

Noting

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2013-1674

CITY OF BOSTON
CLERK OF COURT DEPARTMENT

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City of Boston
(ESC)

BOSTON BY SEGWAY, INC.

vs.

CITY OF BOSTON

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Boston by Segway, Inc. ("BBS") commenced this action against the City of Boston ("City") seeking to enjoin it from enforcing Ordinance 16-12.38A, entitled "Electric Personal Assistive Mobility Devices." This matter is before the court on BBS's motion for preliminary injunction. For the reasons that follow, the motion is **DENIED**.

BACKGROUND

BBS provides guided tours of Boston using Segway Human Transporters ("Segways"). It has done so since 2008 and is currently the only company that provides such tours in the City. During its tours, up to six Segways follow, in tandem, behind a tour guide operator who narrates, by way of audio devices equipped with each Segway, historical information about Boston and its landmarks. Although Segways have a maximum speed of 12.5 mph, BBS limits its customers to a maximum speed of approximately 8 mph. The average speed of the Segways on BBS's guided tours is approximately 4-5 mph. Previously, Segway tours were conducted on sidewalks, however, most recently they have been conducted on bike lanes located on the City's street. BBS ensures that its guides and customer observe all traffic laws.

Prior to the start of each guided tour, customers first participate in a 30 minute training course conducted by a BBS employee during which the customers learn about how to safely operate the Segways and BBS's safety rules (e.g., helmet wearing and the prohibition against using electronic devices while operating the Segway). According to BBS, there have been no safety incidents since the tours began operating in 2008.

In March 2009, a new location for Segway tours was found at 36 Warren Street in Charlestown. The Charlestown location proved problematic because it did not include frontage other than the sidewalk area. As a result, throughout the day, Segways crowded the sidewalk, which angered local residents and prompted them to contact City Counselor Salvatore LaMattina ("Counselor LaMattina").¹

In June 2010, Counselor LaMattina called a public hearing to discuss and examine "how the City of Boston plans to accommodate Segway users." Subsequent to the public hearing, Counselor LaMattina proposed an Amendment to Chapter 16 of the City of Boston Code ("Proposed Ordinance"), which sought to regulate the use of Segways. One of the stated purposes of the Proposed Ordinance was to address the potential safety problems connected with the use of Segways. The Proposed Ordinance was signed by the Boston City Council on June 15, 2011 and endorsed by Mayor Thomas Menino shortly thereafter. It was codified and inserted into the City Boston Code as 16-12.38A ("Ordinance"). The Ordinance states in relevant part:

16-12.38A.1 Definition of Electric Personal Assistive Mobility Device or EPAMD. An electrical personal assistive mobility device (EPAMD) shall mean a self-balancing device with two (2) wheels not in tandem, designed to transport only one (1) person by an electric propulsion system having a maximum speed on a paved level surface of less than twenty (20) miles per hour. For purposes of this section 16-12.38A, EPAMDs shall include but shall not be limited to the Segway® PT. . . .

¹ In Spring of 2011, BBS moved to 420 Commercial Street in the North End.

16-12.38A.2 Prohibition of EPAMDs. The use of EPAMDs are hereby prohibited, based upon the interest of safety, on all public property in the City of Boston except as specifically authorized by the provisions of this chapter. Public property includes but is not limited to all public ways, sidewalks, parks, plazas, bicycle paths and shared use paths owned by and/or under the care, custody and control of the City of Boston.

16-12.38A.3 Definition of Tour Operator. A tour operator is any person, corporation, or other entity engaged in the business of providing tours to customers using EPAMDs and/or engaged in the business of renting EPAMDs to customers in the City of Boston.

16-12.38A.4 Limited Use of EPAMDs for Tour Operations. In the City of Boston the use of EPAMDs in tour operations shall be permitted subject to licensure by the Police Commissioner for the City of Boston who shall have exclusive authority to license and promulgate regulations for the use of EPAMDs in such tour operations. *Subject to such licensure and regulations, tour operators, their employees, customers and users may operate EPAMDs only on public streets in the City of Boston on routes approved by the Boston Transportation Department with a license issued by the Boston Police Department's Hackney Division . . .* The Police Commissioner may establish additional conditions and requirements by rule or regulation consistent with his authority as Police Commissioner of the City of Boston. . . .

(emphasis added). The Ordinance contains no criteria for evaluating a request for a license or approval of a specific route. Since the Ordinance's passage, no regulations have been promulgated which provide such criteria.

The license requirement mandated by the Ordinance is similar to the license requirements imposed by the City for Boston Duck Tours, Pedicabs, Jitneys, and taxicabs. No similar licensing scheme has been imposed on the City's bike tours (e.g., Adventure Bike Tours) or on companies that rent golf carts to customers (e.g., HUBcruzers).

Following the passage of the Ordinance, BBS submitted multiple routes for approval to the Boston Transportation Department and sought to obtain licenses from the Boston Police Department ("BPD") Hackney Division. Both efforts proved unsuccessful. BBS, however, continued to operate its business without any licenses or approved routes.

