

*Residency Restrictions in Texas: The Ongoing
Legal Battles*

Origin of Sex Offender Residency

Restrictions in Texas

Bellaire, Texas, City Council Minutes,

May 1, 2006 (Workshop Session)

<http://www.ci.bellaire.tx.us/Archive.aspx?A>

DID=1130

“Mayor Ken Corley, Brazoria, Texas, addressed City Council regarding the proposed sex offender ordinance on the evening’s agenda. In August of 2005, the City of Brazoria, Texas, passed a sex offender ordinance, and they were the first city to do so.”

“Mayor Corley advised that he was in Austin, Texas, at a Texas Municipal League (TML) meeting and was visiting with their State Representative. He advised that he wished to improve the quality of life in the City of Brazoria and wanted to present an ordinance to City Council that would prevent sex offenders from living in Brazoria, Texas. Mayor Corley was told that this could not be done.”

“Subsequently, Mayor Corley was watching Bill O’Reilly on television who was interviewing the Mayor of Miami Beach, Florida. Such an ordinance was passed by the City of Miami Beach in June of 2005. The very next day, Brazoria contacted Miami Beach for a copy of their ordinance and began working on it. The [Brazoria] ordinance was passed in August of 2005.”

“At the time the ordinance was passed, there were ten (10) registered sex offenders living in the City of Brazoria. Today, there were three (3). Five (5) more sex offenders went to the Brazoria Police Department to register and were denied....Th[ey] [were] sent down the road to another city.”

The sex offender residency restriction ordinance which the City of Brazoria had enacted on August 15, 2005, provided:

“It is an offense for any person who has been convicted of a [reportable sex offense], ...regardless of whether the adjudication was deferred, in which the victim of the offense was less than sixteen (16) years of age, ...

“...to establish a permanent residence or temporary residence within 1,000 feet of any premises where children commonly gather, including but not limited to a school, day care facility, playground, public or private youth center, public swimming pool, or video arcade, as those terms are defined in section 481.134 of the [Texas] Health and Safety Code of the state.”

The City of Brazoria's ordinance further provided that:

“Any person who violates [this ordinance] shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine not to exceed five hundred and no/100 dollars (\$500.00).”

Shortly after the City of Brazoria enacted its ordinance, on August 25, 2005, the Houston Chronicle published a news story, written by its correspondent Thayer Evans, about Brazoria's action.

<http://www.chron.com/neighborhood/pearland-news/article/City-puts-limits-on-sex-offenders-1487394.php>

In its story, which was entitled *City Puts Limits on Sex Offenders*, the Chronicle quoted Mayor Corley:

“This is the best thing, in my opinion, to happen to the state of Texas,” he said.

“Corley said he is not concerned by potential legal challenges to the ordinance. ‘I want it to spread,’ he said. ‘This is not about Brazoria, Texas. This is not about the state of Texas. This is a national issue and it needs to be addressed.’”

As the Chronical further reported, “Since City Council’s approval of the ordinance, the city has received about a dozen requests from other cities statewide asking for copies of it, [Brazoria City Secretary Teresa] Borders said.”

“Frank Fields, a Brazoria native who has lived in the city his entire life, said he is against the new ordinance. He said it is unfair to lump all types of sex offenders together. ‘You still have rights,’ said Fields, 72, a retired Dow Chemical Co. employee. ‘These people have done their time and they're still paying.’”

On December 28, 2015, the City of Brazoria was sued in a Texas State District Court by Texas Voices for Reason and Justice, which brought suit on behalf of its Members.

On February 9, 2016, the City Council of Brazoria, including its celebrated Mayor, Ken Corley, unanimously voted to repeal Brazoria's sex offender residency restriction ordinance, but did so only after being sued by Texas Voices for Reason and Justice.

ORDINANCE NO. 16-003

AN ORDINANCE OF THE CITY OF BRAZORIA, TEXAS, REPEALING ARTICLE 8.03, SEX OFFENDER RESIDENCY, OF THE CODE OF ORDINANCES OF THE CITY OF BRAZORIA; PROVIDING THAT THIS ORDINANCE SHALL TAKE EFFECT AND BE IN FORCE AT THE DATE OF ITS PASSAGE; AND FINDING FACT.

WHEREAS, on August 15, 2005, the City Council of the City of Brazoria, Texas, adopted a Sex Offender Residency Ordinance which was later codified as Article 8.03 of the Code of Ordinances of the City of Brazoria; and

WHEREAS, the City Council is now desirous of repealing the Sex Offender Residency Ordinance;

**NOW THEREFORE:
BE IT ORDAINED BY THE CITY COUNCIL OF THE
CITY OF BRAZORIA, TEXAS:**

Section 1:

The findings of fact cited herein are hereby approved and adopted by the City Council.

