City personnel made at prior meetings about being fair to brick-and-mortar restaurants. For example, at the Planning Advisory Board meeting,

Mr. Warden said that since "brick and mortar" restaurants "pay[] property taxes," the Council needed to "do[] something comparable for a food truck" to be "fair and equal" to restaurants. Ex. 17 at 57:13–19. He also said, "[W]e need to make sure that . . . [food trucks] are paying on a square foot basis . . . the same amount that a brick-and-mortar would pay . . . ." Ex. 18 at 60:24–61:4.

Although the Council considered property-tax burdens for restaurants, at no point did the Council (or staff) consider whether the $300 fee had any relationship to the potential (or actual) costs the city may incur to regulate food trucks. And, in fact, the $300 amount far outweighs those costs, which are minimal. As noted above, the County and State regulate food trucks for health and safety. So the city's responsibilities are essentially limited to permitting and ensuring the food trucks set up in the proper locations and abide by the terms of the Food Truck Ordinance. The City prints stickers for food trucks to reflect that they have the permit, and that costs about $110 per year (in total, not per food truck). Ex. 25. Further, there are occasional emails and phone communications by planners helping food trucks understand the GIS map, which also must be updated only periodically. Ex. 2 at 73:10–12, 83:9–12, 262:7–23. Actual enforcement takes up less than five percent of the code enforcement officers' time and has involved nothing more than emails to food trucks. Ex. 5 at 12:12–19. Lastly, the fire inspection is simple: It usually lasts only 30 minutes, and the paperwork requires only the inspector's signature. Ex. 14 at 17:21–25, 22:15–19.

D. <u>The Council adopted these provisions to protect brick-and-mortar restaurants from unwanted competition.</u>

When adopting the Food Truck Ordinance, and in particular the proximity bans, City personnel repeatedly explained that their goal was to limit food trucks' potential to compete with incumbent brick-and-mortar restaurants. The Council's and staff's contemporaneous statements reflect this, as does the Planning staff's report, and the testimony in this litigation.

i. Statements at the City Council and Planning Advisory Board Meetings.

The Council and its Planning Advisory Board considered an ordinance about food trucks at four meetings in October 2020 and January 2021. At these meetings, City personnel expressed their desire to protect brick-and-mortar restaurants from unwanted food-truck competition. At no point did City officials discuss any other reason besides protectionism for their decision to ban food trucks from selling food within 250 feet of restaurants or any other properties.

The first meeting occurred before the Planning Advisory Board in October 2020. Initially, instead of proximity bans, staff recommended allowing food trucks to operate in an "overlay district." Ex. 17 at 28:4–9. Planning Director King explained that staff selected areas for the overlay where there were "not a whole lot of restaurants where there wouldn't necessarily be a competition." *Id.* at 36:25–37:3; *see also id.* at 46:14–16 (explaining about an area of the overlay district that "there's not a whole lot of restaurants within that quarter. There's some, there's not a whole lot."); *id.* at 33:25–34:2 ("there's not a lot of restaurants in that area"); *id.* at 36:16–17 ("we looked at where there's not necessarily restaurants"); *id.* at 43:3–5 ("we looked at . . . are there bricks and mortar restaurants in these areas?"); *id.* at 57:2–3 ("there's really not a whole lot of restaurants" there).

Officials worried that the overlay district did not offer brick-and-mortar restaurants enough protection. The Council's liaison to the Board, Mr. Warden, said that the Board was "going to hear from some brick and mortar restaurants . . . opposing this." *Id.* at 55:13–15. Mr. King responded by reiterating that they created the overlay specifically to avoid "competition with the bricks and mortars, at least geographically," but admitted that some restaurant owners may still complain that a food truck was "in competition with us." *Id.* at 55:22–56:1. Similarly, another official, Logan Sosa (currently a councilmember), said he thought the overlay district needed "some guidelines where [food trucks] can set up in those areas, so [they're] not competing directly with a brick and mortar right next to them" and "some guidelines [on] how close [food trucks] can get to a competitor." *Id.* at 43:18–20, 44:4–5. He was concerned that, if a food truck could "compete[] [with] a brick and

mortar restaurant," it might threaten the restaurant's "heavy investment in land and lease." *Id.* at 43:25–44:2; *see also id.* at 44:10–11 (recommending "some guidelines and some restrictions" on food trucks near restaurants). Mr. King responded that staff could "add a distance requirement from another restaurant," which could be "whatever [distance] you want." *See id.* at 45:13–16.

Next, at the second meeting, the Council considered the overlay district. Again, officials expressed concerns about food trucks selling food too close to restaurants. Mr. King explained that the overlay district was designed to balance competition "between our bricks and mortar restaurants and the food truck industry." Ex. 18 at 54:14–15; Ex. 2 at 186:4–7. Staff selected areas where there were "either none or very few [restaurants], and so you wouldn't have that competing situation." Ex. 18 at 53:22–25. Dr. Woodruff explained that Jacksonville "get[s] our revenues the old-fashioned way. We tax property. ***We have to protect the brick-and-mortar restaurant***." *Id.* at 59:21–23 (emphasis added). He added that, "as your manager, . . . to allow food trucks in the heart of the restaurant district on Western Boulevard, I do not support that." *Id.* at 60:4–6.

Some Councilmembers at the meeting acknowledged that the overlay might be too harsh on food trucks. Councilmember Randy Thomas observed that the proposed overlay district was so "restrictive" that it was potentially "not worth it for the customer or the food truck." *Id.* at 63:3–9. In response, Dr. Woodruff confirmed that "[i]t was intentional that way" because "staff's goal was to protect the tax base," *id.* at 63:11, 63:14–15; *see also id.* at 60:12–14 (explaining the overlay areas "purposely stayed away from" restaurants because of perceived threats to the "tax base"). Councilmember Warden, evidently troubled by the protectionism, warned they needed to be "careful that we're not favoring bricks and mortars over a food truck." *Id.* at 60:21–22. He worried the overlay had no restaurants because operating a food business there "would not pay," *id.* at 67:18–20, and so "forcing the food trucks to go in" those areas only could mean "it's not going to pay off for [food trucks] because it's not going to generate enough business," *id.* at 67:23–68:3.

But again, some worried that the overlay district was not protectionist enough. Mayor Sammy Phillips asked whether staff considered a spatial restriction "making sure there's a substantial distance away from brick-and-mortar restaurants." *Id.* at 57:9–10. Dr. Woodruff responded that staff could "certainly incorporate . . . a reasonable distance from a brick-and-mortar restaurant," *id.* at 58:1–3, and later explained that a spatial restriction "certainly . . . would make it very difficult" for a food truck to operate in "certain areas," *id.* at 67:3–5.

Then, at the third relevant meeting, the Planning Advisory Board considered staff's updated proposal. Much of the proposal remained the same. But as the Assistant Planner, Jeremy Smith, explained, the overlay district "ha[d] been done away with and . . . changed to a spacing requirement" (i.e., the proximity bans). Ex. 19 at 12:20–21.

Lastly, at the fourth relevant meeting, the Council considered and adopted the Food Truck Ordinance. Councilmembers and staff again discussed food trucks and competition with restaurants. For example, in describing the GIS map that would be provided to food trucks, Mr. King explained that the map would allow food trucks to see "where they can't locate" depending on where "their competition" is located. Ex. 20 at 28:18–25. Councilmember Warden again expressed reservations that the proximity bans might "interfer[e] a little bit . . . against private property" rights because the Council would be prohibiting a property owner from "allow[ing] a food vendor on their property" just because "it might be competing against a brick and mortar restaurant." *Id.* at 29:15–23.

ii. Staff's report to the City Council.

