STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

May 12, 2021

Opinion No. 21-07

Tennessee Heritage Protection Act – Petition for Waiver Filed by State Capitol Commission

Question 1

Is the State Capitol Commission a "public entity exercising control of a memorial" such that it may file a petition for a waiver under the Tennessee Heritage Protection Act to relocate the Nathan Bedford Forrest, David Glasgow Farragut, and Albert Gleaves memorials that are currently on display in the state capitol building?

Opinion 1

A proper petitioner for a waiver under the Heritage Protection Act need only be "[a] public entity exercising control of a memorial." The Act does not require that the public entity exercise exclusive or even primary control of a memorial before it may file a petition for waiver. The State Capitol Commission does exercise some control of the three memorials by virtue of its power to establish plans and policies for the state capitol building. While there are public entities that arguably also exercise control over the three memorials, the State Capitol Commission is a public entity exercising control of the memorials within the meaning of the Heritage Protection Act and so appears to be *an* appropriate petitioner under the Act.

Question 2

If the State Capitol Commission is an appropriate entity to file a petition for waiver to relocate the three memorials, did it have authority to do so without the concurrence of the State Building Commission?

Opinion 2

The decision of the State Capitol Commission to file a petition for waiver could be viewed as establishing a plan or policy pursuant to Tenn. Code Ann. § 4-8-302(a), which would require the concurrence of the State Building Commission. But it could also be viewed as a decision to pursue a legal remedy under the Heritage Protection Act, which, arguably, is not an action requiring the concurrence of the State Building Commission. The Tennessee Historical Commission implicitly found the latter when it granted the State Capitol Commission's petition for waiver without requiring it to show concurrence of the State Building Commission.

BACKGROUND

Under the Tennessee Heritage Protection Act of 2016, "no memorial regarding a historic conflict, historic entity, historic event, historic figure, or historic organization that is, or is located on, public property, may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered" without a waiver from the Tennessee Historical Commission. Tenn. Code Ann. § 4-1-412(b)(1) and§ 4-1-412(c).

On August 14, 2020, the State Capitol Commission filed with the Tennessee Historical Commission a petition for waiver to relocate the memorial sculptures—busts—of Nathan Bedford Forrest, David Glasgow Farragut, and Albert Gleaves, which are currently located on the second floor of the state capitol building.[1] The petition requests that the memorials be moved to the Tennessee State Museum so that they can be made part of an exhibit honoring Tennessee's military heroes.[2]

The initial hearing on the petition for waiver took place before the Tennessee Historical Commission on October 16, 2020.[3] At the beginning of the hearing, the Historical Commission acknowledged that it had received a letter from the General Assembly informing the commission that it could not properly entertain the petition for waiver because the State Capitol Commission had failed to comply with Tenn. Code Ann. § 4-8-302(b), which requires concurrence by the State Building Commission for actions taken by the State Capitol Commission. After considering the letter, the Tennessee Historical Commission voted to proceed with the initial hearing.

On March 9, 2021, the Tennessee Historical Commission, in the presence of an administrative law judge,[4] held a final hearing on the waiver petition and then issued a final order granting the petition.[5] Among other findings of fact, the Historical Commission found:

- The Albert Gleaves bust was placed in the state capitol sometime between 1939 and 1944. Gleaves was an admiral in the U.S. Navy; he served in the Spanish-American War and World War I.[6]

- The David Glasgow Farragut bust was placed in the state capitol in 1946. Farragut was an officer in the U.S. Navy; he served in several wars, including the Civil War.[7]

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[1] *See* https://www.tn.gov/content/dam/tn/statearchitect/scc/20200814%20SCC%20Petition%20for%20Waiver%20and%20Supporting%20Documentation.pdf

[2] *Id*.

[3] *See* Tenn. Code Ann. § 4-1-412(c)(4).

[4] *See id*. § 4-1-412(c)(5).

[5] *In the Matter of: State Capitol Comm'n Re: Request to Relocate the Busts of Nathan Bedford Forrest, David Glasgow Farragut, and Albert Gleaves*, APD Case No. 04.48-204639A (Tenn. Historical Comm'n Mar. 10, 2021).

