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REPORT TO COUNCIL

DATE: August 28, 2009

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Pedicab Operator Permit Cap and the City Issued Pedicab Operator's Licenses

INTRODUCTION

The San Diego City Council [City Council] is currently considering various amendments to the San Diego Municipal Code related to the regulation of pedicabs operating within the City of San Diego. These amendments include a limitation on the number of pedicabs permitted to operate within various designated zones within the City, and the repeal of the requirement that pedicab operators possess a valid California driver's license. In addition to these measures, the City Council has requested that our office research the legality of a restriction on the number of persons permitted to operate a pedicab within the City. The City Council has also asked whether the City can issue its own pedicab operator's license where operators must pass a City administered exam. This memorandum evaluates potential legal issues related to these proposals.

QUESTIONS PRESENTED

1. May the City limit the number of permits issued to operate pedicabs?

2. May the City require a City issued license to operate a pedicab within the City of San Diego?

SHORT ANSWERS

1. Yes. If the City Council can establish a legitimate governmental purpose for a restriction on the number of permits issued to operate pedicabs.

2. No. The City cannot require a City issued license because the California Vehicle Code preempts local licensing requirements for the operation of pedicabs.

BACKGROUND

The City of San Diego has regulated the pedicab industry since January 1, 2000. Since then, the number of pedicabs operating within the City has grown dramatically to over 600 during the peak summer tourist season. These pedicabs operate primarily within certain downtown areas. The concentration of pedicabs within this small area has negatively impacted the community with respect to public safety, traffic congestion, parking, and consumer protection. With these impacts in mind, the City Council requested, and the City developed, amendments to San Diego Municipal Code sections 83.0101 through 83.0136 all related to pedicabs ["Pedicab Ordinance"]. These amendments were introduced on July 28, 2009 by Ordinance O-2010-4, but have not been approved through a second reading.

Currently, the City issues Pedicab Operating Permits to anyone who provides basic personal information, photo identification and payment of an application fee. In addition to an operator permit, the pedicab itself must display a valid pedicab decal. To receive a pedicab decal, the owner must disclose the identity of all owners, provide a serial number for the pedicab, and show proof of $1 million in liability insurance. There are no restrictions on the number of pedicab decals that can be issued.

The amendments under consideration include the creation of pedicab restricted zones within which a pedicab must have a pedicab restricted zone decal to lawfully operate. Council has restricted the number of such decals to two hundred fifty by Resolution No. R-2010-52. The intent behind limiting the number of pedicab restricted zone decals, particularly within the downtown zone, is to limit the operation of pedicabs and congestion on the downtown streets.

The proposed amendments would also repeal the requirement that pedicab operators possess a valid California driver's license. This requirement is preempted by state law because a pedicab is essentially a three-wheeled bicycle and the California Vehicle Code [Vehicle Code] does not require a driver's license to operate a bicycle. The City Council has authorized the Mayor's Office of Intergovernmental Affairs to pursue an amendment to the Vehicle Code, which would authorize local agencies to require that pedicab operators possess a California driver's license.

ANALYSIS

I. Constitutional Limitations on Restricting the Number of Pedicab Operator Permits.

The imposition of a pedicab operator permit cap would allow a limited number of persons to operate a pedicab for hire within the City. If the supply of Pedicab Operator Permits is exhausted, anyone who subsequently seeks to work as a pedicab operator would be prevented from doing so. A restriction on the number of pedicab operator permits may give rise to an equal protection challenge. Whether or not such a restriction would survive such a challenge depends on whether a rational basis or strict scrutiny standard applies.

