1970

Intermountain Ambulance Service, Inc. v. Board Of Commissioners Of Salt Lake City Corporation And Thad B. Emery, License Assessor Of Salt Lake City And Gold Cross Services, Inc., Gold Cross Services, Inc. v. Board Of Commissioners Of Salt Lake City Corporation : Respondent's Brief

In the Supreme Court of the State of Utah

INTERMOUNTAIN AMBULANCE SERVICE, INC.,
Plaintiff and Respondent,

vs.

BOARD OF COMMISSIONERS OF SALT LAKE CITY CORPORATION and THAD B. EMERY, License Assessor of Salt Lake City,
Defendants and Respondents,

and

GOLD CROSS SERVICES, INC.,
Defendants and Appellants.

* * * *

GOLD CROSS SERVICES, INC.,
Cross-Claimant and Appellant,

vs.

BOARD OF COMMISSIONERS OF SALT LAKE CITY CORPORATION, and INTERMOUNTAIN AMBULANCE SERVICE, INC., a Utah corporation,
Cross and Counter-Defendants and Respondents.

Case No. 11934

RESPONDENTS' BRIEF

WORSLEY, SNOW & CHRISTENSEN
and Joseph J. Palmer
Seventh Floor, Continental Bank Bldg.
Salt Lake City, Utah
Attorneys for Respondent, Intermountain Ambulance Service, Inc.

and

JACK CRELLIN, City Attorney
City and County Building
Salt Lake City, Utah
Attorney for Respondents, Salt Lake City Corporation, et. al.

PUGSLEY, HAYES, WATKISS, CAMPBELL & COWLEY and
Zar E. Hayes
315 East Second South
Salt Lake City, Utah
Atorneys for Appellants

INDEX

INDEX—(Cont.)

AUTHORITIES CITED

STATUTES

AUTHORITIES

CASES

In the Supreme Court of the State of Utah

INTERMOUNTAIN AMBULANCE SERVICE, INC.,
Plaintiff and Respondent,

vs.

BOARD OF COMMISSIONERS OF SALT LAKE CITY CORPORATION and THAD B. EMERY, License Assessor of Salt Lake City,
Defendants and Respondents,

and

GOLD CROSS SERVICES, INC.,
Defendants and Appellants.

Case No. 11934

* * * *

GOLD CROSS SERVICES, INC.,
Cross-Claimant and Appellant,

vs.

BOARD OF COMMISSIONERS OF SALT LAKE CITY CORPORATION, and INTERMOUNTAIN AMBULANCE SERVICE, INC., a Utah corporation,
Cross and Counter-Defendants and Respondents.

RESPONDENTS' BRIEF

NATURE OF THE CASE

Appellant's Counterclaim and Cross-Claim attack the validity of the Salt Lake City ordinance requiring a certificate of convenience and necessity as a condition to operate ambulances for hire on Salt Lake City streets.

DISPOSITION OF THE CASE IN THE LOWER COURT

The District Court of Salt Lake County, the Honorable Merrill C. Faux held the ordinance valid and dismissed the counterclaim and cross-claim. A certificate of convenience and necessity issued to appellant was declared void as prayed in the complaint and the complaint was otherwise dismissed as moot.

RELIEF SOUGHT ON APPEAL

Respondents pray the judgment be affirmed and that they be awarded their costs.

STATEMENT OF FACTS

In addition to appellant's statement of facts, the following are material:

Appellant's answer (R-16) and amended answer and counterclaim (R-29) did not allege the amendment to the ordinance of June 18, 1968, but admitted the ambulance ordinance was as attached to plaintiff's complaint. The amendment to the ordinance was never before the Court until written stipulation on November 10, 1969 (R-99). just before entry of the judgment appealed from on November 14, 1969 (R-102).

Pursuant to written stipulation of all parties, a formal two day hearing was held in June, 1969, to determine the issue of convenience and necessity for issuance of the ambulance certificates sought by appellant before a hearing examiner of the Public Service Commission appointed by the Board of Commissioners of Salt Lake City Corporation to hear the matter and submit a recommended Report and Order. Following the examiner's recommendation, the City Commission on September 4, 1969 denied the application (R-97-98), which made the injunctive relief prayed for in the complaint moot.

At the time of making the written stipulation so that final judgment could be entered herein without the necessity of trial (R-96), appellant made no offer of proof or any claim whatosever that it had incurred any damages or claimed damages.

Appellant does not appeal from the District Court's declaration that the certificate of convenience and necessity issued it by the City without hearing was void.

ARGUMENT

POINT I.

THE ORDINANCE, TITLE 44, CHAPTER 2, IS NOT VOID; SALT LAKE CITY CORPORATION HAS AUTHORITY TO PASS SUCH ORDINANCE.

Title 44, Chapter 2, Revised Ordinances of Salt Lake City, relating to ambulance regulation, is identical, as pertains to the requirement of certificate of convenience and necessity, to Title 43, Chapter 2, regulating taxicabs and Title 45, Chapter 2, regulating special transportation vehicles or so-called "wheel chair coaches." Hence, the validity of those ordinances may also be affected by this attack on the ambulance ordinances, not only in Salt Lake City, but in other cities of the state.

U.C.A., 1953, provides as to city powers:

> 10-8-39: "They may license, tax and regulate . . . ; stages and buses, sight-seeing and touring cars or vehicles, cabs and taxicabs, and solicitors therefor; . . . hackmen, draymen, and drivers of stages, buses, sight-seeing and touring cars, cabs and taxicabs and other public conveyances, porters, expressmen and draymen and all others pursuing like occupations, and prescribe their compensation. . . ."
>
> 10-8-14: "*They may construct, maintain and operate* waterworks, sewer collection, sewer treatment systems, gas works, electric light works, telephone lines or *public transportation systems, or authorize the* construction, maintenance and *operation of the same by others,* or purchase or lease such works or systems from any person or corporation, and they may sell and deliver the surplus product or service capacity of any such works, not required by the city or its inhabitants, to others beyond the limits of the city." (emphasis added.)