On April 10, 2013, days before school vacation week, the Hackney Division shut down BBS's business, threatening to impound the Segways if it continued to operate its tours.

On May 7, 2013, BBS filed the present lawsuit and a motion for preliminary injunction seeking to enjoin the enforcement of the Ordinance. For the purposes of the motion for preliminary injunction, BBS is relying solely on the claim in Count I of its Verified Complaint, which maintains that the City exceeded its authority under the Home Rule Amendment of the Massachusetts Constitution in vesting the BPD Hackney Division with the authority to license and regulate companies providing Segway tours.

Since the filing of the lawsuit, the Hackney Division has granted BBS 53 licenses to operate and the parties have attempted to come to an agreement regarding appropriate one hour and two hour tour routes. The City has approved a modified version of a one-hour route submitted by BBS, but the parties have been unable to agree on a two-hour route, which has required BBS to cancel several of its advanced bookings for two-hour tours. Segway maintains that absent an injunction, it will be forced to file for bankruptcy and close its business down.

DISCUSSION

I. Standard of Review

In deciding whether to grant a preliminary injunction, a court must assess whether the plaintiff has demonstrated: "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the [moving party's] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction." *Tri-Nel Mgt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 219 (2001). When the plaintiff is seeking to enjoin governmental action, the court is also "required to determine that the requested order promotes

the public interest, or, alternatively, that the equitable relief will not adversely affect the public.”
Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984).

II. Analysis

Section 6 of the Home Rule Amendment provides that “[a]ny city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is *not inconsistent with the constitution or laws enacted by the general court* in conformity with powers reserved to the general court . . .” (emphasis added). In the present case, BBS contends that the Ordinance is invalid under the Home Rule Amendment because its grant of licensing authority to the Boston Police Commissioner, through the BPD’s the Hackney Division, is inconsistent with St. 1931, c. 399, as amended by St. 1933, c. 93 (“Chapter 399”). BBS maintains that Chapter 399 limits the Police Commissioner’s power to the licensing of sight-seeing automobiles carrying passengers for hire and that, therefore, the Police Commissioner is without authority to license Segways as they are not the type of sight-seeing vehicle targeted by the statute.² This court disagrees.

The existence of legislation on a subject without more does not render the enactment of a local ordinance with respect to the same subject unlawful. *John Donnelly & Sons v. Outdoor*

² Chapter 399 provides in relevant part:

Section 1. The term “sight-seeing automobile,” as used in this act, shall mean an automobile, as defined in [G. L. c. 90, § 1], used for the carrying for a consideration of persons for sight-seeing purposes in or from the city of Boston and in or on which automobile guide service by the Driver or other person is offered or furnished.

Section 2. It shall be unlawful for a person or a corporation to offer or furnish service by a sight-seeing automobile in or from the city of Boston unless said automobile is licensed hereunder . . . and it shall be unlawful for a person to operate such an automobile as Driver in or from said city unless he/she is licensed so to do as hereinafter provided.

Section 3. The police commissioner for the city of Boston shall have exclusive authority to license in said city sight-seeing automobiles and the persons operation [sic] them as divers [sic], and to designate places in public streets which may be occupied as stands for Sight-seeing Automobiles
...

Adver. Bd., 369 Mass. 206, 212 (1975); *Bloom v. Worcester*, 363 Mass. 136, 156 (1973). Rather, an ordinance will be considered inconsistent with a Massachusetts statute, and therefore invalid, only if there is a “sharp conflict” between the ordinance and the statute. *Bloom*, 363 Mass. at 154. A sharp conflict exists when “either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local by-law.” *Grace v. Brookline*, 379 Mass. 43, 54 (1979).³

Chapter 399 does not appear to apply to Segways.⁴ Nevertheless, this fact does not make the City’s actions unlawful. Chapter 399, while granting the Police Commissioner the authority to license sight-seeing vehicles, neither explicitly precludes the commissioner from issuing licenses for other types of vehicles nor suggests that the Legislature intended to limit the Police Commissioner’s authority to license non-sightseeing vehicles. There is also no indication within the statute’s language that licensing Segways would in any way frustrate the law’s purpose. One

³ The statute does not address a subject as to which no local action may be taken without explicit legislative authorization. (e.g., civil relationships between persons, such as between landlords and tenants and between employers and employees). In these circumstances, “the scope of that permissible local action is not determined broadly under Section 6 of the Home Rule Amendment. . . . The situation in this case is analogous to that existing prior to the Home Rule Amendment where a municipality had ‘only those powers which are expressly conferred by statute or necessarily implied from those expressly conferred or from undoubted municipal rights or privileges.’” *Church v. Boston*, 370 Mass. 598, 601 (1976).

