



INSTITUTE FOR JUSTICE

November 13, 2012

Via Email

Mr. Helder Gil
Legislative Affairs Specialist
Department of Consumer and Regulatory Affairs
1100 Fourth Street, S.W., Room 5164
Washington, D.C. 20024
DCVendingRegs@dc.gov

RE: Notice of Third Proposed Rulemaking, Rules Concerning Vending Business License Regulations, 59 D.C. Reg. 40 (Oct. 2012)

Dear Mr. Gil:

We are writing on behalf of the Institute for Justice, a libertarian non-profit law firm that fights for the economic liberty of entrepreneurs across the country. Because anti-competitive restrictions against street vending violate the constitutional right of street vendors to earn an honest living, the Institute works to defeat such restrictions through its National Street Vending Initiative. This initiative combines litigating against protectionist restrictions in state and federal courts, helping vendors organize in order to fight these restrictions through activism, and educating the public about the importance—both economically and socially—of street vending.

It is in this spirit that we offer our comments to Rule 24-500, D.C.'s proposed vending business regulations.

Introduction

Washington D.C.'s food trucks create jobs, enrich consumers, and make the District a safer and more exciting place to live. Currently, there are nearly 50 food trucks in D.C. that directly employ over 100 people and help create jobs for countless others. These food trucks offer convenience and a wide variety of interesting and inexpensive foods that consumers could not get elsewhere. And by drawing customers out of their offices and onto the street, D.C.'s food trucks have helped reactivate long-lost public spaces. Before the food trucks started operating, for instance, Franklin Square was a place where few D.C. office workers would eat

their lunch. Now Franklin Square along with several other parks in the Downtown area are vibrant places that the District's residents and office workers enjoy visiting.

In the Institute for Justice's first published report on street vending,¹ the Institute explained that for a city to encourage a vibrant food-truck culture, it should avoid trying to "protect" brick-and-mortar restaurants from food trucks and instead enact clear, simple, and modern laws that are narrowly tailored to address real health-and-safety issues. Indeed, the proposed regulations that the District noticed in January 2012 were overall very good and came close to meeting this objective.

As the Institute for Justice explained in its March 1, 2012 comments to those proposed regulations, the District needed only to modify a few aspects of the regulations to create one of the best regulatory frameworks for food trucks in the country.² The Institute's suggestions included discarding the Vending Development Zone concept, allowing both sweet and savory food trucks to remain at a parking spot for the full time allowed by the meter, and letting food trucks operate whenever they wish. With these changes, we noted that D.C.'s regulations would "reject[] protectionist and unconstitutional rules in favor of ones that address legitimate concerns about public health and safety."³ The end result of those rules, we continued, "would be a win for food trucks, their many customers, the local economy, and—most importantly—the right of all D.C. small business owners to earn a living free from anti-competitive restrictions."⁴

Although the newest version of the proposed regulations implements the second of our suggested changes, it contains other changes that make this version far, far worse than the prior one. As a result, implementing the proposed regulations would cripple the industry. There are two specific aspects of the proposed regulations that would make it incredibly difficult for food trucks to connect with their customers. First, the regulations would not allow food trucks to park on any street in the Central Business District in which the adjacent sidewalk is less than ten feet wide. This requirement would make it illegal for food trucks to serve their customers at most of the popular operating areas throughout the District. Secondly, this problem would be exacerbated by the position of District officials that the creation of a Mobile Roadway Vending location on a block would prohibit food trucks from parking in any other space on that block, as well as in any space located across the street from the location.

Minimum Sidewalk Width Restrictions

There are two provisions in the proposed regulations concerning the minimum width of sidewalks in front of which food trucks may park. The first, located at Section 531.1(a) of the proposed regulations, specifies that a food truck not operating at a Mobile Roadway Vending [MRV] location must park at a valid parking space that meets the requirements of Section 531.2.

¹ Erin Norman, Robert Frommer, Bert Gall & Lisa Knepper, *Streets of Dreams: How Cities Can Create Economic Opportunity by Knocking Down Protectionist Barriers to Street Vending* (July 2011), available at <http://www.ij.org/streets-of-dreams-2>.

