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June 17, 2013

Honorable Common Council
City Hall, Room 205

Re: 2013 Common Council File No. 111222 (Substitute 3) and other substitute ordinance proposals relating to the issuance of new public passenger vehicle permits for taxicabs, the frequency of vehicle inspections, and vehicle standards and equipment requirements.

Dear Honorable Common Council:

The City Attorney was recently requested to opine as to the legality and enforceability of various ordinance proposals relative to public passenger vehicle (taxicab) regulations. Common Council File No. 111222 was first introduced in December, 2011 and has been amended with substitute proposals several times during the committee process. In May, 2013 three amendments and/or proposed substitutes were offered by various members of the council incorporating many of the same legislative enactments. In light of the Common Council's interest to remedy deficiencies in current taxicab regulations and the recent circuit court decision in *Ibrahim, et al. v. City of Milwaukee*, Milw. Co. Cir. Ct. Case No. 2011-CV-15178 (finding that Milwaukee's taxicab cap is unconstitutional by violating the Equal Protection and Substantive Due Process clauses of the Wisconsin Constitution), this opinion will broadly touch on as many of the various proposals as possible in order to give a framework for the Common Council to work with as it considers legislative changes.

I. THE AUTHORITY TO REGULATE TAXICABS.

The City of Milwaukee has broad and substantial discretion to protect the health, safety and welfare of the public and to promote good order and commercial benefits of residents and visitors alike pursuant to the home rule statute found at Wis. Stat. § 62.11(5). Under Wis. Stat. § 62.11(5), Milwaukee has the "power to act for the government and good order of the city . . . and for the health, safety, and welfare of the public . . . .the powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language." As one of the most essential powers of government, the police power "is the least limitable" and it is necessary to show the lack of any rational relation to a legitimate objective in order for a duly enacted ordinance to fall as a misuse of the police power. *Highway 100 Auto Wreckers, Inc. v. City of West Allis*, 6 Wis.2d 637, 644, 646, 96 N.W.2d 85 (1959). Licensing and regulation of public service occupations is within

the police power of the government. *Peppies Courtesy Cab Co. v. City of Kenosha*, 165 Wis. 2d 397, 401, 475 N.W.2d 156 (1991), *citing*, *Bisenius v. Karns*, 42 Wis. 2d 42, 54, 165 N.W.2d 377 (1969).

The State of Wisconsin has specifically authorized the City to regulate taxicabs on the streets of Milwaukee pursuant to Wis. Stat. § 349.24, (Authority to license taxicab operators and taxicabs). *See also*, *Courtesy Cab Company v. Johnson*, 10 Wis. 2d 426, 432, 103 N.W.2d 17 (1960) ["The transportation of passengers for hire in a taxicab upon the streets of a city is not an inherent right, but a privilege which the city, in the exercise of its discretion may grant or refuse..."].

Pursuant to that authority, the City of Milwaukee regulates public passenger vehicles in Milwaukee Code of Ordinances (MCO) Chapter 100. Public passenger vehicles include taxicabs, limousines, surreys, pedicabs and shuttle vans. MCO § 100-3-21. The key differentiation between taxicabs and limousines or shuttle vans is the ability for taxicabs to be "hailed" by a potential customer at the side of the road rather than requiring a reservation. Milwaukee Code of Ordinances § 100-61. Based in part on the *ad hoc* means of "catching a cab" by hailing it from the side of the road, Milwaukee, and most other large American cities, have promulgated significant consumer protection regulations of the taxicab industry. For example, both residents and visitors are protected by regulations that enact maximum rates to prevent price gouging, fare signage requirements, municipal taxi driver licensing, motor vehicle safety and cleanliness inspections and minimum financial responsibility and insurance requirements.

II. TAXICAB REGULATIONS PROMOTE PUBLIC SAFETY AND CONVENIENCE OF RESIDENTS AND VISITORS.

In order to properly support revisions to the City of Milwaukee's taxicab regulations, a legislative history should demonstrate that the Common Council perceived a public problem and attempted to address the perceived problem with a proposed solution that rationally relates to the problem to be addressed. Evidence of the legislative record may include testimony from witnesses before both the Public Transportation Review Board and the Public Safety Committee, City Clerk's Legislative Reference Bureau memoranda and research papers, learned treatises and other studies from other jurisdictions and federal and state court case law discussing same. This listing is not exhaustive and there are other means to develop a proper legislative record.