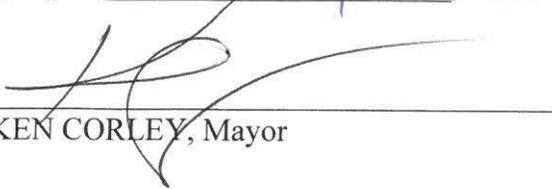
Section 2:

Article 8.03 of the Code of Ordinances of the City of Brazoria, Texas, entitled "Sex Offender Residency" is hereby repealed in its entirety.

Section 3:

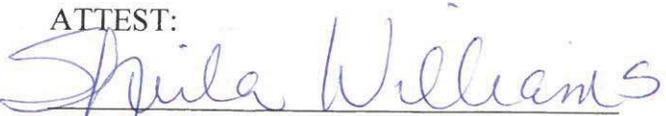
This ordinance shall be effective from and after its passage.

PASSED AND ADOPTED this 9 day of February, 2016.



KEN CORLEY, Mayor

ATTEST:



SHEILA WILLIAMS, City Secretary

As part of the settlement agreement between TVRJ and the City of Brazoria, the City Council of Brazoria, including Mayor Corley, agreed to pay to TVRJ all court costs TVRJ had incurred in filing the lawsuit, in addition to repealing its ordinance.

Fax

To: Richard Gladden

From: Teresa Borders

Fax: 940-539-0093

Date: February 10, 2016

Phone:

Pages: 2

Re: Repeal Sex Offenders Ordinance

CC:

Urgent **For Review** **Please Comment** **Please Reply** **Please Recycle**

•Comments: The check will be put in the mail today for the \$468.01. If you have any questions please call 979-798-2489.

“Corley said he is not concerned by potential legal challenges to the ordinance.” Thayer Evans, *City Puts Limits on Sex Offenders* (Houston Chronicle, August 25, 2005).

<http://www.chron.com/neighborhood/pearland-news/article/City-puts-limits-on-sex-offenders-1487394.php>

Texas sex offender residency restriction ordinances have been challenged with the aid of financial assistance from Texas Voices, and more recently, with the direct involvement of TVRJ as a Plaintiff. These challenges have been raised on both Federal and Texas Constitutional grounds.

**FEDERAL CONSTITUTIONAL
CHALLENGE:**

Duarte v. City of Lewisville

**Protected “Liberty Interests” under
the Fourteenth Amendment**

**Procedural Due Process under
the Fourteenth Amendment:**

***Mathews v. Eldridge*, 424 U.S. 319
(1976).**

1) The nature of “the private interest that will be affected by the official action”;

2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and

3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

On September 28, 2015, the U.S. District Court for the Eastern District of Texas, Sherman Division, per Judge Amos L. Mazzant III, entered an order and final judgment dismissing the Duarte's claims.

Judge Mazzant based his decision solely upon his conclusion that in order to be a constitutionally cognizable “private interest” for procedural due process purposes under *Mathews v. Eldridge*, the asserted interest...

... must be so “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty or justice would exist” without its recognition.

**TEXAS STATE
CONSTITUTIONAL
CHALLENGES:**

Article XI, Section 4 of the Texas
Constitution

When adopting Article XI, Section 4 of the Texas Constitution at the Texas Constitutional Convention of 1875, its Framers understood and intended that Article XI, Section 4 of the Texas Constitution would encompass what at that time had become known as “Dillon’s Rule.”

“Dillon’s Rule,” as expressed in 1873 by local government law authority (and Chief Justice of the Iowa Supreme Court) John Forrest Dillon in his widely recognized legal treatise *The Law of Municipal Corporations*, §55 (2nd ed.), provided then, as it does now, that:

“It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others:

“First, those granted in *express words*; second, those *fairly or necessarily implied* in, or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation---not simply convenient, but indispensable(emphasis in original)...

“Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation, nor its officers, can do any act, or make any contract, or incur any liability, not authorized thereby. All acts beyond the scope of the powers are void.”

Under the Texas Constitution, cities or “municipal corporations” having a population of 5,000 residents or less must be “created” by an Act of the Texas Legislature, in accordance Article XI, Section 4 of the Texas Constitution. These cities are called “general law” cities or towns.

In contrast, under Article XI, Section 5 of the Texas Constitution the Texas Constitution, cities or “municipal corporations” having a population of more than 5,000 residents may be formed without an act of the Texas Legislature, and may create powers in their Charters which are not inconsistent with any statutory laws enacted by the Texas Legislature. These cities are called “Home Rule” cities.

Unlike “Home Rule” cities, “General Law” cities are limited in their ability to enact local ordinances by “Dillon’s Rule.” In other words, they have no power to enact an ordinance unless the Texas Legislature has “expressly granted” them, or has expressly delegated power to them through a state statute, the power to do so.

