



**THE ATTORNEY GENERAL  
OF TEXAS**

**PRICE DANIEL**  
ATTORNEY GENERAL

**AUSTIN, TEXAS**

May 1, 1947

Hon. Otis E. Lock  
Chairman  
Committee of Highways  
& Roads  
House of Representatives  
Austin, Texas

Opinion V-175

Re: Constitutionality of  
H. B. 509, Fiftieth  
Legislature

Dear Sir:

Reference is made to your inquiry concerning the constitutionality of H. B. 509. Sections 2 and 3 of the bill are as follows:

"Sec. 2. It shall be unlawful for any person, firm or private corporation to establish, maintain or operate a junk yard or junk shop within thirty-five yards of any public highway, or to permit such junk yard or junk shop to remain within thirty-five yards of any public highway, except and unless such junk yard or junk shop is effectively screened and hidden from view from such public highway by fences or structures, or evergreen shrubs or other vegetative material.

"Sec. 3. Any violation of this Act by any person, firm or private corporation, shall upon conviction, subject the offender to a fine of not less than Ten Dollars (\$10) and not more than Two Hundred Dollars (\$200), and each day of any such violation shall be treated as a separate offense."

Although Section 2 is couched in prohibitory language, it is in reality a regulatory and not a prohibitory law. The Act does not purport to make a junk yard or junk shop a public nuisance. It merely purports to regulate the business of operating a junk yard or junk shop within 35 yards of a public highway to the limited extent of requiring that the junk yard or junk shop be hidden from view of such public highway. The question is whether or not this is a proper exercise of police power and this question is resolved by a determination as to whether or not such a regulation of a

person's property or business amounts to "taking" thereof in violation of Sec. 19, Article I of the State Constitution and the fourteenth amendment to the Federal Constitution.

We approach this question with serious concern for several reasons. There is nothing in either the State or Federal Constitutions, as such, which prohibits a law of this character, and the ultimate question for decision involves a balancing of interests between the individual and his right to use his property as he sees fit, and the rights of the general public as represented by the Legislature. The question in the last analysis is purely one of reasonableness of the regulation in so far as it affects property rights and its relationship to a public purpose in so far as it affects the public.

In *Lombardo v. City of Dallas*, 47 S. W. (2d) 495, the Dallas Court of Civil Appeals, at page 497, said:

"While the power of states and cities acting under State authority, to enact zoning regulations is now generally recognized, doors are left open in all such enactments for the contention to be made that the regulations prescribed, as applied to a particular situation, are unreasonable, arbitrary or discriminatory."

This is the test which must be applied in determining the validity of any statute or ordinance which has been challenged on the ground that it deprives a person of his property without due process of law. 9 Tex. Jur. 572.

A similar question to the one involved here was passed on by the Supreme Court of Indiana in *General Outdoor Advertising Company v. City of Indianapolis*, 127 N. E. 309. An ordinance of the city of Indianapolis prohibited the maintenance and operation of advertising signs or billboards located within 500 feet of certain parks and boulevards. Suit was brought to enjoin the Board of Park Commissioners of the city from enforcing the ordinance. The court upheld the validity of the ordinance as applied to billboards erected after it was passed, but refused to enforce the ordinance against billboards existing at the date of its enactment. This distinction, referred to as a non-conforming use, finds

support in the Texas cases. City of San Angelo vs. Boehme Bakery (Sup. Ct.) 190 S. W. (2d) 67. Lombardo vs. City of Dallas 47 S. W. (2d) 495, 497, affirmed. 73 S. W. (2d) 475.

