



CITY OF CAMBRIDGE LAW DEPARTMENT

Donald A. Drisdell
Deputy City Solicitor

A handwritten signature in cursive script, appearing to read "Dad", is written over the typed name and title.

To: Robert W. Healy, City Manager

Date: April 16, 1998

Re: City Council Order #19, dated February 23, 1998
Truck Restrictions

The referenced City Council Order requested "...a legal opinion based on an analysis of the Plaistow case outlining the ability of the City to restrict trucks within the City." During the discussion prior to the vote on the order, the City Council indicated that the request was specifically related to the proposal in Truck Advisory Committee Report B for a citywide nighttime truck ban on through trucks.

Given the primary importance of the federal constitutional and statutory issues raised by these questions, I contacted and retained Professor Richard H. Fallon, Jr., who teaches federal law at the Harvard Law School. I sent to Professor Fallon a copy of the Council order, the specific recommendation for the truck ban from Report B along with an appendix from that report in which Attorney Thomas Bracken analyzes legal issues relating to regulating trucks pursuant to the City's Zoning Ordinance, and legal memoranda submitted in *City of Cambridge v. Bedingfield, et al.* (usually referred to as the Portland Stoneware case).

Professor Fallon has now delivered a legal memorandum assessing legal issues that would arise if the City should enact a citywide restriction on nighttime truck traffic. He has also provided a shorter document which summarizes the legal memorandum's conclusions.

I have notified Professor Fallon that the Traffic and Transportation Committee of the City Council is holding a hearing on the Truck Committee Reports on April 28, 1998, and he has indicated that he will be available to attend the hearing that evening to answer questions for the Committee.

Richard H. Fallon, Jr.
Harvard Law School
Cambridge, Massachusetts 02138

LEGAL ISSUES PRESENTED BY RESTRICTIONS ON NIGHTTIME TRUCK TRAFFIC

At the request of City officials, I have prepared a report on legal issues that would arise if Cambridge should attempt to restrict nighttime truck traffic within the City. This separate, shorter document summarizes my conclusions.

I. Introduction and Summary of Conclusions

A Truck Traffic Advisory Committee has advocated that the City of Cambridge adopt a partial ban on nighttime truck traffic. Specifically, the so-called "Report B Proposal" would ban truck traffic between 10:00 p.m. and 7:00 a.m., with exceptions for trucks with points of origin or delivery in the City.

If this proposal were adopted, representatives of the trucking industry might well challenge it in court. They would argue that the resulting restrictions on trucks violate at least two federal statutes, the Commerce Clause of the federal Constitution, and one or more statutes and regulations enforced by the Massachusetts Highway Department.

In my judgment, the legal arguments that could be used to challenge the Report B Proposal are very serious ones. At best, the outcome of a lawsuit would be difficult to predict. If the City wants to restrict nighttime truck traffic, it would be on firmer legal ground if it attempted to do so only on specifically designated, exclusively residential streets.

II. Legal Authority that Might Support Truck Restrictions

To supporters of the Report B Proposal, my conclusion may seem disappointing. In a recent case, a federal Court of Appeals, whose decisions are controlling authority in this region of the country, upheld a curfew on nighttime truck traffic at a truck terminal in Plaistow/Newton, New Hampshire. In New Hampshire Motor Transport Association v. Town of Plaistow, the court of appeals found that the Plaistow ordinance was permissible under all of the provisions of federal law under which a Cambridge ban is most likely to be challenged.

Specifically, the court found that Plaistow's nighttime restriction:

- * did not violate the federal Surface Transportation Assistance Act, which requires "reasonable access" to delivery and other sites from the interstate highway system, because unrestricted access existed during all but the nighttime hours;

- * did not violate the federal Hazardous Materials Transportation Act, because excessive delays on the movement of hazardous materials were not imposed; and

- * did not violate the Constitution's Commerce Clause, which prohibits state and local governments from imposing discriminatory or excessive burdens on interstate commerce, because any "incidental" burden that the nighttime restriction imposed on the flow of commerce was not "excessive" in relation to the local benefits of increased residential tranquility.

The Plaistow decision provides strong support for the idea that Cambridge could restrict nighttime truck traffic in some areas of the City in order to protect residential peace and quiet. But the facts of Plaistow were quite different from those that would be presented in a challenge to the Report B Proposal.

III. Legal Issues Concerning Nighttime Truck Restrictions

Opponents of a Cambridge ordinance restricting nighttime truck traffic could correctly argue that the Plaistow decision left many important issues unresolved.

First, the Plaistow case involved a ban on nighttime truck traffic that applied only to a carefully defined, residential part of town. In addition, there had been a judicial hearing, in which it was found that the residents of that part of town were acutely and regularly disturbed by nighttime traffic to and from the Plaistow/Newton truck terminal. By contrast, a ban on all nighttime truck traffic in Cambridge would restrict truck traffic across a wider and more diverse range of streets. It is not clear that the local benefits would be large in all areas of the City; there may be heavily trafficked or non-residential areas in

which the restriction on truck movements would not provide enough benefits to count as "reasonable" under the Surface Transportation Assistance Act or to satisfy similar tests under the Commerce Clause.

Second, if other cities were to follow Cambridge in enacting ordinances modeled on the Report B Proposal, it could make it very difficult to move hazardous materials swiftly to and from interstate highways during the nighttime. In the Plaistow case, the court of appeals specifically cautioned that prohibitions that affected all streets within a City, especially if coupled with similar restrictions by other cities, might offend the Hazardous Materials Transportation Act.