Conversely, any proposed ordinance provision that fails to offer a proper legislative record documenting a public problem or a proposed solution rationally related to the problem may be met with skepticism by any reviewing court.

Generally speaking, the very purpose of licensing authorizes appropriate persons and vehicles to do a regulated act and forbids inappropriate persons and vehicles from performing those same tasks. Licensing systems also provide for a renewal process

subject to notice and hearing to determine whether a person or vehicle that was once suitable to be engaged in the occupation should lose that privilege if circumstances change to the worse.

Governmental regulations requiring inspections of taxicabs to ensure that vehicles are mechanically sound and clean are reasonable to protect the safety, hygiene and comfort of passengers and other users of the public way. Licensing each taxicab vehicle enables the City to document the identity and contact information of owners and operators, the current state of vehicle registration, evidence of financial responsibility and insurance, and the identity of business associations or dispatch services. The unique identification of each taxicab vehicle also ensures accountability and an enforcement mechanism to ensure compliance with rate, meter and signage requirements.

Taxicab drivers are likewise licensed in order to ensure that the drivers are of such moral character that they may satisfy the licensing committee that they will not abuse the trust placed in them by engaging in criminal behavior or in reckless driving on the streets of Milwaukee. Current driver licensing requirements include the testing of drivers about their knowledge of the streets of the City of Milwaukee and various taxicab regulations, to be able to read, write and speak the English language to the extent necessary to operate a public service vehicle and interact with residents and visitors to the City, to be properly licensed to drive a motor vehicle in the State of Wisconsin, to be of sound physique and eyesight, and not subject to disabilities which might render a person unfit for the safe operation of a taxi and to be clean in dress and person. MCO §100-54-2.

III. PROPOSED TAXICAB PERMIT CLASSIFICATIONS.

In the exercise of its police power to require licenses, the government may make any reasonable classification which it deems necessary to the police purpose intended to be attained by the legislation and a legislature may, without denial of equal protection of the laws, classify businesses and occupations for purposes of regulation, provide different rules for different classes, limit a regulation to a particular kind of business, extend to some persons privileges denied to others, or impose restrictions on some but not on others, where the classification or discrimination is based on real differences in the subject matter and where the classification or the discrimination is reasonable, and the legislation affects alike all persons pursing the same businesses under the same conditions. *State ex rel. Real Estate Examining Board v. Gerhardt*, 39 Wis. 2d 701, 709-710, 159 N.W.2d 622 (1968), *citing*, 33 Am. Jur., *Licenses*, pg. 353, § 30; and, 16A C.J.S., *Constitutional Law*, pgs. 338-339, § 510).

When considering an equal protection challenge to a law, courts employ a rational basis test unless the law involves a suspect class or a fundamental right. *Brown v. Department of Children and Families and Department of Administration*, 2012 WI App. 61, ¶ 35, 341 Wis. 2d 449, 819 N.W.2d 827. Under the rational basis test, a law is unconstitutional if the legislature applied an irrational or arbitrary classification when it enacted the

provision. *Id.* at ¶ 36. In determining whether rational bases exist, court should first look to see what the legislature articulated as a rationale for its determination; if such an articulated rationale is not identified, courts are obligated to construct one. *Id.* at ¶ 37, *citing*, *Nankin v. Village of Shorewood*, 2001 WI 92, ¶ 12, 245 Wis. 2d 86, 360 N.W.2d 141.

The proposed ordinance must meet five criteria in order to have a rational basis. This well-known five part test has been restated in many different contexts, including for licensing purposes as far back as 1949 in *Business Brokers' Association, Inc. v. McCauley, et al.*, 255 Wis. 5, 11, 38 N.W.2d 8 (1949). The five criteria to determine whether a rational basis exists under an equal protection challenge are as follows:

1. All classifications must be based upon substantial distinctions which make one class really different from another;
2. The classification adopted must be germane to the purpose of the law;
3. The classification must not be based upon existing circumstances only and must not be so constituted as to preclude addition to the numbers included within the class;
4. To whatever class a law may apply, it must apply equally to each member thereof; and
5. The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good of substantially different legislation.

