STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF MCLEAN

JULIE CROWE,	)	
	)	
Plaintiff,	)	**Case No. 12 MR 45**
	)	
v.	)	**Judge Foley**
	)	
CITY OF BLOOMINGTON, a municipal corporation,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S REPLY IN
FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Introduction and Background

Defendant's Response to Plaintiff's Motion for Summary Judgment is significant for what it does not contest: 1. that the purpose of the City's certificate-of-convenience ("COC") requirement[1] is to protect established vehicle-for-hire ("VFH") operators from competition; and 2. that this provision is so vague and arbitrary that its chief enforcer disregards one of its terms and makes up her own definition for another. For these reasons alone, judgment should be granted in favor of Plaintiff on her substantive due process claims.

But even if the Ordinance did serve a proper purpose and were not unconstitutionally vague, it is undisputed that there are no procedural rules that govern the VFH COC application, public hearing or appeals processes and that the City failed to provide Crowe with even the most basic elements of procedural due process. Accordingly, for this reason, judgment should be granted in Plaintiff's favor on her procedural due process claim as well.

---

[1] Bloomington City Code Chapter 40, Article X, Section 1002E.

Finally, notwithstanding the Ordinance's improper purpose and vagueness and the City's failure to provide procedural due process, the City's denial of Crowe's application was against the manifest weight of the evidence. As the undisputed record shows, the denial was solely based on the purported lack of need, which was not supported by any competent evidence. Further, the City does not dispute that City Council was presented with an incomplete record and then considered unsupported and conclusory evidence regarding Crowe's financial status that was not a basis for the original decision. Therefore, on these bases alone, judgment should be granted in favor of Plaintiff on her manifest-weight-of-the-evidence claim.

As set forth below, and in Plaintiffs Motion, there are no genuine issues of material fact and Crowe, therefore, is entitled to judgment as a matter of law on all her claims.

I. The COC provision is not rationally related to the public's health, safety or welfare.

As Crowe has set forth in her in her Motion, a long line of case law establishes that an ordinance that infringes on the right to earn a living violates substantive due process if it is not rationally related to serving the public's health, safety or welfare. (*See* Plf. Mot. 17-18, 20-21; Plf. Resp. 4-5.) But in its Response, the City asks the Court to disregard this precedent (*See* Plf. Mot. 17-18, 20-21; Plf. Resp. 4-5) and instead rely upon cases upholding taxi regulations to which the City cites, namely *City of Decatur v. Chasteen*, 19 Ill. 2d 204 (1960); *Yellow Cab v. City of Chicago*, 396 Ill. 388 (1947); and *Capitol Taxicab v. Cermak*, 60 F.2d 608 (N.D. Ill. 1932). (Def. Resp. 2-3.)

However, the decisions in those cases turned on the specific facts of each case. In those cases, the courts conducted a *fact-specific* analysis to determine whether the *particular* city regulation(s) at issue served the public's health, safety or welfare. *See Chasteen*, 19 Ill. 2d at 210; *Yellow Cab*, 396 Ill. at 397-400; *Capitol Taxicab*, 60 F.2d at 609-10. Indeed, even in highly

regulated businesses that the government could choose to prohibit entirely, regulations still must not arbitrarily discriminate and must be reasonably related to a legitimate public purpose. *See City Savs. Ass'n v. Int'l Guaranty & Ins. Co.*, 17 Ill. 2d 609, 612-13 (1959) (although savings and loans are subject to heightened regulation, their "supervision and regulation [still] must be confined to purposes reasonably connected with the public interest"); *City of Chicago v. Netcher*, 183 Ill. 104, 113-14 (1899) (although city could prohibit alcohol entirely, it cannot "arbitrarily discriminate" as to *who* can sell alcohol).

Accordingly, the City cannot defend its COC requirement by relying on those decisions. Rather, the City must show that *this particular* restriction, the COC provision found in Section 1002E, serves a legitimate purpose. And this is something the City cannot do because the undisputed evidence establishes that the COC requirement was enacted with the purpose of protecting established VFH companies from competition.[2] This purpose not only is explicitly stated in the COC requirement's legislative history (*see* Plf. Mot. 18), but also is evident in other provisions of the Ordinance that operate alongside the COC requirement to grant existing VFH companies special privileges (*id.* at 19) while harming the public by reducing competition and consumers' choices (*id.* at. 20-23).

