

STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 05-074

Senate Bill 1971/House Bill 1666 - Display of the American Flag - Restrictive Covenants -
Constitutionality

QUESTION

Whether Senate Bill 1971/House Bill 1666, which permits owners of real property to display the flag of the United States notwithstanding existing restrictive covenants prohibiting the display of all flags, violates (a) the Tennessee constitutional provision against the impairment of contracts, or (b) the Free Speech protections of the First Amendment to the United States Constitution and Article I, Section 19 of the Tennessee Constitution, by making the right to display a flag applicable only to the flag of the United States?

OPINION

If enacted, Senate Bill 1971/House Bill 1666 would violate Article I, Section 20 of the Tennessee Constitution to the extent that it impairs any existing restrictive covenants prohibiting the display of any flags on real property. In addition, the bill is vulnerable to challenge under the Free Speech Clauses of the state and federal constitutions because it is “content-based” legislation that discriminates in favor of the expression of a particular message. Finally, the bill may be subject to attack as a government taking of private property without just compensation.

ANALYSIS

Section 2 of Senate Bill 1971/House Bill 1666 provides that “[o]wners of a separate interest in a common interest development are hereby specifically included within the group of owners and occupiers of land who have a legal right to properly display a flag of the United States on their separately owned property or exclusive common area.” Furthermore, Section 3 of Senate Bill 1971/House Bill 1666 states:

Except as required for the protection of the public health or safety, no declaration or other governing document of property located within a development included in or referred to in Section 2 shall limit or prohibit, or be construed to limit or prohibit, the display of the flag of the United States by an owner on his or her separately owned real property or in their exclusive use common area. Provided that such

declaration or other governing document may limit the height and placement of a flagpole for displaying the flag in order to prevent the flag, while being displayed or flown, from falling beyond the owner's property line or exclusive use common area.

Article I, Section 20 of the Tennessee Constitution provides that "no retrospective law, or law impairing the obligations of contracts, shall be made." Tennessee Courts have held that restrictive covenants running with the land "arise . . . from a series of overlapping contractual transactions. Accordingly, they should be viewed as contracts, and they should be construed using the rules of construction generally applicable to the construction of contracts generally." *Maples Homeowners Ass'n, Inc. v. T & R*, 993 S.W.2d 36, 38-39 (Tenn. Ct. App. 1999)(citations omitted). Furthermore, the Tennessee Court of Appeals described restrictive covenants running with the land as follows:

Persons who develop property may place restrictions on its future use for their own benefit and for the benefit of the other property owners in the development. *Laughlin v. Wagner*, 146 Tenn. 647, 653, 244 S.W. 475, 476-77 (1922); *Benton v. Bush*, 644 S.W.2d 690, 691 (Tenn.Ct.App.1982). These restrictions are commonly known as restrictive covenants. They need not have specific time limits, *Elm Hill Homes, Inc. v. Jessie*, 857 S.W.2d 566, 571 (Tenn.Ct.App.1993), and are binding on remote grantees when they appear in the chain of title or when the grantee actually knew about the restrictive covenant when it acquired title. *Land Developers, Inc. v. Maxwell*, 537 S.W.2d 904, 913 (Tenn.1976); *Hillis v. Powers*, 875 S.W.2d 273, 274 (Tenn.Ct.App.1993); *Stracener v. Bailey*, 737 S.W.2d 536, 539 (Tenn.Ct.App.1986). Like other contracts, restrictive covenants are enforceable according to the clearly expressed intent of the parties. *Jones v. Englund*, 870 S.W.2d 525, 529 (Tenn.Ct.App.1993). Grantees under a common development plan may enforce their rights under a restrictive covenant against other grantees. *Turnley v. Garfinkel*, 211 Tenn. 125, 130, 362 S.W.2d 921, 923 (1962); *Benton v. Bush*, 644 S.W.2d at 692. The remedies available include injunctive relief, *Lowe v. Wilson* 194 Tenn. 267, 269, 271, 250 S.W.2d 366, 367, 368 (1952), or compensatory damages. *Hysinger v. Mullinax*, 204 Tenn. 181, 189, 319 S.W.2d 79, 83 (1958).

