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**LEGAL OPINION
(ATTORNEY-CLIENT PRIVILEGED DOCUMENT)**

September 21, 2020

City of Kemah Mayor and Council

VIA E-MAIL

Dear Mayor and Councilmembers:

Our law office was tasked with strengthening the sound ordinance and two of the methods suggested were to allow shutdown of the establishment for repeat violator and additionally to curb the language coming from the type of music played. Both of these methods are problematic.

First, any shutdown of an establishment for violation of a noise ordinance will result in a lawsuit against the City for a “taking”. Both the cost of defense of the lawsuit and any damages to be paid are outside the City’s insurance policy. Consequently, the potential for liability is very high because not only would the City be liable for damages, but would have to bear the costs of defense from the City’s general fund. We have confirmed this issue about the City’s liability with both the lawyers from Texas Municipal League and from Bill Helfand’s attorneys who are the insurance defense lawyers routinely assigned to defend the City if insurance applies.

City of McAllen v. Ramirez, 2013 WL 3770912, No. 13–09–00067–CV (Tex.App.—Corpus Christi- Edinburg July 18, 2013). Arnaldo Ramirez, Jr. and others (“plaintiffs”) brought suit against the City of McAllen, arguing that the City Council’s decision to deny renewal of the conditional use permit (CUP) for the Collage nightclub—due primarily to numerous noise complaints from residents living near the nightclub—was arbitrary and capricious and amounted to a taking in violation of article 1, section 17 of the Texas Constitution. The trial court rendered judgment in favor of the plaintiffs and concluded that the City was liable to plaintiffs for the total amount of \$4.5 million plus interest.

On appeal, the City made numerous arguments that the evidence was legally and factually insufficient to support the trial court’s findings that there was a compensable taking. Ultimately, the court of appeals affirmed the trial court’s decision because the City’s denial of the CUP was a regulatory action that unreasonably interfered with the property owner’s right to use and enjoy his property under the three factors set forth in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). First the court concluded that there was sufficient evidence at trial that the City’s denial of the CUP lead to a severe economic impact on the plaintiffs, since the evidence showed that plaintiffs invested significant amounts of money to comply with City noise regulations and continue operating the Collage nightclub. Next, the court also relied upon the opinions in City of San

Antonio v. El Dorado, 195 S.W.3d 238 (Tex.App-San Antonio 2006, pet. denied) and Sheffield Dev. Co. v. City of Glen Heights, 140 S.W.3d 660 (Tex. 2004) to determine that the plaintiffs possessed reasonable investment-backed expectations to operate the Collage nightclub with a conditional use permit. Although the court weighed the third Penn Central factor in favor of the City because the City's zoning ordinance was better characterized as a "public program adjusting the benefits and burdens of economic life to promote the common good" instead of as a "physical invasion by government," the court still determined that the facts were sufficient to constitute a taking under the Penn Central standards. The court affirmed the judgment of the trial court and concluded that the trial court awarded damages properly.

The opinion summarized above was later vacated by the court due to the parties coming together and negotiating a settlement. The City may face a similar takings claim should it effectively shut down the operation of a bar/nightclub for noise concerns.

Section 42.01 of the Texas Penal Code prohibits a person from intentionally or knowingly making unreasonable noise in a public place other than a shooting range, as defined by Section 250.001 of the Texas Local Government Code, or in or near a private residence that he has not right to occupy. For purposes of this section an act is deemed to occur in a public place or near a private residence if it produces its offensive or proscribed consequences in the public place or near a private residence AND a noise is presumed to be unreasonable if the noise exceeds a decibel level of 85 after the person making the noise receives notice from a magistrate or peace officer that the noise is a public nuisance. The offense is a class C misdemeanor. This paragraph is Texas State Law. Of course, a City may have more stringent standards in its ordinance and as you know the decibel level drops below this state level after a certain time. However, in order to pass constitutional muster, it must have a reasonableness standard. Our ordinance has a reasonableness standard incorporated in it.

While we highly suggest not writing the ordinance to shut down a business, we do, however, suggest that you may have escalating minimum fines for subsequent offenses. For instance, you may raise the minimum fine for anyone found to have a subsequent offense within one year of being convicted of violating the sound ordinance. Ordinarily a class C misdemeanor is punishable by a fine from \$1.00 to \$500.00 for the first offense. We suggest that the language be changed to make the minimum fine amount \$300.00 for a second conviction and a minimum fine amount of \$400.00 for a third or higher conviction within one year from the date of the first conviction.

Second, any attempt to regulate the content of music lyrics is ripe with First Amendment constitutional problems. Time, place and manner regulations are allowed, like with a noise ordinance, so long as there is a reasonableness standard, but content restrictions banning vulgar language will not pass constitutional muster. **Once more, defense costs and damages are not covered by TMLIRP.**

We have drafted the ordinance amending the prior sound ordinance to incorporate these tighter recommended regulations.

Best regards,



Dick H. Gregg, Jr.



Dick H. Gregg, III