



The Attorney General of Texas

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Honorable Ralph Wallace
Chairman
House Select Committee on
Child Pornography
State Capitol
Austin, Texas 78711

Letter Advisory No. 157

Re: Validity of proposed municipal ordinance prohibiting display or sale of lewd publications to minors.

Dear Chairman Wallace:

You request our opinion concerning the constitutionality of an ordinance proposed to be adopted by a home rule city. You explain that this proposed ordinance also has been suggested as a proposed statute to be recommended by your committee for enactment by the legislature. You also ask whether the proposal, if enacted only as an ordinance by the home rule city, would conflict with present state law.

The proposed ordinance is entitled "Sale or Exhibition to Minors of Lewd Publications, Pictures or Articles." It would provide the following:

(a) Definitions:

(1) 'Description or depictions of illicit sex or illicit immorality' shall mean: human genitals in a state of arousal, or fondling or other erotic touching of the human genitals, pubic region, buttocks or female breast.

(2) 'Nude or partially denuded figures' shall mean:

(aa) less than completely and opaquely covered:

(i) human genitals,

(ii) pubic regions,

(iii) buttocks, or

(iv) female breast below a point immediately above the top of the areola,
or

(bb) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(3) 'Person' shall mean: individual, firm, corporation, co-partnership, joint venture, joint adventurers, or unincorporated association, in the plural, as well as in the singular number.

- (4) 'Knowingly' shall mean: having knowledge of the character and content of the publication or failing on notice to exercise reasonable inspection which would disclose the content and character of the same.
- (5) 'Display' shall mean: not only open presentation of said item, but also presentation of said item enclosed in or placed behind an opaque cover.
- (b) No person shall willfully or knowingly:
 - (1) engage in the business of selling, lending, giving away, showing, advertising for sale, or distributing to any person under the age of eighteen (18) years;
 - (2) have in his possession with intent to engage in the aforesaid business, or to otherwise offer for sale or commercial distribution to any individual under the age of eighteen (18) years, or
 - (3) display at newsstands or any other business establishment frequented by persons under the age of eighteen (18) years of age where said minors are or may be invited as a part of the general public[:]

Any article or instrument of immoral sexual use, any motion picture or live show, any still picture or photograph, or any book, pocket book, pamphlet or magazine the cover or content of which exploits, is devoted to, or is principally made up of descriptions or depictions of illicit sex or sexual immorality, or consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain.

- (c) There is expressly excluded from regulation by this Ordinance, however, any of the above which reveals:
 - (1) any contact between any part of the genitals of one person and the mouth or anus of another person;
 - (2) any contact between the female sex organ and the male sex organ;
 - (3) any contact between a person's mouth or genitals and the anus or genitals of an animal or fowl; or
 - (4) patently offensive representations of masturbation or excretory functions.

The precise standard by which regulations dealing with material harmful to minors must be measured to withstand constitutional objections of vagueness or over breadth is not clear. In Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 n. 10 (1975), the Court noted that it has not had occasion to decide what effect Miller v. California, 413 U.S. 15 (1973), would have on the variable obscenity standards as to children adopted in Ginsberg v. New York, 390 U.S. 629 (1968). The Court then said:

It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults.... Nevertheless, minors are entitled to a significant measure of First Amendment protection, ... and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. . . .

In this case, assuming the ordinance is aimed at prohibiting youths from viewing the films [depicting nudity at drive-in theaters], the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. . . . Clearly all nudity cannot be deemed obscene even as to minors. . . .

Id. at 212-213. The Court said in conclusion:

Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential.

Id. at 216.

Thus, it appears clear that while states and municipalities may take action to control the distribution of display of materials harmful to minors, and that the standard of obscenity approved in Ginsberg v. New York can be broadened to some extent to reflect the holding in Miller v. California, it is still necessary that such legislation be drafted clearly and precisely.

Two reported cases have considered very similar ordinances. The Supreme Court of Tennessee upheld the ordinance against the contention that it was impermissibly vague, although the court described the ordinance as "not a model of legislative draftsmanship." Capitol News Co., Inc. v. Metropolitan Government of Nashville and Davidson County, 562 S.W.2d 430, 431 (Tenn. 1978). A New York Court held the ordinance unconstitutionally vague and overbroad. Calderon v. City of Buffalo, 402 N.Y.S.2d 685 (N.Y. App. Div. 1978). The Tennessee court did not discuss the United States Supreme Court cases which deal with obscenity as to minors. The New York court did, and determined that the ordinance contained no requirement that the material be "harmful to minors" within the variable obscenity standards required under Ginsberg v. New York, 390 U.S. 629 (1968), and was thus unconstitutionally overbroad because it would extend to material not obscene as to either minors or adults. The New York court also found that the ordinance suffered from deficiencies similar to those in provisions held to be unconstitutionally vague by the United States Supreme Court in Rebeck v. New York, 291 U.S. 462 (1968).

content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality," and also that describing the category of materials consisting of "nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion. . . ."

Thus, the different conclusions reached by these two courts demonstrate that a legislative body is in the best position to insure the validity of legislation in this area by stating its purpose clearly and precisely.

You also ask whether the proposed ordinance, if enacted by a home rule city, would conflict with present state law.

A home-rule city's power to enact an ordinance is limited by the rule that an ordinance may not be inconsistent with the general laws of the state. Tex. Const. art. 11, § 5; V.T.C.S. art. 1165; Zachry v. City of San Antonio, 305 S.W.2d 558, 561 (Tex. 1957); City of Wink v. Griffith Amusement Co., 100 S.W.2d 695 (Tex. 1936); Brown Cracker & Candy Co. v. City of Dallas, 137 S.W. 342 (Tex. 1911); Brewer v. State, 24 S.W.2d 409 (Tex. Crim. App. 1930). The clearest instances of inconsistency are those where a city ordinance attempts to regulate precisely the same conduct and attaches a penalty different from that set by the legislature.

