

CAUSE NO. 07-16110-b

2007 DEC 12 PM 1:11
CLERK OF COURT
DALLAS COUNTY
AT LAW NUMBER 2

THOMAS J. "JIM" TRULOCK

Plaintiff,

v.

THE CITY OF DUNCANVILLE

Defendant.

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IN THE COUNTY COURT

AT LAW NUMBER

DALLAS COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION
FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, THOMAS J. "JIM" TRULOCK, hereinafter called Plaintiff, complaining of and about THE CITY OF DUNCANVILLE, hereinafter called Defendant, and for cause of action would show unto the Court the following:

DISCOVERY CONTROL PLAN LEVEL

1. Plaintiff requests discovery to be conducted under Level 3 of the Discovery Control Plan, pursuant to Rule 190.3 of the Texas Rules of Civil Procedure.

REQUEST FOR DISCLOSURE

2. Pursuant to Rule 194 of the Texas Rules of Civil Procedure, Plaintiff requests Defendant to disclose, within fifty (50) days of service of this request, the information and material described in Rule 194.2 of the Texas Rules of Civil Procedure. Plaintiff specifically requests the responding party to produce responsive documents at the undersigned law offices within fifty (50) days of service of this request.

JURISDICTION AND VENUE

3. This court has jurisdiction over Defendant because the events giving rise to this action

occurred in Dallas County and Plaintiff seeks relief within the jurisdiction of this Court. Venue is proper in Dallas County, Texas, because the events giving rise to the claim occurred in Dallas County, Texas.

PARTIES AND SERVICE

4. Plaintiff brings this action individually. Plaintiff resides in Duncanville, Dallas County, Texas.

5. Defendant is an incorporated "home rule" municipality and may be served with citation by and through its mayor, David Green, located at City of Duncanville, 203 E. Wheatland, Duncanville, Texas.

FACTS

6. The City of Duncanville enacted Ordinance No. 2039 (the "Ordinance") on or about November 6, 2007. The subject Ordinance amends the Code of Ordinances of the City of Duncanville, Texas, by adding Chapter 11B, same being entitled "Sex Club Regulations." A copy of the Ordinance is attached hereto as Exhibit "A."

7. The Ordinance purports to make "the operation and maintenance of a sex club" unlawful and deems any such "sex club" a public nuisance *per se*. Plaintiff resides in Duncanville, Texas, and has been cited by Defendant for violation of the Ordinance occurring at his residence. Pertinent portions of the Ordinance are set forth below.

8. *Section 11B-5(h)* of the Ordinance defines "Sex Club" as:

"Any premises, person or organization that is presented, advertised, held out or styled as, or which provides notification to the public that it is a swinger's club; an adult encounter group or center; a sexual encounter group or center; party house or home; wife, spouse or partner swapping club; or that it provides permission, an opportunity or an invitation to engage in or to view sexual activity, stimulation or gratification, whether for consideration or not."

9. *Section 11B-4* of the Ordinance asserts that "(a)ny owner, tenant, person or persons in charge

of a premises; occupant, guest, visitor, patron, member; or person or persons having beneficial use of a property upon which a sex club is located, are all subject to the provisions of this ordinance.”

10. *Section 11B-7(a)* of the Ordinance allows the Building Official to order any person operating and maintaining a sex club to immediately cease such operation and vacate the premises.

11. *Section 11B-8* of the Ordinance provides that violation of the Ordinance shall be a misdemeanor punishable by a fine not to exceed two thousand dollars (\$2,000.00). The ordinance also provides for forceful eviction of the offenders from the premises by the Building Official.

DECLARATORY JUDGMENT

12. Plaintiff requests that this court enter a declaratory judgment regarding the rights and obligations of the parties hereto, and in particular, declare the Ordinance to be invalid and unenforceable as written and violative of Plaintiff's constitutional rights for the following reasons:

Overbreadth and Freedom of Speech

13. The Ordinance, as written, criminalizes the behavior of a substantial portion of the population of Duncanville who seek to engage in sexual activity, as well as each and every person who may be present on the premises at the time in question. No legitimate, constitutionally acceptable, governmental purpose exists for such prohibition. By way of limited example, an individual who presents himself as a person interested in having a sexual relationship with his wife could be subjected to criminal prosecution under the ordinance. Should the assertion be made in a bar or hotel in Duncanville, each guest on the premises (the definition of “premises” includes “(a)ny and all parts” of the “property, structure or location”) is also potentially subject to criminal prosecution. As such, the Ordinance is so overly broad as to be violative of protections guaranteed by the Texas and Federal Constitutions and is invalid and unenforceable.