The City attempts to dispel the stated protectionist purpose of the ordinance by relying on *Chasteen*, a case where the City of Decatur "reserved the right to issue additional licenses, without the consent of any licensee." (Def. Resp. 2, citing *Chasteen*, 19 Ill. 2d at 214.) However, whether or not the City of Bloomington has reserved the right to issue additional VFH COC's is irrelevant because it does not change the fact that the Ordinance has an improper purpose.

---

[2] Plaintiff does not challenge other provisions of Bloomington's Ordinance do relate to the public's health, safety and welfare – for example, its requirements that applicants undergo criminal background, maintain insurance, and submit to biannual inspections. *See* Bloomington City Code §§ 40-1002C, 40-1005A, 40-1010.

Chasteen does not stand for the proposition that a restriction on taxi or VFH licenses is *per se* constitutional as long as a city *might* choose to issue additional licenses in the future. *Chasteen* was decided on its facts, specifically a lack of evidence "that defendants [were] precluded from qualifying for licenses . . . or that they [had] attempted to do so and . . . been refused." *Chasteen*, 19 Ill. 2d at 214. Here, in contrast, the undisputed evidence shows that the City's COC requirement was enacted for the sole purpose of protecting established operators from competition. (Plf. Mot. 17-18, 20-21; Plf. Resp. 4-5.)

The City also cites two other cases where courts upheld ordinances limiting the number of licensed taxis. In those cases, the courts rejected claims that these limits established "monopol[ies]," primarily because those municipalities retained the power to issue additional licenses. (*See* Def. Mot. 2-3, citing *Yellow Cab,* 396 Ill. 388 and *Capitol Taxicab Co.*, 60 F.2d 608.) Like *Chasteen*, however, those cases did not hold that *any* limit on taxi or VFH licenses is *per se* valid, and neither one considered or condoned a COC requirement that was enacted for a purely protectionist purpose, or that was vague and granted city officials unfettered discretion to grant or deny a license. To the contrary, *Yellow Cab* noted that the ordinance at issue contained "proper standards" for determining whether to issue taxi licenses, 396 Ill. at 402, and *Capitol Taxicab* noted that the ordinance at issue did not grant city officials "unregulated discretion." 60 F.2d at 610. Here, however, the City's COC requirement *does* grant the City Manager unregulated discretion and was enacted to serve an improper purpose.

The City claims that "Plaintiff seeks to overturn Illinois law with the opinion of an economist." (Def. Resp. 3.) While it is unclear what "Illinois law" the City is referring to, Crowe does not offer her expert, Dr. Adrian Moore, to opine on the law; his testimony is offered to

explain how and why the COC requirement is not rationally related to the public's health, safety or welfare.[3] (*See* Plf. Exh. 6, Report of Adrian Moore.)

Based on his review of the Ordinance, Adkins' deposition transcript, his own research and work related to transportation economics, and his review of the economics literature on VFHs and related services, Dr. Moore concludes that the City's determination of whether there is a "need" for additional VFH service does not entail "any application of generally accepted economic theory or knowledge," which is "the most appropriate basis for government decisions regarding restricting entry into a market." (*Id.* at 2-4.) Dr. Moore explains how the COC requirement actually *harms* the public because it restricts entry into the market, which leads to "increased fares," "skimp[ing] on service," "reduc[tion of] service levels," and the provision of "less service hours per vehicle." (*Id.* at 11, 18.) A rational economic analysis, explains Dr. Moore, would require, "at a minimum[,] detailed surveys of origins and destinations of travel in the Bloomington metro area, a trip generation model, projected growth in travel and shift in travel patterns, and detailed data on demand and supply of [VFH] services over time to determine elasticities of supply and demand" (*id.* at 3) – none of which Adkins considers because she performs no independent research and consults no transportation experts in making her decisions (*id.* at 2-3). Further, as Moore explains, even if Adkins had that information, determining "need" would still be "extraordinarily complex," if not impossible, because "the necessary information to determine need in the market is not available to any one person" but can only be discovered in the open market, where "consumers can directly let suppliers know