Third, the Report B Proposal would not ban all truck traffic in Cambridge during the nighttime; it would permit trucks to make deliveries in Cambridge and to travel Cambridge streets on trips that begin in Cambridge. As a result, the proposed ban would not protect City residents against all noise caused by trucks. It would only restrict noise caused by trucks that are engaged in commerce, between other cities and states, that neither ends nor originates in Cambridge. Because the impact of the ordinance would be felt only by interstate and intercity commerce, a court might conclude that an ordinance based on the Report B Proposal "discriminates" against such commerce and in favor of commerce from which Cambridge and its residents benefit. If so, the Report B Proposal would violate the Commerce Clause of the federal Constitution.

Finally, the Plaistow case involved zoning by a New Hampshire town. The town's authority was apparently not limited by any relevant provision of New Hampshire law. By contrast, Cambridge's authority to regulate truck movements is subject to restrictions by the Commonwealth of Massachusetts. Based on positions that it has taken in other cases, the Massachusetts Highway Department, which enforces the relevant Massachusetts statutes, would likely conclude that the restrictions recommended by the Report B Proposal sweep too broadly to be allowed. It is unclear whether the Department or the City would prevail in litigation. But because the Department's prior approval of a truck restriction is probably required, its opposition would erect a considerable obstacle to implementing the Report B Proposal.

IV. Conclusion

On no relevant point is the law crystal clear. It is conceivable that Cambridge could fight and win all the legal battles that would be necessary to implement the Report B Proposal. But the fight, at best, would be long and difficult. There is certainly no guarantee of success.

Neither, unfortunately, can success be guaranteed if Cambridge were to attempt to regulate nighttime truck traffic on a narrower basis. But prospects for legal success would at least be better, on all fronts, if the City were to limit any nighttime truck restrictions to overwhelmingly or even exclusively residential streets. A more narrowly targeted approach, applicable only to specifically identified residential streets, could more easily be defended as allowing reasonable access to commercial facilities and reasonable alternative routes for trucks in interstate commerce.

Richard Fallon

April 13, 1998

12,700

Richard H. Fallon, Jr.
Harvard Law School
Cambridge, Massachusetts 02138

TO: Donald A. Drisdell, Deputy Solicitor

FROM: Richard Fallon

DATE: April 13, 1998

Re: Restrictions on Nighttime Truck Traffic

You asked me to provide a legal opinion "based on an analysis of the *Plaistow* case outlining the ability of the City to restrict trucks within the City" and, in particular, to address "the extent to which the *Plaistow* decision would support a citywide nighttime ... ban on trucks" as outlined in a Truck Traffic Advisory Committee Report and referred to as "the Report B Proposal."¹ You also asked me to consider the extent to which the City's authority to restrict truck traffic might be limited by a provision of Massachusetts law, G.L. ch. 85, § 2, which provides that "any sign excluding heavy commercial vehicles"

¹ The relevant language of this Report of December 12, 1997, only pages 11 and 12 of which were furnished to me, is as follows:

[T]his report recommends that the City Council impose a curfew on all through trucks over 2.5 tons to prohibit their using City streets from 10:00 PM to 7:00 AM. The curfew will not apply to trucks with points of origin or delivery in the City. The Committee understands that the implementation of a nighttime truck ban will require further legal analysis.

requires prior written approval by the Massachusetts Highway Department.

In this memorandum, I begin by describing the *Plaistow* decision, *New Hampshire Motor Transport Association v. Town of Plaistow*, 67 F.3d 326, rehearing denied, 67 F.3d 333 (1st Cir. 1995), cert. denied, 116 S.Ct. 1352 (1996). *Plaistow* is of central relevance as the leading case dealing with issues of federal law that might be raised by a Cambridge zoning ordinance restricting truck traffic. After summarizing the court's holding, I attempt to distill the implications of *Plaistow* and other federal authorities for challenges to a truck regulation that might be brought under federal statutes and the federal Constitution. I then address state law issues that might arise under G.L. ch. 85, § 2 and other, potentially relevant statutes.

My general conclusion can be stated succinctly. Notwithstanding the *Plaistow* decision, a ban on nighttime truck traffic throughout the entire City of Cambridge, as contemplated by the Report B Proposal, would be subject to serious challenges under both federal and state law. The City's chances of prevailing in litigation would be uncertain at best. Although the state of the law makes prediction hazardous, City regulations that restrict nighttime truck traffic only on exclusively

residential streets would at least have better prospects of surviving legal challenge.

I. The Plaistow Decision

In *New Hampshire Motor Transport Association v. Town of Plaistow*, *supra*, the United States Court of Appeals for the First Circuit upheld a state court injunction, granted pursuant to a town zoning ordinance, that limited nighttime truck access to and from a New Hampshire trucking terminal. The terminal involved in the *Plaistow* case, located on a site partly in Plaistow and partly in Newton, New Hampshire, serves as a hub for trucking companies in the New England region. "Line haulers from around the country drop off freight to be delivered in New England and pick up freight whose destination lies outside New England" at the Plaistow/Newton facility. 67 F.3d at 327. Most trucks reach the terminal, which is located between five and six miles from Interstate 495, by exiting the interstate highway, then traveling on two New Hampshire state highways, and finally driving along roughly 2000 feet of private way. The first portion of the private drive lies in a Plaistow residential zone.