City staff also prepared a report about the proposed ordinance for the Council. Ex. 23. The report reflects that the Council intended to protect restaurants from unwanted food-truck competition. The report discusses no other reason besides protectionism for the proximity bans.

The report focused on the potential impact of competition from food trucks on restaurants. For example, the report claims food trucks "[m]ay impact conventional restaurants operating from

buildings in the City" and thus threaten the City's tax base. *Id.* at 1. The report also said that food trucks "do not contribute to the property tax base . . . the way bricks and mortar restaurants do" and "[m]ay negatively impact bricks and mortar restaurants." *Id.* at 3. Similarly, it warned that allowing food trucks to compete might "negatively impact restaurants within the City," which could mean "revenue loss overall." Ex. 24. (This is all incorrect. *See* Ex. 34 at 3 (finding "concerns about food trucks hurting the restaurant industry are unfounded"), 17 ("[M]ore food trucks today do *not* lead to fewer restaurants tomorrow."); Ex. 2 at 162:22–163:8.)

iii. Testimony in this litigation.

Testimony in this case shows that the Council wanted to restrict food trucks from competing with restaurants. For example, when asked what the Council was trying to "balance between bricks-and-mortar restaurants and the food truck industry," Mr. King answered simply, "the competition." Ex. 2 at 186:4–7. He also testified that staff was "trying to protect the bricks-and-mortar restaurants from competition of food trucks." *Id.* at 190:2–9.

Other testimony supports the conclusion that the Council intended to protect restaurants. Then-councilmember Michael Lazzara confirmed he owns multiple pizza restaurants, including one in Jacksonville. Ex. 16 at 9:1–17. Similarly, the family of then-councilmember Randy Thomas owned a Dairy Queen in Jacksonville, and Mr. Thomas now owns it himself. Ex. 10 at 11:3–20. Moreover, Mr. Warden testified that he was contacted by Jeffry Bender, an owner of multiple local restaurants, about the Food Truck Ordinance. Ex. 9 at 14:23–16:3. Mr. Bender impressed upon Councilmember Warden that, since restaurants must pay property taxes, it would be unfair if food trucks were not required to pay some sort of similar fee. *See id.* at 15:10–15. Mr. Warden likely was not Mr. Bender's only contact. Though he could not recall discussing specifics with Mr. Bender, Planning Director King also testified that he is friends with Mr. Bender and may have "talk[ed] shop" with him about the Food Truck Ordinance. Ex. 2 at 302:20–25. And although he disclaimed talking with Mr. Bender

about the Food Truck Ordinance, Councilmember Sosa testified that he and Bender are neighbors and friends. Ex. 13 at 13:22–14:10. Mr. Bender confirmed that he likely did lobby multiple City officials. Ex. 15 at 29:20–30:23, 31:6–14, 32:3–21, 32:23–33:22, 34:14–35:14.

In sum, the undisputed evidence shows that the Council adopted the Food Truck Ordinance—and, in particular, the proximity bans—expressly to protect restaurants from unwanted competition from food trucks.

IV. The City enforces the Food Truck Ordinance.

The City enforces the Food Truck Ordinance in several ways. The Planning department is responsible, in the first instance, for ensuring food trucks comply with the 250 foot proximity bans. Ex. 2 at 54:11–55:13. The department generally answers questions that food truck entrepreneurs submit by email or by phone, such as questions about where food trucks are allowed to set up. *Id.* at 261:21–25, 262:14–23. In response to these inquiries, the department typically sends a pre-prepared email with information about the Food Truck Ordinance and a link to a GIS map showing generally where food trucks are not allowed to operate because of the proximity bans. *Id.* at 263:17–21; *see also* Ex. 26. Although the map is not perfect, the department updates it periodically to show when new restaurants open so that food trucks can adjust accordingly and make sure not to run afoul of the ban on competition. Ex. 2 at 74:22–75:1.

Aside from that involvement by the Planning Department, the Code Enforcement Department is responsible for enforcing the Food Truck Ordinance. Ex. 5 at 12:5–11. Violations may result in loss of the permit and/or civil penalties. Ex. 1 § 4.3.C.5. The head of Code Enforcement, Jennifer Ansell, testified that she could recall only two instances where Code Enforcement had to engage with food trucks. Ex. 5 at 29:13–16. In both instances, there was simply confusion about where the food truck was allowed to set up. *Id.* at 30:17–25. And in both instances, Code Enforcement was able to clarify the confusion and achieve compliance simply by sending an

email. *Id.* at 31:6–11. Ms. Ansell estimated that her code enforcement officers spend less than five percent of their time dealing with food truck-related issues. *Id.* at 12:12–19.

Finally, the Jacksonville Police Department also plays a limited role. The Police Department, not Code Enforcement, deals with noise complaints. *Id.* at 29:24–30:1; Ex. 2 at 116:13–23. Since the Council adopted the Food Truck Ordinance in January 2021 though, the police have not had a single complaint or incident involving noise from food trucks. Ex. 33 at 19:1–10. By contrast, the City has investigated pubs and restaurants, including some adjacent to residential property. Ex. 32 at Rows 554, 555, 1369 (Spankys Sports Bar and Grill), 1014, 1205, 2266, 2496, 2762 (Cardinal Lounge), 396, 597 (Hooligans Pub), 481, 484, 502, 515, 523, 544, 588, 598, 740, 1131, 1448, 1477, 1497, 1500, 1501, 1999 (Prive Bar and Lounge), 551, 1547 (Angry Ginger Irish Pub), 2149 (Carolina Ale House), 215 (Pizza Hut), 359 (American Dream Cakes), 479, 1781 (Waffle House), 1028, 2228 (Skybox Sports Bar), 1116 (Old Chicago Pizza), 1189 (Chick Fil A), 2183, 2186 (McDonalds), 2250 (Cook Out); Gonzalez Aff. ¶ 8 & Ex. 1 at 76–77, 87–88 (photos of Spankys Bar and Grill and Cardinal Lounge, which are adjacent to residential property).

V. The Food Truck Ordinance substantially burdens food truck businesses.

The Food Truck Ordinance imposes substantial burdens on food truck businesses. The clearest example is the proximity bans. The bans prohibit food trucks from selling food in almost 90 percent of Jacksonville. Belden Aff. ¶¶ 29–30. Food trucks are not allowed in more than 26.4 square miles of Jacksonville. *Id.* ¶ 29. These 26.4 square miles represent 89.5 percent of the City's area, excluding the Marine base. *Id.* ¶¶ 29–30 (comparing 26.4 square miles against the 29.5 square miles within the City's limits and extraterritorial jurisdiction).

Also, the bans prohibit food trucks from selling food on properties where all other businesses offering food for sale can operate. For example, Nicole could open a restaurant on her property that sells seafood or cheesesteaks, but she cannot host either Tony's or Ray's food trucks

(unless they give away their food for free). This situation plays out on properties throughout the city: A restaurant can open regardless of whether it is surrounded by other restaurants or residential-zoned property, but a food truck is entirely prohibited. *See* Ex. 2 at 95:4–14, 95:21–96:21, 101:1–102:16, 106:8–18, 106:20–107:7; 107:8–13.

The Signage Restrictions, too, impose a burden. Food trucks tend to use signs like feathered flags to help their customers find the trucks safely and efficiently. Proctor Aff. ¶¶ 46–51; Ray Aff. ¶¶ 33–38. These signs are important to food trucks, but under the Signage Restrictions, the signs are banned. This makes it harder for the food truck's customers to locate the food trucks.

