LETTER REPORT

PRELIMINARY ASSESSMENT OF THE LEGAL FEASIBILITY
OF PROPOSED MODEL LEGISLATION REGULATING
VENDOR VEHICLES

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INTRODUCTION

This is a letter report prepared under Contract DOT-HS-7-01536 that addresses the legal feasibility of proposed model legislation regulating vendor vehicles such as ice cream trucks. Such legislation is intended to reduce the incidence of vehicle-pedestrian crashes associated with sales made by vendor vehicles.

The research and analysis leading to the preparation of this letter report was conducted by the Policy Analysis Division of the Highway Safety Research Institute (HSRI) of The University of Michigan for the National Highway Traffic Safety Administration.

BACKGROUND

Vendors selling products from trucks are a familiar fact of urban life. Typically, the vendor vehicle enters a residential neighborhood and cruises slowly down its streets, using bells, lights, music, or some similar device to attract the attention of potential customers. Stops are made to transact sales whenever enough purchasers respond.

Many customers of these vendor vehicles are young children who do not observe safe walking practices. These child-customers, because of their single-minded interest in the vendor vehicle and its products, frequently expose themselves to the danger of being struck by passing vehicles (1).

Several different approaches to the problem of vendor-related crashes have been suggested. The proposed vendor vehicle legislation discussed in this letter report is an attempt to deal with this problem without resorting to the drastic step of prohibiting vending altogether, or depending on the cooperation of the child-customers, considered relatively poor pupils for pedestrian safety education. Rather, the primary focus of the proposed vendor legislation is on the practices of vendors themselves and on the behavior of drivers passing vendor vehicles (Blomberg, Hale, and Kearney 1977, p. 41). This would be accomplished in three ways:

- first, specifying the types of warning signals and other
safety equipment with which vendor vehicles must be equipped;
- second, setting out special traffic regulations governing both vendor vehicles and approaching traffic; and
- third, restricting the times or places in which vendor vehicles may operate.

These provisions are, for the most part, formal statements of those safety measures developed by courts in negligence suits against vendors. A summary of the case law regarding vendor negligence is set out in Appendix A.

A detailed proposal for model vendor vehicle legislation already has been developed (Blomberg, Hale, and Kearney 1974, pp. 41-63) (2), and a version of this legislation was enacted and field-tested in Detroit, Michigan (Hale, Blomberg, and Preusser 1978). The proposed model legislation is set out in Appendix B to this letter report. In addition, two states—Massachusetts and New Jersey (3)—have enacted statutes regulating vendor vehicles.

The following section provides a brief discussion of law-based constraints that affect the implementation of vendor vehicle legislation.

DISCUSSION OF LEGAL CONSTRAINTS

The enactment of vendor vehicle legislation devices from the police power of the state, that is, the power to legislate for the public health, safety, welfare, and morals (4). This power is bounded only by limits imposed by the U.S. and state constitutions. Unless legislation enacted under this power is clearly unrelated to legitimate state goals, or infringes fundamental constitutional rights, then courts will presume it to be constitutional (5). As a general rule, courts have recognized special interests in public safety and, more specifically, in highway safety (6). Statutes of this sort appear to be valid exercises of the police power and would likely be upheld if challenged in court. There is but one difficulty with the enactment of a state vendor vehicle statute, namely that its provisions may conflict with existing legislation regulating vehicle equipment.
Prior analysis of vendor vehicle legislation (Blomberg, Hale, and Kearney 1974, p. 57) has identified a possible conflict with existing equipment legislation. Specifically, in those states that have adopted the Uniform Vehicle Code (UVC) provisions restricting use of red flashing lights to emergency vehicles (7), enactment of a vendor vehicle statute would have to be accompanied by amendment of the UVC provision. If such an amendment accompanies passage of a state vendor statute, it is unlikely that the vendor statute will face any law-based constraints.

Most attempts to regulate street vendors, however, are found in municipal ordinances rather than state statutes. Such ordinances could be challenged on three grounds:

- first, that the city has no power to regulate street vendors;
- second, that the state has a statute regulating street vendors, which preempts the power that cities would otherwise have; and
- third, even though cities have power to regulate street vendors, the ordinance in question is an attempt, disguised as regulation, to abolish street vending as an occupation.

Cities must have power to regulate street vendors before an ordinance can be passed to do so. At common law, courts generally were of the opinion that because states created cities by issuing them charters, cities had only those police powers given to them in their charters or by statute. However, most state constitutions (8) now provide for municipal home rule, and these constitutional clauses have been held to authorize cities to regulate street vendors as an exercise of their police powers (9). Many states also have statutes explicitly granting police powers to cities (10), while in other states, statutes permit cities to exercise all powers over local affairs—including police powers—provided they do not conflict with the state constitution or statutes (11). Either type of statute would appear sufficient to support an ordinance regulating street vendors.

