

STATE OF NORTH CAROLINA
COUNTY OF PITT

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

21 CVS _____

MARK SHIRLEY,
and OLE TIME SMOKEHOUSE, LLC,

Plaintiffs,

v.

TOWN OF FARMVILLE, and DAVID
P. HODGKINS, in his official capacity
as Town Manager,

Defendants.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. Since 1868, the right to earn a living has been guaranteed by the North Carolina Constitution's "fruits of their own labor" clause. For Mark Shirley, the fruit of his own labor includes hush puppies and pork cracklings.

2. Around September 2019, Mark took a big risk by leaving his sales job and starting his own food truck business so that he could pursue his passion: cooking barbeque for his neighbors. He acquired all necessary permits, paid Farmville's then-required \$100 annual fee, rented a private parking space in town, and got down to business serving lunch in Farmville on Wednesdays and Fridays.

3. Despite the usual challenges a new restaurant faces, including a once-in-a-century pandemic, Mark's food truck Ole Time Smokehouse developed a loyal customer base.

4. Then in April 2021, the Town of Farmville amended the food truck ordinance to require Mark to pay a \$75 permit fee *daily*—which amounts to an annual fee of \$7,800 for a truck serving lunch twice per week—an increase of over 7,700%.

5. The Amended Food Truck Ordinance also prohibits food trucks from operating within 100 feet of the parcel line boundary of brick-and-mortar restaurants, unless the food truck receives written permission from his competitor to operate in closer proximity.

6. The Amended Food Truck Ordinance is intended to protect existing brick-and-mortar restaurants from competition from food trucks by erecting expensive, arbitrary regulatory barriers. But the Town of Farmville should not pick economic winners and losers. Because economic protectionism is not a constitutionally legitimate purpose for an ordinance, the restrictions on Mark's business violate the North Carolina Constitution, Article I, Sections 1 and 19.

7. Moreover, because the Amended Ordinance singles out food truck lunch providers for regulatory burdens while exempting brick-and-mortar lunch providers, the ordinance also violates the North Carolina Constitution's equal protection clause, Article I, Section 19. *See Shuford v. Town of Waynesville*, 214 N.C. 135, 198 S.E. 585 (1938).

8. Finally, the so-called regulatory permit “fee” far exceeds Farmville’s costs of regulating food trucks and operates as an illegal tax to raise general funds for the Town’s expenses unrelated to food truck regulation.

JURISDICTION AND VENUE

9. Plaintiffs bring this action pursuant to the Declaratory Judgments Act, N.C. Gen. Stat. § 1-253, *et seq*, and Article I, Sections 1 and 19, of the North Carolina Constitution.

10. This Court has jurisdiction over this action pursuant to N.C. Gen. Stat. §§ 7A-240 and 7A-245.

11. Venue is proper in this Court as the Defendant is located in Pitt County and the relevant events occurred in Pitt County.

12. Defendants do not have sovereign immunity because Plaintiffs seek declaratory and injunctive relief under the Declaratory Judgments Act and N.C. Gen. Stat. § 1-493 and the North Carolina Constitution as no other adequate remedy at law is available or appropriate.

PARTIES

13. Plaintiff Mark Shirley is a citizen and resident of Walstonburg, just west of Farmville in Greene County. He owns the Ole Time Smokehouse food truck, which he operates in Greene County and operated within the Farmville township limits until April 2021. But for Farmville’s Amended Food Truck Ordinance, Mark would continue operating inside the Farmville Township limits.

14. Plaintiff Ole Time Smokehouse is registered as a limited liability corporation under North Carolina law. The food truck specializes in Eastern North Carolina Barbeque and operates two days a week in Greene County and previously operated two days a week inside the Farmville Township limits. The food truck now operates two days a week just outside of the Farmville Township limits.

15. Defendant Town of Farmville is a municipal corporation organized under the laws of North Carolina and located in Pitt County.

16. Defendant David P. Hodgkins is the Town Manager of Farmville. He is sued solely in his official capacity. The Town Manager is responsible for reviewing permit applications, accepting payment, and issuing food truck permits. Farmville Code of Ordinances, § 111.21 (A). The Town Manager is also responsible for enforcing the Ordinance. *Id.* § 30.21.

