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OFFICIAL OPINION NO. 12

September 19, 1972

Hon. Bernard W. Konrady

State Senator

140 East 54th Court

Merrillville, Indiana 46410

Dear Senator Konrady:

This is in reply to your request for an Official Opinion on the following question:

“Does the City of Gary’s Ordinance No. 4685, which would outlaw ‘for sale’ and related signs on private residential property violate the Constitution of the United States or the Constitution of the State of Indiana?”

ANALYSIS

Section 2 of the ordinance to which you refer reads as follows:

“It shall be unlawful for any person to construct, place, maintain, install, or permit or cause to be constructed, placed, maintained, or installed any sign of any shape, size or form on any premises located in any Residential District Zoned R1 through R7 under Title 6, Chapter 6 of the Municipal Code of the City of Gary, Indiana.

“For purposes of this section the ‘signs’ above mentioned are hereby defined to mean any structure, and all parts composing the same, together with the frame, background or supports therefor which are used for advertising or display purposes, or any statuary, sculpture, molding, or casting used for advertising or display purposes, or any flags, bunting or material used for display or advertising purposes, including, but not limited to, placards, cards, structures or areas carrying the following or similar words: ‘For Sale’, ‘Sold’, ‘Open House’, ‘New House’, ‘Home inspection’, ‘Visitors Invited’, ‘Installed By’, or ‘Built By.’”

This city ordinance assumes the Gary City Council has the power to regulate, and here specifically to eradicate, certain property rights of the citizens within its jurisdiction. A second assumption implied in the ordinance is the power of the council to prohibit certain expressions of free speech and the free interaction of buyer and seller in an open market, particularly the housing market, which has been the subject of so many actions involving civil rights.

The power of the state, at any level, to enact such legislation for the purposes of regulation or protection of the public welfare is generally described as a function of the police power inherent in all governments. It has been held that:

“* * * improperly exercised, it would make of a sovereign will a destructive despot, superseding and rendering innocuous some of the most cherished principles of constitutional freedom.” *Mehlos v. Milwaukee*, 156 Wis. 591, 146 N.W. 882 (1914).

The Indiana Supreme Court has held that where the legislative act interferes with the personal and property rights of an individual, destroys or impairs his liberty or property, judicial review is proper to determine whether it relates to and is appropriate to secure the object in view.

Kirtley v. State, 227 Ind. 175, 84 N.E. 2d 712 (1948); *State Board of Barber Examiners v. Cloud*, 220 Ind. 552, 44 N.E. 2d 972 (1942); *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900).

The court further declared in *Department of Financial Institutions v. Holt*, 231 Ind. 293, 108 N.E. 2d 629 (1952), that the Legislature may not arbitrarily interfere with private rights:

[if the act] “prohibits that which is harmless in itself or if it is unreasonable or purely arbitrary, or requires that to be done which does not tend to promote the health, safety, comfort, morality or welfare of society, it is an unauthorized exercise of power.”

See also *Hanley v. State*, 234 Ind. 326, 123 N.E. 2d 452 (1954).

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The enjoyment of private and social life and the beneficial use of property have been said to be dependent upon this power. *State ex rel. Mativy v. Tyndall*, 225 Ind. 360, 74 N.E. 2d 914 (1947), appeal dismissed, 333 U.S. 834 (1948), held:

“Property or property rights may not be taken or destroyed under the guise of the police power or of a police regulation, unless the taking or destruction has a just relation to the protection of the public health, welfare, morals, or safety.”

The police power is thus limited by the Constitutional freedoms of individuals and the reasonableness and necessity of the act of the State. A legislative body may not arbitrarily invade the personal rights and liberty of the individual citizen and its action may not be without reasonable relation to some purpose within the competency of the State to effect, and thus violate, those rights which are guaranteed under either federal or state constitutions. *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 66 N.E. 1005 (1903); *Josam Manufacturing Co. v. State Board of Health*, 26 Wis. 2d 587, 133 N.W. 2d 301 (1905).

More specifically, property rights have often been singled out as particularly exempt from arbitrary interference by a legislative body. While the State may act to protect the public welfare, it may not arbitrarily interfere with the Constitutional right of a property owner to acquire and use his property as he will so long as he does not endanger or threaten the public. *Andrews v. Heiney*, 178 Ind. 1, 98 N.E. 628 (1912); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

The ordinance here does not have any reasonable relation to the public health, safety, morals, or welfare, and, therefore, there is no compelling reason for state or city interference with an individual's property rights by legislative (i.e. council) action.

In addition to the foregoing, the city ordinance in question raises certain points with respect to compliance with the Federal Fair Housing Act. 42 U.S.C. § 3604 (1968) of that Act, all being part of the 1968 Civil Rights Act, makes unlawful the refusal to sell, negotiate for sale or otherwise to

make unavailable or deny a dwelling to any person because of race, color, religion, or national origin. It makes unlawful, further, the discrimination against any person in the terms and conditions of a sale or in the services or facilities connected therewith. Sub-section (d) seems particularly appropriate here:

[It is unlawful] "To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."

The prohibition of signs on property for sale could quite easily infringe upon the civil right to open housing of persons belonging to any minority group by simply withholding the information from them that the property is available. This also is within the purview of the Indiana Civil Rights Law, Acts 1961, Ch. 208, as amended; IC 1971, 22-9-1, as found in Burn's Ind. Stat. Ann. § § 40-2307 to 40-2317A.

It has been held that no property owner has the right to advertise his preference or intent to discriminate in regard to purchasers of his property, and indeed, 42 U.S.C. § 3604 so provides. The infringement upon free speech is in the commercial sense, and this particular expression was held in violation of 42 U.S.C. § 1982 (1968) [Civil Rights Act], which prohibits such discrimination by owner, as well. *U.S. v. Hunter*, 324 F. Supp. 529 (D.C. Md. 1971).

However, the Gary city ordinance in question prohibits the homeowner from advertising on his premises to the public *in general* that his property is for sale to *anyone*. Not only is this a violation of the First Amendment to the United States Constitution, which provides that "Congress shall make no law * * * abridging the freedom of speech * * * but also of the Indiana Constitution, Article 1, § 9 which prohibits laws

"* * * restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever; but for the abuse of that right, every person shall be responsible."

A "For Sale" sign is not an abuse of this basic freedom, nor can the prohibition of same be justified as it has the im-

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mediate effect of depriving the homeowner of the right to effect his own sale, thereby saving a brokerage fee, and of forcing him to go through the listing services of real estate firms. Needless to say, the purchaser is also in effect forced to the same conclusion if he is to find a house for sale.

CONCLUSION

It is, therefore, my Official Opinion that Gary City Ordinance No. 4685 which would prohibit the use of "for sale" signs and related signs on private residential property violates the First Amendment of the Constitution of the United States, the Federal Civil Rights Act (42 U.S.C. 3604) Article 1, Section 9 of the Indiana Constitution, the Indiana Civil Rights Act, and is generally an arbitrary infringement upon the property rights of the home owners and an unconstitutional abuse of the police power of the City of Gary.