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Opinion No. 09-59

Sale/Lease of State Property to Religious Group without Advertisement

QUESTIONS

1. Under current law and regulations, do the department of correction and/or the department of finance and administration have the authority to negotiate a lease with Men of Valor (MOV) without advertisement or other means of competitive procurement?

2. Would SB 1448 violate the Establishment Clause of the First Amendment to the United States Constitution or Article I, § 3 of the Tennessee Constitution?

3. Would SB 1448 violate Article 11, § 8 of the Tennessee Constitution?

OPINIONS

1. Under current law and policies of the state building commission, neither the department of correction nor the department of finance and administration has the authority to negotiate a lease with MOV without advertisement and review of proposals by all interested parties. In the event that it is not feasible to require public advertisement, the property cannot be leased for a consideration less than the fair market value as determined by appraisal without state building commission approval. Tenn. Code Ann. § 12-2-112(a)(9) allows advertisement and appraisal to be waived if it is in the best interest of the state.

2. It is our opinion that SB 1448 is vulnerable to attack under the Establishment Clause of the United States Constitution. A court could conclude that, by suspending the normal competitive bid process for the sole benefit of a single religious organization such as MOV, the government is endorsing MOV's religious mission.

3. It is our opinion that SB 1448 is vulnerable to attack as special legislation under Article 11, § 8 of the Tennessee Constitution because it suspends the general law on the sale/lease of state property for the benefit of MOV in the absence of any apparent rational basis.

ANALYSIS

Men of Valor is a non-profit prison-based religious ministry with the following mission statement: "Men of Valor is committed to winning men in prison to Jesus Christ and discipling them. Our purpose is to equip them to reenter society as men of integrity – becoming givers to the community rather than takers." MOV has asked the department of correction to enter into a letter of intent for the ground lease of 25 acres in the Cockrill Bend area of Nashville owned by the State of Tennessee and under the authority of the department of correction to be used by MOV to construct a new aftercare transitional campus for participating released inmates. The campus would include a large multipurpose building, aftercare residences, and amenities.

Senate Bill 1448 directs the department of correction and the department of finance and administration to enter into negotiations with MOV for the sale or lease to MOV of department of correction property in the Cockrill Bend area of Nashville for rehabilitative services for released felons. The legislative justification provided in the bill is that MOV has recently purchased property in eastern Davidson County where it intends to build a facility to house released felons; residents in the affected area have expressed strong concerns; the State has several correctional facilities in the Cockrill Bend area of Davidson County; and the state-owned land adjacent to such properties would be more suitable for the admirable objectives of the MOV.

l. Current Law

Tenn. Code Ann. §12-2-112 provides the procedure for disposal of surplus interests in state property. Property cannot be sold or transferred unless and until the governor, the attorney general and reporter, and the commissioner of finance and administration determine that there is no feasible use for the property by any state agency. Tenn. Code Ann. §12-2-112(a)(1). Then, before any sale, the property must be appraised by at least two (2) independent, qualified appraisers, except as otherwise determined by the state building commission. Tenn. Code Ann. § 12-2-112(a)(2). If the average appraised value of the surplus property exceeds twenty five thousand dollars ($25,000.00), the property must be advertised and sold by the sealed bid method with the condition that the State has the right to refuse any or all bids. Tenn. Code Ann. §12-2-112(a)(3). The advertisement and appraisal requirements may be waived by the state building commission. Tenn. Code Ann. §12-2-112(a)(5).

Surplus real property cannot be leased except in accordance with policies established by the state building commission. Tenn. Code Ann. §§ 4-15-102(d); 12-2-112(a)(4); 12-2-115(b). The commission's policies require a determination that the interest being conveyed will not hamper the future operations of the State. *By-Laws, Policy and Procedure of the State Building Commission of Tennessee (Jan. 2008) §8.02 Disposal of Interests Other than Fee Simple*. The consideration sought must be based on fair market value but lesser consideration or a grant is possible where the conveyance is for a public purpose. *Id.* If the lease benefits a private person or entity, the State must publicly advertise the availability of the property and receive proposals by interested parties. *Id.* In the event that it is not feasible to require public advertisement, the interest cannot be conveyed for a consideration less than the fair market value as determined by appraisal without commission approval. *Id.*

Under the current law and policies of the state building commission neither the department of correction nor the department of finance and administration has the authority to negotiate a lease with MOV without advertisement and review of proposals submitted by any interested party. In the event that it is not feasible to require public advertisement, the property cannot be leased for a consideration less than the fair market value as determined by appraisal without state building commission approval. Tenn. Code Ann. § 12-2-112(a)(9) allows advertisement and appraisal to be waived if it is in the best interest of the state.

