

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</b>
Petitioner,	
v.	Appeal No. 07-0606
DIVISION OF MOTOR VEHICLES OF THE UTAH STATE TAX COMMISSION,	Case Type: Personalized License Plate
Respondent.	Judge: Chapman

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**Presiding:**

D'Arcy Dixon Pignanelli, Commissioner  
Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER  
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General  
RESPONDENT REPRESENTATIVE 2, from the Division of Motor Vehicles

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on February 27, 2008. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The Division of Motor Vehicles ("Division") issued a personalized license plate with the display "( X )" to the Petitioner in 2003. Division's Exhibit R-3.
2. On March 26, 2007, the Division issued a Statutory Notice to the Petitioner in which it recalled his "( X )" license plate. Division's Exhibit R-1.
3. On April 13, 2007, the Petitioner timely submitted a Petition for Redetermination, in which he asked the Commission to overturn the Division's action and allow him to retain the "( X )" plate.

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4. In its Answer to Petition for Redetermination, the Division indicated that it had recalled the “( X )” license plate for the following reasons:

a. Utah Admin. Rule R873-22M-34 (“Rule 34”) was amended, effective on October 31, 2005, to provide that the Division may not issue personalized license plates that contain “[c]ombinations of letters, words, or numbers that express affiliations or actions that may be construed to suggest endangerment to the public welfare.” See Rule 34(2)(e)(i); and

b. The Division believed that a license plate pertaining to a weapon such as an ( X ) could endanger the public because a it is a ( X ) and a “gang member could possibly think that the owner of the plate was another gang member and retaliate, which could endanger the public.”

5. At the Formal Hearing, the Division stated that it was abandoning its argument concerning a gang member seeing the plate and retaliating. However, the Division continued to assert that the “( X )” license plate should be recalled because it had a connotation that could suggest endangerment to the public welfare.

6. In support of its remaining argument, the Division submitted a definition of “( X )” from <http://dictionary.reference.com>, which indicates that “( X )” refers to “( SENTENCE REMOVED ).” Division’s Exhibit R-2. The Division also submitted other documents describing the ( X ) and the ( X ). Division’s Exhibit R-4.

7. The Petitioner offered a number of arguments why the Commission should overturn the Division’s action to recall his “( X )” license plate, including:

a. The Petitioner stated that the Utah Supreme Court clarified in *McBride v. Motor Vehicle Division*, 1999 UT 9, 977 P.2d 467 (Utah 1999) that “[b]y adopting rule 873-22M-34 the Commission limited the discretion given to it by the Legislature [in Utah Code Ann. §41-1a-411].” 1999 UT 9, ¶12. As a result, the Petitioner argues that the Commission is prohibited from disallowing plates under Rule 34(2)(e)(i)

unless the plate expresses an “affiliation” or an “action” that may be construed to suggest endangerment to the public welfare. The Petitioner argues that the word “( X )” expresses neither an “affiliation” nor an “action” and, as a result, is not disallowed. Furthermore, the Petitioner argues that the word “( X )” does not represent any of the three examples cited in Rule 34(2)(e)(ii);

b. The Petitioner contends that the Commission is authorized only to “refuse to issue” or to “refuse to reissue” plates under Section 41-1a-411 and Rule 34 and that neither authorizes the Commission to “recall” a plate after it has been issued. Because the Petitioner was reissued the “( X )” license plate and because the Division has not received a written complaint concerning his “( X )” license plate, the Petitioner asserts that the Commission has no authority to “recall” his plate;

c. The Petitioner contends that the Commission may disallow a plate under Rule 34(2)(e)(i) only after, in compliance with subsection (2)(e)(iii), it has consulted with “local, state, and national law enforcement agencies to establish the criteria to determine . . . endangerment.” The Petitioner offers a letter from WITNESS of the CITY Police Department Gang Unit, who stated that “as a police officer and gang detective, I have no concern with the word “( X )” being on PETITIONER’S license plate.” Petitioner’s Exhibit P-2. Furthermore, the Division stated that it consulted with the Utah Motor Vehicle Enforcement Division, which indicated that it had no problem with WITNESS’ letter;

d. The Petitioner also argues that there are many words associated with ( X ) and that it would be arbitrary to make a distinction and disallow some names of ( X ) while allowing others. In support of this argument, the Petitioner provided a list on names of ( X ). Petitioner’s Exhibit P-1;

e. The Petitioner provides information to show that ownership of an ( X ) is legal and that the COUNTY Sheriff’s Department has signed the necessary documents to enable him to own an ( X ). Petitioner’s Exhibit P-3. The Petitioner also submitted an article by ( X ) entitled “( X ).” Petitioner’s Exhibit P-4. The Petitioner asserts that this information shows that the federal government and the COUNTY

Sheriff's Department do not consider machine guns to be an "endangerment to the public welfare" and that certain groups and individuals view the word "( X )" in favorable terms; and

f. Lastly, the Petitioner asserts that *McBride* requires the Commission to apply a reasonable person standard in deciding this matter, not a standard of whether there is "any" connotation that a reasonable person might find objectionable. Specifically, the Petitioner argues that the Supreme Court specifically provided in *McBride* that the opinion of any one group would be insufficient to require the Commission to disallow a specific license plate. 1999 UT 9, ¶17.

8. The Division stated that since Rule 34(2)(e) was enacted in 2005, it has not been issuing license plates with words such as "gun," "rifle," and "pistol." The Division also argues that the standard the Petitioner advocated from *McBride* is incorrect. The Division contends that *McBride* requires the Commission to disallow a license plate that has "any" connotation that a reasonable person would find to be an endangerment to the public welfare.