Vagueness

14. Arguing further, should same be necessary, the Ordinance is so convoluted and vague as to fail to give reasonable notice as to the activity that is prohibited and, as such, is violative of protections guaranteed by the Texas and Federal Constitutions and is therefore void, invalid and/or unenforceable. In order to illustrate the inherent confusion in determining the forbidden activity, Plaintiff has inserted numbered delineations in the following reproductions of the Ordinance so as to illustrate various interpretations:

Section 11B-5(h) "Any premises, person or organization

- 1.) that is presented, advertised, held out or styled as, or which provides notification to the public that it is a swinger's club; an adult encounter group or center; a sexual encounter group or center; party house or home; wife, spouse or partner swapping club; or
- 2.) that it provides permission, an opportunity or an invitation to engage in or to view sexual activity, stimulation or gratification, whether for consideration or not."

Another interpretation is as follows:

Section 11B-5(h) "Any premises, person or organization that is presented, advertised, held out or styled as, or which provides notification to the public that

- 1.) it is a swinger's club;
- 2.) an adult encounter group or center;
- 3.) a sexual encounter group or center;
- 4.) party house or home;
- 5.) wife, spouse or partner swapping club; or
- 6.) that it provides permission, an opportunity or an invitation to engage in or to view sexual activity, stimulation or gratification, whether for consideration or not."

Alternate interpretations are numerous and equally confusing.

15. Additionally, the Ordinance fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of Plaintiff's or similarly situated individuals' liberty interest.

Privacy and Substantive Due Process

16. Plaintiff, and all those similarly situated, are free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and applicable provisions of the Constitution of the State of Texas. The Ordinance touches on, and attempts to prohibit, the most private of human conduct, sexual behavior. The fact that a governmental entity has traditionally (or, in this case, "recently" – given that the Texas Legislature repealed its adultery and fornication laws nearly twenty-five years ago) viewed a particular practice as immoral is not a sufficient reason for constructing such an ordinance. The cause currently before this court does not involve or encourage prostitution, nor does it involve minors or non-consenting adults. The cause does involve, though it is far from limited to, consenting adults who choose to engage in a particular lifestyle - a lifestyle that they are at liberty to pursue. There is no constitutionally acceptable reason for Defendant to enact the Ordinance. This Ordinance attempts to deprive Plaintiff of his substantive due process rights and, as such, is void, invalid and/or unenforceable.

Due Process

17. Further, the Ordinance grants The Building Official of the City of Duncanville ("The Building Official") apparent unbridled authority to order any occupant in violation of the Ordinance to vacate the premises upon which the alleged activity is purported to have occurred. The Ordinance does not specify any process by which such orders to vacate may be issued or challenged and as such denies Plaintiff his due process rights. Such actions and conduct of Defendant constitute a

violation of the rights of Plaintiff afforded by the Texas Constitution and the Constitution of the United States, in that if the Ordinance is executed, Plaintiff will be deprived of a recognized liberty and property right without due process of law, thereby causing Plaintiff to suffer harm.

Attorneys' Fees

18. In accordance with the Texas Declaratory Judgment Act and by and through Tex. Civ. Prac. Rem. Code § 37.009, this Plaintiff seeks reimbursement of his costs and reasonable and necessary attorneys fees as are deemed equitable and just.

INJUNCTIVE RELIEF

19. Unless Defendant is immediately enjoined and restrained, Defendant will enforce and has already attempted to enforce the Ordinance. Plaintiff is likely to succeed on the merits of this lawsuit because the Ordinance is in clear violation of the Texas Constitution and the Constitution of the United States. Unless this Honorable Court immediately restrains Defendant as set forth below, Plaintiff will suffer immediate and irreparable injury, for which there is no adequate remedy at law to give Plaintiff complete, final and equal relief. More specifically, Plaintiff will show the court the following:

- A. The harm to Plaintiff is imminent because unless restrained, Defendant may be forced to vacate the premises of his home, thereby displacing Plaintiff from the use of enjoyment of his home, the peaceable right to same Plaintiff has under color of law. Alternatively, Plaintiff will be forced to abandon practices, the right to enjoyment of which is constitutionally protected; and/or
- B. This imminent harm will cause Plaintiff irreparable injury in that Plaintiff's home is unique, and enjoyment of same is also unique.
- C. There is no adequate remedy at law which will give Plaintiff complete, final and equal relief.

