DIAL-A-RIDE PROJECT IN ANN ARBOR: LEGALITY

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Prior to the commencement of dial-a-ride service in Ann Arbor in September 1971, rather clear indications existed that the local taxicab industry regarded the program with fear and suspicion and and would give serious consideration to instituting litigation to prevent the program from coming into being. In an effort to cooperate with the taxicab industry and to alleviate its fears, the Ann Arbor Transportation Authority specifically designed the dial-a-ride program so that taxicab companies could bid to become the operators of the system. No bids were received, however, and the authority proceeded with plans to operate the system itself. To no one's great surprise, a lawsuit denominated Kon et al. v. City of Ann Arbor et al. (Washtenaw County Circuit Court, No. 5967) was commenced by Ann Arbor's 2 major taxicab companies just a few days prior to the scheduled commencement of service. The principal relief requested in the suit was an injunction against the operation of the dial-a-ride system.

The taxicab companies contended that the establishment of dial-a-ride would be unlawful for several reasons.

1. Dial-a-ride vehicles were really taxicabs and were, therefore, required to obtain licenses under the Ann Arbor taxicab ordinance;
2. The granting of licenses to existing taxicabs by the city constituted an implied agreement by the city that it would not engage in a competing business or, in the alternative, that if it did engage in such a business it would do so on terms identical to the terms under which the taxicab industry operates; and
3. Ford Motor Company (which was sued as a co-defendant) was being greatly enriched by the program without giving adequate consideration in return, and the public was thereby defrauded.

The city responded to the complaint of the taxicab companies by filing a motion for summary judgment, in which the Ford Motor Company joined. In its motion, the city answered the principal contentions of the plaintiffs as follows:

(1) The alleged necessity for compliance with the Taxicab Ordinance. The Ann Arbor Taxicab Ordinance (City Code, Chapter 85) defines "Taxicab" as follows:

7:151(1) "Taxicab" shall mean and include any motor vehicle operated solely or mainly within the public streets and quasi-public places of this City, accepting passengers for transportation for hire on call or demand, between such points as may be directed by the passenger or passengers. The term taxicab shall not include vehicles furnishing mass transportation service, such as motor buses which operate over fixed routes or on a fixed schedule or between definite termini; buses employed solely for transporting school children; chartered buses; or motor vehicles used solely for funerals, weddings, christenings, and similar events.

Plaintiffs assert that the dial-a-ride system, if established at all, must be established in conformity with the Taxicab Ordinance, but it is clear from the very definition of taxicab that the ordinance is inapplicable to dial-a-ride.

First, the ordinance states that taxicabs will operate "between such points as may be directed by the passenger or passengers." The dial-a-ride vehicles, however, are not subject to the specific directions of the passengers. As described in the dial-a-ride work program, the vehicles will pick up passengers at their homes but will be permitted to drop these passengers off only along a loop surrounding part of the central business district. As the work program makes explicit, "No stops will be made on streets off the loop."

Second, the ordinance specifically exempts the following from the definition of taxicab: "vehicles furnishing mass transportation service, such as motor buses which operate over fixed routes." The dial-a-ride vehicles will be operated under the auspices of the Ann Arbor Transportation Authority, a body corporate duly organized under P.A. 55 of 1963 [M.S.A. Section 5.3475(1) et seq.] for the specific purpose of operating a mass transportation system. Each vehicle

will provide transportation for 12 persons at one time, and no passenger will have the power—as he would in a taxicab—to limit the number of passengers to be transported. Moreover, as previously indicated, the dial-a-ride vehicles operate at least in part along a fixed route, namely, the central business district loop.

Hence, because the dial-a-ride vehicles are not to be subject to the specific directions of their passengers, because they will furnish mass transportation service, and because they will operate over fixed routes, these vehicles are simply not taxicabs under Chapter 85 of the City Code and, therefore, need not conform to the provisions of that chapter.

(2) The alleged unfair competition, breach of contract, and "deprivation" of property without due process. The individual plaintiffs are municipal taxicab licensees, and they claim that this status gives them standing to prevent the city from instituting the dial-a-ride system. A remarkably similar contention was advanced by the operators of private streetcar systems which had been municipally franchised when the city of San Francisco proposed to construct a municipal system; the battle progressed through the federal courts and up to the U.S. Supreme Court, and at all levels the power of the municipality to create its own transportation system was upheld [United Railroads v. San Francisco, 239 F. 987 (N.D. Calif. 1917); affirmed, 249 U.S. 517 (1918) (Holmes, J., for a unanimous Court)].

