THE ATTORNEY GENERAL OF TEXAS

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May 16, 1973

Honorable Jim Kaster, Chairman
Intergovernmental Affairs Committee
House of Representatives
State Capitol
Austin, Texas

Letter Advisory No. 32

Re: The constitutionality of H. B. No. 406 relating to the establishment of local motion picture licensing and review boards.

Dear Representative Kaster:

On behalf of the Committee on Intergovernmental Affairs of the House of Representatives, you have asked our opinion as to the constitutionality of House Bill No. 406 which would authorize any incorporated city to adopt an ordinance establishing a motion picture licensing and review board and any commissioners court of any county to adopt an ordinance establishing a similar board to be effective in those areas of the county not included within the boundaries of an incorporated city. The Act would also authorize the commissioners court of any county which adopted such an ordinance to enter into an agreement with an incorporated city within that county with a similar licensing and review board to provide for a single classification board having jurisdiction over the incorporated city and the areas of the county affected by the county ordinance.

The statute does no more than authorize "an ordinance establishing a motion picture licensing review board." It sets no standards. It does, however, include in its § 3 a "model ordinance" to serve as a guide to those cities or counties desiring to establish a board.

That portion of the bill authorizing incorporated cities to establish review boards is superfluous. Incorporated cities have plenary powers subject only to the limitation that their charter and ordinances shall contain nothing inconsistent with the constitutions of the state and of the United States or the general laws enacted by the legislature of the state. Article 11, § 5, Constitution of Texas; White v. Zoning Board of Adjustment of Arlington, 363 S. W. 2d 955 (Tex. App. - Ft. Worth, 1963, error ref., n. r. e.); 39 Tex. Jur. 2d, Minicipal Corporation, § 312, p. 642 et seq.

In fact it has been specifically held that the power of an incorporated city to adopt an ordinance providing for the licensing and reviewing of motion pictures was within the plenary powers of a city without any specific legislative authorization. Janus Films, Inc. v. City of Ft. Worth, 354 S. W. 2d 597 (Tex. Civ. App., Fort Worth, 1962) err. ref., n. r. e., 358 S. W. 2d 589 (Tex. 1962).

Counties are in a different classification. They derive their power from Article 5, § 18, of the Constitution of Texas which, after providing for the organization of counties and the commissioners courts, provides:

> " . . . the County Commissioner so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

The courts have consistently limited powers of county commissioners courts to those granted by the constitution or by legislation. Commissioners Court v. Wallace, 15 S. W. 2d 535 (Tex., 1929); El Paso County v. Elam, 106 S. W. 2d 393 (Tex. Civ. App., El Paso, 1937, no writ); State v. Gulf States Utilities Co., 189 S. W. 2d 693 (Tex., 1945); Harrision Co. v. City of Marshall, 253 S. W. 2d 67 (Tex. Civ. App., Ft. Worth, err. ref.). And even when authorized by statute, the powers of a county must be confined to "county business." Sun Vapor Electric Light Co. v. Kenan, 30 S. W. 868 (Tex., 1895); County of Harris v. Tennessee Products Pipeline Co., 332 S. W. 2d 777 (Tex. Civ. App., Houston, 1960, no writ). As a general rule, the Legislature cannot delegate authority to enact a law. The rule, however, does permit the Legislature to grant some designated body powers which the Legislature itself cannot practically and efficiently exercise. It may delegate the power to find facts upon which the applicability of a completed law will be made to depend. Trimmier v. Carlton, 296 S. W. 1070 (Tex. 1927); 53 Tex. Jur. 2d, Statutes, § 35, p. 66 and cases cited.

So long as the statute is complete to accomplish the regulation of the particular matters falling within the Legislature's jurisdiction, matters of detail reasonably necessary for the ultimate application, operation and enforcement of the law may be expressly delegated to the authority charged with its administration. The test is whether the Legislature has prescribed sufficient standards to guide the discretion conferred. Commissioners

Court of Lubbock Co. v. Martin, 471 S. W. 2d 100 (Tex. Civ. App., Amarillo, 1971, error ref, n. r. e.); Moody v. City of University Park, 278 S. W. 2d 912 (Tex. Civ. App., Dallas, 1955, err. ref., n. r. e.).

Because § 3 of H. B. 406 would merely permit but not require the adoption of the model ordinance, the proposed act provides no standards whatsoever to guide a commissioners court in the exercise of the authority delegated by the Legislature to establish a motion picture licensing and review board and, for this reason, is, in our opinion, unconstitutional insofar as it would permit the adoption of licensing requirements.

Because the proposed bill sets out the model ordinance for adoption by incorporated cities, we feel it appropriate to comment upon its constitutionality.

Motion pictures are protected by the First Amendment, Constitution of the United States. Three questions must be considered in determining whether or not the model ordinance contained in House Bill 406 would be constitutional if adopted by a city or county.

(1) May a city or county require a license to exhibit motion pictures?

(2) Is the standard set out in the model ordinance for determining the suitability of material for exhibiting to minors constitutional?