Additionally, the food truck permit fee burdens food truck entrepreneurs. Food trucks have a lower start-up cost than restaurants and thus are an easier way for entrepreneurs to enter the food-service industry. By saddling these entrepreneurs with a $300 permit fee (or $500 if the entrepreneur lives outside Jacksonville), the Council made it more difficult for food truck businesses to get off the ground and potentially compete with restaurants. Both Tony and Ray have paid this permit fee in the past (and would again), but they found that the investment is not worth it given the restrictions challenged here. Proctor Aff. ¶¶ 8, 17, 60; Ray Aff. ¶¶ 13, 45.

In fact, two councilmembers acknowledged that the Food Truck Ordinance would be so restrictive that food trucks would think operating in Jacksonville was not viable. *See* Part III above, pp. 11–12 (Thomas and Warden). And the numbers suggest they were correct. The city has never issued more than 23 permits for food trucks in any given year, and the number has trended downward over the years. Ex. 36 (permits for 2021–22 through 2024–25).

VI. Relevant procedural history.

Plaintiffs filed this lawsuit in December 2022. Since then, there have been two significant events in the procedural history worth mentioning.

First, the Court of Appeals unanimously held that Plaintiffs stated viable claims. The trial court dismissed all of Plaintiffs' claims under a "conceivabl[e] rational bas[i]s test." *Proctor v. City of Jacksonville*, 296 N.C. App. 665, 668, 910 S.E.2d 269 (2024). A unanimous Court of Appeals held that this was the wrong test and remanded the case for further proceedings. *Id.* at 678. Plaintiffs pleaded viable Fruits of Labor and Law of the Land claims because they alleged the city "enacted a regulation solely to benefit a subset of businesses at the expense of another subset within the same line of business," which is "an unlawful and improper governmental purpose," and the Court of Appeals left it for the trial court to apply the appropriate test to determine if the government met its burden to show a permissible purpose and that "the means chosen to affect that purpose are reasonable." *See id.* at 676. Plaintiffs stated viable Equal Protection claims because they alleged the proximity bans "are not based on any differences between Plaintiffs' businesses, subject to those restrictions, and other business which are not," *id.* at 672–73, and the Court of Appeals again left it to the trial court to apply the correct test and determine "whether the government's distinctions are drawn based on actual differences between businesses and whether that distinction is rationally related to the promotion of a permissible government interest," *id.* at 673. The Court of Appeals held Plaintiffs' Free Speech claims should proceed because the State Constitution "requires State action regulating commercial speech to satisfy either strict scrutiny or intermediate scrutiny depending on whether the regulation is content-based or content-neutral, respectively," and so "the rational basis test is inapplicable." *Id.* at 670–71. Finally, the Court of Appeals held that Plaintiffs' challenge to the fee amount should proceed because "the trial court erred by dismissing Plaintiffs' claims because it could 'envision a number of reasonably conceivably rational bases to support the challenged provisions of the UDO[,]' without analyzing whether Plaintiffs' complaint contained facts sufficient to support their allegation that the user fees were reasonable or related to the City's regulation enforcement cost." *Id.* at 678.

Second, on remand, Plaintiffs secured a preliminary injunction preventing the City from enforcing its content-based signage restrictions against Plaintiffs. *Proctor v. City of Jacksonville*, No. 22CVS003264-660, 2025 WL 1548345, at *2 (N.C. Super. Ct. May 13, 2025).

Since then, the parties have been engaged in discovery. The undisputed record that has been developed in discovery shows that Plaintiffs are entitled to summary judgment on all their claims.

LEGAL STANDARD

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56. An issue of disputed fact is material only if resolution of the issue has some tendency to influence the outcome of the litigation. *Hillman v. U.S. Liab. Ins. Co.*, 59 N.C. App. 145, 148, 296 S.E.2d 302 (1982) (affirming award of partial summary judgment for plaintiff).

ARGUMENT

Plaintiffs explain below why the undisputed evidence shows they are entitled to summary judgment on their claims under the State Constitution's Fruits of Labor and Law of the Land Clauses (Part I), the State Constitution's Equal Protection Clause (Part II), the State Constitution's protections for Free Speech (Part III), and the State Supreme Court's decision in *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 41–42, 442 S.E.2d 45 (1994) (Part IV).

I. Plaintiffs are entitled to summary judgment on their claims under the Fruits of Labor Clause and Law of the Land Clause.

Plaintiffs are entitled to summary judgment on Counts I and II, which they bring under the Fruits of Labor Clause and Law of the Land Clause. The same test applies to both claims. Under that test, Plaintiffs are entitled to summary judgment because the undisputed evidence shows that the proximity bans in the Food Truck Ordinance interfere with Plaintiffs' efforts to earn a living in food truck businesses. The undisputed evidence also shows that the Council adopted the proximity

bans specifically to protect restaurants from unwanted competition, which is not a permissible purpose for government action. And it also shows that there is no other permissible purpose for the proximity bans. As a result, Plaintiffs are entitled to summary judgment on Counts I and II.

A. Both claims use the same, fact-intensive test, which places the burden on the government to justify its restrictions.

"[B]oth the Fruits of Their Own Labor clause and the Law of the Land clause protect citizens' constitutional right to earn a living from arbitrary regulations." *Proctor*, 296 N.C. App. at 674. Article I, Section 1 of the North Carolina Constitution provides that it is "self-evident that all persons . . . are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. I, § 1. "[F]or nearly a century, th[e State Supreme] Court has recognized a Fruits of Labor Clause claim when the state unconstitutionally interferes with the right to conduct a lawful business." *N.C. Bar & Tavern Ass'n v. Stein*, 388 N.C. 149, 162, 919 S.E.2d 684 (2025) (citing as examples *State v. Harris*, 216 N.C. 746, 753, 6 S.E.2d 854 (1940); *State v. Ballance,* 229 N.C. 764, 768, 51 S.E.2d 731 (1949); *Roller v. Allen*, 245 N.C. 516, 521–23, 96 S.E.2d 851 (1957)). Article I, Section 19 of the North Carolina Constitution provides that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. This Clause "serves to limit the [S]tate's police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare." *Proctor*, 296 N.C. App. at 674, 910 S.E.2d at 276–77) (quoting *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697 (1988)). These Clauses thus protect Plaintiffs' rights to earn a living in an ordinary occupation free from arbitrary interference.

These Clauses apply here because the proximity bans interfere with Plaintiffs' fundamental rights to earn a living in an ordinary occupation. All Plaintiffs want to do is offer food for sale or use their property to help others do that. Nicole wants to host food trucks on her commercial property

to help promote business at her store and give another entrepreneur a place to sell their food. *See* Facts, Part I above. The store is how Nicole supports herself and her family, and she wants to host food trucks to help grow the store's business. *See id.* Tony and Ray would like to be able to accept invitations from property owners like Nicole so they can sell their food. *See id.* These are quintessentially ordinary occupations that are protected against arbitrary government interference. *See State v. Ballance*, 229 N.C. 764, 771, 51 S.E.2d 731 (1949) (citing "the baker" and "the cook" as ordinary "vocations"); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940) (citing "cooks" as an "ordinary occupation"). However, Plaintiffs' efforts to earn their living these ways is stymied by the proximity bans, which outright prevent Nicole from even trying to host Tony or Ray's food trucks and which prevent food trucks in roughly 90 percent of the City of Jacksonville. Thus, the proximity bans must survive scrutiny under both the Fruits of Labor and Law of the Land Clauses.

The same test applies under both Clauses. As the Court of Appeals explained, "a single standard determines whether an ordinance passes constitutional muster imposed by both section 1 and the 'law of the land' clause of section 19: the ordinance must be rationally related to a substantial government purpose." *Proctor*, 296 N.C. App. at 675 (cleaned up) (quoting *Treants Enter., Inc. v. Onslow County*, 320 N.C. 776, 778–79, 360 S.E.2d 783 (1987)); *see also Poor Richard's*, 322 N.C. at 64; *Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. 418, 424–25, 904 S.E.2d 720 (2024); *N.C. Bar & Tavern Ass'n*, 388 N.C. at 160.