[3] The City parenthetically notes that that Dr. Moore "was not disclosed until Plaintiff's Motion . . . and therefore was not available for deposition by the City" (Def. Resp. 3). However, the City fails to note that while it could have done so, it did not serve any interrogatories, production requests, or other written discovery requests whatsoever on Plaintiff, which would have required such production prior to Plaintiff's filing of her motion. See Ill. S. Ct. R. 213(f). Nor did the City seek to depose Dr. Moore after Plaintiff filed her Motion for Summary Judgment.

their wants, and the more responsive firms [will] win more customers." (*Id.* at 4.) Thus, by limiting consumers' choices, the City "constrains the very dynamic that causes progress in other [unrestricted] markets" – which serves the financial interests of established companies but does not benefit the public. (*Id.* at 4-5.)

Thus, the undisputed evidence shows that the COC requirement does not serve the public's health, safety or welfare and instead harms the public to protect the economic interests of established VFH companies. Plaintiff is therefore entitled to summary judgment as a matter of law on her substantive due process claim.

II. The COC provision violates substantive due process because it is vague and arbitrary and grants the City Manager unfettered discretion.

The undisputed record shows that the City of Bloomington's COC provision is so "incomplete, vague, indefinite and uncertain" that the Deputy City Manager must guess at its meaning and applicants do not know what is required of them. *See City of Wheaton v. Sandberg*, 214 Ill. App. 3d 220, 227 (2d Dist. 1991). As such, the ordinance lacks "adequate standards to control the actions of the [Deputy City Manager] in determining whether or not an application shall be approved," and thus violates due process. *RST Builders, Inc. v. Village of Bolingbrook*, 141 Ill. App. 3d 41, 44 (3d Dist. 1986). (*See* fuller discussion in Plf. Mot. at 14-16.)

The City ignores Plaintiff's void for vagueness claim

In its Response, the City makes no attempt to address Crowe's claim that the terms "desirable" and "in the public interest" in Section 1002E are unconstitutionally vague and arbitrary and grant the City Manager unfettered discretion. Perhaps that is because the City admits: 1) the COC ordinance lacks any written objective criteria by which an applicant can determine what he or she must do to show that additional VFH service is desirable and in the public interest (Def.'s Resp. Req. Admit 23); and 2) the chief enforcer of the ordinance admits

that she ignores one of these criteria in the ordinance altogether – whether an additional VFH would be "desirable" – and created a definition for the other – "in the public interest." (Adkins Dep. 54:3-55:8, 170:23-171:5, 177:5-178:16.)

The City appears to respond to Plaintiff's void for vagueness claim by arguing that because Crowe allegedly had the opportunity to submit "virtually any facts to support her application" but was deficient in providing information that would assist the Deputy City Manager in granting her request for a COC, it was Crowe's fault, not the vague and arbitrary nature of the ordinance, that caused the City to deny her application. (Def. Resp. 2) In explaining its position, the City argues that it was Crowe's failure to submit enough information about her financial status that doomed her application, not the "fatal deficiency of the ordinance." (*Id.*) But this argument itself is fatally deficient and fatally wrong.

First, Crowe's financial fitness was not a basis for Adkins' denial of her license application.[4] (*See* Plf.'s Exh. 1, Adkins Dep. Exh. 4; Plf.'s Exh. 7 Adkins Dep. 253:3-254:11.) Second, the vagueness of the phrase "desirable and in the public interest," made it impossible for Crowe (or any other applicant) to know what to submit with her application or how to prepare, present and support her application.

The City's arguments in its Motion and Response have not brought, and cannot bring, any clarity to the COC requirement's vague terms, nor have they identified any way in which the

[4] Adkins admits that if an applicant's financial fitness were an issue, she would raise it at the applicant's public hearing to "make it part of the record" – which is undisputed she did not do at Crowe's hearing. (Plf. Exh. 1, Adkins Dep. 103:18-24.) In addition, Adkins admits that it was "not fair" for the City to hold Crowe's finances against her (*id.* 302:5-14) when earlier she granted a COC to an existing operator, Aaron Babb, even though his financial statement showed assets consisting of $80 cash on hand, with no real estate, salary, bonuses, or dividends, markedly less than the assets and income Crowe reported (*id.* 291:12-294:7; *id.* Exh. 1).