FACTUAL ALLEGATIONS

A Difference of Degrees

17. For Mark Shirley, Ole Time Smokehouse is more than a food truck. It represents century-old southern cooking traditions, service to others, and his professional calling.

18. Rare is the debate between North Carolinians livelier than about which style of barbeque represents *true* Carolina Barbeque: Eastern-style or Lexington-style barbeque. Some barbeque historians argue that the difference is one of degrees since both styles are vinegar-based—the two styles are more alike than different, especially when compared to other regional barbeque styles.

19. Mark's Ole Time Smokehouse food truck blends these Carolina barbeque traditions. While preparing and serving his whole hog barbeque Eastern-style, the mobility of Mark's Ole Time Smokehouse food truck harkens back to the World War I era, when workers in Salisbury or Lexington were served barbeque from the back of wagons or pop-up barbeque stands.

20. Just as those early barbeque wagons and pop-up stands led to the first brick-and-mortar barbeque restaurants near county courthouses or in tobacco market towns, Mark hopes his food truck will eventually help facilitate his opening a brick-and-mortar restaurant.

21. In fact, like Carolina Barbeque, the difference between food trucks and brick-and-mortar restaurants is one of degrees—not all food trucks follow the same business model, and neither do brick-and-mortar restaurants. Some brick-and-mortar restaurants even own and use food trucks to serve their food in different locations.

22. Food trucks and brick-and-mortar restaurants both serve lunch, and some have places to sit and enjoy their food. Others, like the Little Rocket, a brick-and-mortar restaurant in Farmville, only serve food out of their carryout window.

The Ole Time Smokehouse Food Truck

23. An Eastern North Carolina native, Mark knew that his neighbors loved his Eastern North Carolina style whole hog barbeque and were hungry for additional lunch options in his predominately rural, farming community.

24. After more than a year of research and planning, Mark left his steady automobile sales job to follow his passion for cooking. Mark started his own food truck business, Ole Time Smokehouse, in September 2019.

25. As a lunch provider, Ole Time Smokehouse offers an additional option for a warm meal to people who choose not to take a lunch bag to work, prepare meals at home, or take the time for a full sit-down meal.

26. Like many entrepreneurs, Mark enjoyed the flexibility his food truck business provided. Mark's workday starts well before dawn and he works long hours to prepare his barbeque fresh each day, but the food truck business allows Mark to determine the days and locations where he will work.

27. To heighten customers' anticipation of his mouthwatering offerings, Mark alternates the locations where Ole Time Smokehouse serves lunch. Until Farmville amended its Food Truck Ordinance, Ole Time Smokehouse served lunch in Farmville on Wednesdays and Fridays and in Snow Hill on Mondays and Thursdays. Ole Time Smokehouse caters special events on weekends.

28. Before the Ordinance was amended, Mark rented a private parking space across the street from the Little Rocket restaurant, where he provided lunch to customers from about 11:00 am until 2:00 pm twice per week.

29. Despite his limited operations in Farmville, Mark and the Ole Time Smokehouse food truck quickly developed a loyal customer base through his social media following and old-fashioned word-of-mouth recommendations.

30. Less than six months after Ole Time Smokehouse started lunch service, the COVID-19 pandemic hit, and restaurants were forced closed except for takeout and delivery orders.

31. Ole Time Smokehouse was already serving takeout only and safely continued regular lunch service in compliance with all COVID-19 rules and regulations while some other restaurants could not adjust to the abrupt change to their business model.

32. COVID-19 still presented challenges for food trucks. While continuing his takeout lunch service, Mark's catering opportunities slowed during the pandemic as gatherings were generally forbidden.

Farmville Food Truck Ordinances

33. When Ole Time Smokehouse began its lunch service in Farmville in September 2019, Mark was required to pay a \$100 fee to obtain an annual permit from the Town of Farmville.

34. Under the previous food truck ordinance, Mark was required to operate the Ole Time Smokehouse food truck at least 100 feet from the customer entrance to the closest brick-and-mortar restaurant.