Hewgley v. Vivo, 1997 WL 92077 *2 (Tenn. Ct. App. 1997). Because Senate Bill 1971/House Bill 1666 would operate to invalidate existing covenants restricting the display of flags, it is plainly a law that impairs the obligation of contracts within the purview of Article I, Section 20 of the Tennessee Constitution.

Tennessee courts have held that the legislature may by legislation impair the obligation of an existing contract without violating Article I, Section 20 if such legislation is enacted in the

exercise of the “police power.” Specifically, the Tennessee Court of Appeals has stated that “[a]ll contracts are subject to be interfered with, or otherwise affected by, subsequent statutes and ordinances enacted in the bona fide exercise of police power.” *Profill Development, Inc. v. Dills*, 960 S.W.2d 17, 33 (Tenn. Ct. App. 1997). The precise parameters of the State’s “police power” is not easy to define; however, it has been described as extending to “the health, morals, safety, peace, order, comfort, convenience and general welfare of the public.” *Tennessee Jurisprudence, Constitutional Law*, § 102 (2003). Furthermore, in *Marr v. Bank of West Tennessee*, 72 Tenn. 578, 584-85 (1880), the Tennessee Supreme Court enumerated the following circumstances in which the State could exercise its “police power” as to interfere with existing contractual obligations:

While it is true the State may not impair the obligation of a contract or take from the corporation any essential right, which is conferred by the charter, yet it has been held that this inhibition against impairing the obligation of contracts, does not so far remove from State control the rights and properties which depend for their existence or enforcement upon contracts as to relieve from the operation of such general regulations, for the good government of the State, and the protection of the rights of individuals, as may be deemed important. All contracts and all rights are subject to this power, under the police power of this State.

Senate Bill 1971/House Bill 1666, if enacted, would permit property owners in residential developments with restrictive covenants prohibiting the display of flags to display the flag of the United States notwithstanding the restrictive covenant. Such a law would be an impairment of obligation of contract, *i.e.*, the restrictive covenant. It is unlikely that a court would conclude that invalidating such contracts is necessary to protect “the health, morals, safety, peace, order, comfort, convenience and general welfare of the public.” Nor can it be argued that such covenants violate constitutionally guaranteed rights of free speech and that their invalidation is therefore necessary for the protection of the rights of individuals. *Marr, supra*. Restrictive covenants of this sort are private agreements among the owners of the property to which they apply. The First Amendment of the United States Constitution, as well as the free speech guarantees of the Tennessee Constitution, Article I, Section 19, regulates only government interference with free speech rights. Accordingly, it is the opinion of this Office that, if enacted, Senate Bill 1971/House Bill 1666 would violate Article I, Section 20 of the Tennessee Constitution to the extent that it impairs any existing restrictive covenants prohibiting the display of flags on real property.

Senate Bill 1971/House Bill 1666 is also constitutionally suspect due to the fact that it is “content-based,” *i.e.*, it only permits the flying of an American flag but does not permit the flying of any other flags such as a college flag or the flag of another state or nation. Regulations of speech which are content-based are subject to strict scrutiny and rarely survive a judicial challenge. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).

Finally, in addition to the constitutional provisions identified in your opinion request, Senate Bill 1971/House Bill 1666 may also constitute an unlawful taking of private property without just compensation under the Fourteenth Amendment of the United States Constitution. Before the government can “take” private property, it must provide just compensation under the Due Process Clause of the Fourteenth Amendment and Article I, Section 21 of the Tennessee Constitution. At

least one court in another jurisdiction has held that a statute authorizing a planning commission to vacate restrictive covenants applying to subdivided real estate was invalid as authorizing the taking of property without due process of law. *Pulos v. James*, 302 N.E.2d 768 (Ind. 1973).

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