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October 29, 1999

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The Honorable John Cornyn
Attorney General for the State of Texas
P. O. Box 12548
Austin, Texas 78711-2548

FILE # MW-41088-99
I.D. # 41088

Dear Attorney General Cornyn:

The City of Midland ("City") regulates the operation of taxi cabs within its incorporated city limits with Title 5 Chapter 6 of the Midland City Code ("taxi cab ordinance"). See Exhibit "A". The authority to regulate the operation of taxi cabs is taken from the general authority of a home-rule municipality, the Midland City Charter (see Exhibit "B"), and Tex. Loc. Gov't Code §§ 311.001 and 311.071.

Early last summer, the City realized that the Concho Valley Council of Governments ("COG") would be commencing transportation operations in the City. On June 29, 1999, Mike McGregor, City Manager, sent Robert Stephens of the COG a letter acknowledging that the State Department of Health had awarded the COG a contract to transport Medicaid patients to and from health care providers, informing the COG that the City considered the public safety provisions of its taxi cab ordinance applicable to the COG's operations, and admonishing the COG not to commence operations until it complied with the taxi cab ordinance. See Exhibit "C".

On August 6, 1999, McGregor met with Stephens. McGregor reiterated that the public safety provisions of the taxi cab ordinance were applicable to the COG's operations and that the City would enforce its taxi cab ordinance. McGregor offered to write a letter detailing which provisions of the taxi cab ordinance would be considered to be applicable to the COG's operations. Stephens commented that, as a governmental subdivision, performing under a contract with a state agency, the COG would be exempt from complying with the City's taxi cab ordinance.

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On August 11, 1999, McGregor sent Stephens a letter which set forth the applicable provisions, considering issues of public safety. *See Exhibit "D."* The applicable provisions address local requirements for drivers and vehicles. The request for proposal which was originally issued by the Texas Department of Health actually required that the drivers and vehicles would meet city requirements. *See Exhibit "E"*.

On August 13, 1999, Robert R. Weaver, Executive Director of the Concho Valley Council of Governments sent a letter to McGregor asserting that the COG's operations did not meet the "for hire" element of the definition of taxi cab under the taxi cab ordinance and, as such, was not covered. Weaver also wrote,

The Council of Governments, an independent political subdivision of the State of Texas, will be performing this service as an agent of the Texas Health Department. Our sole function is to provide transportation to essential medical services for low-income citizens of the City of Midland. It is difficult for me to understand how the public interest would be served by burdening this service with additional costs.

See Exhibit "F."

From the foregoing communication from the COG, the City assumes that the COG has commenced operations without complying with the taxi cab ordinance in any way.

Meanwhile, Michael T. Morgan, an attorney for Midessa Transportation, L.L.C., a Midland taxi cab company, has written a letter to the City complaining that the COG and West Texas Opportunities are operating in non-compliance with the taxi cab ordinance. *See Exhibit "G"*. Morgan demands to know whether, and if so, how, the taxi cab ordinance is to be enforced against the COG or West Texas Opportunities.

This raises three issues. First, whether the transportation operations of a political subdivision like the COG which contracts with a state agency like the Texas Department of Health to transport Medicare patients to and from health care providers, are exempt from city ordinances regulating vehicles for hire based on the fact that the operations are being performed by a political subdivision. Second, whether the transportation operations of any entity (other than the federal government) which contracts with a state agency like the Texas Department of Health to transport patients to and from health care providers, are exempt from city ordinances regulating vehicles for hire based on the fact that the operations are

being performed pursuant to a contract with a state agency. Third, whether the term "for hire" as it is used in the taxi cab ordinance describes operations like those that are proposed to be performed by the COG pursuant to its contract with the TDH.

I. Whether the Transportation Operations of a Political Subdivision like the COG Which Contracts with the Texas Department of Health to Transport Medicare Patients to and from Health Care Providers, Are Exempt from City Ordinances Regulating Vehicles for Hire Based on the Fact That the Operations Are Being Performed by a Political Subdivision.