35. Less than a year after Ole Time Smokehouse began to serve Farmville, Farmville Planning Director Justin Oakes recommended the Board of Commissioners implement a moratorium on new Annual or One-Time Food Truck Permits. *See Farmville October 5, 2020 Board Meeting Minutes, available at <http://farmvillenc.gov/october-5-2020-board-meeting/>.*

36. Planning Director Oakes explained the Food Truck Moratorium would allow Town staff an opportunity to review the current regulations and develop alternatives to address complaints by unnamed residents or businesses that food trucks are not required to pay taxes and provide little to the community other than food. *Id.*

37. On October 5, 2020, all five members of the Board of Commissioners voted unanimously to issue a three-month moratorium on the issuance of any new annual or one-time Food Truck Permits. There were no Commissioner recusals for this vote.

38. At the January 4, 2021, meeting of the Farmville Board of Commissioners, Planning Director Oakes requested an extension of the moratorium for three months so the Commissioners could discuss the Food Truck Ordinance at their retreat in February 2021.

39. Four of the five Commissioners voted to extend the 90-day moratorium on new annual and one-time Food Truck Permits at the January 4 meeting. There were no Commissioner recusals for this vote.

40. Plaintiffs were unrepresented by counsel at the October 5, 2020, and January 4, 2021, meetings of the Farmville Board of Commissioners. Plaintiffs retained Counsel prior to the Farmville Board of Commissioners meeting on April 5, 2021.

41. At a public hearing on April 5, 2021, Plaintiffs' Counsel noted that Commissioners Jamie Dixon and Bert Smith had a conflict of interest regarding the

proposed amendments to the Food Truck Ordinance. Both Commissioners subsequently recused themselves from discussing or voting on the amended ordinance.

42. The three remaining members of the Board of Commissioners voted unanimously to amend the Food Truck Ordinance at the April 5 meeting.

Permit Fees, Proximity Restrictions, and Permission Slips

43. Under the Amended Food Truck Ordinance, food trucks must now obtain a permit to operate in Farmville each day of operation.

44. Food trucks must pay a \$75 permit fee *per day* of operations and food trucks can operate no more than two days within a calendar week. Farmville Code of Ordinances, § 111.21(B). Operating for the maximum 104 days a year permitted under the Ordinance would cost a food truck \$7,800 in permit fees a year.

45. Food trucks are prohibited from operating on public streets in Farmville, Farmville Code of Ordinances, § 111.21(G), or on any property within the Central Business District (CBD), *id.* § 111.22(C), and must show written permission to operate on private property in order to obtain a permit. *Id.* § 111.21(D).

46. Food trucks must be located “at least one hundred feet from the nearest parcel boundary” of a brick-and-mortar restaurant—unless the restaurant owner waives the proximity requirement. *Id.* § 111.22(A).

47. Parcel boundaries are not typically marked or otherwise visible.

48. The permission slip exception to operate within 100 feet of any brick-and-mortar restaurants parcel boundary line effectively provides nearby restaurants with a competitor's veto over a food truck's operation.

49. Brick-and-mortar restaurants need no permission from competitors to operate within 100 feet of each other. For example, Farmville Pizza (3750 S. Main St.) and Mi Cabanita 4 (3742 S. Main St.) are within 100 feet of each other's parcel boundary line, and Plank Road Steak House (3689 E. Wilson St.) and Café Madeleine (3699 E. Wilson St.) also are within 100 feet of each other's parcel boundary line. None of these restaurants are required to request permission of their competitors to operate.

50. If Farmville had any constitutionally legitimate concerns about food trucks, it would not allow brick-and-mortar restaurants to waive those concerns with a Competitor's Permission Slip.

51. Farmville's food truck ordinance is strictly enforced.

52. The penalty for violating the ordinance is a Class 3 misdemeanor, punishable by a \$50 fine. N.C. Gen. Stat. § 14-4.

53. But for Farmville's Amended Food Truck Ordinance's exorbitant \$75 a day permit fee, Plaintiffs would continue operating within the Farmville Township limits.

54. But for Farmville's Amended Food Truck Ordinance, Plaintiffs would operate at the food truck's former rental spot, which is within 100 feet of the parcel line of a brick-and-mortar restaurant, for a minimum of two days per week.