A. Is a Pedicab Operator Permit Limitation Rationally Related to a Legitimate State Interest?

If a pedicab operator permit limitation does not infringe upon a fundamental right or suspect class it would be subject to rational basis scrutiny. Rational basis scrutiny requires that a law be rationally related to a legitimate state interest. *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488 (1955). The City has under its police powers, in the interests of the general welfare, the authority to regulate a lawful business. As stated by the California Supreme Court in *Riley v. Chambers,* 181 Cal. 589, 593 (1919):

> "A lawful and useful occupation may be subjected to regulation in the public interest, and that all regulation involves in some degree a limitation upon the exercise of the right regulated. The test is whether or not the limitation imposed is really by way of regulation only, is one whose purpose and effect go no further than throwing reasonable safeguards in the public interest around the exercise of the right. If the limitation is of this character, its imposition is a proper exercise of the police power resident in the Legislature, and whose exercise is one of the latter's most important functions."

See also *Aaroe v. Crosby,* 48 Cal. App. 422, 426 (1920).

A law or regulation under a rational basis test must be reasonable and further a public purpose without being "arbitrary" or "discriminatory." *Max Factor & Co. v. Kunsman,* 5 Cal. 2d 446, 464 (1936).

The reasonableness of a limit on the number of pedicab operator permits would depend on the purpose for which the limitation is imposed. The congestion caused by the number of pedicabs operating within the downtown business areas is a public safety concern. Limiting the number of pedicabs operating in these areas would likely be interpreted as a reasonable measure to promote public safety.

However, the amendments to the San Diego Municipal Code currently under consideration already limit the number of pedicab restricted zone decals issued to 250 decals. Should the Pedicab Ordinance be adopted, a subsequent limitation on the number of Pedicab Operating Permits issued would not reduce congestion within a pedicab restricted zone unless the number of operating permits issued was less than 250 permits. Therefore reduction of congestion caused by pedicabs within the pedicab restricted zones may be found to not be a legitimate public purpose as long as the number of pedicab restricted zone decals is already capped.

To limit the number of permits the City Council would need to determine why it is necessary in light of the pedicab restricted zones. Furthermore it would be important that any operator permit limitation be implemented in a way that ensured the fair allocation of permits so that all potential permit applicants have an equal opportunity to secure a permit.

B. Strict Scrutiny Would Apply if a Fundamental Right or Suspect Class Were Impacted.

Strict scrutiny is applied to laws that affect a fundamental right or a suspect class. Strict scrutiny requires that laws be narrowly tailored to meet a compelling governmental interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).This is a far more demanding standard of review than rational basis scrutiny.

1. Would a Pedicab Operator Permit Cap Affect a Fundamental Right?

Certain traditional rights have been found by courts to be fundamental and are given a high degree of judicial deference. A limitation on the number of Pedicab Operator Permits restricts some from transporting passengers for hire. Picking up a passenger and transporting that passenger to their destination for a fee is a contract. A fundamental right to contract has been found to exist where one's inalienable rights to acquire, possess, and protect property are harmed without the "liberty to contract with others respecting the use to which he may subject his property, or the manner in which he may enjoy it." *Binford v. Boyd,* 178 Cal. 458, 461 (1918). However this right of contract is subject to the state's police powers and any reasonable regulations enacted to protect the public good. *Id.* at 462*; Cilibrasi v. Reiter,* 103 Cal. App. 2d 397, 401 (1951); *People v. Vandersee,* 139 Cal. App. 2d 388, 390 (1956)*; Hersch v. Boston Insurance Company,* 175 Cal. App. 2d 751, 755 (1959). A limitation on the number of Pedicab Operating Permits enacted with the purpose of protecting the public good would not infringe upon a fundamental right to contract.

Nor is there a fundamental right to pursue a given profession. In *Lupert v. The California State Bar*, 761 F.2d 1325, 1328 (9th Cir. 1985), a requirement that students attending a law school not accredited by the American Bar Association pass a state administered examination for first year law students was upheld because the "right to pursue one's chosen profession" is not a fundamental right. The right to operate a pedicab is no more fundamental than the right to practice law. Thus a limit on the number of pedicab operator permits would not affect a fundamental right.

a. Would a Pedicab Operator Permit Cap Affect a Suspect Class?

