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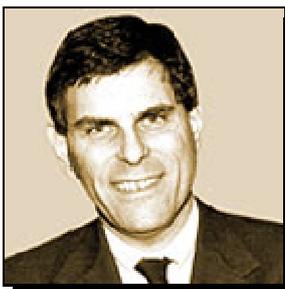
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MUNICIPAL LAW

BY JEFFREY D. FRIEDLANDER

Helping to Keep the City Moving: Pedicabs, Taxicabs and Bicycles

Innovation in transportation is high on the list of New York City's priorities, from new bicycle lanes and public plazas fostered by the City's Department of Transportation to the provision of clean, safe and efficient taxicabs. The Law Department supports these efforts by assisting in drafting both local and state legislation relating to transportation as well as the rules of city agencies that implement such laws, and by representing the city in transportation-related litigation. Several divisions of the Law Department participate in this work, including the Division of Legal Counsel, the Administrative Law Division and the Environmental Law Division. This article will discuss several recent cases and other matters handled by attorneys of these divisions in the area of transportation.



Pedicabs

It would have been hard to predict that, at the end of the first decade of the 21st century, the city would be involved in litigation over human-powered transport, known as pedicabs. This, however, has been the case. Pedicabs, directed mainly at tourists in Manhattan, have appeared in the streets, and legislation and rules have been adopted to address the traffic and safety hazards presented. Attorneys of the Division of Legal Counsel, working with the City Council and the Mayor's office, helped to craft the legislation governing the operation of pedicabs in the city.

Local Law 19 of 2007, enacted on April 23, 2007, requires pedicab businesses and pedicab operators to be licensed and further requires that each pedicab have liability and property damage insurance, seat belts, head lights, a rate card and a registration plate. Administrative Code §§20-250, 254, 255. It also capped the number of pedicab registration plates at 325, with a limit of 30 pedicabs for each licensed pedicab business, and required that each "pedicab owner" seeking to obtain or renew a pedicab business license identify each pedicab "owned, leased or controlled" by that owner for which registration was being sought. Administrative Code §§20-250, 251.

The New York City Department of Consumer Affairs (DCA), charged with implementation of Local Law 19, promulgated rules which, among other things, gave preference in the issuance of pedicab registration plates to applicants who owned or operated a pedicab. The rules further permitted each applicant to apply for up to 30 registration plates. 6 Rules of the City of New York (RCNY) §2-416.

In September 2007, the New York City Pedicab Owners' Association Inc. (NYCPOA), among others, challenged certain provisions of the DCA rules on the ground that they exceeded the authority granted to the agency by Local Law 19. In particular, NYCPOA alleged that DCA was not authorized to allow anyone who operated but did not yet own a pedicab to apply for a registration plate, or to allow a pedicab owner to apply for registration plates exceeding the number of pedicabs that person owned at the time of application.

DCA, represented by attorneys of the Administrative Law Division, argued that, in practice, registration plates would not be issued to pedicabs not owned, at the time of issuance, by the applicant, and, further, that Local Law 19 authorized DCA, in determining whether to grant an application for registration plates, to consider previous operation as well as ownership of a pedicab. In January 2008, the Supreme Court, (Edward H. Lehner, J.) agreed with NYCPOA, and found the challenged sections of the rules to be invalid. *New York City Pedicabs' Owners Assoc. Inc. v. New York City Dep't of Consumer Affairs*, 19 Misc.3d 170 (Sup. Ct., N.Y. Co.), aff'd, 61 A.D. 3d 558 (1st Dept. 2008).

In response, the City Council, on Aug. 13, 2009, enacted Local Law Number 53 of 2009. The new local law established a 60-day time period (which ended on Nov. 21, 2009) within which applications for pedicab registration plates could be made, replacing the previous limitation on the number of registration plates. The enactment further made clear that registration plates can be issued only to a person who holds or has applied for a pedicab business license, and that the number of plates issued to a single owner may not exceed the number of pedicabs identified by that owner in his or her registration application. Administrative Code §20-251.

Taxicabs

Another focus of transportation change in New York City is the taxicab industry. The city's Taxi and Limousine Commission (TLC) seeks to improve the quality and efficiency of taxicab service and the industry's general benefit to the city through technical innovations and effective regulation of owners and operators. The Law Department assists in the preparation of rules to effect changes in taxicab service and defends the TLC's initiatives, when challenged, in court.