See, Metropolitan's Associates v. City of Milwaukee, 2011 WI 20, ¶ 64, 321 Wis. 2d 632, 774 N.W.2d 821; *Brown v. State of Wisconsin Department of Children and Families, et al.*, 2012 WI App. 61, ¶ 36, 341 Wis. 2d 449, 818 N.W.2d 827; *Nankin v. Village of Shorewood*, 2001 WI 92, ¶ 39, 245 Wis. 2d 86, 630 N.W.2d 141; *Grand Bazaar Liquors v. City of Milwaukee, 105 Wis. 2d 203, 215, 313 N.W.2d 805 (1982; State ex rel. Real Estate Examining Board v. Gerhardt*, 39 N.W.2d 701, 710-711, 159 N.W.2d 622 (1968); *Business Brokers' Association, Inc. v. McCauley, et al.*, 255 Wis. 5, 11, 38 N.W.2d 8 (1949).

IV. PROPERTY RIGHT CLAIMS OF CURRENT TAXICAB PERMITEES.

Protecting the reliance interest of current taxicab permitees is a legitimate legislative purpose for the City. "[T]he purpose of protecting those who relied on prior laws – and only to the extent they relied on prior law – is a matter of simple fairness. Governments enact laws which invite citizens to invest their money and time and to arrange their affairs in reliance upon those laws. Laws are not immutable, but we can see no reason to prohibit governments from protecting the interests of those who rely upon prior law." *Sklar v. Byrne*, 727 F.2d 633, 641-642 (7th Cir. 1984).

A taxicab license is a protectable property interest. *Flower Cab Company v. Petitte*, 658 F. Supp. 1170, 1177-1179 (N.D. Ill. 1987). Under an ordinance providing that the taxicab license holder is an exclusive owner, that the holder may assign the license with few qualifications, that the holder is entitled to renewal of the license absent revocation or suspension, and that the owner may assign licenses for consideration to subsequent owners, the ordinance creates valuable property interests that may be protected by the Fourteenth Amendment to the United States Constitution. *Id.*

However, a property right in a taxicab permit is limited to continuation of the permit as the permit was understood to grant authority. In the event new regulations are required based upon changing economic circumstances, public policy choices, and safety considerations, regulations may require current permitees to adopt new requirements.

Currently, there are 320 taxicab permits in the City of Milwaukee. While operating a taxicab may be a privilege and not a right, both the United States and Wisconsin Constitutions protect the property interests of persons who have received and relied upon a license to operate a regulated business. Therefore, municipalities may not arbitrarily rescind or revoke a licensing privilege without notice and a good reason. As has often been stated, constitutional due process requires notice to a licensee that a license may be revoked or suspended and also provide for a hearing to contest that decision. *See generally, Bracegirdle v. Dept. of Regulation & Licensing*, 159 Wis. 2d 401, 417-420, 464 N.W.2d 111 (Ct. App. 1990); *see also, Wisconsin v. Constantineau*, 400 U.S. 433, 436-438 (1971). Due process requires hearings to be before an impartial decision-maker with the right to counsel, to offer evidence and to cross-examine hostile witnesses. *Id.*

Current taxicab permitees in the City have a property right in their license and as long as they obey the various state and municipal regulations, they are entitled to renewal of that license. Furthermore, MCO §100-50 has allowed certain business practices since adoption of the current code in 1992. Most notably, the current code effectively provides a "cap" in the number of taxicab permits issued in the City to those that were in effect on January 1, 1992, which at the time was between 360 and 380, though that number has been lowered to the current amount of 320 due to attrition. The current system is not so much a "cap" in the amount of permits because no numeric number of permits was ever established by the City as necessary. Additionally, because the number of permits may float downward through attrition, it has been held by the Milwaukee County Circuit court in *Ibrahim, et al. v. City of Milwaukee*, Milw. Co. Cir. Ct. Case No. 2011-CV-15178, that the City never set a cap but rather just created an (unconstitutional) arbitrary and discretionless limitation on the number of permits.

Current taxicab permitees enjoy the economic benefit of a downward floating cap in the number of permits on the market due to their ability to transfer these permits on the secondary market without City oversight or involvement (but for administrative paperwork) and the ability to lease these permits to licensed drivers. As has been reported in various media outlets and throughout the litigation of *Ibrahim v. City of Milwaukee*,

the downward floating cap, permit transferability on the secondary market, and leasing to non-permitee drivers has greatly exaggerated the value of taxicab permits on the secondary market. The *Ibrahim* plaintiffs allege that the value is as much as $150,000; anecdotally, the City is aware that such permits have sold for at least $80,000.000 in the past (with a $50,000.00 additional value if there is a Milwaukee County Airport permit associated with that taxicab permit).