However, in states where no home-rule provision exists and there is no statutory basis that would support enactment of an ordinance regulating street vendors, the common-law view is followed and municipal powers
are narrowly defined (Moore 1977, pp. 146-47). In those states, municipalities would be constrained from regulating vendor vehicles.

If the state has enacted a statute governing an activity, a city cannot pass an ordinance governing the same activity if its provisions would frustrate the policy goals that the statute seeks to achieve—for example, an ordinance cannot permit what a statute forbids or vice versa. However, where both statute and ordinance regulate the same conduct, an ordinance that is more comprehensive in its regulation than the statute might not conflict with the statute, but might instead adjust a statewide approach to local needs and is a proper exercise of the police power (Note 1959, pp. 747-48) (12). On the other hand, there are instances where courts refuse to uphold local ordinances that duplicate and extend state statutes. These include situations: where statutes expressly exclude regulation by any governmental body but the state; where statutes grant broad regulatory powers to the state, implying that other governmental bodies lack power to act in that area (13); and where the legislature or state agencies issue detailed regulations governing an area, which may exclude local attempts at regulation (14).

At present, only two states—Massachusetts and New Jersey—have enacted statutes governing vendor vehicles, and both of these are limited to requiring flashing lights on vehicles to warn approaching drivers to use caution when approaching the stop vehicles. It is unlikely that these statutes would by themselves, preempt municipalities from enacting more detailed ordinances regulating, for instance, the times and places of sales. However, if a state were to enact a statute governing vendor operations more comprehensively, a court would be more likely to decide the state had preempted the field, and bar local modifications.

Where vendor vehicle regulations are enacted for the purpose of promoting public safety, they must have a demonstrable potential for reducing traffic crashes associated with vendor sales to pedestrians. Unless such a showing can be made, the regulations will be set aside should they be challenged in court. Even where regulations in fact promote public safety, they may be so burdensome that they constitute an attempt to prohibit street vending altogether. Whether a municipality
may enact such regulations depends on whether street vending is recognized by the state as a "legal occupation." Where it is so recognized—such as where state law makes some provision for licensing vendors (15)—municipalities may not prohibit vending under the guise of regulating it (16). On the other hand, where street vending is not so recognized, ordinances whose practical effect is to prohibit it are a valid exercise of the police power (17). It is unlikely that an ordinance similar to the proposed model vendor legislation would be construed by courts as a disguised attempt to prohibit street vending, since its provisions require a relatively modest expenditure for equipment and do not require that additional personnel be assigned to the vendor vehicle. In fact, Detroit's version of the model ordinance was not challenged by street vendors, but instead enjoyed strong support from most of the industry (Hale, Blomberg, and Preusser 1978). Thus, it is unlikely that vendor vehicle regulations would be struck down as an attempt to prohibit legitimate business activity.

CONCLUSIONS AND RECOMMENDATIONS

Vendor vehicle legislation that mandates safety equipment, sets out traffic traffic regulations, and restricts vendor vehicle operations may be enacted either by the state of by municipalities. Vendor legislation, in the form of a state statute, appears to be a valid exercise of the state's police power to promote public safety, and probably would face no significant law-based constraints.

However, where vendor regulations are imposed by municipal ordinance, significant law-based constraints could be encountered. The first of these deals with the municipality's power to regulate street vendors. While municipal governments in most states enjoy some degree of home rule, there are a number of states in which local police powers are narrowly defined; in those states, specific statutory authority might be necessary for the enactment of an ordinance regulating vendor vehicles. Secondly, even in states where municipalities enjoy home rule, municipalities might be forbidden to regulate vendor vehicles on account of state preemption. At present, however, no state appears to have a vendor statute that
would forbid local governments from acting in this area. Finally, in states that recognize street vending as a legitimate activity, regulations that are in fact disguised attempts to prohibit such vending could successfully be challenged in court. However, vendor regulations of the type discussed here are not intended to discourage street vending and have in fact been supported in principle by major vendors.

Thus we conclude that the concept of vendor vehicle legislation is legally feasible. The only significant law-based constraints likely to be encountered would arise with respect to local vendor vehicle ordinances in states that neither grant home rule powers to municipal governments nor authorize municipalities to regulate street vending.
The specific provisions found in the model vendor legislation that appears in Appendix B are in part derived from court decisions in lawsuits involving vendors. Negligence is the failure to exercise, under the circumstances, that degree of care and prudence that a reasonable person would have used (Prosser 1971, pp. 145-49). Because negligence is determined by measuring one's actions against some standard of "prudent" conduct, negligence cases involving vendors have in effect resulted in the development of safety rules to be followed by vendors (Note 1975).