Ordinance constrains the City Manager's discretion. The undisputed facts thus show that Plaintiff is entitled to summary judgment as a matter of law on her vagueness claim.

III. The City violated Crowe's right to procedural due process, and Plaintiff cannot be faulted for failing to invoke city procedures that do not exist.

As it claims in its Motion for Summary Judgment, the City argues that Crowe's failure to ask for cross-examination and rebuttal at her public hearing somehow waived her procedural due process claim. (Def. Resp. 2.) In doing so, the City both ignores the fact that it failed to establish or otherwise notify Crowe of any procedural rules in existence for its public hearings (because they indisputably do not exist), and also blames the victim, Crowe, for not exercising these nonexistent rights. *See People ex rel. Klaeren v. Village of Lisle*, 202 Ill. 2d 164, 178 (2002) (no need to object to lack of cross-examination in the absence of formal procedures because "formal objections go hand in hand with formal proceedings"). Likewise, the City cannot blame Crowe for failing to object to her lack of an opportunity to conduct cross-examination or rebuttal when any objection would have been futile, as shown by Adkins' refusal of another applicant's request to offer rebuttal in a public hearing held immediately after Crowe's. *See id.* (*See* fuller discussion in Plf. Resp. 11-12.)

The procedural due process due here is an opportunity to consider and respond to opposing evidence, not a pre-hearing discovery process

The City also argues that Crowe's procedural due process claim should be dismissed because she has not shown why Illinois law requires a pre-hearing discovery process. (Def. Resp. 2.) But the City's argument confuses Crowe's claim. Crowe does not claim that the City was required to give her "a pre-hearing discovery process"; Crowe claims that the City denied her a reasonable opportunity to consider, evaluate, and respond to the evidence used against her, which is one of the "minimal" due process guarantees to which license applicants are entitled at an

administrative proceeding. *See Balmoral Racing Club, Inc. v. Illinois Racing Bd.*, 151 Ill. 2d 367, 408-10 (1992). (Verif. Compl. ¶ 51; Plf. Mot. 23-24.) On this point, it is undisputed that the City did *not* give Crowe that opportunity.

Before her public hearing, the City gave Crowe no notice, either directly or through the Ordinance, that Adkins would present or consider information regarding the number of currently licensed VFH seats and had no way to know who would oppose her application or what facts they would present. (Plf. Exh. 1, Adkins Dep. 193:6-23; Plf. Exh. 3, Gooderham Dep. 136:14-137:18.) At her hearing, Crowe had no way to respond to any of this putative evidence against her because she was given no advance notice of it, no time to consider it and no opportunity to rebut it. (*See* Plf. Mot. 5-6, 24-25.) Without those opportunities, Crowe's supposed opportunity to "submit virtually any facts to support her application" (Def. Resp. 2) was constitutionally insufficient; due process requires that an applicant have an opportunity not only to present facts but also to submit opposing evidence to scrutiny. *See Balmoral*, 151 Ill. 2d at 410 ("Manifestly there is no hearing when the party . . . is not given an opportunity to test, explain, or refute.") (quoting *Interstate Commerce Comm'n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 93 (1913)) (internal marks and emphasis omitted).

The City's Response does not address the aspects of Crowe's due process claim related to her appeal to the City Council. It remains undisputed that at Crowe's appeal hearing, the City presented evidence and arguments that were not addressed at Crowe's public hearing and did not form the basis for Adkins' denial of Crowe's application. (*See* Plf. Exh. 1, Adkins Dep. Exh. 4; *see also* fuller discussion at Plf. Mot. 23-24; Plf. Resp. 12-13.) It is also undisputed that the City Manager's office failed to provide the City Council with a complete record on appeal – and excluded evidence that was favorable to Crowe. (*See* Plf. Mot. 25; Plf. Resp. 13-14.)

Accordingly, the City has failed to raise any genuine issue of material fact as to Plaintiff's procedural due process claim, and summary judgment should be granted in favor of Plaintiff on this claim.