It may be reasonably argued by permitees that they have a property right not only in their permit but also in a right to transfer or lease that permit. It would be unreasonable to argue, however, that a current permitee has a property right in the continuation of the downward floating cap set in 1992. If there is a legislative record that the three main characteristics of current taxicab permits (the downward floating cap, the transferability of permits on the secondary market, and permit leasing) has created monopolistic conditions that are negatively affecting the availability of cabs in the City of Milwaukee and is thereby interrupting public safety, convenience and necessity, these regulations may be amended to correct the problem. If there is legislative interest in continuing these rights to the current permitees, but forbidding new permitees from enjoying those potentially financially rewarding characteristics, a legislative record needs to satisfy the five-part equal protection test and explain why similarly-situated taxicab permitees were constitutionally being treated differently. Based upon the circuit court's decision in *Ibrahim* on May 30, 2013, Wisconsin's Equal Protection Clause likely prohibits the City of Milwaukee to restrict the privileges of new permitees simply to protect the economic value of current (unconstitutionally-inflated) permits.

V. LEGAL REVIEW OF COMMON COUNCIL FILE # 111222, SUBSTITUTE 3, AS AMENDED ON MAY 9, 2013 BY THE PUBLIC SAFETY COMMITTEE.

As mentioned above, Substitute 3 of Common Council File 111222 is currently before the Public Safety Committee. The drafting descriptions of the Legislative Reference Bureau follow in italics and are then followed by our legal opinion on each subject.

A. Taxicab Permit Cap.

Common Council File #111222, Substitute 3 repeals the limitation on issuance of new public passenger vehicle permits for taxicabs and authorizes the issuance of 100 new permits prior to November 1, 2014. Ten additional new permits may be issued after November 1, 2014, annually for a period of 5 years. Additional new permits may be issued to ensure that the total number of permitted taxicabs is not reduced to fewer than 320.

The City may condition the granting of a taxicab license on the basis of public need. McQuillen's, *Municipal Corporations, Municipal Licenses and Permits*, § 26:180. Whether or not the public need requires a cap in the amount of taxicab permits is within the sound discretion of the municipality as long as the basis is related to a public need and the general welfare. *Id.* Otherwise, such a limit may be an abuse of discretionary power and therefore unconstitutionally arbitrary. *Id.*

Taxicab congestion is a particular problem that has been historically addressed by a cap in the number of permits issued. This issue is well-known by anecdotal evidence and has been noted by even the Wisconsin Supreme Court:

> Until the late 1980s, General Mitchell International Airport had an 'open' taxi system that did not limit taxis from conducting business at the airport. The open system led to a number of problems. Taxis had to wait up to five hours for customers, and because of the long wait they sometimes would refuse 'short haul' fares. The airport's limited space led to chaotic taxi staging area, with taxi traffic that spilled onto the airport's roadway. This created safety problems for the airport's non-taxi traffic. The congestion and chaos from taxis jockeying for position led to fights between taxi drivers.

County of Milwaukee v. Williams, 2007 WI 69, ¶ 7, 301 Wis. 2d 134, 732 N.W.2d 770. *Williams* further found that the requirement of requiring airport permits and therefore limiting the amount of taxicabs able to pick up passengers at the airport, had the following results:

> [T]he problems of the open system have abated. The time the taxis must wait for fares has decreased, and the time that passengers must wait for curbside taxi serviced has decreased. The cap on taxi permits has reduced the congestion problems, and taxis no longer spill into the airport roadway to create a hazard for other airport traffic. The limited number of taxis also allows airport staff to inspect periodically the taxis servicing the airport, which has resulted in taxis that are better maintained and cleaner than under the open system.

Id. at ¶ 11.

Therefore, given a proper legislative record that the City of Milwaukee is adequately served by a certain number of taxicabs and that a limitation in the number of taxicabs is necessary to ensure the continuity of the taxicab industry in the City, this office could in good faith defend the common council's prerogative to cap the number of taxicab permits issued by the City. If, however, the legislative record is insufficient to demonstrate the

there is a rational basis to limit the number of permits, this provision of Substitute 3 would not be legal and enforceable.

Previous proposals to add 50 new permits would roughly make up the difference in the number of permits lost through attrition since 1992. The current proposal to add 100 new permits would generally match the historically consistent number of taxicab permits issued by the city from post-war through the 1980's. There is not an explanation offered to explain why ten additional permits for the following 5 years are necessary, versus any other number of permits. A further record should be developed, perhaps with assistance from the subsequent LRB annual taxicab reports.