On the general proposition, however, that the Indianapolis ordinance was valid when applied prospectively, the Supreme Court of Indiana, in the above styled case said:

"Under a liberalized construction of the general welfare purposes of state and Federal Constitutions there is a trend in the modern decisions (which we approve) to foster, under the police power, an aesthetic and cultural side of municipal development--to prevent a thing that offends the sense of sight in the same manner as a thing that offends the senses of hearing and smelling. 3 McQuillen, Mun. Corps. (2d) 1049; Ware vs. Wichita, 113 Kan. 153, 157, 214, p. 99; State ex rel. Civello v. New Orleans (1923) 154 La. 271, 97 So. 440, 33 A. L. R. 260; State ex rel. Carter vs. Harper (1923) 182 Wis. 148, 158, 196 N. W. 451, 33 A.L.R. 269; Cochran v. Preston (1908) 108 Md. 220, 70 A. 113, 23 L.R.A. (N.S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048. . . ."

"As social relations become more complex, restrictions on individual rights become more common. Restrictions which years ago would have been deemed intolerable and in violation of the property owners' constitutional rights are now desirable and necessary, and zoning ordinances fair in their requirements are usually sustained. Village of Euclid v. Ambler, Realty Co. (1926) 272 U.S. 265, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016; Building Inspector v. Stocklosa (1924) 250 Mass. 52, 145 N. E. 262, 264; State v. Houghton (1925) 164 Minn. 146, 150, 204 N.W. 569, 54 A.L.R. 1012; State v. Roberson (1929) 197 N. C. 657, 150 S. E. 194; Miller v. Board of Public Works (1925) 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; Fritz v. Messer (1925) 112 Ohio St. 628, 149 N. E. 30. A preponderant majority of the courts of the several

states have upheld the validity of the so-called city planning or zoning laws which create restricted residence districts and prevent the establishment of business enterprises therein. It is stated in *McQuillen, Mun. Corp.* (2d) 369-375 that seventeen out of twenty-six states hold them valid, and an examination of the cases decided subsequent to the preparation of that text shows that they are now held valid in at least thirty out of thirty-three states wherein the question has been considered. . . . Under the laws and ordinances of this character many regulations and limitations of structural design and property use have been upheld which bear no closer relation to the public safety, health, morals and general welfare, or public comfort, convenience, and prosperity (which latter terms are also included in the recent cases, 3 *McQuillen, Mun. Corp.* (2d) p. 355), than does the ordinance concerning billboards in the instant case, 43 C. J. 333-345."

See also Article by Henry P. Chandler of the Chicago Bar entitled "The Attitude of the Law Toward Beauty" appearing in the August 1922 issue of the American Bar Association Journal.

In passing on a question of this character, the Attorney General should act with extreme caution. Chief Justice Cureton expressed this same thought in *Lombardo v. City of Dallas*, 73 S. W. (2d) 475, at 486, when he said:

"In passing upon the validity of an act or an ordinance affecting the public, such as those before us, our duty is one of serious consideration, for, as said by *Texas Jurisprudence* (vol. 9, p. 466 ¶ 49): 'One of the most delicate duties to be performed by the judicial branch of the government is that of declaring an act of the legislative department to be unconstitutional and invalid. The power of the courts in this respect is one that will be exercised with great caution, especially where the

matters in controversy pertain to govern-  
mental policies, the public health and pub-  
lic utilities. The court must necessarily  
cover the same ground as that which has al-  
ready been covered by the Legislative depart-  
ment, and it must indirectly overrule the  
decision of that co-ordinate department.'"

In view of the fact that the Highway Depart-  
ment spends thousands of dollars annually for beauti-  
fication of the public highways, the Attorney General  
cannot say that this bill, which has for its purpose  
the same ultimate aim, is an unreasonable regulation  
of private property when applied prospectively.

SUMMARY

H. B. 509, 50th Legislature, provid-  
ing for screening of junk yards within  
35 yards of a public highway, if enacted,  
will be valid as applied to junk yards or  
junk shops thereafter established but in-  
valid as applied to junk yards or junk  
shops existing on the date it is enacted  
into law.

Very truly yours,

ATTORNEY GENERAL OF TEXAS

By

*James T. Bryan*  
James T. Bryan  
Assistant

JTB:mmc:mrj

APPROVED MAY 1, 1947

*Pace Daniel*  
ATTORNEY GENERAL