A prudent person would anticipate some degree of danger whenever children are in or near the street, especially if they must actually cross it, but operating vendor vehicles creates no unique threat to children. They are exposed to no more danger in this situation than on any other occasion when they must cross the street. For this reason, some courts refuse to characterize street vendor sales as negligent when the vendor did nothing but attract children to a busy street to purchase his products (18). However, most courts require street vendors to take steps to decrease the danger to children in crossing the street to make purchases. These courts emphasize the impulsiveness of children and the real dangers they encounter in crossing busy streets. When vendors choose to use street sales as their method of doing business, they should anticipate that some children are going to be injured by passing motor vehicles (19), even if those children lack money to buy anything (20).

Court decisions, therefore, have developed two safety standards that vendors must observe to decrease danger to their child patrons:

- first, vendors must park their vehicles in a safe place before making sales (21); and
- second, vendors must observe the flow of traffic and, if an approaching motor vehicle is close enough to pose an immediate danger to children, either warn them of that fact or take other steps to prevent them from being injured (22).
APPENDIX B

MODEL ICE CREAM TRUCK ORDINANCE


§1 — Definitions
(a) Ice cream truck—Every motor vehicle in which ice cream, ice milk, frozen dairy products or ice flavored with syrup are carried for purposes of retail sale on the streets of this city (state).
(b) Vend or vending—Offering ice cream, ice milk, frozen dairy products or ice flavored with syrup for sale from a motor vehicle on the streets of this city (state).

§2 — Drivers to stop for ice cream trucks
(a) The driver of a vehicle meeting or overtaking from either direction an ice cream truck stopped on the highway shall stop before reaching the truck when the flashing red lights and stop signal arm described in Section 3 are in use. After stopping, a driver may proceed past such truck at a reasonable and prudent speed, not exceeding 15 miles per hour, and shall yield the right of way to any pedestrian who crosses the roadway to or from the ice cream truck.
(b) The driver of a vehicle on a highway with separate roadways need not stop upon meeting or passing an ice cream truck on a different
roadway.

§3 — Equipment requirements for ice cream trucks

In addition to other equipment required by law, every ice cream truck shall be equipped with:

(a) Signal lamps mounted at the same level and as high and as widely spaced laterally as practicable. These lamps shall be five to seven inches in diameter and shall display two alternately flashing red lights visible at 500 feet to the front and rear in normal sunlight upon a straight level highway.

(b) A stop signal arm that can be extended horizontally from the left side of the truck duplicating the design, size and specifications shown in subsection (d). This arm shall be red and white in color and contain two alternately flashing red lights three to five inches in diameter visible at 300 feet to the front and rear in normal sunlight upon a straight level highway.

(c) Convex mirrors mounted on the front and rear so the driver in his normal seating position can see the area in front of the truck obscured by the hood and an area in the rear extending across the truck and four feet to the rear of the bumper.

(d) The stop signal arm required by subsection (b) shall be [as pictured in Figure B-1].

§4 — Use of special lights and stop arm on ice cream trucks

(a) The driver of an ice cream truck stopped on the highway for the purpose of vending shall actuate (sic) the special red flashing lights and extend the stop signal arm required by section 3.

(b) These lights and the stop signal arm shall not be used when the truck is in motion nor at any time the truck is stopped for a purpose other than vending.

§5 — Inspection required

Every ice cream truck shall be inspected by (some appropriate inspection agency or the police department) once each year prior to its
FIGURE B-1

STOP SIGNAL ARM REQUIRED FOR VENDOR VEHICLES UNDER SECTION 3(b) OF THE MODEL ORDINANCE

WHITE REFLECTIVE COLOR* 6 INCH LETTERS WHITE REFLECTIVE COLOR* 6 INCH LETTERS OUTER END

BACKGROUND RED REFLECTIVE COLOR*

RED LIGHT

INNER END

THEN GO STOP IF SAFE

1/4" 15"

3-1/8 inch diameter (4" recommended)

VIEW OF SIGN FROM FRONT OF TRUCK

OUTER END WHITE REFLECTIVE COLOR* 6 INCH LETTERS WHITE REFLECTIVE COLOR* 2 INCH LETTERS

BACKGROUND RED REFLECTIVE COLOR*

RED LIGHT

DONER END

STOP THEN GO IF SAFE

15"

3-1/8 inch diameter (4" recommended)

VIEW OF SIGN FROM REAR OF TRUCK

* COLORS TO MEET SPECIFICATIONS IN THE 1970 FEDERAL HIGHWAY ADMINISTRATION STANDARD COLOR CHARTS

** APPROXIMATE DIMENSIONS
use in this city for the purpose of retail sales of frozen dairy products. The department shall inspect each ice cream truck to determine whether it complies with this ordinance and other state and local laws. (A fee of $ shall be collected for this inspection.)