Strict scrutiny also applies to a regulation that creates a suspect classification. Laws based upon classifications of race, religion, or alienage have been found by courts to be suspect and thus subject to strict scrutiny. Currently there are no restrictions on the number of Pedicab Operator Permits issued. Any restriction limiting the number of operating permits would create two classes, those with a permit who may operate a pedicab lawfully, and those without a permit. Neither of these appears to be a suspect class. However strict scrutiny may be applied if there is a disparate impact upon a suspect class. *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 265-266 (1977).

It has been suggested that a restriction on the number of Pedicab Operating Permits would reduce the prevalence of foreign students working as pedicab operators in the City. This could potentially give rise to a challenge that an operator permit cap is intended to deprive aliens of an opportunity to pursue a lawful trade.

The Federal Government has broad discretion to make distinctions between citizens and aliens. This federal power extends from the constitutional powers to regulate immigration whereby "the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews v. Diaz,* 426 U.S. 67, 81 (1976). Federal distinctions based upon alienage are held to rational basis scrutiny and are thus upheld unless "wholly irrational." *Aleman v. Glickman,* 217 F.3d 1191, 1197 (9th Cir. 2000) (quoting *Diaz 426 U.S. at 83)*; *Garberding v. Immigration & Naturalization Service,* 30 F.3d 1187, 1190 (9th Cir. 1994) (*quoting Sudomir v. McMahon,* 767 F2. 1456, 1464).

This federal discretion to regulate the conduct of aliens has not been extended to the same degree to state and local governments. States are generally prohibited from making laws regulating the conduct of aliens. In *Graham v. Richardson,* 403 U.S. 365 (1971), an Arizona statute denying

welfare benefits to lawfully admitted aliens was overturned as the "Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide ... on an equality of legal privileges with all citizens under nondiscriminatory laws." *Id.* at 374. However, while considering a New York law that required civil service employees to be United States citizens the Court recognized a State's interest in "establishing its own form of government, and in limiting participation in that government to those who are within the basic conception of a political community." *Sugarman v. Dougall,* 413 U.S. 634, 643 (1973). The Court also reasoned that states can prohibit aliens from positions that "participate directly in the formation, execution, or review of broad public policy functions that go to the heart of representative government." *Id.* at 647. The effect of *Sugarman* was to overturn the citizenship requirement as overbroad because it captured the "sanitation man, typist, and office worker" as well as "the person who directly participates in the formulation and execution of important state policy." *Id.* at 644.

In subsequent cases the Supreme Court found that police officers (*Foley v. Connelie,* 435 U.S. 291 (1978)) and school teachers (*Ambach v. Norwick,* 441 U.S. 68 (1979)) are positions involving discretion in the execution of public policy and therefore upheld laws requiring citizenship to be considered for employment under a rational basis standard. In *Bernal v. Fainter,* 467 U.S. 216 (1984), the Court struck down a Texas law requiring notary publics to be United States citizens using strict scrutiny as notary publics did not have discretionary power to create or execute policy.

To determine whether rational basis or strict scrutiny should be applied to an alienage classification, the Supreme Court specified a two-part test. *Cabell v. Chavez-Salido,* 454 U.S. 432 (1982). First the specificity of the classification is examined for under inclusiveness or over inclusiveness. A classification that is substantially under inclusive or over inclusive will undercut a government claim that the classification serves a legitimate governmental purpose. *Id.* at 440. Second, the classification may only be applied to persons "who participate directly in the formulation, execution, or review of broad public policy." *Id.* at 440.

If it could be established that a permit limitation had the effect of classifying operators based upon alienage, the Cabell test would apply. A Pedicab Operator Permit limitation would be specific to persons who wish to operate a pedicab for hire, and is thus neither under inclusive or over inclusive. However, the second prong of the *Cabell* test asks if the

operation of a pedicab requires the formulation, execution, or review of public policy. The operation of a pedicab involves transporting passengers around the City on a human powered bicycle. It seems clear that this vocation does not involve the formulation, execution, or review of public policy. Thus, if it could be shown that operator permit limitations were in some way based upon alienage, a court could evaluate such an ordinance under the strict scrutiny standard.