The test has two prongs, and Defendants bear the burden for each. *N.C. Bar & Tavern Ass'n*, 388 N.C. at 160, 919 S.E.2d at 693 ("The inquiry here requires the government to satisfy the two-pronged Fruits of Labor test enunciated in *Ace Speedway*."); *id.* ("When ***the government satisfies*** the first prong of the Fruits of Labor test, ***it must then show*** that "the means chosen to effect that purpose [are] reasonable." (emphases added)).

First, the Court must "determine whether there is a 'proper governmental purpose'" for the proximity bans. *Id.* The Court first "look[s] at the actual purpose proffered by the government for the interference with economic activity," but Plaintiffs "'may rebut that assertion with evidence demonstrating that the State's asserted purpose is not the true one, and instead the State is pursuing a different, unstated purpose.'" *Id.* (quoting *Ace Speedway*, 386 N.C. at 425).

Second, the Court must "consider if the actual purpose is a proper governmental purpose," meaning "one that 'addresses the public interest' and 'promote[s] the accomplishment of a public good, or . . . prevent[s] the infliction of a public harm.'" *Id.* (quoting *Ace Speedway*, 386 N.C. at 425) (cleaned up). Here, the Court must weigh both "the public good likely to result . . . against the burdens resulting to the businesses being regulated" and "how effective is the state action at achieving the desired public purpose, and how burdensome is that state action to the targeted business." *Id.* (quotations omitted).

In sum, Plaintiffs are entitled to prevail if the proximity bans "interfere with" their businesses "unless" Defendants carry their burden to prove that "the promotion or protection of the public health, morals, order, or safety, or the general welfare makes [the proximity bans] reasonably necessary." *Id.* at 160. This Defendants cannot do.

B. The Council has no proper purpose for the proximity bans.

The undisputed evidence shows the City Council's actual purpose for the proximity bans was economic protectionism. This was apparent from the City personnel's contemporaneous statements when the Council adopted the Food Truck Ordinance. *See* Facts, Part III.D.i. The Council's meetings were replete with references to the need to protect brick-and-mortar restaurants from competition. *See id.* So, too, was the Planning Department's staff report to the Council. *See id.* Part III.D.ii. And almost as importantly, in these contemporaneous sources, the Council and City personnel made no mention of any other purpose for the proximity bans.

Defendants have not shied away from that purpose here. As noted above, the City's 30(b)(6) witness expressly conceded that the Council sought to balance competition between food trucks and restaurants. *See* Facts, Part III.D.iii. Thus, the undisputed evidence shows that the actual purpose for the proximity bans was economic protectionism for brick-and-mortar restaurants alone.

But economic protectionism is not a permissible purpose for the government to interfere with one's right to conduct a lawful business. The State Supreme Court has repeatedly held as much over the past century because economic protectionism serves only "the interests of a particular class rather than the good of society as a whole." *Ace Speedway*, 386 N.C. at 425 (quoting *Ballance*, 229 N.C. at 772). Recently, in *King v. Town of Chapel Hill*, the Court struck down a town ordinance that set rates for tow trucks because it forced tow truck businesses to bear the costs of a regulation which otherwise may have been passed on to consumers in what was supposed to be a free market for tow-truck services. *See* 367 N.C. 400, 408, 758 S.E.2d 364 (2014). Similarly, in *Roller v. Allen*, the Court struck down licensing requirements for ceramic tile installers because the requirement's "'main and controlling purpose' was 'not health, not safety, not morals, not welfare, but a tight control of tile contracting in perpetuity by those already in the business.'" *Ace Speedway*, 386 N.C. at 425 (quoting 245 N.C. 516, 525, 96 S.E.2d 851 (1957)). In short, when the regulation serves only a subset of private individuals, as the proximity bans do here, there is no permissible public purpose.

Defendants will likely argue that the Council's purpose was not protectionism per se, but rather protectionism in furtherance of preserving the city's tax base. But this argument also fails. First, the State Supreme Court's precedent in this area does not give municipalities license to achieve a possibly permissible end (i.e., preserving tax revenue) through an unquestionably impermissible means (i.e., protectionism). If it did, the government would have prevailed in *Roller*, *Ballance*, and *Harris* simply by saying that it propped up incumbent ceramic tile installers, photographers, and dry cleaners to preserve their respective incomes (by restricting new entrants competing in those

respective fields) and thus preserved the state's resulting income tax revenue. Second, the theory is based on a flawed assumption that food trucks harm restaurants. The Council merely assumed that food trucks would harm restaurants. *See* Ex. 2 at 162:14–163:8. But the assumption is wrong and contrary to the only evidence on this point. *See* Ex. 34 at 3, 17. Indeed, one former councilmember has successfully operated brick-and-mortar restaurants in Jacksonville even though food trucks have been allowed to sell food there since 2021, and in other North Carolina cities (Wilmington and Emerald Isle) where food trucks have also been allowed to operate. Ex. 16 at 9:1–10:9. Similarly, Mr. Jeffry Bender has continued to operate his Jacksonville restaurant, which opened in the early 2000s, despite food trucks operating there. Ex. 15 at 6:25–8:17. Third, the Council overlooked the fact that food trucks do, in fact, add to the tax base. Namely, the property owner hosting the food truck already pays property taxes on the commercial- or industrial-zoned property where the food truck sets up. Moreover, the food truck's sales are taxed, and so is the food truck itself as personal property. In short, although Defendants may argue they were motivated by tax revenue, that still does not justify the protectionist proximity bans.

C. A second, independent reason that the proximity bans are unconstitutional is that they were not "reasonably necessary."

Even if, arguendo, the Council had a proper purpose, the proximity bans still fail because they were not "reasonably necessary" to promote it. To be sure, in this litigation, Defendants offered post hoc, hypothetical harms that were supposedly addressed by the Food Truck Ordinance (despite not being part of the Council's analysis at the time). Ex. 21 at 8; *see also* Ex. 2 at 145:21–146:11. Defendants said the Food Truck Ordinance "[p]romot[ed] public health, safety and general welfare of the community" by "[l]imiting noise," "[l]imiting littering," "[r]egulating traffic flow and parking," "[l]imiting trespassing," "[a]esthetics, maintaining visual appeal and avoidance of visual clutter," "[m]anaging land use and controlling development," "[p]rotecting property values," "[s]eparating incompatible uses," "[f]ostering more orderly development and land use," and "[p]reventing over-

concentration, improper placement and excessive signage." *See* Ex. 21 at 8. But the bans aren't reasonably necessary to promote any of these interests.

Importantly, in the Court's analysis, these theoretical harms must be balanced against the burdens on Plaintiffs' fundamental rights. *N.C. Bar & Tavern Ass'n*, 388 N.C. at 160, 919 S.E.2d at 693–94. As noted above, those burdens are substantial. Food trucks like Tony's and Ray's are banned in roughly 90 percent of the city. Belden Aff. ¶¶ 29–30. And Nicole is totally prohibited from hosting a single food truck on her property, as are countless other commercial and industrial property owners who happen to be too close to a restaurant.