After receiving complaints about noise from nighttime truck traffic at the terminal, Plaistow officials sued the terminal's owner in state court. The suit alleged that the terminal's

operations violated a town zoning ordinance prohibiting land uses that "may be obnoxious or injurious by reason of the production or emission of odors, dust, smoke, refuse matter, fumes, noise, vibration, or other similar conditions, or that are dangerous to the comfort, peace, enjoyment, health, or safety of the community." 67 F.3d at 328. Based on the zoning ordinance, the town ultimately obtained a state court injunction under which no trucks may arrive at or depart from the terminal between 11:00 p.m. and 5:00 a.m. *Id.*²

Following entry of the injunction by the New Hampshire Superior Court, the New Hampshire Motor Transportation Association brought a separate suit against the town in federal court. The federal complaint alleged that various provisions of federal law, which take precedence over state and local law under the Supremacy Clause of the federal Constitution, forbade enforcement of the Plaistow zoning ordinance to restrict access to the Plaistow/Newton truck terminal.

The district court ruled against the challengers on all counts, and the court of appeals affirmed. In a careful opinion,

² Two trucks may arrive or depart between 9:00 and 11:00 p.m., and three trucks may arrive or depart between 5:00 a.m. and 6:00 a.m. There are no restrictions on access or egress from 6:00 a.m. until 9:00 p.m.

the court of appeals dealt separately with challenges under three federal statutes and under the Commerce Clause of the United States Constitution.

The Surface Transportation Assistance Act. The Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31101 et seq., forbids states and municipalities from enforcing rules that would bar trucks and trailers of federally approved length and weight from travelling on the "national network" of interstate highways and other federally funded highways designated by the Secretary of Transportation. The provision of the STAA directly involved in the Plaistow case, 49 U.S.C. § 31114, also prohibits states from denying approved trucks "reasonable access" between the national network and "terminals, facilities for food, fuel, repairs, and rest, and points of loading and unloading."³

³ Section 31114 reads in full:

§ 31114. Access to the Interstate System

(a) Prohibition on denying access. A State may not enact or enforce a law denying to a commercial motor vehicle subject to this subchapter or subchapter I of this chapter reasonable access between--

(1) the Dwight D. Eisenhower System of Interstate and Defense Highways (except a segment exempted under section 31111(f) or 31113(e) of this title) and other qualifying Federal-aid Primary System Highways designated by the Secretary of

Advancing an argument that had been accepted by several federal district courts, the plaintiffs in the *Plaistow* case argued that states and municipalities could restrict access to "terminals ... and points of loading and unloading" only where restrictions were necessary to protect interests in safety. 67 F.3d at 329. Under this argument, a zoning ordinance aimed at promoting residential tranquility could not be enforced. But the First Circuit rejected this argument. Observing that "'[r]easonable' is a comprehensive term," the court found that "nothing in language or common-sense makes reasonableness turn

Transportation; and

(2) terminals, facilities for food, fuel, repairs, and rest, and points of loading and unloading for household good carriers, motor carriers of passengers, or any truck tractor-semitrailer combination in which the semitrailer has a length of not more than 28.5 feet and that generally operates as part of a vehicle combination described in section 31111(c) of this title.

(b) Exception.--This section does not prevent a State or local government from imposing reasonable restrictions, based on safety considerations, on a truck tractor-semitrailer combination in which the semitrailer has a length of not more than 28.5 feet and generally operates as part of a vehicle combination described in section 31111(c) of this title.

solely on safety considerations." 67 F.3d at 329-30.⁴ According to the court's reading of the STAA and its implementing regulations, states and municipalities may permissibly regulate access to the federal highway system to protect interests in residential peace and tranquility, as long as the regulations are "reasonable" in a more comprehensive sense.⁵

With the legal standard thus specified, the court of appeals found that it had "no occasion to review the [district] court's ... fact-specific decision that the Plaistow restrictions," which

⁴ The court rejected an argument that § 31114(b), which begins by saying that "This section does not prevent ... reasonable restrictions, based on safety," implicitly precludes all restrictions that are not based on safety alone. According to the court, this language would permit, "but does not compel, a negative inference that the only restrictions allowed under the main provision are safety restrictions." 67 F.3d at 330. Given the ambiguity of § 31114(b), the court concluded that the statute as a whole was more sensibly read as allowing "reasonableness" to turn on considerations other than safety alone.

⁵ The court reiterated this position in an order issued following a petition for rehearing. A Department of Transportation regulation dealing with the access-review processes to be applied by the states, 23 C.F.R. § 658.19(i)(2)(ii)(A), provides that states should authorize "denial of access to terminals ... only on the basis of safety." According to the challengers, this regulation represented a controlling agency interpretation of the "reasonable access" requirement, under which restrictions on access to terminals could be permitted only on grounds of safety. But the court rejected this argument, noting that a "restriction" on times of access was not a "denial" of access. 67 F.3d at 333.

permitted unrestricted access to the truck terminal between the hours of 6 a.m. and 9 p.m., satisfied the "reasonableness" standard. *Id.* at 331. Implicitly rejecting the argument that states and municipalities must necessarily allow access to truck terminals during all 24 hours of the day, the court ruled that the challengers had "waive[d] the factual issue" about whether the application of the Plaistow ordinance was reasonable under the circumstances. *Id.*

The Hazardous Materials Act. The challengers also contended that application of the Plaistow ordinance was barred by the Hazardous Materials Transportation Uniform Safety Act of 1990 ("Hazardous Materials Act"), 49 U.S.C. § 5101 *et seq.*, which "establishes uniform, national rules for the transportation of hazardous materials." 67 F.3d at 331. The Hazardous Materials Act includes an express preemption clause, which displaces any state and local regulation that is "an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter." 49 U.S.C. § 5125. Because the Plaistow ordinance could require delays in the movement of hazardous materials, the challengers maintained that it was incompatible with "'the federal speedy-transport mandate,' *N.H. Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 51 (1st Cir. 1984)," which

was then codified at 49 C.F.R. § 177.853(a): "All shipments of hazardous materials must be transported without unnecessary delay."⁶ The court of appeals disagreed. "By using the word 'unnecessary,'" the court concluded, "the regulations indicate that some delays are necessary and acceptable." 67 F.3d at 331.

