



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 29, 1992

Honorable Frank Tejada  
Chairman  
Subcommittee on Urban Affairs  
The Texas Senate  
P. O. Box 12068  
Austin, Texas

Letter Opinion No. 92-30

Re: Whether a home rule city may require fees and permits of a metropolitan transit authority for certain operations within its city limits (RQ-292)

Dear Senator Tejada:

You ask whether a home rule city may enforce an ordinance which requires a metropolitan transit authority (MTA) organized pursuant to V.T.C.S. article 1118x to pay fees to and obtain permits from the city to operate charter bus or sightseeing services within the city boundaries. Your question is prompted by the upcoming consideration by the city of San Antonio (a home rule city) of a proposed amendment to an ordinance known as the Comprehensive Ground Transportation Ordinance (GTO). The proposed amendment deals exclusively with charter transportation services, including charter bus service.

The proposed amendment to the GTO states that the policy of the city is "to provide for and promote adequate and efficient bus and charter service in the city." City of San Antonio, Texas, proposed amendment to GTO § 33-800 [hereinafter GTO Amendment]. It provides for the monitoring of bus and charter rates and services which is "to be carried out in a manner that protects the public health and safety, promotes the public convenience and necessity, and respects the concept of free enterprise." *Id.* "Charter bus service" is defined to mean "bus service for the transport of persons belonging to a specified group" that is offered on a prearranged basis and operated from locations within the city to locations either inside or outside the city. *Id.* § 33-804(4). The proposed amendment prohibits ground transportation operations, including charter and sightseeing services, unless the city council finds that the operation is required by public convenience and necessity. As will be more fully detailed below, the proposed amendment also requires an operator of ground transportation services to pay permit fees, employ only bus drivers who qualify for a

city chauffeur's license, allow city inspections of its equipment, and comply with city equipment specifications and other regulatory requirements.

The VIA Metropolitan Transit Authority (VIA) is an MTA organized pursuant to article 1118x. VIA operates and maintains a transit system which includes bus service. VIA's service area includes the City of San Antonio, all of the unincorporated area of Bexar County, and all or part of the incorporated areas of 19 municipalities in the vicinity of San Antonio. Until recently, VIA operated both charter and sightseeing bus lines. Your question essentially is whether the city may enforce the charter service regulations of the GTO, if adopted, against VIA.<sup>1</sup>

A home rule city derives its power directly from the constitution. Tex. Const. art. XI, § 5. As a result, home rule cities need look to acts of the legislature not for grants of power but only for limitations on their powers. *Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641 (Tex. 1975). Any such limitations must appear with unmistakable clarity either expressly or by implication from the constitution, general laws, or the city charter. *Id.*

State law acknowledges that a home rule city may enforce ordinances "necessary to protect [the] health, life, and property and to preserve the good government, order, and security of the municipality and its inhabitants." Local Gov't Code § 54.004. In addition, a home rule city has "exclusive dominion, control, and jurisdiction in, over and under the public streets, avenues, alleys, highways and boulevards, and public grounds of such city." V.T.C.S. art. 1175, subdiv. 3. A home rule city may license and control the operation of vehicles using the public streets and prescribe the qualifications of their operators. *Id.* subdiv. 6. It is also well established that municipalities, in the exercise of their police power, may generally

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<sup>1</sup>We are advised that portions of the GTO currently in effect exempt VIA's regularly scheduled bus service, which is offered to the general public and which constitutes the largest part of VIA's bus operations. The proposed amendment to the GTO provides exemptions that conceivably could include VIA's charter operations. See GTO Amendment § 33-803(2), (7). However, we will address your question on the assumption that VIA charter bus services are not exempt from the application of the GTO. We also understand that the city's proposed regulation of VIA's charter bus operations is premised on its conclusion that such services are not offered as part of or in support of its mass transit operations. Since you ask only whether the city may regulate VIA's charter operations under the proposed ordinance, and not whether VIA is authorized to provide charter bus service, we need not resolve this issue.

regulate buses where the regulation reasonably relates to protecting or securing public safety or convenience in the use of city streets. See E. MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS § 24.690 (3rd ed. 1989); C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 22.18 (1980).