[6] *Id*. at p. 2, ¶ 5, p. 3, ¶ 9.

[7] *Id*. at p. 2, ¶ 5, p. 3, ¶ 8.

- The Nathan Bedford Forrest bust was placed in the state capitol in 1978 in accordance with Senate Joint Resolution 54 (sponsored by Sen. Douglas Henry and adopted on May 4, 1973). Forrest was a lieutenant general in the Confederate army during the Civil War.[8]

- The busts of Gleaves, Farragut, and Forrest are part of the Tennessee State Museum collection.[9]

- Recent action of the State Capitol Commission provides that placement of statues and memorials inside the state capitol is not intended to be permanent. Tennessee State Capitol Commission Policy Regarding Criteria for Commemorative Works, adopted on November 10, 2015, states that "[o]nce accepted, the memorial will be displayed in the Capitol building for a period of time deemed appropriate by the Capitol Commission, after which time they [sic] may be transferred to the Tennessee State Museum for periodic display within their assigned exhibit areas."[10]

ANALYSIS

1. Whether the State Capitol Commission is an appropriate entity to file a waiver petition.

Under the Heritage Protection Act, a petition for waiver may be filed only by "[a] public entity exercising control of a memorial." Tenn. Code Ann. § 4-1-412(c)(1). "Memorial" includes "busts" that have been "dedicated on public property in honor of any . . . historic figure." *Id.* § 4-1-412(a)(7)(B). Accordingly, only a public entity that exercises "control" of the busts of Nathan Bedford Forrest, David Glasgow Farragut, and Albert Gleaves is entitled to file a petition for waiver to relocate those three busts. The State Capitol Commission is a public entity. *Id.* § 4-8-301.

Because "control" is undefined by the Act, the "natural and ordinary meaning" of that word prevails. *English Mountain Spring Water Co. v. Chumley*, 196 S.W.3d 144, 148 (Tenn. Ct. App. 2005); Tenn. Code Ann. § 1-3-105(b). The ordinary meaning of "control" is the "'[p]ower or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee' as well as '[t]he ability to exercise a restraining or directing influence over something.'" *Freeman Indus., LLC v. Eastman Chem. Co*., 172 S.W.3d 512, 518 (Tenn. 2005) (quoting the definition of "control" in *Black's Law Dictionary* 329 (6th ed. 1990) in construing undefined statutory phrase "controlled by").

[8] *Id*. at p. 5, ¶ 3, p. 3, ¶ 7.

[9] *Id.* at p. 4, ¶ 11.

[10] *Id.* at p. 3-4, ¶ 10.

Under this definition of "control," the State Capitol Commission exercises control over the Forrest, Farragut, and Gleaves memorials because the General Assembly has granted the State Capitol Commission the authority to direct and manage the state capitol by charging and empowering it to formulate a master plan for the restoration and preservation of the capitol. Tenn. Code Ann. § 4-8-302(a)(1) (creating the State Capitol Commission to "[f]ormulate and develop a plenary master plan and program for the adaptive restoration and preservation of the state capitol, including the building and contiguous grounds."). The General Assembly has also given the commission the authority to establish policies addressing the capitol's furnishings, maintenance, and use – policies which govern and regulate the capitol. *Id*. § 4-8-302(a)(2) (State Capitol Commission has the power and duty to "establish policy controlling the furnishings, including, but not limited to, wall, floor and window coverings of the state capitol"); *id*. § 4-8-302(a)(3) and § 4-8-302(a)(4) (the Commission "[e]stablishes policy governing maintenance of the state capitol" and "the use of the state capitol for any nongovernmental activities.").

The three memorials at issue, which are located on the second floor in the state capitol building, are thus necessarily subject to the "control" of the State Capitol Commission by virtue of its power to establish plans and policies for the state capitol building. *See Vodafone Americas Holdings, Inc. & Subsidiaries v. Roberts*, 486 S.W.3d 496, 535 (Tenn. 2016) (statutes must be construed in a "common-sense" manner).