Having established that not all delays prompted by state and local regulations are "unnecessary," the court of appeals found that "the burden is upon those who attack the restriction to show the impact." *Id.* at 332. On the facts, the court held, the challengers had made no adequate showing to invalidate the Plaistow ordinance's application. *See id.*

The Noise Control Act. The Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.*, regulates noise emissions by motor carriers in interstate commerce. According to the challengers, the Noise Control Act displaced all state and local regulations of interstate motor carriers that aimed to protect against harms caused by excessive noise. The court of appeals rejected this argument. According to the court, the Noise Control Act was not intended to preempt "a local curfew order based on a range of concerns" including but not limited to "decibel levels." 67 F.3d

⁶ Following a recodification, the relevant language now appears at 49 C.F.R. § 177.800(d).

at 332.

The Commerce Clause. The court of appeals also rejected an argument that the Plaistow ordinance and injunction violated the Commerce Clause of the federal Constitution by interfering impermissibly with the flow of interstate commerce. To resolve this challenge, the court employed a balancing test, first formulated by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), which applies to statutes that impose "incidental" burdens on the flow of interstate commerce but do not facially or intentionally discriminate against interstate commerce. Under the *Pike* test, courts ask "whether 'the burden [imposed on interstate commerce by the local restriction] is clearly excessive in relation to the putative local benefits.'" *Pike*, 397 U.S. at 142. "Starting with 'burden,'" the court of appeals emphasized that the Plaistow ordinance affected only a single terminal and that even that terminal could operate without limitation for 15 hours a day. *Plaistow*, 67 F.3d at 333. "On the other side of the scale," the court cited testimony by residents reflecting "the effect on their lives of unrestricted deliveries" and noted that the challenged curfew was "akin to zoning and traffic restrictions traditionally applied on a local level." *Id.* Under the circumstances, the court of appeals concluded,

"the burden of the curfew on interstate commerce [had] not been shown to be excessive in relation to the benefits." *Id.*

II. Relevance of the Plaistow Decision to Truck Regulations in Cambridge

At a general level, the *Plaistow* decision clearly establishes that federal law does not absolutely forbid the enforcement of municipal zoning regulations, such as those being considered by the City of Cambridge, that reasonably restrict truck traffic in order to protect interests in residential peace and tranquility. In areas where truck traffic severely, regularly, and demonstrably disrupts the tranquility of purely residential neighborhoods during nighttime hours, reasonable access limitations would not violate the Surface Transportation Assistance Act, the Hazardous Materials Act, the Noise Control Act, or the Commerce Clause. Indeed, in the wake of the *Plaistow* decision, it is hard to imagine a successful challenge under the Noise Control Act to any zoning regulation that merely restricts truck traffic during certain hours of the day.

Nonetheless, the *Plaistow* decision leaves many questions unanswered. Several of the unanswered questions are directly relevant to the so-called "Report B Proposal," which calls for the City of Cambridge to ban truck traffic between 10:00 p.m. and

7:00 a.m., with exceptions for trucks with points of origin or delivery in the City. In assessing the permissibility of this proposal, it is important to consider specific challenges that might be brought under the Surface Transportation Assistance Act, the Hazardous Materials Act, and the Commerce Clause. But two general points bear noting at the outset.

First, the *Plaistow* case involved the very narrowly targeted application of a city zoning ordinance to just a single (private) road in a single residential neighborhood, following a fact-specific showing of disruption of tranquility within that neighborhood. By comparison, the Report B Proposal would encompass the entire City of Cambridge. Similarly fact-specific showings that truck traffic disrupts residential tranquility on all streets throughout the City would likely be difficult if not impossible to make.

Second, the First Circuit decision in the *Plaistow* case laid down a number of important legal principles, under which the court ruled that the party challenging the *Plaistow* ordinance had not made the "fact-specific" showings that would be necessary for its challenge to prevail. See, e.g., 67 F.3d at 332. With respect to the Surface Transportation Assistance Act, the court found that the "appellants' cursory argument" actually "waive[d]

the factual issue" on which a challenge to the Plaistow ordinance's application ultimately had to depend. *Id.* at 331. If the Report B Proposal were adopted, representatives of the trucking industry might well litigate with more industriousness and savvy than did the challengers in the *Plaistow* case.

A. Issues under the Surface Transportation Assistance Act

Section 31114 of the STAA requires the City of Cambridge to permit "reasonable access" between covered interstate (and other designated) highways and "terminals, facilities for food, fuel, repairs, and rest, and points of loading and unloading for household goods carriers." Under this provision, I would expect challenges to the Report B Proposal on at least three, related grounds.

First, I would anticipate a general argument that the relatively blanket prohibition of the Report B Proposal has not been, and probably could not be, generally justified as "reasonable." Cambridge has many streets and many kinds of neighborhoods. While nighttime restrictions on truck traffic through residential neighborhoods might be defended based on *Plaistow*, nothing in *Plaistow* specifically justifies so broadly

sweeping a restriction.⁷

Second, although the Report B Proposal appears to bend to § 31114's mandate of "reasonable" access to "terminals ... and points of loading and unloading" by allowing unrestricted access to "points of ... delivery" in Cambridge, the Report B Proposal does not provide any similarly specific accommodation of § 31114's demand for reasonable access to "facilities for food, fuel, repairs, and rest." If the City implicitly recognizes that it is reasonable to permit unrestricted access to "points of ... delivery" in Cambridge, it may be hard to deny the reasonableness of allowing similar access to "facilities for food, fuel, repairs, and rest."

