



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN 11, TEXAS**

**JOHN BEN SHEPPERD  
ATTORNEY GENERAL**

March 14, 1955

Hon. Carlton Moore, Chairman  
Municipal & Private Corporations Comm.  
House of Representatives  
Austin, Texas

Letter Opinion No. MS-185

Re: Constitutionality of  
H.B. 493, 54th Legisla-  
ture, Regular Session

Dear Mr. Moore:

Your letter of March 8, 1955, requests a ruling as to the constitutionality of House Bill 493 of the Regular Session of the 54th Legislature. This bill appears primarily to deal with the grant to cities of the power to condemn substandard dwellings, without compensation to the owner.

Among other provisions, the bill gives cities broad powers to regulate the use, occupancy, confiscation, repair and demolition of buildings existing or to be built. It authorizes cities to set up minimum housing standards, define nuisances, prohibit and abate them. It authorizes an appeal to the courts within 60 days of city action condemning property not up to prescribed standards, making city action final if no appeal is taken in 60 days. In event appeal is perfected to the court, the substantial evidence rule is applied. Damages are denied to any person as a result of the action of the city.

The problem here requires a balancing of the due process provision of our Federal (14th Amendment) and State (Art. 1, Sec. 17) Constitutions against the police power authorizing legislation for the comfort, safety, general welfare, health, peace, order, morals and protection of property of the public.

The leading case on the main issues involved is Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810 (1923). The ordinance in question authorized the city to force removal of "dilapidated buildings." It would unduly prolong this opinion to quote at length from that opinion. We shall, therefore, sum up its holdings. The Court held (S11.par.4) that the Legislature could not authorize a city to force removal of a dilapidated building merely because it was unsightly; that (S11.par.6) the denial of the right to repair a building lawfully erected was a denial of due process of law; that

Hon. Carlton Moore, page 2 (MS-185)

(Sil.par.9) mere declaration by city ordinance that a building is a nuisance does not make it so, that being "a doctrine not to be tolerated in this country"; that (Sil.par.10) city agents may not be authorized to go upon a man's property by force and destroy it; that (Sil.par. 10) "a court of competent jurisdiction must first adjudge it to be so (a nuisance) before the property may be lawfully destroyed"; that (Sil.par.10) only in cases of dire emergency or threatened public calamity can the State delegate to officials the power to determine a nuisance and summarily abate it; and that (Sil.par 10) even the State has no power to denounce as a nuisance and abate that which is not one in fact, although the courts would go behind a legislative defining of nuisance only in clear cases.

It has been held that if a city destroys a building not a nuisance, it is liable in damages. City of Texarkana v. Reagan, 112 Tex. 317, 247 S.W. 816 (1923).

City of Houston v. Lurie, 148 Tex. 391, 224 S.W. 2d 871 (1949), involved a suit by the city for authority to destroy two buildings as fire hazards. The court held that the owner's contention that the buildings, having been lawfully constructed, could not be destroyed without compensation, could not be sustained, since they were fire hazards. However, the court said that if a building could be repaired so as to eliminate the hazard, it could not be destroyed. The city could then force repairs to be made. Further, it was held that a city could not forbid the repair of a building lawfully constructed unless the repair amounted to a reconstruction of the building.

City of Wills Point v. Deen, 192 S.W.2d 940 (Tex. Civ.App. 1946), construed an ordinance denying right to repair frame buildings. The court held it violated due process, absent a showing that repairs would increase the hazard.

Stockwell v. State, 110 Tex. 550, 221 S.W. 932 (1920), involved a statute giving the Commissioner of Agriculture final authority to condemn infected trees and destroy them. It was held the state could delegate to administrative agencies power to determine and abate nuisances, but this power was subject to judicial review in all but emergency cases.

Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921), construed an ordinance prohibiting business houses in residential areas without the approval of 3/4ths of the neighbors and of the Building Inspector. The court held the ordinance unconstitutional. The court said: "Like municipal regulations interfering with property rights and founded upon purely aesthetic considerations, are universally held invalid."

However, in Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 475 (1934), the Supreme Court upheld validity of zoning ordinances subject to the requirement of reasonableness. And in Weaver v. Ham, 149 Tex. 309, 232 S.W.2d 704 (1950), it was held that zoning ordinances, to be valid, must be for the health, safety, morals or general welfare of the public.

In the City of Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953), it was held by the Supreme Court that "as a general rule" zoning restrictions would not apply to non-conforming, non-nuisance uses in existence when the ordinance was passed. However, the court indicated there might be exceptional cases where the non-conforming use could be terminated.

In the Cumulative Supplement to 9 Am.Jur. 234, Buildings, Sec. 40, it is said: "It is clear that buildings cannot be lawfully destroyed solely because of the uses made of them by persons who inhabit them or resort to them. If the danger can be corrected by forbidding the hazardous or obnoxious use of the building, that alone is the remedy."

Other authorities throwing light on the constitutionality of the bill include: Roper v. Winner, 244 S.W.2d 355 (Tex.Civ.App. 1951); 9 Am.Jur. 234, Buildings, Sec. 40 (contains good summary); 14 A.L.R.2d 74; 31 Tex.Jur. 416, Nuisances, Sec. 7; 30 A, Tex.Jur. 404, Municipal Corporations, Sec. 405; Constantin v. Smith, 57 F.2d 227 (1932), affd. 287 U.S. 378; 62 C.J.S. 277, et seq., Municipal Corporations, Secs. 132-136, incl.

From our analysis of the above authorities, we hold that House Bill 493 is unconstitutional and represents a taking of property without due process of law to the extent that it authorizes directly or indirectly the following:

1. Forcing the removal of a dilapidated building for aesthetic reasons (unsightliness).

Hon. Carlton Moore, page 4 (MS-185)

2. Denial of the right to repair a building lawfully constructed when such repairs do not amount to reconstruction of the building.

3. Defining property as a nuisance and forcing the removal thereof when the property is not in fact a nuisance.

4. City agents going on a man's property and destroying it by force.

5. Making the action of the city final and denying appeal to the courts after 60 days.

6. Destroying property without same being adjudged a nuisance by a court of competent jurisdiction, except in cases of threatened public calamity requiring emergency action.

7. Confiscation of property. This would be a taking for public use in clear violation of due process. It is noted that Committee Amendment No. 1 has been adopted, deleting this word.

8. Forcing destruction of a building as a nuisance when same can be repaired so as to eliminate the hazard and without reconstructing the building, the city's remedy in such case being to force the repair.

9. Requiring use of the substantial evidence rule in court reviews of municipal actions to abate a nuisance.

10. Requiring the discontinuance of a non-conforming use of a building, so used at the time of the adoption of the prohibiting ordinance. But see limitations on this rule in City of Corpus Christi v. Allen, supra.

11. Forcing destruction of a building because of its use.

Yours very truly,

JOHN BEN SHEPPERD  
Attorney General

By J. Arthur Sandlin  
Assistant

JAS:amm