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Opinion No. 11-36

Equal Access to Intrastate Commerce Act

QUESTIONS

Senate Bill 632/House Bill 600, if enacted, would forbid cities and counties from adopting or retaining ordinances or resolutions that extend additional protections to any group of persons not defined as protected by state law.

1. If enacted, would this bill contravene the authority of local governments to designate the terms of their contracts according to locally acceptable standards and practices, as provided in Tenn. Code Ann. § 6-2-201?

2. Is the retroactive application of the bill to existing, lawfully enacted ordinances and resolutions by local governments unconstitutional?

OPINIONS

1. Nothing in the bill conflicts with the general contracting authority given cities incorporated under the mayor-aldermanic form of government in Tenn. Code Ann. § 6-2-201. Under principles of statutory construction, the law, if enacted, would control over any more general or earlier enacted statute that might conflict with it.

2. No. The authority of cities and counties is subject to change by the General Assembly A city, county, or private citizen has no constitutionally protected right in an existing ordinance or resolution that contravenes state law. Any impact of the bill on any existing contracts would not substantially impair the value of the contract to the private party.

ANALYSIS

This opinion concerns the constitutionality of Senate Bill 632/House Bill 600 (the "Bill"). The caption of the Bill is "AN ACT to amend Tennessee Code Annotated, Title 4, Chapter 21, Part 1; Title 5; Title 6 and Title 7, relative to local government authority in the area of civil rights." If adopted, the Bill would pass the "Equal Access to Intrastate Commerce Act." Section

2 of the Bill would amend Tenn. Code Ann. § 4-21-102 by adding the following language as a new, appropriately designated subdivision:

> ( ) "Sex" means and refers only to the designation of an individual person as male or female as indicated on the individual's birth certificate.

Section 3 of the Bill would add a new Part 18 to Title 7, Chapter 51, of Tennessee Code Annotated. The new Part 18 would provide:

> 7-51-1801. As used in this part, the term:
>
> (1) "County" includes any county having a metropolitan form of government; and
>
> (2) "Local government" means a municipality or county.
>
> 7-51-1802.
>
> (a)
>
> (1) No local government shall by ordinance, resolution, or any other means impose on or make applicable to any person an anti-discrimination practice, standard, definition, or provision that shall deviate from, modify, supplement, add to, change, or vary in any manner from:
>
> (A) The definition of "discriminatory practices" in § 4-21-102 or deviate from, modify, supplement, add to, change, or vary any term used in such definition and also as defined in such section; or
>
> (B) Other types of discrimination recognized by state law but only to the extent recognized by the state.
>
> (2) Any such practice, standard, definition, or provision imposed or made applicable to any person by a local government prior to the effective date of this act shall be null and void.
>
> (b) Subsection (a) shall not apply with respect to employees of a local government.[1]

1. Contravening Tenn. Code Ann. § 6-2-201

The first question is whether the Bill would contravene the authority of local governments to designate the terms of their contracts according to locally acceptable standards and practices, as provided in Tenn. Code Ann. § 6-2-201. This statute lists the general powers of a municipality incorporated under the mayor-aldermanic charter. The statute provides in relevant

[1] We assume that subsection (b) refers to local government hiring practices.

part that "[e]very municipality incorporated under this charter may: . . . (4) Contract and be contracted with[.]" Nothing in the Bill conflicts with Tenn. Code Ann. § 6-2-201. Further, even if the Bill did conflict with Tenn. Code Ann. § 6-2-201, the Bill, if adopted, would control under two principles of statutory interpretation. First, a statute adopted later in time controls over a conflicting statute adopted earlier in time. *Hayes v. Gibson County,* 288 S.W.3d 334, 338 (Tenn. 2009). Second, "statutes which address the specific are given precedence over those that address the general." *Drennon v. General Electric Co.*, 897 S.W.2d 243, 247 (Tenn. 1994). Since the Bill specifically addresses the authority of local governments to pass ordinances regarding antidiscrimination practices, it would control over a more general statute regarding a city's authority to regulate its contracts.

