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July 7, 1992

ATTORNEY GENERAL OPINION NO. 92- 89

The Honorable Gwen Welshimer
State Representative, Eighty-Eighth District
6103 Castle
Wichita, Kansas 67218

Re: Constitution of the United States--States' Relations--Citizenship; Privileges and Immunities; Cities and Municipalities; Restrictions on Nonresidents Use of City Owned Lakes

Synopsis: Under a privileges and immunities and equal protection analysis a city may restrict nonresidents' use of city parks. In order to pass constitutional scrutiny, the level of discrimination must be offset by a reasonable justification. Cited herein: U.S. Const., art. 4, § 1; Amend. 14th.

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Dear Representative Welshimer:

As representative for the eighty-eighth district, you ask our opinion concerning the constitutionality of a Eureka city ordinance restricting some aspects of use of the city owned lake by nonresidents. Specifically you inquire about ordinance S9-623 which provides:

"BOAT LICENSE: APPLICATION: Any resident of Greenwood County or lessee of a cabin site at Lake Eureka seeking to keep, have and maintain any motorboat with a motor of twenty (20) horsepower or more, upon the lake, may make application

for that privilege to the caretaker, stating the name of the boat owner, the make, size, capacity, condition and general description of the boat and furnish proof that the craft is in safe condition. No such license shall be issued to any person not a resident of Greenwood County or licensee of a cabin site at Lake Eureka nor shall any such license be issued until the owner of such boat shall execute and deliver to the person issuing the boat license a statement, in writing that the insurance coverage provided for in section 9-624 of this article has been obtained and is in full force and affect."

You inform us that this ordinance may have been amended to change the restriction to 30 horsepower.

In effect, the ordinance permits only residents of Greenwood county or cabin sight licensees to use boats with motors of 20 (or possibly 30) horsepower or more on the lake, although presumably nonresidents are allowed boats with motors of lesser horsepower.

We evaluate this ordinance under two provisions of the United States constitution, the privileges and immunities clause under article 4, section 2, and the equal protection clause of the 14th amendment.

In Toomer v. Witsell, 334 U.S. 385, 68 S.Ct. 1156, L.Ed.2d 1460 (1948), the Court considered a state statute which imposed a shrimp fishing license fee on nonresidents that was 100 times greater than that imposed on residents. The Court first discussed the privileges and immunities clause:

> "The primary purpose of this clause, like the clauses between which it is located--those relating to full faith and credit and to interstate extradition of fugitives from justice--was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation."

In Toomer, the Court went on to explain that not all such discrimination is prohibited:

> "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principal that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures."

In the end the court held the license fees unconstitutional, finding that under the facts there was a high degree of discrimination yet little justification for the discrimination. 334 U.S. at 403. In essence, the Court balanced the degree of discrimination against the purpose to determine whether the discrimination was reasonable.

In Baldwin v. Fish & Game Comm'n of Montana, 435 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978), the Court again considered a state statute discriminating against out of state residents. This time, the question concerned a Montana statute which set the price of elk hunting permits for non-Montana residents significantly higher than for Montana residents. This time the Court considered the constitutionality of the statute both under the privileges and immunities clause and the equal protection clause. In its equal protection analysis, the Court used a "rational basis test", apparently finding that elk hunting is not so fundamental a right as to warrant a heightened scrutiny. 436 U.S. at 389-90. The Court upheld the constitutionality of the statute noting that Montana had a strong interest in preserving the Elk herd and Montana expended resources in doing so.

The Eureka ordinance raises a privileges and immunities question because the ordinance precludes out-of-state residents from exercising a privilege that some in-state residents exercise. The ordinance raises an equal protection question because it creates two classes of people who are treated differently--Greenwood county residents and non-Greenwood county residents.

Cases from other states considering analogous facts provide some guidance. In People v. Kraushaar 89 N.Y.S.2d 685 (1949), the court considered a city ordinance establishing parking fees at a railway station at $1.00 per year for residents of the city and two nearby cities and $10.00 per year for all others. The court noted that a city is permitted to treat different classes of persons differently so long as the distinction is based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed. . . ." 89 N.Y.S.2d at 688. The court held, however, that the ordinance in question impermissibly discriminated within a class--nonresidents--by having lower fees for nonresidents within two nearby cities.

In Schneiber v. City of Rye, 278 N.Y.S.2d 527 (1967), the court upheld a city ordinance which restricted use of the municipal pool and golf course to city residents. The city pointed out that these facilities were paid for and staffed by the city and had very limited capacities. The court said that given these reasons, the discrimination against nonresidents was permissible. See also McClain v. City of South Pasadena, 318 P.2d 199 (Cal. 1958) (upholding similar restrictions for similar reasons.)

The use restrictions imposed by the city of Eureka on the city lake do discriminate. The restrictions, however, are minimal. Nonresidents are allowed to use the lake, they are just prohibited from using large motors on the lake. As such, the only activity prohibited is water skiing, an activity which is not a fundamental right and does not call for a "strict scrutiny" equal protection analysis.

We are unaware of the city's reasons for the restrictions and are not able to offer a definite opinion as to the ordinance's constitutionality. However, assuming the lake is small and has a very limited capacity for speeding boats, we are of the

opinion that this would be a sufficient justification and that the ordinance passes constitutional muster.

Very truly yours,

ROBERT T. STEPHAN
Attorney General of Kansas

Steve Phillips
Assistant Attorney General

RTS:JLM:SP:jm