10-8-11: "They may regulate the use of streets, alleys, avenues, sidewalks, crosswalks, parks and public grounds, prevent and remove obstructions and encroachments thereof, and provide for the lighting, sprinkling and cleaning of the same."

10-8-30. "They may regulate the movement of traffic on the streets, sidewalks and public places, including the movement of pedestrians as well as of vehicles, and the cars and engines of railroads, street railroads and tramways, . . ."

10-8-61. "They may make regulations to secure the general health of the city, prevent the introduction of contagious, infectious or malignant disease into the city, and make quarantine laws and enforce the same within the corporate limits and within 12 miles thereof. . . ."

10-8-80. "They may raise revenue by levying and collecting a license fee or tax on any business within the limits of the city, and regulate the same by ordinance; provided, . . . no enumeration of powers of cities contained in this chapter, shall be deemed to limit or restrict the general grant of authority hereby conferred. . . ."

10-8-84. "They may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals,

peace and good order, comfort and convenience of the city and the inhabitants thereof, and for the protection of property therein. . . ."

Utah Constitution, Article XI, Section 5, provides:

"The power to be conferred upon the cities" (forming charters) "by this section shall include the following: . . . (b) to furnish all local public services, to purchase, hire, construct, own, maintain or operate, or lease, public utilities local in extent and use; to acquire by condemnation, or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and within its power regulate the exercise thereof."

A. THE POWER CONFERRED BY 10-8-39 AND 10-8-14, U.C.A. 1953 GIVES POWER TO PASS THE ORDINANCE.

These sections give cities power to regulate public transportation systems. The language clearly includes the power to regulate ambulances.

Section 10-8-14, at the time of Judge Hanson's summary judgment on February 4, 1969 (R-49), read "street railways," but Chapter 28, Section 1, Laws of 1969, changed the words to "public transportation systems," and this was in effect at the time of Judge Faux's judg-

ment of November 14, 1969 (R-102), from which appeal is taken. Now there can be no doubt whatever that cities may operate, or may authorize others to operate, ambulance companies.

Appellant's brief entirely overlooks this change in the statute and since the whole appeal is bottomed on the claimed lack of city power to authorize others to operate ambulance companies, the appeal must fail.

Rich v. Salt Lake City, 20 Utah 339, 437 P.2d 690 (1968), held, as to the language, "they may . . . operate . . . street railways," in Section 14 that when the Legislature adopted the language in 1907, it intended to grant the cities power to operate motor bus systems. It expressly overruled *Utah Rapid Transit Co. v. Ogden City,* 89 Utah 546, 58 P.2d 1, relied upon by appellant. That case concluded the language of the statute did not permit a city to operate a motor bus system.

Section 10-8-39 has been in effect in substantially the same language, since at least 1888 (C.L. 1888, Dec. 1755, p. 37). It gave cities power:

> "To license, tax and regulate the business conducted by hackmen, . . . cabmen, . . . and all others pursuing like occupation and to prescribe their compensation;"

If the 1907 Legislature intended motor buses to be within "street railways," then clearly the 1888 Legislature intended ambulances to be within "hackmen, cabmen and all others pursuing like occupation" with respect to the power of cities to regulate and prescribe compensation.

Utah Light & Traction Co. v. Public Service Comm., 101 Utah 99, 118 P.2d 683 (1941) cited by appellant is not applicable. There, the plaintiff attacked the Public Service Commission's granting of regular route passenger bus authority through various towns, saying the applicant Airways did not comply with the statute requiring it to "file . . . such evidence *as shall be required* by the commission to show such application has received the *required consent, franchise or permit* of the proper county, city, municipal or other public authority."

This Court rejected the contention, saying (1) there was no indication the Commission *required* any such evidence, (2) the "evidence showed . . . (applicant) had a franchise in Salt Lake City, . . . and had made arrangement for all necessary franchises in all towns where it proposed to operate," and (3) there was no evidence that cities required such permits or franchises. Further, the Court said the statute requiring consent "does not apply to certificates such as that here involved but only to the classes specified in the subdivision itself," that is, classes pertaining to the "construction . . . of the contemplated . . . railroad . . ." etc, meaning those utilities

with physical operating facilities in the streets. That is the holding of the case. The case's statement that a city has no statutory power to require an automobile corporation to have a local franchise, upon which appellant relies, is dicta. Note the Court prefaced that statement with the clause: "This is further evident. . . ." The statement is based on the following reasoning:

> "There is no power granted to require or grant a franchise for the use of the streets and highways for the purpose of traveling thereon as used by the public generally. A franchise is the privilege of doing that which does not belong to the citizens generally by a common right. . . . As to streets, it is the right to do something in the public highway which except for the grant would be a trespass. . . . Thus, the right to lay rail, or pipes, or string wire or set poles along a public street is not an ordinary business in which everyone may engage, or a use everyone may make of the street, but is a special privilege, a franchise to be granted for the accomplishment of public objects. They are required only in cases in which it is sought to impose upon the street a special burden which cannot be imposed generally; this is, to burden the street with a special privilege which the public generally may not likewise enjoy. Business such as that of the Airways does not so burden the street. It uses the streets only for purposes of travel and transport in the same manner as the public generally. It is a business not subject to franchise requirements."

That ambulances, being emergency vehicles not subject to the ordinary traffic rules [41-6-14(a), 41-6-3(a), U.C.A. 1953], use the streets specially and differently than ordinary citizens is obvious; the ambulance business may therefore be franchised by cities.