Section (c) of the proposed ordinance specifically excepts from its coverage depictions of sexual acts classified by Chief Justice Burger in Miller as "hard core" pornography. The language of section (c) comes from the definition of "sexual conduct" in section 43.21 of the Penal Code and is apparently intended to avoid preemption of the ordinance by sections 43.22 (obscene display or distribution), 43.23 (commercial obscenity), and 43.25 (commercial obscenity involving person under 17 years of age). Thus, in an attempt to avoid preemption by sections 43.22, 43.23 and 43.25, the ordinance may be held to provide loopholes involving hard core pornography. Such loopholes are unnecessary since the relevant state statute is section 43.24, rather than sections 43.22, 43.23 and 43.25. Section 43.24, which was apparently overlooked when the ordinance was drafted, prohibits the exhibition or distribution of "harmful" material rather than "obscene" material.

Section 43.24 of the Texas Penal Code prohibits the sale, distribution or display of harmful materials to minors. "Harmful material" is defined to follow the variable obscenity standard adopted in Ginsberg v. New York, 390 U.S. 629 (1968). The statute defines a minor as a person under 17, the proposed ordinance uses 18 years. The ordinance defines the culpable mental state of "knowing" in different terms than those used in section 6.03 of the Penal Code. The statute provides defenses for persons with scientific, educational, governmental or similar justification, or where the minor is accompanied by a consenting parent, guardian or spouse. The proposed ordinance provides no such defenses. The proposed ordinance also appears to prohibit a "live show." In some instances the same conduct is prohibited by Penal Code section 21.07, Public Lewdness, section 21.08, Indecent Exposure, and section 42.01(10), Disorderly Conduct, but there are different scienter requirements as between these statutes and the proposed ordinance.

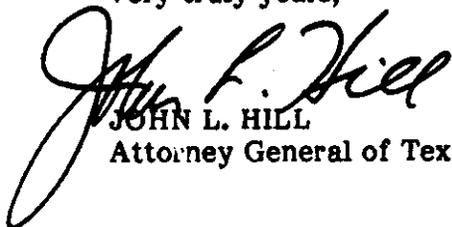
The proposed ordinance appears to cover substantially the same conduct as some state statutes and would be preempted to the extent of any direct conflict. Penal Code § 1.08. However, there are no reported cases interpreting or applying section 1.08, and thus it is not clear whether courts would determine that the legislature intended to occupy the field of distribution or display of harmful materials to minors by enactment of Penal Code section 43.24. A court of civil appeals has held that a state obscenity statute which exempted certain motion pictures from regulation did not prevent a home rule city from prohibiting the exhibition of motion pictures in the exempted categories. Janus Films, Inc. v. City of Fort Worth, 354 S.W.2d 597 (Tex. Civ. App. — Fort Worth 1962, writ ref'd n.r.e.). The Supreme Court of Texas refused writ of error in a per curiam opinion, holding that the trial court did not abuse its discretion in denying a temporary injunction in the case, but then stated: "This opinion is not to be construed as passing on the merits of the case in any respect." Janus Films, Inc. v. City of Fort Worth, 358 S.W.2d 589 (Tex. 1962). The Fifth Circuit Court of Appeals referred to the holding in Janus on the preemption issue as "not very convincing" in light of the Texas Supreme Court's opinion. Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966), [impliedly overruled by Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)]. Janus was followed in Interstate Circuit, Inc. v. City of Dallas, 402 S.W.2d 770, 776-777 (Tex. Civ. App. — Dallas 1966, writ ref'd n.r.e.), rev'd 390 U.S. 676 (1968), and relied upon by the Fifth Circuit Court of Appeals as an authoritative statement of state law on the preemption issue in Interstate Circuit, Inc. v. City of Dallas, 366 F.2d 590 (5th Cir. 1966), vacated 391 U.S. 53 (1968). The authority of these Texas cases on the issue of preemption is clouded by the Texas Supreme Court's refusal to speak to the question and the subsequent action of the United States Supreme Court in reversing or overruling those cases on other issues.

The Texas Supreme Court has said that limitations on the power of home rule cities will not be implied unless the provisions of the general law are "clear and compelling to that end" and that the intention of the legislature to impose limitations "must appear with unmistakable clarity." Lower Colorado River Authority v. City of San Marcos, 523 S.W.2d 641, 645 (Tex. 1975), quoting Glass v. Smith, 244 S.W.2d 645 (Tex. 1952); and City of Sweetwater v. Geron, 380 S.W.2d 550, 552 (Tex. 1964). It would be difficult to characterize the legislature's intent to preempt the field of legislation on the subject of distribution or display of harmful materials to minors as "clear and compelling" or as having been done with "unmistakable clarity."

In conclusion, it is our view that an ordinance regulating display of harmful materials to minors can be prepared which will not violate the United States Constitution. A clearer and more precise ordinance can be drafted which will substantially diminish the possibility that the ordinance will be found to be constitutional and unenforceable. It is possible that home rule cities may impose higher standards of conduct in this area than those set by state law, but the extent to which cities may do so is not clear under present law. Legislative clarification of the preemption question would be appropriate as a means of avoiding judicial

challenges to ordinances regulating display and distribution of harmful materials to minors.

Very truly yours,



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APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman
Opinion Committee

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