B. Taxicab Permit Resident Requirement.

Common Council File #111222, Substitute 3 requires that new permits may only be issued to applicants who reside within city limits, or, if the applicants are partnerships, corporations or limited liability companies, only to those partnerships, corporations or limited liability companies in which the individuals holding the chief financial interest are residents of the city.

Any City regulation limiting the issuance of taxicab permits to City residents must not only be reviewed in the context of the above mentioned five-part equal protection test, but also the Commerce[1] and Privilege and Immunities[2] Clauses of the United States Constitution. Courts from other jurisdictions have concluded that a one-year residency requirement for taxicab owners violated the Commerce Clause of the United States Constitution because it prohibited residents from other states from engaging in the taxi business in the City of Atlanta, *Atlanta Taxicab Company Owners' Association, Inc. v. City of Atlanta*, 638 S.E.2d 307, 346-347 (Ga. 2006),[3] and that a municipality's refusal to grant a taxicab license to a nonresident applicant on the ground of nonresidents' alleged lack of knowledge of an area is a violation of the Privileges and Immunities Clause of the United States Constitution. *O'Reilly v. Board of Appeals for Montgomery County, Maryland*, 942 F.2d 281, 285 (4th Cir. 1991). *See also*, *McQuillen's Municipal Corporations, Municipal Licenses and Permits*, § 26:179.

In a City Attorney's opinion dated June 21, 2012 to the director of the Department of Employee Relations, this office opined that a proposed management training program that would limit eligibility for city management training programs to MPS high school graduates who have completed a college degree or persons who have graduated or will graduate from a college or university within the City of Milwaukee was likely unconstitutional as violative of the equal protection clause because there is no rational basis to support the distinction between MPS and non-MPS high school graduates or

[1] The Commerce Clause of the United States Constitution is found at Article I, Section 8, Clause 3.
[2] The Privileges and Immunity Clause of the United States Constitution is found at Article IV, Section 2.
[3] "As a general principle [,]...the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Id.* at 345.

college graduates of universities and colleges within the city or nearby municipalities. That opinion also referenced another City Attorney opinion dated January 4, 2005 to the executive director of the Fire and Police Commission which opined that limiting that program to MPS high school attendees could also not withstand rational basis challenge.

Further, in a City Attorney's opinion dated November 11, 2008 regarding the expansion of the Unemployed Residents Preference Program of MCO § 309-41, this office extensively critiqued a residents' preference program in the context of providing direct financial aid from the City to various public projects in light of the constitutional protections of the Privileges and Immunities Clause and, to a lesser extent, the Commerce Clause of the United States Constitution. Please note that this program only provided a preference in the selection of various projects and bids. This opinion noted that an extensive legislative record was developed and considered to identify unemployment as the problem to be remedied by promulgating those regulations, while also recognizing that the Privileges and Immunities Clause prevents discrimination against out-of-state residents. The opinion noted that while the City could set preferences to hire City residents over suburban residents, the City could not prohibit contractors from employing a workforce completely of native Illinois residents due to the Privileges and Immunities Clause of the United States Constitution, which prohibits discrimination against out-of-state residents (not same-state residents who do not live in the City of Milwaukee). Thus, this office cautioned that the residents' preference approach "may have the undesired result of permitting a contractor to employ all out-of-state workers and no city residents under a city-funded project." *Id.* at pages 7-8.

In sum, the ability of the City of Milwaukee to set resident preference programs is based on large part on whether the City acts as a market participant rather than a market regulator. In other words, the City has a freer hand in choosing how it spends its money and may provide some preference to local businesses and residents in doing so as opposed to when the City of Milwaukee controls or limits a marketplace as a regulator.[4]

Therefore, until a proper legislative record is compiled, documenting what problem a "residents only" taxicab permit system might seek to address, and in light of the constitutional guarantees under the Equal Protection, Privileges and Immunities and Commerce Clauses of the United States Constitution, and similar state constitutional guarantees, this office must opine that any "residents only" restriction on taxicab permits would not be legal or enforceable.

[4] Please note that the City is required by state law to require Wisconsin residency for 90 days to qualify for an alcohol beverage license. *See*, Wis. Stat. §125.04(5)(a)2. Due to the unique nature of the Twenty-First Amendment of the United States Constitution repealing Prohibition, constitutional analysis of state alcohol beverage licensing laws may be held to a different standard. *State ex re. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis.2d 203, 217, 313 N.W.2d 805 (1982), citing, *California v. LaRue,* 409 U.S. 109, 114 (1972).