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Initiatives to Benefit the Riding Public. One noteworthy innovation in this regard is the taxicab technology system (TTS). The TTS is a package of electronic equipment whose installation in all taxicabs is mandated by a TLC rule, drafted and promulgated by the TLC with the assistance of attorneys of the Division of Legal Counsel and the Contracts and Real Estate Division. The equipment provides four services: acceptance of fare payment by credit card; text messaging; electronic collection of trip-related data (including the taxicab's location at all times as determined by a geographical positioning system or GPS) and transmission of such data to the TLC; and a passenger information monitor which may be viewed from the rear seat. 35 RCNY §§1-01, 3-03, 3-06 and 3-07.

In 2007, shortly after their promulgation, the TTS rules were challenged in a federal class action lawsuit brought by the Taxi Workers Alliance and several individual owners and drivers. Plaintiffs sought to enjoin implementation of the rules, which they alleged violated protections accorded by the U.S. and New York State constitutions by imposing an undue financial burden on owners and drivers, invading their privacy rights, and depriving them of their property rights in their taxicabs and in the routes they traveled, which they argued were proprietary business information.

TLC, represented by attorneys of the Administrative Law Division, asserted in response that the taxi industry was highly regulated for public protection, and that the new TTS requirements were no more onerous than existing vehicle equipment requirements, provided significant public benefit and were necessary to enable New York City to keep pace with the development of the taxicab industry.

U.S. District Court Judge Richard Berman denied plaintiffs' application for a preliminary injunction on the ground that the TTS requirements served a legitimate and substantial governmental purpose that outweighed any privacy right of owners and operators in the location of their taxicabs, and further, that plaintiffs had failed to show a burden upon or deprivation of business significant enough to constitute a regulatory taking of their property. *Alexandre v. New York City Taxi and Limousine Commission*, 2007 U.S. Dist. LEXIS 73642 (SDNY 2007). Plaintiffs subsequently withdrew their complaint, and the court dismissed the action.

Another TLC initiative to benefit the riding public that has resulted in legal controversy is its policy of summary license suspension for taxicab drivers. Pursuant to its rules, the TLC summarily suspends the licenses of taxicab drivers arrested and charged with a crime, such as assault or driving while intoxicated, the elements of which, if true, demonstrate that continued licensure would pose a direct and substantial threat to public health or safety. 35 RCNY §8-16(c).

The licensee is entitled to a post-suspension fact-finding hearing on whether the arrest occurred and whether the charged conduct would, if proven, endanger public health or safety. 35 RCNY §8-16(d). If the criminal charges are

subsequently dropped or the licensee is acquitted, the TLC immediately restores the license.

In 2006, several taxicab drivers whose licenses had been summarily suspended by the TLC following their arrest on criminal charges, and subsequently restored following their acquittal, sought injunctive and monetary relief in the U.S. District Court, Southern District of New York, alleging violation of their procedural and substantive due process rights and their right against self-incrimination under the Fifth Amendment of the U.S. Constitution.

In his recent decision, U.S. District Court Judge Richard J. Sullivan substantially accepted the arguments of the TLC, represented by attorneys of the Administrative Law Division, and dismissed the complaint, concluding that the summary suspension process was justified because the city's interest in protecting the riding public prevailed over the plaintiffs' private interest in their licenses. With regard to plaintiffs' Fifth Amendment claim, the court concluded that the right against self-incrimination was not violated where, as here, none of the statements made by the accused were used against them in their criminal proceedings. *Ndebe v. Daus*, 2009 U.S. Dist. LEXIS 91463 (SDNY Oct. 30, 2009).

Initiatives to Benefit the Environment. An important element of PlaNYC 2030, Mayor Michael R. Bloomberg's plan for improving the environment and quality of life of New York City, is the substantial increase of the fuel efficiency of taxicabs. Consistent with this policy, the TLC has undertaken several initiatives over the past four years to encourage taxi service that is more friendly to the environment. These initiatives include TLC's auction of new taxi medallions that were designated for use with alternative fuel vehicles only, and the approval, in 2005, of several models of hybrid vehicles for use as taxicabs. See Administrative Code §19-532(b). When the TLC sought more directly to regulate the fuel efficiency of taxicabs, however, it confronted the problem of preemption by federal law.

