



INSTITUTE FOR JUSTICE

April 8, 2013

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 Fourth Proposed Rulemaking, Rules Concerning Vending Business License Regulations, 60 D.C. Reg. 12 (Mar. 2013)

Dear Mr. Gil:

We write on behalf of the Institute for Justice, a libertarian non-profit law firm that fights for the economic liberty of entrepreneurs nationwide. Through its National Street Vending Initiative, the Institute works to defeat anti-competitive restrictions on street vending that violate the constitutional right of street vendors to earn an honest living. It does so by litigating against protectionist restrictions in court, by helping vendors oppose restrictions at the grassroots level, and by educating the public about the social and economic importance of street vending.

Since their inception several years ago, D.C.'s food trucks have helped make the District of Columbia a vibrant place for people to work and call home. At the beginning of 2012, it appeared that the District would embrace this phenomenon by enacting good, sensible vending laws. Since then, however, the District has dramatically changed course by issuing two rounds of proposed regulations that would cripple D.C.'s food-truck industry.

As we explain in our comments below, the Institute calls on the District to scrap the current draft of the regulations and instead issue narrow, targeted rules that address actual health and safety issues while leaving food trucks free to compete and succeed.

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 about 100 food trucks in D.C. that directly employ over 300 people and help create jobs for countless others. These food trucks offer convenience and a wide variety of interesting and inexpensive foods that consumers cannot

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, such as Franklin Square.

In the Institute for Justice's first 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. Although the proposed regulations that the District noticed in January 2012 were overall very good and came close to meeting that goal, the D.C. government changed course late last year by issuing a new set of proposed regulations that were far worse and, if implemented, threatened to cripple the industry.

In its last set of comments, the Institute for Justice noted that the minimum sidewalk requirement contained in the regulations would make it illegal for food trucks to serve their customers at many of the most popular operating areas throughout the District. And the Institute also criticized the (then) unstated rule that said that creating a Mobile Roadway Vending (MRV) location on a block would prohibit food trucks from parking in any other spaces on that block, as well as in any spaces located across the street from the location. The Institute ultimately recommended that the District scrap its proposed regulations, adopt the January 2012 rules with the minor tweaks that the Institute had previously suggested, and let food trucks get back to the business of serving their customers and their community.

Unfortunately, the District has instead chosen to accelerate down the path of creating an anti-competitive, and unnecessarily harmful, regulatory scheme. In these comments, the Institute first explains how only allowing trucks to operate Downtown where there is ten or more feet of unobstructed sidewalk space will keep trucks from serving the thousands of customers who rely on them every day. The Institute then explains why prohibiting food trucks from operating within 500 feet of an established MRV location poses grave constitutional concerns.

Together, the above-described rules would wipe out vending in much of Downtown D.C., kill dozens of thriving small businesses, and deprive the District's residents and workers of the varied and inexpensive foods that they currently enjoy. The Institute calls on the District to reject these pointless restrictions and instead pass narrowly tailored rules that protect the public while ensuring the continued vitality of this dynamic industry.

Minimum Sidewalk Width Restrictions

As noted above, the proposed regulations prescribe the minimum width of sidewalks next to which food trucks may park and operate. Section 535.2(c) of the proposed regulations states that a food truck not operating at a MRV location may not park and operate from 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." This one restriction, if enacted, will cripple D.C.'s vibrant food-truck industry, kill jobs, and hurt D.C. resident and workers.

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>.

In November 2012, 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. It discovered that the distance between the outermost obstruction and the building face at eight of those ten locations (including Farragut Square, Franklin Square, and L'Enfant Plaza) was less than ten feet.

In a subsequent survey, the Food Truck Association measured the sidewalk width not just at those ten locations but throughout all of Downtown D.C. What it found was that the ten-foot rule would block food trucks from operating in the vast majority of the Downtown area. The diminished food-truck market would force many food trucks to fire employees, move to other more food-truck friendly cities, or shut down altogether. In total, the proposed ten-foot rule would not regulate the District's food-truck industry; it would destroy it.

Furthermore, the minimum sidewalk widths found at Section 535.2 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 sidewalk cafes, bike racks, and other permanent obstructions, a food truck does not deny anyone the use of the sidewalk.

To see what research, if any, the District could be relying upon in support of the proposed ten-foot rule, the Institute for Justice sent a Freedom of Information request to DDOT asking for any "documents, information, or other evidence considered by the DDOT that supports the need to prohibit food trucks from operating 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.'" In response, DDOT said that the Institute should search the existing vending regulations, chapters in the Design and Engineering Manual and The Public Realm Design Manual, and the FHWA Facility Design Guidelines. But that search revealed that *none* of those sources looks at what impact, if any, food trucks have on street or sidewalk congestion.

Nor does it appear that the District itself has done any original empirical research on whether operating a food truck next to a sidewalk where the unobstructed width is less than ten feet will lead to congestion or, if so, to what extent. 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 2011.² 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.³ Thus, the only research on the topic undercuts the supposed need for the proposed ten-foot rule.

² 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>.

³ *Id.*

Furthermore, in researching street-vending laws across the country, the Institute for Justice has not run across any other city with a ten-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 . . . street, sidewalk or parkway.”⁴

There are two principal advantages to this approach: First, a narrowly tailored rule like Los Angeles’ is more flexible than a one-size-fits-all requirement. Although there might be isolated locations where requiring a ten-foot sidewalk width might be necessary (*if* evidence shows that a congestion problem exists at a particular location and that a ten-foot width restriction is better than the alternative means of solving the problem), there are certainly many other locations around the Central Business District where operating a food truck next to a sidewalk that is less than ten feet wide will not cause any problems. Second, a narrowly tailored rule like Los Angeles’ 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 is also concerned that the proposed rules concerning MRV locations 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 10:30 a.m. and 2:30 p.m. on weekdays. Food trucks that pay a non-refundable \$25 dollar application fee are placed in a monthly MRV location permit lottery. Should the truck be lucky enough to win a location through the lottery, it must pay a \$150 MRV location permit fee before being authorized to vend from the designated location.