Finally, the statement relied on by appellant is bad law, in light of cases herein cited and from the logic of the case itself. The case says:

> "They may grant franchises to railroads, street railways, tramways and union railroad depot companies (Section 15-8-33), to waterworks, gas companies, electric light and telephone lines (Section 15-8-14); to telegraph and all wire lines and pole lines (Section 15-8-21; to gas, electric or lighting works (Section 15-8-20)."

(The citations are to the same sections of Title 10, Chapter 8, U.C.A. 1953). Only in Section 33 is the word "franchise" used; Sections 14 and 20 merely permit cities to "authorize" the named utilities, while Section 21 permits cities to "regulate" gas or electricity sales or to "prohibit" telephone or electric lines or poles. No power is expressly given, by the strict words of the statutes, to "franchise" or "prohibit" gas or water lines, yet the case finds cities have implied power to franchise them from the expressed power to "authorize" or "regualte" them. Notwithstanding express statutory power given cities to "regulate . . . buses" . . . and "other

public conveyances," by 15-8-39, U.C.A. 1953, the Court's dicta says cities have no power to franchise automobile corporations. This makes little sense.

Since the case says cities may grant franchises to those utilities in Section 14, which now includes "public transportation companies" (L. 1969, ch. 28, sec. 1), then the case is authority for respondents' position, not appellant's.

Perhaps the reason for the Court's dicta is that the case pertains to regular route passenger-bus operations, which were and are not exempt from the Motor Vehicle Act (L. 1935, Ch. 65, Sec. 13; 54-6-12, U.C.A. 1953), and hence could in no event be franchised by cities, while ambulances and taxis operating within 15 miles of the radius of any city are exempt and hence are subject to no regulation whatever unless it be by cities. Having in mind only non-exempt operations which a city could in no event franchise, it became easy for the Court to use general dicta with respect to non-exempt carriers which obviously would not have been intended to apply to exempt carriers, had the distinction been considered. Such dicta cannot have been intended to apply to these exempt carriers, for to so apply the dicta is to preclude cities, or anyone, from regulating the number of taxis or ambulances operating in a city or the rates charged thereby, notwithstanding the need for regulation and the broad police power given cities.

B. THE POLICE POWER CONFERRED BY SECTIONS 10-8-11, -30, -61, -80, and -84 GIVES THE CITY POWER TO PASS THE ORDINANCE.

Before discussing further case law supporting the power of the city to regulate ambulance service, it should be noted that the business is greatly involved with the public interest.

The ambulance service directly involves the health of the community since it is the best means of obtaining emergency hospital care for the sick or injured. The interest in safe, competent and prompt emergency care justifies the public in being assured: (a) that there are enough ambulance units to insure reasonable availability at all times; (b) that all operators receive sufficient return on their investment from the available business so that the required capital equipment can be maintained, replaced and added to as technology develops, and so that there will not be needless duplication and waste of waiting time, overhead and capital investment by operators; (c) that terminals are wisely located so as to minimize the travel time between the person in need of transportation and the location of the vehicle at the time of the emergency; (d) that operators are financially sound to enable them to continuously render competent and adequate service; (e) that personnel are properly trained and qualified to recognize the type of care needed, and to render it, enroute and while loading

and unloading; and (f) that the operating company is financially responsible in the event of improper care or malpractice.

There is further public interest since ambulances at times must travel at higher speeds and otherwise be exempt from traffic rules, making extraordinary use of the roadways. This justifies requiring assurance that (a) the drivers are competent; (b) the operating company is financially responsible in the event of an automobile accident; and (c) the mechanical equipment is in safe condition under these extraordinary circumstances.

An ambulance today is no longer a mere means of transportation, dashing pell-mell through the streets whose only purpose is to get the patient to the hospital as fast as possible. Today, ambulances are very expensive vehicles with highly sophisticated medical, radio and telemetry equipment, manned by fully trained personnel, usually medical students, whose objective is to give the patient such good care en route that the necessity of speeding through traffic can be diminished to the point of elimination. The public interest requires that not every station wagon or hearse owner with first aid training be entitled to a license to serve such calls as he might choose to take, if and when he wishes.

With this public interest in mind, it is clear that today cities must have the power to regulate ambulances,

when not regulated by the state, and this power is easily found in the broad grant of police power from the state.

The Legislature has granted to cities the general police power to regulate the use of the streets and the movement of traffic thereon, to secure the general health and welfare of the residents and to reasonably regulate local transportation businesses generally. These particular grants of police power are significant to the issues at hand. Of great importance is the grant of power in Section 10-8-84, since this comprehensive grant of police power is as broad as that possessed by the state.

As noted in *Wadsworth v. Santaquin City,* 83 Utah 321, 28 P.2d 121 (1933), the state may grant to a city as much power as the state itself possesses. The broad wording of Section 10-8-84 shows this is precisely what was done with regard to the police power.

Since the State has authority under its police power to require certificates of convenience and necessity, *Gilmer v. Public Utilities Comm.,* 67 Utah 222, 247 Pac. 284 (1926), a city necessarily has been given the same power under Section 10-8-84 where the state has not acted.

Even if it be assumed that the broad grant of power is not as wide in scope as the State's power, the wording of Section 10-8-84 is still broad enough to give the city the power to regulate the ambulance service.

