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Opinion No. 13-57

Tennessee State Fair and Exposition Act

QUESTION

Does the Tennessee State Fair and Exposition Act infringe any constitutional rights of the Board of Fair Commissioners of the Metropolitan Government of Nashville and Davidson County ("Metro Fair Board") by prohibiting the use of the name "Tennessee State Fair" without the permission of the Tennessee Department of Agriculture and the approval of the Tennessee State Fair and Exhibition Commission, assuming that the name "Tennessee State Fair" was previously registered as a trademark by the Metro Fair Board?

OPINION

No. The Tennessee State Fair and Exposition Act's regulation of the use of the name "Tennessee State Fair" does not infringe any constitutional right of the Metro Fair Board even if the name has been registered as a trademark.

ANALYSIS

The Tennessee State Fair and Exposition Act ("Act"), codified at Tenn. Code Ann. §§ 4-57-101 to -107, effective May 21, 2012, creates a state fair and exposition commission within the Tennessee Department of Agriculture to be the sole body charged with administering any state fair or exposition in Tennessee. Tenn. Code Ann. § 4-57-104. The commission is given certain authority and powers relating to fairs, expositions, and exhibitions. Tenn. Code Ann. § 4-57-105. The Act specifically provides:

> The use of the name "Tennessee State Fair" or "Tennessee State Exposition" in Tennessee to denote a fair serving the state shall only be granted by the department of agriculture with the approval of the commission.

Tenn. Code Ann. § 4-57-106. According to the opinion request, the name "Tennessee State Fair" is registered as a trademark[1] by the Metro Fair Board, and this registration was accomplished prior to the effective date of the Act.

[1] Trademark protection is afforded under the Tennessee Trade Mark Act of 2000, Tenn. Code Ann. §§ 47-25-501 to -518, and the federal Lanham Act, 15 U.S.C. §§ 1051–1141n.

Trademarks are a form of property. The United States Supreme Court has recognized that "[t]he right to use a trade-mark is recognized as a kind of property." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916). Courts have repeatedly recognized trademarks as property. *See Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 399 (1906) ("A trade-mark, or a trade-name, or a title, is property"); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1916) ("[T]rade-marks, and the right to their exclusive use, are of course to be classified among property rights"); *C.F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84, 23 S.W. 165, 174 (1893) ("The right to acquire property in a trade-mark . . . is a common-law right, and the property so acquired is always protected by courts of equity in a proper case"). Therefore, the holding of a valid trademark implicates the protection of property rights guaranteed by the Fourteenth Amendment's Due Process Clause, which prohibits any state from depriving any person of "life, liberty, or property, without due process of law," and the Fifth Amendment's Takings Clause, which provides that no "private property be taken for public use, without just compensation."[2] Similarly, the Tennessee Constitution guarantees in Article I, § 8, that "no man shall be . . . deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land," and in Article I, § 21, that "no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives or without just compensation being made therefor."[3]

Nevertheless, it has long been settled that a political subdivision of a state may not complain of state action on the ground that it has been deprived of its property without due process of law. The United States Supreme Court summarized this principle in *Hunter v. Pittsburgh*, 207 U.S. 161 (1907):

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. . . . The state, therefore, at its

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[2] The Fifth Amendment's Takings Clause applies to the states through the Fourteenth Amendment. *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 232 n.6 (2003); *Chicago, B & Q R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

[3] The Tennessee Constitution's "law of the land" provision is synonymous with the "due process of law" provisions of the United States Constitution. *City of Knoxville v. Entm't Res., LLC*, 166 S.W.3d 650, 655 (Tenn. 2005). Tennessee courts generally have invoked the Fifth Amendment and Article I, § 21, together in determining whether a taking is constitutional without distinguishing between the two provisions. *See, e.g., Metro. Gov't of Nashville and Davidson County v. Allen Family Trust*, No. M2008-00886-COA-R3-CV, 2009 WL 837731, at *4 (Tenn. Ct. App. Mar. 27, 2009) ("The Takings Clause of the Fifth Amendment of the United States Constitution and Article I, Section 21 of the Tennessee Constitution require that any taking of private property by a government be for public use."); *Johnston v. Knox County*, No. 03A01-9108CV280, 1992 WL 79073, at *3 (Tenn. Ct. App. Apr. 21, 1992) ("The Fifth Amendment to the United States Constitution and Article I, Section 21 of the Tennessee Constitution guarantee[s] [sic] that the property of citizens shall not be taken by government without due compensation.").

> pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects, the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Id. at 178-79. *See also Newark v. New Jersey*, 262 U.S. 192, 196 (1923) (holding that "[t]he city cannot invoke the protection of the Fourteenth Amendment against the state"). Similarly, a municipality has no right under Article I, § 8, or Article I, § 21, of the Tennessee Constitution to assert against the State a claim for an uncompensated taking of property. As stated in *Knoxville Util. Bd. v. Lenoir City Util. Bd.*, 943 S.W.2d 879 (Tenn. Ct. App. 1996):

> The power of the legislature over the property which a municipal corporation has acquired in its public or governmental capacity, and devoted to public or governmental uses, is so complete that a municipality in dealing with public property is subject to such restrictions and limitations as the legislature may impose. The legislature may take control of such property from the officers of the corporation and turn it over to other officers under the more direct supervision of the state. The state may, at its pleasure, modify or withdraw the power to hold and manage property, or take such property without compensation.

Id. at 883 (quoting 56 Am. Jur. *Municipal Corporations* § 120).

Although, according to the opinion request, the Metro Fair Board registered the trademark in question, a municipal board is merely an agent or instrumentality of the municipality. *See West v. Indus. Dev. Bd. of City of Nashville*, 206 Tenn. 154, 157 (1960) (stating that Industrial Development Board is agency or instrumentality of city of Nashville); *Tenn. Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 514 (Tenn. 1937) (stating that Power Board is a mere agency of city in construction or acquisition of power plant). Because a municipality, and also therefore necessarily an agency of that municipality, cannot invoke against the State the constitutional protections of property rights afforded to private property, the General Assembly's regulation of the use of the name "Tennessee State Fair" through the Tennessee State Fair and Exposition Act does not infringe any state or federal constitutional right of the Metro Fair Board even if the name was previously registered by the Metro Fair Board as a trademark.

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