



INSTITUTE FOR JUSTICE

December 20, 2021

VIA EMAIL

Matt Roby
Watertown City Attorney
23 Second St. N.E.
Watertown, SD 57201
matt@robylawoffice.com

RE: City's Unconstitutional Actions Against Debra Gagne

To City Attorney Roby,

I am writing regarding the City's taxi license law and the City's actions against Debra Gagne. It is the opinion of my organization, the Institute for Justice, that the City's taxi license ordinance is an unconstitutional "certificate of necessity" law. In addition, it is our opinion that the City has very likely violated Ms. Gagne's rights in how they applied this law and considered Ms. Gagne's taxi license application, including by causing several procedural due process violations. We thus request that the City allow Ms. Gagne to resume operating her Need-A-Ride service immediately.

My name is Erica Smith and I am a senior attorney at the Institute for Justice. The Institute for Justice is a national nonprofit law firm that, for the last 30 years, has protected individual rights against government abuse. That work includes fighting against certificate of necessity laws (also known as "certificate of need" laws), which prevent a business from operating unless the government finds there is a "need" in the community for that business.

Certificate of need laws are generally unconstitutional. The government has the power to pass laws to protect only the public safety and general welfare. In contrast, passing laws that have the primary purpose of protecting other businesses from competition has been held to be unconstitutional by multiple courts.¹ As certificate of need laws usually have the primary

¹ See, e.g., *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (holding protectionism to be an illegitimate government purpose and striking down law enacted for protectionism); *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (same); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) (same); *Santos v. City of Houston*, 852 F. Supp. 601, 608 (S.D. Tex. 1994) (same); *People v. Ala Carte Catering Co.* 159 Cal. Rptr. 479 (Cal. App. Dep't Super. Ct. 1979) (same); *Chicago Title & Trust Co. v. Village of Lombard*, 19 Ill. 2d 98, 107 (1960) (same); *Clutter v. Transp. Servs. Auth. of Nev.*, No. A387827 (Nev. Dist. Ct. May 16, 2001) (same); *Kivirist v. Wisc. Dep't of Agric.*, No. 16-CV-06 (Wis. Cir. Ct. May 31, 2017) (same).

purpose of protecting existing companies from competition, they too are often unconstitutional. In fact, several courts have struck down such laws for transportation companies.²

We have sued numerous towns and states regarding certificate of need laws. Our work has a particular focus on transportation laws, and we have sued several cities that had certificate of need laws or otherwise hindered new transportation companies in order to protect existing companies from competition, including in Little Rock, Arkansas; Milwaukee, Wisconsin; Denver, Colorado; Bowling Green, Ohio; Las Vegas, Nevada; and Tampa, Florida. We also published a report last year on why certificate of need laws are both unconstitutional and bad policy.³ In addition, we regularly consult with lawmakers on how to reform such laws.

As you may recall, Ms. Gagne runs a need-a-ride service, in which she gives rides to members of the community, including people who cannot drive themselves because they are intoxicated. This service is very popular in the community and Ms. Gagne is licensed by the state to provide transportation services. However, the City recently fined Ms. Gagne for taking cash payments because she is not licensed as a taxi under the City's ordinance. Yet the City's taxi ordinance does not allow anyone to become licensed unless "City Council shall find that the then existing public transportation service is inadequate, that public convenience and necessity require the commencement of the service proposed by said applicant." City Ordinance § 19.0905(2). It is our opinion that Watertown's City Ordinance § 19.0905(2) is likely unconstitutional.

After Ms. Gagne received the fine, she applied for a taxi permit and the City Council held an adequacy hearing to determine whether to grant her application. After holding the hearing, the City Council denied Ms. Gagne a license. There were several things wrong with this hearing and denial. First, asking Ms. Gagne to go through an adequacy hearing is constitutionally problematic, as the only reason for such a hearing would be to protect existing businesses from competition; in fact, a representative from Lyft testified against Ms. Gagne at the hearing. Second, the City seemed to rely on emailed evidence against Ms. Gagne, which was not shared with Ms. Gagne. Finally, the City Council did not provide any explicit basis for denying Ms. Gagne's application, nor was this decision provided in writing or with a right to appeal. All of these issues likely pose serious procedural due process problems.

In the meantime, Ms. Gagne is unable to accept cash for her services, effectively preventing her from legally running her business during her busiest time of the year. While Ms. Gagne has reapplied for a license, it seems the City Council would not be willing to consider Ms. Gagne's reapplication until they reconsider the taxi license ordinances, and no date was given for doing either. Again, this poses a likely procedural due process issue.

We hope that we can resolve this issue amicably and are happy to discuss possible solutions for Ms. Gagne to immediately resume her business and legally accept cash from her

² See, e.g., *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014) (striking down certificate of need law for transportation companies); *Ken's Cab, LLC v. City of Little Rock*, No. 60CV-16-1260, 2017 WL 1362047 (Ark. Cir. Ct. Jan. 25, 2017) (same); *In re Certificate of Need for Aston Park Hosp., Inc.*, 193 S.E.2d 729 (N.C. 1973) (same).

³ Institute for Justice, *Conning the Competition: A Nationwide Survey of Certificate of Need Laws*, <https://ij.org/report/conning-the-competition/>.

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customers. We ask that the City either allow Ms. Gagne to resume operating immediately without a taxi license or hold a special session to have an immediate hearing to reconsider her license application. We also hope the City will eliminate its unconstitutional taxi license scheme completely.

Please contact me at your earliest convenience. My email is esmith@ij.org and my phone number is 631-383-5302.

Thank you for your time,

Sincerely,

A handwritten signature in black ink, appearing to read "Erica Smith", with a stylized flourish at the end.

Erica Smith
Senior Attorney
Institute for Justice

CC: Mayor Reid Holien and City Council via overnight mail.