² Institute for Justice, Comments on Notice of Second Proposed Rulemaking, Rules Concerning Vending Business License Regulations, (Mar. 1, 2012).

³ *Id.* at 6.

⁴ *Id.*

Amongst Section 531.2's criteria is subsection (c), which prohibits food trucks from operating at a parking space where "the adjacent unobstructed sidewalk is less than ten feet (10 ft.) wide in the Central Business District or seven feet (7 ft.) wide outside the Central Business District." Secondly, Section 530.8(c) of the proposed regulations state that a proposed MRV location must be adjacent to a sidewalk with an unobstructed minimum width of at least "ten feet (10 ft.) wide in the Central Business District or seven feet (7 ft.) wide outside the Central Business District."

If enacted, these minimum sidewalk width requirements will make it illegal to vend from a food truck at some of the most popular locations in Downtown Washington D.C. A survey conducted by the Food Truck Association of Metropolitan Washington measured the sidewalk width at ten different places in the Downtown area where customers have come to expect their favorite food trucks. What it found is that the distance between the outermost obstruction and the building face at eight of those ten locations was less than 10 feet, including locations at Farragut Square, Franklin Square, and L'Enfant Plaza. Should the District enact this restriction, dozens of spots where food trucks could legally stop and operate will disappear overnight.

The Institute for Justice also notes that the District's proposed minimum sidewalk width requirement would inhibit the creation of MRV locations in many places around Washington D.C. As you are aware, an MRV location is a location where at least three food trucks may park and operate for up to four hours, provided that they have purchased an MRV permit. Section 530.8 states that "[a]n MRV location *shall* not be established . . . [w]here the adjacent unobstructed sidewalk is less than ten feet (10 ft.) wide in the Central Business District or seven feet (7 ft.) wide outside the Central Business District." (Emphasis added). Thus, the District's own regulations would prohibit the District government from establishing MRV locations at the eight locations that the D.C. Food Truck Association surveyed and found to be under ten feet.

Officials at the October 15, 2012 meeting with the District Department of Transportation (DDOT) about the proposed regulations indicated that Section 533.1 gives the DDOT Director "the discretion to add, modify or remove a Mobile Roadway Vending location at any time." According to District officials, this discretion is so broad as to allow the Director to create an MRV location even where the sidewalk width at the proposed location is less than the minimum requirement listed in Section 530.8(c).

To be blunt, the District's position that it will have the discretion to ignore the clear language of its own regulations is simply wrong; as the District of Columbia Court of Appeals has repeatedly noted, "[v]erbs such as 'must' or 'shall' denote mandatory requirements . . . unless such construction is inconsistent with the manifest intent of the legislature or repugnant to the context of the statute." *Williams v. United States*, 33 A.3d 358, 360 (D.C. 2011) (quoting *Leonard v. District of Columbia*, 801 A.2d 82, 84-85 (D.C. 2002)). Because Section 530.8(c) states that an MRV location shall not be established where the unobstructed sidewalk width in the Central Business District is less than ten feet, this language trumps whatever discretion the DDOT Director may possess. Any MRV locations created in such locations would be *ultra vires* and, if challenged in court, would be declared void and without effect. Thus, the minimum sidewalk width language in Sections 530.8 and 531.2, if enacted, will eliminate vending from food trucks altogether in eight of the ten most popular locations Downtown. This measure would not regulate the District's food-truck industry; it would destroy it.

Furthermore, the minimum sidewalk widths found at Sections 530.8 and 531.2 of the proposed regulations are not based on a deliberate, evidence-based investigation that looks at what impact food trucks have on sidewalk congestion. Instead, it appears that the District has copied the minimum sidewalk widths that apply to sidewalk cafes and other permanent occupations of the public right of way and applied them to food trucks. *See, e.g.,* D.C. Mun. Regs. § 24-204.1 (requiring “a clear, unobstructed passageway not less than ten feet (10 ft.) in width at all points” adjoining the use of public surface space); § 24-316.9 (same rule for sidewalk cafes). But unlike the presence of sidewalk cafes, bike racks, and other permanent obstructions, a food truck does not deny anyone the use of the sidewalk.