A. The Taxi Cab Ordinance is not Preempted by Any State Law.

Preemption is one way that application of a municipal ordinance to another entity could be avoided. However, it is not applicable here. A municipality may not pass an ordinance in conflict with legislation enacted by the state as a sovereign. *City of Bookside Village v. Como*, 633 S.W.2d 790 (Tex. 1982) and declined to extend by *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex. App.--Dallas 1989, writ denied) cert. denied 498 U.S. 1087, 111 S.Ct. 191, 112 L.Ed2d 1049 (1991) and distinguished by petition of *Carpenter v. City of Petal*, 699 S.O.2d 928 (Miss. 1997). Also, municipal ordinances that attempt to regulate such a matter preempted by statute are unenforceable to the extent they conflict with the state statute. *Dallas Merchants and Concessionaires Association v. City of Dallas*, 852 S.W.2d 49, 491 (Tex. 1993).

However, home-rule municipalities, like the City of Midland, possess the full power of self government and need not look to the legislature for grants of power, but for limitations on their power. *Id.*, at 490-491. Furthermore, "the mere fact that the legislature has enacted a law addressing the subject does not mean that the complete subject matter is preempted." *City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17, 19 (Tex. 1990). "[A] General law and a city ordinance will not be held repugnant to each other if any reasonable construction leaving both in effect can be reached." *City of Beaumont v. Fall*, 116 Tex. 314, 291 S.W. 202, 206 (1927). Thus, if the legislature chooses to preempt a subject matter usually encompassed by the broad powers of home-rule municipality, it must do so with unmistakable clarity. *Dallas Merchants*, 852 S.W.2d at 491.

Neither the COG nor any other entity has pointed to any statutory provision which would preempt the taxi cab ordinance. Because no such preemptive authority is apparent, the City would continue to enforce the taxi cab ordinance, including as against the COG and West Texas Opportunities.

B. No authority provides that the Concho Valley Council of Governments is exempt or preempted from local law in this instance.

Regional planning commissions, which are defined to include councils of governments (Tex. Loc. Gov't Code § 391.002(2)), are provided for by Chapter 391 of the Local Government Code. Under the applicable provisions, a regional planning commission may plan for the development of a region and make recommendations concerning major thoroughfares, streets, traffic and transportation studies, bridges, airports, parks, recreation sites, school sites, public utilities, land use, water supply, sanitation facilities, drainage, public buildings, population density, open spaces, and other items relating to the commission's general purposes. Tex. Loc. Gov't Code § 391.004 (West 1997). Regional planning commissions may also contract with a participating government unit to perform a service under certain conditions; purchase, lease or otherwise acquire property; hold, or sell, or otherwise dispose of property; employ staff and consult with and retain experts; and provide retirement benefits to its employees. Tex. Loc. Gov't Code § 391.005 (West 1997).

Nothing in Chapter 391 conflicts with the language of the City's taxi cab ordinance, or provides that a regional planning commission, while operating vehicles for hire, is exempt from municipal ordinances. In fact, there is nothing in Chapter 391 that even authorizes a regional planning commission to operate a vehicle for hire, whatsoever. In the absence of a statute that conflicts with the City's taxi cab ordinance, the City would continue to enforce the ordinance.

Because no statute preempts the taxi cab ordinance in this context, and no authority exempts the COG from municipal ordinances, the COG's transportation operations in the City of Midland are subject to the taxi cab ordinance.

II. Whether the Transportation Operations of Any Entity (Other than the Federal Government) Which Contracts with a State Agency like the Texas Department of Health to Transport Patients to and from Health Care Providers, Are Exempt from Municipal Ordinances Regulating Vehicles for Hire Based on the Fact That the Operations Are Being Performed Pursuant to a Contract with a State Agency.