D. Defendant will not be harmed by the granting of a temporary restraining order and temporary injunction. The damage to Plaintiff, should Defendant be allowed to enforce the Ordinance during the pendency of this cause, will be great and immediate.

20. Pursuant to the Texas Rules of Civil Procedure, Plaintiff requests that the Court enter immediately, without written or oral notice to the adverse party or that party's attorney, a temporary restraining order and would show that immediate and irreparable injury, loss or damage will result to Plaintiff before the adverse party can be heard.

21. Alternately, Plaintiff requests that the Court consider a temporary order with the presence of Defendant's counsel, if they so desire to be present, pursuant to the certificate of Plaintiff's counsel which is incorporated by reference the same as if fully copied and set forth at length. Plaintiff requests that the Court hear a separate temporary injunction hearing to temporarily enjoin Defendant from the following:

A. Enforcing against Plaintiff or Plaintiff's agents, servants or employees, guests, if any, directly or indirectly, Ordinance 2039, same including Chapter 11B, of the Code of Ordinances of the City of Duncanville, Texas, based upon any alleged violations of Ordinance 2039, same including Chapter 11B, until further order of this Court; and,

B. Proceeding in any manner in Cause Nos. C000417 and C000422, each styled "State of Texas vs. Thomas J. Trulock," and filed and pending in the Municipal Court in and for the City of Duncanville, Dallas County, Texas.

BOND

22. Plaintiff is willing to post a reasonable temporary restraining order bond and requests this Court to set such a bond.

TO THE COURT ONLY

23. Please take notice that Plaintiff's First Set of Interrogatories, Request for Production, and Request for Admissions will also be served with this Original Petition and citation upon the named Defendant.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff request a temporary restraining order be immediately and without notice, entered restraining Defendant from:

- A. Enforcing against Plaintiff or Plaintiff's agents, servants or employees, if any, directly or indirectly, Ordinance 2039, same including Chapter 11B, of the Code of Ordinances of the City of Duncanville, Texas based upon any alleged violations of Ordinance 2039, same including Chapter 11B, until further order of this Court.
- B. Proceeding in any manner in Cause Nos. C000417 and C000422, each styled "State of Texas vs. Thomas J. Trulock," and filed and pending in the Municipal Court in and for the City of Duncanville, Dallas County, Texas.

Plaintiff further requests that Defendant be cited to appear and upon answer and hearing grant the following relief:

- 1. Grant a Temporary Injunction enjoining Defendant as follows:
 - A. Enforcing against Plaintiff or Plaintiff's agents, servants or employees, if any, directly or indirectly, Ordinance 2039, same including Chapter 11B, of the Code of Ordinances of the City of Duncanville, Texas based upon any alleged violations of Ordinance 2039, same including Chapter 11B, until further order of this Court..
 - B. Proceeding in any manner in Cause Nos. C000417 and C000422, each styled "State of Texas vs. Thomas J. Trulock," and filed and pending in the Municipal Court in and for the City

of Duncanville, Dallas County, Texas.

2. Upon final trial of this cause, the Court find and determine that Ordinance 2039, same including Chapter 11B, of the Code of Ordinances of the City of Duncanville, Texas is unconstitutionally overbroad, vague, violates constitutional due process protection and abridges constitutionally guaranteed rights of privacy and freedom of speech and expression and as such is invalid, void and unenforceable.
3. Upon final trial of this cause, the Court enter the Declaratory Judgment relief hereinabove requested and grant this Plaintiff declaratory relief as is set out herein;
4. Grant judgment for Plaintiff's reasonable attorneys' fees and costs; and
5. Such other and further relief to which the Plaintiff may be entitled at law or in equity.

Respectfully submitted,



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