In *Ray v. City of Owensboro,* Ken. 1967, 415 SW2d 77, the city's ordinance required ambulance operators to obtain a franchise from the city and the city franchised one operator. Plaintiff, another operator, claimed the city had no authority to enact the ordinance. The Court held:

> "We believe the only question to be answered is whether the city had constitutional or legislative authority to enact the ordinance and included in this question is the question of whether the operation of an ambulance service is a proper subject for franchise by governmental authority. If the city had authority to enact the ordinance, certainly appellant has not been denied '(t)he right of acquiring and protecting property' under section one, paragraph five of the Kentucky Constitution nor has he been deprived of his 'property, without due process of law' nor denied 'the equal protection of the laws' under section one of the fourteenth amendment to the United States Constitution.
>
> "The right of a city to grant a franchise is found in sections 163 and 164 of the Kentucky Constitution, which read as follows:
>
> > 'Section 163. Public Utilities Must Obtain Franchise to Use Streets. No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus

along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

'Section 164. Term of Franchise Limited: Advertisement and Bids. No county, city, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.'

"It is apparent from the above that if the subject of the franchise is covered under section 163 and the ordinance meets the technical requirements of section 164, then it is valid. *It will be noted that section 163 deals with certain specific subjects, to-wit, street railway, gas, water, steam heating, telephone or electric light companies within a city or town. We do not believe the right granted cities by this section is today limited to these specific utilities. The purpose of the section was to give the city control of the streets, alleys*

and public grounds and to make it possible for the city to provide the services of these utilities to its inhabitants. *Therefore, the right granted* is not and properly should not be restricted to those utilities enumerated, but *applies to all utilities and services which might today be proper subjects for control, when the original intent and purpose of the act is considered.* (emphasis added)

* * * *

"We are of the opinion that sufficient authority exists in the constitution of this state to support the ordinance. However, even without this authority a municipality under its police powers may provide for the health, safety and welfare of its inhabitants and under these powers would have sufficient authority to limit or regulate the use of emergency vehicles including ambulances upon its public streets. As we view the law, the city has the right to provide emergency ambulance service to its inhabitants, and if the use of a franchise can be an effective instrument or tool in the providing of a more effective service, then certainly it is justified. By the use of a franchise the city can guarantee that the service will always be available; that it will be efficient and adequate; and that the operators will be qualified to act under emergency conditions."

In *City of Wichita v. Home Cab Co.,* 42 P.2d 972 (Kans. 1935), the city passed an ordinance requiring a certificate of convenience and necessity be issued by the city as a requisite to the operation of a taxicab. The Court upheld the power of the city to require the cer-

tificates, citing *Dresser v. City of Wichita,* 1953 Pac. (Kans. 1915). There plaintiff sought to enjoin enforcement of certain ordinances requiring a license to operate jitneys and other motor vehicles over the city streets. The power was upheld on the basis of statutes granting the city power to adopt measures necessary for the safety of the traveling public, to construct and maintain the streets, and to regulate businesses within the city. In *Home Cab,* the Court held:

> "Modern requirements for municipal transportation render it essential that the power to regulate by the governing body be broad. . . . The decided weight of authority supports the right of a municipality either itself to take over the conduct of a business the manner of operating which may affect the public welfare, or to put it entirely into the hands of a single individual or company. . . . Whatever natural right a citizen may have to traverse the streets of his city with a motor vehicle for the conveyance of his family or his friends, no inherent right exists to devote his vehicle to the public use of carrying passengers for hire and appropriate to himself the use of all the streets for purposes of profit. . . . Beyond question, the city could vacate one or more of the streets over which he might desire to operate. It can not only require him to pay a license tax, but it may regulate the manner of his carrying on his enterprise. . . . In licensing the use of vehicles on streets, it has been held that the city is exercising its police, and not its taxing, power."

In accord with the *Dresser* decision is *City of Wichita v. Demers,* 281 P.2d 1106 (Kans. 1955).

In *Bush v. City of Jasper,* Ala. 1945, 24 So. 2nd 543, it was contended the city had no power to require a permit to operate a taxi within the city. The Constitution of Alabama and a statute said:

> "No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town, or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village."

The Court held:

> "The framers of (the Constitution) must have foreseen the increasingly acute situation on the streets of our cities. The control of the streets in conserving the public safety and convenience was deemed an essential sovereign power in the local authorities, who alone can keep an eye on conditions, and meet the needs as they arise.
>
> "The same authority also recognizes that the privilege of operating a taxi business as a common carrier of passengers for hire upon the streets of a city is in the nature of a franchise or easement, and that under our Constitution it can not be acquired without the consent of the city authorities.
>
> * * * *

> "It is within the irrevisable discretion of the city authorities to determine whether, and to what extent, the service is needed and to fix and determine the streets and to name the grantee of the right."

In *Corrao v. Montier,* Wisc. 1958, 90 N.W.2d 623, the Court said:

> "The common council (of the city) has undoubted power to regulate and license the taxicab business. Sec. 85.82, Stats. The public interest will be served by attention to the condition of equipment, the responsibility of the operators, the adequacy of service, and the effect upon traffic, among other considerations. We agree with the city attorney that the common council, at the outset, had the broadest sort of discretion in deciding how many and which applicants should be licensed."

In *Ex Parte Lockhart,* Mo. 1943, 171 S.W.2d 660, the Court considered a St. Louis ordinance providing that no person shall engage in the business of a public mover without first obtaining a license from the license collector and that no such license shall be issued until the applicant shall have obtained a certificate of convenience and necessity from the Board of Public Service. It held:

> "No one has the inherent right to carry on his private business upon the public streets. It is not only the right, but the imperative duty, of the city to make and enforce such regulations cov-

> ering the use of its streets, improving at large cost for the benefit of the public, as will be for the convenience and protection of the public. . . . The provisions of the ordinance relative to securing a certificate of convenience and necessity, and the information required to accompany the application therefor, are reasonable and wholesome, required for the intelligent and proper consideration of the commission in determining whether the convenience and necessity of the public required or justified the granting or refusing the certificate, and the discretion lodged in the commission in passing upon same is a proper, wholesome, and constitutional power given for the benefit and safety of the public, and its exercise of a duty owed to the public. Fletcher v. Bordelon, Tex. Civ. App., 56 S.W.2d 313, loc. cit. 317. The Supreme Court of Illinois held a similar ordinance of the City of Chicago valid in the case of People ex rel Johns v. Thompson, Mayor, et al., 341 Ill. 166, 173 N.E. 137."