Third, the Report B Proposal permits the use of Cambridge streets by trucks with origins and destinations in the City, but would restrict the use of Cambridge streets during nighttime hours by trucks seeking access between interstate highways and "terminals ... and points of loading and unloading" in other cities and towns. This discrimination may be troubling insofar as the aspiration of the STAA is to create a *national*

⁷ Indeed, the court of appeals declined to address what it termed the "fact-specific" question whether the district court had found correctly that "the Plaistow restrictions ... did permit reasonable access." 67 F.3d at 331.

transportation network that encompasses not only interstate and other designated highways, but also local roads that connect the specifically national highways. If it is not too disruptive of residential tranquility for a truck to pass through Cambridge streets to a destination in Cambridge, why is it any more disruptive for the same truck to pass along the same streets to a destination in Arlington, for example? The answer might be that Cambridge should be able to accommodate its citizens on a preferential basis, and other towns can similarly accommodate their citizens on a preferential basis. In fact, however, it would not be possible for every city and town to permit unhindered nighttime deliveries from the interstate highway system to its own residents. Under a regime in which municipalities could selectively restrict truck access to all of their streets during the nighttime hours, cities and towns that do not immediately abut any interstate highways could be entirely cut off (by other cities' zoning regulations) from receiving unhampered nighttime deliveries from the interstate highway network, while cities that do abut the interstate system could allow nighttime deliveries to their own residents, but not to others.

It is impossible to say with assurance how a court would

respond to any of these arguments. As I have noted, the *Plaistow* case did not raise such issues, nor have I been able to find other authority that is directly on point. On the authority of *Plaistow*, Cambridge would almost certainly not violate the Surface Transportation Assistance Act if it were to ban truck traffic on at least some, specifically identified, purely residential streets during the nighttime hours, provided that the City made sufficiently street-specific findings about normal uses and the potential for disruption. But much is murky. In particular, to allow exceptions to an otherwise applicable truck curfew (for trucks with points of origin or delivery in Cambridge) is a double-edged sword, with uncertain legal ramifications. On the one hand, such exceptions may appear to enhance the reasonableness of a regulation with respect to those who immediately benefit; surely the exceptions reduce the likelihood of a legal challenge by the exceptions' beneficiaries. On the other hand, exceptions are inherently selective and in some sense discriminatory; an exception allowing nighttime use of Cambridge streets to permit nighttime deliveries in Cambridge but not elsewhere is likely to invite challenge as not only discriminatory, but as "unreasonably" so under the Surface Transportation Assistance Act.

B. Issues under the Hazardous Materials Act

The crucial question under the Hazardous Materials Act is whether a regulation, such as the Report B Proposal, interferes with the Act's implicit "speedy-transport mandate." *Plaistow*, 67 F.3d at 331, quoting *N.H. Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 51 (1st Cir. 1984), which is currently codified in 49 C.F.R. § 177.800(d).⁸ Although the application of the *Plaistow* ordinance entailed a delay in the delivery of some hazardous materials, the court of appeals clearly found that some delays occasioned by zoning ordinances are "necessary and acceptable." 67 F.3d at 331.⁹ But the court did not necessarily imply that other, broader curfew orders would be acceptable under the statute. On the contrary, the court pronounced the *Plaistow* case "quite unlike *National Tank Truck Carriers, Inc. v. Burke*, 698 F.2d 559 (1st Cir. 1983), in which [the court] affirmed a

⁸ 49 C.F.R. § 177.800(d) provides: "All shipments of hazardous materials must be transported without unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination."

⁹ See also *National Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982) (upholding a regulation forbidding the transport of hazardous gases by tank truck within the City, unless with permission and subject to time restrictions, on the ground that any forced delay is "necessary" rather than "unnecessary").

decision striking down Rhode Island's state-wide curfew and permitting procedure for transporting certain liquid gas on any Rhode Island roadway."¹⁰ Indeed, the court of appeals said specifically in its *Plaistow* decision that "[q]uite possibly a local restriction might also unjustifiably interfere with hazardous shipment movements, either standing alone or in combination with restrictions in other communities." 67 F.3d at 331-32.

The concerns of the court of appeals echo those expressed by the Department of Transportation in ruling on the permissibility of local regulations that expressly regulate the movement of hazardous materials. In DOT Inconsistency Ruling IR-14, 49 Fed. Reg. 46656 (1984), the Department said specifically that if one county were permitted to impose restrictions impeding the movement of hazardous materials within its boundaries, others might follow suit, and "[t]his would lead to the type of regulatory balkanization which Congress sought to preclude" by enacting the Hazardous Materials Transportation Act. *Id.*

¹⁰ The Rhode Island statute invalidated in *Burke* absolutely forbade the transportation of certain liquified gases within the state during certain times of day, as well as requiring a permit for the transportation of those gases within the state. See *National Truck Carriers, Inc. v. Burke*, 535 F.Supp. 509 (D.R.I. 1982), *aff'd per curiam*, 698 F.2d. 559 (1st Cir. 1983).

Because the Report B Proposal is so different in structure from the order upheld in *Plaistow*, it is difficult to predict with confidence whether a court would find it preempted by the Hazardous Materials Act. The Report B Proposal, which encompasses the entire City of Cambridge, is in one sense broader than the judicial order challenged in *Plaistow*. On the other hand, the Proposal allows exceptions for -- and thus imposes no delay at all upon -- shipments that originate or end in Cambridge. And it is hard to gauge how the total quantity of hazardous materials that would be affected by the Report B Proposal would compare with that in the *Plaistow* case, where the affected area was geographically small, but specifically encompassed an important regional shipping hub.