A home rule city's ability to enforce its ordinances against another political subdivision operating within the city's boundaries is subject to other limiting principles of law. For instance, an ordinance may not be enforced against a separate political subdivision when the effect is to usurp the authority and responsibility delegated to the political subdivision by law. See *Port Arthur Indep. School Dist. v. City of Groves*, 376 S.W.2d 330, 334 (Tex. 1964).

A home rule city also may be prohibited from enforcing an ordinance on the basis of preemption. This occurs when either (1) the city is expressly prohibited from regulating in the area, (2) the legislature intended that state law exclusively occupy the field, or (3) the municipal regulation conflicts with state law. See Attorney General Opinion JM-619 (1987) and authorities cited therein.<sup>2</sup> The mere fact that the legislature has enacted law addressing the subject does not mean that an ordinance on the same subject matter is automatically preempted. *City of Richardson v. Responsible Dog Owners of Texas*, 794 S.W.2d 17 (Tex. 1990). Where there is no conflict between an ordinance and a statute, the ordinance is not void, and the two will not be held repugnant to each other if any other reasonable construction leaving both in effect can be achieved. *Id.*

A small area of overlap between a *narrow* statute and a *broad* ordinance is not necessarily fatal to the validity of the ordinance. *Id.* But where a statute confers broad authority upon a political subdivision to do a particular thing, a city may not inhibit or bar the performance of that function under the guise of its police power. See, e.g., *City of Lucas v. North Texas Municipal Water Dist.*, 724 S.W.2d 811, 821-22 (Tex. App.--Dallas 1986, writ ref'd n.r.e.).

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<sup>2</sup>Again, since the source of a home rule city's power is constitutional, these limitations must appear with unmistakable clarity. *L.C.R.A. v. City of San Marcos*, 523 S.W.2d 641.

It rarely will be the case that a political subdivision organized for a special purpose is completely insulated from regulation by its host municipalities.<sup>3</sup> A city may enforce reasonable ordinances against a political subdivision which are designed to fill gaps in the law and are necessary to protect the health and safety of the community. See *Austin Indep. School Dist. v. City of Sunset Valley*, 502 S.W.2d 670 (Tex. 1973); *Port Arthur Indep. School Dist. v. City of Groves*, 376 S.W.2d 330. The question of whether an ordinance is reasonable or not is a question of law, but it is one predicated on the facts of the individual case. *Lucas*, 724 S.W.2d 811, 820. Municipal regulations that indirectly affect the work of a political subdivision by requiring the work to be conducted in a manner which achieves the political subdivision's goals while protecting municipal interests may be applied to the political subdivision. See *id.* at 822.<sup>4</sup>

Upon review of the relevant portions of the proposed amendment and article 1118x, we can conclude that several portions of the proposal, if adopted, would be unenforceable against VIA as a matter of law because they conflict with or are preempted by state law. Other portions of the proposal, however, are not so affected and in our opinion are reasonable regulations of VIA's charter bus operations. The remainder of this opinion will explain our conclusions.

The proposed amendment authorizes the city to set the terms of a charter bus operator's operating authority, including the rates of fare the operator may charge. GTO Amendment §§ 33-812; 33-886. It requires buses to carry special equipment designed to accommodate the comfort and safety of passengers (such as air conditioning and fire extinguishers) and documentation showing compliance with the GTO (*e.g.*, copies of the GTO, operating permit, and evidence of insurance). *Id.* §§ 33-890; 33-891. These provisions are, in our view, in direct conflict with those portions of article 1118x defining the powers and duties of an MTA and its board.

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<sup>3</sup>Such a determination would, in the words of one court, constitute a "momentous departure from prior law." *Lucas*, 724 S.W.2d 811, 822.

<sup>4</sup>The legislature specifically has acknowledged the authority of cities to regulate some aspects of an MTA's operations. For example, article 1118x section 1, V.T.C.S., permits certain county commissioners courts to adopt an ordinance of the most populous city in the county which relates to, among other things, the conduct of persons riding vehicles operated by an MTA.