Other public entities, namely the Tennessee State Museum under the supervision of the Douglas Henry State Museum Commission[11] and the Department of General Services under the supervision of the General Assembly,[12] may also be said to exert some control over the memorials on the second floor in the state capitol building. But that does not mean that the State Capitol Commission is not an appropriate petitioner for a waiver under the Heritage Protection Act. The Act does not require a petitioner to have exclusive or even primary control of the memorial. The Act merely provides that the petitioner must be "[a] public entity exercising control of a memorial." Tenn. Code Ann. § 4-1-412(c)(1). In other words, more than one public entity can be an appropriate petitioner for a waiver under the plain language of the Act. *See State v. Strode*, 232 S.W.3d 1, 9 (Tenn. 2007) (a court's role is "to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope").

Because the State Capitol Commission exercises "control" within the meaning of the Heritage Protection Act, it appears to be an appropriate public entity to file a petition with the Tennessee Historical Commission for a waiver to relocate the Forrest, Farragut, and Gleaves memorials.

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[11] In 2009, the Douglas Henry State Museum Commission was created and given "the sole governing authority of the state museum," 2009 Tenn. Pub. Acts, ch. 497, § 1 (codified at Tenn. Code Ann. §§ 4-20-301, -304), and the duties and functions of the Tennessee Art Commission relative to the operation of the state museum were transferred to the Douglas Henry State Museum Commission, *id*. § 7 (codified at Tenn. Code Ann. § 4-20-303).

[12] Tennessee Code Ann. § 4-8-101(a)(2) provides:

> It is the duty of the department of general services, through the commissioner acting with approval of the speaker of the senate and the speaker of the house of representatives, to take care of and preserve the second floor of the state capitol, including all chambers, galleries, offices, rooms, hallways, balconies, storage areas and other spaces therein, and all associated furniture and fixtures and to keep the same in good order.

2. Whether the State Capitol Commission was authorized to file its waiver petition without the concurrence of the State Building Commission.

Under Tenn. Code Ann. § 4-8-302(b), "[a]ll actions of the [State Capitol C]ommission pursuant to subsection (a) shall be subject to the concurrence of the state building commission." Thus, the question is whether filing a petition for waiver under the Heritage Protection Act is an action taken by the State Capitol Commission pursuant to subsection (a) of 4-8-302. Subsection 4-8-302(a) provides that it is the power and duty of the State Capitol Commission to formulate a master plan for restoration and preservation of the state capitol. And consistent with that plan, the State Capitol Commission is to establish policies "controlling" the furnishings of the state capitol and policies "governing" the maintenance and use of the state capitol.

On the one hand, one could view the filing of the waiver petition as an action of the State Capitol Commission implementing or establishing a plan or policy under subsection (a), in which case the concurrence of the State Building Commission would be required. For example, as the Tennessee Historical Commission noted at the final hearing, the Tennessee Capitol Commission has established a "Policy Regarding Criteria for Commemorative Works" to address the period of time for which commemorative works are to be displayed inside the Capitol.[13] If the petition for waiver is viewed as implementing this policy—or if the petition for waiver is viewed as establishing an altogether new policy or as formulating a plan under subsection (a)—concurrence of the State Building Commission is necessary.

[13] *See* note 10, *supra*, and accompanying text.

On the other hand, one could view the filing of the waiver petition as a decision by the State Capitol Commission to pursue a legal remedy under the Heritage Protection Act—i.e., not an action pursuant to subsection (a) to create or implement a plan or a policy—in which case the concurrence of the State Building Commission arguably would not be required. Since the Historical Commission was aware of the issue regarding the concurrence of the State Building Commission and nevertheless entertained and granted the State Capitol Commission's petition for waiver without that concurrence, the Historical Commission implicitly found that filing the petition was not an action taken by the State Capitol Commission pursuant to subsection 4-8-302(a) and so did not require Building Commission concurrence. *See Memphis Publ'g. Co. v. Tennessee Petroleum Underground Storage Tank*, No. 01A01-9607-CH-00300, 1997 WL 445817, at *8 (Tenn. Ct. App. May 9, 1997) (finding an issue squarely before court was impliedly decided because there was no other plausible construction of the court's decision).

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