IV. The City's denial of Crowe's COC application was unreasonable and against the manifest weight of the evidence.

Instead of defending the finding that formed the sole basis for the Deputy City Manager's denial of Crowe's application – the supposed lack of "need" for additional VFH service – the City attempts to defend its actions and defeat summary judgment by bringing in a new and different reason: Crowe's alleged failure to "submit adequate financial information." (Def. Resp. 2.) As the undisputed material facts show, however, Crowe's financial fitness was not a basis for Adkins' denial of her application. (*See* Plf. Exh. 1, Adkins Dep. Exh. 4.) Indeed, the City's claims regarding Crowe's financial fitness are nothing more than an after-the-fact attempt to rationalize an unsupportable decision. As such, the City's reliance on evidence that was not presented at the public hearing stage and not part of the findings letter does not defeat Plaintiff's claim.

The other evidentiary basis the City has offered for its decision – the opinions of existing VFH licensees (Def. Mot. 18) – is particularly ironic. That is because on the one hand, the City is arguing that it should be allowed to rely on biased VFH owners' opinions when it denies a VFH application; but on the other hand it argues that the COC requirement is not protectionist because it does not require VFH owners' consent to issue additional COCs. (Def. Resp. 2.) Ultimately, the City's reliance on VFH owners' opinions illustrates that, even without a consent requirement, the COC provision only serves to protect VFH owners' interests. In fact, the statements of current VFH licensees contained only unsupported, unsworn, conclusory and self-serving opinions, not facts, which were wholly discredited by Adkins' own admission that the VFH

owners are "cutthroats" who will "say whatever they need to say to keep someone else from encroaching on their business." (Plf. Exh. 1, Adkins Dep. 221:4-21, 224:6-10.) As such, these opinions cannot provide a sufficient basis to support the upholding the City's denial of Crowe's application. *See Kerr v. Police Bd. of the City of Chicago*, 59 Ill. 2d 140, 146 (1974) (decision relying on uncorroborated testimony against manifest weight of the evidence); *Basketfield v. Police Bd. of the City of Chicago*, 56 Ill. 2d 351, 359 (1974) (decision relying on "totally discredited" and "refuted" testimony against manifest weight of the evidence).

Far from supporting the City's decision, the undisputed record evidence, provided by the City itself, establishes that Crowe's VFH would be desirable and in the public interest:

- Crowe's service to young women would be desirable (Plf. Exh. 1, Adkins Dep. 171:19-173:15);
- Crowe would add diversity, which would be desirable and in the public interest and would serve the interests of consumers (*Id.* 173:16-174:17);
- Crowe is an experienced VFH driver (*Id.* 205:8-16);
- Crowe's VFH would cause no harm to the public (*Id.* 201:1-10);
- Crowe's VFH would not add to traffic congestion (*Id.*);
- Crowe's VFH would give 15 passengers at a time an additional choice they would not otherwise have (*Id.* 212:3-23); and
- Crowe's petition signed by downtown bar owners and managers supporting her application is evidence that her VFH service would serve the public convenience (*Id.* 183:1-10).

Accordingly, the undisputed material facts show that the City's denial of Crowe's VFH application was unreasonable and against the manifest weight of the evidence, and Crowe is entitled to summary judgment as a matter of law on Count III of her Verified Complaint.

Conclusion

WHEREFORE, in light of the foregoing, and as stated in Plaintiff's Motion for Summary Judgment and Memorandum in Support thereof, and in her Response in Opposition to Defendant's Motion for Summary Judgment, Plaintiff respectfully requests that this Court grant summary judgment as a matter of law with respect to all of her claims.

DATED: MAY 20, 2013

Respectfully submitted,

Diane S. Cohen (#6199493)
Jacob H. Huebert (#6305339)
Attorneys for Plaintiff

Liberty Justice Center
190 S. LaSalle Street, Ste. 1630
Chicago, Illinois 60603
Telephone (312) 263-7668
Facsimile (312) 263-7702
dcohen@libertyjusticecenter.org
jhuebert@libertyjusticecenter.org

CERTIFICATE OF SERVICE

On May 20, 2013, I served the foregoing Reply in Further Support of Motion for Summary Judgment by sending a copy by electronic mail to Plaintiff's counsel, J. Todd Greenburg, at tgreenburg@cityblm.org.

Attorney for Plaintiff