Before the U.S. District Court, the operators of the private streetcar systems argued—much as plaintiffs do here—that the creation of a municipal system would breach contractual obligations created by their franchises and would deprive them of property without due process of law. The court rejected this argument quoting with approval from the decision of the U.S. Supreme Court in Knoxville Water Co. v. Knoxville (200 U.S. 22):

> A municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested in words so clear as not to admit of two different or inconsistent meanings.

In the instant case, plaintiffs do not contend—nor could they truly—that the city of Ann Arbor in granting taxicab licenses explicitly agreed not to enter the taxicab business. A fortiori, plaintiffs cannot successfully contend that the city agreed not to commence a dial-a-ride system, which, by definition, is not even a taxicab system. Plaintiffs state only that their licenses are implied contracts, and, under the clear-cut decisions of the U.S. Supreme Court, the exercise of the municipal police power in the public interest cannot be relinquished by mere implication.

Thus far, plaintiffs' contentions have been treated purely as matters of law and have been shown to be untenable. It might be added, however, that plaintiffs' arguments are also factually unsupportable. The dial-a-ride system, in its initial phases, will serve only 2,100 of Ann Arbor's 31,000 households and only between 6:30 a.m. and 6:00 p.m. on Mondays through Thursdays and between 6:30 a.m. and 11:00 p.m. on Fridays and Saturdays, and is thus clearly incapable of competing—let alone competing unfairly—with the taxicab industry, which serves the entire community 24 hours a day. Thus, even if the creation of a municipal transportation system gave plaintiffs a legal foundation for their claim—which it does not—their "damages" in this case would be entirely too speculative to justify equitable relief.

(3) The alleged illegality of cooperating with Ford Motor Company. Plaintiffs argue that, because Ford Motor Company stands to benefit from its agreement to cooperate regarding the development of the dial-a-ride system, commencement of the system is illegal. The short answer to this contention is that, if benefit to a private party invalidated a government contract, a government could almost never enter into contracts—a patently absurd conclusion.

Plaintiffs appear also to advance the related argument that the consideration received from Ford is "woefully inadequate" and that the agreement is therefore invalid. This argument, particularly in light of the facts of the situation, is entirely without merit. It is first to be noted, as a matter of law, that a municipal contract is presumed to be valid (1). Moreover, the adequacy of consideration is not generally a matter of judicial concern (1). In this case, it is the considered judgment of the members of the Ann Arbor Transportation Authority that the arrangement with Ford Motor Company is more than fair to the city and its residents and very much in the public interest.

While it is true that Ford may obtain data which will be useful to it in developing dial-a-ride systems in other localities, the information to be obtained from the Ann Arbor experiment will be public information,

usable not only by Ford but by all other interested parties. Furthermore, Ann Arbor is under no obligation whatever to obtain future vehicles from Ford if the system proves successful. Ford, in exchange for this information, is devoting numerous hours of expert manpower to developing a system which is expected to be of great long-term benefit to the citizens of Ann Arbor in meeting their transportation needs; additionally, Ford will, at no cost, lend a vehicle to the Transportation Authority for use in the initial phases of the program. Even if the court is inclined to consider the question of adequacy of consideration, there can be no doubt that the citizens of Ann Arbor are being treated fairly in the instant situation.

Summary: What was true in the case of the San Francisco streetcars in 1917 is even more true in today's crowded urban environment: The municipality must be permitted to further the public interest by improving the system of public transportation. Particularly in a case like the present one, where the proposed improvement is experimental in nature and covers only a small part of the city, the speculative fears of the taxicab industry provide no basis for equitable relief.

The city further contended that the taxicab industry was precluded by the legal doctrine of estoppel from obtaining injunctive relief. The city argued that, at the urging of the taxicab industry, the city had gone out of its way to make it possible for the taxicab industry to become the operator of the dial-a-ride system and that it would therefore be inequitable for the taxicab industry to be permitted to keep the system from coming into being.

