

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

March 23, 2020

Opinion No. 20-05

Prohibition on Homeowners' Associations from Amending Declarations to Prevent Continued "Long-Term Rental Property" Use

Question

Proposed legislation would prohibit homeowners' associations from amending their declarations to prevent an owner of residential property that is subject to a declaration from using the property as "long-term rental property" until the owner transfers the property. Is the proposed legislation defensible against a challenge that it unconstitutionally impairs the obligations of contracts?

Opinion

Depending on the particular declaration(s) involved in any given case, the proposed legislation is likely defensible against a claim that it violates the Contract Clause of either the federal or Tennessee Constitution.

ANALYSIS

The proposed legislation¹ would add a new part 7 to Chapter 27 of Title 66 of the Tennessee Code.² The proposed legislation would in effect establish a continued-use provision for owners of residential property who are subject to homeowners' association "declarations"³ that currently permit "long-term rental property" usage, but would allow the association to prohibit long-term rentals of the property once the property is transferred to a new owner. Specifically, the proposed legislation provides that "[t]he owner of a property subject to a declaration that is amended to prohibit, or effectively prohibit, the use of residential property as long-term rental property during the period of the owner's ownership of the property has a vested right to use the property as long-term rental property until the owner transfers the property." (Proposed Tenn. Code Ann. § 66-27-703.) The proposed legislation would apply to declaration amendments that are enacted on or after the effective date of the Act. (Proposed Tenn. Code Ann. § 66-27-705.)

¹ See Senate Bill 1429, Amend. No. 2, 111th Tenn. Gen. Assem. (2019).

² Chapter 27 addresses "multiple ownership of property"; currently it comprises the Horizontal Property Act (part 1), the Tennessee Condominium Act of 2008 (parts 2-5), and a part (part 6) that deals with the authority of homeowners' associations to regulate the display of flags through dedicatory instruments.

³ A "declaration" is any instrument that creates a homeowners' association and governs the use of the residential property owned by the members of the association. A declaration is a contract between the property owner and the homeowners' association. See Proposed Tenn. Code Ann. § 66-27-701(2) and (4).

As explained below, compelling arguments exist to support the position that the proposed legislation does not unlawfully impair any contractual obligation. However, a definitive answer to the question of whether the proposed legislation unconstitutionally impairs the obligation of contracts would be dependent on the particular facts and circumstances involved in any given case. *See Southern Wisconsin Ry. Co. v. City of Madison*, 240 U.S. 457, 459 (1916) (question of impairment depends on construction of the instrument). *Cf. Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978) (“The severity of the impairment . . . increase[s] the level of scrutiny to which the legislation will be subjected.”).

The Contract Clause of the Tennessee Constitution provides “[t]hat no retrospective law, or law impairing the obligations of contracts shall be made.” Tenn. Const. art. I, § 20. The Contract Clause of the United States Constitution similarly provides that “[n]o state shall . . . pass any . . . law impairing the obligation of contracts” U.S. Const. art. I, § 10. The Tennessee Supreme Court has stated that the meaning of these two constitutional provisions is identical. *First Util. Dist. of Carter Cnty. v. Clark*, 834 S.W.2d 283, 287 (Tenn. 1992).

As interpreted by the Tennessee Supreme Court, the Contract Clause “does not mean that absolutely no retrospective law shall be made.” *Dark Tobacco Growers’ Co-op. Ass’n v. Dunn*, 150 Tenn. 614, 632, 266 S.W. 308, 312 (1924). Rather, a “retrospective law” that violates the Contracts Clause is one that takes away or impairs vested rights acquired under existing laws, creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed. *See Doe v. Sundquist*, 2 S.W.3d 919, 923 (Tenn. 1999); *Dark Tobacco*, 150 Tenn. at 632, 266 S.W. at 312. Stated another way, a constitutionally objectionable retrospective law is one that “operates forward but looks backward in that it attaches new consequences or legal significance in the future to past acts or facts that existed before the statute came into effect.” *Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 836 n. 4 (Tenn. 2010).