C. New Taxicab Permit Lottery.

Common Council File #111222, Substitute 3 authorizes the city clerk to establish a process for accepting and processing completed applications using a lottery or other system as necessary to ensure orderly processing of taxicab permit applications. If a lottery is established, the city clerk may provide for a waiting list. A $100 lottery participation fee is established. Not more than 2 lottery entries will be permitted during a single lottery except that a veteran will be entitled to submit a third without additional fee.

Provided that an adequate legislative record was developed and considered to support a cap on the number of taxicab permits to be issued and if there are more applications for new taxicab permits than there are permits available, a lottery designed and operated by the City Clerks' Office is a reasonable response to solving the problem of having too many applicants for too-few permits. However, any preferences in that lottery system must be examined under the lens of an equal protection challenge using the five-part test. First, there is currently no legislative record as to what public problem is to be addressed by giving veterans an extra lottery chance seeking a permit. Additionally, the veterans' preference really is not a preference at all, it is simply an increase in the odds (depending on the overall number of lottery applications) in which a veteran may receive a sought after permit. Thus, an additional legislative record must be developed and considered for this provision to be legal and enforceable.

D. Limitation of Two New Taxicab Permits.

Common Council File #111222, Substitute 3 prohibits an applicant from having a financial interest in more than 2 new taxicab permits. This limitation does not apply to permits issued prior to November 1, 2013. No person holding more than one taxicab permit issued prior to November 1, 2013, shall be eligible to apply for a new permit on or after that date. Each applicant for a taxicab permit is required to acknowledge these limitations in the sworn statement that is filed with the application.

Provided that an adequate legislative record was developed and considered to support a cap on the number of taxicab permits to be issued, any preferences as to which recipients may receive a new permit must be examined under the lens of an equal protection challenge using the five-part test. First, an adequate legislative record supporting the policy determination to promote one or two car owner-operator taxicabs over larger fleet or corporate taxicab companies must be made. What characteristics substantially distinguish owner operators from fleet taxicab companies? Why is that classification germane to the limitation? If the motivation is simply to prevent a perceived monopoly in the current taxicab market, how does this limitation compare with the actual statistics of current owner operated cabs versus those owned or controlled by a single company? Or a few companies? These questions must be addressed in the legislative record.

Please note that a review of case law throughout the United States during the pendency of the *Ibrahim* litigation has suggested that many municipalities have favored the maintenance of taxicab companies and/or dispatch services while seeking to rely less on independent owner operators in order to provide taxicab services within their municipalities. Generally speaking, larger companies have greater capital to support computer and smart phone dispatch services, on-site maintenance to ensure taxicab safety and cleanliness, and employee or contractor training programs to uphold higher customer service standards beyond the minimally required municipal regulation. For an additional summary of those considerations that were examined by the City of Houston please see *Greater Houston Small Taxicab Company Owners' Association v. City of Houston*, 660 F.3d 235, 239-240 (5th Cir. 2010), a copy of which has been previously provided to the legislative record.

E. Additional Taxicab Inspection, Education and Feature Requirements.

Common Council File #111222, Substitute 3 also provides that new permits, issued on or after November 1, 2014, may only be issued for vehicles that, in addition to meeting all other requirements, either meet requirements for handicapped-elderly vehicles or provide passenger leg room of not less than 40 inches.

Provided that an adequate legislative record is developed and considered, this provision would be legal and enforceable.

Common Council File #111222, Substitute 3 requires that 2 inspections of permitted taxicabs be scheduled and conducted in the course of a permit year. The department of public works is designated as the agency responsible for scheduling and conducting inspections of public passenger vehicles including taxicabs, or if the volume is too great, to approve and designate one or more additional parties, businesses or agencies to conduct inspections.

Provided that an adequate legislative record is developed and considered, this provision would be legal and enforceable.

All persons operating a taxicab under a new permit are required to file a copy of a certificate or other document to the city clerk attesting completion of a driver training course offered by the Taxicab, Limousine and Paratransit Association or its equivalent approved by the chief of police.

Provided that an adequate legislative record is developed and considered, this provision would be legal and enforceable.

All permittees replacing a taxicab or placing a new vehicle into service on or after November 1, 2013, shall install rear seat swipe credit card processing equipment subject

to policy or rule established by the city clerk under a policy reviewed and approved by the licensing committee.