In *U. S. v. Yellow Cab Co.*, (D.C. Ill. 1946), 69 F. Supp. 170, reversed on other grounds 332 U.S. 218, 91 L.Ed. 2010, the Court said:

> ". . . The courts have uniformly held that the licensing and regulation of the taxicab industry is a subject for exercise solely by a municipality under its police power. This court and the courts of Illinois have held Chicago's taxicab ordinances a valid exercise by the city of its police power and they have held that the issuance by the city of a majority of the taxicab licenses to the defendant operating companies in this case

does not create a monopoly (citing Illinois cases). In Rudack v. Valentine (Spec. Term, N.Y. County, 1937), 163 Misc. 326, 295 N.Y.S. 976, aff'd, 1937, 274 NY. 615, 10 N.E.2d 577, the court held that the licensing and regulation of the taxicab industry is a valid exercise of a municipality's police power. The court pointed out that in substantially all cities the taxicab industry is treated as a public utility under local regulations.

> "It is not for the court to determine whether the city has acted wisely or unwisely in issuing the majority of its licenses to one interest or to two corporations owned or controlled by the same interest. It is a question rather for the determination of the city in the public interest of its citizens."

For similar cases upholding the police power of cities to regulate public service vehicles, see *Courtesy Cab Co. v. Johnson,* Wisc. 1960, 103 N.W.2d 17 and *S & R Auto & Truck Service v. City of Charlotte,* N.C. 1966, 150 S.E.2d 743.

It has long been established that when a business is "burdened with the public interest," the governmental unit may regulate such business under its police power to the extent necessary to protect the public. Any business effected with the public interest may be regulated.

Western Colorado Power Co. v. Public Utilities Comm., 411 P.2d 785 (Colo. 1966); *Gates v. Easter*, 354 P.2d 438 (Okla. 1960); *State Road Comm. v. Utah Power & Light Co.*, 10 Utah 2d 333, 353 P.2d 171 (1960); *Nebbia v. New York*, 291 U.S. 502, 78 L.Ed. 940, *Munn v. Ill.*, 94 U.S. 113 (24 L.Ed 77).

It has been held that the police power includes the authority to impose any rule or regulation which is designed for the protection, safety and welfare of the citizenry. *Ex parte Mayes*, (Taxicabs, Okla., 1917), 167 Pac. 749; *Gibbons v. Ogden*, 22 S.C. 1, 6 L. Ed. 23; *Slaughterhouse Cases*, 83 S.C. 36, 21 L.Ed. 394.

Furthermore, it has been held that police power must of neecssity be as broad as the need for protection to the public. *Salt Lake City v. Board of Education*, 52 Utah 540, 175 Pac. 654 (1918); *Daniels v. City of Portland*, 265 Pac. 790 (Ore. 1928); *Camfield v. United States*, 167 U.S. 518, 42 L.Ed. 260. Given this rule, it follows that the police power of the city is as broad as that of the state when applied to local affairs in areas not preempted by the state. *City of Seattle v. Rogers*, 106 P.2d 598 (Wash. 1940). The many interests of the public in ambulance service, noted above, justify the authority to impose the broad regulation contemplated by the city ordinance in question.

Regardless of the quantum of police power possessed by a city, the general case law as to when it can be used and the extent of its use justifies the regulation contemplated by the ordinance in question.

In *State ex rel. Schaefer v. City of Spokane,* 186 Pac. 864 (Wash. 1920), the relator sued to require the city to issue him a license to operate a jitney bus in the city. The city had previously refused to issue a license because it determined that the area where the relator asked to operate was already adequately served by another bus company. The question of the authority of the city to refuse to grant a license on this ground was raised by the relator. The Court held that although government power is limited as to the control of most businesses, greater regulation is justified in businesses which use the public streets as the object of their business, that use of streets is a privilege to be granted or denied by the government and that power to grant or to deny includes the power to grant to one and not another when a public interest will be served thereby. No statutory grant of power was cited by the Court, but the decision was based on the inherent power to provide for the safety and welfare of citizens of the city.

In *Kenyon Hotel Co. v. Oregon Shortline Railroad,* 62 Utah 364, 220 Pac. 382 (1923), the plaintiffs commenced an action against the railroad company and the Commissioners of Salt Lake City to enjon them from

enforcing an ordinance which restricted the places where taxicabs and other vehicles which carried passengers for hire could park. Plaintiffs contended that the ordinance was beyond the power of the city to enact. This Court held that under the police power the city may enact ordinances for the safety of its citizens, including the regulation of traffic on the streets.

In *Ex parte Martinez,* 138 P.2d 10 (Calif. 1943), a habeas corpus action by one convicted of operating a taxicab at rates more than fixed by the city, petitioner contended the city did not have power to prescribe rates. Held, since the state had not attempted to regulate taxicabs, the cities may do so pursuant to their police power, which was:

> "Any city, town or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with the general laws."

Salt Lake City's grant of power is far more specific.

In *Ex parte Lee,* 1953 Pac. 192 (Calif. 1915), a bus line violated an ordinance requiring buses operating in the city to abide by a schedule, and action was brought seeking declaration that the ordinance was invalid as beyond the city's power. The Court held that the police power of the city is sufficient to allow the regulation

of motor vehicles using the streets. The Court said the police is as extensive as the need for protection of the public requirements.