In March of 2007, then-Attorney General Greg Abbott, in a published opinion, determined that “general law” cities in Texas have no constitutional authority, under Article XI, Section 4 of the Texas Constitution, to enact ordinances which prohibit where registered “sex offenders” may reside.

Specifically, then-Attorney General Abbott determined that he “*found no law authorizing a general-law municipality to adopt this type of residence restriction [ordinance]*” and that “*unless the Legislature expressly authorizes it, a general-law municipality may not adopt an ordinance restricting where a registered sex offender may live.*” Tex.Att’y Gen.Op. GA-0526 (March 6, 2007)(italics added).

Since issuance of the aforementioned legal opinion by the Texas Attorney General in 2007, and as recently as the 84th Session of the Texas Legislature immediately preceding this conference, legislation has been repeatedly introduced biennially in the Texas Legislature proposing to expressly delegate this “power or privilege” to Texas’ general law cities.

Without exception, each of these legislative efforts has unqualifiedly failed. *See*, Tex. H.B. 1224, 81st Leg., R.S. (2009); Tex. H.B. 1681, 81st Leg., R.S. (2009); Tex. H.B. 764, 82nd Leg., R.S. (2011); Tex. H.B. 1177, 83rd Leg., R.S. (2013); Tex. H.B. 601, 83rd Leg., R.S. (2013); Tex. H.B. 1872, 84th Leg., R.S. (2015); and, Tex. H.B. 384, 84th Leg., R.S. (2015).

On November 4, 2015, TVRJ, through its attorney (yours truly) mailed notice to 46 Texas general law cities threatening to sue them, on behalf of its Members, unless they repealed their sex offender residency restriction ordinances within 45 days.

The 46 Texas “general law” cities that originally received the aforementioned notice from TVRJ are: **Archer City** (Archer Co.); **Argyle** (Denton Co.); **Balcones Heights** (Bexar Co.); **Brazoria** (Brazoria Co.); **Bullard** (Cherokee Co.); **Chandler** (Henderson Co.); **Clear Lake Shores** (Galveston Co.); **Cottonwood Shores** (Burnet Co.); **Eagle Lake** (Colorado Co.); **El Lago** (Harris Co.); **Farmersville** (Collin Co.); **Fulton** (Aransas Co.); **Goliad** (Goliad Co.)...; **Gunter** (Grayson Co.); **Hamlin** (Jones Co.); **Henrietta** (Clay Co.); **Hickory Creek** (Denton Co.)....

Hollywood Park (Bexar Co.); **Hubbard** (Hill Co.); **Jamaica Beach** (Galveston Co.); **Justin** (Denton Co.); **Maypearl** (Ellis Co.); **Meadows Place** (Fort Bend Co.); **Milano** (Milam Co.); **Mount Enterprise** (Rusk Co.); **Mount Vernon** (Franklin Co.); **Oak Point** (Denton Co.); **Oak Ridge** (Cooke Co.); **Orchard** (Fort Bend Co.); **Ponder** (Denton Co.); **Pottsboro** (Grayson Co.); **Rhome** (Wise Co.); **Saint Jo** (Montague Co.)... **San Saba** (San Saba Co.)....

...**Shiner** (Lavaca Co.); **Springtown** (Parker Co.); **Sunnyvale** (Dallas Co.); **Van Horn** (Culberson Co.); **West** (McLennan Co.); **West Lake Hills** (Travis Co.); **Westworth Village** (Tarrant Co.); **Whitewright** (Grayson Co.); **Whitney** (Hill Co.); **Winona** (Smith Co.); **Winters** (Runnels Co.); and **Woodville** (Tyler Co.).

To date, 23 Texas general law cities have repealed their sex offender residency restriction ordinances in direct response to TVRJ's challenges; 20 cities did so before being sued by TVRJ, and 3 cities (Alvarado, Brazoria and Mount Vernon) only did so after being sued.

Presently, in addition to a lawsuit filed in March of 2015 against the City of Krum (which was independently filed by yours truly on behalf of Plaintiff Taylor Rice), there are 7 lawsuits pending against 11 Texas general law cities.

Approximately 12 cities, including but not limited to those remaining from the original list of 46 cities, will likely be sued in the near future (the Cities of West, Gunter and Gregory, Texas, are at the top of the list. Hi Ya'!!!).

Notable Events in the Ongoing Litigation

Duarte
v.
City of Lewisville

City of Krum

v.

Rice

TVRJ

v.

***Cities of Argyle, Hickory
Creek, Oak Point, and
Ponder (“AHOP”)***

City of Westworth Village

v.

TVRJ

THE END