(3) Are the procedures set out in the model ordinance relating to prior restraint on the exhibition of certain movies constitutionally permissible?

Requiring a license to engage in certain types of business is within the police power of the state. Constitutional restrictions may be placed on the authority of the licensing agency to regulate the business of a licensee, but, the constitutional protection does not prevent a license requirement. For example, radio and television transmission are licensed by the federal government even though these arms of the press receive constitutional protection under the First Amendment, Constitution of the United States. Those parts of the model ordinance which restrain the showing of any motion picture because of a failure to obtain a license or to comply with the administrative requirements of the ordinance are permissible since they do not involve prior restraint based on the content of the motion picture.

The model ordinance allows a restraint on the exhibition of certain motion pictures to minors. The need and obligation of the states to protect minors from material considered harmful to moral or physical development

has been recognized by the Supreme Court in Ginzburg v. United States, 383 U. S. 463, 16 L ed 2d 31, 86 S Ct 942 (1966) and Interstate Circuit v. City of Dallas, 390 U. S. 676, 20 L ed 2d 225, 88 S Ct 1298 (1968). Material which a state could not regulate with regard to adults may be regulated with regard to minors. Additionally, determination of what is harmful to minors may be made from an adult perspective. The definition of material "unsuitable for minors" contained in § 2 of the model ordinance in House Bill 406 tracks the definition of material "harmful to minors" contained in Subsection (f), § 3, Article 534 (b), Vernon's Texas Penal Code. To date this Article has not been considered by either the federal courts or Texas courts. However, the definition of obscenity contained in Subparagraph (A), § 1, Article 527, Vernon's Texas Penal Code, was upheld in Newman v. Conover, 313 F. Supp. 623 (N. D. Tex. 1970). The only significant difference between these two definitions is the inclusion of the standard as applied to minors. In light of the cases cited above, it is the opinion of this office that the standard for determining the suitability of material for minors contained in H. B. 406 is constitutional.

Guidelines for procedures designed to regulate the exhibition of motion pictures have been set out in a number of United States Supreme Court Decisions. In Tietel Film Corp. v. Cusack, 390 U. S. 139, 19 L ed 2d 966, 88 S Ct 754 (1968), the court again reaffirmed the test prescribed in Freedman v. Maryland, 380 U. S. 51, 13 L ed 2d 649, 85 S Ct 734, (1965):

> " . . . that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system . . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film . . . . [T]he procedure most also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.' (Emphasis supplied.) The Chicago censorship procedures violate these standards in two respects. (1) The 50 to 57 days

> provided by the ordinance to complete the administrative process before initiation of the judicial proceeding does not satisfy the standard that the procedure must assure 'that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film.' (2) The absence of any provision for a prompt judicial decision by the trial court violates the standard that ' . . . the procedure must also assure a prompt final judicial decision . . . .'" (390 U. S. at 141-2)

For additional authorities see Chemlime, Inc. v. City of Grand Prairie, 364 F 2d 721, 5th Cir. 1966); Jacobellis v. State of Ohio, 378 U. S. 184, 12 L ed 2d 793, 84 S Ct 1676 (1964); Roth v. U. S., 354 U. S. 476, L ed 2d 1498, 77 S Ct 1304 (1957); Burstyn v. Wilson, 343 U. S. 495, 96 L ed 1098, 72 S Ct 777 (1952); Paramount Film Distributing Corp v. City of Chicago, 172 F. Supp. 69 (N. D. Ill. 1959); and Jodbor Cinema, Inc. Ltd. v. Sedita, 309 F. Supp. 868 (W. D. N. Y. 1970).

Section 6 of the model ordinance contained in House Bill 406 requires that an application for classification of the motion picture be made at least 14 days prior to the first scheduled date of exhibition. It does not specifically state that the classification must be rendered by the board within that 14 day period, although that is the implication. It also provides that in the case of a disputed classification, the city, county or district attorney who is notified of the dispute must file suit within three days of notification. The 14 day period and the three day period are considerably shorter than the 57 day period disapproved in Tietel Film Corp. v. Cusack, supra. It is out opinion that the time periods of the model ordinances are not unreasonable and would be upheld as constitutionally permissible by a court.

The model ordinance, however, does not contain any provisions to insure a prompt final judicial determination. Although the model ordinance does not allow enjoining the exhibition of any motion picture on the basis of content, it does allow a judicial determination on whether or not the exhibition of the picture to minors would violate Article 534b, Vernon's Texas Penal Code. The penalties of Article 534b, Vernon's Texas Penal Code, include the issuance of an injunction. It is our

opinion therefore that the omission of provisions for a prompt judicial determination makes the model ordinance constitutionally defective.

The foregoing discussion of the model ordinance contained in House Bill 406 is based on the premise that the ordinance would be adopted by a city or county in toto. House Bill 406 does allow adoption of any portion of the ordinance. Obviously we express no opinion as to any ordinance containing only a portion of the model ordinance set out in House Bill 406.

Very truly yours,

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APPROVED:

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