Section 6(a) of article 1118x provides that an MTA, once constituted, shall have "all powers necessary or convenient to carry out and effectuate the purposes and provisions of this Act." An MTA "shall make all rules and regulations governing the use, operation and maintenance" of its transit system. V.T.C.S. art. 1118x, § 6(n). The board of an MTA may adopt and enforce reasonable rules and regulations to "secure and maintain safety and efficiency in the operation and maintenance of its system"<sup>5</sup> and to govern "the use of the authority's system and services by the public and the payment of fares, tolls, and charges." *Id.* § 13(a)(1), (2); *see also id.* §§ 6(j) (MTA shall establish and maintain rates, fares, tolls, charges rents, or other compensations for use of its facilities); 6E (approval of MTA rates, fares, tolls, and charges by committee comprised of members of governing bodies of cities and county comprising the MTA).

As these provisions demonstrate, MTAs are charged with the duty of ensuring the safety of their passengers and the safe operation of their vehicles. It is also clear that rates and fares charged by MTAs are in the first instance to be determined by the MTA, subject in some cases to approval by a local government committee. We believe these provisions of article 1118x reflect manifest legislative intent that MTAs shall have broad powers to implement the overriding public policy of relieving the state's urban centers of the problems associated with vehicular traffic congestion and the lack of a comprehensive scheme of public mass transit. *See generally City of Humble v. Metropolitan Transit Authority*, 636 S.W.2d 484 (Tex. App.--Austin 1982, writ ref'd n.r.e.) *app. dismissed*, 464 U.S. 802 (1983). Accordingly, we conclude that these provisions preempt the city's enforcement of the portions of

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<sup>5</sup>"System" is defined in relevant part to mean

all real and personal property of every kind and nature whatsoever, owned, rented, leased, under the control of or operated or situated on property of, or held at any time by an authority for mass transit purposes, including (without limiting the generality of the foregoing), [sic] land, interests in land, buildings, structures, rights-of-way, easements, franchises, rail lines, bus lines, stations, platforms, terminals, rolling stock, garages, shops, equipment and facilities . . . necessary or convenient for the beneficial use and access of persons and vehicles to stations, terminals, yards, cars, and buses, and control houses, signals and land, facilities and equipment for the protection and environmental enhancement of all such facilities . . . .

V.T.C.S. art. 1118x, § 2(f).

the GTO purporting to regulate the safe condition of VIA vehicles, the equipment they shall carry, and the fares charged by VIA for charter services.<sup>6</sup>

Various provisions of the proposed amendment require operators of charter bus services to obtain a permit of operating authority from the city and to pay fees for such operating authority prior to providing such services and prohibit the operation of charter services without a permit. See GTO Amendment §§ 33-811; 33-812; 33-815; 33-818; 33-820. These provisions, in our opinion, would conflict with VIA's right to use city streets under article 1118x. Section 6(e) of article 1118x provides the following in pertinent part:

The authority shall have the power to acquire construct, complete, develop, own, operate and maintain a system or systems within its boundaries, and both within and without the boundaries of incorporated cities, towns and villages and political subdivisions, and for such purposes shall have *the right to use the streets, alleys, roads, highways and other public ways . . . as necessary or useful in the construction, reconstruction, repair, maintenance and operation of the system . . . .* [Emphasis added.]

Language identical to the italicized portion of section 6(e) was construed in Attorney General Opinion JM-979 (1988). The opinion concluded that a municipality which operates a municipal transit department pursuant to article 1118z, V.T.C.S., may not use taxes dedicated by the statute for mass transit purposes to pay for street maintenance. The opinion construed language authorizing a municipal transit department to "use the streets, alleys, roads, highways, and other public ways within the city or town" to include the right to subject streets to normal wear and tear. It also emphasized that the statute did not tie the ordinary use of public streets to the payment of any fee from tax funds raised solely to fund operation of the mass transit system by the department.

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<sup>6</sup>Section 33-890 of the proposed ordinance would also require city inspections of bus/charter vehicles for purposes of determining the safety of the vehicle, condition of maintenance, and compliance with state and federal laws. Since we have concluded that MTAs are delegated primary responsibility for ensuring the safe condition of MTA vehicles, this section, too, would be unenforceable against VIA.