Perhaps the central question is whether a Cambridge ordinance, "either standing alone or in combination with restrictions in other communities," 67 F.3d at 332, would have a significant effect on the movement of hazardous waste to and from other cities and towns. Although the Department of Transportation has ruled (in another context) that regulations with the potential to "balkan[ize]" the movement of hazardous materials should held preempted, the actual effect of any particular ordinance is obviously a fact-specific question; and

the Plaistow court made clear that "the burden is upon those who attack the restriction to show the impact." 67 F.3d at 332.

Clearly, however, if the Report B Proposal were adopted, it should be anticipated that a serious fact-specific challenge might be brought under the Hazardous Materials Act, based on *National Tank Truck Carriers, Inc. v. Burke, supra*, and dicta in the *Plaistow* case suggesting that city-wide restrictions might be suspect on the same basis as the state-wide curfew in the *Burke* case. The City's position would be stronger if a restriction on nighttime truck traffic were limited to specifically residential streets, and thus left open at least some thoroughfares for trucks carrying hazardous waste to and from other cities.

C. Issues under the Commerce Clause

If adopted, the Report B Proposal would also invite attack under the Commerce Clause. The challenge would likely proceed on two fronts. One line of argument would be that the Report B Proposal intentionally discriminates against interstate commerce flowing to and from locations other than Cambridge. Trucks originating trips in or delivering goods to Cambridge may travel the Cambridge streets at any time of night; trucks engaged in commerce to and from other states and cities may not. The Supreme Court has held that state and local laws that

intentionally discriminate against interstate commerce are virtually per se illegal. See, e.g., *C. & A. Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).¹¹ And the Court has made it clear that limited, intrastate discrimination -- as, for example, discrimination by Cambridge against commerce moving to and from other cities and towns in Massachusetts -- will not excuse otherwise impermissible discrimination against interstate commerce. See, e.g., *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353 (1992); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

In response to this argument, it might be asserted that the Report B Proposal is not "discriminatory" against interstate commerce in the sense condemned by the Supreme Court. For the most part, the Supreme Court's cases condemning discriminatory legislation under the Commerce Clause have involved instances of economic protectionism, in which a state or municipality attempts to protect in-state economic interests from competition with out-of-state economic interests. See, e.g., *Carbone, supra*, at 392 (emphasis added) ("Discrimination against interstate commerce in

¹¹ It is clear under Supreme Court authority that local as well as state legislation can violate the Commerce Clause. See, e.g., *Carbone, supra*.

favor of local businesses or investment is per se invalid, save in a narrow class of cases in which the [state] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.").¹²

By contrast with classic cases of economic protectionism, it might be argued, the Report B Proposal seeks to promote an interest in residential peace and tranquility that is entirely unrelated to economic interests: Cambridge just wants to ensure quiet streets, not to promote anyone's economic interests at anyone else's expense.¹³ The difficulty with this argument is that the Report B Proposal does not attempt to promote the

¹² For example, the Court has held that a state may not impose discriminatory taxes favoring in-state producers of dairy products over out-of-state producers. See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

¹³ There is some awkwardness in fitting a nighttime restriction on truck traffic into any well-recognized category of Commerce Clause cases. Just as a zoning regulation aimed at protecting residential tranquility is far from a classic case of economic protectionism, neither does such a regulation fall naturally into the category of cases involving the regulation of transportation to protect safety interests. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978). In that category of cases, it was once thought that judicial review was appropriately highly deferential, but the Supreme Court's "recent transportation cases suggest that the screws of judicial review are tightening." Laurence H. Tribe, *American Constitutional Law* 419 (2d ed. 1988).

interest in quiet streets in a consistent, even-handed way: It allows truck traffic originating in Cambridge, as well as deliveries to and from Cambridge addresses, at all times of the night. As a result, the entire burden imposed by the Report B Proposal (the burden of being hampered in conducting trucking activities or receiving truck shipments during the night) is borne wholly by people outside of Cambridge, while the entire benefit (the benefit of quieter streets) is realized wholly by people inside Cambridge. When the proposed ordinance is seen in this light, it may appear that Cambridge does not really want to protect its citizens from all noisy truck traffic during the nighttime; it just wants to exclude from Cambridge, and steer into other communities, all nighttime truck traffic from which Cambridge does not benefit. This purpose could easily be classed as discriminatory against interstate commerce. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 685 (1981) (Brennan, J., concurring) (finding that a state purpose of reducing interstate traffic on its roads should be classified as protectionist in nature and thus insufficient to justify a regulatory statute); see also Laurence H. Tribe, *American Constitutional Law* 422 (2d ed. 1988) ("*Kassel* ... stands for the rule that under the commerce clause a state may not reduce the

risks posed to its own citizens by the stream of commerce by diverting the stream out of state, thereby increasing the hazards to non-residents.").¹⁴

In sum, there is a serious possibility that the Report B Proposal would be deemed intentionally discriminatory against interstate and intercity commerce and held invalid under the Commerce Clause on this basis.

