

MEMORANDUM OF LAW

DATE: November 3, 1987

TO: Betsy McCullough, Transportation and Land Use
Committee Consultant
FROM: City Attorney
SUBJECT: Restraint of Trade and Regulatory Fees -
Referral from Transportation and Land Use
Regarding Item No. 9, Committee Meeting Date of
October 12, 1987

By referral of October 13, 1987, you requested our advice concerning Councilmember Wolfsheimer's question whether establishing numerical limits on taxicab operator permits is a restraint of trade. The question arose during consideration of an amendment to Council Policy 500-2 delineating the City Manager's responsibility in issuing single taxicab operator permits.

By way of background, this amendment was contained in City Manager Report No. 87-342 which forwarded to the Transportation and Land Use Committee a recommendation that the decision of a Hearing Officer directing the transfer of a single operator permit to another single operator be overruled. The Hearing Officer had held that restricting such transfers to sixteen percent (16%) of the total number of permits was not supported in practice and represented an arbitrary goal.

Section 3 of Council Policy 500-2 reads: "No taxicab permits will be issued or transferred to any person if such issuance or transfer would result in single permit holders in aggregate having interest in more than sixteen percent (16%) of the existing permits." The implementation of this policy would seemingly require the City Manager to disapprove the transfer of single taxicab permits to other single operators. The Hearing Officer found to the contrary. The Paratransit Administrator appealed this decision.

The Paratransit Administrator has advised that levels of service and operating efficiencies decrease as the number of

individual taxicab permits increase, with related increases in administrative costs and decreases in regulatory efficiency. None of these factors was articulated in the policy. The Council Policy did specifically seek to avoid monopolization in the cab industry by limiting the concentration of multiple permits to no more than forty percent (40%) for any one holder, but did not establish any basis for a goal of sixteen percent (16%) for

single permits.

The Council Policy did not set forth any statement or finding of public convenience and necessity implicit in the regulation of transportation industries. Attached is a memorandum dated April 9, 1987 addressed to Councilmember Struiksma on this subject. We do not see the question you present to be so much an issue of restraint of trade, as posed by Councilmember Wolfsheimer, but rather a question of establishing a proper basis for such regulation, and we therefore answer her question in the negative based on our earlier advice to Councilman Struiksma. The City is authorized by Public Utilities Code section 5353 to regulate taxicabs, and such regulation is exempt from the restraint of trade provisions of the Sherman Act, 15 U.S. Code section 1, et seq., under the "state action" exemption. See *Golden State Transit Corp. v. City of Los Angeles*, 563 F.Supp. 169 (D.C. 1983), aff'd, 726 F.2d 1430 (9th Cir. 1984), cert. denied, 471 U.S. 1003, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985).

We may observe that the paratransit industry often seeks to reduce competition; regulators seek to increase competition by increasing the number of permits. Decreased competition through fewer cabs could result in decreased service; public convenience and necessity would dictate an opposite result.

The present percentage of single taxicab permits is less than eighteen percent (18%). To reduce this number to sixteen percent (16%) would require transfers be restricted. The revision to Council Policy 500-2 proposed in City Manager Report No. 87-494 would direct the City Manager to accomplish what the Council Policy seemingly directs, the Hearing Officer's comments notwithstanding. This is permissible if a factual basis supports such reduction based on regulation under the City's police power. Other alternatives are to maintain the status quo but allow existing single permit operators to transfer to other single operators or to fleet operators, to allow complete transferability of the existing permits, or to increase either the number of permits or the percentages.

Maintaining the status quo or increasing transferability does not act in derogation of the concept of public convenience and

necessity that can accompany increased competition. However, there is also nothing to preclude the Council from simply eliminating restrictions on the transfers of single permits from the Council Policy, thereby effectively relieving the City Manager of any responsibility for the economic viability of industry competition, but still maintain the forty percent (40%) maximum limit for anti-monopolization purposes.

Although the number of permits can be changed pursuant to San

Diego Municipal Code section 75.0104(a) by the City Council, the following considerations should be kept in mind:

1. An immediate decrease in the total number of permits not based on attrition or a factually supported finding that the public convenience and necessity supports such a reduction would be impermissible under the City's police power;
2. Maintaining the status quo does not affect any property interests or public convenience and necessity. If anything, market forces dictate whether or not individual permit holders could viably operate in a competitive atmosphere, a factor which is also achieved by eliminating restrictions on single permit transfers, other than for monopolization.

A second part of your memorandum concerns regulatory fees vis a vis cost recovery and penalties. We do not perceive any legal objection to the imposition of regulatory fees for cost recovery of City services involved in regulating the paratransit industry. We also do not perceive the fees or apportionment proposed in either City Manager Report No. 87-494 or 87-493 to be impermissible so long as those fees and fines rationally attain regulatory objectives. The proposed process allows for a public hearing pursuant to Council Policy 100-05 and Administrative Regulation 10.05 and due process for public review of the staff rationale for proposed regulatory fees. We defer further comment in the absence of a narrower question or concern permitting a more tailored response.

JOHN W. WITT, City Attorney

By

Rudolf Hradecky

Deputy City Attorney

RH:mrh:238(x043.2)

Attachment

cc Barbara Lupro

Allisyn Thomas

Tom Steinke

ML-87-110