Following a hearing, Washtenaw County Circuit Judge Ross W. Campbell granted the city's motion for summary judgment, thereby dismissing the lawsuit. A copy of the judge's opinion is included in the Appendix.

Subsequent to the issuance of the Circuit Court order, the plaintiffs filed an appeal with the Michigan Court of Appeals. The matter was argued in April 1972. The arguments of the taxicab companies on appeal were essentially the same as those made at the trial level, with a slight shift in emphasis. Rather than complaining principally of a purported violation of an implied agreement not to compete, the companies contended they were being denied equal protection of the laws because they were governed by standards different from those applied to dial-a-ride concerning such matters as rates and licensing. The city, in its brief, answered this contention as follows:

While appellants phrase their constitutional arguments both in terms of due process and equal protection, it appears that these arguments are based on a single premise, namely, that similarly situated activities are being treated in an unlawfully dissimilar manner. As appellees have demonstrated in the preceding portion of this brief, it is simply not the case that dial-a-ride and taxicabs are similar activities; moreover, appellants' suggestion that taxicab rates are somehow forced upon them by a malevolent city government is simply untrue. Hence, appellants' premise is false, and their argument is without support. However, it is worth going on to point out that even if dial-a-ride and taxicabs were virtually identical in their operations and even if the city did force the taxicab industry to charge particular rates, appellants' constitutional claims would be invalid, for the following reason: Dial-a-ride is an activity of a governmental agency, performed in the interest of public health, safety, and welfare, and this fact would make it constitutionally permissible to govern dial-a-ride by standards different from those applied to the taxicab industry.

In Springfield Gas and Electric Co. v. City of Springfield [257 U.S. 66 (1921)], the U.S. Supreme Court considered, and unanimously rejected, the claim that it constituted a denial of equal protection of the laws for a state to require private utilities to be regulated by a utilities commission while allowing a municipality to set the rates for a utility owned by it. Mr. Justice Holmes explained the Court's conclusion in the following way (257 U.S. 70):

The private corporation, whatever its public duties, is organized for private ends, and may be presumed to intend to make

whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object, it is a gain to a public body, and must be used for public ends. Those who manage to work cannot lawfully make private profit their aim, as the plaintiff's directors not only may but must.

Appellants cite an A.L.R. annotation and a handful of cases which purportedly demonstrate that it makes no difference that dial-a-ride is a governmental project and that dial-a-ride and taxicabs must follow the same procedures. These authorities, however, are utterly irrelevant. All that these authorities indicate is that, if a government provides a service, it cannot unreasonably discriminate among users of the service. For example, the Ann Arbor Transportation Authority could not discriminate unreasonably among dial-a-ride riders. The authorities in no way suggest that there is anything unlawful about a governmental agency engaging in an activity which competes with a private activity, even if rate structures are different and even if such competition is detrimental to the private activity.

Indeed, the propriety of governmental agencies engaging in activities potentially competitive with private business has been upheld by the highest courts on both the state and federal level, and the poverty of appellants' position is best indicated by the fact that appellants have consistently ignored these controlling decisions throughout these proceedings [Springfield Gas and Electric Co. v. City of Springfield, supra; United Railroads v. San Francisco, 249 U.S. 517 (1918); Detroit v. Wayne Circuit Judges, 339 Mich. 62 (1954); Andrews v. City of South Haven, 187 Mich. 294 (1915)].

To summarize, it is not true that dial-a-ride is the same sort of transportation system as the taxicab industry, nor is it true that any governmental agency forces the taxicab industry to charge rates higher than those of dial-a-ride; however, even if either or both of these allegations were true, appellants would have failed to state any valid constitutional claim.

On June 2, 1972, the Court of Appeals rendered a unanimous decision upholding the Circuit Court and affirming the legality of Ann Arbor's dial-a-ride system. A copy of this decision is also given in the Appendix. The taxicab companies have elected not to appeal the decision of the Court of Appeals to the Michigan Supreme Court. Hence, it would appear that the legal basis for Ann Arbor's dial-a-ride system has been firmly established.

Reference

1. McQuillin. Municipal Corporations, 3rd Ed. Sections 29.96 and 29.02.

Appendix

TRANSCRIPT OF OPINION OF WASHTENAW COUNTY CIRCUIT JUDGE ROSS W. CAMPBELL

THE COURT: Gentlemen, I apologize for being much longer than I had anticipated, but in deference to the amount of work which counsel have put into the case, the numerous serious questions presented and their complexity required more time to decide the matter than I had anticipated, and I wanted to be able in rendering my decision to make the opinion as detailed as the complexity and number of issues required.