See also 60 C.J.S., Motor Vehicles Sec. 45, p. 194, 33 for numerous other cases sustaining the power of cities to regulate public service vehicles based on their general police powers, their power to license or regulate businesses, or to regulate use of the streets as derived from the legislature.

See 9 McQuillon, Municipal Corporations, section 26.176 citing many cases upholding as a valid exercise of police power ordinances requiring a showing of public need as a condtion to taxicab operation.

Pond, Public Utilities, Sections 50 to 52 provide:

> "§ 50. Power to provide municipal public utilities generally implied. — The principle of the implied powers of municpal corporations to provide themselves with municipal public utilities is generally recognized by our courts. Through their liberal recognition of the existence of implied powers more than in any other way they have given full effect to the purpose, and practical recognition to the commercial objects, for which municipal corporations are established. The field is naturally a fertile one for judicial legislation and construction, and it has been fully developed by our courts in giving effect to the powers necessary to a full enjoyment and a complete realiza-

tion of the advantages of such corporations, to the end that the greatest public good might be attained. Decisions giving the most complete freedom of activity to municipalities, consistent with their best interests and not derogatory of specific statutory regulations, represent the great weight of authority. It is only a few of our courts that refuse the right of municipal corporations to keep abreast of the times and to conduct their affairs to their best advantage and for the greatest benefit of their citizens.

"§ 51. Best interests of municipality the test. — In view of the fact that practically the sole purpose of such corporations in their capacity as business concerns is to benefit the people who inhabit them and thus constitute their stockholders, so to speak, it is submitted that the present advantage of their citizens and the prospective advancement of these organizations should be the test of the control exercised over them by the legislature and the courts. The only other party even remotely concerned is the state and its interests in such matters are identical with those of the municipality. Since the interests of the two parties involved are the same it is only reasonable to suppose that the one party, in legislating for the other, intends always to accomplish the greatest good for the greatest number concerned.

* * * *

"§ 52. Only general powers expressly given by statute. — Because of the many details in administration and the varying circumstances and changing conditions of the different cities, only general legislation with reference to them is ad-

> visable or possible. This necessitates the exercise of much judgment and of many implied powers by the cities, in whose officers must be vested a wide discretion. And in construing such general statutes in a particular case regard must be had for the facts and circumstances of the case in hand so that the general law as applied will give the best results. It is in determining the legislative intent and in giving such intention the most favorable practical application to the particular city of which it will admit, that the courts take the opportunity to advance the interests by extending the scope of the activity of such municipality as its welfare requires. And it is submitted that for these practical reasons the authorities with very few exceptions favor a decided increase of the sphere of municipal activity because the best interests of these corporations demand it."

Section 87 cites numerous cases making it amply clear the courts liberally recognize the implied municipal power to regulate public service vehicles, including the power to limit the number thereof.

Section 41-6-3, U.C.A. 1953, while not conferring power to regulate, clearly illustrates the Legislature recognizes the cities have this power. It says:

> "'Authorized emergency vehicle.' (Definition) Vehicles of the fire department, police vehicles, and such *ambulances* and emergency vehicles of municipal departemnts or public service corporations *as* are designated or *authorized by* the department or *local authorities.*"

Appellant's simple statement (brief p. 22) that Sections 10-8-11, -30, -80, -61, and -84, U.C.A. 1953 "have no bearing" and "are revenue regulation measures" falls by its own weight. Only section 80 deals with revenue; all others deal with municipal police power to regulate streets and provide for safety and health, as shown by their own language and the foregoing cases. Section 80 is cited to show the enumeration of specific powers is not intended by the Legislature to limit the general grant of authority conferred.

C. THE POWER CONFERRED BY UTAH CONSTITUTION, ARTICLE XI, SECTION 5 GIVES LEGISLATIVE CITIES POWER TO PASS THIS ORDINANCE.

This section expressly gives charter cities power "to grant local public utility franchises" and to regulate them.

In *Wadsworth v. Santaquin City,* 83 Utah 321, 28 P.2d 161, 168, the Court said:

> ". . . The question then is, Are the powers enumerated in the amendment (Article XI) equally available to cities operating under legislative enactment? The answer we think must be in the affirmative, *at least to the extent that the Legislature has conferred any such powers on the cities.* . . . The reservoir of power is the same,

> and we can perceive of no reason to distinguish between the charter adopted by the people of a city and one enacted by general law of the Legislature based merely on the origin of the legislation. . . .
>
> "We think the enumeration of the power to borrow money on the security of a utility or its income, or both, was intended by the people in adopting the constitutional amendment to place such power within the scope of municipal action, and was clearly intended to be available to chartered cities in forming their own charters, and in addition thereto by use of the language, 'power to be conferred upon the cities by this section,'
>
> just as clearly was intended to enumerate a power which the Legislature might, if it chose, confer on cities depending on general law for their organization and authorty."

While the *Wadsworth* case held that leislative cities do not necessarily have all the powers enumerated in the amendment because the amendment is not self-executing, it did hold that all the powers enumerated in the amendfent are equally available to cities operating under legislative enactment, "at least to the extent that the Legislature has conferred any such powers on the cities." The Legislature has by the amendment (Article XI) conferred on all charter cities the power to franchise all public utilities, local in extent, which includes common carriers (54-2-1(29)). The Legislature has conferred on *all* cities power to "regulate" and "prescribe the compen-

sation of other public conveyances" and "all others pursuing like occupations" (10-8-39) and to "authorize the . . . operation of (public transportation systems) by others" (10-8-14). The Legislature has to that extent conferred "*any* such powers on the cities." Did the Legislature also intend to confer on legislative cities the power to franchise local common carriers? As in *Wadsworth,* there is "no reason to distinguish between a charter adopted by the people of a city and one enacted by the general law of the Legislature." Thus, it appears the Legislature did impliedly confer on legislative cities the power to grant public utility franchises, including ambulance franchises, local in extent.