2. Retroactivity

The second question is whether the Bill, by voiding existing local government ordinances and resolutions passed before it became effective, is unconstitutional. Article I, Section 20, of the Tennessee Constitution, states "[t]hat no retrospective law, or law impairing the obligations of contracts, shall be made." Similarly, Article I, Section 10, of the United States Constitution provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts . . . ." The Tennessee Supreme Court has stated that the meaning of the federal and state constitutional provisions is identical. *First Utility District of Carter County v. Clark*, 834 S.W.2d 283, 287 (Tenn. 1992). A "retrospective law" that violates Article I, Section 20, of the Tennessee Constitution is one that takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed. *Doe v. Sundquist,* 2 S.W.3d 919, 923 (Tenn. 1999) (citing *Morris v. Gross*, 572 S.W.2d 902, 907 (Tenn. 1978)).

The Bill does not violate this provision. Neither cities nor counties have a vested right to enact or retain an ordinance or a resolution. Municipalities are creatures of the legislature, and they may exercise the powers given them by the legislature so long as they do so in the manner the legislature prescribes. *Manning v. City of Lebanon,* 124 S.W.3d 562, 565 (Tenn. Ct. App. 2003), *appeal denied* (Tenn. Dec. 22, 2003). Similarly, counties have no authority other than that expressly given by statute or necessarily implied from the provisions of such statute. *Bayless v. Knox County*, 199 Tenn. 268, 281, 286 S.W.2d 579 (1956). Municipal authorities may not adopt ordinances which infringe the spirit of state law or are repugnant to the general policy of the state. *Manning,* 124 S.W.3d at 565. County resolutions are subject to the same restrictions. Thus, the General Assembly remains free to change the statutory powers of local governments without violating the United States Constitution. *See, e.g., Hunter v. Pittsburgh*, 207 U.S. 161, 178, 28 S.Ct. 40, 52 L.Ed. 151 (1907) (Article I, Section 10, of the United States Constitution does not, in general, apply to relations between a municipal corporation and its creating state); *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 39 S.Ct. 526, 63 L.Ed. 1054 (1919); *Worcester v. Worcester Consolidated Street Rwy. Co.*, 196 U.S. 539, 25 S.Ct. 327, 49 L.Ed. 591 (1905) (a city may not challenge a state statute on the grounds that it impairs an agreement between a city and a third party).

Similarly, the Tennessee Constitution does not protect municipal corporations from legislation amending their charters or altering their powers. *First Utility District of Carter*

County, 834 S.W.2d at 287. Nor may a county challenge a statute on grounds that it impairs a contract. *Cunningham v. Broadbent,* 177 Tenn. 202, 147 S.W.2d 408 (Tenn. 1941).

Private citizens generally have no vested right in an existing ordinance, resolution, or statute. Absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature ordains otherwise. *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.,* 470 U.S. 451, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432 (1985). Thus, an ordinance or resolution is subject to invalidation when it violates a new state statute.

The Bill may affect contracts between a local government and a private party entered into before it became effective. As discussed above, neither a city nor county may challenge a state law on the grounds that it impairs its contract right. Moreover, any impact on a private party would not violate Article I, Section 20, of the Tennessee Constitution or Article I, Section 10, of the United States Constitution. In determining whether a particular state regulatory measure is constitutionally valid under the federal Contract Clause, courts generally apply a three-pronged test. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-13, 103 S.Ct. 697, 704-05, 74 L.Ed.2d 569, 580-81 (1983). The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978). The Bill would remove a private contractor's duty to comply with any resolution or ordinance that the Bill voids. Thus, it would not substantially impair the private party's rights under the contract. For all these reasons, the Bill does not violate either Article I, Section 20, of the Tennessee Constitution or Article I, Section 10, of the Tennessee Constitution.

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