First of all, I would like to comment that this, indeed, is a most unfortunate situation. The public through its duly elected officials and government is trying to develop and improve less expensive systems of transportation for the people of the community, and the changes they are attempting to introduce, at least experimentally, necessarily compete with and threaten the livelihood of those who are established in providing additional service. The situation is somewhat reminiscent of the dislocation that we know accompanied the advent of the industrial revolution many years ago, a process which is still in evolution. But this case is not so much a conflict between the mu-

nicipal and private enterprises as a matter of mutation and experimental change in the form of public transportation service, as I see it.

Let us assume for a moment, without deciding, that dial-a-ride is a taxi service under Chapter 85, Section 7.151(12), of the Ann Arbor City Code, and that, if operated by a private person or a corporation, it would fall within Chapter 85, Section 7.161, of the code, which requires a certificate of public convenience.

The Court does not interpret Chapter 85, Section 7.161, of the code as applying to the city itself. It would be patently useless and circular to require a city to obtain from itself a certificate of public convenience and necessity before it could operate a taxicab service itself. The provision of the code was obviously intended to apply only to persons other than the city itself. So, I find first that provision of the city code does not apply to the city itself should it undertake to operate a taxi service.

Second, viewing the complaint in the manner most favorable to the plaintiffs, I find that there is no estoppel operating against the defendants.

Third, there is no allegation that an individual passenger in the vehicles which the transportation authority would be operating would have the power, as they would in a taxicab, to limit the number of passengers who could be in those vehicles, again viewing the complaint in the manner most favorable to the plaintiffs; that is, there is no allegation that the passengers or any one passenger could hire the entire vehicle with one fare and deprive other persons or other members of the public from occupying empty seats in it.

There is further no allegation in the complaint that the vehicle could be hired to take any particular route that the passenger wishes; instead it must follow a fixed route. Now these are not the only indicia, but it would be difficult to conceive of a taxi, at least within our traditional concept of a taxicab, in which a passenger did not have those two rights.

Now even if these vehicles are otherwise classed as taxicabs or even if they are ordinary taxi vehicles which the city should choose to utilize for this purpose (I do not understand that they do but assuming for the purpose of this argument or this opinion that the city were to utilize ordinary types of vehicles like those used as taxicabs), I would find that they are vehicles which are within the words of the ordinance furnishing mass transportation service, and the furnishing of mass transportation service is not dependent upon the configuration, the geometry, size, number of seats, or the color of the vehicle which is used for that purpose. As such, I find that these vehicles are expressly exempted from the definition of taxicab under Chapter 85, Section 7.151(12), of the Ann Arbor City Code. My third finding, then, is that these vehicles are not taxicabs within the definition of this section of the code.

Now, there is no question but that the dial-a-ride system will compete with the plaintiffs, but does it constitute unfair competition, within the technical definition of that phrase, as grounding an action under the law? To do so, there must be traditionally a passing off or pawning off the goods or services of one person as those of another. It is not every competition, no matter how hard it may be on the person who is not used to that competition, which falls within the legal definition of unfair.

There is no allegation here of any passing off or pawning off of the services provided by the proposed transportation authority as those of any of the plaintiffs, individual or corporate; and, accord-

ingly, my fourth finding is that there is no unfair competition within the legal definition of such a phrase as capable of grounding a cause of action.

Do the city licenses issued to plaintiffs constitute a contract which prevents the city from going into the taxi business itself? If so, such a contract exists only by implication. I would quote from United Railroads of San Francisco v. City and County of San Francisco (249 U. S. 517, 993) as follows:

> In the construction of legislative enactments and of ordinances and of contractual relationships which directly concern the public, the doctrine which controls is as announced in Knoxville Water Co. v. Knoxville, 200 U.S. 22; 26 Sup.C. 224, 50 L.Ed. 353: "A municipal corporation, when exerting functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."
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> This general rule is but another form of stating a principle that statutory grants by way of franchise or property, in which the government or public has an interest, are to be constructed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by implication.