The only interest the city has seriously proffered to justify these burdens is "limiting noise." The 30(b)(6) designee explained that food trucks often have generators, which may generate noise that could bother residential properties. Ex. 2 at 114:4–16, 122:17–24. But the designee also admitted that the proximity bans apply even to food trucks that don't use generators. *Id.* at 124:20–23. And from the face of the Food Truck Ordinance, the proximity bans would not apply to food trucks that are parked and giving away food even if they have a generator. *See id.* at 116:16–21. Furthermore, generators themselves are not banned within a certain distance of residential properties. *Id.* at 117:22–25. The designee further agreed that the buffers, such as a tree line, that exist between properties that are zoned commercial and properties that are zoned residential could limit the noise from a generator. *Id.* at 117:1–20, 123:23–124:1. Additionally, he agreed that even without the bans, noise would be controlled by the City's noise ordinances. *Id.* at 123:20–22.

Importantly, the City has produced no evidence of food trucks causing any issues with noise. Indeed, the record shows the opposite. There has not been a single noise complaint related to food trucks. Ex. 33 at 12:24–13:17, 18:22–19:10. By contrast, brick-and-mortar restaurants have been investigated for noise complaints, including restaurants with outdoor seating adjacent to residential

property. *See* p. 15 above (citing Ex. 32). In short, there is no evidence that the proximity bans are reasonably necessary to combat potential noise from food trucks.

Nor is there any evidence that food trucks are reasonably necessary to prevent any of the other harms proffered in Defendants' interrogatory responses. Code enforcement has not conducted any investigation or enforcement action against food trucks relating to the potential harms identified in response to Interrogatory No. 8. Ex. 5 at 10:21–11:4, 27:3–31:13. Nor has the City explained how the proximity bans in any way prevent or mitigate these potential harms, which are largely addressed by other, unchallenged provisions in the Food Truck Ordinance. For example, as one of their post hoc rationalizations during discovery, Defendants identified "limiting littering" as a possible justification for the Food Truck Ordinance. But the proximity bans are not reasonably necessary to combat that potential harm because the Food Truck Ordinance already requires food trucks to provide adequate trash receptacles and to clean and clear their areas daily. Ex. 20 at 17:19–18:5; Ex. 2 at 41:13–22, 218:18–219:17; *see also* Ex. 2 at 126:20–127:4 (the 30(b)(6) designee conceding he was "not sure" how if at all the proximity bans address littering). Moreover, like with noise, the proximity bans don't apply to food trucks that park and give food away (as opposed to selling it), even though any hypothetical risk of litter would be the same regardless.

Another potential harm related to "regulating traffic flow and parking." But these also do not make the proximity bans reasonably necessary. Ex. 2 at 137:23–138:4 (the 30(b)(6) designee conceding he was "not sure" what the bans do to address traffic or parking). The Food Truck Ordinance already requires that food trucks be able to set up on their host properties without taking up required parking and without blocking pedestrian and vehicular pathways. Ex. 1 § 4.3.C.5(4). And again, the proximity bans would *not* apply to food trucks parking and giving away food, even though they would present the same theoretical risks relating to parking and traffic flow.

So too with "limiting trespassing." Ex. 2 at 138:5–139:11. The Food Truck Ordinance prohibits food trucks from setting up on any property unless the property owner provides written, notarized permission, which must be displayed at all times. Ex. 1 § 4.3.C.5(11). And again, the proximity bans do not apply to food trucks that simply park and give food away, even though they theoretically could lead to trespassing.

Then, the proximity bans are not reasonably necessary to "aesthetics, maintaining visual appeal and avoidance of visual clutter." Ex. 2 at 139:12–20. The proximity bans apply to *all* food trucks selling food, not just unsightly ones. And on the flip side, the proximity bans do not apply to *any* food trucks that are parked and giving away free food, even if the food trucks are unsightly.

Nor are the proximity bans reasonably necessary to "managing land use and controlling development," "separating incompatible uses," or "fostering more orderly development and land use." *Id.* at 139:21–140:3, 141:4–11. The Food Truck Ordinance already limits food trucks to commercial- and industrial-zoned properties. Ex. 1, Table 4.3.1. In other words, the proximity bans do nothing but prevent food trucks from selling food on properties where the Council has already determined they would be an appropriate land use. Also, if the proximity bans were really about separating supposedly incompatible land uses or controlling development, the bans would apply even to food trucks that set up and give food away for free. But again, they do not.

Additionally, the proximity bans are not reasonably necessary to "protecting property values." *See* Ex. 2 at 142:6–10. As noted above, the evidence in the record points in the opposite direction: Food trucks do not harm neighboring businesses and, in fact, help them. *See* Ex. 34 at 3, 17. The Council simply assumed the contrary, but Defendants have no evidence to support that assumption.

Lastly, the bans are not reasonably necessary to "[p]reventing over-concentration, improper placement and excessive signage." The Signage Restrictions in the Food Truck Ordinance already

strictly limit the type and placement of food truck signage. Ex. 1 § 4.3.C.5(12). Setting aside the Signage Restrictions, the city already has other ordinances that prohibit signage from being placed in any way that, for example, interferes with motorists' views. *Id.* § 5.12.P. Moreover, the proximity bans do not apply to food trucks that park and give away free food, regardless of the theoretical risk that they'll place signage improperly.

Accordingly, because the proximity bans interfere with Plaintiffs' fundamental rights to earn a living, and because no permissible purpose makes the proximity bans reasonably necessary, Plaintiffs are entitled to summary judgment on Counts I and II.

II. Plaintiffs are entitled to summary judgment on their claims that the proximity bans violate the Equal Protection Clause because there is nothing distinct about food truck businesses that would justify subjecting food trucks alone to the proximity bans, which were instead adopted only for economic protectionism.

Plaintiffs are entitled to summary judgment on Count III, which they bring under the State Constitution's Equal Protection Clause. The undisputed evidence shows that, under the proximity bans in the Food Truck Ordinance, food trucks are treated differently from similarly situated businesses and that there is no rational basis for the disparate treatment. Therefore, Plaintiffs are entitled to summary judgment on Count III.

The State Constitution provides that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." *N.C. Bar & Tavern Ass'n*, 388 N.C. at 162–63 (quoting N.C. Const. art. I, § 19). In the context of business regulations like the proximity bans, the State Supreme Court has explained that "[c]lassification is permitted when (1) it is based on differences between the business to be regulated and other businesses and (2) when these differences are rationally related to the purpose of the legislation." *Poor Richard's*, 322 N.C. at 67 (citing *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940)); *see also N.C. Bar & Tavern Ass'n*, 388 N.C. at 163 ("[T]he challenged classification

[must] bear[] some rational relationship to a legitimate governmental interest."). When Plaintiffs show there is no rational basis for the classification, they can and do win summary judgment. *Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 65, 698 S.E.2d 404, 423 (2010), *aff'd, ordered not precedential,* 365 N.C. 305, 716 S.E.2d 849 (2011); *Catherine H. Barber Mem'l Shelter, Inc. v. Town of North Wilkesboro*, 576 F. Supp. 3d 318, 343 (W.D.N.C. 2021) (applying federal Equal Protection Clause). The undisputed evidence shows that summary judgment is appropriate here.

A. The proximity bans classify food trucks separately from all other food-related businesses.

First, food trucks are classified differently from all other food businesses under the Food Truck Ordinance because food trucks alone are subject to the proximity bans. Restaurants may locate on all the properties where food trucks are prohibited because they are not subject to the bans. Specialty-eating establishments are allowed on all the properties where food trucks are prohibited, including in some residential areas, because they also are not subject to the proximity bans. All told, no other business but food trucks are subject to these proximity bans.

Classifying food trucks separately from all other food businesses and subjecting food trucks alone to the proximity bans makes no sense. This is because Plaintiffs are similarly situated to those other food businesses in every relevant respect. All these businesses are engaged in the business of selling food and drink to the general public. They're all regulated by the State and County for health and safety. They're all subject to inspections and certification by the Fire Department. They all generate some level of noise. And they all present some risk that their patrons may park illegally, or litter, or generate more traffic. And yet, only food trucks are prohibited from operating within 250 feet of each other, restaurants, or all residential-zoned property.