If the Report B Proposal were not found to be discriminatory, its permissibility under the Commerce Clause would be subject to a balancing test; a court would weigh "whether the burden [on interstate commerce imposed by the local restriction] is clearly excessive in relation to the putative local benefits." *Plaistow*, 67 F.3d at 332, quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). It is impossible to be confident about the outcome that this test would yield. On the one hand, it could be argued that a nighttime truck curfew applicable to all Cambridge streets, rather than residential streets only, would impose burdens that exceed the local

¹⁴ But cf. *National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270, 275 (2d Cir. 1982) (rejecting arguments that an ordinance restricting the transport of hazardous gases by tank truck in New York City discriminated against interstate commerce); *People of the State of New York v. Dempsey*, 466 N.Y.S.2d 923 (1983) (same).

benefits. In upholding the order involved in the *Plaistow* case, for example, the court of appeals cited the narrow tailoring of the order before it; it also noted that the record included specific testimony concerning the hardship suffered by those living close to the Plaistow/Newton terminal. By contrast, the Report B Proposal encompasses the entire City of Cambridge. The burden on commerce might therefore be greater; similarly specific testimony about important local benefits would probably be hard to marshal. On the other hand, the *Plaistow* court emphasized that "absent discrimination, courts may reasonably insist on a fairly clear showing of undue burden before holding unconstitutional a traditional example of local regulation." 67 F.3d at 333.¹⁵ As a result, if discrimination were not found and judicial review was deferential, the Report B Proposal might well survive Commerce Clause scrutiny pursuant to a balancing test.¹⁶

With some uncertainty about how the Report B Proposal might

¹⁵ See also *New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 48 (1st Cir. 1984) (burden of showing that a statute excessively burdens interstate commerce lies on those bringing the challenge).

¹⁶ Cf. *Commonwealth v. Laffond*, 655 N.E.2d 384 (Mass. App. Ct. 1995) (rejecting a Commerce Clause challenge to a regulation forbidding the hauling of garbage in any vehicle in a residential district between 7:00 AM and 7:00 PM).

fare, only one thing seems certain. Narrower prohibitions, which restricted nighttime truck traffic on residential streets only (and possibly on a non-discriminatory basis), would be less likely to be categorized as discriminatory against interstate commerce and would be easier to defend under a balancing test.

III. Possible Restrictions under Massachusetts Law

Chapter 85, § 2 of the General Laws of Massachusetts clearly provides that any local "rule, regulation, order, ordinance or by law which excludes motor vehicles from state highways shall be invalid and of no effect." As a result, any Cambridge ordinance limiting nighttime truck traffic could not be applied to any state highways that run through the City.

Even with respect to City streets, an ordinance such as that contemplated by the Report B Proposal would potentially be subject to challenge under at least two provisions of state law. The first is Chapter 85, § 2, which specifies that "any sign excluding heavy commercial vehicles" must be approved in writing by the Massachusetts Highway Department ("MHD") before taking effect. The second is Chapter 90, § 18, which authorizes cities and towns to impose "special regulations" concerning the use of public ways, but also requires that such special regulations be approved by the MHD as "consistent with the public interests."

Chapter 85, § 2. The statute says explicitly that the MHD must give prior approval to "any sign excluding heavy commercial vehicles." Building upon this language, the MHD apparently takes the position that an exclusion may not be lawfully implemented without a sign and, accordingly, that this provision requires advance written approval by the MHD of any exclusion of heavy commercial vehicles from any Cambridge street.¹⁷ If so, implementing the Report B Proposal would require MHD approval.

Chapter 90, § 18. G.L. ch. 90, § 18 authorizes a City to make "special regulations" concerning the speed of vehicles and "prohibit[ing] the use of such vehicles altogether" on public "ways,"¹⁸ but provides that no "special regulation" may be implemented unless the MHD "shall have certified in writing that such regulation is consistent with the public interests." In *M & M Transportation Co. v. Town of Wellesley*, 333 Mass. 11 (1955), the Supreme Judicial Court held that a restriction on road use by

¹⁷ Although the courts have apparently not ruled on the validity of this position, the MHD's argument is at least a very plausible one, which the Department could be expected to defend in litigation.

¹⁸ In Cambridge, regulatory authority is specifically assigned to the traffic director under the terms of Chap. 455 of the Acts of 1961, "An act establishing a department of traffic and parking and a board of traffic and parking in the City of Cambridge."

heavy vehicles was a "special regulation" within the meaning of Chapter 90, § 18. Under this interpretation, Chapter 90, § 18 is a source of authority for the assertion of regulatory jurisdiction by the MHD, under which the Department would weigh whether a nighttime truck restriction is "consistent with the public interests."

The current authority of *M & M Transportation Co.* (and thus the applicability of ch. 90, § 18) is not wholly free from doubt, however. In *American Motorcyclist Ass'n v. Park Commission of the City of Brockton*, 592 N.E.2d 1314 (Mass. 1992), the Massachusetts Supreme Court more recently held that ch. 90, § 18 does not authorize the selective exclusion of certain classes of motor vehicles; regulation under the authority of that statute must either exclude all "such vehicles altogether," *id.*, or none at all. Moreover, the court held, a municipal regulation of the movement of motor vehicles is preempted by state law unless affirmatively authorized by some provision of state law, such as ch. 90, § 18.

The *American Motorcyclist Ass'n* case did not cite *M & M Transportation Co.*, and the two cases are, at best, difficult to reconcile; *M & M Transportation Co.* held that a selective exclusion (of trucks) was subject to ch. 90, § 18, whereas

American Motorcyclist Ass'n says that selective exclusions lie beyond the regulatory authority conferred on cities and towns by that statute. Arguably *American Motorcyclist Ass'n* could be limited to its somewhat peculiar facts, involving a total and discriminatory prohibition of motorcycles, but not other motor vehicles, from city parks. If the cases can be distinguished and the continuing authority of *M & M Transportation Co.* affirmed, a nighttime truck restriction would be covered by ch. 90, § 18, and would be permissible if, but only if, certified by the MHD as "consistent with the public interests."