Nor does the District put forward any evidence to suggest that operating a food truck next to a sidewalk where the unobstructed width is less than ten feet will lead to congestion. Indeed, as part of its National Street Vending Initiative, the Institute for Justice surveyed the academic literature for any analyses of whether food trucks caused or exacerbated sidewalk congestion. Finding none, the Institute conducted its own empirical study on the streets of D.C. in 2011.⁵ What it found was that the presence of a food truck did not significantly increase foot traffic or make it more difficult for pedestrians to traverse the sidewalk.⁶

Although the Institute for Justice has researched street-vending laws across the country, it is not aware of any other city that has a 10-foot minimum sidewalk width requirement. Instead, the most common requirement is one that simply tells food trucks that they should not operate in a way that blocks the sidewalk. Rather than establish a rigid minimum width requirement, the Institute recommends that the District follow the approach taken by the City of Los Angeles, which says that trucks should take care not to “interfere with or obstruct the free passage of pedestrians or vehicles along any such street, sidewalk or parkway.”⁷ The advantage of this approach is twofold: First, a narrowly tailored rule like this is more flexible than a one-size-fits-all requirement. Although there might be times when requiring a ten-foot sidewalk width might be necessary (although that requirement should be based on objective, demonstrable evidence concerning a congestion problem at a particular location), there are certainly many other times of day and many other locations around the Central Business District where operating a food truck next to an unobstructed sidewalk width of less than ten feet will not cause any congestion. Second, such a rule maximizes the opportunities for vending by keeping more public spaces open for food trucks. As mentioned above, a vibrant food-truck industry benefits both consumers and the broader community as a whole.

Mobile Roadway Vending Locations

The Institute for Justice also has great concerns that the actual implementation and establishment of MRV locations throughout the District will further reduce the number of locations from which food trucks may operate. Part 4 of the proposed regulations introduces the concept of MRV locations, which are spaces on the public right-of-way that the District dedicates for use by food trucks between the hours of 11:00 a.m. and 3:00 p.m. on weekdays.

⁵ For more detail about this analysis, *see* Erin Norman, Robert Frommer, Bert Gall & Lisa Knepper, *Streets of Dreams: How Cities Can Create Economic Opportunity by Knocking Down Protectionist Barriers to Street Vending* 33-34 (July 2011), available at <http://www.ij.org/streets-of-dreams-2>.

⁶ *Id.*

⁷ *See* L.A. City Code § 56.08(c).

Food trucks that purchase a special parking permit can park at these locations on a first-come, first-serve basis.

As it is drafted in the proposed regulations, the MRV location concept is one that would benefit food trucks, as it would give them an option to stay at a vending site for longer than the two-hour limit proposed in the regulations. But at the October 15, 2012 meeting with Department of Transportation officials, the food-truck community first learned that the District planned to prohibit food trucks from operating anywhere on a block where an MRV location has been established, other than at that location itself. Officials also indicated that they planned to bar food trucks from operating across the street from an MRV location. When meeting attendees noted that none of these restrictions appear anywhere in the proposed regulations, DDOT officials made clear that these restrictions would be added later.

These unwritten aspects to the proposed regulations raise grave concerns that the MRV locations could reduce, not increase, the opportunities available to food trucks in the District. Under the system as laid out by District officials, the Director could create an MRV location that would have dedicated spaces for three food trucks. But in so doing, there would be a tradeoff: The establishment of the MRV location would make it illegal for food trucks to park anywhere else on either side of that block. So while three locations would be gained, many more would be lost, with the ultimate effect that establishing an MRV location could potentially make it harder, not easier, for a food truck to park and operate.

Indeed, there is nothing in the regulations that would prevent the Director from establishing MRV locations in order to substantially reduce the overall number of parking spaces available to food trucks. (Although the Director would not have the power to place an MRV location in an area that food trucks are forbidden to operate because of the 10-foot minimum sidewalk width restriction, he would—pursuant to Section 533’s language that he may “add, modify or remove a Mobile Roadway Vending Location at any time”—have the unfettered power to place an MRV location anywhere food trucks are not forbidden to operate.) Because the Director has total discretion in this regard and is not required to provide any explanation for his or her decisions, there is the risk that this discretion will be used for improper purposes, including the constitutionally impermissible purpose of attempting to “protect” politically connected restaurants from competition from food trucks.

