



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**CRAWFORD C. MARTIN
ATTORNEY GENERAL**

August 2, 1971

Honorable Wallace E. Dingus
County Attorney
Coleman County Courthouse
Coleman, Texas 76834

Opinion No. M-916

Re: Constitutionality of House
Bill 1089, Acts 62nd Leg.,
R.S. 1971, requiring certain
county officials to report
and pay to the county certain
monies received by them from
the operation of a private
business on public property.

Dear Mr. Dingus:

You have requested our opinion on the constitutionality of House Bill 1089, Acts 62nd Legislature, R.S. 1971. Sections 1 and 2 of House Bill 1089 provide:

"Section 1. No county official, his agents, servants, deputies, or employees shall operate a private business on public property unless he shall:

"(a) keep an accurate and detailed record of all monies received and disbursed by him; and

"(b) file with the county auditor, or the auditing authority of the county, a report covering all of said receipts and disbursements during the immediately preceding calendar year on or before January 1 of each year; and

"(c) make available to the county auditor all records of said receipts and disbursements,

"provided however that this Act shall not apply to compensation received by justices of the peace and official court reporters for performance of an act not required by law of such official.

"Sec. 2. Any and all monies received and required to be reported under Section 1 of this Act together with any interest thereon which has been

paid by any financial institution as a result of the deposit of said funds over and above any disbursements required to be reported under Section 1 of this Act shall be delivered to the county treasurer at the time of filing said report or at such other regular intervals throughout the year as may be prescribed by the county auditor or auditing authority of the county, provided, however, that this section shall not be applicable to any person, firm or corporation operating or doing business under or by virtue of any written contract with the county."

Sections 3 and 4 provide the method for enforcing the provisions of the Act.

In construing the provisions of Section 3 of Article I of the Constitution of Texas and the Fourteenth Amendment to the Constitution of the United States, it was held in Rucker v. State, 342 S.W.2d 325, 327 (Tex.Crim. 1961):

". . . As these provisions have been construed by the highest courts of this state as well as by the Supreme Court of the United States, a state law is not repugnant to either constitutional provision so long as unequal treatment of persons is based upon a reasonable and substantial classification of persons. Unequal treatment of persons under a state law which is founded upon unreasonable and unsubstantial classification constitutes discriminatory state action and violates both the state and federal constitutions." (Citing numerous authorities).

The Court concluded:

"There appears no reasonable and substantial classification of persons which justifies the imposition of a \$25 fine upon peddlers, salesmen, and solicitors and a \$200 fine upon all other persons for the same act."

We believe the same principle is applicable to the provisions of House Bill 1089. There appears no reasonable or substantial classification of persons which justifies requiring certain

county officials to report and pay to the county monies received by them in the operation of a private business on public property and not require other officials to do likewise.

It is therefore our opinion that the provisions of House Bill 1089 violate the provisions of Article I, Section 3 of the Constitution of Texas and the Fourteenth Amendment to the Constitution of the United States.

Section 17 of Article I of the Constitution of Texas provides:

"Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof."

Section 19 of Article I of the Constitution of Texas provides:

"Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Section 17 of Article I of the Constitution of Texas has reference to the exercise of the right of eminent domain, while Section 19 of Article I constitutes a limitation on the exercise of the police power by the State. Livingston v. Ellis County, 68 S.W. 723 (Tex.Civ.App. 1902, no writ); State v. Richards, 157 Tex. 166, 301 S.W.2d 597 (1957); State v. City of Austin, 160 Tex. 348, 331 S.W.2d 737 (1960).

The test that should be used in determining whether a statute is an arbitrary or unreasonable exercise of police power is stated in Houston & T.C. Ry. Co. v. City of Dallas, 98 Tex. 396, 84 S.W. 648 (1905), as follows:

"The power is not an arbitrary one, but has its limitations. It is commensurate with but

does not exceed the duty to provide for the real needs of the people in their health, safety, comfort, and convenience as consistently as may be with private property rights. As those needs are extensive, various, and indefinite, the power to deal with them is likewise broad, indefinite, and impracticable of precise definition or limitation. But as the citizen cannot be deprived of his property without due process of law, and as a privation by force of the police power fulfills this requirement only when the power is exercised for the purpose of accomplishing, and in a manner appropriate to the accomplishment of, the purposes for which it exists, it may often become necessary for courts, having proper regard to the constitutional safeguard referred to in favor of the citizen, to inquire as to the existence of the facts upon which a given exercise of the power rests, and into the manner of its exercise, and if there has been an invasion of property rights under the guise of this power, without justifying occasion, or in an unreasonable, arbitrary, and oppressive way, to give to the injured party that protection which the Constitution secures."

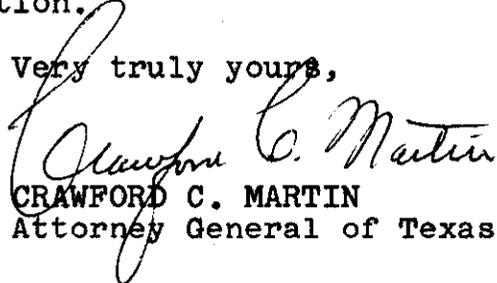
Applying the foregoing principles to the provisions of House Bill 1089, it is our opinion that its provisions are not the proper exercise of the police power of the State. In the exercise of the police power of the State, the Legislature of course could prohibit the use of public buildings by private businesses and prohibit the conduct of private business in public offices. In exercising such power, however, the Legislature must treat every private business alike and not arbitrarily apply such provisions to only a few unless there is a reasonable basis for the classification. In the instant case it does not prohibit the use of public buildings by private businesses. See Tarrant County v. Rattikin Title Co., 199 S.W.2d 269 (Tex. Civ.App. 1947), recognizing the authority of the commissioners court to furnish space in the courthouse to an abstract company in which to conduct its business. It demands forfeiture of monies without adjudication and does not treat all public officials or private businesses alike.

It is therefore our opinion that the provisions of House Bill 1089, Acts 62nd Legislature, R.S. 1971, are unconstitutional, being in violation of Sections 3 and 19 of Article I of the Constitution of Texas and the Fourteenth Amendment to the United States Constitution.

S U M M A R Y

House Bill 1089, Acts 62nd Leg., R.S. 1971, requiring certain county officials to report and pay to the county certain monies received by them from the operation of a private business on public property, is unconstitutional, being in violation of Sections 3 and 19 of Article I of the Constitution of Texas and the Fourteenth Amendment to the United States Constitution.

Very truly yours,


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Prepared by John Reeves
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APPROVED:
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