§6 — Vending restrictions

(a) A person shall not vend (on arterial streets) (on through highways) (on streets shown on an official thoroughfare plan) (in the central business district) (in business districts) (on streets where the speed limit exceeds 30 miles per hour) (on divided highways where the speed limit exceeds 30 miles per hour).

(b) A person shall not vend within 500 feet of any property used as a grade or (junior high) (middle) school from one hour before the regular school day to one hour after the regular school day; provided, this subsection shall not apply on days when school is not attended by children nor on school property when vending has been approved in writing by the principal.

(c) A person shall vend only when the ice cream truck is lawfully parked or stopped.

(d) A person shall vend only from the side of the truck away from moving traffic and as near as possible to the curb or edge of the highway.

(e) A person shall not vend to a person standing in the roadway.

(f) A person shall not stop on the left side of a one-way highway to vend.

§7 — Backing restricted

The driver of an ice cream truck shall not back the same to make or attempt a sale.

§8 — Unauthorized riders prohibited

(a) The driver of an ice cream truck shall not permit any unauthorized person to ride in or on the vehicle.

(b) A person shall not ride in or on an ice cream truck unless employed by its owner or unless authorized in writing to do so by the
owner or police department.

§9 — Exemption authorized

The (chief of police or other appropriate official) may except from the requirements of this ordinance any ice cream truck which is not used to vend to persons under 12 years of age.
FOOTNOTES


2. Another version of a model vendor legislation was developed in Note, The Liability of Ice-Cream Vendors for Injuries of Child-Pedestrian Customers, 26 SYRAUCUE L. REV. 927, 946-47 (1975).


7. UNIFORM VEHICLE CODE § 12-227(b) (Supp. II 1976).

8. ALASKA CONST. art. X, § 11; ARIZ. CONST. art. XIII, § 2; CAL. CONST. art. XI, § 6; COLO. CONST. art. XX, §§ 1-6; GA. CONST. § 6-2001; IDAHO CONST. art. XII, § 2; ILL. CONST. art. VII, § 8; KAN. CONST. art. XII, § 5; LA. CONST. art. VI, § 5; MD. CONST. art. XI - E; MASS. CONST. amend. II, §§ 1, 6; MICH. CONST. art. VII, § 22; MINN. CONST. art. XII, § 4; NEB. CONST. art. XI, §§ 2-5; NEV. CONST. art. XI, § 8; N.J. CONST. art. 4, §§ 7(10),7(11); N.M. CONST. art. X, § 6; N.Y. CONST. art. IX, § 2(c); OHIO CONST. art. XVIII, § 3; OKLA. CONST. art. XVIII, §§ 2,3(a); OR. CONST. art. XI, §§ 2,2a; PA. CONST. art. IX, § 2; R.I. CONST. amend. XXVIII; S.D. CONST. art. IX, § 2; TENN. CONST. art. XI, § 9; TEX. CONST. art. XI, § 5; UTAH CONST. art. XI, § 5; WASH. CONST. art. XI, §§ 10,11; W. VA. CONST. art. 6, § 39(a); WIS. CONST. art. XI, § 3.


13. Wisconsin statutes were held to preempt the field of traffic regulation of traffic and thus prohibit local regulations in City of Janesville v. Walker, 50 Wis.2d 35, 183 N.W.2d 158 (1971) [ordinance prohibiting driver to possess beer in vehicle also occupied by minor], and City of Madison v. Reynolds, 48 Wis.2d 156, 180 N.W.2d 7 (1970) [ordinance creating traffic lanes for exclusive use of buses and taxicabs].


15. The existence of a state statute expressly declaring peddling to be a lawful occupation was held to prevent municipalities from barring ice-cream vending in State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963); and Eastern Carolina Tastee-Freeze Inc. v. Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962).


17. See, Good Humor Corp. v. Village of Mundelein, 33 Ill. 2d 252, 211 N.E.2d 269 (1965) [outright prohibition]; and City of Stevens Point v. Boeksenbaum, 225 Wis. 373, 274 N.W. 505 (1937) [regulation that had prohibitory effect]; but see Trio Distributor Corp. v. City of Albany, 2 N.Y.2d 690, 143 N.E.2d 329, 163 N.Y.S.2d 585 (1957), which discusses cases overturning municipal prohibitions of ice-cream vending.


REFERENCES