The only purpose that makes sense for the proximity bans is an impermissible one: economic protectionism. The undisputed evidence already shows this. As laid out above, the Council adopted the proximity bans for the express purpose of protecting brick-and-mortar

restaurants from unwanted competition. *See* Facts, Part III above. This is also apparent from how the proximity bans are not rationally related to any other conceivable difference between food trucks and other food-related businesses.

B. A separate, independent reason the proximity bans fail constitutional scrutiny is that there is no rational basis for singling out food trucks.

Second, the potential differences between food trucks and other food-related businesses are not rationally related to the proximity bans.

The proximity bans are irrationally underinclusive. The bans do not apply to the similarly situated businesses described above, but they also do not even apply to all food trucks. As noted above, food trucks can park and give away food for free within 250 feet of residential properties or restaurants. This is true even though food trucks that are giving away food may have generators that produce noise and even though the food truck may cause the other potential harms identified in Defendants' discovery responses. In other words, if the Council imposed the classification in the proximity bans to address issues like noise, then the classification is hopelessly underinclusive.

Similarly, the proximity bans are overinclusive. They apply to all food trucks even if the food trucks don't use generators that produce noise. And they apply to food trucks within 250 feet of any residential-zoned property, even if no one is residing on the property and thus wouldn't be bothered by any noise (or other potential harms). Ex. 1 § 4.3.C.5(2).

It is also important to remember that businesses do not need to be identical for consistent treatment to be required. *Catherine H. Barber Mem'l Shelter*, 576 F. Supp. 3d at 338 (quoting *Williams v. Vermont*, 472 U.S. 14, 23–24 (1985)). Instead, what matters is whether they are similarly situated "in all material respects." *In re Hughes*, 253 N.C. App. 699, 709, 801 S.E.2d 680 (2017) (citation omitted); *Amward Homes*, 206 N.C. App. at 65 (similarly situated if "all relevant respects alike"). Food trucks are mobile, but that fact alone has no logical bearing on the Council's decision to ban them from selling food while they are parked within 250 feet of any property. If there were something

inherently wrong with food trucks because they are mobile, then food trucks would not be allowed to give food away within 250 feet of the other properties or to sell food when they are over 250 feet away, but food trucks can do both of these things. Moreover, food trucks can sell food within 250 feet of restaurants, each other, and residential properties during special events. Ex. 2 at 279:12–281:4.

Similarly, another of the city's post hoc rationalizations—that food trucks are not required to provide their own restrooms—also has no bearing on the proximity bans. Food trucks are not prohibited from providing temporary restroom facilities. The city just assumes they would not. Regardless, any food truck must be located on a property with a principal use, which, as Defendants concede, could provide restroom facilities that are available to the public and the food truck's patrons. *Id.* at 209:16–20. For example, if Nicole were permitted to host Tony's or Ray's food trucks, the patrons could simply use the restroom at her store. Gonzalez Aff. ¶ 5. And, in fact, there is no evidence that this has caused any problems for neighboring property owners.

At base, Plaintiffs are entitled to summary judgment on their Equal Protection claims because there is no rational basis for food trucks alone to be subject to the proximity bans.

III. Plaintiffs are entitled to summary judgment on their Free Speech claims because the Council targeted food truck businesses with signage restrictions without ever considering any less-restrictive alternative.

Plaintiffs are entitled to summary judgment on Count IV, which they bring under the State Constitution's Free Speech Clause. The Signage Restrictions implicate Plaintiffs' speech by prohibiting them from using reasonable signage to reach their customers. Since the Signage Restrictions are content based, they face (and fail) strict scrutiny because they are not narrowly tailored to serve a compelling government interest. The Signage Restrictions also fail intermediate scrutiny, if it applied, because they are not narrowly tailored to serve an important government interest. Accordingly, Plaintiffs are entitled to summary judgment on Count IV.

Article I, Section 14 of the North Carolina Constitution "guarantees the citizens of North Carolina the freedom of speech as one 'of the great bulwarks of liberty[.]'" *Durham Cnty. Dep't of Soc. Servs. v. Wallace*, 295 N.C. App. 440, 450, 907 S.E.2d 1 (2024) (quoting N.C. Const. art. I, § 14, cl. 1). This means that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (interpreting the analogous free speech clause of the federal First Amendment). And although Plaintiffs' free speech claim is brought under the State Constitution, rather than the U.S. Constitution, North Carolina's "appellate courts have held that the free speech protections contained in the federal and North Carolina constitutions are parallel and has addressed them as if their protections were equivalent." *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 869 (2019) (internal quotation marks omitted).

Plaintiffs are entitled to summary judgment on their free speech claim. First, by restricting Plaintiffs' ability to use commercial signage, it is blackletter law that the challenged Signage Restrictions burden Plaintiffs' protected speech. Second, laws that burden protected speech rights are subject to two forms of heightened review. If the restriction is content neutral, then intermediate scrutiny applies, and the "government must prove that [the restriction is] 'narrowly tailored to serve a significant governmental interest[.]'" *State v. Bishop*, 368 N.C. 869, 874–75, 787 S.E.2d 814 (2016) (citation omitted). If, however, the restriction is content based, then strict scrutiny applies, and the government must prove that the restriction is "the least restrictive means of achieving a compelling governmental interest." *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 484 (2025). Because the government can't meet its burden under either test, Plaintiffs are entitled to summary judgment.

A. The Signage Restrictions implicate Plaintiffs' protected speech.

By preventing Ray and Tony from using effective signage to communicate with their customers, the challenged Signage Restrictions infringe on their free speech rights. *See Cumberland*

County v. E. Fed. Corp., 48 N.C. App. 518, 522, 269 S.E.2d 672 (1980). When operating their food trucks in other jurisdictions, Ray and Tony use a tall, feathered flag style sign to guide customers safely and effectively to their respective food trucks. Ray Aff. ¶¶ 32–34; Proctor Aff. ¶¶ 35–37. But for the challenged Signage Restrictions, Ray and Tony would use feathered flag signs when allowed to operate in Jacksonville. Ray Aff. ¶¶ 37, 42–44; Proctor Aff. ¶¶ 38, 50–51. Yet they are banned from doing so under the Signage Restrictions, which limit food trucks to a single 5' x 5' "A" frame sign placed within 20 feet of the food truck itself, while expressly prohibiting "[a]ll other signage" beyond that single 5' x 5' "A" frame sign. Ex. 1 § 4.3.C.5(12)(i)–(iv). Thus, even though Jacksonville expressly allows feathered flag signs for general commercial and non-commercial use—*see* Ex. 1 § 5.12.E.1(8); *see also, e.g.*, Gonzalez Aff. ¶ 8 & Ex. 1 (photos of feathered flags in use throughout the city)—the food-truck-specific Signage Restrictions ban food trucks—and only food trucks—from using these signs, or any of the other signs that Jacksonville permits other businesses to use. Ex. 2 at 238:17–21, 243:1–12, 245:22–246:10, 252:11–13 (admitting that businesses other than food trucks can use a variety of signs, including both feathered flag signs and freestanding signs up to 35 feet tall, and that no other business is subject to the signage restrictions imposed on food trucks). This infringes on Ray and Tony's protected free speech rights.