We believe section 6(e) of article 1118x should be interpreted in the same manner. Like article 1118z, VIA's enabling statute does not require MTAs to pay cities a fee for the use of city streets. Since VIA is entitled to "use" city streets without liability to the city for normal wear and tear, it follows that the city may not exact a charge from VIA for the ordinary use of the same streets or require it to obtain a permit to do that which article 1118x unequivocally entitles it to do. *Lucas*, 724 S.W.2d 811.<sup>7</sup>

As previously noted, parts of the proposed ordinance would require every person accepting employment with a charter bus operator to obtain a city chauffeur's license, which is subject to a separate application process and payment of a separate fee. GTO Amendment §§ 33-831; 33-835; 33-852. In addition, the ordinance establishes standards of conduct for drivers of charter vehicles, prescribes a mandatory rest period for drivers under certain conditions, requires drivers to maintain a neat and cleanly appearance, and requires drivers to wear uniform apparel. *Id.* §§ 33-864; 33-865; 33-881.

The board of an MTA is vested with responsibility for the management, operation, and control of the properties belonging to the MTA and may employ all persons "deemed necessary by the board for the conduct of the affairs of the authority." See V.T.C.S. art. 1118x, 12(a)(1); see also *id.* § 4(a)(1). It is argued that the requirement that VIA employ only drivers who hold a city chauffeur's license would effectively frustrate VIA's employment authority. It also is suggested that V.T.C.S. article 6687b precludes the city from imposing conflicting licensing requirements on VIA bus drivers or, alternatively, that it forbids the city from collecting a fee for a chauffeur's license.<sup>8</sup>

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<sup>7</sup>A separate section of the amendment would require permit holders to procure and furnish to the city a performance bond conditioned on terms prescribed by the city and in an amount specified in the ordinance. GTO Amendment §§ 33-867 - 33-896; 33-872; 33-873. In our opinion, this requirement amounts to a charge for the privilege of using city streets and is thus inconsistent with section 6(e) of article 1118x.

<sup>8</sup>Section 2(d) of article 6687b states that no person holding a duly issued driver's license shall be required to obtain any license for the operation of a motor vehicle from any other state authority or department. The courts have held that home rule cities reasonably could require operators of vehicles for hire to procure city chauffeur's licenses when necessary to protect its citizens but they could not charge a fee for such a license. *Ex parte Heine*, 254 S.W.2d 790 (Tex. Crim. App. 1953); *City of Corpus Christi v. Gilley*, 379 S.W.2d 84 (Tex. Civ. App.--Corpus Christi 1964, writ ref'd n.r.e.). The basis for

In our opinion, neither article 1118x nor article 6687b prohibits the city from requiring drivers of charter vehicles to obtain a city chauffeur's license. Article 1118x does not address the licensing of drivers of MTA vehicles, while article 1175, subdivision 6, authorizes home rule cities to prescribe the qualifications of drivers of vehicles using public streets. Several cases held that article 6687b largely occupied the field of chauffeur regulation and that while cities in some circumstances could require drivers of vehicles for hire to obtain a city chauffeur's license, they could not charge a fee for the license. *See, e.g., City of Corpus Christi v. Gilley*, 379 S.W.2d 84 (Tex. Civ. App.--Corpus Christi 1964, writ ref'd n.r.e.). The state discontinued issuing chauffeurs' licenses in 1984. *See* Acts 1983, 68th Leg., ch. 345, at 1793 (repealing references to chauffeurs' licenses and fees for such licenses in article 6687b).<sup>9</sup> In our opinion, this change resolves any doubt of the preemptive effect of article 6687b.<sup>10</sup>

Furthermore, we believe the provisions of the proposal relating to the licensing of charter vehicle drivers are reasonably related to the protection of public safety. We do not believe the enforcement of this portion of the ordinance would inhibit or frustrate the accomplishment of VIA's primary mission since the licenses are granted or denied to individuals rather than to VIA.<sup>11</sup>

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(footnote continued)

these decisions was that article 6687b effectively precluded cities from charging a fee for chauffeur's licenses. *See Reed v. City of Waco*, 223 S.W.2d 247 (Tex. Civ. App.--Waco 1949, writ ref'd).

<sup>9</sup>The change was part of a substantive revision of state motor vehicle operator licensing requirements. The purpose of the revision was to convert Texas from a "operator-chauffeur plan" state to a "classified plan" state. A classified plan of drivers' licensing employs functional criteria based on the specific driving task required to operate a vehicle regardless of the purpose of its use, while an operator-chauffeur plan focuses on the purposes for which a vehicle is being used at the time. Bill File to H.B. 1273, 68th Leg., 1983.