The best way to guard against this danger is to reject the DDOT officials’ reading of the proposed regulations concerning the elimination of parking spaces near MRV locations. We do not believe that creating dedicated parking spaces for food trucks is, in and of itself, problematic. But giving the Director the power to create those spaces so as to reduce the total number of parking spaces available to food trucks for protectionist reasons is. The only reason the Director should be able to bar a truck from operating in any space is because he or she can demonstrate, using objective and clear criteria and evidence, that allowing a food truck to park in that space would cause a real threat to public health and safety.

Conclusion

As discussed above, had the District enacted the food-truck rules contained in the second round of proposed vending regulations, with the modifications suggested by the Institute for

Justice, they would have been one of the best sets of laws throughout the country. That is because they would have followed the two principles that the Institute identified in *Food Truck Freedom: How to Build Better Food-Truck Laws in Your City*: 1) rejecting protectionism as a reason to legislate, and 2) fidelity to the idea that laws should be clear, narrowly tailored and outcome-based.⁸ Instead, the District went back to the drawing board and now, eight months later, has come back with drastically altered regulations that seek to impose a command-and-control structure on the entire industry. If implemented, these regulations will be some of the most restrictive in the country, will lead to a pitched decline in the number of food trucks on the District's streets, and will fly in the face of the thousands of public comments that the District government has received from D.C. residents and office workers who support the industry.

The public is owed an explanation for this dramatic shift in policy and the total disregard of the public's wishes. Given that the changes discussed above do little or nothing to address real public health and safety concerns in a logical manner, the Institute is concerned that the reason for these changes is rooted in economic protectionism. As the Institute has explained before, economic protectionism is not a legitimate governmental interest, and regulations enacted on that basis raise grave constitutional questions.⁹ Just as importantly, protectionism is bad public policy. As the Institute for Justice describes in *Seven Myths and Realities about Food Trucks*, food trucks create jobs, satisfy customers, and make communities safer and more enjoyable places to live.¹⁰

The bottom line is that if the District persists in the current path outlined in its proposed regulations, it will create one of the worst regulatory schemes for food trucks anywhere in the country. There is simply no rational reason for the District to throw away the vast economic benefits that food trucks provide the city, which include dozens of productive small businesses, hundreds of jobs, increased choices for consumers, and millions of dollars in sales tax and other revenue that the District collects each year. Accordingly, the Institute recommends that the District change course, return to the version of the proposed regulations that it proposed in January 2012, and revise them along the lines of what the Institute for Justice previously suggested. If the city is concerned about sidewalk congestion, it should adopt Los Angeles' common-sense approach to that issue. And if the District wants to create dedicated parking spaces for food trucks, it should not do so in the manner it now proposes.

⁸ Robert Frommer & Bert Gall, *Food Truck Freedom: How to Build Better Food-Truck Laws in Your City* 5 (Nov. 2012), available at <http://www.ij.org/food-truck-freedom>.

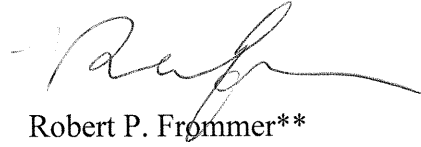
⁹ Institute for Justice, Letter to Helder Gil re: Notice of Second Proposed Rulemaking, March 1, 2012, at 3 (citing *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008); *Craigsmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002); *St. Joseph Abbey v. Castille*, No. 10-2717, 2011 U.S. Dist. LEXIS 79327, at *2 (E.D. La. July 21, 2011).

¹⁰ Bert Gall & Lancée Kurab, *Seven Myths and Realities about Food Trucks: Why the Facts Support Food-Truck Freedom* (Nov. 2012), available at www.ij.org/7-myths-and-realities.

Sincerely,



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