MEMORANDUM OF LAW

DATE: March 14, 1991

TO: Jack McGrory, City Manager
FROM: City Attorney
SUBJECT: Potential Transient Transportation Tax Ordinance Revisions

BACKGROUND

This is in response to Mr. Lockwood's memorandum requesting our views concerning an alternative to the current Transient Transportation Tax ("TTT"). Two alternatives were presented: 1) a daily flat fee on each vehicle rental; or 2) an annual flat fee on each rented vehicle to be paid by the operator of the vehicle rental business. The first alternative is preferred by the Financial Management Department since the tax would be paid by the transient (consumer) and would be easier to administer.

The TTT ordinance originally adopted in August 1990, and currently being held in abeyance pending the Attorney General's opinion on the subject, was found by the State Board of Equalization ("Board") to be a "use" tax and not a "substantially different" tax within the meaning of California Revenue and Taxation Code ("R & T") section 7203.5 By way of explanation,

> in 1955, the Legislature enacted the Bradley-Burns Uniform Local Sales and Use Tax Law . . . as part of the Revenue and Taxation Code . . . . It was the first legislation which authorized counties cities to adopt and impose sales and use taxes. Under Bradley-Burns, the State Board of Equalization (hereinafter Board) is the sole agency authorized to administer and collect county sales and use taxes . . . . Each county city adopting a local sales and
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> use tax is required to execute a contract with the Board which provides that the Board will perform all functions incident to the administration and operation of the tax ordinance.

County of Sonoma v. State Board of Equalization, 195

Cal.App.3d 982, 985 (1987).

> The State Board of Equalization shall not administer and shall terminate its contract to administer any sales or use tax ordinance of a city, county . . . if such city, county . . . imposes a sales or use tax in addition to the sales and use taxes imposed under an ordinance conforming to the provisions of Sections 7202 and 7203.

R & T section 7203.5.

The requirements for a local use or sales tax acceptable under Bradley-Burns are listed in R & T sections 7202 and 7203 and are paraphrased as follows:

1. Local tax rate must not exceed 1-1/4 percent;
2. Provisions of the local tax ordinance must be identical to the state sales and use tax acts;
3. The local ordinance must contain a provision that the City shall contract prior to the effective date of the local sales and use tax ordinance with the State Board of Equali-zation to perform all functions incident to the administration or operation of the local sales and use tax ordinance. (Emphasis added.)

The purpose behind this legislation was explained by the California Supreme Court:

> The Bradley-Burns Act "contemplates an integrated, uniform system of city and county sales and use taxation. The counties are given authority to impose sales and use taxes as a means of raising additional revenue, and the cities are furnished with a plan of state administration which will relieve them from operating collection systems of their own. The taxpayers will receive the benefit of a scheme which will free them from the burden of complying with differing
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> regulations of state and local taxes, avoid the necessity of making payments and reports to several governmental bodies, and permit all

> auditing to be done by a single agency."

Rivera v. City of Fresno, 6 Cal.3d 132, 136 (1971), citing Geiger v. Board of Supervisors, 48 Cal.2d 832, 837 (1957).

The preceding language should assist in explaining the Board's objection to the original TTT ordinance, since the City did not intend that ordinance to be either a sales or use tax.

ANALYSIS

The alternatives available to the City in order to obtain revenue from the vehicle rental business would appear to be:

1. Flat daily fee on each vehicle rental transaction.

(The option preferred by Financial Management.)

It is our opinion that such a fee would be construed by the State Board of Equalization as a "use" tax, since it would be imposed at the consumer level and the base of the tax would be keyed to usage (daily rental); therefore similar problems would be encountered as with the TTT enacted in 1990. Some definitions found in the R & T Code may be useful here to clarify any potential misconceptions.

"Use," as defined by R & T section 6009:

> includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business. (Emphasis added.)

R & T section 6006, "Sale," states that "'Sale' means and includes: . . . (g) Any lease of tangible personal property in any manner by any means whatsoever, for a consideration . . . ." (Emphasis added.) R & T section 6006.3 states that "'Lease' includes rental, hire and license."

R & T section 6016, "Tangible personal property," states that "'Tangible personal property' means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses."

R & T section 7203, "Use tax; operative effect," . . . (a), states in relevant part that

> the use tax portion of any sales and use tax ordinance adopted under this part shall impose a complementary tax upon the storage, use or
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> other consumption in the county city of tangible personal property purchased from any retailer for storage, use or other consumption in the county city. Such tax shall be at the rate of 1-1/4 percent of the sales price of the property whose storage, use or other consumption is subject to tax.

The State Board of Equalization auditors and legal counsel, in an informal discussion with our office, could not give the assurance that this alternative would be "substantially different" as required in R & T section 7203.5, and consequently recommended against its adoption.

2. The second alternative listed in Mr. Lockwood's memorandum is an annual flat fee per rented vehicle.

It is our opinion that such a fee would be acceptable; that is, it would not be considered a sales tax since it would not be "imposed for the privilege of selling tangible personal property at retail." R & T section 7202. In addition, it would also not be included under the definition of a "sale" per R & T section 6006(a), "Any transfer of title or possession . . . of tangible personal property for a consideration"; and (g), "Any lease of tangible personal property in any manner or by any means whatsoever, for a consideration."

Hence, this tax is "substantially different" than a sales tax, and is akin to a business license tax. A business license tax is, of course, different than a use or sales tax. The California Supreme Court held in West Coast Advertising Co. v. City of San Francisco, 14 Cal.2d 516 (1939), as quoted in Arnke v. City of Berkeley, 185 Cal.App.2d 842, 849 (1960), that "the levy of taxes including license taxes by a city for revenue purposes is a municipal affair and . . . a city may legally impose and collect license taxes for revenue purposes." And further, "a municipal taxing scheme is thus valid unless pre-empted by state law or prohibited by constitutional principles." (Emphasis added.) Times Mirror Co. v. City of Los Angeles, 192 Cal.App.3d 170, 179 (1987), citing United Business Com. v. City of San Diego, 91 Cal.App.3d 156, 164 (1979).

The fact that vehicle rental agencies may be required to pay different, higher rates than other businesses should not cause constitutional problems of due process or equal protection if the ordinance is written in compliance with requirements found in relevant case law.

> Neither due process nor equal protection impose a rigid rule of equality in tax legislation . . . . "It is well settled that occupations and businesses may be classified and subdivided for purposes of taxation and it is within the discretion of the Legislature to exact different license taxes from different classes or subclasses of businesses, subject only to the limitations of the state and federal Constitutions in regard to equal protection of the laws. No constitutional rights are violated if the burden of the license tax falls equally upon all members of a class, though other classes have lighter burdens or are wholly exempt, provided that the classification is reasonable, based on substantial differences between the pursuits separately grouped, and is not arbitrary." (Citations omitted.)

Times Mirror Co. v. City of Los Angeles, 192 Cal.App.3d 170, 183 (1987); see also Park 'N Fly of San Francisco, Inc. v. City of South San Francisco, 188 Cal.App.3d 1201 (1987); Kelly v. City of San Diego, 63 Cal.App.2d 638 (1944).

An informal discussion with the auditors and legal counsel of the State Board of Equalization on this alternative as well, leads us to the conclusion that this alternative could be successfully implemented as a revenue-raising measure. It must be understood, however, that this is an informal opinion and a final analysis cannot be conducted until the final ordinance is reviewed by the Board.

CONCLUSION

It is our conclusion that a valid ordinance lies with the second alternative presented. Such an ordinance framed in the nature of a business license tax should avoid any objection by the State Board of Equalization as to sales or use tax construction

and is legally supported by relevant case law.

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By
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