<sup>10</sup>State law does require bus drivers to obtain either a Class B driver's license, a Class B commercial driver's license, or a Class C commercial driver's license, depending on the capacity of the vehicle. V.T.C.S. arts. 6687b, § 4A(c)(2); 6687b-2, § 21(b)(2), (3). However, since the regulatory scheme in either case is centered on the class of vehicle driven rather than the purpose of its use, we cannot state as a matter of law that cities are prohibited from issuing and charging a fee for chauffeur's licenses.

<sup>11</sup>The prospect of barring VIA's accomplishment of its primary statutory function is made even less likely by the fact that the bulk of VIA's bus operations are exempted from the GTO.

On the other hand, we believe the provisions of the ordinance that prescribe the conduct, attire, and working conditions of charter bus drivers would conflict with VIA's authority to govern the operation and use of its facilities. Consequently, we conclude that the city may not enforce them against VIA or its charter bus drivers.

A separate section of the proposal requires charter bus operators to procure and furnish proof of liability insurance or a certificate of self insurance. GTO Amendment §§ 33-870, 33-871. An MTA is authorized but not required by state law to procure liability insurance or to self-insure at its own discretion. *See* Civ. Prac. & Rem. Code § 101.027 (authorizing a unit of government to purchase insurance policies protecting it and its employees against claims arising under Texas Tort Claims Act); V.T.C.S. art. 715c (allowing political subdivisions to issue bonds for purpose of establishing self-insurance and to join risk retention groups); V.T.C.S. art. 1118x, § 13A (MTAs are "units of government" for purposes of Tort Claims Act). Thus, we think it is beyond the city's authority to require VIA to obtain liability insurance or to self-insure. However, we do not think it unreasonable to require proof of such protection where VIA voluntarily has secured it. Such a showing is in our opinion clearly related to the safety of the public and the protection of property within the city. As we interpret this requirement, it does not inhibit or prevent VIA from providing charter bus service.

Finally, section 33-860 of the proposed amendment requires holders of permits and the drivers of bus or charter vehicles to comply with the terms of the GTO, rules and regulations adopted by the city manager and the city's director of aviation, and all other applicable laws, rules, and regulations. Since we do not have before us the remainder of the GTO or any rules of the city manager and director of aviation, we cannot determine whether VIA can reasonably comply with these regulations.

To summarize, we conclude that a home rule city may enforce reasonable regulations designed to protect the health and safety of the public against a metropolitan transit authority created pursuant to V.T.C.S. article 1118x. The portions of the proposed amendment to the City of San Antonio's Comprehensive Ground Transportation Ordinance which would be unenforceable against VIA Metropolitan Transit Authority relate to the following: (1) the safe condition of charter vehicles; (2) the equipment in such vehicles; (3) the rates of fare charged by a charter bus operator; (4) the conduct, attire, and working conditions of charter vehicle drivers; (5) the procurement of liability insurance or self insurance; and (6)

the procurement and submission of a performance bond. The city may require VIA charter bus drivers to obtain a city chauffeur's license and may require VIA to submit proof of liability insurance or self insurance where VIA voluntarily has acquired such protection pursuant to other law.

**S U M M A R Y**

As considered in this opinion, portions of the city of San Antonio's proposed amendment to its Comprehensive Ground Transportation Ordinance regulating (1) the safe condition of charter vehicles, (2) the equipment in such vehicles, (3) the rates of fare charged by a charter bus operator, (4) the conduct, attire, and working conditions of charter vehicle drivers, (5) the procurement of liability insurance or self insurance, and (6) the procurement and submission of a performance bond would be unenforceable against the VIA Metropolitan Transit Authority as a matter of law. Other portions of the proposed ordinance requiring charter bus drivers to obtain a city chauffeur's license and requiring VIA to submit proof of liability insurance or self insurance, where VIA voluntarily has secured such protection pursuant to other law, would be applicable to the transit authority.

Yours very truly,



Steve Aragón  
Assistant Attorney General  
Opinion Committee