2. Establishment Clause

The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion[.]" The First Amendment is applicable to the states through operation of the Fourteenth Amendment. At a minimum, the First Amendment guarantees that the government may not coerce anyone to support or participate in a religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith or which tends to do so. *Lee v. Weisman*, 505 U.S. 577 (1992). Similarly, Article 1, Section 3 of the Tennessee Constitution provides that "no preference shall ever be given, by law, to any religious establishment or mode of worship." In *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15-16 (1947), the Supreme Court stated that the Establishment Clause means that neither a state nor the federal government may "pass laws which aid one religion, aid all religions, or prefer one religion over another." 330 U.S. at 15. No tax, in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. *Id*. at 16.

Courts use the following guidelines to determine if a statute violates the Establishment Clause of the United States Constitution. First, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989). Second, if no such facial preference exists, courts frequently use a three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Under this test courts review whether: 1) the statute has a secular legislative purpose; 2) whether its primary effect is one that neither advances nor inhibits religion; and 3) whether it fosters excessive government entanglement with religion. The *Lemon* test has been criticized in some cases. *See, e.g., Orden v. Perry*, 545 U.S. 677, 685-86 (2005). In *Orden*, the Court found that the *Lemon* test was "not useful" in determining whether a display of the Ten Commandments on the Texas Capitol grounds violated the Establishment Clause. *Id*. At the same time, the Court did not reject use of the test in other contexts. We think the *Lemon* test still applies in determining whether a government lease of property violates the Establishment Clause. Under *Lemon* as later refined in what is known as the "endorsement test," courts look to whether a reasonable observer would believe that a particular action constitutes an endorsement of religion by the government. *Adland v. Russ*, 307 F.3d 471, 479 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003)("endorsement test" is a refinement of the second prong of the *Lemon* test.); *Hawley v. City of Cleveland*, 24 F.3d 814, 822 (6th Cir. 1994)(lease of airport space to religious groups).

Senate Bill 1448 has a secular purpose: to preserve safety and property values in other, more residential areas of the county. On the facts presented it is impossible to determine if the

courts would consider that there was excessive government entanglement as the lease terms are unknown.

However, a court could conclude that a reasonable observer would believe that, by suspending the normal competitive bid process solely for the benefit of a single religious organization such as MOV, the government is endorsing religion. This perception would only be intensified if MOV is given preferential and favorable leasing terms. If, for example, MOV leases the property for less than fair market value, the arrangement would be viewed by a reasonable observer as government aid to a religious organization, rather than an arms-length commercial transaction. Accordingly, we conclude that the proposed legislation is vulnerable to attack under the Establishment Clause.

3. Special Legislation

Art. 11, § 8 of the Tennessee Constitution provides "[t]he Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie[s], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law." The term "individual" includes private corporations such as MOV. *See Daly v. State*, 81 Tenn. 228 (1884); *see also* Tenn. Code Ann. § 48-51-201(26). By eliminating the competitive bid requirements and bypassing the state building commission, SB 1448 suspends a general law of mandatory statewide application on the sale/lease of state property. *See* Tenn. Code Ann. § 12-2-112.

For the purposes of SB 1448 MOV is the sole member of the statutory classification of those entities exempt from the general law pertaining to the sale/lease of state property. Statutory classifications which do not affect a fundamental right, or discriminate as to a suspect or quasi-suspect class, are subject to the rational basis test. *Gallaher v. Elam*, 104 S.W.3d 455, 460-62 (Tenn. 2003). The exemption of MOV from the general law pertaining to the sale/lease of state property does not implicate a fundamental right or a suspect or quasi-suspect class. Under the rational basis test, then, the issue to be resolved is "whether the classification[] [has] a reasonable relationship to a legitimate state interest." *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988). The classification will be upheld if some reasonable basis can be found for the classification or if any set of facts can reasonably be conceived to justify it. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). No justification for exempting MOV from the general law appears in the bill or is readily apparent. Therefore, it is our opinion that SB 1448 is vulnerable to attack as special legislation under Article 11, § 8 of the Tennessee Constitution because it suspends the general law on the sale/lease of state property for the benefit of MOV in the absence of any apparent rational basis.

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