In *City of Mill Valley v. Saxton* (Cal. 1940) 106 P.2d 455 the Court said:

> "Amicus curiae advance the point that the constitutional section is not self-executing and that hence the city is without the power to act in the absence of a legislative enabling act. It is then contended that, since certain sections of the Municipal Corporations Act fail to mention bus lines specifically, the city is without power to establish them. Both the premise and the conclusion are erroneous. The Constitution expressly authorizes 'any' city to establish and operate public works for 'transportation.' It expressly authorizes such city to furnish 'such services to inhabitants outside its boundaries.' Here is the grant of power. If the legislature should attempt by statutory enactment to deny or withhold the power as to any

special class of cities its act would be clearly unconstitutional. *If it attempted the same result indirectly by failing to mention the power in some corollary legislation, its act to that extent would have no effect on the constitutional grant.*" (Emphasis added.)

POINT II.

THE STATE HAS NOT PRE-EMPTED THE REGULATION OF AMBULANCES AND TAXIS AND NO CONFUSION RESULTS FROM CITY REGULATION.

While the State of Utah has entered the field of motor vehicle regulation through Title 54, Chapter 6, U.C.A. 1953, ambulances and taxis operating within 15 miles of any city are specifically excepted from the regulation. Thus, the cities are free to regulate this portion of the motor vehicle industry. Section 54-6-12(f), U.C.A. 1953, provides:

> "Except for the provisions of 54-6-17 relative to the requirements of insurance, 54-6-21 relative to safety regulations, and 54-622 relative to accident report, no portion of this act shall apply: . . . (f) to motor vehicles . . . when used as hearses, ambulances, or licensed taxicabs, operating within a 15 mile radius of the limits of any city or town."

The exclusion cannot be construed as showing an intent to kep ambulances out of the field of regulated industries due to language of 41-6-3(a), U.C.A. 1953. Moreover, the

reference to the territory around the city in 54-6-12(f) indicates that local regulation was expected.

Most important, Article XI, Section 5 of the Utah Constitution clearly authorizes charter cities to franchise utilities, which includes motor carriers. In light of this, it cannot be said the Motor Carrier Act pre-empted the field as to charter cities and, ergo, did not as to legislative cities.

Because the public interest is so greatly affected by taxi and ambulance operations, the Legislature would have expressly said there is to be no municipal regulation, notwithstanding the Motor Carrier Act exemption of city operations, had it so intended.

The states in the cases sustaining municipal police power to regulate cabs and ambulances have regulation of intra-state carriers, yet there is no objection raised to municipal regulation on the basis of state pre-emption.

60 C.J.S., Motor Vehicles, Sec. 43, p. 195, provides:

> "Unless the municipality has been granted exclusive power, the legislative control of public service vehicles, either directly or through its designated administrative body, is superior to any conflicting action of the legislative body of a municipality. However, in the absence of a repeal or conflict, the power of the municipality may be

> exercised notwithstanding the existence of some statutory regulations pertaining to the same subject; and the exercise of such power is not inconsistent with a statute regulating motor vehicles generally."

It is noted appellant's brief cites absolutely no authority whatever for the proposition urged. Instead, we are given a pure "shotgun" appeal.

Appellant argues that a small city might attempt to regulate throughout the 15 mile radius of its boundary and into adjoining cities, or that cities might overlap their regulation. The proposition is illogical, is without basis in the record, and is contrary to the fact. There is nothing in the record to show the ordinance has in any way affected appellant's operations outside of Salt Lake City. Appellant is operating in Salt Lake County outside Salt Lake City, and without certification or regulation and without interference by Salt Lake City Corporation or any governmental authority. Moreover, there has been no objection to appellant's merely being on the streets of Salt Lake City without originating trips for hire in Salt Lake City. Indeed, its terminal is at 1695 East 5th South within Salt Lake City. It always has, before and after passage of the ordinance amendment, and while the injunction was in force, brought patients into Salt Lake City on trips originating out of the city without objection by the City. Thus, appellant's theo-

retical, "literal," unfounded and illogical objections to the ordinance are irrelevant and afford no real basis for appeal.

In *National Indemnity Co. v. Harper,* D.C. Mo. 295 F. Supp. 749 (1969) the Joplin ordinance required private ambulance operators to show the public convenience and necessity required their proposed service and if a certificate were granted, to post certain liability insurance. The ordinance contained no reference to any limited radius of operations. Defendant, a certified carrier, posted insurance with a fifty mile radius restriction and an accident occurred more than fifty miles from Joplin. The insurer denied coverage, questioning the validity of the ordinance and saying that even if valid, the city had power only to regulate operations in Joplin. The Court held the ordinance valid, being "an exercise of the basic police power . . . designed to protect the public generally" and said:

> "In this day of rapid transportation with daily need for taxicabs, ambulances and other public conveyances to travel in, out of, and into the city limits to airports, hospitals, to medical centers and to scenes of personal injuries on the highway, the needs of municipal protection of citizens of municipalities and the travelling public should not be measured narrowly by city boundaries. It is a reasonable exercise of Missouri municipal legal powers to require insurance effective beyond the city limits, to be provided by municipal licensees whose base of operations is within the municipality."

Appellant never did plead the existence of any amendment to the ordinance, and its answer and amended answer both admitted the ordinance was as pleaded in the complaint. By stipulation of November 10, 1969, the parties stipulated as to certain facts and judgment was entered November 11, 1969. Appellant did not make any offer of proof whatever as to any damage to appellant. Therefore, there is no need to remand for determination as to whether appellant was injured by failure of the injunction to recite the ordinance amendment.

POINT III.

THE ORDINANCE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UTAH AND UNITED STATES CONSTITUTIONS.