Provided that an adequate legislative record is developed and considered, this provision would be legal and enforceable.

F. Additional Administrative Requirements.

Common Council File #111222, Substitute 3 provides that failure to place a vehicle into service within 60 days of the date that permit issuance is authorized by the common council constitutes surrender of the permit. Upon notice from the city clerk, cause may be given to retain the permit or to allow an extension by the licensing committee.

Provided that an adequate legislative record is developed and considered, this provision would be legal and enforceable.

Common Council File #111222, Substitute 3 increases the one-year permit fee from $175 to $370, and the one-year renewal permit fee from $100 to $295. The fees for a new permit and for a renewal permit are reduced by $20 if the permitted vehicle is registered within the city. The ordinance also provides an increased late filing fee for public passenger vehicle permits from $25 generally charged for late renewal applications to $125 to cover the costs of inspection. Late permit renewal fees are applicable to permits for horse and surrey livery, limousines, motorcycles used for tours, pedicabs, shuttle vehicles and taxicabs.

Provided that an adequate legislative record is developed and considered, this provision would be legal and enforceable.

Common Council File #111222, Substitute 3 requires the legislative reference bureau to provide the common council with an annual report on or before April 1 including information about the numbers of permit applications made and permits issued, changes in the costs to the city incurred in processing applications and issuing new and renewal permits, factors affecting the availability, accessibility and safety of public passenger vehicles, and other information requested by the licensing committee. The report due on or before April 1, 2014 shall be accompanied by a report with information and recommendations related to the implementation of fuel efficiency standards by April 1, 2018.

This office recommends regular review of City of Milwaukee ordinances and regulations in order to ensure regulatory effectiveness and promote best practices.

G. Owner-Operator Requirement of New Taxicab Permits.

Common Council File #111222, Substitute 3 further provides that no taxicab may be operated under a permit first issued on or after November 1, 2013, except by the permittee, the person holding the chief interest in the applicant if the applicant is a partnership, limited liability company or corporation, or a relative of the permittee, or the person holding the chief financial interest in the applicant if the applicant is a partnership, limited liability company or corporation. Relative means a parent, grandparent, child, grandchild, brother, sister, parent-in-law, grandparent-in-law, brother-in-law, sister-in-law, uncle, aunt, nephew, niece, spouse, fiancé, fiancée or registered domestic partner.

Based upon the considerations set forth above in this opinion, and a lack of a legislative record documenting a rational basis to deny new permitees the same leasing or business practices permitted of current taxicab permitees, this provision is not legal or enforceable. There exists no legislative record that would overcome a rational basis challenge to a two-tiered taxicab permit system which unconstitutionally protects current permitees based upon the *Ibrahim* circuit court decision that invalidated the current closed system.

H. Taxicab Operator Uniform Requirement.

Common Council File #111222, Substitute 3 requires each taxicab operator to be readily identifiable by uniform clothing consisting of a white shirt with collar and khaki-style trousers. Shirts must be clearly marked with the words "City of Milwaukee Taxicab" or a symbol of the city adopted by the common council. Alternatively, shirts worn by operators driving taxicabs for an affiliated company may reflect the colors of the company.

The Wisconsin Supreme Court has previously held that a municipal ordinance requiring taxicab drivers to wear uniforms and comply with certain grooming requirements was unconstitutional because it lacked substantial justification for regulating driver appearance when the legislative record contained no extrinsic evidence showing taxicab drivers' appearances were a negative affect on visitors' opinions about the quality of life in the City of Kenosha. *Peppie's Courtesy Cab Company v. City of Kenosha*, 165 Wis. 2d 397, 404, 475 N.W.2d 156 (1991). In the *Peppie's Courtesy Cab Company*, the City of Kenosha proposed a municipal ordinance requiring the chief of police to prescribe cab uniforms and emblems to be worn by the drivers of taxicabs. *Id.* at 399. In addition, the ordinance required taxicab drivers to "exercise hygiene and grooming, including hair care, in a manner befitting a person who deals with the public." *Id.* This ordinance proposal was developed in response to two reports which addressed ways to improve the image of the City of Kenosha's promotion of tourism, industry and business. *Id.*

The Wisconsin Supreme Court held that the form of regulation must bear a reasonable and rational relationship to the public good being pursued by the government and must

not unreasonably restrict the particular rights being curtailed. *Id.* at 404 (citation omitted). The asserted governmental interest in creating the city ordinance was "cleaning up the image of the city." *Id.* The Wisconsin Supreme Court commended the City of Kenosha for its desire to improve its image, but held that the uniform ordinance was adopted only on the basis of subjective complaints of members of the police department and the legislative record showed no studies were conducted that showed that cab drivers were responsible for the city's image nor was any data presented indicating that visitors to the city felt they would enjoy their time in the City of Kenosha more if the cab drivers wore uniforms or were differently dressed. *Id.* at 404. Therefore, the Wisconsin Supreme Court struck down the City of Kenosha taxicab uniform requirements.

