IN THE MUNICIPAL COURT
OF THE CITY OF ATLANTA, GEORGIA

CITY OF ATLANTA	*	
	*	**CASE No._____**
v.	*	
	*	
ADELE MACLEAN,	*	
	*	
Defendant.	*	
	*	

DEFENDANT'S MOTION TO DISMISS OR DEMURRER AND MEMORANDUM IN SUPPORT THEREOF

Defendant Adele MacLean respectfully submits this Motion to Dismiss or Demurrer and Memorandum in Support Thereof and shows that the restaurant regulations underlying her citation do not even apply to groups or individuals occasionally feeding the homeless (but rather apply to commercial activities), and that those regulations are unconstitutionally vague even if one could possibly apply them to Ms. Maclean's charitable acts.

Ms. MacLean is one of a number of individuals who occasionally meet in Atlanta's Woodruff Park to provide food, at no charge, for hungry and homeless people who do not have enough to eat. After eight years in which Ms. MacLean and other volunteers have occasionally offered this free meal on Sunday mornings, Ms. MacLean received a citation for failing to display permits required for operation of a "Temporary

Food Service Establishment."[1] But the relevant Georgia regulation governs for-profit enterprises, and does *not* apply to individuals who occasionally provide food to homeless or hungry individuals at no charge. Furthermore, if applied to Ms. MacLean, the provision of the Atlanta Municipal Code, and the accompanying state regulation, would be void for vagueness under the Due Process Clause of the United States Constitution. Therefore, the citation must be dismissed.

STATEMENT OF FACTS

On Sunday, November 19, 2017, Adele MacLean was providing a free meal to homeless or hungry individuals in Woodruff Park. A police officer issued a citation to Ms. MacLean. Ex. A (Citation No. 0001363). The citation alleged that Ms. MacLean had violated Atlanta Municipal Code Sec. 86-2, a provision that incorporates Fulton and DeKalb County health regulations by reference. Ex. B (Atl. Mun. Code Ordinances Sec. 86-2); ex. C (Fulton Cty. Code Ordinances Sec. 34-151).[2] In the portion of the citation describing the allegedly unlawful conduct, the officer wrote that Ms. MacLean had "violat[ed] . . . 511-6-08(2)(b)(3) the state regulations requiring display of the temporary food service permit." Ex. A.

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[1] It should be noted that Ms. Maclean's groups previously successfully sued the City of Atlanta for attempting to regulate feeding homeless people under another ordinance in 1997. *See Richardson v. City of Atlanta*, No. 1:97-CV-2468 (N.D. Ga. 1997). Moreover, in 2003, the City of Atlanta and the Georgia State University police met and agreed that feeding the homeless was not subject to the regulatory scheme at issue here.

[2] The citation refers to a "Sec. 34-152," but this appears to be an error. Section 34-152 is "reserved," while Section 34-151 incorporates state health regulations by reference.

ARGUMENT

I. The Citation Must Be Dismissed Because Ms. Maclean Was Feeding Homeless People At No Charge, Not Operating a For-Profit "Food Service Establishment" That Would Have Required A Permit.

Since Atlanta Municipal Code Sec. 86-2 incorporates the underlying regulation, Ms. MacLean is ultimately accused of violating Section 2 of Food Safety Rule 55-6-1-.08. But the rule applies only to commercial establishments, not to individuals like Ms. MacLean.

A person who wishes to "operate" such an establishment must apply for a permit from the Health Authority. *See* Ga. Comp. R. & Regs. r. 511-6-1-.08(2)(a)(3)(i). The specific portion of the rule on Ms. MacLean's citation requires that the "permit . . . must be displayed for public view and protected from inclement weather." Ga. Comp. R. & Regs. r. 511-6-1-.08(2)(b)(3) (hereinafter "the display requirement").

Authoritative guidance documents show that Ms. MacLean and others who provide free food for homeless people are not even required to *seek* a permit, and therefore cannot be required to display one. Chapter 511-6-1 states that the "[t]his Chapter *shall* be interpreted by [DPH]," and that the department's official "[i]nterpretations and guidance may be found in . . . the 'Interpretation Manual for the Georgia Rules and Regulations for Food Service.'" Ex. D. (Ga. Comp. R. & Regs. r. 511-6-1-.02(7)(d)(8) ("Interpretation of this Chapter")).