A. No authority provides that the Texas Department of Health is exempt or preempted from local law in this instance.

The Texas Department of Health is organized and empowered by Chapters 11 and 12 of the Texas Health and Safety Code. The Department may apply for, contract for, receive and spend an appropriation from the state, the federal government, or any other public source, subject to any limitation or condition prescribed by legislative appropriation. Tex. Health & Safety Code Ann. § 12.011(a) (Vernon 1992). Further, the department may provide funds by a grant or contract to a qualified person for the provision of services to be used to promote and maintain the public health. Tex. Health & Safety Code Ann. § 12.051 (Vernon 1992). Nothing in the Health & Safety Code, however, provides that the award of a contract by the department to a third party for the purposes of transporting patients to and from health care providers preempts the enforcement of local ordinances.

B. Nor are contractors to the Department of Health exempt from municipal ordinances.

It is unclear whether the COG officials were claiming that some authority preempted enforcement of the City's taxi cab ordinance, or that contractors to the Department of Health providing transportation to Medicare patients to and from health care providers were somehow exempt from municipal ordinances regulating the operation of vehicles for hire. Both theories fail: the former for the aforementioned reasons and the latter because there is no authority exempting contractors to state agencies from municipal ordinances.

Rather, these issues are similar to those resolved by *City of Wichita Falls v. Bowen*, 182 S.W.2d 695 (Tex. 1944). In *City of Wichita Falls*, a man named Bowen had been granted certificates of convenience and necessity authorizing him to operate bus lines on part of Highway 70 near Wichita Falls. The City of Wichita Falls went on to annex the part of Highway 70 upon which Bowen had been operating his bus line and to enact ordinances regulating and taxing the operation of buses. Bowen sued the City of Wichita Falls praying

for a declaratory judgment that the ordinances were void and enjoin their enforcement over him. Also, Bowen prayed that the City of Wichita Falls be enjoined from exercising any control over him as a bus operator. *Id.*

The trial court entered judgment for Bowen. It held, not the annexation or regulatory ordinances were void or voidable, but that ordinances could not operate to affect, diminish, or terminate the rights which the law attached to certificates of convenience and necessity issued by the Railroad Commission and held by Bowen. The City of Wichita Falls appealed to the Court of Civil Appeals, which affirmed the trial court's judgment. The City of Wichita Falls applied for writ of error to the Supreme Court. The Supreme Court granted the writ of error. *Id.*

The Supreme Court held that the "certificates of convenience and necessity were issued subject to the laws of this State governing cities and towns and their power to regulate and control their own streets. *Id.*, at 698. The State had not specifically preempted the City's authority.

It follows that if the Railroad Commission, at a time when it had the authority to license buses on public highways, did not preempt a municipal ordinance by issuing a license, then neither the Texas Department of Health nor the COG, by contracting with each other, would preempt a municipal ordinance regulating vehicles for hire.

III. Conclusion

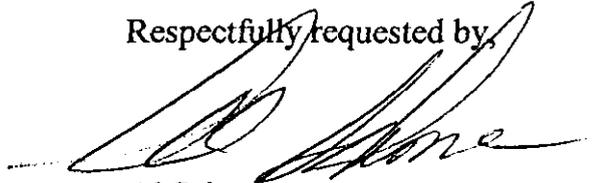
A home-rule municipality may regulate the operations of vehicles for hire. Although a municipal ordinance is preempted by statute with which the ordinance conflicts, such preemption is limited to the extent of the conflict. There is no statutory authority with which the City's taxi cab ordinance is in direct conflict. Because there is no direct conflict, the City's taxi cab ordinance is not preempted and entities which are operating vehicles for hire, even pursuant to contracts with the Texas Department of Health, must comply. Furthermore, there is no authority for considering contractors to State agencies exempt from municipal ordinances.

No reference has been made herein to the contract between the Texas Department of Health and the COG. Nonetheless, a copy of that contract is attached as Exhibit "H."

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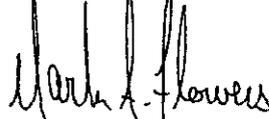
Having investigated these involved questions, and having submitted the foregoing letter as a brief on these questions, I respectfully request pursuant to Tex. Gov't Code § 402.043 that you advise me accordingly as to whether enforcement of the City ordinance is precluded by exemption or preemption in this case.

Respectfully requested by,



Al Schorre
District Attorney for Midland County

Request letter prepared by,



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