If, on the other hand, a nighttime truck restriction is not authorized by Chapter 90, § 18 because it would not exclude all motor vehicles "altogether" from affected streets, then the restriction would be absolutely preempted by state law (under the reasoning of *American Motorcyclist Ass'n*) unless authorized by some other provision of state law. And the only other authorizations that arguably apply¹⁹ are expressly subject to

¹⁹ G.L. ch. 40:22 authorizes cities to make regulations for "carriages and vehicles used therein," but provides that this grant of regulatory authority is limited by "section two of chapter eighty-five." Chapter 455 of the Acts of 1961, which confers regulatory authority on the traffic director for the City of Cambridge, similarly provides that the power thus conferred is "[s]ubject to the provisions of section two of chapter eighty-five of the General Laws."

Chapter 85, § 2, discussed above, under which the MHD claims authority to review the substantive permissibility of traffic restrictions that require "signs" for their implementation.

Regulatory Stance of the MHD. In exercising its asserted authority under G.L. ch. 85, § 2, the MHD maintains that all heavy truck exclusions must conform to its current "manual on uniform traffic control devices" and to an additional set of MHD amendments.²⁰ One of the MHD's amendments recognizes the permissibility of "a truck exclusion from a municipal way" as long as "a suitable alternative route is available."²¹ In currently pending litigation,²² the MHD has taken the position -- which it apparently believes to be mandated by the federal Surface Transportation Assistance Act, discussed *supra* -- that a city must allow truck access to every "place of business ... at

²⁰ Amendments to the Manual on Uniform Traffic Control Devices and Standard Municipal Traffic Control (not published, but available to be photocopied by the MHD).

²¹ Section 10A-9 ("Heavy Commercial Vehicle Exclusion"). Exclusions are permissible under this provision only after the completion of an engineering study and the provision of other, supporting reports and materials to the MHD. See *id.*

²² *City of Cambridge v. Bedingfield*, Middlesex County Superior Court, Civ. Action No. 94-3397.

all times."²³

It is not entirely clear whether the Report B Proposal accords with this interpretation, which is currently subject to challenge in Massachusetts state court. Although the Report B Proposal would not apply to "trucks with points of origin or delivery in the City," it might affect truck access to businesses offering "food, fuel, repairs, and rest," 49 U.S.C. § 31114, as well as access to businesses that are sites of mid-trip pick-ups, rather than "deliveries." If so, MHD would maintain that the Report B Proposal could not be implemented.

Even if MHD's position in the current litigation should be rejected, on the ground that the Department has misconstrued the federal Surface Transportation Assistance Act and truck access to every place of business is not required at all times, the MHD could point to other sources of authority for its likely resistance to the Report B Proposal. For example, the language of ch. 85, § 2 clearly evinces a state interest in controlling "signs" -- and, very arguably, the substantive rules that such

²³ See Memorandum in Support of Plaintiff City of Cambridge's Cross Motion for Summary Judgment, and in Opposition to Defendant Bedingfield's Motion to Dismiss or for Summary Judgment 11, in *City of Cambridge v. Bedingfield*, Civil Action No. 94-3397.

signs implement -- "on ways leading [to and from state highways], on all main highways between cities and towns," and on roads that "connect[] one city or town with another."

Finally, as discussed above, it is possible that the Department could claim authority to review a nighttime truck restriction on the ground that it is a "special regulation" within the meaning of ch. 90, § 18. Under this provision, the MHD could easily maintain that a regulation broadly curbing intercity traffic or restricting access to places of business is not "consistent with the public interests." Although I have not found any cases that give useful content to the "public interests" standard in this context, ch. 90, § 18 clearly contemplates the exercise of discretionary judgment by the MHD.

In light of the dearth of reported cases construing the provisions under which the MHD might claim regulatory authority, it is difficult to assess Cambridge's prospects in a judicial challenge to likely MHD resistance to the Report B Proposal. Nonetheless, based on the language of Chapter 85, § 2 and on common sense, the MHD would appear to be on firmest ground in resisting nighttime truck exclusions from those streets that furnish direct access to state highways, that connect Cambridge with other cities and towns, and that are not substantially or

even purely residential.

If the Report B Proposal sweeps too broadly to win approval from the MHD, and if the prospects of success in litigation are too uncertain to be worth the costs, the City might consider seeking MHD approval of a truck curfew that applies only to specifically identified, purely residential streets. Presumably it would be possible to draft provisions that would not significantly affect access to businesses or impede truck traffic on streets connecting Cambridge with other cities and towns.

IV. Conclusion

Even in the wake of the *Plaistow* decision, a nighttime truck restriction that applied to all Cambridge streets would confront serious legal challenges under the federal Surface Transportation Assistance Act and the Hazardous Materials Act, as well as under the Commerce Clause of the United States Constitution. The particular nighttime restriction reflected in the Report B Proposal might also be opposed by the Massachusetts Highway Department as incompatible with applicable state law. Nighttime truck restrictions that applied more narrowly to specifically identified, purely residential streets would offer better prospects for successful defense against challenges based on both federal and state law.



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EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

RICHARD C. ROSSI
Deputy City Manager

April 27, 1998

To The Honorable, The City Council:

Please find attached a response to Council Order No. 19, dated February 23, 1998, regarding a legal opinion on restricting trucks within the City, received from Deputy City Solicitor Donald Drisdell.

Very truly yours,

Robert W. Healy
City Manager

RWH/mec
Attachment

Consent Agenda #7

Regarding a legal opinion on
restricting trucks within the
City.

Cal. 1
49H

In City Council April 27, 1998

CHARTER RIGHT
BY Councillor Triantafyllou

574/98

Referred to
Traffic + Transportation
Committee