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Opinion Committee

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The Senate of
The State of Texas

RQ-858

October 12, 1995

FILE # ML-36598-95
I.D. # 36598

The Honorable Dan Morales
State of Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Dear Attorney General Morales:

On behalf of Houston Northwest Chamber of Commerce, I am requesting a formal opinion from you, as Attorney General for the State of Texas, on whether Section 43.056 of the Texas Local Government Code violates Article 1, Section 19 of the Texas Constitution.

Attached is a fact sheet for your review.

I look forward to your prompt response. Please feel free to contact me if I can be of further service.

Sincerely yours,

Don Henderson
Don Henderson

DH/tk

enclosure

cc: Houston Northwest Chamber of Commerce



REQUEST FOR AN OPINION OF THE ATTORNEY GENERAL
OF THE STATE OF TEXAS

Does Section 43.056 of the Texas Local Government Code
violate Article I, Section 19 of the Texas Constitution

FACTS:

By City of Houston ("City") Ordinance Nos. 93-1245 and 93-1246, effective December 31, 1993, the City annexed certain territory in and around Willowbrook Mall in northwest Harris County.

Pursuant to Sections 43.052 and 43.056 of the Texas Local Government Code, the City held the required public hearings and adopted a service plan for the annexed area, under which the City could not provide fewer services or lower levels of services in the annexed area than were in existence in the area immediately preceding the date of annexation.

As part of the service plan, the City agreed to locate a fire station in the annexed territory. On December 17, 1993, the City of Houston leased land in the annexed area and subsequently erected the City of Houston Fire Station No. 96.

On April 24, 1995, Club Royale made application to the City for a sexually oriented business license (Control Number 544740) to provide services in the annexed area as a restaurant and a gentleman's cabaret. On May 5, 1995, the permit was granted pursuant to the provisions of the City's ordinance covering sexually oriented businesses.

The sexually oriented business will be built on property encumbered by the City's lease and next door to the City's Fire Station No. 96.

Prior to annexation, citizens in the unincorporated area of Harris County were protected by an ordinance regulating sexually oriented businesses. Under the Harris County Ordinance, citizens have a right and privilege to be free from sexually oriented businesses within 1,500 feet of their schools, churches, child care facilities, hospitals, public buildings, and public parks.

The City's ordinance regulating sexually oriented businesses prohibits the location of such businesses within 750 feet of any school, church, or licensed day care center, or within 1,000 feet of any other enterprise for which there is a permit, if 75% or more of the tracts within a circular area with a radius of 1,000 feet are residential in character. The City's ordinance contains no distance requirements between sexually oriented businesses and hospitals, public parks, or public buildings.

ISSUE:

Is Section 43.056 of the Texas Local Government Code in violation of Article I, Section 19 of the Texas Constitution in that it fails to require a municipality to provide the same or equal levels of protection under ordinances in existence in the area immediately preceding the date of annexation?

DISCUSSION:

Art. I, Sec. 19 of the Texas Constitution states that “No citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disenfranchised, except by due course of the law of the land.”

Sec. 43.056 of the Texas Local Government Code provides that “A service plan may not provide fewer services or lower levels of services in the area than were in existence in the area immediately preceding the date of annexation...”

The County ordinance gave citizens in the unincorporated area of Harris County the right and privilege to be free from sexually oriented businesses within 1,500 feet of their schools, day care centers, churches, homes, public parks, public buildings, and hospitals.

After annexation, the City ordinance diminished their right and privilege to be free from sexually oriented businesses to 750 feet and eliminated their right and privilege to have any distance requirements between sexually oriented businesses and their public parks, hospitals, and public buildings.

When the City applied its ordinance to the permitting process for the topless bar next to Willowbrook Mall, their right and privilege to be free from such sexually oriented businesses was eliminated because the City ordinance does not require any distance between sexually oriented businesses and public buildings like the Houston Fire Department Station. If the provisions of the County ordinance had been applied, the sexually oriented business could not have received a permit. Therefore, annexation and the application of the less restrictive City ordinance has caused citizens in the newly annexed area to be deprived of rights and privileges previously afforded to them under the County ordinance.

The impact of the differences between the City and County ordinances can best be illustrated by the following hypotheticals.

(1) Suppose a sexually oriented business wanted to locate in an unincorporated area of Harris County 800 feet from an elementary school. The County ordinance would not let it do so because it would not be located 1,500 feet from the elementary school. But after annexation, the sexually oriented business would be granted a permit because the City ordinance only requires a distance of 750 feet from schools.

(2) Suppose a sexually oriented business wanted to locate in an unincorporated area of Harris County next to a public park. The County ordinance would not let it do so unless it was located more than 1,500 feet from the public park. But after annexation, the business could receive a permit because the City ordinance does not have any distance requirements between a sexually oriented business and a public park.

Furthermore, in 1989, the 71st Texas Legislature amended certain regulations relating to Limited Purpose Annexation. Specifically, Section 43.121 of the Texas Local Government Code was amended to permit a municipality with more than 225,000 inhabitants to annex an area for the limited purposes of applying its planning, zoning, health, and safety ordinances in the area. The Section further requires the municipality to annex the area for full purposes within 3 years of the date the area is annexed for limited purposes.

Section 43.124 requires the municipality to hold hearings on the proposed Limited Purpose Annexation and requires the municipality to “hear and consider the appropriateness of the application of rural and urban ordinances in the area to be annexed for limited purposes.”

If a municipality is required under Section 43.124 to consider the appropriateness of the application of rural and urban ordinances in an area annexed originally for limited purposes and followed by full purpose annexation within three years, should not a municipality be required to consider the appropriateness of rural and urban ordinances in an area annexed originally for full purposes? Why should a hearing and notice provision applicable to full purpose annexation be less restrictive than hearing and notice provisions for Limited Purpose Annexation?

CONCLUSION:

Section 43.056 of the Texas Local Government Code permits a disenfranchisement of rights and privileges derived from a prior County ordinance without due course of the law of the land and constitutes a “taking” in violation of the U.S. Constitution and Article I, Section 19 of the Texas Constitution.