Because the challenged Signage Restrictions infringe on Ray and Tony's protected speech, it is Jacksonville's burden to demonstrate that the restrictions "satisfy either strict scrutiny or intermediate scrutiny depending on whether the regulation is content-based or content-neutral, respectively." *Proctor*, 296 N.C. App. at 670; *see also Billups v. City of Charleston*, 961 F.3d 673, 684 (4th Cir. 2020) (explaining that after determining an ordinance "burdens protected speech," courts must next determine whether "intermediate or strict" scrutiny applies). If the Signage Restrictions are content based, then strict scrutiny applies. *See Proctor*, 296 N.C. App. at 670. If they are content-neutral, then intermediate scrutiny applies. *See id.*

Therefore, this Court must first determine whether the challenged Signage Restrictions are content-based or content-neutral. There are "*several* paths [that] can lead to the conclusion that a speech restriction is content based and therefore subject to strict scrutiny." *Bishop,* 368 N.C. at 875 (emphasis in original). First, a speech restriction is content based if it defines the regulated speech by its "subject matter . . . function[,] or purpose." *Reed*, 576 U.S. at 163. Second, restrictions that discriminate "among different users of the same medium for expression . . . is another form of content-based speech regulation." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1266 (11th Cir. 2005) (internal quotation marks omitted); *see also Reed*, 576 U.S. at 170 ("[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference[.]" (citation omitted)). Third, a speech restriction is also content based if it "cannot be justified without reference to the content of the regulated speech." *Bishop*, 368 N.C. at 875 n.2. Fourth, and finally, a speech restriction will be considered content based if the restriction was "adopted by the government because of disagreement with the message the speech conveys." *Id.* (internal quotation omitted). If any of these four things is true, then the Signage Restrictions are content based and subject to strict scrutiny. *See id.*

For a speech restriction to be considered content neutral, by contrast, the government must be able to justify the restriction "without reference to the content of the regulated speech." *Shackelford*, 264 N.C. App. at 552 (citation omitted). If the government does so, the Signage Restrictions then face a "rigorous form of intermediate scrutiny." *Bishop*, 368 N.C. at 874.

Finally, the government bears the entire evidentiary burden to justify its speech restriction under either test. *See id.* at 874–76. This Defendants cannot do.

B. The Signage Restrictions are content based and fail strict scrutiny.

The challenged Signage Restrictions are content-based restrictions because they define the regulated speech by who is speaking and what the speech is about. Specifically, the regulations

expressly apply only to "[f]ood vendor signage." *See* Ex. 1 § 4.3.C.5(12). The term "food vendor," meanwhile is defined to encompass food trucks while excluding traditional brick-and-mortar restaurants and other businesses. *See id.* at 463 (definition for "Food Vendor (mobile)"). Further, the City defines "food vendor signage" as "signage that is affiliated with a mobile food vendor." Ex. 2 at 248:1–4. And to determine whether a sign "is affiliated with a mobile food vendor" such that it constitutes "food vendor signage" subject to the Signage Restrictions, the City must "read [the sign]." *Id.* at 248:1–17. In other words, whether the Signage Restrictions apply depends on the sign's content. *See id.* As the Signage Restrictions facially discriminate based on the speaker and apply only to "signage that is affiliated with a mobile food vendor[,]" *id.* at 248:1–4, they are content-based speech restrictions subject to strict scrutiny. *Solantic*, 410 F.3d at 1265–66; *see also Reed*, 576 U.S. at 170. Further, insofar as the Signage Restrictions are construed to apply to signs about food trucks, or to signs whose function is to advertise food trucks, they are content based and subject to strict scrutiny for that reason as well. *Reed*, 576 U.S. at 163.

The Signage Restrictions fail strict scrutiny. To satisfy strict scrutiny, "the State must show that the statute serves a compelling governmental interest, and that the law is narrowly tailored to effectuate that interest." *Bishop*, 368 N.C. at 876. Under the narrow tailoring requirement, the government must "prove that no less restrictive alternative would serve its purpose." *Cent. Radio Co. Inc. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) (internal quotation marks omitted). This is "the most demanding test known to constitutional law." *Free Speech Coal.*, 606 U.S. at 484 (citation omitted). In the words of the U.S. Supreme Court: "It is rare that a regulation restricting speech because of its content will ever be permissible." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011). Furthermore, the government bears the entire evidentiary burden of proving that its speech restriction satisfies all elements of the test. *See Reed*, 576 U.S. at 171.

The undisputed evidence shows that Jacksonville has failed to meet any of its evidentiary burdens under strict scrutiny, let alone all of them. First, Jacksonville fails its initial burden to show that the Signage Restrictions further a compelling governmental interest. Compelling governmental interests are rare and involve momentous issues not present here: (1) safeguarding national security by "barring the provision of material aid to foreign terrorist groups," (2) preserving judicial integrity by preventing judges from "personally soliciting campaign contributions," and (3) protecting voting rights by "upholding a buffer zone around election sites as a measure to safeguard the right to vote freely and effectively." *Bishop*, 368 N.C. at 878.

The only relevant interests offered by the City related to the challenged Signage Restrictions are "[a]esthetics, maintaining visual appeal and avoidance of visual clutter." Ex. 21 at 8; *see also* Ex. 2 at 231:5–8 (describing the City's signage regulations as designed "to prevent visual clutter and preserve aesthetics"). However, "interests in aesthetics and traffic safety" are, as a matter of law, *not* compelling interests. *Cent. Radio*, 811 F.3d at 633. Thus, the Signage Restrictions fail step one.

Second, the Signage Restrictions also fail strict scrutiny for the independent reason that the undisputed evidence shows they are not narrowly tailored. Again, narrow tailoring requires the government to prove that its speech restriction is "the least restrictive means of advancing the [government's] compelling interest." *Bishop*, 368 N.C. at 878; *see also Cent. Radio*, 811 F.3d at 633. Defendants, however, have submitted no evidence to prove that the challenged Signage Restrictions are "the least restrictive means of advancing [any] compelling interest." *Bishop*, 368 N.C. at 878. Nor could they ever meet this burden on this record.

One reason the Signage Restrictions fail the narrow tailoring requirement is that they are "hopelessly underinclusive." *Cent. Radio*, 811 F.3d at 634. A speech restriction is fatally underinclusive "when it leaves appreciable damage to that supposedly vital interest unprohibited." *Reed*, 576 U.S. at 172 (citation omitted). Here, as it pertains to the "preservation of aesthetics, [food

truck] signs are no greater an eyesore than" commercial signage generally. *Id.* Thus, the Signage Restrictions fail because Defendants "cannot claim that placing strict limits on [food truck] signs is necessary to beautify the Town while at the same time" exempting all other forms of commercial signs from those requirements. *Id.* In other words, Defendants must somehow explain why banning Tony or Ray from placing a feathered flag sign on Nicole's private, commercially zoned property is the "least restrictive means" of serving a compelling interest, while also explaining why that compelling interest vanishes when a physically identical sign is displayed in the exact same location on behalf of a non-food truck business like a restaurant. *See* Gonzalez Aff. ¶ 8 & Ex. 1 (pictures of restaurants and other businesses using flag signs). Because the city "cannot do so," its Signage Restrictions fail strict scrutiny. *See Reed,* 576 U.S. at 171.

C. The Signage Restrictions also fail intermediate scrutiny.

Assuming arguendo that the Signage Restrictions were content neutral and thus analyzed under intermediate scrutiny, they would still fail. Under intermediate scrutiny, "[t]he government must prove [that its speech restriction is] narrowly tailored to serve a significant governmental interest[.]" *Bishop*, 368 N.C. at 874–75 (citation omitted). As with strict scrutiny, the government bears the burden to prove all elements of this test. *See id.*; *see also Billups*, 961 F.3d at 685 ("The [government] bears the burden of proving that [its content-neutral speech restriction] survives intermediate scrutiny."). The undisputed evidence here shows the City fails to meet its burden for at least two independently sufficient reasons.