Current taxicab regulations require taxicab drivers to be "clean in dress and person." MCO §§ 100-54-2-h. Notwithstanding this apparently subjective regulation, it is the opinion of this office that Substitute 3's proposed uniform requirement lacks any legislative record supporting the conclusion that there is a problem with the poor dress of taxicab drivers and how the proposed uniform requirement would solve any perceived problem with poor dress.

Substitute 3's requirement that taxicab drivers wear long sleeve or short sleeve white collared shirts (depending on the season) and khaki pants fails to articulate why a white shirt would be better than a dark blue or red shirt or khaki pants would be favored over navy or gray slacks. The uniform provision also ignores gender differences in clothing between male and female taxicab drivers. Additionally, drivers would be exempt from the uniform requirement if they worked for a company that had standardized colors, thereby creating yet another distinctive class of drivers.

Most importantly, the proposed ordinance fails to rationally articulate how requiring a white collared shirt and khaki pants would benefit the image of the city in any way because the ordinance does not require the white collared shirt and khaki pants to be laundered, pressed or ironed on a regular basis. In other words, wearing a filthy and wrinkled white collared shirt and mud-stained khaki pants would not improve the image of taxicab drivers in the City of Milwaukee notwithstanding presumed compliance with the ordinance uniform requirement as written. By comparison, current City of Milwaukee regulations regulating the dress of limousine drivers (whom are also regulated as licensed public passenger vehicle drivers) merely require that "limousine chauffeurs shall be uniformed in business attire." MCO § 100-60-4-b.

Based upon the above analysis, this office must conclude that this portion of Substitute 3 is not legal or enforceable.

I. Transfer Rights of Taxicab Permitees.

Common Council File #111222, Substitute 3 replaces provisions for the transfer of public passenger vehicle permits including new taxicab permits issued on and after November 1, 2013, with the general transfer procedures applicable to other business licenses and permits provided in ss. 85-19 and 85-24 effective November 1, 2013. Taxicab permits issued prior to November 1, 2013, may be transferred under current provisions.

Based upon the discussion set forth above, any new legislation should protect the property interests of current permitees by allowing them to transfer their permits to other persons (subject to subsequent City of Milwaukee approval, as is the current case) and to continue the provision for permitees to lease their permits to nonpermitee City of Milwaukee licensed public passenger vehicle drivers (also the case in the current regulations). Based upon the five-part equal protection test discussed extensively throughout this opinion, however, there is not a rational basis to prohibit new taxicab permitees from enjoying the same rights as current permitees. The only stated reason for creating such a two-tiered system is the protection of the economic monopoly that has been developed over the past 22 years by the current permitees and which has been found unconstitutional by Branch 39 of the Milwaukee County Circuit Court in *Ibrahim, et al. v. City of Milwaukee*, Milw. Co. Cir. Ct. Case No. 2011-CV-15178. Per the court's decision, merely protecting and promoting the economic benefit of a closed permit system was not, and is not, a legitimate governmental purpose. In this regard, there is not yet a legislative record establishing a rational basis to create a distinction between current and new permitees.

Alternatively, if an adequate legislative record suggested that the transfer of taxicab permits on the secondary market created undesirable and harmful monopolistic conditions in the industry or promoted poor citywide taxicab service coverage, potential legislation could prohibit the transfer of taxicab permits outside of the City's regulatory process. This alternative would be consistent with the City's general licensing practice in other fields.

VI. CONCLUSION

The City Attorney appreciates the Common Council's concerns regarding significant revisions contemplated by Common Council File No. 111222 and remains available to advise as to the various legal options the Council considers in making its public policy determinations. Given the fact-specific nature of developing a proper legislative record, this office will continue to opine as to the adequacy of the legislative record established by the Taxicab Study Committee of the Public Transportation Review Board as it considers these revisions.

Very truly yours,

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