CAUSES OF ACTION

Count I—Fruits of Their Own Labor, Law of the Land N.C. Const. art. I, §§ 1, 19 (Proximity rule)

55. Plaintiffs repeat and incorporate all of the preceding paragraphs.

56. The North Carolina Constitution enshrines the right to earn a living in the Fruits of Their Labor provision, N.C. Const. art. I, § 1, which states that: “We hold it to be self-evident that all persons are created equal; that they 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.”

57. The right to earn a living in an ordinary occupation, also known as the right to the enjoyment of the fruits of one’s own labor, is a fundamental right under North Carolina law. *See King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) (“This Court’s duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one’s own labor.”)

58. The Law of the Land provision of the North Carolina Constitution guarantees 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.

59. No person may be deprived of a fundamental right unless the restriction is narrowly tailored to a compelling state interest.

60. The purpose and effect of the Town of Farmville’s Food Truck Ordinance is to protect existing brick-and-mortar restaurants from competition.

61. Economic protectionism is not a constitutionally legitimate purpose for a law under the North Carolina Constitution.

62. The Town of Farmville's Amended Food Truck Ordinance is not narrowly tailored to any legitimate, let alone compelling, purpose.

63. The Amended Food Truck Ordinance addresses traffic and other safety concerns without granting existing brick-and-mortar restaurants with a competitor's veto. *See, e.g.*, Farmville Code of Ordinances § 111.22(N) ("Food trucks shall be positioned at least three feet away from any fire hydrants, any fire department connection, utility box or vault. The food truck shall not locate within any area of the lot that impedes, endangers, or interferes with pedestrian or vehicular traffic. A food truck shall not impede ingress and egress from driveway entrances, handicapped parking spaces & ramps, building entrances and exits").

64. Any health or safety rationales for the 100-foot proximity restriction in the Food Truck Ordinance is undermined by the ability of private brick-and-mortar restaurants to waive the restriction and grant a food truck permission to operate in closer proximity.

65. The Amended Food Truck Ordinance fails even the reasonable relation test, which asks whether the Town has acted with a proper governmental purpose, and if so, whether its actions were reasonable when viewed against the balance between the likely public benefit to be achieved and the burden imposed.

66. The reasonable relation test looks at the evidentiary record to assess the balance between the public good and private burden.

67. The burden on food trucks far exceeds any public benefit, as the Food Truck Ordinance is detrimental to the public good, in part by limiting safe, accessible choices for lunchtime consumers.

68. Economic protectionism is not a legitimate, much less proper governmental purpose, so the Amended Food Truck Ordinance cannot pass the reasonable relation test.

69. Although public health, safety, and welfare are proper government purposes, such purposes cannot be waived by private actors—in this instance, by competitors of the regulated party. The proximity restriction and permission slip requirement are not reasonably related to public health, safety, and welfare.

70. Mark Shirley and Ole Time Smokehouse’s right to earn a living cannot be dependent on a permission slip to operate from competitors operating brick-and-mortar restaurants.

Count II—Equal Protection
N.C. Const. art. I, § 19 (Proximity rule, Frequency rule)

71. Plaintiffs repeat and incorporate all of the preceding paragraphs.

72. The Equal Protection provision of the North Carolina Constitution guarantees 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. Const. art. I, § 19.

73. An ordinance violates the equal protection provision when persons who are engaged in the same business are subject to different restrictions or if they are given different privileges.

74. The regulation of a business or occupation must be based on some distinguishing feature of the business itself, which, if unregulated, will produce substantial injury to the public peace, health, or welfare.

75. “[O]rdinances are valid and enforceable only when they are not arbitrary or discriminatory and operate uniformly on all persons similarly situated[.]” *Shuford*, 214 N.C. 135, 198 S.E. 585, 588.

76. While food trucks are prohibited from operating within 100 feet of the parcel boundary of an existing brick-and-mortar restaurant without securing permission from the same, brick-and-mortar restaurants do not face any similar anti-competitive requirements to request permission from other proximate restaurants before serving consumers.

77. At least four existing brick-and-mortar restaurants in Farmville can and do operate within 100 feet of the parcel boundary of another brick-and-mortar restaurant.

78. Food trucks are prevented from operating more than two days a week under the Amended Food Truck Ordinance, while brick-and-mortar restaurants may operate seven days per week.

