



THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

JOHN BEN SHEPPERD
ATTORNEY GENERAL

May 28, 1955

Hon. Allan Shivers
Governor of Texas
Austin 11, Texas

Opinion No. MS-219

Re: Constitutionality and validity
of H.B. 662, 54th Legislature,
regulating the sale of shell-
fish.

Dear Governor Shivers:

By letter of May 23, 1955, you requested the opinion of this office as to the constitutionality and validity of House Bill 662, 54th Legislature, which attempts to define shellfish, regulate the sale thereof, and provide penalties for the violation of any of its provisions. Since this would necessarily be a penal statute, if it should become law, it must therefore be strictly construed.

Section 2 thereof reads as follows:

"It shall be unlawful for any person to sell, or offer for sale, any shellfish that has been secured from areas declared to be polluted by the State Department of Public Health."

Essentially, the Legislature by this Section has said that it shall be unlawful to sell shellfish which have been taken from areas which the Department of Public Health determines to be polluted under that department's own definition of what conditions must exist before an area is actually polluted. In other words, the Legislature has delegated to the Department of Health the power not only to determine what areas are polluted, but it also leaves within the uncontrolled discretion of that administrative agency the power to define what is meant by the term "polluted."

Section 1 of Article II of the Texas Constitution precludes one branch of our government from delegating to another the power and authority conferred upon it by the Constitution. The Court of Criminal Appeals has laid down the rule that before a legislative body can confer upon executive or administrative officers the authority to make rules and regulations to promote and carry a law into effect, the legislative body must first declare a policy and fix a primary standard by which the administrative body is to be governed in its authority. Williams v. State, 146 Tex.Crim. 430, 176 S.W.2d 177. Then again our Supreme

Court has recognized that whenever discretionary authority is conferred by law upon any person, agency, or board to make a decision governing the rights of others, such grant of discretion must be accompanied by definite rules or standards to govern the exercise of such discretionary powers. Railroad v. Shell Oil Co., 139 Tex. 66, 161 S.W.2d 1022. See also Ex parte Leslie, 87 Tex.Crim. 476, 223 S.W. 227. The Legislature has failed to provide for the necessary primary standard to govern the authority granted to the Department of Public Health.

Therefore, it is our opinion that Section 2 constitutes an unconstitutional delegation of legislative authority prohibited by Section 1 of Article II of the Texas Constitution.

It is our further opinion that Sections 2, 3 and 4 also violate the provisions of Article I, Sec. 10 of the Texas Constitution, and Articles 3 and 6 of Vernon's Texas Penal Code, which guarantee every citizen the right to know the nature and character of an accusation against him. In construing these sections of the Constitution and Penal Code our Court of Criminal Appeals has declared that a statute which forbids or requires an act in terms so vague that men of common intelligence must guess as to its application lacks the first essential of "due process of law." Ex parte Chernosky, 153 Tex.Crim. 52, 217 S.W.2d 673.

It seems clear to us that such terms as "polluted", "good sanitary facilities", and "good sanitary practices" as used in this Act are so vague, indefinite and ambiguous that they do not sufficiently inform a person in advance of what acts are criminal.

Therefore, it is the opinion of this office that House Bill 662, 54th Legislature, is unconstitutional.

APPROVED:

J. Fred Jones
State Affairs Division

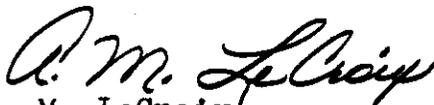
J. A. Amis, Jr.
Reviewer

John Reeves
Reviewer

John Atchison
Administrative Assistant

Yours very truly,

JOHN BEN SHEPPERD
Attorney General of Texas

By 
A. M. LeCroix
Assistant