#### APPLICABLE LAW

1. Utah Code Ann. §41-1a-411 provides for the application for and refusal of personalized license plates, as follows:

- (1) An applicant for personalized license plates or renewal of the plates shall file an application for the plates in the form and by the date the division requires, indicating the combination of letters, numbers, or both requested as a registration number.
- (2) The division may refuse to issue any combination of letters, numbers, or both that may carry connotations offensive to good taste and decency or that would be misleading.

2. Utah Admin. Rule R873-22M-34 ("Rule 34") provides guidance concerning the issuance of personalized license plates, as follows in pertinent part:

- (1) The personalized plate is a non-public forum. Nothing in the issuance of a personalized plate creates a designated or limited public forum. The presence of a personalized plate on a vehicle does not make the plate a traditional public forum.

(2) Pursuant to Section 41-1a-411(2), the division may not issue personalized license plates in the following formats:

(a) Combination of letters, words, or numbers with any connotation that is vulgar, derogatory, profane, or obscene.

....

(e) (i) Combinations of letters, words, or numbers that express affiliations or actions that may be construed to suggest endangerment to the public welfare.

(ii) Examples of letters, words, or numbers described in Subsection (2)(e)(i) include words, signs, or symbols that represent:

(A) illegal activity;

(B) organized crime associations; or

(C) gang or gang terminology.

(iii) The division shall consult with local, state, and national law enforcement agencies to establish criteria to determine whether a combination of letters, words, or numbers express affiliations or actions that may be construed to suggest endangerment to the public welfare.

....

3. In *McBride v. Motor Vehicle Division*, 1999 UT 9, 977 P.2d 467 (Utah 1999), the

Utah Supreme Court ruled as follows in pertinent part:

P12 The legislature granted the Commission discretion in determining whether . . . to grant or refuse an applicant's request for personalized license plates. See Utah Code Ann. § 41-1a-411 . . . An agency which has been granted discretion by statute may limit its own discretion in its regulations. See *Ashcroft v. Industrial Comm'n*, 855 P.2d 267, 269 (Utah Ct. App. 1993). By adopting rule 873-22M-34 the Commission limited the discretion given to it by the legislature. See Utah Admin. Code R873-22M-34 (stating that "the division may not issue {977 P.2d 470} personalized license plates . . . with any connotation that is vulgar, derogatory, profane, or obscene." (emphasis added)). . . .

P15 Relying upon the opinion of any one person or group in determining whether a term carries a prohibited connotation is not a reasonable application of either section 41-1a-411 or rule 873-22M-34. . . . Permitting the Commission to base its decisions upon the personal opinions of its commissioners would be tantamount to allowing an agency to follow or ignore its own rules to suit its own purposes--an approach which lies at the very heart of arbitrary and capricious action and which would frustrate the Commission's proper role to apply its rules consistently and objectively, regardless of the personal views of individual commissioners.

P16 Likewise, . . . it would not be reasonable for the Commission to rely upon the general public's perception of a certain term because the general public may be wholly ignorant of a term's connotation. For example, offensive slang in an obscure foreign language may be meaningless to the general English-speaking public; nevertheless, the reasonable person who speaks the foreign language would conclude that the slang carries an offensive connotation. . . .

P17 Finally, the Commission could not reasonably rely upon the opinion of any one group, whether it be small or large. Such an approach could preclude the issuance of any personalized license plate because the members of any group could assert that any given term is offensive to them. . . .

P18 The only reasonable standard that may be applied is that of the objective, reasonable person. In other words, under . . . rule 873-22M-34 the Commission had to determine, in light of all the evidence presented, whether an objective, reasonable person would conclude that the term "redskin" contains any vulgar, derogatory, profane, or obscene connotation, or expresses contempt, ridicule, or superiority of race or ethnic heritage. . . . If such a person would conclude that the term carries a prohibited connotation, rule 873-22M-34 prohibits the Commission from issuing a license plate carrying that term.

### DISCUSSION

Rule 34(2)(e) provides that the Division may not issue personalized license plates that display a “[c]ombination of letters . . . that express affiliations or actions that may be construed to suggest endangerment to the public welfare.” The Commission finds that the word “( X )” suggests endangerment to the public welfare because of its association with crime and violence. As a result, the Commission finds that an “( X )” license plate is specifically prohibited under Rule 34(2)(e)(i).

In reaching this conclusion, the Commission specifically rejects all of the Petitioner’s arguments. Although the word “( X )” does not express an “affiliation” or an “action,” which are terms that appear in Rule 34(2)(e)(i), the Commission finds that the word “( X )” is similar to those types of terms that are described in Rule 34(2)(ii) and, as a result, is also prohibited. Furthermore, the Commission rejects the Petitioner’s claim that the Commission may not “recall” a license plate or that the Commission must confer with law enforcement agencies and establish a criteria before disallowing a plate pursuant to Rule 34(2)(e). In addition, the Commission does not find that the legality of owning an ( X ) is persuasive in allowing the word “( X )” to be displayed on a license plate. Words or terms representing many legal items or activities are not allowed on license plates. Lastly, the Commission agrees with the Division that the standard established by *McBride* is whether the word “( X )” has any connotation that an objective, reasonable person would find to

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suggest endangerment to the public welfare. The Commission concludes that such a connotation exists and, as a result, finds that it may not allow the word “( X )” to be displayed on a license plate.

CONCLUSION OF LAW

1. The Commission finds that at a connotation of the term “( X )” exists that an objective, reasonable person would find to suggest endangerment to the public welfare.

2. Pursuant to Rule 34(2)(e), the Commission sustains the Division’s action to recall the Petitioner’s “( X )” license plate

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division’s action to recall the Petitioner’s “( X )” license plate. Accordingly, the Petitioner’s appeal is denied. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

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Kerry R. Chapman  
Administrative Law Judge

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BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

**Notice of Appeal Rights:** You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63-46b-13 et seq.

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