The guidance document states that "temporary food service establishment" permits are required only for events organized or sponsored by commercial entities. "If

the event is sponsored by a for-profit entity, for-profit vendors would be issued a Temporary Food Service permit under Chapter 511-6-1." Ex. E (Ga. Food Service Interpretation Manual, pp. 239–240.) Therefore, intermittent charitable feeding of hungry and homeless people is not subject to regulation, and Atlanta Municipal Code Sec. 86-2 does not apply to Ms. MacLean's conduct. The citation should be dismissed.

a. Even If The Regulation Could Somehow Apply To Ms. Maclean's Conduct, The Atlanta Code Section Is Void For Vagueness As The Regulation Does Not Give Fair Warning Of Such An Application.

Ms. MacLean and other like-minded individuals have intermittently participated in charitable feeding of hungry individuals since 2010. Until this citation, the City had not attempted to enforce Atlanta Municipal Code Sec. 86-2 (and the operative state regulation) against individuals who voluntarily provide free food to homeless people.

The Due Process Clause of the Fourteenth Amendment forbids government from depriving "any person of life, liberty, or property, without due process of law." United States Const., Amend. 14. A basic tenet of due process is that "[all persons] are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

A statute will be voided for vagueness if it defines the offense so people of ordinary intelligence must guess at the enactment's meaning or enforcers differ as to its application. Vagueness may invalidate a civil or criminal ordinance either (1) because it fails to provide notice to people of ordinary intelligence as to what kind of activity is prohibited or (2) it could authorize and possibly encourage arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)); *see also Hartrampf v.*

Georgia Real Estate Comm'n, 256 Ga. 45, 46 (finding term "unworthiness" too subjective to provide adequate notice of prohibited conduct); *Parker v. Leon County*, TCA 91-40133-WS, 1992 U.S. Dist. LEXIS 20723 *71-73 (N.D. Fla. October 16, 1992) (finding unconstitutional a county's reliance on a policy that did not include definitions or specifications of certain terms or criteria for weighing standards).

In this case, Ms. MacLean received a citation for purportedly violating a permit requirement that applies only to the operation of "food service establishments." Chapter 511-6-1 defines that term as follows:

> "Food service establishment" means public or private establishments which prepare and serve meals, lunches, short orders, sandwiches, frozen desserts, or other edible products directly to the consumer either for carry out or service within the establishment. The term includes restaurants; coffee shops; cafeterias; short order cafes; luncheonettes; taverns; lunchrooms; places which retail sandwiches or salads; soda fountains; food carts; itinerant restaurants; industrial cafeterias; catering establishments; *and similar facilities* by whatever name called.

Ga. Comp. R. & Regs. r. 511-6-1-.08(1)(58) (emphasis added).

The plain meaning of each example listed by the rule-writers clearly indicates to a person of ordinary intelligence that the regulation only applies to *commercial activity*. And for eight years, Ms. MacLean and other persons have believed their actions were lawful and not in violation of any provision of the Atlanta Municipal Code or of the operative state regulation. The City's lack of enforcement since 2010 shows that the City's interpretation was consistent with Ms. MacLean's view.

All this changed in November, when the City of Atlanta unilaterally changed its interpretation and determined that individuals who provide free food to homeless people

are not in compliance with the law. Accordingly, Ms. MacLean was cited without any notice that her conduct was unlawful. The regulation by its terms applies to commercial feeding only and is authoritatively interpreted to only reach commercial activity. Thus, to apply such a vague regulation to a new and unanticipated context, in contravention of the regulation's own terms, violates basic due process protections.

CONCLUSION

Adele MacLean received a citation for the act of providing free food to hungry and homeless persons who would otherwise go without. She was not operating a commercial "temporary food service establishment" in Woodruff Park. Therefore, it is impossible for her to violate a regulation that concerns food service events organized by for-profit entities—or else the statute is so vague that it cannot be enforced against her here. The citation and charge against Ms. MacLean must therefore be dismissed.

Respectfully submitted this ____day of November, 2017.

/s/ Gerald Weber

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December 13, 2017

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CERTIFICATE OF SERVICE

This is to certify that the foregoing *Defendant's Motion to Dismiss or Demurrer and Memorandum in Support Thereof* was served by hand to the address below:

Raines F. Carter, Solicitor General
Municipal Court for the City of Atlanta
150 Garnett Street SW, 3rd Floor
Atlanta, Georgia 30303

Respectfully submitted this __ day of November, 2017.

/s/ Gerald Weber
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