In December 2007, the TLC promulgated rules requiring new taxicabs, except those that are wheelchair accessible, put in service beginning Oct. 1, 2008, to achieve at least 25 city miles per gallon, and those put in service beginning Oct. 1, 2009, to achieve at least 30 city miles per gallon. Former 35 RCNY §3-03(c)(10) (amended April 1, 2009), (11) (repealed April 1, 2009) ("25/30 MPG rule").

A group of fleet owners, represented by the Metropolitan Taxicab Board of Trade (MTBOT), sought to enjoin the rule in the U.S. District Court, Southern District of New York, arguing that it was preempted by the Energy Policy Conservation Act (EPCA), which authorizes the establishment of federal fuel economy standards for automobiles, and by the Clean Air Act (CAA), which authorizes the establishment of federal air emissions standards for automobiles. 49 U.S.C. §32919 (EPCA preemption), 42 U.S.C. §7543(a) (CAA preemption).

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The TLC, represented by attorneys of the Environmental Law Division, argued, with regard to the CAA, that the 25/30 MPG rule did not regulate auto exhaust emissions and therefore did not implicate that statute, and, with regard to the EPCA, that the taxi industry was a substantial part of the city's public transportation system, so that the city, as an essential participant in that system, could enforce the 25/30 MPG rule under the provision of EPCA permitting "[a] State or a political subdivision of a State [to] prescribe requirements for fuel economy for automobiles obtained for its own use." 49 U.S.C. §32919(c).

U.S. District Court Judge Paul A. Crotty concluded that the 25/30 MPG rule, though not preempted by the CAA, was likely preempted by the EPCA, and granted plaintiffs' motion for a preliminary injunction. *Metropolitan Taxicab Board of Trade v. City of New York*, 2008 U.S. DIST. LEXIS 94021 (SDNY Oct. 31, 2008) (MTBOT I).

Following this setback, the TLC, with the assistance of attorneys of the Environmental Law Division, turned to a rulemaking approach aimed at providing financial incentives for the use of clean vehicles as taxicabs. This new framework allows the owners of taxicabs and the medallions (or vehicle licenses) required to operate them to lease these assets to drivers for a higher amount than was previously allowed when the vehicle is a hybrid or clean diesel vehicle, and for a lower amount that was previously allowed when the vehicle is a conventional vehicle. 35 RCNY §1-78(a)(3).

Following the promulgation of these rules, plaintiffs in MTBOT I alleged that the new rules, so far as they reduced the amount that can be charged for the lease of conventional taxicabs, were preempted by the EPCA and the CAA. According to the amended complaint, the reduced lease cap for conventional taxicabs will in effect force taxicab owners to purchase hybrid or clean diesel vehicles and thus constitutes a mandate inconsistent with federal fuel efficiency and emissions requirements. The TLC, represented by attorneys of the Environmental Law Division, argued that the new rules still allow conventional taxicabs to return a profit to their owners, and thus constitute an incentive rather than a mandate.

On June 22, 2009, Judge Crotty granted plaintiffs' petition for a preliminary injunction against the provision of the new rules relating to lease caps for conventional vehicles, ruling that the provisions are effectively a mandate to purchase environmentally clean vehicles and are therefore preempted by both the EPCA and the CAA. *Metro. Taxicab Board of Trade v. City of New York*, No. 08 Civ. 7837, 2009 U.S. Dist. LEXIS 52658 (SDNY 2009) (MTBOT II). The city has appealed the order in MTBOT II to the U.S. Court of Appeals for the Second Circuit.

Bicycles

Another element of Mayor Bloomberg's PlaNYC 2030 is the increased use of bicycles in New York City for

commuting. According to the city's Department of Transportation (DOT), bicycle commuting has increased by 26 percent during the past year. To further encourage this development, the Mayor's office and other agencies, including the Law Department, have worked closely with the City Council to craft legislation that will provide locations where bicyclists can safely park or store their bicycles when they are not in use.

These efforts have resulted in two enactments, both signed into law by the Mayor on July 29, 2009: Local Law No. 51 of 2009, which requires operators of commercial garages and parking lots to provide, depending on their size, a specified number of secure parking spaces for bicycles; and Local Law No. 52 of 2009, which requires, with certain exceptions, that the management of any office building equipped with a freight elevator, at the request of one or more tenants of that building, develop and implement a bicycle access plan, providing for the entry of bicycles into and their secure storage within the building. The Law Department is now working with DOT, the Department of Buildings and the Department of Consumer Affairs to draft rules for the implementation of these requirements.

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