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November 30, 2012

Councilor Johnathan Austin  
Councilor Valerie Abbott  
Councilor James Roberson, Jr.  
Birmingham City Council  
710 North 20<sup>th</sup> Street  
Birmingham, Alabama 35203

**Re: Proposed Ordinance to Establish Regulations for Mobile Food Vehicles and Pushcarts in the City of Birmingham, Alabama (Draft dated November 13, 2012).**

Dear Councilors:

I have been retained by a group of food truck and pushcart owners to advise them regarding the construction or effect of Birmingham's proposed food truck ordinance. We understand that the Public Safety Committee has revised the draft ordinance that was rejected by the Council at its September 18<sup>th</sup> meeting and that the Committee intends to present the revised proposed ordinance for consideration at the City Council's upcoming December 11<sup>th</sup> meeting.

My clients and I have reviewed the revised draft. My clients have serious concerns about the revised draft ordinance. We would appreciate the opportunity to meet with the Committee to discuss the proposed ordinance prior to its presentation to the City Council. While I will not endeavor to address all of the problems with this draft ordinance, the following is a brief discussion of a few of its major flaws:

1. Pushcarts: This ordinance proposed to govern both pushcarts and food trucks. It is my understanding that Birmingham already has a pushcart ordinance applicable to downtown and that the pushcarts are already subject to regulation by ONB. The pushcart owners are disappointed in your proposal to enact a new ordinance that would lump them together with the food trucks. The pushcart owners would appreciate you reconsidering your decision to lump them together with food trucks in the proposed ordinance.



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2. Hours of operation: The hours of operation in the proposed ordinance are extraordinarily restrictive. Under the terms of the proposed ordinance, mobile food vendors are only allowed to operate for two hours in the morning, two hours in the afternoon and two hours in the evening. These hours are much more restrictive than the limitations imposed by the Jefferson County Health Department. My clients cannot imagine any legitimate health or safety issue that would justify these severe limitations on my clients' right to do business.
3. Proximity Restrictions: The proposed ordinance prohibits food trucks and pushcarts from operating within 230 feet of any restaurant. The proposed ordinance also prohibits food trucks and pushcarts from operating within 230 feet of each other. We are opposed to provisions designed to stifle economic competition. It is not the proper role of government to protect one business by preventing competition. Moreover, as Councilor (soon to be Judge) Smitherman pointed out at the September 18<sup>th</sup> Council meeting, the anti-competitive provisions of this proposed ordinance raise serious constitutional concerns. In addition to being anti-competitive, the proximity restrictions would also harm the bricks and mortar restaurants that own food trucks. This provision would, for example, make it illegal for the Cantina or Slice (which are both locally owned and headquartered here in Birmingham) to sell food from mobile food vehicles set up on the streets outside their own restaurants.
4. Zones. The zones contemplated by the proposed ordinance are clearly anti-competitive. If food truck owners had gotten together and carved the city into zones as part of an agreement not to compete in designated areas, they might be subject to an antitrust lawsuit. An ordinance requiring food trucks to do something that would be illegal for them to do voluntarily seems inappropriate on its face.
5. Fees. The draft ordinance contains blanks for many of the fees that are contemplated. Some of the fees that are contemplated are clearly inappropriate. For example, an applicant must pay a \$200 fee before parking at any location that is not preapproved by the City. Under the proposed ordinance, an ice cream truck would have to pay \$200 every time it stops to sell a popsicle. It would be much more reasonable for the City to impose a single fee for doing business in the City on a yearly basis and not require a fee for each location where a truck might park.
6. Mobile Food Vendors Committee. Food truck owners face most of the same regulatory hurdles imposed on bricks and mortar restaurants. They must buy business licenses and pay sales tax in each city where they do business. Their commissaries are subject to the same building codes, zoning ordinances and other rules and



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regulations that are applicable to restaurants. The kitchens on food trucks are inspected and approved by the Health Department. In addition to the mountain of red tape and regulations that already exist, the proposed ordinance seeks to force food trucks to go through a lengthy and exhaustive administrative process before a bureaucracy to obtain a license. This process will serve no purpose other than to discourage food truck operators from doing business in Birmingham.

Some cities have hundreds of food trucks and hundreds of thousands – or even millions – of people crowding their busy downtown streets and sidewalks. Birmingham has only a handful of food trucks. Downtown congestion is the least of our problems. In 1960, there were over 340,000 people living in Birmingham. Today, according to the last census, there are only about 200,000 people living here. There are contractors who refuse to work on buildings in Birmingham and there are business people who refuse to open businesses here because of Birmingham's reputation for having an onerous regulatory climate. The food truck business – which is in its infancy here - is a very demanding, low-grossing, low-margin businesses. The public loves the trucks. They make Birmingham a better place to live and to work. The trucks provide variety of food choices for consumers, a means for aspiring restaurateurs break into the restaurant business and a way for established bricks-and-mortar restaurants to increase sales without the expense of multiple locations.

People all over the country, just like the citizens of Birmingham who were elected to represent, have enthusiastically embraced food trucks operating in their cities. The only people complaining are restaurateurs afraid of legitimate competition. Savvy restaurateurs, like the owners of Cantina, Slice and Dream Cakes have decided to jump onto the food truck bandwagon. Even Chick-fil-A, which spearheaded the opposition to food trucks in Birmingham is experimenting with food trucks. (<http://foodtruckfiesta.com/chick-fil-a-mobile-food-truck/>). Businesses that build better mousetraps should not be forced out of business by governmental regulation designed to stifle competition.

We would appreciate a meeting and we would respectfully request that you revise the draft ordinance to address our concerns. We look forward to hearing from you.

Sincerely,



David Donaldson



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Cc: Thomas Bentley, III (Acting City Attorney)  
Greg Nuckolls (Greg's Hot Dogs)  
Frank Repici (Repicci's Franchise Group, LLC)  
Mary Lou Torbert (Dog Bus)  
Dirk South (Cantina on Wheels, LLC)  
Rom Mendez (Cantina on Wheels, LLC)  
Jorge Castro (Cantina on Wheels, LLC)  
Katie M. Moon (Dreamcakes Bakery)  
Chad Schofield (Shindigs Catering, LLC)  
Mac Russell (Shindigs Catering, LLC)  
Jason Parkman (Spoonfed Grill)  
Michael Brandon (Spoonfed Grill)  
Brad Wardlaw (Fresh of the Bun)  
Chris Bajalieh (Slice Mobile, LLC)  
Dawn Evans (Donaldson & Guin, LLC)