Accordingly, a statute is not rendered unconstitutional merely because it relates to antecedent events or draws upon antecedent facts for its operation. *See Tennessee Ins. Guar. Ass’n v. Pack*, 517 S.W.2d 526, 528 (Tenn. 1974); *Louisville & N.R. Co. v. Hammer*, 191 Tenn. 700, 712, 236 S.W.2d 971, 976 (1951). To take on constitutional dimensions, the statute must relate back to an antecedent transaction *and* give that transaction some different legal effect from that which it had under the law when the transaction occurred. 16A C.J.S. Const. Law § 645 (2020).

For example, in *Kee v. Shelter Ins.*, 852 S.W.2d 226 (Tenn. 1993), the Tennessee Supreme Court held that a statute could not be retroactively applied to extend an insurance policyholder’s claim-filing deadline. At the time that the insurance contract was executed and at the time of the insured’s loss, the law of the State, as incorporated into the contract, required that the suit commenced within the contractually limited time be the suit prosecuted to judgment. *Id.* at 229. Retrospective application of the statute would have negated that requirement and would have allowed the policyholder to extend his cause of action, despite the fact that he failed to comply with the contractual obligation. Consequently, the Court concluded that retroactive application of the statute was not permitted because the insurer’s contractual rights had accrued before the statute was enacted. *Id.*

Similarly, in *Bryan v. Leach*, 85 S.W.3d 136 (Tenn. Ct. App. 2001), the court considered the retrospective application of a 1994 legislative enactment that provided for the termination of alimony upon the remarriage of the receiving spouse. The parties to the case had contracted at the time of their 1992 divorce for the husband to pay alimony to the wife. *Id.* at 141. When the wife remarried in 1997, the husband sought to end alimony payments. *Id.* at 142. The court held that application of the 1994 law to the parties' 1992 contract violated the Tennessee Constitution: "We will not apply [the statute] retroactively to create an automatic termination of contractual obligations undertaken and rights vested prior to its enactment." *Id.* at 144.

In sum, a statute does not have an impermissible retrospective effect unless it prejudices a contractual right that has been "already acquired." 16A C.J.S. Const. Law § 645 (2020). *See Kee*, 852 S.W.2d at 229; *Bryan*, 85 S.W.3d at 144.

Here, the proposed legislation does not prejudice contractual rights already acquired because the legislation is not aimed at homeowners' association declarations that prohibit long-term rental usage. Rather, the proposed legislation is aimed only at homeowners' association declarations that *allow* long-term rental usage. It provides that "[t]he owner of a property subject to a declaration *that is amended to prohibit*, or effectively prohibit, the use of residential property as long-term rental property during the period of the owner's ownership of the property has a vested right to use the property as long-term rental property until the owner transfers the property." Based on the italicized language, the proposed legislation is necessarily aimed only at those declarations that are currently silent as to long-term rentals or expressly permit long-term rentals; there would be no need to amend a declaration to prohibit long-term rental property usage if such usage is already prohibited.⁴ Thus, the proposed legislation does not alter or affect one way or another the *existing* long-term rental terms of any declaration.

Furthermore, the proposed legislation allows a homeowners' association that currently permits long-term rental use to amend its declaration to prohibit long-term rental use but provides that such an amendment would not apply until and unless the property is transferred to a new owner. In other words, the effect of the legislation would be prospective only. The proposed legislation actually recognizes as vested—and protects rather than impairs—the contractual rights of the parties and, for that reason, does not run afoul of the constitutional prohibition against retrospective laws that impair existing contracts. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 18 n. 15 (1977) (Contract Clause applies only to laws with retrospective, not prospective, effect).

⁴ Moreover, a construction that limits the proposed legislation to those declarations that currently allow long-term rentals is commanded by statutory construction principles. *See Davis-Kidd Booksellers v. McWhorter*, 866 S.W.2d 520, 529-530 (Tenn. 1993) (when faced with a choice between two constructions, one of which will sustain the validity of the statute and avoid a constitutional conflict, and another which renders the statute unconstitutional, the court must choose the former).

Accordingly, depending on the particular declaration(s) involved in any given case, the proposed legislation, as a general proposition, is defensible against a claim that it violates the Contract Clauses of the Tennessee Constitution and the United States Constitution.

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