⁴ The statute defines a sight-seeing vehicle as “an automobile, as defined in [G. L. c. 90, § 1], used for the carrying for a consideration of persons for sight-seeing purposes in or from the city of Boston and in or on which automobile guide service by the Driver or other person is offered or furnished.” It appears that Segways are not encompassed within this definition for two reasons. First, the plain language of the definition suggests that the statute is only applicable to vehicles carrying passengers for hire. Segways do not carry passengers as they are driven by the tour’s participants. Second, it does not seem that a Segway is an automobile under G. L. c. 90, § 1. Section 1 defines an automobile as “any motor vehicle except a motor cycle.” In defining the term motor vehicle, the statute grants the registrar of motor vehicles the power, in doubtful cases, to determine whether a particular vehicle is a motor vehicle and, if she classifies the vehicle as a motor vehicle, the authority to require that it be registered. See G. L. c. 90, § 1. The Registry of Motor Vehicles’ drivers manual suggests that the registrar does not consider Segways to be motor vehicles. It states that “The Registrar has determined that a ‘Segway’ cannot be registered in this state as a ‘motor vehicle’ or as a ‘motorized bicycle’ (moped).” Commonwealth of Massachusetts Driver’s Manual at 128. It is worth noting that the City does not argue that a Segway is sight-seeing automobile under Chapter 399.

likely purpose of Chapter 399 is to mitigate and control the congestion that sight-seeing vehicles could cause on Boston roads. See *Commonwealth v. Boston & Maine Transp. Co.*, 282 Mass. 345, 350 (1933). The licensing of Segways does not hinder this goal in any way. BBS has not pointed to any other statutory purpose that the Ordinance would frustrate.

It is also significant that Chapter 399 was enacted (and subsequently amended) prior to the existence of the Home Rule Amendment, when most local action required statutory authorization. As the SJC observed in *Bloom*:

Obviously, many pre-Home Rule Amendment statutes granting authority to municipalities were rendered unnecessary by the Home Rule Amendment. We are not inclined to attribute to permissive statutes of that type a limiting function upon the powers of municipalities under the Home Rule Amendment or under the parallel language of Section 13 of the Home Rule Procedures Act. Were we to infer such a limiting function from the existence of such permissive statutes, the result would be that the legislative powers of municipalities would be restricted precisely to those which they had at the time of the adoption of the Home Rule Amendment. That was not the purpose of the voters in adopting the Home Rule Amendment, and no such purpose can be found in the Home Rule Procedures Act or in any other legislation passed since the adoption of the Home Rule Amendment.

363 Mass. at 157. Chapter 399 is one such permissive statute that the Home Rule Amendment likely rendered unnecessary. It purports to grant power, not take it away. As such, this court is reluctant to infer the limiting function BBS seeks to read into Chapter 399.

BBS points to no other statute evidencing a legislative intent to preclude local regulation of Segways or indicating that the Police Commissioner is precluded from licensing Segways. Nor does BBS provide any case law suggesting that licensing is a subject area as to which no local action may be taken without explicit legislative authorization. Instead, BBS cites to several cases pre-dating the passage of the Home Rule Amendment. See *Commonwealth v. Plaisted*, 148 Mass. 375 (1889); *Commonwealth v. Clay*, 224 Mass. 271 (1916); *Commonwealth v. Slocum*, 230 Mass. 180 (1918); *Commonwealth v. Maletsky*, 203 Mass. 241 (1909). These cases

are inapposite. While they establish that the Legislature has the power to license Segways and to delegate such power to the municipalities, they do not do not address the present nature of the City's regulatory authority under the Home Rule Amendment.

In support of its position, BBS also points out that in 1998, the Legislature passed a special act providing for the registration and licensing of commercial messengers in Boston. See St. 1998, c. 302. However, this occurrence by itself does not mean that the City may grant licenses only with express legislative authority. Nothing in the statute itself suggests that the City's licensing power is restricted in the situation presented here. BBS has failed to cite any documentation revealing the context that surrounded the passage of the legislation.⁵

The court is mindful of the frustration BBS has experienced in its attempts to operate within the Ordinance's restrictions as well as the financial toll that the City's licensing and route approval process has taken on the company's business.⁶ Indeed, the court believes that Segway tours likely provide a great benefit to Boston and encourages the City to work in good faith to quickly approve more routes for BBS. Nevertheless, it is the duty of this court to apply the law to the facts of this case.

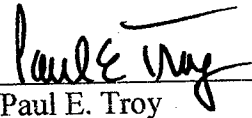
BBS has failed to show that it is likely to succeed on the merits of Count I of its complaint as it appears that the City was free to grant licensing authority for Segways to the Police Commissioner. Consequently, the court cannot impose an injunction upon the City.

⁵ It may be that passage of St. 1998, c. 302 was related to the fact that the Legislature apparently had passed several statutes governing bicycle use prior to its enactment. See, e.g., G. L. c. 85, § 11B. As discussed above, a similar situation does not appear to exist regarding Segways.

⁶ However, this court does not conclude, as BBS suggests, that the Ordinance itself or the current functioning of the route approval process is designed to put the company out of business. See *Foster From Gloucester, Inc. v. City Council of Gloucester*, 10 Mass. App. Ct. 284, 294 (1980) ("There is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare.")

ORDER

For the foregoing reasons, BBS's motion for preliminary injunction is **DENIED**.



Paul E. Troy
Justice of the Superior Court

Date: June 14, 2013