Standing alone, the MRV location concept is one that would benefit food trucks, as it would give them an option to stay at a location for longer than the two-hour limit proposed in the regulations. But Section 533.7 of the proposed regulations states that “[n]o mobile roadway vending shall be authorized within five hundred feet (500 ft.) of a designated MRV location during the designated hours, except within another designated MRV location or with written approval from DCRA.” This section means that the advent of MRV locations will likely reduce, not increase, the opportunities available to food trucks in the District. Although the proposed regulations state that an MRV location must contain “at least three parking spaces,” the creation of an MRV location would make it illegal for food trucks that either did not participate in the lottery, or were not lucky enough to win a spot, from parking anywhere nearby. As the map created by the Food Truck Association of Metropolitan Washington shows, the prohibited zone would encompass not just the block where the MRV location is situated, but would reach adjoining blocks and—in some instances—would prevent any food-truck activity even on the next street over.

⁴ See L.A. City Code § 56.08(c).

Furthermore, because of the broad discretion that the regulations give District officials, particularly the DDOT Director, in proposing, approving, modifying, or removing an MRV location, there is nothing stopping District officials from establishing MRV locations precisely to reduce the overall number of parking spaces available to food trucks. Because officials have total discretion in this regard and are not required to provide any explanation for their decisions, there is the risk that this discretion will be used for improper purposes, including the constitutionally impermissible purpose of attempting to restrict competition between restaurants and food trucks, as well as between food trucks that take part in the lottery and those that do not.

Indeed, D.C. officials have stated that the very reason for the 500-foot rule laid out in Section 533.7 is to frustrate competition. After the Department of Consumer and Regulatory Affairs (DCRA) issued this most recent round of proposed rules, the Food Truck Association sent DCRA officials a set of questions to clarify some unresolved questions. One question asked for the reasoning behind the 500-foot rule. In response, DCRA officials told the Food Truck Association that “[t]his distance requirement is designed to protect the vendors that participate in the MRV lottery from non-lottery vendors encroaching upon their assigned spaces and customers.” This is inappropriate: The only time that the District of Columbia should bar trucks from using a parking space is when the District can demonstrate, using objective criteria and evidence, that letting a food truck park in that space would cause a real threat to public health and safety.

The 500-foot rule also raises grave constitutional concerns. This is because protectionism, simply put, is not a legitimate government interest. Accordingly, courts regularly strike down laws that are designed to serve protectionist ends. *See, e.g., St. Joseph Abbey v. Castille*, No. 11-30756, 2013 U.S. App. LEXIS 5701, at *14 (5th Cir. Mar. 20, 2013) (invalidating a Louisiana law allowing only funeral directors to sell caskets while rejecting the idea that “pure economic protection of a discrete industry is an exercise of a valid state interest”); *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (striking down regulatory regime because it “was designed to favor economically certain constituents at the expense of others similarly situated, such as Merrifield”); *Craigsmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (invalidating a rule permitting only funeral directors to sell caskets as a “naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers”).⁵ In January 2011, IJ brought suit against El Paso, Tex., which prohibited food trucks from operating within 1,000 feet of a brick-and-mortar food establishment.⁶ As a result of that lawsuit, El Paso soon recognized that its law, like those at issue in *St. Joseph Abbey*, *Merrifield*, and *Craigsmiles*, was invalid and changed its vending rules to not discriminate against the city’s vendors.⁷

Again, the Institute does not believe that creating dedicated parking spaces for food trucks is, in and of itself, problematic. But the proposed regulations’ prohibition on trucks operating within 500 feet of an MRV location is. The best way to guard against the constitutional problems that the Institute has identified with Section 533.7 is to eliminate that provision altogether.

⁵ IJ represented the plaintiffs in *Craigsmiles* and is currently litigating on behalf of the monks of St. Joseph Abbey.

⁶ *Castaneda v. City of El Paso*, No. 3:11-CV-00035-KC (W.D. Tex. filed Jan. 26, 2011), <http://www.ij.org/economicliberty/3648>.

⁷ Institute for Justice, *Victory for El Paso Mobile Food Vendors*, (Apr. 26, 2011), <http://www.ij.org/about/3790>.

Furthermore, striking Section 533.7 also make good public policy sense. 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.⁸ Striking Section 533.7 will help the District avoid the harms that a 500-foot proximity rule would create both for food trucks themselves and for the thousands of consumers who have come to appreciate the convenience and variety that the trucks provide them.

Conclusion

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—benefits that include dozens of productive small businesses, hundreds of jobs, increased choices for consumers, and millions of dollars in sales tax and other revenue. Accordingly, the Institute recommends that the District change course, return to the version of the proposed regulations that it proposed in January 2012, and then 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.

The Institute for Justice has previously discussed how the food-truck rules contained in the second round of proposed vending regulations, with the modifications suggested by the Institute in its comments to those regulations, 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) the rejection of protectionism as a basis for regulation, and 2) fidelity to the idea that laws should be clear, narrowly tailored and outcome-based.⁹

Instead, the District completely reversed direction, and has now issued two consecutive rounds of regulations that would impose a command-and-control structure on the entire industry. Should they be 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 cost the District hundreds of jobs, thousands of satisfied customers, and millions in tax revenue.

⁸ Bert Gall & Lancée Kurcab, *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.

⁹ 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>.

Sincerely,

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