II. Preemption and The City Issuance of a License to Operate a Pedicab.

In response to this Office's conclusion that the City cannot require possession of a California driver's license to obtain a Pedicab Operator Permit, the City Council asked whether the City could require that applicants obtain a City-issued license to operate a pedicab as part of the Pedicab Operator Permit application process.

As a charter city, the City may enforce regulations that conflict with general state laws, but only if the subject of the regulation is a "municipal affair" and not one of "statewide concern." *Barajas v. City of Anaheim*, 15 Cal. App. 4th 1808, 1813 (1993). If a municipal regulation conflicts with a state statue and the subject of the regulation is of statewide concern, the regulation is preempted by the state law. *Id.*

"A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *Id. (*quoting *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993)). "[L]ocal legislation enters an area that is fully occupied by general law when the Legislature has expressly manifested its intent to fully occupy the area . . . ." *Id.* at 1813-14, (quoting *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897-98 (1993)).

In this case, the proposed regulation is preempted by state law because: (1) it conflicts with state law by entering an area fully occupied by state law, and (2) the subject matter of the regulation is of statewide concern. The Vehicle Code clearly indicates its subject matter is of statewide concern, and it clearly expresses the Legislature's intent to fully occupy the field regulating the operation of vehicles on public streets. Vehicle Code section 21 states: "Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein."

The Vehicle Code requires a valid driver's license to operate a motor vehicle or motorcycle on public streets and highways (*See* California Vehicle Code Section 12500), but does not require a license for the operation of a bicycle or a pedicab on public streets. Although the Vehicle Code contains numerous regulations regarding the operation of bicycles, it is silent as to bicycle or pedicab licenses. The Vehicle Code does not expressly or implicitly delegate power to local agencies to create bicycle or pedicab license requirements.

Delegation of regulatory power to local agencies is not implied by silence on a particular item. "Courts have invariably held, 'The delegation to local authorities of power to make vehicular traffic rules and regulations will be *strictly construed*, such authority must be *expressly (not impliedly)* declared by the legislature.'"[1] *Id.* at 1815 (quoting *City of Lafayette v. County of Contra Costa,* 91 Cal. App. 3d 749, 756 (1979)). Therefore, the silence in the Vehicle Code regarding licenses for operation of bicycles or a pedicab on public streets, in the absence of any express declaration of delegation, does not constitute a delegation to local authorities to require such licenses.

Furthermore, according to the maxim of statutory interpretation *expressio unis est exlusio alterius* (the expression of one thing implies the exclusion of another), the Legislature's inclusion of a license requirement for motor vehicles and motorcycles and silence as to any license requirement for bicycles and pedicabs indicates the Legislation's intent to exclude any such license requirement. *See Barajas* 15 Cal. App. 4th, 1815, fn. 5 and Black's Law Dictionary, 602 (7th ed. 1999). A City-issued pedicab license requirement is therefore preempted by state law.

CONCLUSION

Generally, the City may regulate a lawful business or occupation under its police powers including the operation of a pedicab. The City may not however implement a limitation on the number of Pedicab Operating Permits and adopt the Pedicab Restricted Zones without a reasonable justification for doing so. Any additional regulation must take care to avoid effects based upon alienage as this could expose the law to strict scrutiny review. This stringent level of review would require that a compelling governmental purpose be at stake, and that any regulation be narrowly tailored to address this purpose.

The City may not issue a license to operate a pedicab as its authority to do so is preempted by state law. The California Vehicle Code expressly states the Legislature's intent to regulate the operation of all vehicles on public roads throughout California, and does not require any form of licensure to operate a bicycle on California streets. The silence on the issue of requiring licenses to operate a bicycle or pedicab indicates intent by the Legislature that a license should not be required.

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[1] The court in *Barajas v. City of Anaheim,* 15 Cal. App. 4th 1808, 1815 (1993), goes on to state : "We have found no reported judicial decision or opinion by this state's Attorney General that has sanctioned an implied legislative grant of authority to local agencies on any subject that is touched upon in the Vehicle Code; quite the opposite."