79. There are no features of food trucks as distinguished from brick-and-mortar restaurants that would produce substantial injury to the public peace, health, or welfare if food trucks were allowed to operate more than two days a week, or within 100 feet of the parcel boundary of an existing brick-and-mortar restaurant.

80. The Amended Ordinance itself demonstrates there is no health or welfare rationale for the proximity restriction because brick-and-mortar restaurants may grant food trucks a waiver to avoid the proximity restriction.

Count III—*Ultra Vires*
N.C. Gen. Stat. § 160A-174 (\$75/day “fee”)

81. Plaintiffs repeat and incorporate all of the preceding paragraphs.

82. A municipality, such as the Town of Farmville, has only such powers as the legislature confers upon it.

83. Farmville cites its “general ordinance-making power,” N.C. Gen. Stat. § 160A-174 for its authority to adopt the Food Truck Ordinances.

84. This authorizing statute provides: “A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.” N.C. Gen. Stat. § 160A-174.

85. The N.C. Supreme Court has held that “the municipal power to regulate an activity implies the power to impose a fee in an amount sufficient to cover the cost of the regulation.” *Homebuilders Ass’n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 42, 442 S.E.2d 45, 49 (1994).

86. However, the *fee must not exceed the costs of regulation* and it must be reasonable “[b]ecause the purpose of such a fee or charge is to place the cost of regulation on those being regulated, a rough limit of ‘reasonableness’ is the amount necessary to meet the full cost of the particular regulatory program.” *Id.* 336 N.C. at 46, 442 S.E.2d at 51 (cleaned up).

87. The Amended Food Truck Ordinance defines “regulatory fee” as a “fee assessed to cover the cost of regulating a particular business activity that is assessed to the particular business being regulated.” Farmville Code of Ordinances, § 111.20(C).

88. The Amended Food Truck Ordinance imposes a “fee” of \$75 *per day*, which vastly exceeds Farmville’s cost of regulating food trucks.

89. Before the Town Commissioners amended the Food Truck Ordinance, Farmville charged food trucks a \$100 fee for an *annual* permit.

90. The \$75 a day fee does not cover health inspections, which are performed by county officials under a separate permit fee, or the provision of town services such as water or waste removal. *See, e.g.*, Farmville Code of Ordinances, § 111.21(D–E).

91. The Town of Farmville did not employ a reasoned methodology to set the Food Truck Permit “fee” at \$75 per day.

92. The Legislature has not granted the Town of Farmville the authority to impose taxes on food trucks operating in the town to generate revenue for town expenses unrelated to the regulation of Food Trucks.

93. Under the Amended Farmville Food Truck Ordinance, it would cost Mark Shirley \$7,800 in permit fees paid to Farmville annually to operate a food truck in the town for maximum two days a week—a total of just 104 operating days a year.

94. The Amended Farmville Food Truck Ordinance permit fee is peerless among North Carolina municipal regulations of food trucks. Most annual fees, which

permit food trucks to operate seven days per week, range from \$10.40 (Durham) to \$400 (Dallas).

95. There is no reasonable justification for Farmville's exorbitant Food Truck Permit fee.

96. The \$75 a day permit "fee" in the Amended Farmville Food Truck Ordinance operates as a tax to raise general revenue for the town. Accordingly, the Town of Farmville lacks the statutory authority to impose the \$75 a day permit "fee" and it should be declared *void ab initio*.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request relief as follows:

A. A declaratory judgment that Farmville Code of Ordinances § 111.21, both on its face and as applied, violates the Fruits of Their Labor clause of Article I, Section 1, of the North Carolina Constitution;

B. A declaratory judgment that Farmville Code of Ordinances § 111.21, both on its face and as applied, violates the law of the land and equal protection clauses of Article I, Section 19, of the North Carolina Constitution;

C. A declaratory judgment that Farmville Code of Ordinances § 111.21 is *ultra vires* and *void ab initio*;

D. A permanent injunction enjoining Defendants and their officers, employees, and agents from enforcing Farmville Code of Ordinances § 111.21;

E. Nominal damages of one dollar for the harm caused to Plaintiffs;

F. An award of the costs reasonably incurred by Plaintiffs in pursuing this action; and

G. All further legal and equitable relief as the Court may deem just and proper.

Respectfully submitted this 21st day of September, 2021.

/s/ Jessica L. Thompson
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