I find nothing in the law making such a franchise as was granted to the plaintiffs in this case an exclusive one pro tonto, and under these circumstances I must accept the reasonable interpretation of the language used in the ordinance under consideration here as not showing any deliberate purpose to make a surrender of the city's rights, nor as a conferring of such an exclusive right to the plaintiffs as against the city as would enable them to ground this action, even on the theory of a covenant or contract by the city not to compete.

I would point also to the appellate court opinion growing out of the case which I just cited (United Railroads v. San Francisco, 249 U. S. 517, 520) that a covenant by a city not to grant to any other person or corporation a privilege similar to that granted to the covenantee does not restrict the city from itself exercising similar power.

Mr. Crippen has well made his point here that the city originally put this system contract out for bids and might very well have contracted with a private agency for this purpose. But that is not the question before us here, and we will not address ourselves to that. What we have here is a case where a municipal authority itself will be operating the transportation system. Accordingly, the fifth finding of the Court is that the franchise issued by the city to the plaintiffs does not constitute a contract by the city not to compete.

The plaintiffs complain of deprivation of property without due process. The kind of damage which constitutes deprivation of property without due process and grounding of an action on that basis is damage which results from conduct, like taking or appropriation, that would be tortious in and of itself, unless in proceedings in eminent domain or under some other law authorizing it on the condition that damages be paid. In this connection I would again cite the United Railroads case, at page 521: "Mere competition alone does not ground such a right or claim for damages. Mere competition alone is not such a tortious taking as to ground such an action." Accordingly, my sixth finding is that there is no violation of the constitutional provision forbidding the taking of property without due process, viewing the allegations of the complaint in their most favorable light.

The complaint further alleges that the Ford Motor Company is giving the city a free vehicle and technical services in ex-

change for the city permitting the Ford Motor Company to do certain things. The decision as to the adequacy of consideration is in the first instance one for the duly elected representatives of the city to determine. Their decision and the terms of the contract in this case do not appear to the Court to be so inadequate as to be evidence of fraud or to shock the conscience of the Court. My seventh finding is that I do not find the consideration inadequate nor any evidence whatsoever of fraud from the face of the complaint.

For the same reasons that I have hereinbefore stated, my eighth finding is that I find no denial of equal protection to the plaintiffs. Ninth, I do not find that the actions of the city constitute an unreasonable, arbitrary, or capricious exercise of police power.

For the reasons stated, the motion for summary judgment is granted. Court is adjourned.

OPINION OF THE COURT OF APPEALS

Plaintiffs appeal from the trial court's grant of summary judgment [GCR 1963, 117.2(1)] in favor of defendants. We affirm.

Plaintiffs are licensed by defendant city under its ordinance to operate taxicabs in the city. Under authority of the mass transportation authorities act [MCLA 124.351 et seq.; MSA 5.3475(1) et seq.], defendant city has instituted and operates an experimental transportation system known as "dial-a-ride." Plaintiffs' action sought to restrain defendants, individually or collectively, from establishing and operating dial-a-ride.

On appeal, plaintiffs contend that dial-a-ride is subject to the city's taxicab ordinance; that plaintiffs are denied due process of law and equal protection of the law through the operation of dial-a-ride as proposed by defendants.

Chapter 85, Section 7.161, of the city's taxicab ordinance reads: "No person shall operate any taxicab in the city of Ann Arbor without first having obtained a certificate of public convenience and necessity from the board authorizing such operation." The language of the ordinance precludes its application to defendant city [United Railroads of San Francisco, 249 U. S. 517; 39 Supreme Court 361 (63 L. Ed. 739, 1919)].

The basic premise from which plaintiffs advance their due process and equal protection arguments is rights they assume they have as licensees. We find that basic premise to be false. Defendant city has reasonable control of its streets (Const. 1963, Article 7, Section 29). Plaintiffs have no right to use the streets without the consent of the city [Melconian v. City of Grand Rapids, 318 Mich. 397 (1922)]. The licenses plaintiffs rely on are nothing more than a privilege to do what is prohibited without such licenses [C. F. Smith Co. v. Fitzgerald, 270 Mich. 659 (1935)].

In establishing and operating dial-a-ride, defendant city is doing what the mass transportation authorities act, supra, authorizes.

Affirmed but without costs.

Quinn, Brennan, and Targonski, JJ.