First, intermediate scrutiny's narrow tailoring requirement requires the government to "demonstrate that it actually tried or considered less-speech-restrictive alternatives" before enacting the speech-restricting law, and that the restriction was only enacted after the government determined that "such alternatives were inadequate to serve the government's interest." *Billups*, 961 F.3d at 688. Crucially, the "government's burden in this regard is satisfied only when it presents actual evidence

supporting its assertions." *Id.* (cleaned up). Yet, the record reveals that the City never considered any alternative to the Signage Restrictions, as the City's 30(b)(6) witness conceded. Ex. 2 at 252:14–253:17 ("Q: Did the City – in drafting and formulating the Food Truck Ordinance, did the City ever consider any alternatives to these signage restrictions? A: Not that I remember."). Consequently, the City cannot meet its burden of proving that the Signage Restrictions satisfy intermediate scrutiny.

Second, the City must also prove that the Signage Restrictions are "no more restrictive than necessary." *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429 (2012). Jacksonville's disparate treatment of similar businesses, however, demonstrates that the Signage Restrictions are more restrictive than necessary. As discussed above, the Signage Restrictions stand in stark contrast to Jacksonville's policy regarding commercial signage generally, which recognizes the importance of commercial signage and thus allows businesses (except food trucks) to use a wide variety of signage. Businesses other than food trucks, including brick-and-mortar restaurants, can use at least one feathered flag sign up to 15 feet tall and 5 feet wide, as well as at least one freestanding sign that may be up to 35 feet tall. *See* Ex. 1 §§ 5.12.E.1(8), 5.12.N.4; *see also* Ex. 2 at 238:17–21, 243:1–12. Indeed, the city restricts food truck signage even more than "Adult Business Signage." *Compare* Ex. 1 § 5.12.S.2, *with id.* § 4.3.C.5(12).

Yet the very presence of these less restrictive alternatives demonstrates that the city could just as easily advance its interests "in a manner less intrusive to [Plaintiffs' speech]," which "indicates that [the Signage Restrictions are] more extensive than necessary." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995). In other words, the unique restrictions on food trucks are compelling evidence that the Signage Restrictions are "more restrictive than necessary." *Hest*, 366 N.C. at 298. This is an additional, independent reason as to why the Signage Restrictions fail intermediate scrutiny.

Because the undisputed evidence shows that the Signage Restrictions infringe on Plaintiffs' speech and fail either form of scrutiny, Plaintiffs are entitled to summary judgment on their claim that the Signage Restrictions violate Article I, Section 14 of the North Carolina Constitution.

IV. Plaintiffs are entitled to summary judgment on their challenge to the amount of the annual permit fee because the Council set the fee amount without considering its costs to regulate food trucks and because the fee bears no relation in fact to the city's costs to regulate food trucks.

Plaintiffs are entitled to summary judgment on Count V, which they bring under the State Supreme Court's decision in *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 41–42, 442 S.E.2d 45 (1994). The undisputed evidence shows the Council imposed a $300 annual permit fee on food trucks without ever considering whether that amount was related in any way to the City's potential costs to regulate food trucks, and that the $300 permit fee outstrips the City's minimal costs to regulate food trucks. So, Plaintiffs are entitled to summary judgment on Count V.

"[A] municipality has only such powers as the legislature confers upon it." *Homebuilders Ass'n*, 336 N.C. at 41–42 (citation omitted). And "the municipal power to regulate an activity implies the power to impose a fee in an amount sufficient to cover the cost of regulation." *Id.* at 42. However, "such fees will not be upheld if they are unreasonable," meaning the fees are in "the amount necessary to meet the full cost of the particular regulatory program." *Id.* at 46 (citation omitted). This requires actual evidence that the city set its fee based upon its actual or estimated costs to regulate the activity. *See id.* at 39. Defendants fail this test here because the record shows the Council never considered its costs to regulate food trucks and because the $300 annual permit fee is, in fact, not reasonably related to the city's minimal costs.

The undisputed record shows the Council set the amount of the fee without ever considering its potential costs to regulate food trucks. Instead, the Council expressly set the fee based on a desire to be fair to brick-and-mortar restaurants. *See* Facts, Part III.C and Part III.D. This

alone warrants summary judgment for Plaintiffs on Count V because Defendants openly admitted the fee had no bearing on the potential or actual costs to regulate food trucks.[3]

Regardless, the fee is, in fact, not reasonable in relation to the City's minimal cost to regulate food trucks. The City admits that, unlike the municipality in *Homebuilders Ass'n*, it has never calculated its costs to regulate food trucks. Ex. 2 at 255:3–257:19; *see also* 336 N.C. at 39 (noting "comprehensive study" supporting fees there). But Defendants claim in this litigation (without giving even an approximate dollar amount) that it has costs to regulate food trucks. Ex. 21 at 7. The evidence shows that the City incurs very minimal costs to regulate food trucks.

The City plays almost no role in safety regulations. Most notably, the County and the State regulate food trucks for health and safety, not the City. While the Food Truck Ordinance requires that food trucks comply with those regulations, the city plays no role in enforcement. It is true that the fire department performs an annual inspection of each food truck, but these inspections are short (usually no more than a half hour), and the subsequent paperwork takes mere seconds to complete. Ex. 14 at 17:21–25, 22:15–19. Though these inspections may involve some cost, they hardly justify a $300 annual permit fee for each food truck.

So, too, the city's limited enforcement of the Food Truck Ordinance fails to justify the $300 annual fee. The City's only concrete cost specific to food trucks comes from printing sticker decals for permitted food trucks. In total, these stickers cost around $110 per year. Ex. 25. Planning Director King conceded that his staff spends "minimal" time on food trucks. Ex. 2 at 263:6–16. There are limited instances where the Planning staff helps a food truck identify permissible locations, but that takes only "[t]hirty minutes to an hour and a half . . . on average." *Id.* at 265:16–

[3] The fee cannot be justified as a "tax," because municipalities "have power to impose taxes only as specifically authorized by act of the General Assembly," N.C.G.S. § 160A-206, and the General Assembly has authorized no tax on food truck businesses, *see id.* §§ 160A-206 to -215.2 (authorizing taxes only on certain property, animals, motor vehicles, local meals, room occupancy, short-term rentals, and heavy equipment).

19. And because of the GIS map, food trucks can typically determine on their own where they're allowed to operate, "[w]hich wouldn't cost [the City] anything." *Id.* at 267:13–18. According to the Code Enforcement Supervisor Ansell, code enforcement officers have only been required to engage with food trucks on two occasions. Ex. 5 at 27:3–29:16. In each instance, nothing but an email was required to ensure the food truck's compliance. *Id.* at 27:14–29:9. In total, Ms. Ansell conceded that her officers spend less than five percent of their time on food truck-related issues. *Id.* at 12:12–19.

Plus, the $300 fee is higher than fees in neighboring jurisdictions. The city's minimal costs help explain why other jurisdictions charge far less for food truck permits. *See* Belden Aff. ¶ 38 (collecting fees from other jurisdictions ranging from $0 to $150).

At bottom, the undisputed evidence shows that the Council adopted its $300 annual permit fee amount solely to be fair to brick-and-mortar restaurants by saddling food trucks with additional start-up costs, and the fee amount is unreasonable in light of the City's minimal costs to regulate food trucks. Accordingly, Plaintiffs are entitled to summary judgment on Count V.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment for Plaintiffs on all their claims.

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CERTIFICATE OF SERVICE

I certify that on this date, a copy of the foregoing was served upon counsel by e-service, email and by first class mail at the following address:

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