Appellant contends that since the issuance of a certificate to respondent Intermountain, the latter has a monopoly and the ordinance violates the equal protection clause.

Appellant ignores the fact that the very purpose of regulating utilily businesses affected with the public interest is to encourage a monopoly to prevent duplication and waste and to protect the source of the service from competition so as to assure that the service will continue. *Public Utilities Comm. v. Garvilock*, 54 Utah 406, 181 P. 272 (1919); *Bamberger Transportation Co. v. Public Service Comm.*, 115 Utah 274, 204 P.2d 163 (1949). See *Whaley v. Lenoir County* (N.C. 1969) 168 SE 2d 411, particularly with regard to ambulance operations.

The ordinance does not create a monopoly or grant an exclusive franchise . More than one operator can be certified after consideration of the factors mentioned in Section 7 of the ordinance.

"Grand-daddy" certificates may be, and traditionally are, issued without hearing to existing carriers at time of adoption of the regulatory legislation. Indeed, to not recognize the existing carrier's rights would be to unconstitutionally deprive him of its business. *Whaley v. Lenoir County* (N.C., 1969) 168 S.E. 2d 411. In any event, the record certainly does not show that certificates were granted to Intermountain's predecessors in interest with or without hearing or with or without determination of public convenience and necessity. That is an entirely irrelevant argument, one which is outside the records and is denied.

Appellant's statement that a certificate was granted to Intermountain, without hearing, creating an unbreakable monopoly, is not only uncontroverted, it is declared a gross distortion. Public hearings were held, after published notice, before the Board of Commissioners of Salt Lake City and the Utah Public Service Commission almost two years ago on Intermountain's application to purchase, for substantial amounts of money, the certificates of Intermountain's two predecessors. Those hearings were atended by the management or counsel of appellant, who entered no objection whatever.

Appellant's argument that the "door is locked to any additional ambulance service" is contrary to obvious fact. The complaint that supporting witnesses can never be obtained for a hearing is pure hogwash. Applicants for passenger authority present the same type of evidence on the same convenience and necessity issues to the Interstate Commerce Commission, the fifty state public service commissions and innumerable municipal bodies time and time again. There are plenty of groups, such as hospitals, medical associations, doctor's clinics, police and fire departments, etc., all of whom have direct knowledge of the adequacy of existing ambulance service and the need for additional service, who could give favorable testimony if the facts justified such. Such testimony can be admitted even though such persons do not usually themeslves use, in the sense of ride in, the vehicle; indeed, they probably have better information and opportunity to observe than actual riders who are infirm by definition. In *Ashworth Transfer Co. v. Public Service Commission,* 2 Utah 2d 33, 268 P.2d 990, a newspaper business editor and an oil geologist, testified of the need for service in the petroleum industry and this Court said:

> "These men are probably better qualified to offer a picture of the entire industry than would be a small oil operator using trucking services."

In *Lake Shore Motor Coach Lines v. Salt Lake Transportation Co.* (Oct. 22, 1968) 21 Utah 2d 422, 446 P.2d 416, a grant of additional sightseeing and charter bus author-

ity to a passenger carrier was sustained on evidence, characterized by the Court as:

> "Testimony of witnesses from private business, civic organizations and State government indicates that there is a present and steadily growing need for the extension of the service of the defendant Salt Lake Transportation Company as granted in order to make available adequate transportation to the scenic attractions and the skiing resorts of the State; and there was also testimony that such services as presently exist through plaintiff carriers were either inadequate as performed ,or as made available to the public, in that they were not sufficiently promoted and publicized to accomplish the necssary and desired purpose."

It is indeed strange to hear a potential carrier complain evidence is not available as to the necessity of its proposed service. It would seem plain business sense would dictate that if, after market study, one cannot find anyone to say his proposed service is needed, then one would not risk his time and capital on the proposal.

Appellant's claim really shows there is no public convenience or necessity for appellant's services, not that plaintiff has a locked-in monopoly.

There is in fact no conspiracy by the City to maintain a monopoly situation, or to grant Intermountain an exclusive franchise, for after all, a certificate was in

fact issued to appellant, without hearing, and therein arose this lawsuit.

POINT IV.

APPELLANT HAS NO STANDING AND IS ESTOPPED TO ASSERT THE COUNTERCLAIM IN THIS ACTION.

In this case, appellant applied for and has been issued a certificate of convenience and necessity pursuant to the terms of the ordinance which it now calls into question. It denies in this action (R-29) the certificate was improperly issued, and but for the complaint and injunction herein, appellant would have availed itself of the benefits of the ordinance. It subsequently went to regular hearing under the ordinance seeking a certificate and would have availed itself of benefits of the ordinance had the certificate been granted (R-98). Under these circumstances, the Utah law is clear that appellant has no standing to contest the validity of an ordinance from which it attempted to benefit. *Kent Club v. Toronto,* 6 Utah 2d 67, 305 P.2d 870 (1957); *Salt Lake City Lines vs. Salt Lake City,* 6 Utah 2d, 428, 315 P.2d 859 (1975).

CONCLUSION

It is submitted the ordinance is a valid exercise of municipal power, and that appellant is estopped to deny

it. The need for local regulation and control, in the public interest, is clear. The judgment should be affirmed.

WHEREFORE, it is submitted the judgment herein should be affirmed and that respondents should be awarded their costs.

Respectfully submitted,

WORSLEY, SNOW & CHRISTENSEN
and Joseph J. Palmer
Attorneys for respondent

Intermountain Ambulance Service, Inc.

Seventh Floor, Continental Bank Bldg.
Salt Lake City, Utah

and

JACK CRELLIN, City Attorney
Attorney for Respondent

Salt Lake City Corporation, et al.

101 City and County Building
Salt Lake City, Utah